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LEGISLATIVE HEARING ON THE VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017

HEARING

BEFORE THE

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

ONE HUNDRED FIFTEENTH CONGRESS

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LEGISLATIVE HEARING ON THE VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017

Tuesday, May 2, 2017

COMMITTEE ON VETERANS' AFFAIRS,
U. S. HOUSE OF REPRESENTATIVES,
Washington, D.C.

The Committee met, pursuant to notice, at 10:00 a.m., in Room 334, Cannon House Office Building, Hon. David P. Roe [Chairman of the Committee] presiding.

Present: Representatives Roe, Bilirakis, Wenstrup, Radewagen, Bost, Dunn, Arrington, Rutherford, Higgins, Bergman, Banks, Walz, Takano, Brownley, Kuster, O'Rourke, Rice, Correa, Sablan, Esty, and Peters.

OPENING STATEMENT OF DAVID P. ROE, CHAIRMAN

The CHAIRMAN. Good morning the hearing will come to order. Thank you for being here today.

We all know the problem. The VA's appeals process is broken. Last year, VA testified that it takes on average 5 years for a veteran to get a decision from the Board of Veterans Appeals. And the problem is getting worse. As of January 1st, 2015, there were 375,000 appeals pending in VBA and Board. A little more than 2 years later on April 1st, 2017, VA's backlog had grown to 470,000 a 20 percent increase. VA's current appeals system is slow, cumbersome, and just doesn't serve the veterans very well. We have to do better.

There are improvements that can be made without congressional approval such as improving its IT system, updating decision letters, and most importantly ensuring workers are giving veterans accurate decisions in the first place. But at the same time, Congress has to make some changes to give VA the tools it needs to ensure that veterans receive a fair and timely decision on their appeals. I am committed to doing just that, as this entire Committee is.

This draft bill is the result of extensive negotiations among VA, VSOs and other veterans' advocates. That is not to say that the Committee is not open to other ideas.

I am looking forward to your testimony and suggestions on how we improve the bill to ensure VA is best serving our Nation's veterans. After this hearing, I intend to work with Mr. Bost, Ms. Esty, Ranking Member Walz and all my colleagues on this Committee to

move forward with a bill that we can take to the floor of the House as soon as possible.

But I also promise that our work will not end after the bill passes the House. I plan to work with Chairman Isakson and our Senate colleagues to get an appeals reform bill on President Trump's desk this year. So the reforms will go into effect as soon as possible.

I will now turn it over to Ranking Member Walz for an opening statement.

OPENING STATEMENT OF TIMOTHY J. WALZ, RANKING MEMBER

Mr. WALZ. Well, thank you to Chairman Roe for holding this hearing and for that commitment to move this forward. To acting vice chair Spickler, director McLenachen and all the representatives of VSOs, a special thank you to the gentlelady from Nevada, our colleague and former Member of this Committee, Ms. Titus for her champion of appeals reform and for sticking with it. We thank you for being here and look forward to your testimony.

Today, each of us are part of a once in a generation opportunity to reform the disability claims process for our Nation's veterans. I am happy we might actually be able to see the finish line. Chairman Roe's leadership has been critical in getting it this far. He has our full confidence in making sure that we are able to find those compromises necessary.

I want to pay tribute to the role the VSO community always plays in legislation, of being there and willing to work through this, bringing hard decisions to the tables, and working through compromises where we could get them all in the name of what is best for veterans. Without them, the best policy ideas and technical expertise would mean nothing because it would not have the collation it takes to pass and implement this.

I know not everyone is in total agreement, we look at all points of view which receive testimony today. But the process has been inclusive, it has been transparent and it has been bipartisan. I am proud of that and thankful to the Chairman's leadership for that.

I also want to thank VA's Secretary Shulkin for integral role that VA played it from the beginning. VA helped to pull stakeholders together, provided expertise, and consistently made appeals reform legislation a top priority for these past 3 years. Veterans need this legislation to be passed into law. The system is broken and we are responsible for fixing it. We need the fix to work and not create new and unforeseen problems. I know Chairman Bost and Ranking Member Esty have been working hard to do that. And I thank them for taking this, and going with it, and improving on it and getting it to this place.

I am here today to do my part to encourage Members on our side of the aisle to do the same for veterans find partnership, find the working solutions, and get this thing over the finish line.

Thank you, Mr. Chairman. And I yield back the remainder of my time.

The CHAIRMAN. I thank the gentleman for yielding.

With that, I yield to Mr. Bost, the author of the draft legislation we are considering today and who can detail what the proposal would do.

I understand Mr. Bost, the chair of one of our Subcommittees intends to introduce appeals legislation today with our colleague, Ms. Esty. I am pleased that the bipartisan cooperation by the leaders of the Subcommittee on Disability Assistance and Memorial Affairs.

And with that Mr. Bost, you are recognized.

OPENING STATEMENT OF HONORABLE MIKE BOST

Mr. BOST. Thank you, Mr. Chairman. I would like to start off by thanking the Subcommittee Ranking Member, Ms. Esty who has worked hand in hand with me with this important issue. She and I cohosted a roundtable earlier this year with the VA and the stakeholders, and I am looking forward to introducing this legislation with her later today.

This proposal incorporates the same provisions that were negotiated among the Department and the VSOs last year and which passed this House as part of the H.R. 5620 on September 14th of last year. The base agreement between the VA and the VSOs would give veterans more options when pursuing their appeals, including the chance to get a faster decision by waiving their right to have a hearing or submit new evidence.

One of the compromises made by the VSOs last year was to end the duty to assist after VA issues the initial decision. However, the compromise also gives the veteran the right to keep the original effective date of the claim, as long as the veteran files new and relevant evidence on his or her claim within a year following a VA decision.

While last year's bill was a good start, my bill goes further by including help for more than 470,000 veterans who currently have an appeal at VA. My proposal would allow some of the veterans who have been waiting for years to get decisions on their appeal to take the advantage of this new system. Unfortunately, we must limit the number of veterans who can opt in because VA is concerned that if too many veterans opt in, the new system will be overwhelmed and unable to operate successfully.

Members are also probably aware that last March, GAO released a report that raised serious concerns about whether the VA is ready to change its appeals process. To address the GAO's concerns about the implementation, this proposal would require the VA to develop a detailed implementation plan, including how the Department will update its software and training. The GAO would then review VA's plan and let us know if they are any gaps.

Additionally, the VSOs would work directly with the veterans appealing their decisions. And would be able to review and comment on the plan. Moreover, the bill would require the Secretary to keep VSOs in the loop as the Department works through the planning process. Before the reform could go into effect nationwide, the Secretary would have to collaborate with the VSOs and confirm that the Department is ready to go.

Finally, my bill would ensure that this transparency will continue by imposing rigorous reporting requirements so that we can ensure that the Department is treating all veterans fairly.

Mr. Chairman, I appreciate you holding this hearing today and I yield back.

The CHAIRMAN. I thank the gentleman for yielding. Ms. Esty, do you have any comments?

OPENING STATEMENT OF HONORABLE ELIZABETH ESTY

Ms. ESTY. Yes. Thank you, Mr. Chairman. And I am very happy to join my colleague, Mr. Bost here today, and the entire Committee in our united effort with the VSOs and with the VA to improve this process. And I want to thank all of you. And welcome to the Committee the distinguished gentlewoman from Nevada who has been so key in making this happen and has been doing so much of the spadework.

As we know, there are more than 470,000 veterans whose appeals are waiting. And if you are lucky as a veteran that means 3 years to wait. If you are not lucky, it is 6 years. And if we don't do something, it is going to be 10 years, and that is just not right and we know it.

So our united effort here is to try to get it right. And our commitment to everyone on the Committee, to everyone in the room, is to work with you and the VA so that we not just pass legislation in this body, in the Senate, get it signed, but then get it implemented, in a way that really works. We are not here for headlines. We are here to serve veterans.

And I want to thank everyone at the table, thank the Chairman, the Ranking Member, my distinguished colleague and friend, the Chairman of the Subcommittee, and Ms. Titus for her extraordinary work and getting us to this place today.

Thank you all. I look forward to rolling up our sleeves, and getting to work, and getting it done. Thank you.

The CHAIRMAN. I thank the gentlelady for yielding.

And I will say that if you are unlucky, as has happened at, to least a close friend of mine, you die before the appeal gets heard. And quite frankly, I think this is one of the most important pieces of legislation, certainly at the VA that I have dealt with since I have been in the Congress, 8 years I've been here.

And the reason is because we have veterans out there waiting literally until some of them die before we get this resolved. And this is not a perfect bill, but it is certainly one that effects every single congressional-I know in my own congressional office I spend more time probably with this than with anything else we do and I think all of us do. And to streamline this and make it easier and better is absolutely what we should be doing.

And at this point, I would like to introduce our first witness. It is one of or colleagues, obviously who has been on the Committee for many years, who has now moved to a different Committee. But Ms. Titus thank you very much for your passion about this. Now I recognize you for 5 minutes.

STATEMENT OF HONORABLE DINA TITUS

Ms. TITUS. Well, Thank you very much, Mr. Chairman, Ranking Member Walz.

It is an honor for me to be back with you today. I have missed serving on this Committee and all of you personally. It is a little strange to be on this side of the table though instead of that side. But I think this is such an important issue I wanted to just come back and commit to you that I am still working on this. And however I can be helpful I certainly want to.

This Veterans Appeals Improvement and Modernization Act of 2017 may be one of the most important things that we do, because fixing this outdated appeal system has been one of my top priorities since I was the Ranking Member on the Disability Assistance an Memorial Affairs Subcommittee.

When I became the Ranking Member of DAMA in 2013, much of the focus at the VA was on the disability claims backlog. It had ballooned and it was causing some veterans to wait almost 2 years before they could get their initial claim decision. After the VA and this Committee worked very hard to reduce that backlog, it was like squeezing the balloon and the air pops up somewhere else. The problem shifted to the appeals process.

You have heard that over 400,000 veterans are currently in that overburdened and overcomplicated system. The average claim takes about 3 years to adjudicate and claims that progress on to the Board of Veterans' Appeals can continue to languish for more than 2000 days. And both of these figures are rising.

If we continue to delay fixing this problem, I am afraid that the wait for our veterans will continue to grow. And by 2027, we may be telling our constituents, I am sorry, but you are likely to have to wait a decade before your appeal can be resolved. And I know all of you in this room think that is just unacceptable, as do I.

It is important to keep in mind that the appeals system was first developed in 1933 and it was last updated in the late 1980s, so true reform is long overdue. More than a year ago, the VA convened a working group, it consisted of senior VA officials, veterans service organizations, and congressional staff. And the results of month's long work on that was the basis of the legislation you consider today.

Last year, as you heard, I introduced the VA Appeals Modernization Act of 2016, it was passed by the House as part of a larger bill, but unfortunately the Senate didn't take it up.

Now I know you all are well versed in the details of the new proposed system. And I thank Chairman Bost and Ranking Member Esty for continuing to work on this legislation. I know that the editions and changes that you have made will just continue to move us in the right direction. And I thank you for those improvements.

So I would just encourage this Committee to move as quickly as possible to pass this legislation to the floor. Every day that we fail to bring real reform to this outdated system means that more veterans will be filing appeals in a broken system that does not meet their needs.

So I appreciate many of today's witnesses and the help that they have given us to come with the bill that is before you today, including the American Legion, which has shared my sense of urgency

all along. We should pass this bill so that veterans are able to choose what is the right path for them, what best fits their unique situation as they file their appeals.

So thank you very much for allowing me to join you today to testify on this. And I look forward to continuing to work with you. And I am confident that this will get done and we will see it go into effect. So thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you for being here. You did say one very prophetic thing, unfortunately we have the Senate. You are correct about that.

We will forego a round of questions for Ms. Titus, and any questions that anyone may have for our colleague can be submitted for the record and you are now excused. Thank you very much for being here.

Our second panel can step up, please. Thank you.

Thank you all. And joining us for our second panel this morning are David C. Spickler, the acting vice Chairman, and executive in charge for the Board of Veterans Appeals. Welcome. Mr. Spickler is accompanied David McLenachen, who is a director of appeals, management center of the Veterans Benefits Administration.

Also with us this morning, are Louis J. Celli, the director of national veterans and rehabilitation division of the American Legion. Mr. Jim Marszalek, who is the national service director for the Disabled American Veterans, and Mr. Ryan Gallucci who is director of the National Veterans Service for the Veterans of Foreign Wars. Thank you all for being with us here with us today.

And thank you for the many, many hours of work you have done on this issue. Your complete written statements will be entered into the hearing record.

And Mr. Spickler, you are recognized for 5 minutes to present the Department's testimony.

STATEMENT OF DAVID C. SPICKLER

Mr. SPICKLER. Good morning, Chairman Roe, Ranking Member Walz and Members of the Committee. Thank you for inviting us here today to discuss critical reforms needed to improve and modernize the VA appeals process.

The bill we will be discussing is a necessary step to transform an appeals process that is failing veterans.

Joining me today is Dave McLenachen, the director of VBA's appeals management office. Dave and I both share Secretary Shulkin and Under Secretary Murphy's commitment to getting appeals reform done this year. The Secretary has made it clear that appeals modernization is one of the Department's top priorities. Thanks to the Committee's efforts, I am confident that working together we can achieve appeals reform for veterans.

The current appeals process is confusing, inefficient, takes too long and provides veterans with no real choice. In the current process appeals have no defined endpoint. VA adjudicators and veterans are instead engaged in a continuous loop of evidence gathering and readjudication of the same appeal. The cycle of evidence gathering and readjudication means that appeals often churn between VBA and the Board to meet legal requirements with little to no benefit flowing to the veteran.

The multiple layers of adjudication built into the current appeals process exacerbates delays even more. Without significant legislative reform to modernize the appeals process, wait times and the cost to taxpayers will only increase. The good news is that we have a better alternative for veterans. The new framework contained in the draft bill would provide veterans with an appeals process that is timely, transparent and fair.

The new process is not just a VA idea. It is the product of over a year of collaboration between the board, VBA, VSOs, the private bar, and other stakeholders. The new appeals process we developed is simpler and easier for veterans to understand. It provides a streamlined process focused on earlier resolution of appeals and generating long-term savings for taxpayers.

The new process also empowers veterans by providing them with the ability to tailor the process to meet their individual needs. Veterans in the new process can pursue one of three different lanes.

One lane would be for review of the same evidence by a higher level adjudicator at the regional office. One lane would be for submitting new and relevant evidence with a supplemental claim at the regional office, and one lane would allow veterans to take their appeal directly to the board, eliminating the duplicative steps currently required by statute to receive board review.

The robust effective date protections built into the draft bill enhanced veterans rights and ensure that veterans and their advocates cannot make a wrong turn in making their selection. The new process also preserves the duty to assist but focuses it in the supplemental claim lane, while at the same time creating a mechanism for duty to assist errors to be corrected in the other lanes.

The draft bill additionally provides opt-in provisions, which would allow more veterans with legacy appeals to take advantage of the new modernized process.

While VA strongly supports the essential features of the draft bill, we do have some concerns with the proposed legislation as currently drafted. VA strongly opposes the language that extends effective date provisions to supplemental claims filed within 1 year of a decision of the Federal courts.

These provisions go against an essential construct of the new process which encourages veterans to stay within VA to achieve the earliest resolution possible. It would be unfortunate to eliminate sources of unnecessary churn in VA only to create new incentives for endless appeal in the Federal courts.

The VA also believes that the proposed certification of readiness provision is problematic. Given the annual nature of the budget cycle, it would be impossible for the Secretary to predict the level of resources provided by appropriations actions in future years. Moreover, the certification provisions are incompatible with the provisions that allow veterans to opt into the new system 1 year before the effective date of the law. We are committed to working with the Committee to reserve this conflict.

The VA also opposes some of the notice in reporting requirements contained in the bill, although we look forward to working with the Committee to better shape these provisions in a manner that achieves adequate protection for veterans, and robust information for congressional oversight, while at the same time uses ad-

ministrative resources wisely. We appreciate any opportunity to work with Congress to further refine this legislation.

Mr. Chairman, this concludes my statement. We again thank you and the Committee Members for your hard work on appeals reform. It is critical that we get appeals reform done this year. We would be pleased to respond to any questions that you or the other Members may have.

[THE PREPARED STATEMENT OF DAVID SPICKLER APPEARS IN THE APPENDIX]

The CHAIRMAN. I thank you Mr. Spickler.

Mr. Celli, you can recognized for 5 minutes, representing the American Legion.

STATEMENT OF LOUIS J. CELLI, JR.

Ms. CELLI. I have been testifying from witness tables just like this for over 10 years. And in all that time, I don't I've ever seen a perfect piece of legislation make it all the way through the legislative process and get signed into law. No bill is perfect.

Chairman Roe, Ranking Member Walz, and distinguished, dedicated defenders of veterans, who proudly serve on this Committee.

On behalf of the Commander Schmidt, the national commander of the largest veterans service organization in the United States of America representing more than 2.2 dues paying members, and combined with our American Legion family, whose numbers exceed 3.5 million voters, living in every district in America, it is my duty, honor to present the American Legion's position on how to improve the Department of Veterans Affairs claims and appeals process.

All progressive legislation is an experiment. As a government, as a community, we take calculated risks and do our best to prepare for the unintended consequences. This legislation is no different, it is not perfect and it never will be. And that is okay. The American Legion applauds this Committee for having the restraint and vision to craft the legislation loosely enough to give the VA enough flexibility to build a new program as needed. Bravo.

It is impossible to successfully legislate every detail of a program, that is what regulations are for. Good legislation gives the government the necessary tools and guidance to perform the task and then charges them with carrying out the intent of Congress.

In your opening statements you all talked about what this legislation will do and why it is important. No need for me to repeat that again. Our value to you isn't telling you what you already now, it is being able to provide you with the grassroots intelligence you can't get from your offices here on Capitol Hill.

Feedback from the veterans, their families and the advocates who work with them every day, that is how we serve you and government and that is how we will work together to ensure this new program, appeals modernization, will be a success.

The American Legion has been assisting veterans access their benefits before there even was a Department of Veterans Affairs. And as we prepare to celebrate our centennial anniversary, we also stand prepared to continue to assist our veterans for the next 100 years and the 100 years after that.

Together with our colleagues here at this table, our veteran service partners, and the employees who serve at VA, we will do our best to ensure this program is a vast improvement over what we currently have and hopefully will one day see an end to the multiyears' long purgatory of backlog appeals and claims waiting to be serviced.

Chairman Roe, Ranking Member Walz, and Members of this Committee, your staffs worked hard for you and on behalf of veterans every day. Now while we don't always agree, it is a pleasure working with them and I sincerely hope that they take great pride in this day as we continue to work together to send appeals modernization to the President's desk for signature.

On behalf of the American Legion, one of the founding architects who participated in helping design this program, I will be happy to try to answer any questions that you may have.

[THE PREPARED STATEMENT OF LOUIS CELLI, JR. APPEARS IN THE APPENDIX]

The CHAIRMAN. Thank you very much, Mr. Celli, your comments are most appreciated.

Mr. Marszalek, you are now recognized for 5 minutes.

STATEMENT OF JIM MARSZALEK

Mr. MARSZALEK. Mr. Chairman, and Members of the Committee, thank you for inviting DAV to testify today on appeals reform legislation.

As national service director for DAV, I want to thank you, Mr. Chairman, as well as Ranking Member Walz, for making appeals modernization a priority for the 115th Congress.

I also want to thank Subcommittee Chairman Bost, Ranking Member Esty and Congresswoman Titus for their leadership on this issue.

Mr. Chairman, DAV operates the Nation's largest claims and appeals assistance program, providing free representation to more than 1 million veterans, or their survivors. We are fully invested in reforming and modernizing the appeals system. And we fully support this draft legislation.

The new appeals framework developed last year by VA, the board, VSOs and other stakeholders would protect due process rights of veterans while offering multiple options for them to receive their decisions in a judicious manner.

The critical core of this new system provides veterans with multiple options to challenge unfavorable decisions, introduce new evidence that both VBA and the board, and protect their earliest effective dates without having to be locked into the current long and difficult appeals process.

The central dynamic of this new system is that a veteran who receives an unfavorable decision from one option, may then pursue one of the other options. And if they continuously pursue a new option, within 1 year of the last decision they will be able to preserve their earliest effective date.

The draft bill embodies the appeals modernization framework agreed to by DAV and the rest of the workgroup last year and in addition includes some significant improvements. The legislation

would enhance effective date protections for claimants that choose to appeal board decisions to the court. This is a fair and equitable approach to provide claimants with the option to exercise their full appellate rights without having to potentially jeopardize their effective dates.

The draft legislation requires the Secretary to submit a detailed transition implementation plan requiring stakeholder consultation and then requires the Secretary to certify the new system is ready before the transition could begin.

DAV further recommends creating a stakeholder transition implementation advisory committee to strengthen stakeholder engagement with VBA and the board. The draft legislation also contains detailed reporting requirements by VA with oversight by GAO. DAV recommends that all VA plans metrics and reports be made immediately available to the public.

My written testimony has a number of recommendations to strengthen the legislation. I will comment on a few key recommendations.

First, we believe the terminology in the draft bill used to distinguish the two board dockets, compounded by separate evidentiary time periods associated with each, could cause confusion and add unnecessary complexity to the board's processing of appeals.

The first docket is the "non-hearing docket" for appeals without new evidence and without hearings. The second docket would be the "hearing" docket for claimants who want a hearing or will submit new evidence. However, claimants who choose a "hearing docket" must then elect whether to request a hearing on the hearing docket or to request no hearing on the hearing docket.

DAV recommends new terminology to distinguish these two dockets such as using terms "new evidence" and "no new evidence" rather than "hearing" and "no hearing" because a hearing itself is also evidence.

We also recommend the time periods when evidence could be submitted to the board be streamlined as follows. For the "hearing" or "new evidence docket", the board should accept evidence with the filing of the NOD and continue to accept it for an additional 90 days if no hearing is elected, or until 90 days after a hearing when a hearing is elected. In addition, we recommend the board consider creating a third docket for those appeals that will include new evidence but do not request a hearing. With just two dockets, veterans who submit new evidence but do not request a hearing could be forced to wait months or even years waiting on the same docket with veterans who request a hearing.

Mr. Chairman, the draft legislation being considered today represents a true collaboration between VA, VSOs other key stakeholders, and Congress. With the additional improvements recommended by DAV and others, they could provide veterans with quicker, accurate outcomes while fully protecting their due process rights.

We remain committed to working with you, VA, and other stakeholders to resolve any remaining issues and swiftly passing and enacting comprehensive repeals reform early this year.

That concludes my testimony. I will be happy to answer any questions that you or Members of the Committee may have. Thank you.

[THE PREPARED STATEMENT OF JIM MARSZALEK APPEARS IN THE APPENDIX]

The CHAIRMAN. Thank you, Mr. Marszalek. I think some of your suggestions have already been accepted. Thank you for that.

Mr. Ryan Gallucci, you are now recognized for 5 minutes to present your testimony for the VFW.

STATEMENT OF RYAN M. GALLUCCI

Mr. GALLUCCI. Thank you, Mr. Chairman. Chairman Roe, Ranking Member Walz and Members of the Committee, on behalf of the VFW I want to thank you for the opportunity to testify today on appeals reform.

The VFW's 1,900 accredited representatives around the world represent nearly 500,000 veterans and their VA benefit claims. This legislation will have a tremendous impact on all the men and women our professional advocates serve every day. The VFW supports the Committee's efforts to perform and modernize the VA appeals process to better serve of the needs of veterans.

Over the years, the process has morphed into a bureaucratic Leviathan that most veterans cannot understand. And for veterans who disagree with their rating decisions, they have no way to determine whether choosing to appeal is a reasonable course of action, and if they choose to appeal exercising their due process rights can take up to half a decade. This does not sound like a veteran centric, nonadversarial process.

The goal of this legislation is to once again build a process that focuses on veterans, one that is easy to navigate and protects veterans rights. Last year, the VFW was one of many stakeholders convened to discuss modernizing the process. And we believe this legislation will build a framework for adjudication that the VFW strongly supports.

However, we have several recommendations for the Committee to consider to ensure that the new framework satisfies our shared intent. Each of these items is outlined in our prepared testimony. For the balance of my time, I would like to focus on why the new framework is beneficial to veterans, why protections for clear and unmistakable errors or queue must be preserved, and our concerns on legacy appeals.

The new framework will do three things to improve the claims process. First, it will improve notifications to ensure veterans can understand their ratings. Second, it will offer more recourse at the local level. Third, it will lower the evidentiary threshold for supplemental actions. Each of these improvements makes the process more veteran friendly.

Inadequate notifications have been a fundamental failure of the current process leaving veterans with no reasonable way to understand how VA arrived at its decision, and no way to conclude whether or not to appeal. Improved notifications empower veterans to better navigate their benefits, cutting down on appeals that result from misunderstandings.

Improved notifications also helped to bolster the new lanes for adjudications, specifically supplemental claims and higher level review. The VFW believes the supplemental claims lane is the most critical option in the framework. This lane allows veterans to seek a new rating decision dating back to their original effective date, at the lowest possible level simply by submitting new and relevant evidence.

For matters that could be best handled locally in a nonadversarial manner, this cuts years off the process. Plus accredited advocates now have a new tool to help resolve claims at the earliest possible time, ensuring that veterans receive every benefit they have earned with the earliest possible effective date.

Prolonging a veterans claim is bad all around. It puts unnecessary stress on the veteran and it makes VA look careless. At a time when more veterans need access to benefits, the VFW supports offering more nonadversarial recourse locally to arrive at quality rating decisions. This is what our veteran clients expect and why we support this new framework.

As with any systemic change, VFW seeks to avoid unintended consequences. One current protection in the system is the ability to revise queue decisions. While veterans usually must take a remedial action within one year of a rating decision to preserve an effective date, decisions based on queue can be revised back to the original date at any time. The VFW is concerned that the bill as written creates a potential conflict of law as it does not specify the veterans can still submit a queue motion past 1 year.

The VFW must have assurance that veterans can still seek queue revisions, otherwise the VFW believes the entire framework can fail. Since the first discussions on appeals reform, the VFW has been clear that any changes to the system must be coupled with aggressive initiatives to adjudicate legacy appeals. The VFW asked for off ramps to allow veterans to opt-in to the new framework. And we thank the Committee for including this in the legislation.

However, we have a technical concern about fully developed appeals. As written it seems the new process would not allow legacy appellants to off ramp into this system, and the VFW would recommend clarifying this option otherwise the provision does not satisfied its intent.

That being said, the issue of resourcing for VA remains a persistent problem. BVA and VBA must have the resources to adjudicate both legacy appeals and supplemental claim actions in the new framework. My predecessor at the VFW, Jerry Manar used to say, that VA liked to play whack-a-mole with its pending workload. Every time the VA faces a crisis, the VA reallocates its resources to focus solely on the crisis, neglecting other work. This only breeds further crises. The VA must have the resources to manage its workload. Otherwise, we will find ourselves back here discussing another backlog.

The VFW is encouraged by this legislation and strongly supports efforts to build a more veteran-centric appeals process. For years we have been stuck in the same place, afraid to act out of fear we will make the wrong decision. But if we stay put, the situation will never improve, that is unacceptable. It is time to improve this process.

We look forward to working with the Committee to advance these critical reforms. And I am happy to answer any questions that you may have. Thank you.

[THE PREPARED STATEMENT OF RYAN GALLUCCI APPEARS IN THE APPENDIX]

The CHAIRMAN. I thank the gentleman for yielding. And thank all of you all for being on time. I will yield myself 5 minutes.

And I want to start by asking Mr. Spickler, you mentioned in your testimony that there were some concerns that you had I think three of them. I read you testimony last night. Before we get started on that, though, just tell me if the VA should support this draft legislation as is without any changes.

Mr. SPICKLER. Well, we generally support the legislation. I mean, we have noted the concerns. We have tried to articulate the concerns that we have with the legislation. We are hopeful to work with the Committee on some of these concerns and we are happy to work with you.

The CHAIRMAN. I thank you for that. I am going to just start with Mr. Celli and go around would you support this legislation or would your organization?

Mr. CELLI. As we recognized in our testimony, the legislation is not perfect but we absolutely support it 100 percent.

The CHAIRMAN. Thank you very much. Mr. Marszalek?

Mr. MARSZALEK. DAV does as well. Again, the recommendations we made will only strengthen it, but yes, absolutely, we do support it.

The CHAIRMAN. And I think those have already been worked in. And Mr. Gallucci some of your comments have been also worked into the draft legislation too.

Mr. GALLUCCI. Absolutely, Mr. Chairman. I just want to echo my colleagues Lou and Jim, that we absolutely support the framework outlined in this legislation.

One of the asks that we had when the Subcommittee first approached us earlier this year is was repeals reform still a priority for us. Absolutely, unequivocally. Even in discussions among our VSO partners what we determined in looking at this framework is that it results-like I said I think a number of times in my remarks, it results in favorable decisions, protects veterans rights at the lowest possible level and we are proud to support it.

The CHAIRMAN. I am delighted to hear this. And certainly I think from our standpoint on the Committee, it gives us some direction about where we need to go. And as a matter of fact for the whole Congress where we need to go with this. I very much appreciate your forthright answer, no beating around the bush.

I think that concerns, and I guess the VA can answer this, the VA's concerns allowing veterans to retain their effective date after an adverse decision at the court of appeals for veterans claims. Why is that a problem?

Mr. SPICKLER. Well, as we have noted in the statement I think the reason why we made the statement that we did was it goes against the original design that was prepared over a year ago with all of the stakeholders. And it, as a matter of policy, the principle was to try to achieve early resolution, the earliest resolution pos-

sible. And we felt that in allowing veterans to stay within the VA or create a situation where veterans could stay within VA and file supplemental claims after an adverse determination within the agency, that that would result in the earliest resolution of the claim possible.

I think the concern we have is that by affording effective date protection after a court decision you create the possibility of elongating the process in which veterans could go appeal then to the court and then still end up coming back to the agency and filing a supplemental claim after a much longer process.

Again, it is just-it is our concern and our comment. We are more than happy to continue a dialogue on this and work with you with the Committee on this, but that is—

The CHAIRMAN. Would it be a deal breaker?

Mr. SPICKLER [continued]. I am sorry?

The CHAIRMAN. Would it be a deal breaker? In other words, up here we always have something you stick one more thing in there and we say, I just can't support that because of that-did it rise to that level?

Mr. SPICKLER. I wouldn't want to say that anything about the legislation is a deal breaker being we are committed. The Secretary is committed to trying to achieve appeals reform now. As I have stated, we have articulated our position on the matter. But no, I would not say it is a deal breaker.

The CHAIRMAN. Thank you. I can't think of anything we could do on this bill that would make this process any longer. Quite frankly, I think it is going to shorten the process. Just very quickly because I don't have much time, just go around, if you all could answer the same question I asked.

Mr. CELLI. Chairman, the veterans community has been a strong advocate of judicial review for a great number of years. No one was happier than the veteran community when we were able to establish the court. We don't want to see anything that deters a veteran from using the court. Our only concern early on in this process was the score the CBO would come back with would blow it out of the water and it would be unattainable goal at that point.

So provided that the score is within reason and we can still move this legislation forward, American Legion is never going to be on record that calls for less protections for veterans.

The CHAIRMAN. Thank you.

Mr. MARSZALEK. I would agree, Mr. Chairman. It is good for veterans. It gives them another opportunity to go to that level without any harm, so DAV is supportive.

Mr. GALLUCCI. Well, thank you, Mr. Chairman. I can't add much more than what my colleagues have already said. The VFW is certainly supportive of that as well. And as Lou said, making sure that veterans have due process protections all throughout the system.

The CHAIRMAN. My time has expired. Mr. Walz, you are recognized.

Mr. WALZ. Well, thank you, Chairman. And thank you all for your testimony. I maybe segue a little bit from where the Chairman is and I am sensitive to his concerns on red lines. We know what happens when we get into those things, or things don't get

acceptable. It can derail legislation that we all want to get. So I appreciate this with the understanding that we are still always trying to work to improve. I think you all have articulated that he very well.

I do want to go back to one of your concerns, Mr. Spickler, in here because this comes up with anything we do. In your testimony you expressed serious concern about requiring the Secretary to certify he has the resources necessary to timely process appeals. Is there an alternative or can you explain your thinking on that? Because all too often all of us in this room knows what happens if he has to come and ask for money or sign off.

Mr. SPICKLER. I will try and explain our thinking. The concern-the idea of a certification-that is not really the concern. I mean, it is not necessarily that-I guess it is what the Secretary has to certify to. Our concern is that because of the opt-in provision, allowing veterans to opt-in to the legislation 1 year before an enacted, before enactment, which was added-I think we all agreed that that was a good provision as a way of allowing more veterans to opt-in to the new process and therefore take them out of the legacy appeal process.

So the concern is that that is kind of based on having a fixed date for when the law is going to take effect, because we have notice requirements that have to go out, informing veterans of their opportunity to opt-in. And our concern is that not knowing when the Secretary may be able to certify that the Department is ready, has the resources, and timely able to address, kind of puts that date in depth, creates ambiguity as to the timeframe.

And the certification in part has to do with-is going to be dependent upon the appropriations cycles in future years and potentially puts the Secretary in a difficult position of certify now, as to what that readiness is going to be in future years, which is going to be dependent upon the budget cycle.

So our concern is really just how it impacts that certification and the lack of certainty, impacts on the effective date of the law and how the opt-in provisions work. We don't want a situation where the opt-in provision is diluted, if you will, by a potentially sliding enactment date. So that is the concern.

Mr. WALZ. That is helpful.

Mr. SPICKLER. As to, are there other things we could work out? We would hope to be able to come up with maybe something that satisfies both the concern in the draft legislation about the Secretary certifying as to implementation, but also gives us some protection for those opt-in provisions.

Mr. WALZ. Very good. That helps us on that. To the VSOs, just for me again, and I know we are kind of going down the line, I think there is a real-trying to build this coalition on this. Do you, each of you believe that veterans rights are preserved in each of the three lanes that have being proposed? I know we are being a little redundant but I think it is important for us to hear that.

Mr. GALLUCCI. We absolutely believe that and that was the foundation of the framework. And just real quick to Mr. Spickler's comments, you know, we see the certification as enhanced partnership between Congress and the Department. And in our view, there was going to be no one who would be better qualified than the Depart-

ment to testify to this body on when they would be ready to launch on this program.

Mr. MARSZALEK. Yes, that was one of the very first things we did in the work group was talk about why veterans appeal. It is primarily about protecting their effective date. So that was the first thing we took off the table. Anything we create, we have to take that out of the equation to make sure the veterans have options and are protected no matter what they chose.

So with a representative or without a representative, they can't be harmed in any lane that they go to. So it is definitely great.

Mr. GALLUCCI. I would agree with my colleagues from DAV and the American legion. The way the VFW looks at this as I said in my remarks today is that prolonging a veteran's claim is bad for everyone. And that is what we do with the current process. If a veteran doesn't understand their decision, many times they are driven to appeal and then they are caught up in a year's long bureaucratic quagmire.

I have a close friend who reached out regarding his claim very recently, it had been so long that VA contacted him he didn't remember exactly what he appealed. That is absurd. Veterans should have recourse at the local level. And many times that is where our organizations provide advocacy. We provide it at the local level, at the community level. It gives veterans options to pursue what they believe is fair recourse and to do it in a timely manner and do it locally.

Mr. WALZ. Well, as a veteran and member of your organizations I am glad you are there for us, so thank you.

The CHAIRMAN. Thank you, Mr. Walz. Chairman Bost you are recognized for 5 minutes.

Mr. BOST. Thank you, Mr. Chairman.

An important part of this legislation is something that wasn't included last year, and now is, is the fact that a process of trying to deal with backlog.

Mr. Spickler, if you could tell me how do you plan to handle the legacy appeals, and then the backlog, and after the reform bill is already put in place. What do you see that will come to pass?

Mr. SPICKLER. Well, obviously, we are-the resources we have will have to be devoted to both the new appeals, as well as the legacy appeals. And we all know the importance of dealing with the legacy appeals. So the thinking would be we would certainly devote resources to make sure that we addressed all new appeals in the new process, in a timely manner, which will be a more efficient adjudication process than the current process.

And then the remaining resources that we have will be devoted to working with the legacy appeals and making sure that we make as strong inroads as we can on reducing that inventory of legacy appeals over time.

Mr. BOST. Do you have like a rough guess of which ones are so difficult that they are going to be difficult to move that backlog on, and which ones we can get to quickly so that we know what we are trying to do to get as many handled as quick as possible? Is there any way to try to estimate that?

Mr. SPICKLER. Well, I am not sure we can estimate based on the difficulty. I mean, we would know how many legacy appeals there

are versus the new appeals, if you will. So we would know what resources we need to devote to maintaining timely dispositions of the new appeals and then devote the remaining resources to the legacy appeals.

And I would invite my colleague Mr. McLenachen if you have additional comments you would like to make on that as well.

Mr. MCLENACHEN. So Chairman Bost, the options that we designed would have a large impact on that. A lot of our resolution of appeals occurs in VBA, before it even gets to the board. So of the 11 to 12 percent that appeal, only 4 to percent end up going to the board. So that is a lot of resolution that occurs at the VBA level.

And we have about 220,000 notices of disagreement pending. When we get to the point where we process those NODs, they will have an opportunity to opt-in to the new process. So a lot of that opt-in is going to be occurring at that point where we have most of our inventory. So of the 465,000 that are pending, roughly half of those will have the ability to opt-in fairly quickly.

Just to answer your question about the resource allocation. In any modeling that we have done, it has roughly been about one-third of our resources would be on the new process, operating it timely and about two-thirds. As David said, the rest of our resources that would be allocated to legacy appeals. And that would be about two-thirds it ever our appeals resources.

In addition to that, the intent is that we would figure out exactly what additional resources we might need and work that in the budget process every year.

Mr. BOST. Okay. My next question I am going to go to the VSOs, and if you can-one of the important things we did was we wanted to make sure you are working in conjunction with the VA. Can you explain why you believe it is important for the Secretary to collaborate with the VSOs before certifying the Department is ready to go through this process?

Ms. CELLI. You want to go first, Ron?

Mr. GALLUCCI. All right. Thank you, Lou. No, we agree with that provision. We welcome its inclusion in the draft legislation. And we think it is an important partnership that we have with the VA. We value the relationship that we have with VA to provide advocacy for the veterans who seek our assistance. In many ways we make sure that veterans understand the process up front. And part of our responsibility in deploying the new framework is going to be explaining the new framework to veterans and what their rights are under the system, how to take advantage of some of the off ramps that are available to them. Or which lane would satisfy their intent in seeking a supplemental claim action.

So I think-and again you have heard from each of us, the scope of our operations. I mean we represent veterans around the world and in communities. It is just critical that we have that input and implementation of the new framework.

Mr. MARSZALEK. I would only add that VSOs have people in the field all over the place and they are giving us feedback constantly. So with that feedback and working alongside VA, we can say, hey, this is what we are hearing, this is what we are seeing. That is important. And from day 1 in the work group we were together.

In the past, we were often an afterthought. VA would develop something alone and we would be sometimes be disagreeing with everything that they were saying. We don't want that process anymore. We want to work together and develop something that is good for veterans all around. So it is very, very important that we continue that partnership all the way through the entire process.

Mr. CELLI. I agree with my colleagues.

Mr. BOST. My time has expired.

The CHAIRMAN. The gentleman's time has expired.

Mr. Takano you are recognized for 5 minutes.

Mr. TAKANO. Thank you, Mr. Chairman. This is a question for the veterans service organizations. There is a strong recommendation in the March GAO report, that Congress require proposed reforms to be subject to a pilot test. Regardless of whether we mandate it or make it discretionary, how do you organizations feel about the pilot the GAO recommends?

Mr. CELLI. Yes, so going back to the previous question that Mr. Spickler answered from Chairman Bost, I think it is well addressed in this new addition-this new revision of the bill. And what it does is it gives the Secretary the opportunity to introduce this as the Secretary sees that he is ready to do that. And he will do that with the consultation of VBA and BVA. And I think those concerns are largely answered.

Mr. MARSZALEK. And I would add to that that it adds a layer of complexity that is really unnecessary in DAV's opinion. Considering how cases are processed today all over the country with the national work queue—they are going here, they are going there. So doing a phase in or a pilot is very difficult to do? So, if only California is participating, they could be processing claims from 12 different States. So now employees are doing two different types of work as well. So we feel it just adds an unnecessary layer of complexity that they don't need at this point.

Mr. TAKANO. Great. Go ahead.

Mr. GALLUCCI. And I would reiterate Jim's point about the practicality. But in addition to that, not only do you have the national work que which Chairman Bost and Ranking Member Esty heard us talk about just a couple of months ago, the new work environment the VA is implementing, but in many ways it would be inequitable for appellants.

We are going to tell just a certain group of appellants based on their geography or where their claim ends up? No, you are allowed to go into this new, more favorable system with more protections. But I am sorry to the rest of you, you are just going to have to wait until we decide whether or not this works.

We think the framework that we have now is sufficient to move forward and give veterans a better option.

Mr. TAKANO. Well, thank you. I think I will just-I got the sense from all of you where you are. And so I am not going to ask the VA to really comment on that.

Under the a new modernized system, a veteran who want to submit only evidence to BVA, and this question is for the VA, but does not have a hearing, that veteran is required to wait in the hearing docket. There are currently over 60,000 pending hearing requests,

a 5 to 6 year wait in the current system. Why would VA force those veterans onto the hearing docket?

Mr. SPICKLER. So could I ask you, sir, to repeat the question? So the question is why-if you would please repeat it.

Mr. TAKANO. Under the new modernized system, a veteran who wants to submit only evidence to the VA to the BVA, but not have a hearing, that veteran is required to wait in the hearing docket. There are currently over 60,000 pending hearing requests, meaning a 5 to 6 year wait in the current system. Why would the VA require that those veterans-force those veterans onto the hearing docket?

Mr. SPICKLER. Well, first of all, I don't think they would have to wait. I mean, they would be in that docket, but they wouldn't necessarily-if they are not having a hearing, they really would not have to wait behind veterans who are having a hearing.

So that docket could be administered so that veterans who are only submitting additional evidence, but not having a hearing, could have their appeals adjudicated without consideration to veterans who are awaiting hearings.

Mr. TAKANO. Thank you. Well, how does the VA plan to resolve the backlog of hearing requests in the legacy system while implementing the new system?

Mr. SPICKLER. Well, I guess I would say the hearings-I mean, the board is going to have the hearings, whether the new system is implemented or not. I mean, the hearings-for one thing, until we get a better handle on a more efficient processing of appeals generally, holding hearings has limited utility if we hold hearings and then a veteran's appeal still isn't decided for some period of time after they have a hearing.

So we will-the problem of getting to the hearings is just-I mean, that is a matter we will have to address regardless of implementation of the new law or not. The implementation of the new framework won't necessarily effect those hearings.

Mr. TAKANO. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. I thank the gentleman for yielding. Chairman Arrington, you are recognized.

Mr. ARRINGTON. Thank you, Mr. Chairman. Mr. Spickler and Mr.-how do you say your last name?

Mr. MCLENACHEN. McLenachen.

Mr. ARRINGTON. How long have you been in this area of the VA in terms of the appeals process?

Mr. MCLENACHEN. In VA 16 years for me. I was deputy Under Secretary for disability assistance and I had responsibility for this prior to my current job.

Mr. ARRINGTON. What about you, Mr. Spickler?

Mr. SPICKLER. Yeah, I have been with VA 35 years this year, all at the Board of Veterans Appeals, and basically all in appellate adjudication—

Mr. ARRINGTON. So we have got 50 years of combined experience in this area. Why is it so broken? Why has it taken this long to fix it? What tools have you not had? What authority have you not had?

My understanding is you had $200 million in 2013 that was given to you guys to fix this problem. What has taken so long? What is the problem?

Mr. SPICKLER. I would say that the really why we are here today and why we are talking about this is that the law and the system is antiquated. It is 80 plus years old. It was designed and built at a time when the veterans population was much smaller.

The appeals typically filed by veterans were much less complicated and involved far fewer issues, and, you know, much less complicated issues.

Mr. ARRINGTON. Give me one tool that you don't have that you have needed for 20 years, 35 years, 16 years, to not have a backlog of 5 years and to have the wait times that we now are trying to deal with.

I am a new member so this is my 100 days into this and I am just-mystified.

Mr. SPICKLER. Well, I will say my and I am sure Mr. McLenachen might have his own thoughts.

But I would say basically again why we are here today and that is a redesign and new legislative framework for the appeals system.

Mr. ARRINGTON. What is the legal barrier-what is the legal barrier-you need Congress to pass a law so that you guys can have an efficient appeals process. Give me one specific tool, not a broad legal framework. Why do we need Congress to pass a law so that you can do your job to serve the veterans? I don't understand it.

I mean, if we have to wait till Congress passes a law to manage the VA's business and we have to micromanage it from here, I am more discouraged than when I just read about this stuff on the outside.

What is the one tool that you don't have that you need? Not a legal framework, nothing broad. Give me one specific thing.

Mr. MCLENACHEN. We need essentially billions of dollars in additional appropriations.

Mr. ARRINGTON. Of course. We need billions of dollars.

Mr. MCLENACHEN. So the solution to that is, within the law which controls how we process appeals, we are not allowed any flexibility that you are suggesting that we have. We don't have those tools, because the current appeal process is in statute.

So what we need is either an extraordinary amount of resources or we need to change the law. And that is why we are here, because it does not make sense to throw more money at a process that is broken.

Mr. ARRINGTON. Okay.

It is going take 18 months to stand this up. That is what I read. Is that correct?

Mr. MCLENACHEN. Yes, sir.

Mr. ARRINGTON. Why is it going to take so long?

Mr. MCLENACHEN. Because we have to do rulemaking, which is probably the longest piece that we have to solve. And that is a pretty aggressive schedule, just 18 months for rulemaking.

Mr. ARRINGTON. Is managing your human capital, is that an issue for you guys? Is that a challenge for you guys?

Mr. MCLENACHEN. Yes. Less so for VBA because our adjudicators work both initial claims and appeals—

Mr. ARRINGTON. One of the things that I am working on is reining in union activity. We don't know how many people are working on official time. We had a GAO study that said that some hundreds are spending 100 percent of their time on union activity. You all are aware of that, right?

The law says that it has to be reasonable, necessary, and in the best interest of the public. Do you all think it is reasonable and in the best interest of the public for VA employees to spend 100 percent of their time on union activity? Just yes or no.

Mr. SPICKLER. I mean, I certainly agree with you that—

Mr. ARRINGTON. Just yes or no, please, because I have to work down the line. Yes, you do think it is reasonable?

Mr. SPICKLER. No, I don't-I agree—

Mr. ARRINGTON. No.

Mr. SPICKLER [continued].-with your position. No.

Mr. ARRINGTON. Okay. Thank you.

What about the VSOs? Is it reasonable, necessary, and in the best interests, yes or no, for veteran employees, VA employees, to spend 100 percent on union activities? Yes or no, is it reasonable?

Mr. CELLI. No, especially when they are higher paid physicians.

Mr. ARRINGTON. Okay.

Yes or no?

Mr. MARSZALEK. No.

Mr. ARRINGTON. Yes or no?

Mr. GALLUCCI. Well, no. But for a longer answer, that is why we talked in our testimony about the resources that the VA would need to be focused on adjudication, not ancillary tasks.

Mr. ARRINGTON. Thank you for your answers.

I yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentleman for yielding.

Ms. Esty, you are recognized for 5 minutes.

Ms. ESTY. Thank you, Mr. Chairman.

Returning to what we can do constructively to try to improve the system, for those of us who are working hard on it, first, there are three topics I want to quick try to get through in the 5 minutes I have.

One is on the improved decision notices. And I am really glad that you mentioned that, because that really wasn't highlighted but, I know, in my district, is one of the most critical points of the process. If we have an unlimited flow of appeals into the system because people don't understand, we are never going to solve this problem, and no amount of money is going to deal with it. So a quick comment on that.

On the duty to assist, because there has been some concern about that, and I think it would be helpful to get maybe the VA to explain how we are dealing with the duty to assist. It is not going away, and I have had a few people reach out, and I would like to get on the record on duty to assist.

And to return to the legacy appeals, so you have a chance at the end of the table, on the VA, to think about the transparency issues. For our oversight on those legacy appeals, how are they going to be tracked and not just reclassified so that we don't find we are

getting calls in our office and suddenly it looks like they are being resolved and they have actually just been put in a new queue and the clock has been reset? There is going to be a whole lot of trouble if we hear that.

So let's quick start, if we can, on the importance of the improved decision notices.

Mr. GALLUCCI. Thank you, Ranking Member Esty.

Improved notifications, I did spend a lot of time talking about that, but I think that is also indicative of the anecdote that I gave before, the friend who reached out. The letters and notifications that he saw in e-Benefits didn't articulate anything that he needed to understand the scope of his appeal that was pending. That is unreasonable. And that is one of the legislative authorities that we are seeking to codify. This has been a persistent issue over the years, are veterans armed with the information that they need to navigate these benefits.

I keep going back to it, the rhetoric on this. This is supposed to be a nonadversarial process. Veterans are supposed to file paperwork and claim a benefit. That is what this is. But what we have built is something that becomes adversarial very early on and unnecessarily so. If we improve notification letters, we cut down on that, veterans understand their rating decisions.

It makes our jobs as advocates easier. We spend a preponderance of our time just explaining the scope of a rating decision and the evidence that would be required to either pursue a higher rating or whether or not it is worth appealing a rating decision.

I can't stress the importance of improved notification notices enough. It is transparency, and it arms veterans to navigate their own benefits. I can't stress it enough.

Thank you.

Ms. ESTY. Thank you. Because that is what I am hearing in my district, too, from the VSOs, that your job is otherwise attempting to demystify this very vague notice. And I think, again, for the VA it is going to be important to make sure we have the resources to do those notices and to work closely over this 18-month period to make sure those notices are really meeting the needs of veterans. You shouldn't have to have the VSO, and you certainly shouldn't have to hire a lawyer when you are a veteran and you are trying to get your disability benefits. And if we have to, sometimes we will need to, but it shouldn't require that.

And I hope we get everybody's commitment. I am going to assume a show of nodding "yes," we are going to work hard on getting these notices right.

All right. To turn to the VA, can you explain a little bit how the duty to assist-I think you are all in agreement, so, on the duty to assist, what is happening to that? Because, again, we have gotten questions. I know the Chairman and I want to make sure all veterans understand it is not going away. Where is it going to? Who is going to be satisfying that duty within the VA?

Mr. SPICKLER. I will start, and then I am sure Mr. McLenachen may want to add more to this.

But, primarily, the duty to assist would be in the supplemental claim lane at the Veterans Benefits Administration, where a veteran, by filing a supplemental claim, is basically saying to VA, "I

want to file this supplemental claim. I have additional evidence I would like to present to be considered." And that is where the duty to assist would be focused.

The higher-level-review lane as well as the appeal-to-the-Board lane are lanes in which the veteran is primarily seeking a direct review, a higher-level review, of the adjudication that has already been done. So the focus there is on whether there was error in the decision that was made, not so much in additional evidence that could be relevant to his or her claim.

So that is how I would describe it. Dave—

Mr. MCLENACHEN. Just quickly, I think maybe that is one of the problems we made before, was we talked about removing the duty to assist. And that is where there was always breakdown between us and the VSOs. And that is the breakthrough we had here, working together, was we are not removing the duty to assist, we are just pulling the process that we have now apart and putting the duty to assist where it makes sense.

So we are not removing the duty to assist. We have liberalized effective dates. This design is better for veterans than what they have now.

Ms. ESTY. Thank you. I appreciate that.

I realize my time has expired, but if we can follow up on that transparency issue of tracking those legacy claims, because I think that is something we all share. We want to make sure that is done properly.

The CHAIRMAN. I thank the gentlelady for yielding.

Dr. Dunn, you are recognized for 5 minutes.

Mr. DUNN. Thank you, Mr. Chairman.

So I would like to address my comments to Mr. Spickler and Mr. McLenachen.

So I think we are all concerned about the delays, and we are almost waiting for veterans to die through these vague VA appeals processes. Is it actually the process, the legal structure of the process, that is causing these incredible delays in handling those appeals, extreme delays? Is it the laws, the way they are written? Is that what I understood you to say?

Mr. SPICKLER. Yes, it is. I mean, that is the primary reason. I mean, the system that is in place today basically provides, sort of, continuous evidence submission. For example, at the Board of Veterans Appeals, in most instances the Board is not really acting as an appellate agency reviewing an adjudication—

Mr. DUNN. Do I understand-because we are all on the clock heredo I understand, then, there is basically no end to the appeal? The appeal goes on and on and on?

Mr. SPICKLER. There is no end, plus the record can be drastically changed from the time that the original rating decision in VBA—

Mr. DUNN. The medical record could change?

Mr. SPICKLER [continued]. Yeah, the medical evidence of record could be completely different. And so it just allows for this endless churning and endless readjudication.

Mr. DUNN. Okay. So let's change our-because I think all of us have this gestalt that the pace of work at the VA is slow. I mean, I am a sergeant, and I have worked at some of the VA hospitals in my residency programs, and, you know, it was pretty common

to have four patients in the morning, four in the afternoon. Now, you know, there isn't a private medical practice in the country that could survive on that pace.

I mean, what is the-and is that the pace throughout the VA, by the way? That is the first question. Is that the pace of production throughout the VA?

Mr. SPICKLER. Well, I would say no. At the Board of Veterans Appeals, we have rigorous productivity standards for our attorneys and judges. And, I mean, it is a-I would say it is a fairly fast-paced—

Mr. DUNN. So what is the explanation for that? I mean, honestly, we just have a hard time understanding how so many people can produce so little product over such a vast period of time.

Mr. SPICKLER [continued]. I am sorry? Could—

Mr. DUNN. The VA, the product, the clinics, you know, they are seeing patients, and they are actually not seeing that many patients, and they are taking a great deal of time to do that.

Mr. SPICKLER. I mean, I am sorry, I can't speak to basically what happens in the medical centers—

Mr. DUNN. But they are the ones generating the medical evidence that you just spoke about, right? I mean, they go see a doctor, and the medical evidence changed. You said there are new findings, medical findings of the patients.

Mr. MCLENACHEN. Right, so the point is that, when we initially process a claim, yes, we send either to a contractor or to a VHA examiner to get a medical examination, and that is used in adjudicating the claim. We do that now in roughly 125 days, decide the claim.

Dave's point is, by the time it gets to the Board 6 years later, the disability picture has changed. As I am sure you know, it can change drastically by that point. So they may need to remand it back VBA to go get another examination. We then readjudicate the claim. The appeal process may start over. And, again, it may get to the Board 3 years later and, again, the disability picture has changed or there is some other medical evidence that might be necessary.

Dave is right, we can't speak to timeliness or how productive doctors are in doing treatment. As far as the medical examinations that we get, we get them very timely; it is just a matter of the disability changing over time and a slow process.

Mr. DUNN. Thank you, Mr. Chairman. I yield back my time.

The CHAIRMAN. I thank the gentleman for yielding.

Mr. Sablan, you are recognized for 5 minutes.

Mr. SABLAN. Thank you very much, Mr. Chairman.

Good morning, everyone.

Mr. Spickler and maybe Mr.-I can't say your last name, so I will call you Mr.—

Mr. SPICKLER. Spickler.

Mr. SABLAN. No, I don't-Mr. David. And this may sound, you know, way off, but here we are trying to settle all these ways of making appeals more timely, making them more easier maybe. The word "duty to assist" that Ms. Esty just brought up, does that include an obligation on the part of VA to assist veterans to file appeals wherever they are in the United States?

Mr. SPICKLER. Does it change the duty?

Mr. SABLAN. No, does it include—

Mr. SPICKLER. Does it improve it?

Mr. SABLAN [continued]. Does it mean that VA, the Department, has a duty to assist veterans with their appeals anywhere they are in the United States?

Mr. MCLENACHEN. So, if I could take a shot at that, they have Veterans Service Organization representatives that help them file an appeal, if necessary. But the key—

Mr. SABLAN. Yes, I understand that, but—

Mr. MCLENACHEN [continued]. – point is, we have a statutory duty to assist in VA, whether it is in the initial claim phase or it is the appeal phase.

Mr. SABLAN. Okay. All right.

Mr. MCLENACHEN. So, once the appeal is initiated, we have to help them substantiate their claim if we can.

Mr. SABLAN. Okay. I agree.

Now, see, I come from a place where you don't exist. There is no VBA staff, no VBA office. We get visits by VBA periodically; they stay for 6 hours. They come to one island and not visit the other two islands.

Can you open this?

And they are also told that they cannot-when they have appeals, they have to travel to either Washington, D.C., which is, you know, at least $3,000, or they travel to Guam and use a VTC to-there is a VHA office with a VTC, and they are told they cannot use that because it is not a VHA matter, it is a Veterans Benefits matter.

My Governor has agreed to assist, to provide resources to the VBA, to the State Veterans Affairs office, and we are going to ask your office, the VBA, to get these individuals trained and probably certified and maybe also have access, if they could, to VBA record of the veterans, if possible.

But is there any way that we could-you know, a round trip to Guam, sir, is over $200, and that is a 50-minute flight. And for veterans, that is a lot of money. Is there—

Mr. MCLENACHEN. Sir, can I make a suggestion?

Mr. SABLAN [continued]. Yeah, yeah.

Mr. MCLENACHEN. Why don't we try to get together sometime after the hearing, and we will—

Mr. SABLAN. Yes. That is exactly what I am trying to get from you, sir, is a commitment to please come, and we will talk about this. Because, in your case, our veterans are certainly, if not forgotten, then never known.

Mr. MCLENACHEN. Dave and I will arrange to come meet with you.

Mr. SABLAN. Thank you.

Mr. MCLENACHEN. He has the hearing issue, and we will see if we can find a—

Mr. SABLAN. Yes, sir. Thank you very much.

Mr. SPICKLER [continued]. Yeah, if I just may briefly, I do believe-speaking for the Board, I do believe we conduct video conference hearings, Board video conference hearings, I believe, through the Honolulu regional office, and—

Mr. SABLAN. Right. But they—

Mr. SPICKLER [continued].-that does serve—

Mr. SABLAN. Yes, sir. So they have to fly to Honolulu then.

Mr. SPICKLER. No.

Mr. SABLAN. That is $1,500.

Mr. SPICKLER. No. I believe we have set up a satellite-I think we better check on this.

Mr. SABLAN. That is a VHA office, and the VHA person in there says you can't use that—

Mr. SPICKLER. Okay.

Mr. SABLAN [continued].-because it is not a VBA issue.

And I am actually, for our VSO individuals here, I am actually taking a list of all VSOs in the country and taking contact information, a summary of what your organization does, and I am going to make it available to my over 900 veterans so that they are aware that there are organizations that they could be eligible for and connect with and become a member of and get assistance.

Because the only VSO we have is the Veterans of Foreign Wars. And they are very good; they help where they can. But we are new to the United States, and we are, what, 30-something, 40 years, and we are brand-new to this, but we need the help as much as we can.

And so I have your commitment we will sit down and talk.

Mr. SPICKLER. Yes, sir.

Mr. SABLAN. Yeah. Thank you.

I yield back.

The CHAIRMAN. The gentleman's time has expired.

Mrs. Radewagen, you are recognized for 5 minutes.

Mrs. RADEWAGEN. Thank you, Mr. Chairman, Ranking Member. Welcome, gentleman.

My question is for the VSOs.

Mr. Celli, are you confident that the Department's plan will ensure that veterans who cannot opt into the new system or choose not to do so receive a decision in a timely manner?

Mr. CELLI. I am sorry, would you repeat the question?

Mrs. RADEWAGEN. Are you confident that the Department's plan will ensure that veterans who cannot opt into the new system or choose not to do so receive a decision in a timely manner?

Mr. CELLI. I think that if we don't implement the framework, they have no other options. And they will have the same wait time that they have today at a minimum, and that the new framework will start to dwindle down on the backlog.

And one of the beauties of Chairman Bost's opt-in language is that it will allow the VA to adjust as necessary. So if the initial decision calls for a certain amount of veterans opting in to control the spigot so that it is not too fast and they don't get overwhelmed, once they start to handle that and they start to understand how the process is going to have its benefits and its detriments, then they can open it up even further to allow for more legacy appeals to move over.

Mrs. RADEWAGEN. Mr. Marszalek, would you like to comment on that?

Mr. MARSZALEK. Sure. Thank you.

Definitely we believe that veterans are going to continue waiting in the legacy system. There is no doubt, right? – Will more people

coming into the new system make the legacy appeals go any faster? I don't believe so. So what we have to do is continue, working together and collaborating.

In regards to the reporting requirements, VA has to share that information. How long are appeals taking? Has anything improved in the legacy side once they start allowing people into the new framework? We have to pay very, very close attention to that to make sure veterans are receiving decisions that are timely, absolutely.

Mrs. RADEWAGEN. Mr. Gallucci, would you like to weigh in on this issue?

Mr. GALLUCCI. Sure. Thank you.

First of all, I agree with my colleagues. But I think this is also one of the reasons why we were so committed to including the off-ramps in the legislation. There is no doubt that some veterans are going to be stuck in the legacy system, but, again, this is why we focused on resourcing as well. The last thing we want to see, as my predecessor Jerry often said, is VA playing Whac-A-Mole, just taking resources and putting them at the new, shiny toy. We want to avoid that at all costs.

And we think that some of the reporting mechanisms that are in the bill help us get to that point. They encourage transparency, they encourage consistent reporting. We have a little bit of a disagreement about the timeline of some of those reporting metrics. Some of them, we don't believe it would be practical for them to be monthly, and we spoke about that in our written remarks. But we think that it will help keep optics on the legacy system and allow us to adjust if we see that it is getting worse.

Mr. CELLI. And can I add one more thing real quick? And that is, the legacy appeals-veterans will also benefit from the new notification letters, and I think that that will help considerably.

The new notification letter, the agreement to institute that was the very first agreement that VA had to come to terms with with the VSOs before we even started to discuss moving forward in an appreciable way. That was a critical component. And every veteran will benefit from that at those decision points where the off-ramps take place.

Mrs. RADEWAGEN. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. I thank the gentlelady for yielding.

Mr. Rutherford, you are recognized for 5 minutes.

Mr. RUTHERFORD. Thank you, Mr. Chairman.

And, first, I want to say thank you to the Committee for bringing what has been described as, although maybe not perfect, certainly a step up from where we are at.

And one of the issues that I would like to talk about is the performance and past performance. And this may have come up in the staff work in the Committee and with the VA and the VSOs and all of the hard work that you all have done, and I really appreciate that.

Mr. Spickler or Mr. McLenachen, do you know the number of appeals that were actually completed by the entire Veterans Benefits Administration last year? And when I say "completed," I mean either denied or granted.

Mr. MCLENACHEN. So that is one of the problems with the current appeal process. We can tell you roughly how many we resolved, which was about 138,000, I believe. And "resolved" means they are out of the process.

Mr. RUTHERFORD. And how many of those were at the RO level?

Mr. MCLENACHEN. Well, that was in VBA.

So there is a small number of resolutions of appeals in the current process, and that is because there is a lot of work that goes into moving the appeal along in the process without resolving it. So that is kind of the problem we are dealing with today, is there is no beginning and ending point. An appeal can continue for a long period of time and churn in the Department. We had some examples of appeals had been pending for 20, 25 years and had 30 or 40 decisions between VBA and the Board in that 1 appeal.

Mr. RUTHERFORD. Yeah.

Mr. MCLENACHEN. So it is really hard to determine what our production is, which is what you are looking for, because of the process.

Now, in the new process, each of those lanes is going to have a beginning and ending point. You are going to have a supplemental claim that is either granted or denied. You are going to have a higher-level review. Same thing.

Mr. RUTHERFORD. Right. And that is one of the things that I really like about this bill. And I would encourage you all, as you have done already, it sounds: Keep track of those outcomes, and that will tell us where the tweaks need to come, whether it is letters or, you know, whatever.

So do you know what number of appeals are granted? Not the hearing, but that they are given their benefit.

Mr. MCLENACHEN. We do have that data, and we could provide it to you.

Mr. RUTHERFORD. Is it 50 percent? I mean, do you have an off-the-cuff percentage? Fifty percent? Ten percent?

Mr. SPICKLER. The Board tracks dispositions. So, last year, for example, the Board decided over 52,000 appeals.

Now, we track those by allowances, grants, denials, and remands. So X number of those 52,000 dispositions included remands of one or more issues. I mean, some appeals might have 6, 10 issues. And some issues might be granted, some might be denied, some might be remanded.

So we do have that information, and if you would like that information, we would be happy to—

Mr. RUTHERFORD. Hold on to that, because I will tell you, I think it is going to be very important to be able to go back to that data after implementation and actually show the improvement or not.

Mr. SPICKLER. Right.

Mr. RUTHERFORD. I am sure it will be.

But, with that—

Mr. SPICKLER. Yes, we definitely plan to continue tracking that information.

Mr. RUTHERFORD. Thank you.

Mr. Chairman, I yield back.

The CHAIRMAN. I thank the gentleman for yielding.

Mr. Banks, you are recognized for 5 minutes.

Mr. BANKS. Thank you, Mr. Chairman.

I want to direct my question to the VSOs.

So often at home, I hear from my constituents about the important work that your organization does to assist my veteran constituents in the claims process. And that invaluable aspect of what each of your organizations does for our veteran population is very much appreciated by myself and, I am sure, every other Member of the Committee.

So I wonder if you can elaborate a little bit on maybe concerns that you have or maybe a confidence that you have that you can retrain your volunteers back home to be able to assist our veteran population. What goes into that process? Again, if you have concerns or a level of confidence that that will occur, as well as you hope that it will, I would like to hear that as well.

So, Mr. Celli?

Mr. CELLI. Sure. Thank you.

So the American Legion has about 3,200 representatives across the country. Twice a year, we have in-resident training where they come in and we update them on any new developments that have happened, any relevant case law that may have taken place, and we give refresher training as well.

We are not going to have-I mean, it is going to be a challenge to educate everybody on the new process, but it is something that we already have a framework to do. So I anticipate that we will be able to handle this fairly smoothly between us and the attorneys that we have on staff.

Mr. BANKS. And you believe that 18 months is enough time for that retraining to occur?

Mr. CELLI. Absolutely.

Mr. BANKS. Okay.

Mr. Marszalek?

Mr. MARSZALEK. We believe the 18 months is plenty of time. We have over 260 professional staff members who we train through an electronic system. And they are able to see everything that we are training, so can we provide that training consistently across the board.

And they go out into their communities and train another 4,000 advocates that we have across the country and provide that exact same training in electronic format, also one-on-one training, whatever is necessary.

So, yes, 18 months is plenty of time for us to get that information out.

Mr. BANKS. Okay.

Mr. Gallucci?

Mr. GALLUCCI. So I would agree that the 18 months is a reasonable amount of time for us to train to a specific standard.

So the 1,900 accredited advocates with the VFW are professional, trained, accredited advocates. They work at VA regional offices. They are employees of the Veterans of Foreign Wars. They are employees of State governments, county governments, what have you. We are required to provide them training, per the accreditation agreement that we have with Department of Veterans Affairs. To do that, the VFW does four in-person training conferences a year

and monthly training updates to each of our accredited representatives.

And, also, as these discussions have been going on, we have provided consistent feedback and solicited feedback from our accredited representatives on what the new framework would look like. They are already aware that this should be coming down the pike, and they are prepared for what the new process would look like.

Communication is going to be key with our clients; certainly agree with you on that. And I think we are ready to accept that challenge. And I think our professional advocates in the field are more than willing to do this.

Again, recourse at the local level gives veterans a clear rating decision within a year. It gives them the steps to take to get a fair rating decision. So I think we are up to the challenge.

Mr. BANKS. Very good.

Again, in closing, it is why I am so proud to be a member of at least two of your organizations. That check that I write every year to be a member, I know that it goes toward the cause that you fulfill and exactly that process of helping so many who need the help.

So, with that, Mr. Chairman, I yield back.

The CHAIRMAN. I thank the gentleman for yielding.

Mr. Peters, you are recognized for 5 minutes.

Mr. PETERS. Thank you very much, Mr. Chairman.

I want to thank you and Ranking Member Walz for having this hearing to discuss the current appeals process at the VA. This is the issue that I hear about most at home, and I am going to say it for my own peace, just because everyone else has. It is the same story.

We have in San Diego the third-largest veterans population in the country. And our office has helped countless veterans who have gotten bogged down in the appeals process. With nearly a decade or coming on a decade to have an appeal heard, that is just not acceptable.

One story I just wanted to share with you from my constituent was Monica's husband. He was a veteran diagnosed with ALS. And with her husband not working and his condition worsening, she just struggled to keep up financially. She appealed to the VA to increase her husband's benefits and provided documentation. She asked for an expedited case due to her husband's illness and financial hardship. And, unfortunately, by the time the appeals process concluded, her husband had passed away.

We have heard examples like this before. They are heartbreaking. They are not just heartbreaking, they are wrong. And it is on us, all of us, to work together to do something about it.

Our office will always help vets who need it. And we are honored to do that, we are proud to do it. But it shouldn't take congressional intervention to get veterans the help that they deserve.

So I hope we can come together to move this legislation forward to create new appeals pathways. It is a very sensible kind of approach. And we ought to try something-something different. Let's take that risk. It helps get the backlog down and fix the problem. Because every name on the backlog isn't just a statistic, it is a story like Monica's husband, who is not receiving the benefit that he was promised, that he earned in service to the country.

So I can't stress the importance of this reform enough to me and to my constituents. I want to thank Mr. Bost and Ms. Esty for their leadership, Ms. Titus before her, and look forward to pushing this thing on to a bipartisan approval. In a Congress that is stuck on a lot of issues, I am heartened that we are not stuck on this one.

And I yield back.

The CHAIRMAN. I thank the gentleman for yielding.

And now I thank you all very much on the panel. It has been a great discussion, as I thought it would be. I think this has an opportunity to move forward.

And the panel is now excused.

I ask unanimous consent that all Members have 5 legislative days to revise and extend their remarks and include extraneous materials.

Hearing no objection, so ordered.

And any questions or statements that Members may have may be submitted for the record.

And I ask also that the VA, for Mr. Rutherford, submit the data that Mr. Rutherford asked for.

And I will now yield to Mr. Walz for any closing comments.

Mr. WALZ. Just, again, thank you all. The partnership here is greatly appreciated, trying to come together to solve a problem.

Mr. Roe and I were talking about we pay dues to these organizations. All Americans also pay dues to the VA, in the form of tax dollars, and we are in this together to get it right. I think that spirit of cooperation and I think the collaboration that was done ahead of time-with the recognition we still have things people are concerned about, and we can still keep bringing them forward. But very heartened by this, and I think our constituents are being well-served by all of you. So thank you.

And I yield back.

The CHAIRMAN. I thank the gentleman for yielding.

You know, I think, at the end of the day, we either continue the current system and live with these extraordinarily long waits-that is one option. As was pointed out by the VA, we can appropriate a lot more money and expand what we are doing now and hope that clears the system up, as you clearly pointed out. Or we can try a new system, which Mr. Spickler said was timely, transparent, and fair. I am ready to try timely, transparent, and fair over what we had.

And we could hear stories like Mr. Peters gave. I had a similar story before he got here. There are hundreds of thousands of them out there. It is time for those stories to cease, and we need to get the veterans a timely decision.

And I appreciate very much-I know how many meetings that you all went to, to work out all these extraordinarily complicated details to help the veterans, and I very much appreciate what you have done. And I look forward to getting this across the finish line this year and signed into law and get this process reformed.

Thank you all very much.

The meeting is adjourned.

[Whereupon, at 11:33 a.m., the Committee was adjourned.]

A P P E N D I X

Prepared Statement of David Spickler

Good morning, Chairman Roe, Ranking Member Walz, Members of the Committee. Thank you for inviting us here today to present our views on a bill that would take critical action necessary to modernize and improve the Department of Veterans Affairs (VA) claims appeal process. Joining me today is David R. McLenachen, Director of the Appeals Management Office, Veterans Benefits Administration.

Thank you for the opportunity to come before you today to discuss the current VA appeals process and the pressing need for reform. I believe it is critical for Veterans that we all work together and gain consensus on a way forward to reform the VA appeals process.

Modernizing the appeals process is a top priority for VA. Although Veterans are waiting approximately 116 days for a decision on VA disability compensation claims, they are waiting an average of 3 years for a final decision if they choose to appeal. Moreover, those Veterans who choose to continue their appeal to the Board are waiting an average of 6 years from the date that they initiated their appeal for a decision, and the Board decision may not even resolve the appeal. The draft bill being considered today would provide much-needed comprehensive reform for the VA appeals process to ensure that Veterans receive a timely, final VA decision on their claims. It would replace the current, lengthy, complex, confusing VA appeals process with a new appeals process that makes sense for Veterans, their advocates, VA, and stakeholders. VA supports the intent of this bill; however, we have some concerns with certain provisions in the bill as drafted, such as the provisions that would remove finality from the process upon judicial review and require the Secretary to certify that he has the resources necessary to timely process appeals in the future. We look forward to the opportunity to work with the Committee to address those concerns.

The current VA appeal process, which is set in law, is broken and is providing Veterans a frustrating experience. In the current process, appeals have no defined endpoint and require VA staff to engage in a continual loop of gathering evidence and re-adjudicating that information based on that new evidence. This continuous process of gathering evidence and readjudication can add years to the appeals process, as appeals churn between the Board and the AOJ. All of this has resulted in a system that is complex, inefficient, ineffective, and confusing. Additionally, it splits jurisdiction of appeals processing between the Board and the agency of original jurisdiction (AOJ), which is typically the Veterans Benefits Administration (VBA). Due to this complex and inefficient process, Veterans wait much too long for final resolution of their appeal. Without significant legislative reform to modernize the appeals process, VA projects that wait times and the cost to taxpayers will only increase.

As VA has increased claims decision output in VBA over recent years, appeals volume has grown proportionately. Between FYs 2012 and 2017, the number of pending appeals climbed by 40 percent to more than 460,000 today

Comprehensive legislative reform is required to modernize the VA appeals process and provide Veterans a decision on their appeal that is timely, transparent, and fair. VA continues to work collaboratively with a wide spectrum of stakeholder groups to reconfigure the VA appeals process into something that provides a timely, transparent, and fair resolution of appeals for Veterans and makes sense for Veterans, their advocates, stakeholders, VA, and taxpayers. We believe the engagement of those organizations that participated ultimately led to a stronger proposal, as we were able to incorporate their feedback and experience having helped Veterans through this complex process. The result of this collaborative work was a new appeals process, with the same fundamental features as the process described in section 2 of the draft bill, which would provide Veterans with timely, fair, and quality

decisions. VA is grateful to all of the stakeholders for their contributions of time, energy, and expertise in this effort.

The draft bill would result in a new appeals framework and processes that feature differentiated lanes, which give Veterans clear options after receiving an initial decision on a claim One lane would be for review of the same evidence by a higher-level claims adjudicator in the AOJ; one lane would be for submitting new and relevant evidence with a supplemental claim to the AOJ; and one lane would be the appeals lane for seeking review by a Veterans Law Judge at the Board. In this last lane, intermediate and duplicative steps currently required by statute to receive Board review, such as the Statement of the Case (SOC) and the Substantive Appeal, would be eliminated. Furthermore, hearing and non-hearing options at the Board would be handled on separate dockets so these distinctly different types of work can be better managed. As a result of this new design, the AOJ, such as VBA, would be the claims adjudication agency within VA and the Board would be the appeals agency. This design would remove the confusion caused by the current process, in which a Veteran initiates an appeal in the AOJ but the appeal is really a years-long continuation of the claim development process. It would ensure that all claim development occurs in the context of a supplemental claim filed with AOJ, which the AOJ can quickly adjudicate, rather than in an appeal.

Currently, VA has a statutory duty to assist the Veteran in the development of a claim for benefits. This duty includes obtaining relevant Federal records, obtaining other records identified by the claimant, and providing a medical examination if VA determines that the claim requires such an examination. This new design contains a mechanism to correct any duty to assist errors by the AOJ. If the higher-level claims adjudicator or Board discovers an error in the duty to assist that occurred before the AOJ decision being reviewed, the claim/appeal would be returned to the AOJ for correction unless the claim/appeal could be granted in full. However, the Secretary's duty to assist would not apply to the lane in which a Veteran requests higher-level review by the AOJ or review on appeal to the Board. The duty to assist would, however, continue to apply whenever the Veteran initiated a new claim or supplemental claim. Moreover, the bill would require VA to modify its claims decision notices to ensure they are clearer and more detailed. This notice would help Veterans and their advocates make informed choices as to which review option makes the most sense.

This disentanglement of processes would be enabled by one crucial innovation. In order to make sure that the Veteran fully understands the process and can adapt to changed circumstances, a Veteran who is not fully satisfied with the result of any lane would have 1 year to seek further review while preserving an effective date for benefits based upon the original filing date of the claim. For example, a Veteran could go straight from an initial AOJ decision on a claim to an appeal to the Board. If the Board decision was not favorable, but it helped the Veteran understand what evidence was needed to support the claim, then the Veteran would have 1 year to submit new and relevant evidence to the AOJ in a supplemental claim without fearing an effective-date penalty for choosing to go to the Board first.

The framework proposed in the draft bill has many advantages. It provides a streamlined process that allows for early resolution of a Veteran's appeal while also generating long-term savings for taxpayers. The lane options allow Veterans to tailor the process to meet their individual needs and control their VA experience. It also enhances Veterans' rights by preserving the earliest possible effective date for an award of benefits, regardless of the option(s) they choose, as long as the Veteran pursues the same claimed issue in any of the lanes within the established timeframes. By having a higher-level review lane within the VBA claims process and a non-hearing option lane at the Board, both reviewing only the record considered by the initial claims adjudicator, the new process provides a feedback mechanism for targeted training and improved quality in VBA.

Beyond stopping the flow of appeals into the existing broken system, the bill provides two opt-ins to ensure that as many Veterans as possible benefit from the streamlined features of the new process. These opt-ins would provide opportunities to take advantage of the new process for all Veterans who receive a decision during the 1-year period prior to the effective date of the law and for all other Veterans who receive an SOC or Supplemental Statement of the Case (SSOC) in a legacy appeal after the effective date of the law. While VA believes that the opt-in for Veterans who receive an SOC or SSOC after the effective date of the law could be accomplished through regulation, VA does not object to the inclusion of this into the bill.

While VA strongly supports the fundamental features of the new process outlined in the draft bill, we have concerns with some aspects of the proposed legislation as presently drafted, as discussed below. VA strongly opposes a substantive change

that would make the effective date protection afforded by the filing of a supplemental claim within 1 year of a decision, applicable to supplemental claims filed within 1 year of a decision by the United States Court of Appeals for Veterans Claims, the United States Court of Appeals for the Federal Circuit, or the United States Supreme Court as it is beyond the scope of VA's decision process. Additionally, this change is contrary to VA's policy interest in encouraging dissatisfied claimants to stay within VA unless it is truly necessary to go to a higher court.

With regard to applicability and the proposed certification of the readiness to carry out the new system by the Secretary, the requirement that the Secretary submit a statement to Congress that he has the resources necessary to timely operate the system is problematic, given the annual budget cycle. While VA will be prepared to implement the new system at the end of the 18-month period prescribed in the bill and shut off the flow of appeals to the broken process, the Secretary cannot predict the outcome of future budget cycles. Moreover, if the bill was enacted with this provision, it would create significant uncertainty in implementing the opt-in component of the law. We note that the bill grants claimants a procedural right to elect to participate in the modernized appeals system as of one year before the applicability date. The applicability date in this bill is necessarily indeterminate because, without knowing when the Secretary will be able to certify under subsection (x)(1)(A)(ii) that VA has the resources it needs to operate the modernized system, it is not possible to know when the one year period allowing claimants the right of election begins. We would be happy to work with the Committee to discuss alternative approaches to the applicability date of the law.

The draft bill also adds notice requirements to higher-level review and Board decisions, for the purpose of explaining whether the claimant submitted evidence that was not considered, and if so, why it was not considered and what the claimant or appellant can do to have that evidence considered. VA views this addition as unnecessary, as a claimant who had elected either a higher-level review or an appeal to the Board would have already received notice addressing all lane options in the new process, including restrictions on the submission of new evidence. They would also be aware of the option to file a supplemental claim, where they would have the opportunity to submit new evidence for consideration by the AOJ. Additionally, the issue of how to handle improperly submitted evidence is an administrative matter that would best be determined by VA.

Lastly, the draft bill includes reporting requirements that we believe could be adjusted to be less onerous but still provide valuable information to the Congress. VA is glad to work with the Committee to discuss these requirements, and how they can be shaped to provide robust information useful for your oversight should the bill be enacted, but that would reflect an efficient use of administrative resources.

VA is poised to provide technical assistance on several other aspects of the proposed legislation. We appreciate any opportunity to work with Congress to further refine this legislation.

Mr. Chairman, this concludes my statement. Thank you for the opportunity to appear before you today. We would be pleased to respond to questions you or other Members may have.

Prepared Statement of Louis J. Celli

In May of 2016 we addressed this Committee on the importance of passing comprehensive appeals reform. Between then and now, over 125,000 veterans have started their multi-year journey into the appeals abyss - how do we explain to those veterans, their families, and the American taxpayers that we're still years away from implementing a better system because our Congress decided not to act?

In the 114th Congress, the House Committee on Veterans Affairs, with overwhelming support from the veterans' community, passed an appeals processing bill that would modernize and streamline the program that would bring relief to millions of veterans - but the Senate's inaction set the process back almost a year, so here we are again, a year later, no further along than we were this time last year.

Chairman Roe, Ranking Member Walz, and distinguished, dedicated, defenders of veterans who proudly serve on this committee; on behalf of Charles Schmidt, the National Commander of the largest Veteran Service Organization in the United States of America representing more than 2.2 million dues paying, voting members, and combined with our American Legion family whose numbers exceed 3 and a half million voters, living in every district in America; it is my duty and honor to present The American Legion's position on how to improve the Department of Veterans Affairs (VA) claims and appeals process.

The American Legion thanks this Committee, and your staff, for the many hours of hard work and critical thought that you have put into this project, and we specifically would like to thank your Chief of Staff John Towers and Subcommittee on Disability Assistance and Memorial Affairs Staff Director and Counsel, Maria Tripplaar, for their committed collaboration and dedication to making this proposed legislation as meaningful and impactful as possible.

The American Legion currently holds power of attorney on more than three quarters of a million claimants. We spend millions of dollars each year defending veterans through the claims and appeals process, and our success rate at the BVA continues to hover around 80 percent.

When VA invited stakeholders to the table to discuss appeals modernization, The American Legion knew that appeals modernization could not start with looking at the appellate process; the conversation needed to begin at the point of the initial adjudication; so the first things the group looked at was the VBA decision notice. As a negotiated component of this framework, VBA has promised to improve their decision notice which will better inform veterans and their advocates. More importantly, a better decision letter will not only help veterans better prepare if they need to appeal, but it will help prevent appeals from being introduced because the veterans were not properly informed about the basis for denial. After VA's commitment to improve the initial decision letter, stakeholders helped sort through barriers that slowed appeals processing, and highlighted another of The American Legion's primary concerns - centralized training.

VA further argued that if there were a process within the appeals system that allowed law judges to review disputed decisions that were adjudicated at the regional offices, based only on the same information that the regional office had at the time the claim was originally decided, then BVA would be able to provide a "feedback loop" they could use to help train and educate VBA's regional offices, and additionally help identify regional offices where the decisions uniformly fail to address specific legal issues, and improve initial decisions.

It was with these two foundational underpinnings that the big six VSOs, in addition to state and county service officers, veteran advocate attorneys, and other interested groups worked with senior VA officials from VBA and BVA to design the framework of the legislation being discussed again here today.

The guiding principle leading all of our discussions was ensuring that we preserved all of the claimant's due process rights while ensuring that they did not lose any claims effective date time, which we were not only able to do successfully, but we were able to increase protections for veterans through this new process.

As you are aware, the design of the proposed appeals process allows for multiple options for claimants, as well as options for additional claim development, the option to have the decision reviewed by another adjudicator (difference of opinion) and the chance to take your case straight to the court to have a law judge review the decision and make a ruling on your claim.

The proposed bill provides veterans additional options while maintaining the effective dates of original claims. Veterans can elect to have an original decision reviewed at the ROs through a Difference of Opinion Review (DOOR) which is similar to the current functions of the Decision Review Officers (DROs). A DOOR provides an opportunity for a claimant to discuss concerns regarding the original adjudication of a particular issue, or the entire claim, prior to appealing to the BVA. Additionally, the administrative actions removes the need for a Notice of Disagreement (NOD), a process that took 412.8 days, according to a report released to The American Legion following the end of last fiscal year. The April 24, 2017 VA Monday Morning Workload Report indicates the delay has increased over two weeks, to 429.4 days VA Monday Morning Workload Report, April 24, 2017.

Beyond improvements in administrative functions, the proposed bill enables claimants to select a process other than the standard multi-year long backlog, if they want to have an appeal addressed more expediently if they believe they have already provided all relevant and supporting evidence. Similar to the Fully Developed Claims program, veterans will be able to elect to have their appeals reviewed more expeditiously by attesting that all information is included within the claim, VA's records, or submitted with VA Form 9 indicating the intent to have their claims expeditiously forwarded to BVA for review.

Veterans indicating that they may need additional evidence or time, could elect to have their claim reviewed in BVA's current format of allowing additional evidence entered. For veterans requiring additional evidence, such as lay statements from friends and families or a private medical examination rebutting VA's medical examinations, this is a viable alternative to allow the time and opportunity to prove a veterans case and secure the benefits they have earned.

Recognizing that an increased burden is being placed upon veterans, VA will ensure veterans maintain their effective dates, even if BVA denies the claim. If a veteran's appeal is denied by BVA, the veteran can submit new and minimally relevant evidence to reopen the claim at the RO while holding the original effective date that may have been established long before the second filing for benefits.

Similar to FDC, The American Legion will work tirelessly to ensure this program is successful and appreciates the Committee's support by including stakeholders in the certification process as this program is officially launched. We recognize the increased burden it can place on veterans; we also recognize that our approximately 3,000 accredited representatives have the tools to ensure success for the veterans and claimants we represent. Throughout the year we will continue to work with our representatives, our members, and most importantly our veterans to understand the changes in law, and how they will be able to succeed with these new changes.

The American Legion recognizes that this is a huge undertaking and that as with any contract, the agreement is only as good as the people who sign it. We agree that there is a lot that is not going to be included in statutory language, and that this initiative places a lot of trust and responsibility on VA to do the right thing. The American Legion believes that the Secretary needs this flexibility in order to set this program up effectively, and that VA will continue to work with stakeholders and congress as we move forward. Any deviation from that plan will upset overseers and stakeholders alike, and will surely result in veterans being cheated as we all will ending up right back here in this hearing room to fix it.

In order to come to an agreement, stakeholders needed to trust VA to do the things they promised to do, and do them in good faith. There are a lot of nuances that aren't able to be legislated, and the VSOs are going to be providing constant feedback as we move forward with appeals modernization. We believe that the architects of this proposal have acted in good faith, and we support their efforts to modernize the appeals process for the good of veterans, for the good of the process, and for the good of the American taxpayer.

Prepared Statement of Jim Marszalek

Mr. Chairman and Members of the Committee:

Thank you for inviting DAV (Disabled American Veterans) to testify on the new appeals modernization framework and specifically on new draft legislation to implement it. As you know, the appeals modernization framework was developed through a remarkable collaboration between the Veterans Benefits Administration (VBA), the Board of Veterans Appeals (Board) and a group of stakeholders who represent veterans, including DAV. Through further consultation and collaboration with this Committee and others in Congress, we now have a legislation that DAV strongly supports and we look forward to working with you to move this legislation through the House and Senate, and onto the President's desk so that he can sign it into law.

As National Service Director for DAV, I want to thank you Mr. Chairman, Ranking Member Walz, as well as Chairman Bost, and Ranking Member Esty from the Subcommittee on Disability and Memorial Affairs for making appeals modernization a priority for the new 115th Congress. I also want to thank Congresswoman Titus for her leadership on this issue. As you may know, DAV is a congressionally chartered national veterans' service organization of 1.3 million wartime veterans, all of whom were injured or made ill while serving on behalf of this nation. To fulfill our service mission to America's injured and ill veterans and the families who care for them, DAV directly employs a corps of more than 260 National Service Officers (NSOs), all of whom are themselves wartime service-connected disabled veterans, at every VA regional office (VARO) as well as other VA facilities throughout the nation. Together with our Chapter, Department, Transition and County Veteran Service Officers, DAV has over 4,000 accredited representatives on the front lines providing free claims and appeals services to our nation's veterans, their families and survivors.

In 2016, DAV NSOs interviewed over 152,000 veterans and their families; filed over 197,000 new claims for benefits; and obtained more than $4 billion in new and retroactive benefits for the injured and ill veterans we represented before the VA. We currently represent over one million veterans or survivors, making DAV the largest veterans service organization providing claims assistance. In addition DAV employs 11 National Appeals Officers (NAO) who represent veterans, dependents and survivors in their appeals before the Board of Veterans' Appeals (Board). In fiscal year 2016, DAV NAOs provided representation for 28 percent of all appeals decided by the Board, a caseload of 14,630 appeals, more than any other VSO. This

testimony reflects the collective experience and expertise of our thousands of dedicated and highly trained service officers who provide free claims and appeals assistance to hundreds of thousands of veterans and survivors each year.

While the claims and appeals process has always taken too long to get veterans accurate decisions, over the past few years the number of pending appeals has risen dramatically - to over 450,000 - even while the claims backlog has been significantly reduced. As a result, an appeal today can take anywhere from three to five years before final resolution, a delay that is simply unacceptable and often harmful for veterans forced to wait years for earned benefits. We hope today's hearing will move us one step closer to finally enacting meaningful reform of the appeals process.

Mr. Chairman, the draft bill you have put forward builds upon the efforts of the workgroup comprised of VBA, the Board and 11 major stakeholder organizations, including DAV, all of whom assist veterans with their appeals. Just over one year ago, over several very intensive months that included a number of closed-door, all-day sessions, the workgroup was able to reach general consensus on principles, provisions and ultimately draft legislation. Several bills embodying the framework were introduced last year in the House and Senate, and one subsequently passed the House, however further action stalled as the 114th Congress came to a close. However, we were very pleased that legislation embodying the appeals modernization framework was reintroduced in the House (H.R. 457) by Rep. Dina Titus, and in the Senate (S. 712) by Sen. Blumenthal, in addition to the draft legislation being considered by the Committee today. We are greatly encouraged with the bipartisan support for reforming the appeals system and look forward to working with all of you to continue refining the legislation while moving swiftly to enact it early this year.

Before turning to the draft legislation, it is important to understand that the pending and growing appeals inventory was primarily an unfortunate, yet foreseeable consequence of a long-term lack of adequate resources for both VBA and the Board. Over the past five years, there was a clear shift of focus and resources inside VBA to bringing down the claims backlog, thereby neglecting the appeals processing at VA Regional Offices (VARO) and resulting in today's staggering appeals backlog. Moving forward, adequate resources will be critical to the success of appeals reforms, as well as continuing progress on the claims backlog.

A New Framework for Veterans' Claims and Appeals

The new framework developed by the workgroup would protect the due process rights of veterans while creating multiple options for them to receive their decisions in a more judicious manner. The critical core of the new system allows veterans to have multiple options to reconcile unfavorable claims' decisions, introduce new evidence new evidence at both the Board and VBA, and protect their earliest effective dates without having to be locked into the current long and arduous formal appeals process at the Board.

In general, the framework embodied in the draft legislation would have three main options for veterans who are unsatisfied with their claims decision. Veterans must elect one of these three options within one year of the claims decision to protect their effective date. First, there will be an option for a local, higher-level review of the original claim decision based on the evidence of record at the time of the claim decision. Second, there will be an option for readjudication and supplemental claims when new and relevant evidence is presented or a hearing requested. Third, there will be an option to pursue an appeal to the Board - with or without new evidence or a hearing.

The central dynamic of this new system is that a veteran who receives an unfavorable decision from one of these three main options may then pursue one of the other two appeals options. As long as the veteran continuously pursues a new appeals option within one year of the last decision, they would be able to preserve their earliest effective date, if the facts so warrant. Each of these options, or "lanes" as some call them, have different advantages that allow veterans to elect what they and their representatives believe will provide the quickest and most accurate decision.

For the higher-level review option, the veteran could choose to have the review done at the same local VARO that made the claim decision, or at another VARO, which would be facilitated by VBA's electronic claims files and the National Work Queue's ability to instantly distribute work to any VARO. The veteran would not have the option to introduce any new evidence, nor have a hearing with the higher-level reviewer, although VBA has indicated it may allow veterans' representatives to have informal conferences with the reviewer in order for them to point out errors of fact or law. The review and decision would be "de novo" and a simple "difference of opinion" by the higher-level reviewer would be enough to overturn the decision

in question. If the veteran was not satisfied with the new decision, they could then elect one of the other two options.

For this higher-level review, the "Duty to Assist" (DTA) would not apply since it is limited to the evidence of record used to make the original claims decision. If a "duty to assist" error is discovered that occurred prior to the original decision, unless the claim can be granted in full, the claim would be sent back to the VARO to correct any errors and readjudicate the claim. If the veteran was not satisfied with that new decision, they would still elect the other appeal options. It is critical that relevant information be captured relative to decisions that have been overturned by a higher-level reviewer, the number of decisions upheld, and the number of decisions sent back to the RO's to correct DTA violations. This information is needed to correct any claims processing errors that may be taking place within RO's.

For the readjudication/supplemental claims option, veterans would be able to request a hearing and present new evidence that would be considered in the first instance at the VARO. VA's full "duty to assist" would apply during readjudication, to include development of both public and private evidence. The readjudication would be a de novo review of all the evidence presented both prior to and subsequent to the claims decisions until the readjudication decision was issued. As with a higher-level review, if the veteran was not satisfied with the new decision, they could then elect one of the other two options to continue redress of the contested issue(s). These first two options take place inside VAROs and cover much of the work that is done in the current Decision Review Officer (DRO) process, although it would be separated into two different lanes: one with and one without new evidence or hearings.

For the third option, a notice of disagreement would be filed to initiatie Board review, triggering the formal appeal process. The Board would operate two separate dockets, one that does not allow hearings and new evidence to be introduced; and a second that allows both new evidence and hearings. The Board would have no "duty to assist" obligation to develop any evidence presented. For both of these dockets, the appeal would be routed directly to the Board and there would no longer be Statements of Case (SOCs), Supplemental Statement of the Case (SSOCs) or any VA Form 8 or 9 to be completed by VBA or the veteran. The workgroup established a goal of having no hearing/no evidence appeals resolved within one year, but there was no similar goal for the more traditional appeals docket. While eliminating introduction of evidence and hearings would naturally make the Board's review quicker, it is important that sufficient resources be allocated to the traditional appeal lane at the Board to ensure a sense of equity between both dockets.

For the Board docket that allows hearings, veterans could choose either a video conference hearing or an in-person hearing at the Board's Washington, DC offices; there would no longer be travel hearing options offered to veterans. New evidence would be allowed, but limited to specific timeframes: if a hearing is elected, new evidence could be presented at the hearing or for 90 days following the hearing; if no hearing is elected, new evidence could be presented with the filing of the NOD or for 90 days thereafter. If the veteran was not satisfied with the Board's decision, they could elect one of the other two VBA options, and if filed within one year of the Board's decision, they would continue to preserve their earliest effective date. The new framework would impose no limits on the number of times a veteran could choose one of these three options, and as long as they properly elected a new one within a year of the prior decision, they would continue to protect their earliest effective date.

If the Board discovers that a "duty to assist" error was made prior to the original claims decision, unless the claim can be granted in full, the Board would remand the case back to VBA for them to correct the errors and readjudicate the claim. Again, if the veteran was not satisfied with the new claim decision, they could choose from one of the three appeals options available to them, and as long as they properly made that NOD election within one year of the decision, they would continue to preserve their earliest effective date.

Improving Claims Decision Notification

While the workgroup was initially focused on ways to improve the Board's ability and capacity to process appeals, from the outset we realized that appeals reforms could not be fully successful unless we simultaneously looked at improving the front end of the process, beginning with claims' decisions. One of the issues that the development of the FDA proposal exposed was the importance of strengthening decision notification letters provided by VBA. A clear and complete explanation of why a claim was denied is the key to veterans making sound choices about if and how to appeal an adverse decision. Therefore, a fundamental feature of the new appeals

process must include ensuring that claims' decision notification letters are adequate to properly inform the veteran.

Under the new framework, the contents of the notification letter must be clear, easy to understand and easy to navigate. The notice must convey not only VA's rationale for reaching its determination, but also the options available to claimants after receipt of the decision. The draft legislation would require that in addition to an explanation for how the veteran can have the decision reviewed or appealed, all decision notification letters must contain the following information to help them in determining whether, when, where and how to appeal an adverse decision:

(1)A list of the issues adjudicated;

(2)A summary of the evidence considered;

(3)A summary of applicable laws and regulations;

(4)Identification of findings favorable to the claimant;

(5)Identification of elements that were not satisfied leading to the denial;

(6)An explanation of how to obtain or access evidence used in making the decision; and

(7)If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation for the benefit sought.

Overall, the new framework embodied in the draft legislation would provide veterans with multiple options and paths to resolve their disagreements more quickly, while preserving their earliest effective dates to receive their full entitlement to benefits. The structure would allow veterans quicker "closed record" reviews at both VBA and the Board, but if they believe that additional evidence is needed to satisfy their claim, they retain the right to introduce new evidence, or request a hearing at either VBA or the Board. If implemented and administered as envisioned by the workgroup, this new appeals system could be more flexible and responsive to the unique circumstances of each veteran's claim and appeal, leading to better outcomes for many veterans.

Significant Modifications to Appeals Framework in Draft Legislation

Although this draft bill embodies the appeals modernization framework agreed to by the workgroup last year, it includes some significant differences.

This legislation would enhance effective date protections for claimants that choose to file appeals with the Court of Appeals for Veterans Claims, the Court of Appeals for the Federal Circuit and the Supreme Court. Claimants could preserve their effective dates for continuously pursued claims, if they choose to file a supplemental claim within one year following a decision from these courts. This is a fair and equitable approach to provide claimants with the option to exercise their full appellate rights, without having to potentially jeopardize their effective date.

Under this proposal, claimants with legacy appeals would also be permitted to enter into the new system at certain junctures. In instances when a Statement of the Case, or Supplemental Statement of the Case is issued, claimants would have the opportunity to opt into the new processing system. In addition, this draft legislation would allow veterans who file a Notice of Disagreement within one year of the new system becoming effective, the option to enter into the new system rather than being forced to undergo processing in the legacy system. These changes were proposed by VBA and the Board and DAV supports them. Allowing claimants to make well informed decisions on the type of processing that is in their best interest would not only help to reduce the number of legacy claims, but provide these claimants with options best suited for their individual circumstances.

In order to provider greater assurance that VBA and the Board are prepared to make this major transition to a new appeals system, the legislation would require the Secretary to submit a detailed transition and implementation plan, and then require the Secretary to certify that all elements are in place to efficiently process legacy claims and run the new modernized system. Furthermore, VSO collaboration is required along with this certification, a provision that serves everyone's best interests. DAV looks forward to continuing to work with VBA, the Board and Congress to ensure the transition and implementation is as smooth as possible.

Lastly, the draft legislation contains detailed reporting requirements, along with oversight to be performed by the Government Accountability Office (GAO). It is essential to have continuous real-time data concerning elements of both the legacy system and modernized system. In order to measure VA's progress, these metrics will assess where modifications would be needed in order to improve processing within either system. The oversight performed by GAO is another effective way of

ensuring these changes produce a positive outcome for claimants within the legacy and modernized systems.

RECOMMENDATIONS

Options Following decision by the Agency of Original Jurisdiction

Section 2 (h) (1) (a), of this bill sets forth the options available to a claimant once a decision has been made. These options include, but are not limited to, filing a supplemental claim, requesting a higher level review, or filing a notice of disagreement.

Within this provision, there is some uncertainty how the word "claim" would be interpreted. Today, one claim can contain multiple issues, or a claim can simply contain one issue. The language would need to specify that a claimant can seek one of the three options noted above separately for each "issue" contained within a claim in order to avoid any unintended consequences that would disadvantage a claimant. For example, a veteran seeking an increased rating for hearing loss should be able to choose to file a supplemental claim for that issue, while also filing their notice of disagreement to the Board for the denial of service connection for a left knee disability. Allowing each issue to flow through the most appropriate "lane" will not only result in more timely decisions for the veteran, it will also make more efficient use of both VBA and Board resources.

DAV recommends:

- The legislation clarify that claimants can elect different appeals options for individual "issues" decided within a claim.

Appeals to the Board

The manner in which evidence would be handled by the Board, particularly, as it pertains to their DTA requirements would fundamentally change under this proposal.

The draft legislation would create two separate dockets for the Board, while allowing them the authority to create additional dockets. The first docket, currently called the "non-hearing" docket in the legislation, would be for claimants that simply want their case reviewed at the Board based on the evidence of record, the simplest docket to manage. The Board would be limited to determining if the decision can be overturned based on the evidence of record, or whether VBA committed any DTA violations during the adjudication of a claim.

The second docket, currently called the "hearing" option docket in the legislation, would allow claimants the right to a hearing as well as to submit evidence directly to the Board for their review in the first instance. A claimant who chooses the "hearing" docket would then have to elect whether to request a "hearing" in the "hearing" docket, or to request "no hearing" in the "hearing" docket, which would still allow them the opportunity to submit evidence. For those who choose the "hearing" docket with the "hearing" option, they would have an opportunity to supply evidence at and up to 90 days after their Board hearing.

For those who choose the "hearing" docket with the "no hearing" option, they would have the opportunity to submit new evidence with and up to 90 days after filing their NOD. However, the legislation does not make clear whether evidence presented with the NOD or 90 days thereafter for the "hearing" docket / "hearing" option would be accepted, returned or ignored. Would the Board really ignore evidence that arrived one day prior to a hearing?

We believe legislative language in the draft bill used to distinguish the two dockets, compounded by the separate evidentiary time periods associated with each, could cause confusion, disadvantage some veterans and add unnecessary complexity to the Board's processing of these appeals.

DAV recommends:

- New terminology should be used to distinguish the two dockets, such as the term "new evidence" rather than "hearing". For example, there could be one docket for "no new evidence" and another for "new evidence." The "new evidence" docket would then offer the option to request a hearing, because the hearing itself is also evidence.
- Rather than having two distinctly different time periods when evidence would be accepted for the "new evidence" docket, the "hearing" option should allow evidence to be presented from the filing of the NOD until 90 days after the hearing. Evidence presented prior to a hearing would simply be made part of the record and considered in conjunction with the appellate issues before the Board. Since the Board no longer would have any DTA obligations, all new evidence would still be considered at the same time after the hearing.

- The Board should be required to regularly report on the length of time it takes to process appeals on each docket, including separate metrics for those that request hearings and those who submit new evidence but don't request hearings.
- For evidence presented prior to the hearing date, where evidence can be supplied within 90 days following a hearing, we recommend this evidence simply be made part of the record.
- For evidence presented to the Board after the time periods allowed in the law on the "new evidence docket", or any evidence presented for appeals on the "no new evidence" docket, the decision notice explain the evidence was not considered in the decision, together with an explanation of options for the claimant to have such evidence considered. The draft legislation already contains a provision requiring this notice for the new "higher level review" option, which should be the same for Board decisions.

The legislation would also provide the Board with the authority to "screen cases" in order determine if further development is required earlier in the process, rather than waiting longer to accomplish the same thing.

To assure this authority is properly utilized, DAV recommends:

- The Board be required to report on all screened cases, delineated by:
- The number of issues found to require additional development;
- The types of issues that required additional development, i.e., issues involving service connection, or issues involving increased ratings;
- The number of claimants that chose to opt into the new system following remand;
- The number of claimants that chose to remain in the legacy system following remand;
- The number and types issues that were granted based on screening;
- The number of cases containing multiple decisions, including how many of the issues were remanded, denied, or allowed.

The draft legislation mandates the creation of the two dockets discussed above, and also provides authority for the Board to create additional dockets, subject to notifying the House and Senate Veterans' Affairs Committees, with the justification. The Board might consider creating a third docket in order to separate appeals that will include new evidence, but do not request a hearing. As it stands now, veterans who submit new evidence, but do not request a hearing could be forced to wait months, or even years behind veterans who request a hearing. A third docket could be implemented to avoid such unnecessary delays for veterans, allow greater oversight and make more efficient use of Board resources.

New and "Relevant" Evidence

The legislation would replace the standard for reopening claims from "new and material" with "new and relevant." In the current system, the "new and material" standard has not effectively functioned as intended to focus VBA and Board resources on adjudicating the substance of claims and appeals.

In order to monitor whether the "new and relevant" standard will be more effective in this regard, while continuing to protect veterans rights, DAV recommends::

- VBA and the Board should regularly report on the number and outcome of "new and relevant" decisions, including -
- The number of supplemental claims denied because no "new and relevant" evidence had been received;
- The number of higher level reviews filed with respect the issue of no "new and relevant" evidence, and the disposition of these higher level reviews;
- The number of appeals filed with respect to the issue of no "new and relevant" evidence, which Board docket or options were used, and the outcome of the Boards determination, i.e, decisions upheld, decisions overturned, cases remanded for DTA violations.

Stakeholder Transition and Implementation Advisory Committee

Since March of 2016, DAV, Congress, VA, the Board and many other stakeholders have worked very closely to develop and refine the appeals modernization proposal. This partnership has been integral to making sure a modernized system will benefit our nation's injured and ill veterans, without compromising their due process rights and keeping VA's non-adversarial roll intact.

We are appreciative that the draft legislation includes a provision that requires the Secretary to collaborate and consult with the three largest veterans' service organizations as part of the certification required to begin operating the new appeals

system, and expect that our continued partnership with VA will continue to benefit both veterans and the VA. However, the hard work of implementing operating this new system will continue for many years, and VSOs and other stakeholders can continue to play an integral role supporting this effort.

To ensure this partnership continues on throughout all phases of the implementation process, DAV recommends:

- The legislation include a provision to create a "Stakeholder Transition and Implementation Advisory Committee" to engage with VBA and the Board during implementation, transition and operation of the new system. This advisory committee should be composed of at least the three largest VSO's in terms of the number of claimants they represent before the VBA and the Board, as well as other major stakeholders who represent veterans at VBA of the Board, as determined by the Secretary.

Planning, Oversight and Public Reporting

The draft legislation includes a number of new planning, reporting and certification requirements that are appropriate for legislation embodying such a significant transformation. This level of reporting is critical to allow Congress and other stakeholders to help identify and offer solutions to unintended consequences and problems that may arise.

To strengthen this oversight, DAV recommends:

- The legislation require that all VA plans, metrics and reports provided to Congress also be made immediately available to the public.

Temporary Staffing Increases

Finally, as mentioned above, the most critical factor in the rise of the current backlog of pending appeals was the lack of sufficient resources to adequately manage the workload. Similarly, unless VBA and the Board request and are provided adequate resources to meet staffing, infrastructure and IT requirements, no new appeals reform will be successful in the long run. As VBA's productivity continues to increase, the volume of processed claims will also continue to rise, which has historically been steady at a rate of 10–11 percent of claims decisions. In addition, the new claims and appeals framework will likely increase the number of supplemental claims filed significantly.

We are encouraged that VA has indicated a need for greater resources for both VBA and the Board in order to make this new appeals system successful; however, too often in the past funding for new initiatives has waned over time. We would urge the Committee to ensure that proper funding levels are determined and appropriated as this legislation moves forward.

Over the past few years, DAV and our Independent Budget partners have recommended that Congress consider providing VBA with the temporary authority and resources to hire two-year temporary employees. In the past, VBA used such an authority to hire several thousand employees for a temporary two-year term. At the end of those two years, many of the best that were hired on a temporary basis transitioned into permanent positions as they became open due to attrition. VBA not only had additional surge resources to work on the claims backlog during the two-years, but VBA also benefited by creating a pool of trained, qualified candidates to choose from as replacements for full-time employees leaving VBA.

This draft bill recognizes the need to address personnel requirements within the VBA and the Board as they implement and administer the modernized appeals system, as well as address the legacy appeals.

In order to provide a surge capacity to address both appeals and claims, DAV recommends:

- VBA and the Board be provided additional authority and resources to hire two-year temporary employees, with the goal of eventually making the best of the temporary employees permanent employees based on the future and continuing personnel requirements of VBA and the Board.

Mr. Chairman, the draft legislation being considered today represents a true collaboration between VA, VSOs, other key stakeholders and Congress in order to reform and modernize the appeals process. We are confident that this draft legislation, with the additional improvements recommended by DAV and other, could provide veterans with quicker favorable outcomes, while fully protecting their due process rights.

We remain committed to working with you, VA and other stakeholders to resolve any remaining issues and swiftly pass and enact comprehensive appeals reform legislation early this year.

That concludes my testimony and I would be happy to answer any questions that you or members of the Committee may have. Thank you.

Prepared Statement of Ryan M. Gallucci

Chairman Roe, Ranking Member Walz, and distinguished members of the Committee, on behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and its Auxiliary, thank you for the opportunity to present the VFW's thoughts on the pending Veterans Appeals Improvement and Modernization Act of 2017. The VFW is the nation's largest war veterans organizations, with more than 1,900 accredited representatives around the world, representing nearly 500,000 veterans in prosecuting their benefit claims before the Department of Veterans Affairs (VA). As such, this proposed legislation will have a tremendous impact not only on the members of the VFW, but on all the men and women we serve every day out of VA Regional Offices, military installations, as well as state and county offices.

First, I must clarify that the VFW supports the Committee's effort to reform and modernize the VA claims and appeals process to better serve the needs of the veterans' community. Over the years, the VA claims and appeals process has morphed into a bureaucratic leviathan that the average veteran cannot possibly understand. Moreover, for veterans who disagree with their assigned rating decision, they currently have no way to determine whether choosing to appeal is a reasonable course of action without seeking assistance from an accredited representative or legal counsel. Then, should a veteran choose to appeal their decision, exercising their due process rights can take up to five years. To the VFW, this does not seem like a veteran-centric, non-adversarial process.

To the VFW, the goal of the Veterans Appeals Improvement and Modernization Act of 2017 is to once again build a veteran-centric process that is easy to navigate and protects a veteran's rights every step of the way. Last year, the VFW was one of more than a dozen veterans' community stakeholders convened to discuss the way forward in modernizing the VA claims and appeals processes. At the time, the acknowledgement was that the system was cumbersome and no longer satisfied the needs of veterans who rightfully expect timely and accurate rating decisions on the benefits they earned. The resultant product of these discussions is the framework included in this draft legislation, and the VFW is proud to support it. However, we have several questions and recommendations for this Committee to consider before advancing this legislation to ensure that any new claims and appeals framework satisfies the intent of Congress to build a veteran-centric system. In our testimony today, we will discuss the VFW's perspective on the new claims and appeals framework—preserving clear and unmistakable error protections; options to adjudicate legacy appeals; and VA reporting requirements.

New Claims and Appeals Framework

Through this legislation, Congress will modify the options for veterans to pursue accurate rating decisions prior to filing a formal appeal, while simultaneously preserving their earliest possible effective date. This legislation also directs VA to improve its award notifications for veterans, outlining seven specific pieces of information each decision notice to a veteran shall include. Improved notification letters have been a top priority of the VFW and our partner organizations for years, and we are happy to see the Committee pursue this aggressively. To the VFW, inadequate notification letters have been a fundamental failure in the VA claims process for decades. In their current format, veterans have no reasonable way to understand how VA arrived at their benefit decision, meaning veterans have no way to reasonably conclude whether or not the decision is accurate and whether or not they need to pursue another avenue of recourse.

As accredited representatives, one of our top responsibilities is explaining rating decisions to veterans and deciphering which evidence was used to render a decision and how VA evaluated that evidence. Improved decision notices will put some of this power back into the veteran's hands, ensuring they are well informed of their rating and how VA arrived at its conclusion. This sets the veteran up for success in navigating the process and has the potential to cut down on appeals where veterans simply may have misunderstood their rating decision.

Coupled with improved notifications, this legislation codifies three specific paths through which veterans can arrive at a fair and understandable rating decision, while preserving the earliest possible effective date. Two of these paths—higher level review and supplemental claims readjudication—offer recourse for the veteran

without filing a formal appeal, offering the veteran and VA the opportunity to rectify discrepancies before the veteran formalizes an appeal.

Currently, when a veteran receives a rating decision, they must choose whether or not to formally file a notice of disagreement, kicking off a potentially years-long process to arrive at a new decision, sometimes when only small matters of evidence or interpretation of the law need to be addressed. By redesigning appeal options, the process remains non-adversarial as long as possible, and also encourages VA to produce quality rating decisions at the local level, instead of punting more complicated cases for the Board of Veterans Appeals (BVA) to review.

Critics have called these two new paths at the regional office an "erosion" of veterans' due process rights. This is an inaccurate assessment that fails to acknowledge that the VA claims process is supposed to be veteran friendly and easily navigable by any veteran who seeks to access his or her earned benefits. Moreover, the new framework actually expands veterans' due process rights by offering additional recourse at the local level, preserving routes to the BVA and the courts, and preserving a veteran's right to seek legal counsel after an initial rating decision.

Though the VFW always encourages veterans to seek professional assistance from an accredited representative whenever possible, a perfect system would be one where veterans do not need professional assistance, and certainly do not need to retain a lawyer, simply to claim an earned benefit. The VFW believes this proposed framework—if properly implemented—moves veterans more closely to such a system.

To the VFW, the most critical new protection for veterans is the lane in which veterans can continually submit new and relevant evidence to VA within one year of a rating decision and receive a new rating decision on the evidence of record, preserving their original effective date. Coupled with improved notification letters, this option could be a game changer for veterans, resulting in more favorable decisions at the local level.

First, lowering the evidentiary threshold to receive a new rating decision to only new and relevant is an improvement for veterans. The old standard was new and material. While the VFW would prefer that VA only be required to consider new evidence, we support this change which would ease the evidentiary burden for veteran claimants, potentially resulting in more favorable decisions.

Key to the success of this lane is communication among VA, the veteran, and the veteran's advocate where applicable. If a veteran receives a clear and understandable rating decision, but notices that certain evidence was not contained in the record, they now have an opportunity to formally submit this and receive a new, timely rating decision, instead of pursuing years of a formal, contentious appeal. Moreover, accredited veterans' advocates now have a new tool to help resolve claims at the earliest possible time, ensuring that their clients receive every benefit they have earned.

To the VFW, this is the best possible outcome. According to VA's own data, more veterans are seeking out our assistance every year to access their earned benefits. Last year, the VFW took on four new claimants for every claimant we lost. While we like to tout that this is a testament to the professionalism of our staff, we also know that this kind of growth means that we need to help VA get it right the first time. Prolonging a veteran's claim is bad all around. It puts unnecessary stress on the veteran and it makes VA look like an irresponsible steward of benefits. At a time when more veterans need access to benefits, the VFW supports offering more non-adversarial recourse at the local level to arrive at quality rating decisions. This is what our veteran clients expect, and this is why we support this new framework.

The VFW also supports the maintenance of two separate dockets at BVA to adjudicate new appeals, though we have persistent concerns about the timeliness of decisions in each docket and the potential disincentive for veterans to pursue an appeal with a hearing. That being said, the VFW supports docket flexibility so that BVA can properly manage its workload and provide veterans with timely decisions. However, in testimony earlier this year, VFW Commander-in-Chief Brian Duffy called for the simultaneous maintenance of five separate dockets at BVA to best reflect the legacy workload as well as the new system workload, including one docket for appeals with no new evidence and no hearing; one for appeals with new evidence but no hearing; and one for appeals with both new evidence and a hearing.

Next, in past discussions, some were concerned that a new framework would erode veterans' due process rights and have a chilling effect on the Court of Appeals for Veterans Claims. The VFW is happy to see that the Committee worked to address this concern in this legislation, articulating that effective dates of supplemental claims resulting from court decisions will be offered the same protections within one year of the court's decision. The VFW believes that this is sufficient to retain oversight of BVA decisions and assuage concerns that veterans would be pe-

nalized for pursuing their claims through the court system only to lose their effective date.

When the Committee first started discussing the concept of appeals reform for the 115th Congress, the VFW and several of our partner Veterans Service Organizations (VSOs) saw this as an opportunity to once again discuss potential conflicts that arose in the initial discussions in 2016. One significant conflict was the ability of veterans with appeals languishing in the legacy system to be able to opt into the new framework. In this legislation, we are pleased to see that the Committee addressed these concerns by articulating formal "off ramps" for legacy appeals to opt into the new system at critical decision points.

To the VFW, this is a benefit to affected veterans and to VA. First, veterans whose appeals have been mired in the old appeals system will have several opportunities to take advantage of new processes, such as submitting new and relevant evidence when their claims are remanded back to the Regional Office. This will allow veterans an opportunity to avoid another lengthy appeal process and allow VA to address the issues at the Regional Office in a timely manner. For VA, the VFW believes this will be a critical tool in helping to adjudicate the backlog of legacy appeals, resulting in more timely, favorable decisions for veterans.

The VFW understands that VA had some concerns about these off ramps and the strain on resources at the local level. The VFW does not share these concerns as VA has the responsibility to adjudicate its workload regardless of where the claim happens to be in the process. Moreover, this reinforces the VFW's calls on Congress to properly resource Veterans Benefits Administration (VBA) and BVA to manage their workload. Without proper resources, any claims and appeals framework will fall prey to dangerous backlogs, resulting in unacceptable benefit delays for veterans.

Preserving Clear and Unmistakable Error Protections

As with any systemic change, the VFW seeks to avoid unintended consequences. One of the most critical protections offered to veterans in the current claims and appeals framework is the ability to revise rating decisions in which VA has made a clear and unmistakable error (CUE) in its rating decision. While many times veterans must take a remedial claim action within a year of their rating decision to preserve an original effective date, decisions based on CUE can be revised back to the original effective date at any time.

In revisions to the discussion draft, section 5104(c) was added to allow veterans with decisions issued in the one year period prior to the effective date of the modernized appeal system to opt in to the system. This revision adds a section that creates a conflict of law, and we would like to address this now in the statutory language so there is no need for litigation. After the one year period to submit additional evidence or appeal a decision has passed, the decision becomes final and can only be revised in two ways: by submitting new and material evidence (new and relevant under the modernized appeals system); or by submitting a motion to revise a previous decision based on clear and unmistakable error. A motion to revise a previous decision based on clear and unmistakable error (CUE) is not a claim. It has its own authority under section 5109A of title 38 United States Code (USC) for motions filed with respect to a final decision by the agency of original jurisdiction and under section 7111 of title 38 USC for motions filed with respect to a final decision by the Board of Veterans Appeals.

The authority to revise a decision based on CUE is an important vehicle for redressing wrongs in the event that a veteran failed to prosecute his or her claim and the underlying decision was incorrect based on the law at the time of the decision. If a claimant is ill or unable to file a notice of disagreement within a year, the effective date of the claim is lost. In the event that the decision was so off base as to constitute clear and unmistakable error, it is against the interest of justice to disallow a revision of that decision, back to the date that it should have been granted.

Because section 5104(c) of title 38 USC states that the only way to revise a final decision is to file a supplemental claim under section 5108 of title 38 USC or regulations pursuant to this section, it vitiates the authority of section 5109A of title 38 USC and section 7111 of title 38 USC.

The VFW must have assurance from the Committee that nothing in these sections precludes a veteran from filing a request to revise a final rating decision containing a CUE, or filing a notice of disagreement or request for higher level review on such a request. Without this critical due process protection for veterans, the VFW believes that the entire framework for appeals reform fails.

Legacy Appeals

Since the first discussions on appeals reform with VA, the VFW has been very clear that any changes to the system must be coupled with aggressive initiatives to adjudicate legacy appeals in a timely manner through both legislative authority and proper resourcing. The VFW had asked for off ramps to allow veterans with legacy appeals to opt into the new process, and we thank the Committee for including these off-ramps in this legislation.

In the 114th Congress, the VFW also supported an initiative to create a fully developed appeals process for veterans in the legacy system. Through fully developed appeals, veterans and their accredited advocates would have an opportunity to submit all relevant evidence and a statement of the argument at the time in which they file a notice of disagreement. The Committee included this in the legislation as a potential option for the Secretary of Veterans Affairs to exercise in helping to more quickly adjudicate legacy appeals.

The VFW supports the intent of this position, but we question its value as written pertaining to legacy appeals already included in the appeals backlog. In its current form, it seems that a potential fully developed appeals process would only appeal to new appellants after enactment. This would likely only serve as a stop-gap for any appellants who file within the first six months of enactment of the legislation. The VFW would recommend amending the election criteria to allow for veterans with legacy appeals to elect into a proposed fully developed appeals process at any point after enactment.

Finally, the VFW must stress the importance of properly resourcing BVA and VBA to adjudicate the legacy appeals backlog and the potential influx of supplemental claims and higher level review requests at the VA Regional Office. My predecessor in VFW National Veterans Service, Jerry Manar, used to say that VA liked to play Whack-a-Mole with its pending workload. When initial claims were backlogged, they concentrated resources on initial claims. This has since set off a chain reaction that has resulted in a backlog of appeals and other claim actions at the Regional Office level. Every time there is a crisis, VA has the habit of reallocating its resources to address the latest crisis. This only leads to other crises. VA must be properly resourced to manage its workload if we expect this new framework to succeed.

Planning and Reporting Requirements

The VFW supports the inclusion of a 90-day report to Congress on VA's plans to address legacy appeals, implement its new system, and process claims in the new system in a timely manner. While this planning report may seem extensive, the VFW is very interested in the feedback that VA can provide on its plans to ensure that the new framework is designed to succeed.

One of the most critical points that the VFW supports in the planning proposal is the requirement for VA to report on required resourcing and staffing levels to accomplish its new mission. The VFW is also interested in VA's estimates on total work load, processing times, and its communication plan to properly inform veterans of changes and criteria to take advantage of new options. The VFW also supports semiannual reports on implementation.

The VFW understands the need for extensive reporting requirements and we agree with the Committee on many of the data points included in the legislation. However, we question the practicality of insisting that VA report on all 22 data points on a monthly basis. The VFW instead recommends that the Committee articulate the timeline on which VA would need to periodically report each data point. For example, the VFW believes that the data points included in Section 5, A through G are standard data points that VA should already be tracking and should be able to report out on a monthly basis.

Next, data points H through K and U deal with supplemental actions on remanded decisions. Understanding the VA workflow, this may not be practical to report on a monthly basis, but instead on a quarterly basis to better analyze data and identify trends.

Finally, data points L through V (omitting U) seem to be long term metrics that would be impractical to track on a monthly basis and would likely only be useful in identifying annual or semi-annual trends. For example, data point M is likely only to yield data once a significant number of veterans have submitted new and relevant evidence in supplemental claims to preserve their effective date over a span of several years.

The VFW was also happy to see that the Committee is asking for extensive reporting from VA on legacy appeals. The VFW supports many of these data points, and has had similar questions about the appeals process over the years—particularly the disaggregated time that VA waits for a claimant to take action and the time a claimant waits for VA to take action. We believe that this report will help

to better understand the pitfalls that led to the appeals backlog and help avoid them in the new framework.

A modernized appeals system must be responsive to future needs of veterans. Veterans benefits date from the beginning of the United States, and our citizens and government have stepped up to care for veterans as the nature of war and society has changed. Judicial review of veterans benefits decisions has been in place for almost thirty years, and a decision this past week by the Federal Circuit in Monk v Shulkin recognized that veterans have a right to aggregate their appeals into class actions. While this decision does not directly affect the modernized appeals framework, it will also help to eliminate the "hamster wheel" appeals process, and will affect regulations handling new procedural directives from the Courts. Congress must maintain close oversight over the timely handling of appeals for veterans who have been waiting the longest. At the same time, the modernized appeals system also needs the oversight of Congress to continually improve the process. We believe the changes proposed in the legislation being considered today would go a long way in forming a more veteran centric process. But appeals do not exist in a vacuum, and the feedback we receive must drive improvements to the processes used by VA and stakeholders to obtain fair accurate decisions at the earliest point possible, and improve the quality of life for veterans and their families.

The VFW is encouraged by the legislation you are considering today and strongly supports effforts to reform the claims and appeals system to build a more veteran-centric appeals process. For years, we have been stuck in the same place, afraid to take action out of fear we will make the wrong decision. The problem is that if we stay put, the situation will never improve. That is unacceptable for the veterans who deserve timely access to their earned benefits. The VFW believes it is time to improve this process. We encourage the Committee to include the VFW's recommendations when marking up this legislation, and we look forward to continuing to work with the Committee to advance these critical reforms.

Mr. Chairman, this concludes my testimony. I will be happy to answer any questions you or the Committee members may have.

Statements For The Record

MILITARY OFFICERS ASSOCIATION OF AMERICA (MOAA)

CHAIRMAN ROE, RANKING MEMBER WALZ, and Members of the Committee, the Military Officers Association of America (MOAA) is pleased to present its views on legislation under consideration by the Committee, "Veterans Appeals Improvement and Modernization Act of 2017."

MOAA does not receive any grants or contracts from the federal government.

EXECUTIVE SUMMARY

On behalf of our more than 350,000 members, MOAA thanks the Committee for holding this important hearing and for your continued support of our nation's veterans and their families. MOAA is especially grateful for the Committee's leadership in seeking views from a variety of stakeholders relevant to the VA appeals modernization.

Initially, it is clear this legislation takes into consideration the comments and concerns of not only the veteran service organization community but also various other groups. MOAA is very appreciative to Representative Bost for these efforts.

MOAA supports the legislation with the following recommendations:

- Allow direct submissions of additional evidence to the Board of Veterans' Appeals on the "non-hearing option docket"
- Regarding reference to the three veterans service organizations with the most members, the qualifying factor should be changed from the most members to the veterans service organizations that file the most claims on behalf of claimants.
- The Board docket appeals processed under the Fully Developed Appeals program should be entered into the "non-hearing option docket."

VA Appeals Reform

MOAA supports efforts by Congress and the Department of Veterans Affairs to modernize the claims process, including appeals. The procedural basis set forth in this legislation will eliminate outdated aspects of the existing claims process, such

as the Statement of the Case and the VA Form 9. Those additional bureaucratic hurdles made the claims process confusing, unnecessarily long, and extremely inefficient. MOAA greatly appreciates the efforts of this Committee in hosting roundtable discussions, hearings, and introducing legislation to address this outdated system.

Board of Veterans' Appeals Dockets

This bill sets forth that the Board of Veterans' Appeals shall maintain two dockets, one for claimants requesting a hearing before the Board and the other for claimants not requesting a hearing before the Board.

MOAA supports allowing claimants the opportunity to submit evidence to the Board directly. This allows claimants with legally complex claims to have a Veterans Law Judge consider that evidence in conjunction with the questions of law instead of cycling through the Agency of Original Jurisdiction (AOJ), where the AOJ may lack the legal acumen to adequately resolve the claim.

MOAA recommends the legislation be modified to provide that claimants submitting evidence directly to the Board be placed on the "non-hearing docket." This is the closest docket fit to their circumstances because the claimant is not requesting a hearing. Further, regardless of whether a claimant's appeal includes additional evidence or not, the Veterans Law Judge will be required to review evidence within the record. In other words, if a claimant merely appeals without submitting additional evidence, the Board must still review all existing evidence in the record. Thus, the choice not to submit additional evidence does not prevent the Board from having to review evidence.

We do not recommend the other option of placing these appeals on the "hearing docket," as this would disproportionately disadvantage the claimant. During roundtable discussions leading up to appeals reform legislative proposals, VA officials stated that the "hearing docket" would be much slower than the "non-hearing docket." It is unjust to force claimants not requesting hearings to wait behind those requesting hearings for the Board to address their appeals where it does not require any additional work of the Veterans Law Judge to consider the additional evidence.

VA has expressed concerns that including claimants with additional evidence amongst those without additional evidence on the same docket would confuse the "feedback loop," but we believe this is manageable. The feedback loop permits the Board to provide input to the AOJ regarding errors the AOJ committed in the original adjudication of the claim. There appears to be no reason, however, that the Board could not simply exclude the claims with additional evidence from the feedback loop and still provide very useful feedback to the AOJ from the remaining claims.

Collaboration with Veterans Service Organizations

MOAA greatly appreciates that the legislation includes mandates for VA to collaborate with and give weight to the inputs of veterans service organizations. MOAA recommends, however, that references to "the three veterans service organizations with the most members" be modified to "the three veterans service organizations that file the most claims on behalf of claimants." Veterans service organizations serve many functions in the veteran community, not exclusively confined to filing VA benefits claims. Merely because a veterans service organization has a large number of members does not necessarily mean the organization is intimately familiar with the VA claims process. A more reliable gauge of a veterans service organization's value to the process is the number of VA claims filed by the organization. The Veterans Benefits Administration already tracks the number of claims filed by each veterans service organization, making this information readily available to VA.

Fully Developed Appeals

MOAA supports granting the Secretary the authority to carry out a fully developed appeals program. A fully developed appeal option would allow a claimant to expedite a claim to the Board with all evidence needed for the appeal. This goal is consistent with the overall intent of VA appeals modernization.

This process would also be almost identical to the process for a claimant participating in the modernized appeals process who chooses to submit additional evidence for the Board's consideration. For that reason, MOAA recommends that appeals processed using this option be docketed in the "non-hearing option." This would prevent the need for the Board to maintain a third docket, as the legislation currently contemplates. A third docket with varying processing rules would be very confusing to claimants in understanding whether their claim is being handled properly.

MOAA thanks the Committee for considering this important legislation and for your continued support of our veterans and their families.

National Association of State Directors of Veterans Affairs (NASDVA)

RE: VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017 (DRAFT)

Dear Chairman Roe and Ranking Member Walz:

On behalf of the National Association of State Directors of Veterans Affairs (NASDVA), thank you for your work and support on behalf of our Nation's Veterans and for your commitment to modernizing the Veterans Affairs Appeals process. NASDVA is honored to have been a part of the working group, including VA and a very wide group of our Nation's Veterans Service Organizations, whose work resulted in language and legislation that passed in the United States House of Representatives last year. The work and cooperation last year that yielded workable and sustainable Appeals Reform is unprecedented and should be the model for getting things done in the future. The process included stakeholders who are actually "on the ground" serving Veterans every day. We are hopeful that any final Appeals Modernization legislation will accurately reflect the work and majority agreement reached last year.

In reviewing the discussion draft (Veterans Appeals Improvement and Modernization Act of 2017) provided to NASDVA on Monday, April 24, 2017, we submit the following comments:

1.There are significant content changes within the discussion draft that NASDVA had no knowledge of or discussion on until receiving the draft on April 24, 2017. We are disappointed in that as it has been the framework and cooperation of many stakeholders that enabled this vitally important initiative (for our Veterans) to advance to where it is now.

2.NASDVA has been and continues to be concerned and cautions against any language that may be intended to expand (paid) attorney's fees under the "guise" of preserving Veterans' rights. (Reference: NASDVA letter to Senate Veterans Affairs Committee dated September 23, 2016). We are concerned about language, as to effective date after the courts, in the discussion draft. The following items of discussion are germane to that point:

a. An intentional feature of the design developed collaboratively with Appeals Working Group was that Veterans would not be encouraged to initiate judicial review when there is an efficient administrative remedy available.

b. Allowing effective date protection after the Courts could provide incentive for filing an appeal to the Court for the sole purpose of generating attorney fees, notwithstanding the fact that a more immediate remedy is available in the administrative process.

(1)As we understand, attorney fees would be available for representing claimants in the higher-level review, supplemental claim, and appeal lanes.

(2)A reason behind effective date protection after the Courts (for paid attorneys) could be that it would delay resolution and generate more past due benefits; advantageous for attorneys but not good for Veterans.

(3)As NASDVA has maintained previously, judicial review should be reserved for Veterans who believe that they have exhausted their administrative remedies and have a meritorious legal issue.

(4)There is currently no effective date protection if the Court of Appeals for Veterans Claims (CAVC) affirms a Board of Veterans Appeals decision. The improved process, reflected in the collaborative/cooperative VA/stakeholder proposal, is not a change from the current system. Just as currently exists, in the new process, if CAVC vacates and remands the Board decision, the effective date is protected. Veterans lose no rights, as they exist in current law, in the Appeals Working Group proposal.

There has been much work that has gone into developing meaningful Appeals Modernization/Reform over the past year and a half. The work has focused, putting the Veteran first, on a system that seeks the best possible and timely outcome at the lowest level that is both advantageous to the Veteran and the American tax-

payer. We find it disheartening that there continues to be an effort to insert language that (appears) to be intended to support the business model of (paid) attorneys. We sincerely hope attention will be refocused on making sure the largest number of Veterans are served in the most efficient manner possible.

NASDVA sincerely appreciates this opportunity to submit our views on the current Veterans Appeals Improvement and Modernization draft.

Sincerely,

SIGNED

Randy Reeves
President
NASDVA

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. (NOVA)

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

Chairman Roe, Ranking Member Walz, and members of the Committee, the National Organization of Veterans' Advocates (NOVA) would like to thank you for the opportunity to offer our views on the discussion draft entitled Veterans Appeals Improvement and Modernization Act of 2017.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 500 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for all persons seeking VA benefits. NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the U.S. Court of Appeals for Veterans Claims (CAVC) and U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award. NOVA operates a full-time office in Washington, DC.

Attorneys and agents handle a considerable volume of appeals at BVA. In FY 2015, for example, attorneys and agents handled 14.9% of appeals before BVA. This number was fourth only behind Disabled American Veterans (28.1%), State Service Officers (16.5%), and American Legion (15%). U.S. Department of Veterans Affairs, Board of Veterans' Appeals Annual Report Fiscal Year 2015 at 27.

NOVA members have been responsible for significant precedential decisions at the CAVC and Federal Circuit. In addition, as an organization, NOVA has advanced important cases and filed amicus briefs in others. See, e.g., Henderson v. Shinseki, 562 U.S. 428 (2011)(amicus); NOVA v. Secretary of Veterans Affairs, 710 F.3d 1328 (Fed. Cir. 2013)(addressing VA's failure to honor its commitment to stop applying an invalid rule); Robinson v. McDonald, No. 15–0715 (July 14, 2016)(CAVC amicus).

NOVA will not oppose the bill if the effective date protection extended to court proceedings remains in the legislation. In addition, as detailed below, because of VA's continued disregard for NOVA's status as a stakeholder in this process, we ask the Committee to include NOVA as a stakeholder considered "appropriate" under the statute for purposes of the collaboration necessary to certify the program is ready to implement.

BACKGROUND

In March 2016, NOVA was invited to participate with a group of stakeholders in a three-day summit, and at occasional meetings thereafter at VA's convenience, to discuss VA's appeals reform proposal. The framework provided by VA, and modified during the course of these meetings, became the basis of H.R. 5083, VA Appeals Modernization Act of 2016. NOVA provided a written statement detailing its views on that bill to the Committee in May 2016. National Organization of Veterans' Advocates, Inc., Statement for the Record Before the House Committee on Veterans' Affairs Concerning H.R. 5083, the VA Appeals Modernization Act of 2016 (May 24, 2016). Because NOVA expressed disagreement with some of the proposal's features, VA repeatedly excluded NOVA from continuing discussions and important dialogue amongst the summit participants.

NOVA thanks the Committee for its time and effort to address the concerns expressed by NOVA and other stakeholders, as well as the General Accountability Office (GAO), in the current discussion draft. We detail additional considerations

below that should be addressed to ensure preservation of the veteran-friendly benefits process developed and preserved by Congress for many decades.

STATUTORY FRAMEWORK

NOTICE

The declining quality of VA rating decisions and notice has been cited by stakeholders numerous times over the years as the primary problem in the claims process. The participants in VA's appeals summit agreed that detailed notice of the rating decision is critical to making an informed decision regarding further review. Proper notice allows a veteran to understand the reasons for the underlying rating decision and enables an advocate to provide a veteran with the best possible advice on the evidence needed to prove a claim. Because the new framework detailed in this bill would offer a veteran three choices after a denial of benefits, quality notice is critical.

The proposed language to amend 38 U.S.C. § 5104 is an important first step in reform, but only if properly implemented by VA. VA will need to commit to extensive training of its regional office employees to provide adequate notice and well-written decisions. Without it, the new process could result in another backlog at the local level.

Recommendations: If enacted, we would encourage the Committee to conduct detailed oversight of this process throughout its implementation. While the legislation relieves VA from providing the statutorily-mandated notice after a veteran files a supplemental claim, it is critical that VA be required to provide the veteran with adequate notice of the decision on a supplemental claim, i.e., identification of the elements not satisfied leading to the denial. This burden should be somewhat lighter due to the addition of section 5104A binding VA to its prior favorable findings.

EFFECTIVE DATE PROTECTION

As NOVA noted in the 114th Congress, this new framework removes many procedural and due process protections for veterans. To offset the removals of some of these protections and eliminate "effective date traps," VA proposed the primary benefit conferred to veterans under its original proposal: the ability to preserve the effective date of a claim denied in a BVA decision by filing a "supplemental claim" within a year of that denial (with no limit to the number of times the veteran can avail himself of this option).

NOVA testified last year that it was inconsistent to limit effective date protection solely to decisions of the agency of original jurisdiction and BVA, and fail to provide that same one-year period after a final CAVC decision. Such a limitation could result in far fewer veterans exercising their hard-fought right of judicial review because of concerns over losing effective date protection. For example, if BVA declines to find VA failed to fulfill its duty to assist by obtaining an adequate examination for a veteran, that veteran may feel required to obtain a costly private opinion in an effort to preserve an effective date, as opposed to seeking judicial review to enforce what VA was required to do all along.

Judicial oversight is critical in the implementation of a new process, especially given the shrinking reach of the duty to assist. NOVA applauds the inclusion of effective date protection for veterans after a court decision and urges the Committee to retain this language in spite of VA's "technical assistance" intended to "protect the consensus agreement."

Recommendations: This legislation codifies an existing right of veterans under 38 C.F.R. § 3.156(b). NOVA recommends the provisions of 38 C.F.R. § 3.156(c) also be codified in the statute as an important protection for the effective dates of claims for veterans who find additional service records after an original claim.

DUTY TO ASSIST

As noted above, veterans gain effective date protection in a new system. In exchange, BVA is relieved of an aspect of its duty to assist the veteran, as amended in 5103A(e): "The Secretary's duty to assist under this section shall apply only to a claim, or supplemental claim, for a benefit under a law administered by the Secretary until the time that a claimant is provided notice of the agency of original jurisdiction's decision with respect to such a claim, or supplemental claim, under section 5104 of this title." The understood purpose behind this provision is to relieve BVA of the obligation to remand for additional development due to a duty to assist triggered by evidence submitted after the agency's decision.

Recommendations: This provision should be clarified to ensure the restriction on the duty to assist at BVA is limited to a duty triggered by evidence submitted after the agency's decision and does not apply to affirmative duties required to be performed by BVA in the conduct of its adjudication process.

NEW AND RELEVANT EVIDENCE STANDARD

During the course of the appeals summit meetings, the stakeholders generally agreed the "new and material" standard should be eliminated. There was significant discussion on this topic, with the stakeholders generally agreeing the standard should be "new" evidence only. Instead of following this consensus, VA inserted the term "relevant" to replace "material."

Although VA officials have repeatedly stated the "relevant" evidence standard would be easier to meet than the "material" evidence standard, NOVA maintains merely trading "relevant" for "material" will not significantly reduce the adjudication burden on VA. Removing "relevant" allows VA to adjudicate the merits every time and eliminates the need to make a threshold determination.

The definition of relevant evidence - "evidence that tends to prove or disprove a matter in issue" - on its face is more stringent than the current definition of "material" evidence ("existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim"). Furthermore, what effect a "relevant" evidence standard would have on veterans is completely unknown, whereas extensive case law exists concerning the "material" evidence standard. If VA truly intends to create an evidentiary burden easier to meet than "material" evidence (which we support), the best way to ensure that is to simply require "new" evidence.

Recommendations: The words "and relevant" should be deleted from 38 U.S.C. § 5108 and the definition of "relevant" found at 38 U.S.C. § 101(35) should be stricken. In the alternative, the standard should remain as it is currently - "new and material." If the "relevant" standard is retained, we request Congress make an unambiguous statement of its intent that this standard be interpreted as a lower burden than current law.

ABILITY TO CHANGE "LANES"

NOVA appreciates the added language of section 5104C(2)(A), (B), and (C) that provides guidance regarding a veteran's right to take various actions permitted by statute at different times and to take different actions on different claims.

Recommendations: This provision should make clear the time period is tolled while the veteran is in a particular lane, so that if he chooses to withdraw from a lane after the expiration of the original one-year period and seek relief in a different lane, his original effective date is preserved.

NOTICE OF DISAGREEMENT

NOVA appreciates inclusion of a more reasonable standard for veterans when filing the notice of disagreement (NOD) by reverting back to the requirement that a veteran "shall identify the specific determination with which the claimant disagrees."

Recommendations: A provision should be added requiring VA to provide the claimant with notice and an opportunity to cure the defect before BVA dismisses an appeal due to the veteran's failure to specify the determination with which she disagrees.

SUBMISSION OF EVIDENCE ON APPEAL

Regarding evidence in the non-hearing docket, section 7113(b)(2)(B) puts a burden on veterans at the time an NOD is filed by requiring the veteran to submit evidence with the NOD or within 90 days, and make an election for a hearing. Given that veterans often are unrepresented until after the filing of an NOD, there is no reason to require that irreversible legal decisions be made at that exact moment. This provision is too restrictive; if the case is waiting to be reviewed by BVA, it is more veteran friendly (and does not unduly burden BVA) for that period to be open until the decision is made.

Recommendations: The veteran should be permitted to submit evidence or request a BVA hearing up until the date of BVA's decision.

DOCKET MANAGEMENT

NOVA maintains that requiring a veteran who wants to submit additional evidence to BVA should not be required to go into the hearing docket. BVA currently has an enormous backlog of hearing requests - approximately five to six years - and discussion of implementation generally has not included VA's plans for reducing that backlog. It is not veteran friendly to force an appellant to wait for significant periods of time if he is not interested in a hearing, but would like to submit evidence.

NOVA appreciates the inclusion of a requirement in section 7107 that the Secretary provide a report describing the docket "for cases in which no hearing before the Board of Veterans' Appeals is requested in the notice of disagreement but the appellant requests, in the notice of disagreement, an opportunity to submit additional evidence." NOVA urges the Committee to require such a docket.

Recommendations: It should be made clear that a veteran can move into the non-hearing docket without penalty if he determines he no longer wants a hearing after the initial request.

IMPLEMENTATION ISSUES

Successful implementation of this legislation will be key if it is truly to be the positive change veterans deserve and VA promises. Successful execution of VA's proposed process hinges on its ability to consistently meet its goals of adjudicating and issuing decisions in the 125-day window identified in its "middle lane" and deciding appeals within the one-year period before BVA. As demonstrated with the prior backlog of original claims and scheduling of medical appointments, VA often struggles to meet its own internal goals to the detriment of veterans.

At the recent roundtable held by DAMA Subcommittee Chairman Bost and Ranking Member Esty, GAO elaborated on its concerns with VA's ability to implement a new process while resolving legacy appeals. U.S. Government Accountability Office, VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions (GAO–17–234)(March 2017)(hereinafter GAO Report). This concern was shared by some of the stakeholders.

Therefore, the extensive reporting requirements and requirement that the Secretary certify VA's readiness to implement the new system are critical. These requirements must remain in the legislation. Because VA stated it cannot pilot this system as recommended by GAO, congressional oversight is necessary. The legislation has far-reaching implications; many of them likely unforeseen until the system is implemented.

Recommendations: As noted above, NOVA has been included as a stakeholder when it has been convenient for VA. Bringing the major organizations together initially allowed VA to state there was full consensus on the framework; when NOVA disagreed with some features of last session's bill, VA declined to include NOVA in much of the ongoing discussion and negotiations with the organizations that participated in the original summit. As noted above, given the high percentage of involvement by attorneys and agents at BVA and the CAVC, we ask the Committee to include NOVA as a stakeholder considered "appropriate" under the statute for purposes of the collaboration necessary to certify the program is ready to implement.

Furthermore, because this system is predicated on veterans making significant choices in relatively short periods of time, VA must commit to providing attorneys and agents, and their professional staff members, with consistent electronic access to claimants' files. To its credit, VA agreed to provide attorneys and agents with remote access last fall. However, to allow veterans to fully access their right to representation and make an informed choice as to how to proceed when faced with a denial, access must be expanded and improved.

NOVA urges Congress to fully fund VA's information technology budget requests, especially innovations needed for VBMS and modernization of BVA systems. Modern IT systems, to include electronic case filing systems common in other venues, are necessary tools that benefit veterans, their advocates, and VA employees.

ADDITIONAL CONCERNS

While focusing solely on process, the proposal is devoid of reform to the foundational underpinning of the claims adjudication and appeals process, i.e., the need for an adequate medical examination and opinion. At the January 2013 hearing addressing the appeals process, BVA acknowledged the problem: "The adequacy of medical examinations and opinions, such as those with incomplete findings or supporting rationale for an opinion, has remained one of the most frequent reasons for remand." Why Are Veterans Waiting Years on Appeal?: A Review of the Post-

Decision Process for Appealed Veterans' Disability Benefits Claims: Hearing Before the Subcommittee on Disability Assistance and Memorial Affairs of the House Committee on Veterans' Affairs, 113th Congress, 1st Sess. 23 (2013)(prepared statement of Laura H. Eskenaki, Executive in Charge, Board of Veterans' Appeals). Two years later, the Subcommittee on Disability Assistance and Memorial Affairs requested appeals data from VA, to include the top five remand reasons for the six fiscal years between 2009–2014. While not particularly detailed, in five of the six years, "nexus opinion" was listed as a top five reason. Department of Veterans Affairs (VA) Appeals Data Requested by House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs (January 2015). Other consistently reported reasons included "incomplete/inadequate findings," "current findings (medical examination/opinion)," and "no VA examination conducted." Id.

VA often cites the veteran's submission of evidence as triggering the need for additional development. But see GAO Report at 25 ("VA lacks data to inform and confirm its understanding of the root causes of lengthy time frames. For example, VA lacks complete historical data on the extent to which submission of new evidence and multiple decisions and appeals occur, and thus cannot determine the impact of its current, open-ended process on appeals decision timeliness."). The reality is VA has consistently demonstrated difficulty fulfilling its fundamental obligation to provide veterans with adequate medical examinations and opinions in the first instance. Without substantive reform to this process, to include consideration of a greater role for private and treating physician evidence, it is unlikely procedural reform alone can solve systemic problems.

CONCLUSION

NOVA shares the concerns of VA and the Committee that veterans wait too long for a final and fair decision on appeal. NOVA welcomes the opportunity to work with VA and this Committee to ensure a fair and comprehensive reform of the system. NOVA further recommends adoption of the revisions outlined in our testimony. Thank you for allowing us to present our views on this legislation.

For more information:

NOVA staff would be happy to assist you with any further inquiries you may have regarding our views on this important legislation. For questions regarding this testimony or if you would like to request additional information, please feel free to contact Diane Boyd Rauber by calling NOVA's office at (202) 587–5708 or by emailing Diane directly at drauber@vetadvocates.org.

NATIONAL VETERANS LEGAL SERVICES PROGRAM (NVLSP)

BARTON F. STICHMAN

AND

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JOINT EXECUTIVE DIRECTORS

EXECUTIVE SUMMARY

The Veterans Appeals Improvement and Modernization Act of 2017 provide a far-reaching restructuring of the VA administrative appeals process. It contains many positive features that are likely to decrease appeal times while providing claimants with various options for pursing their appeals. As with any substantial change to a complex system, there will clearly be effects that we cannot now predict. But given that the current appeals process is not functioning well, we have ultimately concluded that the proposed legislation - even without being able to predict all of its effects - is a necessary step.

However, NVLSP opposes some of the substantive changes to the draft bill that VA is seeking under the guise of "technical amendments." First, VA seeks to eliminate subsection (a)(2)(E) from the draft bill's amendments to 38 U.S.C. § 5110. This subsection appears on lines 10–14 of page 13 of the draft bill. This subsection is critically important and NVLSP's support of the draft bill is contingent on this provision remaining intact.

If the Board of Veterans' Appeals denies a claim under the draft bill - regardless whether proposed subsection (a)(2)(E) remains or is eliminated—the veteran would

be required, in order to preserve the earliest effective date, to choose between appealing to the CAVC and filing a supplemental claim with the RO. Eliminating subsection (a)(2)(E) would be unjust because it would put a heavy thumb on the scale when veterans make this choice. It would strongly discourage veterans from appealing to the CAVC in favor of filing a supplemental claim.

NVLSP also opposes VA's effort to amend Section 3 of the draft bill, which wisely requires VA to report and the Comptroller General of the United States to assess VA's plans for processing appeals on legacy claims. The VA obviously needs to make choices in allocating resources between processing legacy appeals and processing new appeals. VA's precise plans on this allocation and its effects on timeliness should be exposed to public view and analysis. Its desire for technical amendments that would undermine public disclosure and analysis should be rejected.

Mr. Chairman and Members of the Committee:

Thank you for inviting our organization to submit a statement for the record concerning the "Veterans Appeals Improvement and Modernization Act of 2017," an important legislative effort to reform the veterans claims and appeals process in the United States Department of Veterans Affairs (VA). (Throughout the rest of this statement, we refer to this document as "the draft bill").

The National Veterans Legal Services Program (NVLSP) is a nonprofit veterans service organization founded in 1980 that has been providing free legal representation to veterans and assisting advocates for veterans for the last 37 years. NVLSP has represented veterans and their survivors at no cost on claims for veterans benefits before the VA, the U.S. Court of Appeals for Veterans Claims (CAVC), and other federal courts. As a result of NVLSP's representation, the VA has paid more than $4.6 billion in retroactive disability compensation to hundreds of thousands of veterans and their survivors.

NVLSP publishes numerous advocacy materials, recruits and trains volunteer attorneys, trains service officers from such veterans service organizations as The American Legion, and Military Order of the Purple Heart in veterans benefits law, and conducts local outreach and quality reviews of the VA regional offices on behalf of The American Legion. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, which has, since 1992, recruited and trained 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.

The Draft Bill

Since the beginning of last year, NVLSP has participated with a workgroup of veterans service organizations convened by the VA to find common ground on a set of reforms to address the serious dysfunctions that exist in the current VA appeals process. The text of the draft bill takes the text of the draft bill that VA developed last year and adds additional language that NVLSP welcomes and believes should be kept intact.

We believe the draft bill is a welcome attempt to address the serious problems veterans and their dependents face in processing appeals in the VA. Before we address its merits in more detail, we begin with a general point that is important to remember. The proposed structuring of the administrative appeals process envisioned under the draft bill is far-reaching. As with any change to a complex system, there will clearly be effects that we cannot now predict. We have considered this reality quite seriously. If the system were functioning generally well, a concern with unintended consequences might be sufficient to oppose such a comprehensive change in the system, at least without first conducting a pilot program. But we are not dealing with a well-functioning system. Given that state of affairs, we have ultimately concluded that the draft bill - even without being able to predict all of its effects - is a necessary step. We support it, as long as Congress rejects the attempts that we understand VA is spearheading to make substantive changes to the additional language that appears in the draft bill that was not contained in the bill that VA drafted and supported last year.

I. POSITIVE FEATURES OF THE DRAFT BILL

We briefly highlight the significant positive features of the changes envisioned under the draft bill. Taken together, we believe these features will decrease appeal

times while providing claimants with various options for pursing their appeals. The most significant positive features in the draft bill are:

- It provides for enhanced "notice letters" to veterans and other claimants concerning the denial of their claims. Enhanced notice is critically important to veterans as they make determinations about how to proceed when they are dissatisfied with a VA decision.
- It also eliminates the requirements under current law concerning the preparation of a Statement of the Case (SOC), the veteran's corresponding need to complete an additional step to perfect an appeal to the Board (i.e., VA Form 9) and VA's subsequent need to certify the appeal by completing VA Form 8. While there may have been a time at which the SOC served a useful function in this system, the enhanced "notice letters" required by the proposal eliminate the need for an SOC. Thus, the SOC process serves only to delay the processing of claims.
- It lowers the standard necessary for re-opening a claim under Section 5108. The current standard of "new and material evidence" is replaced with "new and relevant evidence." The lowering of the standard is critically important. In addition, and as we discuss in more detail below, the revised Sections 5108 and 5110 will allow veterans to obtain earlier effective dates in many circumstances than they would be able to do under the current version of this provision.
- It allows veterans a meaningful choice when they appeal to the Board of Veterans' Appeals (Board). A veteran may elect to forgo the submission of new evidence and a hearing in cases in which he or she determines such an approach is best. This would provide for more expeditious treatment of such appeals. On the other hand, a veteran can elect to proceed on a track in which the submission of new evidence and a hearing is allowed. This dual-track approach recognizes the reality that not all appeals are alike.
- It allows a claimant to seek the assistance of a lawyer for pay after an initial denial but before the filing of a Notice of Disagreement (NOD). This is a change from current law in which a lawyer may not charge a fee before the filing of an NOD. While seemingly a small change, we believe this is significant because the structure of the proposed new system provides claimants with myriad ways in which to proceed. Advice to such claimants will be critical and the proposed change allows more options for that advice.
- We believe the draft bill also reduces the means by which the VA can "develop to deny." NVLSP has reviewed many regional office and BVA cases in which the existing record before the VA supports the award of benefits, but instead of deciding the claim based on the existing record, VA has delayed making a decision on the claim by taking steps to develop additional evidence for the apparent purpose of denying the claim. Certain aspects of the current proposal - for example, the restriction on the application of the duty to assist at the Board - will likely reduce such actions.

II.THE NEED TO RESIST VA'S EFFORTS TO AMEND THE DRAFT BILL UNDER THE GUISE OF PROPOSING TECHNICAL AMENDMENTS

A. The Change VA Wants to Discourage Veterans From Appealing to the CAVC

We understand that one of the "technical amendments" supported by VA is to eliminate subsection (a)(2)(E) from the draft bill's amendments to 38 U.S.C. § 5110. This subsection appears on lines 10–14 of page 13 of the draft bill. This subsection is critically important and NVLSP's support of the draft bill is contingent on this provision remaining intact.

Proposed subsection (a)(2)(D) would allow a veteran to file a Section 5108 supplemental claim which preserves the earliest possible effective date if the veteran receives a Board of Veterans' Appeals (BVA) denial and files the supplemental claim within one year of the BVA decision. Proposed subsection (a)(2)(E) mirrors proposed subsection (a)(2)(D) by allowing a veteran to file a Section 5108 supplemental claim which preserves the earliest possible effective date if the veteran loses his appeal to the Court of Appeals for Veterans Claims (CAVC) or a higher court and files the supplemental claim within one year of the final court denial. The VA supports proposed subsection (a)(2)(D), but wants to eliminate proposed subsection (a)(2)(E).

If the BVA denies a claim under the draft bill - regardless whether proposed subsection (a)(2)(E) remains or is eliminated—the veteran would be required, in order to preserve the earliest effective date, to choose between appealing to the CAVC and filing a supplemental claim with the RO. Eliminating subsection (a)(2)(E) would be unjust because it would put a heavy thumb on the scale when veterans make this

choice. The veteran would have nothing to lose by filing a supplemental claim within one year of the BVA denial because if the supplemental claim is denied, the veteran can keep the right to retroactive benefits alive by appealing. But if subsection (a)(2)(E) is eliminated, the veteran has a lot to lose by appealing to the CAVC. If the judicial appeal results in the court affirming the BVA's denial (as occurs in approximately 30% of all appeals), the veteran's right to retroactive benefits is lost forever. For a disabled veteran, this can mean losing the opportunity for tens of thousands of dollars.

The explanation we received from VA for VA's objection to subsection (a)(2)(E) is that "it is contrary to VA policy interest in encouraging dissatisfied claimants to stay within VA unless it is truly necessary to go to a higher court." The flip side of this statement is the desire to discourage veterans from appealing to the CAVC, and discouraging appeals to the CAVC is exactly what eliminating subsection (a)(2)(E) would do. Veterans are not omniscient. At the time they have to choose between appealing to the CAVC and filing a supplemental claim, they cannot know whether an appeal to the CAVC would be successful. In the 120 days they have to decide whether to appeal a BVA decision to the CAVC, they also will be unlikely to know if "it is truly necessary to go to a higher court," as the VA puts it.

If subsection (a)(2)(E) is eliminated, the safest course of action would be to file a supplemental claim. The unfortunate result of VA's attempt to place a heavy thumb on the scale would be that veterans who should appeal to the CAVC will not. Instead, they will file a supplemental claim that will unnecessarily prolong the time the veteran's claim is on the hamster wheel. NVLSP strongly supported the Veterans' Judicial Review Act of 1988. We oppose this unwise effort to discourage veterans from appealing to the court that this important Act created.

B. VA's Efforts to Escape Oversight of Its Processing of Legacy Claims

Section 3 of the draft bill wisely requires VA to report and the Comptroller General of the United States to assess VA's plans for processing appeals on legacy claims. This is a critical issue. NVLSP would have preferred that the draft bill structure the VA's decision-making on how to allocate its resources between new appeals and legacy appeals. But at least Section 3 would expose the VA's plans on this issue to public view and Comptroller General analysis.

The technical amendments to Section 3 supported by VA would significantly dilute this requirement. Ironically, the VA's explanation for these technical amendments undermines, rather than support their position. VA admits that it "has established a timeliness goal average of 365 days in the Board non-hearing lane option" for new appeals. VA also candidly states that it "does not have an established timeliness goal for legacy appeals." The VA obviously needs to make choices in allocating resources between processing legacy appeals and processing new appeals. VA's precise plans on this allocation and its effects on timeliness should be exposed to public view and analysis. Its desire for technical amendments that would undermine public disclosure and analysis should be rejected.

Conclusion

Thank you for this opportunity to present our views, and we would be pleased to respond to any questions that Members of the Committee may have.

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PARALYZED VETERANS OF AMERICA (PVA)

Chairman Roe, Ranking Member Walz, and members of the Committee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to offer our views on the draft bill entitled, "Veterans Appeals Improvement and Modernization Act of 2017."

Initial Considerations

PVA employs a highly-trained force of over 70 service officers who develop veterans' claims for both member and non-member clients. These frontline employees spend a minimum of two years in specialized training. We maintain a national appeals office staffed by attorneys and legal interns who represent clients at the Board of Veterans' Appeals (Board). We also have attorneys who practice before the Board, the Court of Appeals for Veterans Claims (CAVC), and the United States Court of Appeals for the Federal Circuit. Of all the major Veteran Service Organizations (VSO), only PVA offers such continuity of representation throughout subsequent appellate review.

Our most important attribute, though, is that our service officers and attorneys consistently advocate for catastrophically disabled veterans. Complex claims are the norm, not the exception. As we attempt to bring greater efficiency to the claims and appeals system, our perspective is geared toward ensuring that the due process rights of the most vulnerable among us-those most deserving of benefits-are not watered down for the sake of expediency.

PVA's unique aspects discussed above should illustrate the point that this Committee should not judge the importance of an organization's input based on the volume of claims it processes. We fear that in the absence of further hearings on this subject, Congressional consideration of a piece of legislation with the propensity to impact multiple generations of veterans will have been relegated to a single hearing, with a single panel of witnesses. In addition to the structure of this hearing, a bias toward the "three veterans service organizations with the most members" is also evident in the draft bill itself. Congress and stakeholders alike have repeatedly praised the Department of Veterans Affairs (VA) for its unprecedented level of collaboration. Encouraging VA to abandon that method now on the cusp of implementing a program of this scope is incomprehensible. It is within this Committee's power to influence the level of VSO involvement going forward, and PVA highly suggests that any bill introduced includes a mandate for continued collaboration with all the VSOs who participated in the original consultations in March 2016.

Background

The number of pending appeals is approaching 500,000. VA projects that if we fail to address the process, within a decade the average wait time for resolving an appeal will reach 8.5 years. We believe reform is necessary, and we support this legislation moving forward.

There is no shortage of news articles and academic pieces that attempt to illustrate for readers the level of complexity and redundancy in the current appeals process. It is a unique system that has added layer after layer of substantive and procedural rights for veterans over the years. The most notable aspect differentiating it from other U.S. court systems is the ability for a claimant to inject new evidence at almost any phase. While this non-adversarial process offers veterans the unique ability to continuously supplement their claim with new evidence and seek a new decision, it prevents VA from accurately identifying faulty links in the process, whether it be individual raters or certain aspects of the process itself.

It is important that as we approach this major issue that we do not lose sight of the fact that veterans have earned these benefits through the highest service to their country and have every right to pursue these earned benefits to the fullest. As we promote and seek public support for change, it is easy to use statements such as, "there are veterans who are currently rated at 100% who are still pursuing appeals," to illustrate the problems that pervade the system. PVA will be the first to point out, though, that a veteran rated at 100% under 38 U.S.C. § 1114(j) might also be incapacitated to the point that he or she requires 24 hour caregiver assistance. A 100% service-connected disability rating does not contemplate the cost of this care, and veterans may seek special monthly compensation (SMC) to the tune of thousands of dollars needed to address their individual needs. Few people would disagree that pursuing these added disability benefits are vital to a veteran's ability to survive and maintain some level of quality of life. Without clarification, such statements lead people to believe that veterans are the problem.

This is why PVA believes it is so important to ensure that VSO's remain as involved in the follow-on development process and implementation as they are now if this plan is to succeed. This is a procedural overhaul, and VSO's are the bulwark that prevents procedural change from diluting the substantive rights of veterans.

The Framework

As the working group came together and began considering ways to address the appeals inventory, it became clear that a long-term fix would require looking beyond appeals and taking a holistic view of the entire claims process. The work product in front of us today proposes a system with three distinct lanes that a claimant may enter following an initial claims decision-the local higher-level review lane, the new evidence lane, and the Board review lane. The work horse in this system is the new evidence lane. The other two serve distinct purposes focused on correcting errors. A decision to enter any of the lanes must be made within one year of receiving the previous decision. Doing so preserves the effective date relating back to the date of the original claim-a key feature of this new framework.

When a claimant receives a decision and determines that an obvious error or oversight has occurred, the local higher-level review lane, also known as the difference of opinion lane, offers a fast-track ability to have a more experienced rater review the alleged mistake. Review within this lane is limited to the evidence in the record at the time of the original decision. It is designed for speed and to allow veterans with simple resolutions to avoid languishing on appeal.

If a claimant learns that a specific piece of evidence is obtainable and would help him or her succeed on their claim, the new evidence lane offers the option to resubmit the claim with new evidence for consideration. VA indicates that its goal is a 125-day turn around on decisions within this lane. Another important aspect is that the statutory duty to assist applies only to activity within this lane. This is where VA will concentrate its resources for developing evidence.

The third lane offers an appeal to the Board. Within this lane there are two tracks with separate dockets. One track permits the addition of new evidence and option for a Board hearing. The other track permits a faster resolution by the Board for those not seeking to supplement the record. A claimant within this track will not be permitted to submit new evidence, but they will have an opportunity to provide a written argument to accompany the appeal.

If the claimant receives an unfavorable opinion at the Board, he or she may either revert to the new evidence lane within one year or file a notice of appeal with the CAVC within 120 days. Notably different from earlier versions of this legislation, this draft bill would preserve the claim's effective date even after an adverse decision at the Court.

Concerns Specific to the Framework

Throughout the development of this new framework, PVA's biggest concern has been the proposed dissolution of the Board's authority to procure an independent medical examination or opinion (IME) under 38 U.S.C. § 7109. An IME is a tool used by the Board on a case-by-case basis when it "is warranted by the medical complexity or controversy involved in an appeal case." § 7109(a). The veteran may petition the Board to request an IME, but the decision to do so remains in the discretion of the Board. The Board may also request an IME sua sponte. Experienced Board personnel thoroughly consider the issues which provoke the need for an outside opinion. Complicating the process further, the CAVC has carefully set parameters for the proposed questions to be answered by experts. A question presented to a medical expert may be neither too vague, nor too specific and leading. A question too vague renders the opinion faulty for failing to address the specific issue, while a question too specific tends to lead the fact finder to a predisposed result.

The standard for granting such a request is quite stringent. 38 C.F.R. 3.328(c) states, "approval shall be granted only upon a determination . . . that the issue under consideration poses a medical problem of such obscurity or complexity, or has generated such controversy in the medical community at large, as to justify solicitation of an independent medical opinion." The number granted each year usually amounts to no more than one hundred, with approximately fifty percent of those IME's being requested by the Board itself. The regional offices have long held a companion authority under 38 U.S.C. § 5109. Incredibly, in a room full of practitioners convened in March 2016 as part of this current reform process, not one among them could recall an instance of a rating officer requesting an IME. And yet the original proposal was to eliminate the Board's authority to procure an IME and rely solely on a rating officer exercising his or her authority under § 5109.

VA's rationale for dissolving this authority is primarily based on having all development of evidence take place at the Agency of Original Jurisdiction (AOJ) level in the New or Supplemental Evidence Lane. This unwavering desire to rid the Board of any development stems in part from an attempt to exploit its experienced Veteran Law Judges (VLJ) to the greatest possible extent. VLJ's who adjudicate appeals are a human capital commodity and form a critical component of the system. Because employees and outside attorneys cannot reach the experience and qualifications of a VLJ overnight, VA is limited in its ability to scale this particular resource simply by hiring new employees.

These concerns are valid to a degree, and we have worked with officials to find a solution that allows the Board to realize the benefit of making the best use of VLJ's while attempting to preserve the beneficial aspects of IME's procured by the Board. Part of the mitigating measures are reflected in this draft bill's proposed amendments to 38 U.S.C. § 5109, permitting the Board to remand specifically for procurement of an IME and requiring the VLJ to articulate the specific questions to be presented to the expert.

We remain concerned, however, with the remand language. As written, the Board would only be permitted to remand for an IME if it determined an error existed on the part of the AOJ to satisfy its duty to assist under 38 U.S.C. § 5103A. We recommend striking this requirement. First, the existing statute explicitly renders an IME discretionary. VA's failure to employ a discretionary tool cannot, by definition, be considered a violation of a compulsory duty to assist. These two statutory provisions are diametrically opposed and cannot be reconciled. Second, should these statutory parameters be reconciled, there are still situations where the AOJ carried out its duty to assist, but the Board determines an IME is warranted. An IME might be needed when the AOJ procured advisory medical opinions from its own staff doctors, but the medical question is of such complexity that the Board feels only an expert can shed light on the appropriate decision. There could be multiple conflicting medical opinions in need of resolution, or an IME could be used to avoid conflicts of interest in claims under 38 U.S.C. § 1151 for medical malpractice.

None of these circumstances would violate the AOJ's duty to assist under a plain-language reading of the statute. Of course, we would also note that some of these situations could easily be resolved if VA would better adhere to its own reasonable doubt provision when adjudicating claims. We still see too many VA decisions where this veteran-friendly rule is not properly applied. More often it appears VA raters exercise arbitrary prerogative to avoid ruling in favor of the claimant, adding obstacles to a claimant's path without adequate justification. While due diligence in gathering evidence is absolutely necessary, too often it seems that VA is working to avoid a fair and legally acceptable ruling favorable for the veteran. Both the failure to accept and tendency to devalue non-VA medical evidence are symptoms of this attitude.

Dissolving § 7109 would have the additional effect of abolishing the centralized office of outside medical opinions. This small staff has played a vital role in facilitating IME's and maintaining their effectiveness by developing relationships with doctors who are experts on particular subjects and willing to do this tedious task for almost no money. This office not only expedites the receipt of opinions, but it also ensures a high level of quality. VA has committed verbally to PVA that it will preserve this resource by moving it from the Board and placing it under VBA's management, in essence making it available to the AOJ going forward.

The decreased efficiency with having the process conducted at the AOJ level is also concerning. Instead of the VLJ requesting an IME and receiving the opinion, now a second person must review the claim-the rating officer who received the file on remand. If a veteran wishes to appeal this re-adjudication, we have asked for and received VA's commitment to reroute the appeal by default, with exceptions, back to the same VLJ who remanded the case to avoid yet another person from having to review a claim with enough medical complexity to warrant the IME. Unless this Committee is willing to outright preserve § 7109, we would strongly recommend that the Committee conduct oversight on these specific commitments by VA, perhaps as part of the increased reporting requirements.

We also recommend an additional jurisdictional safeguard for the Board. In 38 U.S.C. § 7104, it would be helpful to include language that addresses situations where the Board finds that an appeal presents extraordinary circumstances. The Board, in its sole discretion, should be able to retain jurisdiction over a remand of that appeal.

Some stakeholders have expressed concern over the replacement of the "new and material" evidence standard with "new and relevant." It is true that there are a number of appeals in the system currently disputing a decision that evidence submitted was not deemed "material." The stated concern is that changing "material"

to "relevant" will simply exchange one appealable issue for another. While it is a fair point, "relevant" is a significantly lower legal threshold and as higher numbers of veterans meet this threshold, it should correlate to fewer appeals. Those expressing concern propose having VA simply accept all "new" evidence and make a decision. Under this proposal, if the evidence is so weak that it is not even relevant, then VA can easily deny the claim. For every denial, VA will be required to do the work of providing the improved notice explaining its decision. Conversely, a legal determination that new evidence is not relevant would not be subject to this requirement, thus a reduced workload for VA. PVA believes "new and relevant" is an acceptable standard for veterans to meet. But at this point, it is unclear whether dealing with continued appeals on relevance determinations or processing improved notice for denials will lead to a greater aggregate negative impact on the system.

Earlier objections were raised concerning the specificity with which a veteran was required to identify issues of fact or law being contested on appeal in a notice of disagreement. At first glance, the prior language appeared to be quite "legalese" requiring a sophisticated level of pleadings. Placing such burden on veterans would be at odds with the non-adversarial nature of the system. We are pleased to see that the current draft bill has addressed this issue.

Judicial Review

We noted above that this draft bill would preserve a claim's effective date following an adverse decision from CAVC. It would also provide the same relief after an adverse decision from the Federal Circuit and the Supreme Court of the United States. The concept of imposing finality after a Court decision has provoked a significant debate among the stakeholders. Unfortunately, the strongest objections to imposing finality at the Court have not been met with much discussion regarding why VA, or some of the other stakeholders, are comfortable with finality at that stage. We would encourage the Committee to draw out this discussion and fully examine the issue. There are arguments and perspectives on both sides that warrant attention.

Our initial impression is that while VA is trying to create new efficiencies in its claims and appeals processing, we must remember that the CAVC is not part of that system, and it does not exist for VA's benefit or efficiency. Nor does it exist to create precedent. Precedent is a byproduct of an individual availing him or herself of the Court. The Court exists to hear veterans' individual claims and gives veterans an independent avenue to challenge whether VA considered a claim correctly. We in the veterans community fought long and hard for judicial review, and it is precious. PVA is uniquely positioned in this regard. Our organization has boxes full of claims that, but for the Court, the veteran would never have had a full and fair review. When we approach analyzing the impact on the Court, we should not focus on the systematic efficiencies or precedent, because these are not the Court's purpose. We should focus on what an individual veteran's right to judicial review is and what it takes to avail him or herself of that right.

There are reasonable assertions that failing to provide effective date relief following a Court decision will have a chilling effect on the Court. They should be addressed unless willing to be conceded. One scenario presented is where a veteran, who having received a denial under what she believes is an erroneous application of law to the case, also has new evidence to attach to the claim. She is faced with deciding whether to pursue Court review on the legal issue or circulate back through the system with new evidence. If she chooses the Court and loses, she can still continue to pursue the claim with new evidence, but she will have lost her effective date. If she chooses to handle the new evidence first, her claim will again be adjudicated under what she considers to be an erroneous interpretation of law. This predicament, so the argument goes, will likely force veterans to choose to avoid the Court at the risk of missing an opportunity to strengthen the record. Hence the chilling effect. It also inconveniences the veteran by having them cycle through the system while being again scrutinized under a misinterpretation of the law.

One might argue, though, that there is no chilling effect in this scenario. The veteran is in fact inconvenienced. But ultimately, if the veteran cycles through again with the new evidence, strengthening the record, she arrives in the exact same position if denied, this time without the predicament. The choice is obvious, and she heads to the Court. The only person in this scenario who ultimately would not reach the Court is one who received an earlier and favorable adjudication at a lower level of review. This is precisely what we want for veterans. Any reduction in claims reaching the Court would be attributed to more efficient outcomes for the veterans. Making a decision about the framework that accommodates veterans facing this scenario also requires a belief that the veteran's legal interpretation is always correct

and, necessarily, that VA's is always wrong. This is not how sound policy is formed. Further, it is hard to weigh at this point a single veteran's inconvenience in this scenario against the potential gains for numerous veterans who are benefitting from a more efficient system due to the finality imposed after a Court decision.

There is, perhaps, also an undue assumption that a chilling effect on the Court would in fact reduce precedent and oversight on VA. Conceptually, one may concede that a reduction in volume of claims at the Court raises the possibility that a "perfect case" for setting precedent will not arrive. But it is possible that a reduction in the Court's workload would offer greater opportunity to give more time and attention to a precedent-setting claim, which otherwise might have slipped through the cracks or not garnered a more thorough opinion.

There are other scenarios that argue in favor of granting effective date relief following review by the CAVC. If the Board rules against a veteran and finds that a medical exam being challenged was adequate for purposes of his rating decision, he is faced with two choices. He could appeal to the CAVC, or he could develop independent evidence that would strengthen his argument that the exam provided by VA was inadequate. The latter option costs money. If effective date relief followed a decision at the CAVC, the veteran could wait and see if the Court agreed with his position before he was forced to shell out money he likely does not have to invest in proving his claim. Veterans with means may not see this as an issue. For those without means, it would be an unwarranted obstacle in a system that is designed to be non-adversarial.

One aspect of this framework that has not been discussed at all is the fact that you can technically take one issue from a multi-issue claim up to the Court, and cycle back through the other lanes in the framework on the remaining issues. Currently, the Court takes jurisdiction over issues that are expressly identified by the veteran, and issues not appealed after a Board decision are final. Nothing in this draft bill changes the way an issue reaches the CAVC. But because this new framework has provided liberal effective date relief, new incentives for action have been introduced. There should be further discussion among stakeholders and VA about how claims are dealt with that end up being split up between the Court and the agency. There is no precedent for this in the current system.

PVA was a supporter early on of judicial review, and we believe the availability of that review has improved the appeals process for veterans. Determining the best way to preserve that protection deserves more conversation at this point in time.

Implementation

We applaud the heavy reporting requirements found within this bill. One of the biggest reservations that the collective stakeholders have voiced is the absence of information related to implementation. GAO's recent report reinforced our claim that the success of this new framework hinges on how VA makes the transition, and VA has yet to fully demonstrate what it needs to accomplish this task. We also agree that it is important that VA provide a full accounting of the bases for certain assumptions that have been used to support the feasibility of this new framework. For example, what is the basis for the assumption that within the "hearing lane" at the Board, thirty-five percent of veterans will choose to have a hearing? What is the impact on the system if that estimate is drastically wrong?

Within the reporting requirements, we recommend including a mandate to track legacy appeals that have transitioned into the new system. The goal would be to ensure that Congress can easily identify how many legacy appeals have been truly resolved as opposed to being reclassified in the new system.

We support VA's proposed first step toward combatting the backlog of legacy appeals. One of the hurdles to permitting veterans with legacy appeals to join the new system was that veterans in the legacy system may not have been provided sufficient notice to make an educated decision. Allowing veterans to join after they have received a statement of the case or supplemental statement of the case addresses this concern and will help stem the flow of new claims into the old, broken system. The quicker we can shut off that valve, the quicker the backlog of legacy appeals will be handled.

We note in closing that this is not simply a VA problem. As stated earlier, PVA has many service representatives and spends a great deal of time, funds, and effort on ensuring they accomplish their duties at a high level of effectiveness. However, it is important that veterans and their representatives also share responsibility when appeals arrive at the Board without merit. A disability claim that is denied by VBA should not automatically become an appeal simply based on the claimant's disagreement with the decision. When a claimant either files an appeal on his own behalf, or compels an accredited representative to do so with no legal basis for ap-

pealing, that appeal clogs the system and draws resources away from legitimate appeals. Since 2012, PVA has taken steps to reduce frivolous appeals by having claimants sign a "Notice Concerning Limits on PVA Representation Before the Board of Veterans' Appeals" at the time they execute the Form 21–22 Power of Attorney (POA) form. PVA clients are notified at the time we accept POA that we do not guarantee we will appeal every adverse decision and reserve the right to refuse to advance any frivolous appeal, in keeping with VA regulations.

PVA believes that substantial reform can be achieved, and the time is ripe to accomplish this task. Our organization represents clients with some of the most complex issues, and we cannot stress enough that moving forward should not be done at the expense of the most vulnerable veterans. We must remain vigilant and appreciate the benefits of bringing together the variety of stakeholders who are participating and bringing different perspectives and viewpoints-it is a healthy development process that ensures veterans remain the focus. Thank you, Mr. Chairman, for the opportunity to offer our input on this important legislation.

VIETNAM VETERANS OF AMERICA (VVA)

PRESENTED BY JOHN ROWAN, PRESIDENT

Vietnam Veterans of America (VVA) is pleased to have the opportunity to present this statement for the record regarding the bill entitled "Veterans Appeals Improvement and Modernization Act of 2017."

Vietnam Veterans of America (VVA) is strongly opposed to the enactment of the Veterans Appeals Improvement and Modernization Act of 2017 in its current form. While VVA certainly supports initiatives to fix the broken claims process, the solution should never be to replace a broken system with a new one that is equally flawed. The bill ignores the need for legal precedent in the VA claims process, limits due process protections, and compromises the non-adversarial, pro-veteran claims system at the convenience of VA.

While head of the Department of Veterans Affairs (VA), General Omar Bradley once stated, "[w]e are here to solve . . . veterans' problems, not our own." VVA believes that the proposed bill seeks to solve VA's "problems", to the direct detriment of veterans. In considering the merits of the bill, VVA urges Congress and stakeholders to sincerely consider if this bill will fix the fundamental problems with the current claims system. VVA believes it does not.

It is widely understood that the appeals process is in need of urgent reform, and to do nothing would be unacceptable; however, VVA urges Congress to not replace the current broken system with an equally flawed plan simply because it is too daunting to redesign a plan that directly addresses the problems facing the appeals process today. In its current form, this bill is an insult to the brave men and women who sacrificed to protect the Constitution of the United States.

I. The bill fails to address the lack of precedent in the VA claims process and decreases decision finality at all levels of appeal.

The bill fails to address the lack of a precedent-setting mechanism in the veterans benefits adjudicatory system. Even more concerning, VVA believes the new proposed framework could decrease the rate of legal precedent being set due to the erasure of the duty to assist at all higher levels of review.

One of the fundamental problems with the current claims system is that veterans who have nearly identical records will receive drastically different results. Whether a veteran's claim is granted should depend on the claim's merits, not on who happened to be adjudicating the claim that day. Sadly, the current bill does not address the need for a precedent-setting mechanism in the claims process, which VVA believes will increase consistency in decisions, decrease the rate of appeals, and enable VA to automate similar types of claims.

Additionally, the bill permits the veteran to continue to file a supplemental claim after a decision is issued at any higher level of appeal to preserve the original effective date. Although VVA supports legislation that protects the earliest possible effective date, the bill exacerbates the current problem of the never-ending churn of cases between all levels of appeal. In theory, the bill permits a veteran to refile a supplemental claim to continue a claim after he receives a decision by the Supreme Court of the United States. Indeed, the bill creates more uncertainty with the finality of decisions, which VVA fears may increase the claims backlog.

II.The bill fails to address VA's inability to properly satisfy its duty to assist at the Agency of Original Jurisdiction-level.

The bill fails to address one of the fundamental problems with the claims system: VA has not yet proven itself to be able to properly apply the laws and regulations to any veterans claims file in a consistent and pro-veteran manner at the Agency of Original Jurisdiction-level. In FY 2015, 41 percent of the reasons for remands at the Board were due to a VBA error.[1] The bill does not address the high frequency of errors at the initial decision-level.

Instead, the bill proposes to increase the role of the Agency of Original Jurisdiction by eliminating the Secretary's duty to assist requirement for any higher-level reviewers or Board decisions. Additionally, the bill proposes to eliminate Decision Review Officers (DROs), who come from the ranks of the most senior raters at VBA. VVA believes this shift to rely exclusively on initial claims raters to conduct all development and duty to assist requirements, without additional required proficiency training, is a concern. Unfortunately, incompetent raters in need of urgent training will be able to hide behind the National Work Queue process, where claims are being moved around the country on a daily basis.

Although the bill proposes a higher-level review option, many higher-level reviewers will likely lack the expertise and experience of DROs due to the larger pool of staff necessary to conduct these reviews under the new framework. Notably, the bill does not indicate any competency level requirement for the higher-level reviewers. VVA fears the higher-level review process will lead to the rubber-stamping of rating decisions, especially since higher-level reviewers, unlike DROs, will not be subject to the Secretary's duty to assist.

III. The bill attacks the uniquely pro-veteran system at the Board due to the limited applicability of the Secretary's duty to assist.

The Secretary's duty to assist does not extend to higher-level reviews or decisions at the Board; nonetheless, the veteran may submit additional evidence and hearing testimony at the Board-level. Moreover, veteran advocates have been assured that they will still be able to submit Informal Hearing Presentations (IHPs), or written advocacy papers, for both hearing and non-hearing docketed cases prior to a final Board decision. VVA believes the absence of a duty to assist requirement at the Board will result in erroneous denials and a waste of VA resources.

The bill creates a system where a Veterans Law Judge (VLJ) may deny a claim because she does not have the duty to assist in gathering additional relevant federal documents necessary to get the claim granted. Although the veteran will have the ability to file a supplemental claim at the AOJ, it hardly seems like a pro-veteran system where an adjudicatory body knows of possible helpful information for a claimant, but is not able to act on this knowledge in a helpful way to the veteran. Under this new framework, the pro-claimant system would deteriorate and it is nonsensical for a VLJ to receive additional evidence for consideration, but not be able to act in the veterans favor once receiving this evidence.

VVA also is concerned about how "evidence" will be defined at the Board-level. If advocates are permitted to submit IHPs (advocacy briefs) but not "evidence" in the non-hearing track, what happens if an advocate includes a statement by the veteran in the IHP or references the existence of federal records that should be included in the veteran's file? Is that considered "evidence" if the claim is in the non-hearing track? Will it be transferred to the hearing track? Will the VLJ not consider the statement or acknowledge the existence of potentially helpful evidence? Again, VVA is concerned that this process cannot be reconciled with the pro-veteran claims process.

III. The bill encourages veterans to not exercise their right to a Board Hearing, not submit additional evidence, and not have their case reviewed by a Veterans Law Judge.

In the bill, if a veteran wishes to appeal her decision to the Board, the Veteran must choose the hearing docket or the non-hearing docket. VA has indicated that veterans who wish to exercise their right to a Board hearing will need to wait longer for a final Board decision, and veterans who do not wish to have a hearing will have their claims decided more quickly. VVA is strongly opposed to a system that disincentives a veteran to exercise his right to a hearing.

Additionally, VVA believes veterans that do not want a hearing, but wish to submit additional evidence should not be required to choose the hearing docket. Again, the bill is penalizing a veteran for exercising his right to add evidence to the record. VVA believes veterans wishing to only add additional evidence should be able to

[1] Government Accountability Office (GAO), VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions, GAO–17–234 (March 2017).

choose the non-hearing docket. The bill is asking veterans to forgo their due process rights so that VA may process claims more quickly.

Finally, VVA is concerned that due to the unequal treatment for veterans who wish to have a hearing or submit additional evidence and the absence of the Secretary's duty to assist at the Board, the proposed bill incentivizes veterans to file a supplemental claim at the AOJ-level instead of appealing to the Board. This may be the case, even if the AOJ clearly erred. The bill is an assault on the veteran's right to appeal and be heard by a VLJ.

IV.The bill does not give adequate consideration to the legacy appeals that have already been pending for years.

VVA is concerned about the status of the legacy appeals. The bill creates the dramatic need for additional raters at the AOJ-level, as well as the need for appropriate division of staffing to address appeals. Currently, VVA has hundreds of pending Board hearings, some of which have been pending since 2009. The Board has admitted that it will take several years for it to complete its current backlog of hearings, notwithstanding the inevitable influx of new hearing requests. VVA is concerned that the new appeals system will take priority over appeals that have languished in the system for many years. Any new claims process must ensure the legacy appeals system has adequate resources.

V.The bill should not include the Fully Developed Appeals Program due to problems with implementation with the other sections of the bill.

Although VVA recognizes the optional-nature of the Fully Developed Appeals (FDA) Program in the bill, VVA believes now is not the time to "test assumptions" relied on in development of the bill. There are numerous problems with the FDA's concept, such as it will pull substantial resources from the already taxed Board, it will create more confusion by developing a new docket, and it does not provide unrepresented veterans the same rights as represented veterans. Additionally, the FDA Program asks the Board to conduct claim development, which is completely contrary to the other sections of the bill. In a time where Congress seeks to overhaul the entire claims process, it does not make sense to also "test" a plan that requires a completely new administrative process.

VI. The bill harms the veteran by permitting VA to prematurely "dismiss" appeals, even if the veteran intends to appeal an initial decision.

The bill permits the Board to "dismiss" any appeal that fails to identify the specific determination with which the claimant disagrees in the Notice of Disagreement (NOD). This requirement significantly raises the standard by which the veteran is required to follow to successfully appeal her decision. This is certainly not in the spirit of the non-adversarial and pro-veteran claims system.

If a veteran files a proper NOD, but VA needs additional clarification, VA should request clarification and not "dismiss" the appeal. By filing a NOD, clearly the veteran disagrees with something in the initial decision; policies should be implemented to assist the veteran in completing his appeal, not end it. This change appears to be yet another scheme to allow VA to easily dismiss appeals.

VII. The bill harms veterans by creating a "new and relevant" evidence standard with a definition that is unclear.

The bill proposes to remove the "new and material evidence" standard and replace it with a "new and relevant evidence" standard. "Relevant evidence" is defined as "evidence that tends to prove or disprove a matter in issue." This language is so general as to be meaningless, and will certainly lead to the need for litigation to further define it. Why did VA make this definition so vague? VVA has significant concern that VA is intending to make this definition more restrictive than what was promised to stakeholders during negotiations.

VIII. The bill fails to require reporting be made available to the public.

The bill requires VA to submit a comprehensive plan to the Committee on Veterans' Affairs of the Senate, the Committee on Veterans' Affairs of the House of Representatives, and the Comptroller General of the United States no later than 90 days after the date of enactment. The bill also requires the Comptroller General to review the comprehensive plan to determine whether the plan comports with sound planning practices, identification of any improvements, and formulation of any recommendations. VA is also instructed to submit semiannual reports.

VVA believes the bill should require that VA's comprehensive plan, Comptroller General's written assessment, and any VA reports be publicly published. Moreover,

the bill should require VA to timely address the recommendations made by the Comptroller General, and the actions taken should be made available to the public.

CONCLUSION

The Veterans Appeals Improvement and Modernization Act of 2017 is an attempt to improve the appeals process of VA. VVA is strongly opposed to enactment of this legislation as it does nothing to fix the fundamental problems with the appeals system. The system is broken and needs urgent repair; however, enacting a bill that will ultimately fail veterans is not a conscionable choice.

This bill is a tool for VA to more expeditiously process cases, while simultaneously limiting a veteran's due process rights. VVA believes veterans and their families will be harmed with this so-called appeals modernization bill. The immense pressure to "fix the problem" does not mean we must support a bill that does just the opposite. As the saying goes, "delay, deny, until we die"; sadly, due to the bill's inadequacies, VVA fears that enactment of this bill will be to the detriment of veterans and their families.

On behalf of VVA's members and our families, thank you for the opportunity to submit this statement for the record. For questions, please contact Rick Weidman, Executive Director for Policy and Government Affairs, at rweidman@vva.org, or Kelsey Yoon, Director of Veterans Benefits, at kyoon@vva.org.

Questions For The Record

Responses to Post Hearing Questions

Chairman Roe

1. Is it important for the Department of Veterans Affairs (VA) to continue to work with veterans advocates throughout the implementation phase of appeals reform?

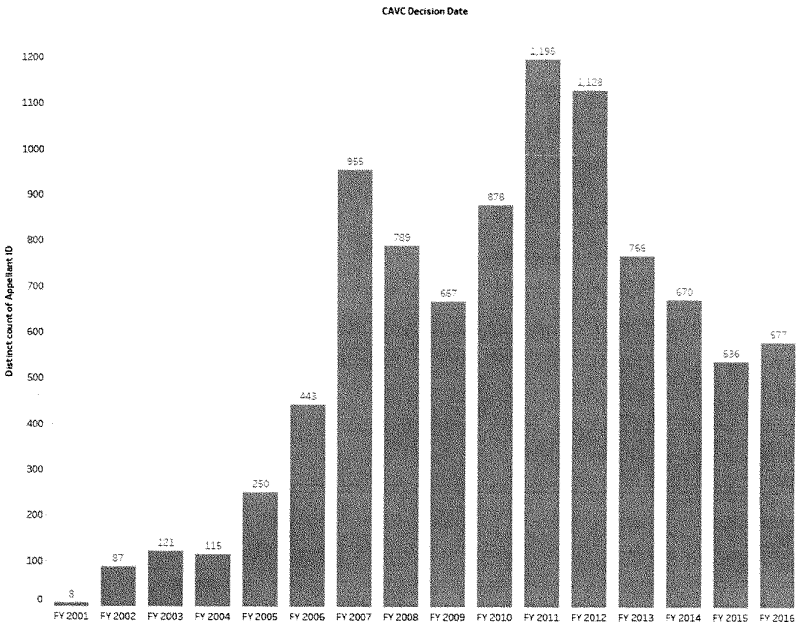
RESPONSE: Yes, it is important for VA to continue to work with Veterans advocates throughout the implementation phase of appeals reform. VA has previously stated and remains committed to ongoing engagement during the implementation phase of appeals reform, to the extent allowed by law.

2. Which stakeholders do you believe that VA should collaborate with prior to certifying that the Secretary?

RESPONSE: We believe that VA should collaborate with the stakeholders that participated in the March 2016 Appeals Summit, specifically, the American Legion, American Veterans, Disabled American Veterans, the Military Officers Association of America, the National Association of County Veterans Service Officers, the National Association of State Directors of Veterans Affairs, the National Organization of Veterans' Advocates, the National Veterans Legal Services Program, Paralyzed Veterans of America, Veterans of Foreign Wars, and Vietnam Veterans of America.

3. How many veterans would be impacted if Congress were to protect veterans' effective dates after an adverse decision at the Veterans Court?

RESPONSE: If Congress were to protect Veterans' effective dates after an adverse decision at the United States Court of Appeals for Veterans Claims (CAVC), any Veteran who has at least one issue affirmed on appeal to CAVC could be impacted, as that Veteran could file a supplemental claim within one year of the CAVC decision and have the date of claim, for purposes of assigning the effective date of an award of a benefit eventually granted, relate back to the date of filing of the initial claim. The Board does not have information about how many Veterans file a request to reopen their claim after a CAVC affirmance and eventually have a benefit granted. The table below shows the number of individual appellants by fiscal year (FY), 2001 through 2016, who had at least one issue affirmed at the CAVC. Any Veteran who has at least one issue affirmed at the CAVC would potentially be impacted if Congress were to protect Veterans' effective dates following an adverse decision at CAVC after the effective date of the legislation.



4. Does VA anticipate allowing veterans who are currently in the system, but would not be eligible to opt-in to the new system under the draft legislation, to opt-in to the new system in the future?

RESPONSE: The opt-ins presently in the draft legislation provide opportunities for Veterans who would otherwise have an appeal in the legacy process to choose to participate in the new system instead. While one opt-in provides opportunities to Veterans who receive a decision during the 1-year period prior to the effective date of the law, the other allows Veterans who receive a Statement of the Case (SOC) or Supplemental Statement of the Case (SSOC) in a legacy appeal after the effective date of the law, to opt-in to the new system. This SOC/SSOC opt-in means that, even if a Veteran is not immediately eligible to opt-in to the new system, he or she could later opt-in upon issuance of an SSOC in the legacy system. VA does not anticipate creating additional opt-ins during the initial implementation of the new system. However, after we have been operating in the new system, and have had an opportunity to reassess pending workload and resource allocations, we are open to the possibility of exploring whether there may be additional opportunities for opt-ins into the new system.

5. How many resources will the Board of Veterans' Appeals (Board) devote to deciding legacy appeals?

RESPONSE: The Board intends to devote resources required to maintain timely processing in the new system. All remaining resources will be allocated to addressing legacy appeals.

a. Based on the estimated resource allocation, how long does the Department anticipate that it will take to resolve legacy appeals?

RESPONSE: VA intends to address the legacy appeals inventory as quickly and efficiently as possible. Without significant legislative reform to modernize the claims appeals process, VA projects that Veteran wait times and the cost to taxpayers will continue to increase over time. The goal is to eliminate the inventory of legacy appeals in a timely manner following enactment of the appeals modernization legislation, while also maintaining timely processing in the new process. Prioritization, assessment of resource requirements in the annual budget process, and the opt-in features of the new process will assist VA in accomplishing that goal. However, due to the nature of the complex, inefficient and outdated legacy process, VA projects that there will be an inventory of legacy appeals for a substantial amount of time, regardless of the amount of resources made available to

legacy appeals processing. The rate at which legacy appeals are resolved will depend upon future funding determinations.

6. How will the Board balance the resources for multiple dockets to ensure that veterans receive a timely decision even if he or she wants to have a hearing?

RESPONSE: As indicated above, the Board will allocate resources to maintain timely processing in the new system. The allocation, of course, must take into account the number of cases that come into the Board with a request for a hearing, or a request for consideration of new evidence.

7. At this time, how many resources does Veterans Benefits Administration (VBA) plan to allocate to the legacy appeals?

RESPONSE: VBA is mindful of the need to balance resources so that the agency can eliminate the legacy appeals inventory as quickly as possible. VBA intends to allocate resources in an efficientmanner that will establish timely processing in the new system and will allocate all remaining appeals resources to address the inventory of legacy appeals.

a. Based on the estimated resource allocation, how long does the Department anticipate that it will take to resolve the legacy appeals?

RESPONSE: The goal is to eliminate the inventory of legacy appeals in a timely manner following enactment of the appeals modernization legislation, while also maintaining timely processing in the new appeals framework. Prioritization, assessment of resource requirements in the annual budget process, and the opt-in features of the new process will assist VA in accomplishing that goal. However, due to the nature of the complex, inefficient and outdated legacy process, VA projects that there will be an inventory of legacy appeals for a substantial amount of time, regardless of the amount of resources made available to legacy appeals processing. The rate at which legacy appeals are resolved will depend upon future funding determinations.

b. Based on the estimated resource allocation, will VBA be able to meet its goal of processing the appeals for veterans who want a hearing within 1 year?

RESPONSE: One of the benefits of the new system is that VBA will be the claims agency and the Board will be the appeals agency. Therefore, VBA will not process appeals under the new legal framework. A Veteran may request a pre-decisional hearing during the processing of an initial claim, and a supplemental claim; however, there are no hearings in the higher-level review lane. The average processing time goal for initial claims, supplemental claims, and higher-level reviews in the new system is 125 days.

8. Will VA provide an examination or develop for relevant private medical evidence if the veteran's condition worsens while the appeal is pending?

RESPONSE: No. In the new system, all appeals will be handled by the Board. As stated above, clearly establishing VBA as the claims agency and the Board as the appeals agency is one of the benefits of the new system. Because the duty to assist will not apply to review on appeal by the Board, the Board would not remand to obtain an examination or develop relevant private medical evidence if the Veteran's condition worsens while the appeal is pending. However, if a Veteran believes that his or her condition worsened while the appeal was pending, he or she could file a supplemental claim with new and relevant evidence within 1 year of the Board decision, in which case the effective date of any increased benefits granted would be protected.

9. Will VA have a duty to assist if a veteran files a supplemental claim?

RESPONSE: Yes. In the new system VA's duty to assist applies in the supplemental claim lane.

10. Do you have concerns that putting the contents of a decision notification letter into statute would make it more difficult for VA to revise these letters as the needs of veterans or other laws change over time?

RESPONSE: While VA generally prefers administrative flexibility in its statutory authority, it became clear during March 2016 appeals design discussions with stakeholders that any reform legislation would need to prescribe the core elements of a decision notice. Without these provisions, it is unlikely VA would have reached a near unanimous consensus for change. VA will still have the flexibility

it needs to prescribe rules related to providing this notice and to modify its notification letters consistent with the statutory requirements. To the extent that the needs of Veterans change over time, VA would work with stakeholders to propose necessary statutory amendments.

11. Is VA planning to update VBMS to enable it to process appeals?

a. If so, when will such update be available?

RESPONSE: In December 2016, the first iteration of the SOC and SSOC legacy program was integrated into the Veterans Benefits Management System (VBMS). The new functionality reduces reliance on legacy systems, and improves VBA systems integration while streamlining the process of issuing an SOC. However, under the appeals modernization legislation, VBA would not process any new appeals; therefore, VBA would require a modification to VBMS to account for changes to the claims process, specifically the higher-level review and supplemental claim lanes in the new process. VA plans to have those changes implemented before the effective date of the legislation.

12. How long would it take for the Board to update its Information Technology system to implement the changes required by the bill?

RESPONSE: The United States Digital Service has a team of digital service experts at the Board working to replace the Veterans Appeals Control and Locator System (VACOLS), its current, outdated software for managing the appeals process, with Caseflow, a modern suite of web applications designed to increase timeliness, accuracy and Veteran experience in the appeals process. The Digital Service team has been monitoring the legislative process, and is developing Caseflow using agile, iterative processes that enable them to quickly adapt in response to the final form of the legislation. Therefore, the Board and Digital Service are fully prepared to implement in Caseflow the information technology related changes required by the bill, in the normal course of development, within one year of passage of the Veterans Appeals Improvement and Modernization Act.

a. What are the anticipated costs of these changes?

RESPONSE: There are no anticipated additional costs for these changes. Because Caseflow development work is ongoing, and will include these changes, all funding for these changes is covered by the existing Appeals Modernization budget.

Representative Bost

13. Is VA planning to process appeals through the National Work Queue?

RESPONSE: In the new process, VBA will use its National Work Queue (NWQ) workload management strategy to electronically distribute claims in the higher-level review and supplemental claims lanes to any VA regional office that has processing capacity. In addition, VBA intends to distribute legacy appeals pending in VBA's jurisdiction to its regional offices using the NWQ. The Board does not utilize the NWQ to manage its appeals workload.

14. After appeals reform is enacted, will the Board be able to meet its goal of processing the appeals for veterans who want a hearing within one year?

RESPONSE: To clarify, the average processing goal of one year in the new system is for appeals with no request for a hearing and no additional evidence. However, enactment of appeals reform will dramatically reduce processing time for all appeals, resulting in a better experience for the Veteran, and a much more efficient system. We have confidence that appeals not accompanied by a request for a hearing or consideration of new evidence can be resolved in one year. VA's ability to reduce the overall processing time for appeals will depend on the proportion of cases that come to the Board with a hearing request, a request for consideration of new evidence, or both.

a. If not, what additional resources, such as technology, does the Board need to meet its goal?

RESPONSE: As indicated above, the Board anticipates that it will be able to meet the timeliness goal of an average processing time of 1 year for appeals with no request for a hearing and no additional evidence in the new system.

15. Total number of BVA decisions issued in which at least one claim contained therein was remanded for each of the past three fiscal years (i.e.,

Fiscal Year 2014, Fiscal Year 2015, and Fiscal Year 2016). Please also note the top five reasons necessitating remand by BVA.

RESPONSE: The table, below, provides the number of decisions with at least one remanded issue for FYs 2014 through 2016.

RESPONSE: The table, below, provides the number of decisions with at least one remanded issue for FYs 2014 through 2016.

Decisions--Revised Hierarchy								
Fiscal Year	Decisions	Allowed	Allowed (No remanded issue)	Decisions with at least one remanded issue (Allowances with at least one remanded issue + remands)	Allowed (with at least one remanded issue)	Remanded	Denied	Other
2014	55,536	16,189	8,766	32,703	7,423	25,280	11,935	2,132
2015	55,726	17,281	8,574	34,596	8,707	25,889	10,628	1,928
2016	52,025	16,550	8,099	32,384	8,451	23,933	9,383	2,159

***Note:** Data for this request was pulled from a Veterans Appeals Control and Locator System (VACOLS) report on June 20, 2017, while the decision totals reflected in the Board's Annual Report to Congress are pulled at the end of the fiscal year (FY). VACOLS reports are completed in "real time" and are updated continuously as work process records are updated to reflect current status, reassigned to another employee, cancelled, or completed.

Below are the top five reasons for remand from the Board to the Agency of Original Jurisdiction for FYs 2014–2016:

Year	Reason
2014	VA medical records. Nexus opinion. Incomplete/inadequate findings. Current findings (medical examination/opinion). Private medical records.
2015	VA medical records. Nexus opinion. Current findings (medical examination/opinion). Incomplete/inadequate findings. Private medical records.
2016	VA medical records. Incomplete/inadequate findings. Nexus opinion. Current findings (medical examination/opinion). Private medical records.

Representative Rutherford

16. Please provide the number of appeals decided in the Board of Veterans' Appeals in 2016.

RESPONSE: In FY 2016, the Board issued 52,011 decisions for Veterans and their families.

a. How many were remanded, denied; and, granted?

RESPONSE: See the information, below. The historical reporting system for Board decisions with multiple issues identifies the disposition of an appeal based on the following hierarchy: allowance, remand, denial, or other (i.e., dismissals). When there is more than one disposition involved in a multiple issue appeal the "reported disposition" for Board Statistical Reports will be categorized based on the disposition hierarchy noted above.

Decisions

Fiscal Year	Total Decisions	Percent	Allowed	Percent	Remanded	Percent	Denied	Percent	Other	Percent
2016	52,011	100.00	16,544	31.81	23,926	46.5	9,384	18.04	2,157	4.15

17. Please provide the number of appeals decided in VBA in 2016.

RESPONSE: In FY 2016 VBA decided 202,088 appeals.

a. How many of such appeals were remanded, denied, and granted.

RESPONSE: See the information below.

Decisions	GRANTS		DENIALS	
Fiscal Year	Full Grants*	47,477	Statements of the Case	53,048
2016	Partial Grants	12,672	Certified to the Board**	88,891
202,088	Total	60,149	Total	141,939

**Grants include 6,774 Board remands resolved in the appellant's favor by VBA.*
*** Denials include *27,412 remands re-certified to the Board for a decision after VBA adjudication of the remand.*

