

**BATTLING THE BACKLOG: CHALLENGES FACING
THE VA CLAIMS ADJUDICATION AND APPEAL
PROCESS**

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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BATTLING THE BACKLOG: CHALLENGES FACING THE VA CLAIMS ADJUDICATION AND APPEAL PROCESS

THURSDAY, MAY 26, 2005

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:02 p.m., in room SR-418, Russell Senate Office Building, Hon. Larry E. Craig (Chairman of the Committee) presiding.

Present: Senators Craig, Burr, Thune, Akaka, Rockefeller, Murray, Obama, and Salazar.

OPENING STATEMENT OF HON. LARRY CRAIG, U.S. SENATOR FROM IDAHO

Chairman CRAIG. Good afternoon, everyone, and welcome to the Senate Committee on Veterans' Affairs. We have entitled this hearing, "Battling the Backlog: Challenges Facing the VA Claims Adjudication and Appeal Process."

This afternoon, we will discuss the state of the Department of Veterans Affairs' claims adjudication and appeals system. It is through this system that separated service members must proceed in order to receive VA disability compensation for injuries sustained during military service.

Especially during the time of war, when we have thousands of wounded soldiers returning from the battlefield, it is essential that we ensure there is a system in place that will provide prompt and accurate decisions to those who have served, sacrificed, and suffered for our Nation.

Over the years, there has been significant concern about the backlog of claims in the VA system, the length of time claims remain pending; and the quality of the decisions being rendered. And in recent months, there have been serious questions raised by the press, members of Congress, my colleague who is a member of the Committee and has joined me, VA's Office of Inspector General, regarding the ability of this vast system to provide consistent decisions for veterans across the country.

Earlier this year, Secretary Nicholson testified before this Committee that, as a presidential initiative, improving the timeliness and accuracy of claims proceedings remains VA's top priority for VA's benefits program. And our Committee is also committed to ensuring that we continually strive to improve this system.

To that end, today we will discuss how well the current system is serving our Nation's veterans, what challenges the system is facing, and what steps can be and should be taken to ensure that, now and in the future, our veterans will not endure delays in receiving a fair resolution of their claims.

Joining us for this discussion we have on the first panel the Honorable Daniel Cooper, the Under Secretary for Benefits in the Department of Veterans' Affairs. Welcome, sir. He is accompanied by Ronald Garvin, the Acting Chairman for the Board of Veterans' Appeals. Welcome. And Robert Epley, Associate Deputy Under Secretary for Policy and Program Management for the Veterans Benefits Administration. Bob, welcome.

On our second panel, we will be pleased to have a very distinguished public servant, the Honorable Ken Kramer, who recently retired as the Chief Judge of the United States Court of Appeals for Veterans' Claims; and in a former life in which I first knew him, as a Congressman from Colorado.

We also are pleased to be joined on the second panel by Cynthia Bascetta, Director of Education, Workforce, and Income Security for the U.S. Government Accountability Office; Rick Surratt, the Deputy National Legislative Director for the Disabled American Veterans; and Robert Chisholm, former president, National Organization of Veterans Advocates.

Ladies and gentlemen, we welcome you all. Our Ranking Member has just arrived. While he is getting his house in order, I know that the Senator from Illinois has an appointment awaiting him, so I am going to turn to Senator Obama for his comments, and then we will come back to Senator Akaka, the Ranking Member of the Committee.

Senator.

**OPENING STATEMENT OF HON. BARACK OBAMA,
U.S. SENATOR FROM ILLINOIS**

Senator OBAMA. Thank you so much, Mr. Chairman. Thank you to my wonderful Ranking Member, for allowing me the prerogative of going quickly. I apologize in advance; I am going to have to leave in a few minutes, but will try to get back before the end of the hearing.

I want to thank Admiral Cooper and the other persons on the panel for your appearance and participation in this important hearing.

You know, when we call our armed forces to go into battle to defend this Nation, they don't tell us, "Not now; it is not a convenient time," or, "Call us back in a couple of months; we will be ready then." Instead, what they do is, they respond immediately, and go bravely into battle to fight for our democracy.

Their prompt response to their Nation's call to arms stands in stark contrast to how our Government seems to be dealing with these soldiers when they return home. When veterans ask for their earned benefits, and decide to appeal a decision, they are subject to, on average, a 3-year wait. In fact, some veterans are asked to wait more than a decade to have their claims fully adjudicated.

This doesn't sit right by me. I don't think it sits right by the American people. I know that Admiral Cooper has been working

diligently to try to improve the situation. But part of my specific and particular concern arises out of the fact that there also appear to be large discrepancies between benefits that are paid in various States.

Admiral Cooper, along with Secretary Nicholson, attended a town hall meeting in Illinois this past week to discuss what could be done to improve the variability in rating certain illnesses; particularly those like post-traumatic stress disorder, that may not have objective visible physical attributes.

And the reason I think I am very concerned about how we are moving forward is, number one, that in Illinois, Secretary Nicholson discussed the fact that we may need to look at claims from the past in which Illinois veterans seem to have been shortchanged. And I am going to be working with Admiral Cooper, Secretary Nicholson, and others, to try to figure out how we set that system up.

More broadly, it appears that the claims delays are worse in Illinois and in the Chicago regional office, than they are in other parts of the country. And finally, even where the national average is concerned, it appears to be far too high.

I think that we have a lot of work to do, both specifically to Illinois and across the Nation. We need to shorten the time that it takes to file and appeal a claim. I hope that we can create some standards that create consistency in the disposition of these claims at the end of them.

I have read the written testimony that is being presented. I will be very interested in figuring out how we on the Committee can be helpful to the VA in making significant progress in this area.

The last point that I would make, Mr. Chairman, is that one of the things that happened when Secretary Nicholson was at our town hall meeting in Illinois was an acknowledgement that some of the variability, and certainly some of the delay, had to do with what appears, at least from the IG's report, some under-staffing in some of these offices. When we had discussions during the budget debate about getting more money into the VA, there was a presentation made by the Secretary that in fact we had sufficient money to deal with these claims. Both things can't be true.

If, in fact, part of the problem has to do with the fact that the VA just doesn't have enough personnel to deal with this backlog and get the time for appeals down to the stated goals that have been established, then we have to have that reflected in our budget and that has to be part of the commitment that we make to our veterans.

I don't want to be criticizing a department that is understaffed for not operating as quickly as it should. On the other hand, I expect that department to be honest when it says that it is short-staffed, so that we can get them the resources. And so, to the extent that Admiral Cooper will be touching on staffing issues as part of this whole conversation, I will consider that testimony with great interest. Thank you very much, Mr. Chairman.

Chairman CRAIG. Thank you, Senator.

And now let me turn to our Ranking Member, Senator Akaka. Dan.

**OPENING STATEMENT OF HON. DANIEL K. AKAKA,
RANKING MEMBER, U.S. SENATOR FROM HAWAII**

Senator AKAKA. Thank you very much, Mr. Chairman. I am so happy that we are having this hearing today and having the distinguished witnesses we have. And I am very pleased to welcome back to this Committee Admiral Cooper.

Mr. Epley, I understand that this will be your last time with us. And thank you so much for your service to our Nation's veterans.

Former Chief Judge Kramer, I am very pleased that you have agreed to join us today to give us your special insight into the claims process and how it is working. And we hope to have you make suggestions for improvement.

I, additionally, want to thank the rest of the panel members in advance for testifying before us today. As we all know, the claims process is very important for our Nation's veterans. All veterans deserve no less—no less than quality workmanship done in a timely manner.

Those of you on the second panel have a unique perspective on claims processing, and I am happy that you are here to share it with us today. We plan to use this hearing as an opportunity; an opportunity to hear all angles of the issue.

This hearing will be broadly focused; hopefully, touching on major areas of concern in the VA claims process. The information gathered at this hearing will be used as a basis for more narrowly-tailored hearings in the future.

Along with Chairman Craig, I look forward to building on what we learn today and in subsequent hearings. To date, in fiscal year 2005, 43 percent of the claims reaching the Board of Veterans' Appeals are remanded. These remands worry me because of the additional time it adds to the process. Today, I hope to hear about the causes of these remands, and possible ways to eliminate the errors at the regional office level that are causing the high remand rate.

I also note to Admiral Cooper that your testimony states that delays in remand processing grew as a result of the resource demands of the total growing workload. Admiral Cooper, I would like to work with you to appropriately address this situation.

I want to thank the VA for the proactive steps it has made towards decreasing the delay in standardizing business processes through the creation of the appeals management center and the claims processing improvement model. However, we can all see that there is much more work to be done.

I want to make a few remarks about the recent VA Inspector General's report. The report states that it is statistically impossible for each State to have virtually identical average payments, and that there are numerous factors that affect payments by State. The report says the VA must determine, and I quote, "whether the magnitude of the variance from the highest average State payment to the lowest average State payment is within acceptable limits." I, for one, believe that it is not.

The Inspector General states that some reasons for the payment differential are timeliness pressures, greater experience, and training. These all seem to be personnel and staffing issues that could be fixed if the VA and Congress worked together to allocate the necessary resources.

Another factor stated in the report is subjectivity in PTSD claims ratings. While some disabilities such as PTSD are more prone to subjective rating decisions, such subjectivity adds to the inconsistent decisions. There must be common standards for rating PTSD to ensure fair treatment of our veterans, whether they live in New Mexico or Illinois. But these common standards should not overlook the varying degrees of disability caused by PTSD.

I am happy to know, Admiral Cooper, that you agreed with the review findings and recommendations of the report. I hope that you will periodically inform the Committee on the VA's progress in correcting the problems within claims processing.

Thank you. I look forward, Mr. Chairman, to hearing the testimony of our witnesses.

Chairman CRAIG. Senator Akaka, thank you very much.
Senator Rockefeller, any opening comments?

**OPENING STATEMENT OF HON. JOHN D. ROCKEFELLER IV,
U.S. SENATOR FROM WEST VIRGINIA**

Senator ROCKEFELLER. Mr. Chairman, thank you for having this hearing.

My West Virginia staff, which is a third of my total staff members, spends almost half their time on claims cases having to do with veterans. I will just say, I look forward to the testimony. I understand that there may be some interesting ideas coming out of the testimony. Thank you.

Chairman CRAIG. Thank you very much.
Senator Salazar, any opening comments?

**OPENING STATEMENT OF HON. KEN SALAZAR, U.S. SENATOR
FROM COLORADO**

Senator SALAZAR. Thank you very much, Chairman Craig, and Ranking Member Akaka, and members of the Committee. And to all the witnesses, we look forward to your testimony.

I look forward, as well, to hearing from another Coloradan, former Congressman Ken Kramer, about his thoughts on how we might be able to improve this system.

This is only my fifth month here in Washington, D.C., so I am the number-100 Senator. But this Committee to me is one of the most important things that I work on here. And it is because in Colorado, as I travel around my State, I hear so much from the veterans in Colorado about delays in processing their claims. And like Senator Rockefeller spoke earlier, it is one of the areas that consumes a significant amount of the time in my office.

We can tell the story in the lives of veterans who approach us and tell us about the hardships that are being caused by delays in the processing of their claims, or we can look to the statistics. And when we look at the statistics, I understand we have 340,000 veterans that are waiting for their claims to be adjudicated at this time. And that is up 86,000 from October of 2003.

The average wait for a rating on debated claims jumped from 111 days to 119 days in that same period. And thousands of veterans have waited around as sometimes, from their point of view, they get passed around kind of like an administrative football.

These veterans are men and women who didn't hesitate when our Nation called them to serve. They did not delay when they were ordered to risk their lives for us. Yet we are asking them sometimes to wait years for the benefits that they are entitled to. And so the purpose of this hearing, hopefully, will be to help us work together to figure out how we can do a better job.

An important part of the solution is making sure that the VA has the men and women power and the resources to do their jobs. The Veterans' Administration has not, in my view, properly explained how it will deal with nearly 800,000 claims, when I understand we only have fewer than 9,000 workers to process those claims.

These are claims that are longer and more complex than they were in years past. And I would like Admiral Cooper, in my admiration and respect for you, to explain how you intend to cut into that backlog and to improve the accuracy rates, with the limited resources that you have for this task.

We also need to continue to improve the fairness and efficiency of the system. It is a system that gives to veterans of one State an average of \$12,000, and gives veterans in another State less than \$7,000. We need to understand why that occurs. And my home State of Colorado is below the national average in veterans' compensation.

We need to improve training and communication at the regional offices, to make sure that the system is fair and consistent. We need to continue adjusting the system, from gradual small administrative changes, such as improving quality control measures, to more significant legislative reforms, such as simplifying the appeals process in a way that preserves veterans' rights.

Backlogs and quality control are issues that have bedeviled the VA for decades. These are not new issues. And it is not one that I believe we can solve overnight, but I am hoping that today's hearing and your leadership at the Veterans' Administration will help us move forward in making progress in the resolution of some of these issues.

And finally, let me just note that both Senator Craig, I am sure, and I are delighted with the fact that our good friend and colleague from Ohio, former Attorney General Al Lance, is now sitting comfortably in the Court of Veterans' Claims. And I know that he will do a great job on behalf of veterans in that position. Thank you, Mr. Chairman.

Chairman CRAIG. Senator, thank you very much.

We have been joined by Senator Murray. Patty, do you have any opening comments you would like to make?

**OPENING STATEMENT OF HON. PATTY MURRAY, U.S. SENATOR
FROM WASHINGTON**

Senator MURRAY. I will submit my comments for the record. Let me just join my colleagues in welcoming you all here. You have a tremendous task in front of you.

We are all heading home for the Memorial Day recess. I am sure we will all be talking with troops and observing the holiday over the weekend. We are going to come back and face some serious issues with some of the claims that are pending, and continued

concern from our veterans who are not getting the services they need.

And I think every senator in this entire body has someone working for them full-time helping veterans from their home get through the process. And I think it really behooves all of us to determine how we can get through that and deal with the red tape and the delay in the best way possible for those who have served us. Thank you, Mr. Chairman.

Chairman CRAIG. Patty, thank you very much.

Now, then let's turn to you, Daniel Cooper, Under Secretary for Benefits, Department of Veterans' Affairs. Dan, please proceed.

STATEMENT OF HON. DANIEL L. COOPER, UNDER SECRETARY FOR BENEFITS, DEPARTMENT OF VETERANS AFFAIRS; ACCOMPANIED BY RONALD GARVIN, ACTING CHAIRMAN OF THE BOARD OF VETERANS' APPEALS; AND ROBERT H. EPLEY, ASSOCIATE DEPUTY UNDER SECRETARY FOR POLICY AND PROGRAM MANAGEMENT, VETERANS BENEFITS ADMINISTRATION

Adm. COPPER. Thank you, sir. Mr. Chairman, members of the Committee, thank you for the opportunity to testify today concerning the VA's disability claims process. I am accompanied, by Ron Garvin, the Acting Chairman of the Board of Veterans' Appeals, and Mr. Bob Epley, my Associate Deputy for Programs.

I understand today that your interest is primarily in the disability compensation process. This process is built on a body of law that has evolved over many years. It is complicated, and it sometimes takes longer than any of us wish to reach decisions. But at the foundation, the disability claims process is designed to offer veterans the broadest opportunities and assistance to apply and re-apply for benefits, so they receive their fullest entitlement.

That single concept—the benefit of the doubt for the veteran—frames all of the other elements of our process. In my written statement, I've tried to outline how the disability claims process works; provide some statistics about our performance; and provide some description of the major factors that complicate it.

Over the last several years, several management actions have been taken to improve the process. We have worked to bolster our staffing and strengthen the training we provide to the staff. We have standardized the work process. We have installed significant performance and accountability measures, and we monitor those measures diligently.

These steps have helped. We have stabilized our work, but challenges remain and new challenges continue to arise. One of our biggest challenges is obviously the growth of incoming claims. Almost 2.6 million veterans are receiving disability compensation today, more than at any time in U.S. history.

The number on the rolls is growing at the rate of 5,000 to 7,000 per month. Coincident with this growth, the number of claims we receive each month is increasing, and the number of issues on each claim for each veteran is also rising steadily.

Legislative changes also affect our process. Most notably, the passage of VCAA, the Veterans Claims Assistance Act, had a dramatic effect on our work. This legislation clarified and enhanced

the VA's duty to assist claimants. But it also resulted in a larger inventory of pending work, and it lengthened the process.

In addition, court decisions can affect our claims process. An example of this was the PVA v. VA case, decided in September of 2003. This decision directed that the VA hold open many of our pending claims until one year after the date of claim. It slowed down the system dramatically for about 3 months, until Congress passed amending legislation.

Our appeals process is another key component of this VA disability claims process. Our Board of Veterans' Appeals was established in 1933 to review evidence, to hold hearings, and to render quality decisions on appeals of claims for veterans' benefits. Its function remains essentially the same today.

A claimant initiates an appeal by filing a notice of disagreement with the original regional office. The regional office offers the opportunity for the claimant to discuss that appeal with a decision review officer in that office. Then, if it does not resolve the appeal, the claimant can continue his action by filing a substantive appeal to the Board of Veterans' Appeals.

Claimants also have a right to a hearing on their appeal, and this can be arranged at the regional office, by videoconference, or in Washington, DC, at the Board of Veterans' Appeals. Most appellants choose to be represented before the Board by veterans' service organizations, and many of these organizations have appeals units co-located at the Board here in Washington.

The Board has worked hard to expedite the appeal process, but the process continues to be a lengthy one. Our management improvement efforts include emphasis on resolving appeals at the local level; seeking productivity improvements at the Board, and centralizing the handling of remands.

In summary, our disability claims process has evolved over many years. Its fundamental principle is to make the system work for the veterans' benefit. The process is complicated, and often lengthy; but we continue to look at ways to improve it.

I welcome your interest in processing systems. I look forward to collaborating with you on ways to improve the system so that the veterans continue to see improvements in our service delivery and each veteran can be fully and fairly served in a consistent and timely manner.

I will now be glad to answer any of your questions.
[The prepared statement of Adm. Cooper follows:]

PREPARED STATEMENT HON. DANIEL L. COOPER, UNDER SECRETARY FOR BENEFITS,
DEPARTMENT OF VETERANS AFFAIRS

Good morning Mr. Chairman and Members of the Committee.

I am pleased to appear before you today to discuss the extremely important work of the Veterans Benefits Administration. As you are aware, we administer myriad veterans' programs in VBA. Disability compensation is the one program that probably has the most visibility in the total veteran community and will be the primary focus of my testimony today. I will also briefly discuss several other important programs that directly and deeply affect individual veterans and their families.

In June 1944 President Roosevelt signed the original GI Bill. This landmark legislation gave birth to our VA Education and Home Loan Guaranty Programs. The GI Bill is proclaimed as one of the most important social actions of that century. It underpinned major economic change for the 16 million veterans returning from WWII in the European and Pacific theaters of action, most of whom had never been employed as civilians. Each of those veterans was eligible for educational benefits

and loans for businesses, homes, or farm purchases. Today, our Education and Loan Guaranty Programs remain vitally important to both veterans and active duty servicemembers.

Our Vocational Rehabilitation and Employment Program is directed specifically at veterans who have an employment handicap as a result of their service-related disabilities. We assist these disabled veterans in preparing for and obtaining suitable employment, which often means establishing rehabilitation programs to help them get a better education, obtain basic skills and training, or start a business. For the most seriously injured for whom employment is not immediately feasible, we provide services to help them gain more independence in daily living.

Our Insurance Program is administered by the Philadelphia Regional Office and Insurance Center. We currently have four active insurance plans, the largest of which is the Servicemembers Group Life Insurance (SGLI) Program. The SGLI Program makes life insurance available to every servicemember entering military service. The Philadelphia Insurance Center and the Office of Servicemembers Group Life Insurance have done an extraordinary job in serving widows and other family survivors during Operations Enduring and Iraqi Freedom. Once the Insurance Program receives the necessary paperwork from the Department of Defense, payments to the surviving beneficiaries are made in less than two days.

Finally, our Disability Pension Program is available for wartime veterans who have low income and are permanently and totally disabled.

Today I am here to discuss the largest of our programs in VBA, the Disability Compensation Program. Disability compensation is a monetary benefit paid to veterans who are disabled by injury or disease incurred or aggravated during active military service. The amount of compensation varies with degree of disability and, when appropriate, with the number of dependents. Compensation is paid monthly and is not subject to either Federal or State income tax. The specific amounts paid for each 10 percent step in disability are decided by Congress. Today a veteran with 10-percent disability rating receives \$108 per month. Fifty-percent disabled veterans receive \$663; the 90-percent rate is \$1,380; and the 100 percent rate is \$2,299. Note the much larger jump from 90 percent to 100 percent versus any other 10-percent increment. Those veterans rated 30 percent and higher receive an additional allowance for a spouse and each dependent child.

The recently released report by the Department's Inspector General (IG), entitled, "Review of State Variances in VA Disability Compensation Payments," stated:

"The VA disability compensation program is based on a 1945 model that does not reflect modern concepts of disability. Over the past 5 decades, various commissions and studies have repeatedly reported concerns about whether the rating schedule and its governing concept of average impairment adequately reflects medical and technological advancements or changes in workplace opportunities and earning capacity for disabled veterans. Although some updates have occurred, proponents for improving the accuracy and consistency of ratings advocate that a major restructuring of the rating schedule is long overdue."

The VA Disability Compensation Program has evolved from a long series of legislative actions, spanning most of a century. Each piece of legislation was intended to address a specific need, or the needs of a special sub-population of veterans. The one constant has been Congress' desire to recognize the sacrifice of those who served in uniform.

The incremental legislative process has also had the effect of building an increasingly complicated system. Our Disability Compensation Program recognizes over 110 diseases that are considered to be presumptively related to special military service conditions. These special conditions range from prisoner of war experiences, to exposure to ionizing radiation, to service in Vietnam (with related exposure to Agent Orange).

In addition to these complicating factors, and possibly because of them, the Disability Compensation Program is growing rapidly. Almost 2.6 million veterans are receiving disability compensation today, more than at any time in U.S. history. The number on the rolls is growing at a rate of 5,000 to 7,000 per month. Entitlement to disability compensation drives eligibility to other programs, including VA medical care, vocational rehabilitation, dependents educational assistance, and some home loan and insurance benefits. In addition, recent laws provide for concurrent receipt of VA disability compensation and military retirement benefits. So there are clear incentives for the VA Disability Compensation Program to continue to grow.

All of these laws rightfully serve to benefit our veterans and are extremely important to them. A classic example is the group of laws and rulings related to Agent Orange exposure. Any veteran stationed in Vietnam between January 9, 1962 and May 7, 1975 is presumed to have been exposed to Agent Orange, and any of several

diseases they might have contracted is presumed to be a result of that exposure. The presumption of service connection for type II diabetes, in particular, resulted in over 100,000 individual claims.

In addition, a recent law dramatically changed the business of VA disability claims adjudication. This legislation was the Veterans Claims Assistance Act of 2000 (VCAA). One of its central provisions clarified and enhanced VA's "duty to assist" veterans with their benefit claims. In my opinion, this was a proper and well-conceived law that addressed a deficient process under which VA was previously adjudicating claims. That law clearly defined VA's responsibilities for assisting claimants. It made our adjudicators absolutely responsible for helping each individual veteran know what to do, what is needed to substantiate his/her claim, and how to respond. It also requires that we tell the veteran what we will do to assist him or her.

It was as a result of the VCAA, and the immediate and very rapid accumulation of claims, that Secretary Principi convened the Claims Processing Task Force in May 2001. His charge was to ". . . recommend specific actions that the Secretary (of Veterans' Affairs) could initiate, within his own authority, without legislative or judicial relief, to attack and reduce the current veterans' claims backlog and make claims processing more efficient."

I was asked to chair that Task Force, although I had had no prior experience with VA or with claims processing. However, the Secretary appointed to the Task Force a group of individuals who were extremely knowledgeable and very motivated. In October 2001, we reported out.

There had been many such reports over the years, each with a larger scope; but ours was focused on what could be done—soon and under the purview of the Secretary—without asking Congress to revisit laws or opinions.

The thrust of our recommendations was to improve the efficiency and effectiveness of VBA claims processing. Accountability and integrity were to be absolute. But the engine was uniformity of organization, application, and process. The Task Force was convinced that each of the 57 regional offices operated in ways unique only to that individual office. The Task Force essentially dictated the internal organization of all offices, the IT applications to be used by all, and the standard business processes to be followed in adjudicating veterans' claims. This revised, consistent operational structure is now known as the Claims Processing Improvement (CPI) Model. Additionally, we specifically increased the oversight from headquarters and in the field, and we established measurable goals for which all offices are accountable.

The Task Force also initiated one of the most important and quick-response recommendations, the establishment of a "Tiger Team" in Cleveland, Ohio, whose only task was to address claims which were over 1-year-old, from veterans over 70 years of age. This specialized team has also assisted with our most difficult cases, and continues to fulfill a valuable role.

A primary goal we established, as we made major changes in VBA, was to increase productivity. We did that in somewhat dramatic fashion. In the year 2001, we had completed claims at the rate of 41,000 per month across the country. Last year we produced 63,000 per month. There were many who said we sacrificed quality. That is incorrect; quality improved about 6 percentage points. It is now 86 (plus) percent.

In February 2002, the number of pending claims in our inventory (frequently referred to as the "backlog") reached 432,000. Veterans were waiting 233 days on average for decision on their claims. Over the next nineteen months, through implementation of the CPI Model throughout the entire VBA field organization, we reduced the inventory to 253,000 by September 2003. Even more important, we reduced the time to provide veterans with decisions on their claims to 156 days.

That same month a judicial opinion (*PVA v. Secretary of Veterans' Affairs*) was rendered which stated that we could make no negative decision on any claim issue for at least one year from the date we notify the claimant as to what evidence is needed to support the claim. Three months later, in December, the Congress put corrective language into effect. By that time the inventory reached 352,000.

Another factor that has to date prevented us from reducing the inventory much further is the increasing number of disability claims received each year (674,000 in 2001; 771,000 in 2004; over 800,000 projected to be received in 2005).

A further complicating factor in our process is the number of disabilities (referred to as claims' "issues") veterans are now presenting in each of their claims. Prior to a decade or so ago, VBA estimated there were 2.5 issues per claim. Today we are seeing higher numbers of issues—in many cases, over 10 issues per claim.

Appeals of claims have also measured slightly more than one would expect for the large increase in decisions. That rate too has peaked and is coming back down.

Additionally, remands from the Board of Veterans' Appeals, until just very recently, have been growing. Delays in remand processing grew as a result of the resource demands of the total growing workload.

In October 2003, we established the Appeals Management Center (AMC), which receives all BVA remands. It is responsible for completing all actions possible on these cases, sending only a small number of remanded cases in certain specific categories to the regional offices for processing. VBA and BVA also undertook joint improvement initiatives as a result of a special remand study directed by the Deputy Secretary. Through the AMC and the joint initiatives, we have reduced the number of cases being remanded by BVA, and we are slowly diminishing the inventory of pending remands.

There is also a large body of work activities which are not "rating claims" but which also take our human resources to administer. Not the least of this latter group are Public Contact Teams, whose members provide information and assistance to veterans over the phone, conduct our extensive outreach programs, and take care of the individual veterans who visit our regional offices.

Over the last 3 years of my tenure as Under Secretary for Benefits, VBA has worked hard to achieve consistency across and among all regional offices. As you are aware, consistency in disability evaluations and payments to veterans has become a very visible concern in recent months, and rightfully so.

The IG's recent investigation found that claims involving more objective decisions do, in fact, have close to zero variability. On the other hand, the much harder subjective issues, such as PTSD and other mental disorders, exhibit variability to a degree that leaves open to question the consistency of our evaluations for these conditions.

Through the implementation of the Task Force recommendations, I believe VBA has laid the basic groundwork that will also continue to bring more consistency in our claims decisions. As previously mentioned, we have made all regional offices consistent in organizational structure and work process. Specialized processing initiatives have been implemented to consolidate certain types of claims in order to provide better and more consistent decisions. VBA is now consolidating the rating aspects of our Benefits Delivery at Discharge initiative, which will bring greater consistency of decisions for newly separated veterans.

Training, both for new employees and to raise the skill levels of the more experienced staff, is obviously key to consistency in our rating decisions. VBA deployed new training tools and centralized training programs that support greater consistency. New hires receive comprehensive training and a consistent foundation in claims processing philosophy and principles through a national centralized training program called "Challenge." After the initial centralized training, employees follow a national standardized training curriculum (full lesson plans, handouts, student guides, instructor guides, and slides for classroom instruction) available to all regional offices. Standardized computer-based tools have been developed for training decision makers (53 modules completed and an additional 38 in development).

Training letters and satellite broadcasts on the proper approach to rating complex issues have been provided to the field stations. Regulations that contain the Schedule for Rating Disabilities are being revised to eliminate ambiguous rating criteria and replace them with objective rating criteria wherever possible.

We have stressed giving the "benefit of the doubt" to the veteran, and every regional office has improved. The average annual amount a disabled veteran receives in each State has increased above the rate of economic increases.

While we have made major improvements and laid a strong foundation, the Veterans' Benefits Administration continues to face significant challenges. The payment variance issue is difficult and complex; our every effort is to be fair and consistent to all veterans, no matter their disability or state of residence. We obviously must continue to improve the consistency of disability rating decisions, and we must take immediate steps to correct any deficiencies in the adjudication system that contribute to inconsistent rating decisions. The Inspector General's report has given us a comprehensive assessment of the many factors that impact this complex issue; and there is still much work to be done to better understand the regional variance in VA compensation payments. Our challenge is to ensure that all regional offices are generating consistently accurate and timely decisions that provide the maximum benefits to which veterans are entitled.

I believe we must also streamline the appeals process. Any assessment of the current appeals process raises serious questions about its effectiveness. As many reviews of the appeals process have concluded, it lacks finality. The policy and process for addressing appeals are provided in statute and regulations, drafted and implemented at different times in history, resulting in a complex process that consumes a large and increasing portion of finite claims processing resources. The process can

be improved, and veterans and taxpayers can be better served. While VBA shares the greatest responsibility for ensuring that the process is fair and timely, streamlining the process will depend on increased coordination among the various elements within VA as well as cooperation of stakeholders.

We are continuously challenged to produce more with fewer resources. In this era of declining resources across all Federal agencies, we will be even further challenged to increase the efficiency of our claims processing system. This task is made more difficult by the ever-growing complexity of the laws and regulations governing our adjudicative process and the fact that veterans today claim more disabilities than ever before. We need to continue to make changes in our processes, supporting technologies, and organizational structures that enable us to produce more and better decisions with fewer resources.

The delivery of benefits to veterans and their families is supported by legacy systems that are not interoperable and cannot be easily modified to add or enhance applications. Applying the potential of today's technologies to our business processes is also a major challenge and one we are addressing. Our most immediate technological challenge is to migrate benefits processing from the Benefits Delivery Network to the VetsNet corporate environment. However, we must also continue to work to more fully integrate IT into our daily business processes and explore the potential that technology offers for expanding the services and access provided to veterans.

VBA has dedicated and committed employees across this Nation who have proven that they are up to these challenges. I am certain the changes we have made and will continue to make, the training we have done and still need to develop and carry out, as well as the oversight we conduct, are making a real difference for the veterans we serve.

Mr. Chairman, as the Secretary's representative before this Committee today, I want to also talk about the work of the Board of Veterans' Appeals.

The mission of the Board has remained unchanged since its inception in 1933—to hold hearings and render quality, timely, and final decisions in appeals of claims for veterans benefits. The vast majority of appeals involve claims for disability compensation benefits, such as claims for service connection, an increased rating or survivor's benefits.

The initial decision in benefits claims is made by the Agency of Original Jurisdiction or "AOJ", typically one of VA's Regional Offices or Medical Centers. If that decision is unfavorable, the claimant may initiate an appeal by filing a Notice of Disagreement. If the appeal is still not resolved, the AOJ will issue a Statement of the Case, explaining the rationale for its decision. The claimant then has 60 days from the issuance of the Statement of the Case to file a Substantive Appeal or VA Form 9 to the Board of Veterans' Appeal. At this point, the claim is assigned a place on the Board's docket, although it still remains under the control of the AOJ, where further development and consideration may be required. As claimants have the right to a hearing on appeal, the Board will conduct "Travel Board" hearings at Regional Offices or videoconference hearings, with the claimant at the Regional Office and the Veteran Law Judge presiding in the Board's offices in Washington, DC. Ultimately, if the claim is not fully granted at the AOJ, and after any requested Board hearing has occurred, it is then certified and the record transmitted to the Board. At this point, the Board has jurisdiction over the appeal.

By law, the Board generally must review appeals in docket order. The vast majority of appellants are represented before the Board by veterans service organizations, many of which have appeals units co-located with the Board. They provide representation at hearings at the Board's offices and submit briefs in support of the appeal.

Once the representative completes his or her presentation, the Board reviews the appeal, thoroughly considering all evidence and argument presented and all applicable laws, regulations and other legal precedents. Board review is *de novo*—it is based on a fresh look at the case. The Board will then issue a written decision. The Board may allow or deny a benefit sought, or, if additional development is necessary or a procedural defect needs to be cured, it must remand the case back to the AOJ to fix the problem. If the Board denies the appeal, the claimant's remedies include filing a Notice of Appeal with the United States Court of Appeals for Veterans' Claims.

Information is collected throughout the appeals process, from the filing of the Notice of Disagreement to the final resolution of an appeal, and is tracked in the Veterans' Appeals Control and Locator System, or VACOLS. This database enables VA to collect statistical data on every stage of the appeals process, both at the AOJ and the Board. It enables VA to measure performance both currently and over time.

For example, using the VACOLS data, VA can determine the elapsed processing time for each segment of the appeals process at each AOJ and the Board. VA tracks

appeals resolution time—the time it takes from the filing of the Notice of Disagreement until the claimant receives a final decision on appeal. The Board measures cycle time—the time that it actually takes the Board to issue a decision (excluding the time the case is with the service organization representative). The Board also records decisional quality and the reasons for remanding cases to the AOJ.

The Board's performance, as reflected by the VACOLS data, has improved over the years. For example, in Fiscal Year 1994, the Board issued about 22,000 decisions. The Board's pending caseload stood at 47,000, and the measure of timeliness then used—average response time—was 781 days.

By Fiscal Year 1998, the Board's timeliness markedly improved and the pending caseload was down to less than 30,000 cases. The Board issued 38,886 decisions, and held 4,875 hearings. Appeals resolution time was 686 days.

In fiscal year 2004, the Board issued 38,371 decisions. The Board also conducted 7,259 hearings—a substantial increase from 1998. Appeals resolution time decreased to 529 days. Cycle time was reduced to 98 days. Cases pending at the end of fiscal year 2004 stood at 28,815. And the Board did this with 43 fewer FTE than in 1998.

The Board made these improvements despite several significant challenges, including the impact of the Veterans' Claims Assistance Act of 2000, and the initiation and termination of evidence development at the Board due to the decision of the U.S. Court of Appeals for the Federal Circuit in *Disabled American Veterans' Principi*.

The Board did not do this alone, but had much help from:

- The Congress, providing unqualified support for the appellate rights of veterans and their families.
- The veterans' service organizations, which represent about 85 percent of appellants before the Board.
- VA leadership, that supports improvements in the appeals process to ensure that veterans receive timely and quality decisions.
- The staff at the Board, including the Veterans Law Judges, counsel, and administrative support staff. Through their efforts, productivity increased, over historic levels, by 20 percent for staff counsel, and by 25 percent for the VLJs. The number of hearings held also increased, with videoconference hearings nearly doubling since fiscal year 1998. Finally, the average number of decisions per employee increased from 49.9 in fiscal year 1994 and 80.5 in fiscal year 1998, to 87.3 in fiscal year 2004.

Two of the most significant and persistent challenges faced by the Board are:

- Eliminating avoidable remands, and
- Increasing productivity to contain and reduce the appeals backlog.

In regard to remands, the Board knows that:

- Veterans want timely and correct decisions on claims for benefits. In order to do that, the record must contain all evidence necessary to decide the appeal and show that all necessary due process has been provided. If the record does not meet these requirements, and the benefits sought cannot be granted, a remand for further development is necessary.
- Remands significantly lengthen appeals resolution time. A remand adds about a year to the process. Remands also divert resources from processing other claims and appeals.
- The Board is working with VBA, OGC and VHA to identify and track root causes of remands, to provide training, and, ultimately, to eliminate avoidable remands. The results are already encouraging, with the remand rate for the first part of fiscal year 2005 dropping to 42.6 percent, as compared to 56.8 percent in fiscal year 2004. For February and March 2005, the remand rate was even lower at 38.4 percent. In April, it was down to 36 percent.

If nothing is done, the Board's backlog is projected to grow to unacceptable levels. The backlog disposition time—the projected time it would take the Board, working at its current rate, to eliminate the backlog—would increase from 170 days in 2004, to 391 days in 2006, and to nearly 600 days in 2008.

Through incentives and sound management, the Board has beat past projections, and will continue to do so by:

- Eliminating avoidable remands: About 75 percent of cases remanded are returned to the Board, which increases the appellate workload and degrades timeliness. A 50 percent reduction in remands in fiscal year 2005 could reduce appeals resolution time by as much as 25 to 30 days.
- Strengthening intra-agency partnerships: Joint training efforts with VBA, OGC, and VHA, will improve decision quality and reduce remands and appeals.
- Writing shorter and more concise decisions: The Board is training its Veterans' Law Judges and counsel to write shorter and more concise decisions.

- Utilizing employee incentive, mentoring and training programs: A number of new programs have been introduced to increase employee motivation and satisfaction, as well as to increase productivity and decision quality.
- Making use of overtime: The Board will use overtime within existing resources to enhance productivity.
- Increasing use of paralegals: The Board will increase the use of paralegals for non-decisional support activities.

The Board believes these measures will work to reduce the backlog and shorten the time it takes for a veteran to receive a well-reasoned and final Board decision. Already, VA has reduced the time it takes for an appeal to be finally resolved from 686 days in fiscal year 1998, to 529 days in fiscal year 2004. Decision quality at the Board has improved from 88.8 percent in fiscal year 1998 to 93 percent in fiscal year 2004, and the Board's cycle time is a little over three months.

The Board of Veterans' appeals will continue working to develop new and creative solutions to the challenges faced in order to fulfill its statutory mission to hold hearings and provide timely, high quality decisions to the Nation's veterans and their families.

Mr. Chairman, this concludes my testimony. I greatly appreciate being here today and look forward to answering your questions.

Chairman CRAIG. Thank you, Mr. Secretary. Are claims filed by veterans decided on a first-come, first-served basis?

Adm. COPPER. Not specifically. The fact is, when Senator Rockefeller chaired the Committee during my confirmation, just after we had completed the study, I explained how we were going to change the system. One component we have is a "triage." With triage, we look at every claim that comes in to see if we can satisfy it immediately, rather than delay resolving it.

If we cannot render an immediate decision, we move on to our next processing step, predetermination. We review the claim and send a VCAA letter back to the veteran explaining exactly what we can do and exactly what he or she should try to do, and what type of information is needed to process his or her claim.

We then send out for the other information we need. When it comes in, we compile the information and someone works the claim.

For those severely disabled coming back from OIF/ OEF, we have set up what we call "seamless transition". When they come back and while they are still in the service, we try to adjudicate the claim, so that on the day they leave the service, the day that we get the DD-214, we will finalize the claim and, within approximately 30 days, they will receive their first check. Similarly, with the National Guard and Reserve, we try to process their claims as fast as we can.

And finally, for all people who are leaving the service, from whatever place, we try to have what we call "benefits delivery at discharge." In that system, we request/suggest that, if they can get their discharge physical exam—and we will help them arrange to get the exam—then we will start processing the claim, with the hope that we can have it done by the time they are discharged. And that is a system that we are trying to expand, so we can get those people as they leave.

With those exceptions, claims that come in are processed on a first-come, first-served basis.

Chairman CRAIG. So you are telling me a young man or woman coming out of Iraq, injured, ultimately discharged from active service or the Guard or Reserve, by the process you have set up, goes to the front of the line?

Adm. COPPER. Essentially, goes to the front of the line. That is correct, yes, sir.

Chairman CRAIG. OK. Many attempts have been made over the past decade to fix the delays in the claims processing system. More money for staffing has been provided; different management techniques—you have discussed some of those—under both Democrat and Republican Administrations have been employed.

I am looking at the numbers here. During the Bush years, we have increased funding by about 40 percent, 44 percent in this area. This year's budget is awfully close to the independent budget, at about 28 percent increase. And yet, the lines seem to keep building.

What haven't we tried? And is there something in the law that can be changed to produce a swifter, more accurate decision-making process?

Adm. COPPER. First, let me say, if I knew what we hadn't tried, I would have certainly made a great effort to try it.

When Secretary Principi asked me to head a taskforce, he told us specifically, "I want you to look at everything under my purview, the changes we can make to do this thing properly." We certainly attempted to do that.

I think that the Commission on Disability Claims should be looking at the entire process, and trying to understand the overall process rather than focusing on its component parts. Some of those things will be controversial. But I think the Commission needs to study it thoroughly, and then come back with recommendations.

There are obviously things that make the process longer. But everything that is in, the law that has been passed, every judgment that has been made, in fact has been for the benefit of the veterans, as it should be. It occasionally takes us too much time to try to understand precisely how to implement it.

Chairman CRAIG. Thank you very much. Let me turn to Senator Akaka.

Dan.

Senator AKAKA. Thank you very much, Mr. Chairman. Admiral Cooper, it is anticipated that one in five service members returning from Iraq and Afghanistan will suffer from some form of a stress-related disorder. According to last week's VA Inspector General report, stress disorder claims are more subjective judgment and create disparities among veterans receiving these benefits. What can be done to establish a more consistent standard for awarding disability payments for mental disabilities?

Adm. COPPER. I think one of the things that the Inspector General stated was he was bothered by the disparity from one State to another in the rating of claims for PTSD.

He also was very concerned by the fact that he looked at 2,100 records that were rated at close to 100 percent due to PTSD or individual unemployability, IU. What we are going to do, starting a week from Monday, is to call in all of those cases that he saw, the 2,100, in which he didn't think the stressors were properly shown.

In order to process a PTSD claim, you first have to find a time in the service in which the veteran was exposed to something, or a series of things, that would be considered the stressor. Then you determine the degree of disability for PTSD. So there is essentially

a two- or three-step process to go through. The final disability rating itself is predicated upon the medical examination.

One of the main things the Inspector General found was that our people had not always listed the proper stressor, or identified it in such a way that he thought was appropriate. Therefore, we feel it is very important that we review all 2,100 of these to make sure that they are properly adjudicated. If they are not, if the stressors are not appropriate, we will go back to the veteran and work with him or her, and work with the VSO representative and ensure that we get it right.

During this process we will attempt to get a template that will help us review all of our PTSD cases, to ensure that we have adjudicated them properly.

Simultaneously, we are working with VHA, to ensure that proper medical templates are available for them to do the medical exams, which will then allow VBA to establish the degree of disability.

Senator AKAKA. Admiral, claims must be reviewed with standard practices and procedures across all 57 ROs. What is VA doing to ensure that there is a consistent level of training for all claims processes across all VA region offices?

Adm. COPPER. Training is very important, as you know. And with my background as a nuclear submariner, I strongly believe in training. We have pushed training fairly hard over the last 8 months. That is why I have imposed certain training requirements in each regional office. But more than that, we have computer modules that we use to train our workforce in different aspects of claims processing.

We also have centralized training. When we hire new veteran service representatives or rating veteran service representatives, we put them through centralized training, and try to ensure that training continues when they return to their regional offices.

I have also required the regional offices to send me reports concerning the training they have carried out and the degree to which they have followed our requirements on training.

Finally, I would say to you that, we have improved our quality review program. Before we established the claims processing taskforce, evaluation of quality was much more localized. We immediately decided to centralize quality review at one location in Nashville. That gives us a good idea of how well each of the 57 regional offices is doing.

When we identify weaknesses or problems, we provide specific feedback to the regional office. And I expect them to stress that in their training, ensuring that they correct the problem.

Senator AKAKA. Mr. Chairman, my time is nearly up. I have other questions.

Chairman CRAIG. OK. We will come back for another round.

Senator Rockefeller.

Senator ROCKEFELLER. Thank you, Mr. Chairman. I didn't intend to ask this question, but the thought of trying to go back and determine when the stress in combat—either as it relates to mental illness, which I think Senator Akaka was referring, or to PTSD—occurred, is complex, I think you would agree.

Adm. COPPER. Yes, sir.

Senator ROCKEFELLER. Because, first, it implies that stress may not be accumulated, but it may have arisen only because of a series of episodes.

Adm. COPPER. Yes, sir.

Senator ROCKEFELLER. Maybe some episodes one year, some another episode the next year. One of the great experiences, or the bad experiences, of the Gulf War Syndrome PTSD awakening was that it was very much accumulated—at least, that is the way I saw it—that it wasn't necessarily episode based; that episodes sometimes lingered simply because of the memory of them, even though the episode itself had stopped. I am just interested in the formulation of how you determine an episode for PTSD or a stressor.

Adm. COPPER. The veteran is usually the one that says, "I received a stressor at this time, or with this unit, during this period." There are other forms of evidence, by the way, such as a combat medal that he might have gotten.

The VSOs help us verify the evidence. There is also an organization down at Fort Belvoir called "CURR." We go to them and make sure, for example, that the veteran was a member of a unit, that was in fact where he said it was and was in a firefight. There are certain very specific requirements and steps we must follow to ensure that we establish the stressor.

Senator ROCKEFELLER. Do you remember what I refer to as the "Zumwalt result"? And that was during the Vietnam War. Agent Orange was used and it seems to me that it would have been very difficult, since it was used quite a lot during certain definable periods. Soldiers were the recipient of it. The Congress didn't know what to do about it and the Administration wasn't doing anything about it.

It has always interested me—not happily—that it was when Admiral Zumwalt's son developed cancer from Agent Orange that the Congress decided that we had just better take on Agent Orange in general, almost as if it was a presumption, if you had cancer and you had been at some time exposed.

That is a problem which is easier within the coal mines, but is not done within the coal mines. Ken Salazar and I would probably agree that if you have been working underground—I guess you don't do that in Colorado—if you have been working underground for 10 years and breathing the dust, there is a presumption after 10 years that you have black lung, and the Government kicks in. Now, the Government and the Congress, in our lack of wisdom, only reimburse 4 percent of those who we believe have black lung—money problems. But stress is hard to measure.

Adm. COPPER. Yes, sir.

Senator ROCKEFELLER. In the measuring of it, I am sure the expense goes up as a result. But in the measuring of it, also, the expense goes up as a result of trying to measure it, and perhaps inaccurately.

I don't actually ask for a question, because I think it is not a fair question to you; but if you had any thoughts, they would interest me.

Adm. COPPER. I honestly cannot talk to you about measuring the effect. I can say that, in order to start the claim for PTSD, a

stressor is the component you need. You have to have a stressor for PTSD. That is pretty well laid down.

My immediate concern is that we inappropriately identified a condition as PTSD, when it might be something else. No doubt, the people are ill. The issue is whether the cause is PTSD. We had not recorded the stressor, according to the IG, in 25 percent of the cases. I need to solve that problem and ensure we do that part properly.

And as we do that, then we are working with VHA to make sure that we have proper templates for evaluating PTSD. I am afraid I didn't answer your question exactly, but I was trying to make a point.

Senator ROCKEFELLER. No, but you have been honest in approaching it, and I appreciate that.

Adm. COPPER. Thank you.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

Chairman CRAIG. Senator, thank you.

Senator Salazar.

Senator SALAZAR. Thank you, Mr. Chairman. Admiral Cooper, two questions. First, with respect to the Veterans Disability Benefits Commission, what kind of guarantees can you give to this Committee that it will be a credible effort? Within some of the communications that I get in my office there have been concerns expressed that the Commission has been created simply as a thinly-veiled effort to try to cut back on veterans' benefits.

I think that it is always a worthwhile effort for us to examine our processes and to make sure that we have credible efforts. And I believe that this is a credible initiative, but I would like you to tell us what kind of assurances you can give us on that.

And then the second question that I would like you to respond to just has to do with the manpower at the VBA, with 800,000 claims pending and with the manpower that you have assigned to processing those claims; a comment on whether or not you believe we have enough resources focused in on the problem.

Adm. COPPER. Let me talk about the President's Commission. Quite frankly, since I am not of member of the Commission, I can't guarantee anything. I've talked to them when they've asked me to come, and the next time they meet, I am going to be talking to them about claims processing.

I have been very impressed with the chairman, General Scott, and I have seen them in action. Mr. Surratt, who will testify next, might be able to give you better insight. They certainly seem to be listening carefully.

I do not know exactly what experience everybody has. Again, I imagine Mr. Surratt probably has more experience than anybody. But it looks to me like it is a balanced group of intelligent people who want to do what can be done.

We support them, but we are very much "hands-off." If they have questions, we answer them at open hearings and that sort of thing. So I can't give you a guarantee, but it looks to me like it is a professional group that has been put together.

It looks to me like they tried to do what could be done to get people across a broad range. I think one of their requirements was that a certain number had to have a combat medal—and I forget

which one it was—but something that indicated that they had in fact been in combat. That is about the best answer I can give you on that.

As far as manpower goes, you know, we put together a budget 2 years in advance. As a result, when we get an influx of claims—it went up 5 percent last year and it looks like it is going up 5 percent again this year—we have to go through a very careful process to ensure adequate resources. We are doing that now.

I cannot give you a specific answer. I am talking to the Secretary about this. And that is really the best answer I can give you right now.

Senator SALAZAR. Let me just follow up with a question on that, then. If claims are up 5 percent last year, another 5 percent this year, we have a 10 percent increase; and yet the manpower within the VBA has not kept up at that same proportion. I am certain it has not grown by that level of 10 percent.

So in your own mind and in your own calculation, what additional resources would you need to be able to process those claims in the kind of timely and prompt manner that I am sure you would want to?

Adm. COPPER. Again, I can't give you a number. We would have to look at it. The IG report certainly indicated that the people working out there felt we needed some more. I haven't looked at that that closely. But I would like to make one—

Senator SALAZAR. Can I just follow up?

Adm. COPPER. Yes, sir.

Senator SALAZAR. When would you be in a position where you could provide that information to at least this Senator, and probably this Committee? I think it is an issue that we would very much want an answer to.

Adm. COPPER. Yes, sir. And my answer, honestly, would be that after I talk to the Secretary and we look at this together and talk it through.

Senator SALAZAR. So over the next several months, next several weeks?

Adm. COPPER. I can't answer that question. We will be talking fairly shortly about the IG report. He and I went out to Illinois last week. So it is an ongoing process. I am talking with him; I am talking to the Deputy Secretary about this. And I cannot give you a specific time.

Senator SALAZAR. What I would like to do, Admiral Cooper, is to have you get to us the information that essentially describes what the gap is in resources that you need to effectively process these claims—

Adm. COPPER. Yes, sir.

Senator SALAZAR [continuing]. Given the unanticipated surge that we have had in both last year's claims and this year's claims. And I am sure that, I mean, since you are working at it—

Adm. COPPER. Yes, sir.

Senator SALAZAR [continuing]. At the appropriate time, if you would get that information to us, I very much would appreciate it.

Adm. COPPER. Sure. Could I please address one more thing?

Senator SALAZAR. Yes, sir.

Adm. COPPER. You mentioned in your discussion that our workload increased by 80,000 cases since September of 2003. September of 2003 was the time that the court made the decision that, for 3 months we could not make any decisions that were negative. In other words, if a veteran had an issue and we found—let's say he had five issues, and we had two of them we could find affirmatively, and three of them we had to say "No." We could go back with the two affirmative; we could not go back with the three to say "No." And that happened for 3 months.

And by the end of that 3 months, we had gone from 253,000 to 352,000. Today, we are at 340,000, and I am having difficulty getting that down. But I wanted to put it in context, because that jump was for quite a specific reason.

Senator SALAZAR. OK. Well, I thank you for that.

Adm. COPPER. That does not remove my problem, but I just wanted to put that in perspective.

Senator SALAZAR. Thank you very much, Admiral Cooper.

Adm. COPPER. Yes, sir.

Chairman CRAIG. Thank you.

Senator Murray.

Senator MURRAY. Thank you, Mr. Chairman. Admiral Cooper, we have in Washington State thousands of guardsmen and reserves who are coming home now. And I am very concerned about the limited access to the VA the 2-year period will have on their eventual compensation. Are you concerned that that short amount of time will limit their ability to assess their injuries and get compensated?

Adm. COPPER. I think your question addresses the medical treatment that they get for the 2 years. That should not affect any claim they make to us. We should be able to handle their disability claims in a very appropriate time. Unfortunately, our processing time is too long right now, but we should be able to handle them appropriately and to our best ability. That 2-year open period to use medical services should not impact my work at all.

Senator MURRAY. And to be able to give them compensation?

Adm. COPPER. Yes, ma'am.

Senator MURRAY. OK. Can you tell me, there is not a large number, but there are a number of veterans who are maybe winning a case, but dying before receiving compensation. And Secretary Principi had told us the VA was going to examine whether that law should be changed to allow the estates of veterans to collect back benefit awards. Is that something that you are still considering?

Adm. COPPER. I am sorry, I have not been involved in that. I cannot answer that question. I am not aware of anything going on right now. However, one of the things we did do, coming out of our taskforce, we established a "tiger team" in Cleveland, looking at, particularly at that time, veterans who were at least 70 years old and had a claim pending for more than 1 year.

I think there were 10,000 to 12,000 at that time. That is now down to about 2,000.

Mr. Epley maybe can add to that.

Senator MURRAY. OK.

Mr. EPLEY. I think that we can address it partially, Senator. There have been laws on the books for years that allow us to pay

accrued benefits if a veteran had a claim and all the evidence was in the VA's hands at the time the veteran passed away.

There has been until recently a 2-year limit on the accrued benefits, but I believe a year ago Congress passed legislation to liberalize that and extend it.

Senator MURRAY. OK.

Adm. COPPER. I am sorry. I had forgotten that.

Senator MURRAY. OK. Very good. I would like to ask if you are noticing whether any of our veterans are seeking less medical care once they are determined to be 100 percent disabled?

Adm. COPPER. I, personally, cannot address that. That, of course, is what the IG said. The IG seemed to feel that there was a certain percentage of those they looked at who had not gone back for the PTSD treatment. But I can do no more than look up what the IG said.

Senator MURRAY. So you don't know whether it is true or not? You just have the IG report?

Adm. COPPER. I have the Inspector General's report. I have no reason to think that what he said is not true. I just don't have any personal knowledge.

Senator MURRAY. OK. Well, let me then ask you what lessons you think we can learn from the current appeals process, so we can make sure that our servicemen and women don't go through this grueling process 20, 30, 40 years from now.

Adm. COPPER. I would say the Presidential Commission has to look at the appeals process and determine what can be done to improve it. I want to reiterate that everything that has been done has been to help the veterans and to make sure they get a chance to provide evidence to support their claims.

It is more difficult if, during the appeal process a veteran submits new information to BVA. There is a concern whether there should be some kind of a limit on how often, how long in the process, more information can be added?

What I would like is to have all the information come to us, and let us make the decision. Now, there may be many reasons for not closing the record, and I am not judging that. I am merely saying that that is something that at least should be looked at.

Senator MURRAY. OK.

Adm. COPPER. A second thing is, the average you see is an average time for processing a claim. Over the last few years we have gotten claims from veterans from World War II.

These claims take more time because we have to retrieve their records from the Records Maintenance Center. It is very difficult sometimes to get records. That extends the process.

Senator MURRAY. So are we doing something right now with the soldiers who are returning, to have their records be in a better spot, in a better place, and better accessible?

Adm. COPPER. Yes, we are. We have our own records center, a records center for veterans that we started up about 13 years ago in Saint Louis, called "Records Maintenance Center."

The third thing that I think is really important, and the thing that I am pleased with, is our benefits delivery at discharge program. If we can get the individual the minute he leaves the service, we then have his record, we have his first claim, and we have

whatever is needed to adjudicate the claim. And then later on, if he reopens his claim we have the record readily available.

One of the things we have done to better utilize our personnel resources is to have two primary adjudication centers. We take claims in 140 separate benefits delivery at discharge sites. We will send them to one of two places—Salt Lake City, Utah or Winston Salem, North Carolina—and have them adjudicated. That should give us more consistency and help us make better use of the people we have.

That is one thing we are trying to do to improve processing. I really think that getting these claims as soon as the person is discharged is important. The second point I would make is that we are working with OSD now to a degree I have not seen before, so that they will help us, in getting the records. I can foresee that, within a few years, we will be able to electronically get records from OSD that will further expedite the system.

Senator MURRAY. OK. Thank you very much, Mr. Chairman.

Chairman CRAIG. Patty, thank you very much.

Senator, Burr, questions?

Senator BURR. Thank you, Mr. Chairman. Admiral, I am going to be somewhat pointed, so please don't take it personally. My colleagues have been very kind in the way they have stated some things. Do we have a problem?

Adm. COPPER. Yes.

Senator BURR. When are we going to fix it?

Adm. COPPER. That's a harder question. The fact is, we have been trying. We have been doing a lot of things to improve the process. We have been doing a lot of things to get consistency. We are looking at several different things to attempt to resolve the problem.

Senator BURR. I asked both the Secretary in his confirmation hearings and Dr. Perlin when he came before the Committee, looking at the veterans that are going to be coming back, looking at the amount of deployment, if we looked at the resources that we are going to need to take care of this population—

Adm. COPPER. I believe that we will be—I'm sorry.

Senator BURR. Well, let me just say this. Their answer was "Yes."

Adm. COPPER. I believe we have the resources to take care of them as they are going through the seamless transition or benefits delivery at discharge. But right now that is a small percentage of the case load.

More than half—57.9 percent, I think was the amount—of claims we get are reopened claims, from veterans who have already gotten their initial claims decision and are coming back, either because they have other conditions that they think are a result of their service—or their condition has deteriorated.

Senator BURR. And I understand that, and I think every member understands that. And, we are willing to work with you for whatever tools or changes you need to be able to handle that. Because we give them that right.

Adm. COPPER. Yes, sir.

Senator BURR. And that may be the subject of discussion in this Committee, as to whether we change that. But I guess my point

is, have you got the resources you need to be able to handle the claims?

When I ask about North Carolina—I happen to be that Winston Salem connection, as you know—North Carolina is now the No. 1 spot for military retirees in the country, enough so that we have nine new clinics at least targeted. Given the trend, I know we are going to need them.

Given your trend of increases in claims, I guess my question is simple: Are we asking for everything we need to be able to handle something that is not going to change short term, and probably not going to change long term, given what we know today?

Adm. COPPER. My answer is that we are going through the process right now to figure out what resources are needed. I am working with the Secretary. I do not have a specific answer.

Obviously, if you increase claims 5 percent every year, and if I am going to review lots of records, as required by the IG report, then I think it is pretty obvious that I am going to be stretched pretty thin.

I would like to say that, we have very good people, and we hold them to good standards of accountability. I am sorry Senator Rockefeller isn't here because, at my confirmation he said, "Well, what are you going to do if people don't carry out this plan that you say you are proposing?" And I responded that I would allow them to broaden their horizons and find jobs somewhere else. And we have in fact in a couple of cases done that.

I think we have done many things to ensure that we operate as efficiently as we can, and continue to look at what more we can do. BDD being a primary example. We are also looking at consolidation of some activities that will help us be more efficient.

Senator BURR. And the one thing that I would like to stress on you and those individuals involved is that there is somebody, if not multiple people, in our offices that lives each one of these claims with each one of these veterans. Some are handled quickly, and we are heroes. Some are a little more difficult and, because of the good people you have and the good people we have, we find some resolution to it, and all parties are happy.

You know, the only ones that are troubling are the ones that you can't seem to resolve. I know that has to be frustrating for you, but it is extremely frustrating for us. And I don't think that we can touch the frustration level of the veteran. That process that may go from BVA to the appeals management center, only to never be heard from again.

I have one that my staff shared with me this morning that has been at the appeals management center since the mid-part of 2003. Now, I don't know whether that is a process problem; I don't know whether it is the intricacies of the case. But that is an impossible thing to explain for 2 years.

Adm. COPPER. And I would say our goal is to treat every veteran as an individual. I emphasize to my people that we must treat each and every veteran individually.

I would like you to give me the name, and I will find out the status of the claim.

On the other hand, we have to remember that every claim and every issue is not necessarily satisfactorily resolved, because there

are differences of opinion. It may be that we cannot tie a particular ailment to service. We always have to have a nexus, a connection to something that happened in service or got worse while that individual was in the service.

Sometimes when I hear about a case that went to a regional office and they said "No" on that issue, and then the DRO said "No" on the issue, and a third time we said "No," and then we sent it to BVA and they said "No," somewhere in there I have to think maybe the claim was not a valid claim, for whatever reason. This is a difficult, complex process and we will continue to do everything we can to do it right.

Senator BURR. And I can only speak for myself, but let me assure you that the individuals that are denied are usually the ones that my staff asked me to call.

Adm. COPPER. Yes, sir.

Senator BURR. So they talk to us after they have talked to you. We are the ones that try to explain that there is a point in time where everything has been exhausted. So we are not disconnected from the stress or the emotion of what these individuals go through.

I had one last question, but I am going to give it to you in the form of a suggestion.

Adm. COPPER. Yes, sir.

Senator BURR. And that is, I know you have got to get back to us on staffing and on funding. But let's make sure that those claims officers have the training, have the continual education that they need to deliver that constituency accurate decisions.

I think there can be a tendency to bring good people in and not to allow them to continue to grow, because we either, don't provide the education or the training, or we just don't provide the time for them to take advantage of the education and training. And I think when you look at every successful model around, you find if that is eliminated your level of success continues to decline.

Adm. COPPER. I absolutely agree.

Senator BURR. I thank you for being here today.

Adm. COPPER. Thank you.

Senator BURR. Thank you, Mr. Chairman.

Chairman CRAIG. Thank you, Richard.

Admiral, I asked you the question about today's soon-to-be or are-now-just veterans coming out, and you said they move to the front of the line. What happens if it is 6 months or 7 months out when they decide they have a problem and they apply to the VA for assistance?

Adm. COPPER. I think they would fall in line with everybody else at that point. I would like to comment further.

Chairman CRAIG. Yes.

Adm. COPPER. We have really increased outreach. That is one of the things we are using some of our people for, to reach out to these people at the National Guard centers and at the Reserve centers. We have 57 regional offices and I have told them that they have to be in contact with these centers so that, when the people come back, we are there to tell them all about the benefits that are available and how to apply for them, and encourage them if they think they have a problem.

Chairman CRAIG. OK. The IG's report also found a 107 percent increase over the past 6 years in the so-called "individual unemployability claims." What accounts for the increase in these claims?

Adm. COPPER. I honestly can't tell you what accounts for it. These are people who must have a certain degree of disability. If they cannot be employed because of their disability, then they can get IU. That is one of the things that we have to look at, to ensure that in some places we have not gotten careless in our allowing IU. That is one of the things I have to do in the review that we are going to do.

I cannot tell you why it would increase, unless we have gotten a little bit careless and therefore it has been seen as a thing that could be done and would benefit the veteran.

Chairman CRAIG. Does an employment specialist who works with the individuals with disability make the determination as to IU?

Adm. COPPER. No, sir. No, sir.

Chairman CRAIG. How is that made?

Adm. COPPER. The employment specialist works in the Vocational Rehabilitation and Employment Service. The employment specialist works with the veteran to help him or her find employment suitable to their condition.

Now, let me give you an interesting fact that I learned this morning. Over the last year, about 7,000 veterans who were in the Vocational Rehabilitation program withdrew voluntarily. Maybe they got a job other than the one they were being trained for. Maybe they wanted to do something else. About 400 of them had gotten IU and then withdrew from the program.

We are trying to see if people might withdraw from this voc rehab program because they have been granted IU. But I think that number, 400 out of 7,000 or so shows that there were many more who continued on in the voc rehab program.

Mr. EPLEY. If I could add?

Chairman CRAIG. Mr. Epley.

Mr. EPLEY. In addition to that, we have asked our disability compensation program staff to sit down and work more closely with the vocational rehabilitation staff, to address that very issue, Mr. Chairman; to make sure that, as a rating specialist in the disability program, the specialist is considering individual unemployability, based on records that show they may not be able to sustain employment, that we will make referral and have discussions with the vocational staff at the same time.

Chairman CRAIG. OK. We talk about the 800,000 claims from veterans this year. How many disabilities within those claims will require a VA decision?

Adm. COPPER. Every single one of them.

Chairman CRAIG. Is the trend of disabilities filed per claim increasing?

Adm. COPPER. Absolutely. For example, several years ago, somebody figured it to be somewhere between 2.0 and 2.5 issues per claim. It looks to me that our average is now closer to four issues per claim.

The data from the benefits delivery at discharge sites is even more startling. Last week I became aware that, for all of the BDD

claims that have gone to Salt Lake City in the last 6 months, the average number of issues is 10.2. These are people retiring and people being discharged from the service.

Chairman CRAIG. So what can I draw from that? Is that 800,000 number a true measure of your workload? Or is that a measurement of the number of claims? That does not therefore represent individuals?

Adm. COPPER. That is correct.

Chairman CRAIG. Is that correct?

Adm. COPPER. It represents individuals. It doesn't represent the true work—

Chairman CRAIG. All right.

Adm. COOPER [continuing]. Because each individual will have "X"-number of issues, and each issue has to be adjudicated with a concomitant medical exam and gathered of information. So I would like to be able to measure my workload based on the number of issues that we are adjudicating rather than the number of individual veterans' claim.

If a veteran claims five disabilities, and we say "Yes" on two of them and "No" on three of them have we favorably considered the claim, or have we negatively considered the claim? There are lots of ramifications depending on how you answer this.

We expect 800,000 claims to come in this year. Right now our pending workload is just under 340,000. I think, a standard inventory on hand should be about 250,000. I think 250,000 is a good inventory for the number of people I have. The "backlog" I consider the amount above the 250,000—or currently, 80,000 to 90,000. That is what I am trying to eliminate.

I think we would have a better handle on the actual workload if we counted issues. And I don't know quite how to do that yet, but I hope to do that sometime during my tenure at VA.

Chairman CRAIG. Thank you.

Senator AKAKA, additional questions?

Senator AKAKA. Thank you, Mr. Chairman. The Government Accountability Office recommended that the Secretary develop a plan to be included in the Department of Veterans' Affairs annual performance plan, that describes how VA intends to use data from the Rating Board Automation 2000.

GAO also recommended that VA conduct studies of impairments for which RBA 2000 data reveal inconsistencies among VA regional offices. GAO states that one year of RBA 2000 data would suffice before conducting this study.

Admiral, can you please tell the Committee if the Secretary has developed such a plan?

Adm. COPPER. We have a plan. RBA 2000 is one of our IT systems that has been under development for the last 3 years. About 6 months ago, I said that from now on, everybody will use RBA 2000 to adjudicate a claim. So we are all now using it.

GAO feels that we have no effective way to measure consistency. However, we feel with the extra capability of RBA 2000, we can better determine how to assess consistency, and will.

We are working the plan now. We still have to gather a good bit of data before I can determine just how well we are doing. But, yes, we are proceeding down that road.

Senator AKAKA. According to the recent VA Inspector General report, veterans who are represented by a veterans service organization receive an average of \$6,225 more in compensation per year than those without representation. What can we do to ensure that all veterans submitting a disability claim receive appropriate compensation, regardless of whether they have representation or not?

Adm. COPPER. We absolutely should do that. But, let me say first that I believe we are talking about figures over a period of 50 to 60 years. I think when we consider just the last couple of years, the difference is about \$1,700.

I would say to you, we have very competent VSOs out there, and obviously they know the system very well. And if the veteran has a valid claim, they will help that veteran get all the records and evidence that he needs to help us adjudicate the claim. It is not that we don't want to do everything we can for the veteran, and we are required by the VCAA law to do so. But veterans service organizations are extremely competent and good in helping the veteran understand what needs to be done.

My personal goal is to continue to work very closely with VSOs and ensure that we do give the veteran everything that he deserves.

Senator AKAKA. Admiral, can you explain BVA and its system for docketing cases? I can understand that BVA generally decides appeals in the order in which they are received from VA regional offices. When a case is received from a regional office, it is given a docket number.

If that case is later appealed to the Court of Appeals for Veterans' Claims and remanded back to the BVA, it appears that BVA issues a new docket number, and that veteran goes to the back of the line at BVA, rather than retaining its earlier docket number and receiving near immediate review. This can add as much as 3 to 5 years to the veteran's claim being resolved.

My question to you is, do you support remanded cases retaining their original docket numbers in order to reduce lengthy waits for final decisions?

Adm. COPPER. Senator, I would like to ask my friend, Mr. Garvin, to address that question from BVA.

Mr. Garvin. Yes, sir. And there is a procedure, when a case is remanded back to the Board, where a motion may be entered to have that case retain its original docket number. And perhaps what we need to look at is our educational program, so that we ensure that both the applicants and the VSOs are aware of that.

Senator AKAKA. Well, I want to thank Mr. Garvin and Mr. Epley for their responses, and especially Admiral Cooper. Thank you very much.

Adm. COPPER. Thank you, sir.

Chairman CRAIG. Danny, thank you.

Richard, do you have any further questions?

Senator BURR. Mr. Chairman, just one, with Mr. Garvin's last answer. Why would it get a new number? Take for granted all of them get new numbers if they are coming back through the system, if there is an appeal, a further appeal? Is that what you are saying?

Mr. Garvin. When a case comes to the Board, it is assigned a docket number. And it is assigned a docket number in accordance with when it is certified ready for the Board to take action on the appeal.

Senator BURR. Is there anybody that wouldn't want their concern heard quickly?

Mr. Garvin. I doubt it.

Senator BURR. But not all of them request the current docket number to remain?

Mr. Garvin. That is correct. We will take a look at that.

Senator BURR. Thank you.

Mr. Garvin. Yes, sir.

Chairman CRAIG. Admiral, thank you very much. Mr. Epley, Mr. Garvin, thank you for your testimony.

Adm. COPPER. Thank you.

Chairman CRAIG. Before you leave, a bit of admonishment, if I can, and it is about the 48-hour rule on testimony that we are striving to achieve with all of you. And I say that because the agency was notified of this hearing more than 3 weeks ago, and the Secretary received notice 2 weeks ago. Your testimony arrived last night at 5:45. It is very difficult at that point for my staff to effectively review it and prepare us for the hearing held this afternoon. They spent into the night, working on that testimony.

So I guess I am sending what I hope is a clear message. Because we will have a good many more hearings over the course of the next couple of years, working cooperatively with you and other divisions of the Veterans' Affairs, to respond to our veterans. And timeliness is critical and important for us to be effective and to prepare. And I would hope you would take that back with you, Admiral, to your colleagues.

Adm. COPPER. I sincerely apologize.

Chairman CRAIG. Thank you. Thank you very much for being here.

Now let me invite our second panel forward, please. The Committee has looked forward to this panel, because it presents us with a broad array of experience in the area that we are focusing on today.

And first, we will lead with the Honorable Kenneth B. Kramer, former Chief Judge for the U.S. Court of Appeals for Veterans' Claims, and a former colleague of mine in the U.S. House a good number of years ago.

Judge Kramer, we are pleased to have you before the Committee. Please proceed.

STATEMENT OF HON. KENNETH B. KRAMER, FORMER CHIEF JUDGE, U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Mr. KRAMER. Mr. Chairman, Ranking Member Akaka, Senator Burr, it is an honor for me to be here with some old friends. Senator Akaka, I brought my wife here, who was born in Hawaii, for assistance, so I may call on her if I get in trouble.

My testimony is going to be centered around my personal observations as a judge for 15 years. I didn't do a huge amount of research, and I don't have a lot of statistics. It is just things that

have been embedded in my mind over the years. And I want to make it clear that I speak only for myself, and not for the court.

I have three major recommendations that I am going to make to fix one of the largest, if not the largest problem of all, as I see it in the adjudication system. And that is the constant, never-ending cycle of remands back and forth, passing of papers, among four levels of decisionmakers. These levels are the regional office; the Board of Veterans' Appeals; our court, which is the U.S. Court of Appeals for Veterans' Claims; and another Federal appellate court, the U.S. Court of Appeals for the Federal Circuit.

What I am going to suggest are not perfect solutions. But I see them as possible starting points to addressing the backlog problem.

My first suggestion is very specific. And that is to amend 38 U.S.C. § 5103A(2)(d)(B)—to make it crystal clear when a claimant is entitled to a VA medical opinion, which will address the causative relationship between present disability and military service.

This issue is by far the most critical in most compensation and cause of death cases. And I believe that obtaining such an opinion at the earliest possible time will save huge amounts of work, litigation, and time.

I would suggest that the Committee consider providing for such an opinion when the following factors are present: there is evidence of both present disability or death and a possible causative event in service; there has been a denial of the claim based on no nexus evidence; and a notice of disagreement has been filed to this denial.

My second and third recommendations are a little more systemic and a little more general. I believe that the time has come to decentralize high-level VA decisionmaking, so as to require a formal administrative law decision at the RO level—that is, the local level—before an appeal can ever be brought to the Board, and then only after a claimant has gone back to the administrative law judge with a proper motion either averring specific errors in that administrative law judge decision, or showing that the claimant can offer evidence that might affect the result.

Before rendering an initial decision, the ALJ would be required to ensure that VA's duty to assist has been carried out. If the initial decision was adverse, the claimant would be permitted to hire counsel to file the motion with the ALJ or, if that failed, to appeal to the Board. That appeal also would have to specify specific errors in the ALJ decision, not just a general disagreement with the result, as is presently the case today.

My third recommendation goes solely only to judicial review. I believe that independent judicial review has made a huge difference in the quality of VA decisionmaking. Now decisions are based on evidence of record, and they must be analyzed. And the decisions that the VA produces are far better today than they were when I first became a judge.

That said, I believe, personally, that judicial review is a real part of the problem in finalizing claims. Under existing law, there are four levels—four—of possible appellate appeal: an administrative appeal to the Board, to the BVA; and three levels of judicial appeal, to our court, to the Federal Circuit, and possibly to the Supreme Court.

I recommend that the Federal Circuit be removed from this process. Our court is the real expert in veterans law, not because the caliber of its people are better in any way than the Federal Circuit, which has the highest quality of people, but simply because the work of our court is full-time in the veterans area; while the Federal Circuit's work is part-time, its main thrust being intellectual property law.

The Federal Circuit was originally put into the process when the court was created because of fears that the veterans court, as an Article I court, might be captured by its constituents, and that Article III review by the Federal Circuit would ensure that didn't happen.

With 15 years of decisionmaking under the belt, those fears, I believe, have never materialized. Although one could argue that it is good to give a party which has lost at the court, my court—and that is either a claimant or the Government—one more bite at the apple, the further delay—which means about 2 more years of time before the Federal Circuit will render an opinion and, if that case is remanded back to our court, at least an additional year of time—and the confusion that results from inconsistent court decisions, simply provides more justice than the system can bear. I truly believe that justice delayed is justice denied.

The organic law of the only other Article I appellate court, the U.S. Court of Appeals for the Armed Forces, has provided for direct appeal from it to the Supreme Court for more than half a century.

I further recommend that our court's organic law be changed, so that where a fully-developed evidentiary record clearly reflects entitlement to a benefit or clearly reflects a claimant's inability to succeed, in spite of otherwise remandable BVA error, that the court should end the matter with either a benefit award or an affirmance based on non-prejudicial BVA error.

Thank you for the opportunity to be heard. If I can be of further assistance in providing our veterans with the best justice system possible, I stand ready to help in any way I can.

[The prepared statement of Mr. Kramer follows:]

PREPARED STATEMENT HON. KENNETH B. KRAMER, FORMER CHIEF JUDGE,
U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Mr. Chairman, Ranking Member Akaka, and Members of the Committee:

It is an honor to be asked to provide my thoughts as to how the VA claims adjudication and appeal process might be able to provide more timely and accurate decisions. My suggestions are based upon my personal observations growing out of a career in which I have had the privilege of serving first in the military and then as a civilian in all three branches of the Federal Government. The last 15 years of my service was as a Judge of the U.S. Court of Appeals for Veterans' Claims (Court), the last four of which was as Chief Judge, the position from which I retired last fall.

As preliminary matters, I want to make sure that it is understood that I speak only for myself, not for the Court, and that my remarks are not in any way meant to be critical of any individual or institution but only directed to what I see are systemic problems that no individual or institution could remedy without statutory changes. I also want to make sure that it is understood that I do not pretend to offer perfect solutions, only starting points to fixing the major problem as I see it—the almost never-ending cycles of both Board of Veterans' Appeals (BVA) and Court ordered remands in far too many cases. These remands clog the system and prevent timely justice for all claimants, those who are trapped in the remands themselves and those who wait for those who are trapped. Lastly, I congratulate the Committee for its willingness to begin to take on the challenge of changing a system that has

already been the subject of significant study and its recognition that, despite that study, the system is still plagued by backlog and delay and the frustration that accompany them. Making major changes will not be easy—there will be opposition from those feeling threatened by new ways of doing business, but I believe that, if all the stakeholders are permitted to participate actively in crafting these changes, they can happen.

I have three major recommendations, the first of which would affect both the administrative and judicial processes, the second of which would affect primarily the former, and the third of which would affect primarily the latter.

1. Despite the controversy and resources expended over the former requirement of a claimant having to present a well-grounded claim before being entitled to the VA-provided duty to assist, and despite the controversy and resources already expended in the purported fixing of the problem, it appears that little has changed regarding what is, in most cases, the major need for such a duty: That is, to provide a thorough medical opinion as to the causative relationship between present disability and military service. Indeed, it appears that 38 U.S.C. § 5103A(d)(2)(B), in essence, reimposes a well-grounding requirement to obtain such an opinion. To avoid much future litigation and future cycles of both BVA and Court ordered remands, this provision should be clarified.

Where causation is at issue, I believe that obtaining a medical opinion on this issue at the earliest possible time in the claims process would likewise result in much earlier finalization. One approach could be that once there is evidence of both present disability and a possible event in service, a claimant would be entitled to such an opinion.

Needless to say, this would put a heavy burden on VA, but I would be hopeful that both cost and emotional savings from early resolutions, would offset the expenditures and reorganization that such a change would require. One possible quick fix would be for every VA physician treating a new condition to fill out a standard form addressing causation including possible comment on the need for the consideration of additional documentation prior to rendering an opinion.

2. I have seen too many claims that have remained in the VA administrative system despite the passage of more than a decade. Many of these are caught in a cycle of remands between a VA regional office (RO) and the BVA and the confusion and bureaucracy that is created by the back and forth transmission of documents. And many times the claimants are themselves part of the problem by continuously sending in more and more papers that in turn result in delay and frequently new adjudications.

In my view, in keeping with the theme expressed in my preceding recommendation, the adjudicative objective should be to finalize as many claims as possible at the RO level. In order better to achieve this objective, I also recommend that Administrative Law Judges (ALJs) or, at a minimum, Veterans Law Judges (VLJs), working at the final stage of RO adjudication where there is claimant disagreement, should insure that all necessary development has taken place and that, in the event of such a judge's continuing denial, should prepare, in lieu of a Statement of the Case, a decision as thorough as one now prepared by the BVA. In essence, what is being suggested is to decentralize high level administrative decisionmaking. (I would also note that the VA itself has taken initial steps in this direction by implementing a voluntary Decision Review Officer program staffed by more experienced adjudicators.)

Once such a decision was rendered, only formal motions that specified and articulated errors in the decision or made offers of proof would be accepted by the ALJ or VLJ. In such event, claimants would be permitted to hire counsel, if they chose to do so, to file such motions. Under present law, counsel may only be retained after an adverse BVA decision. Some will oppose such a change as upsetting the non-adversarial agency process, which in my mind is illusory once you have said "no" to a claimant. Permitting such a motion prior to an appeal to the BVA would allow for additional building of the evidentiary record often critical to success. Only after the prerequisite motion had been filed and a response from the ALJ/VLJ resulted in continuing denial would an appeal to the BVA be allowed. At this point, the record would be closed and no further evidentiary submissions could be made.

The approach suggested here will likely require many more ALJs or VLJs than the number of VLJs presently at the Board. Some will come from the present Board but others will have to be hired along with staff. Thus, as with the additional expenditures and reorganization of the medical side of the house likely needed for the implementation of my first recommendation, this recommendation also will carry with it additional expenditures and the need for reorganization of the adjudicative side of the house. Nevertheless, it is possible that here, too, overall savings will re-

sult by removing vast amounts of paper and vast numbers of the adjudicative hours required by the present system.

3. I am a big believer in the success of independent judicial review. It has caused VA decisionmaking to be light years ahead of where it was before such review by requiring that decisions be based on the real evidence and hard analysis, often previously missing. The bottom line is that judicial review has done much to bring about accurate decisions and helped insure fairness to our nation's veterans.

That said, judicial review has done little, if anything, to improve timeliness and, indeed, viewed objectively, can be seen as a real part of the problem. In the worst case, which happens more than occasionally, a veteran dies, leaving a case unresolved. Just as the administrative process itself is involved in the ever-revolving RO-BVA two-step, judicial review turns that two-step into a four-step, adding on additional years to the process with a cycle of remands between the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) and the Court and between the Court and the BVA. As to the latter, I myself have seen too many cases come back to the Court after two previous Court remands to the BVA and the passage of nearly a decade since the initial appeal to the Court was first brought. As to the former, an appeal to the Federal Circuit from the Court often carries with it 2 more years of the claimant's life; and in the event of a Federal Circuit remand back to the Court, I would estimate that another year can be added on, to say nothing of the additional years that will be involved if the Court in turn remands the case back to the BVA.

Under existing law, there are four levels of possible appeal—one administrative appeal to the BVA and three levels of judicial involvement: The Court, the Federal Circuit, and the Supreme Court. Stated simply, this is more "justice" than the system can properly bear. Indeed, justice delayed is justice denied and the timeliness problem cannot be fixed without reforming the judicial process.

There is no compelling reason to have so many layers of judicial review. The only fathomable argument in support is that the party who has lost at the Court will have one more opportunity to demonstrate the rightness of that party's view. Although there is no question that the Court does make mistakes and is not omniscient, the same is true of the Federal Circuit. Indeed, the Court has far greater expertise in veterans' law. This capability is an outgrowth of nothing more complicated than the fact that this subject is the Court's sole business, while it is only a part-time focus of the Federal Circuit. Moreover, the reality of confusion over conflicting judicial decisions is directly proportionate to the number of judicial bodies involved in the process.

In my view, the best fix would be to make the Court, in all respects, the final arbiter of veterans' law, short of the Supreme Court to which appeals still, of course, should be allowed. Moreover, to provide for greater finality and fewer remands to the BVA, I would change the Court's organic law to clarify the Court's power to review BVA benefit-of-the-doubt determinations. Where a fully developed evidentiary record clearly reflects entitlement to a benefit or clearly reflects a claimant's inability to succeed, the Court, in spite of otherwise remandable BVA error, should end the matter, either respectively, with an award of a benefit or an affirmance based on non-prejudicial error.

The other possible approach to eliminating layers of judicial review would be to merge the Court into the Federal Circuit. The Federal Circuit's history itself reflects one of merger and spin-off. Such a merger would give the Federal Circuit a much bigger diet of veterans cases, thereby increasing its expertise. And it would provide for Article III decisionmaking, the very reason that the Federal Circuit was originally put into the process. Despite these considerations, it is my view, with 15 years of history behind the Court, that the preferable course of action would be to eliminate Federal Circuit review. First, I think it is preferable to have judicial review exclusively focused on veterans' cases. Second, even with an added focus on such cases, the Federal Circuit's primary focus will remain with intellectual property matters, the compelling reason for its own creation. At this juncture, I would think that few proponents still remain of the need for Article III review, short of the Supreme Court, of veterans cases. The Court's history shows that the threat of its being captured by its constituents has never materialized.

Lastly, the model of Article I court review being the final stop before review to the Supreme Court has been in place for half a century. Indeed, appeals from the only other Article I appellate court—The U.S. Court of Appeals for the Armed Forces—are brought directly to the Supreme Court.

Thank you for the opportunity to be heard. If I can be of further assistance in providing our veterans with the best justice system possible, I stand ready to help in any way that I can.

Chairman CRAIG. Judge Kramer, thank you very much for that testimony.

Now, let's turn to Cynthia Bascetta, Director, Education, Workforce, and Income Security, Government Accountability Office. Cynthia, please proceed.

STATEMENT OF CYNTHIA BASCETTA, DIRECTOR, EDUCATION, WORKFORCE, AND INCOME SECURITY, GOVERNMENT ACCOUNTABILITY OFFICE

Ms. BASCETTA. Thank you, Mr. Chairman, other Committee members. We appreciate the opportunity to be here today to share our views on VA's performance in processing compensation and pension claims.

VA provided almost \$30 billion in cash disability benefits to more than 3.4 million veterans and their survivors in fiscal year 2004. As you know, for years the claims process has been the subject of concern and numerous studies, mostly focused on persistently long waits for decisions, large backlogs, and inaccurate decisions.

We believe these longstanding concerns, coupled with the need to modernize Federal disability programs, support GAO's decision to designate VA disability programs as a high risk area.

My comments today draw from numerous GAO reports and testimonies on this topic. To update our work, we reviewed recent claims processing performance data, VA's fiscal year 2006 budget justification and its 2004 performance and accountability report. After briefly addressing the current state of the disability claims process, I would like to focus on factors that we believe impede VA's ability to improve its performance.

The bottom line, as we have all been discussing, is that VA continues to experience claims processing problems characterized by a large number of pending claims and lengthy processing times. VA did make considerable progress in reducing the size and age of its inventory through fiscal year 2003, but it has recently lost some ground.

Pending claims for example, have increased from 254,000 at the end of fiscal year 2003, to 340,000 by the end of this March. This is about 50,000 cases more than their goal of 290,000 cases for fiscal year 2005. More importantly, claims pending over 6 months, an indicator of a growing backlog, have increased more than 60 percent during the same period.

VA has also reduced the average age of its pending claims from 182 days at the end of fiscal year 2001, to 111 at the end of fiscal year 2003. But the trend is slightly upward, to 119 days at the end of this March. This is far from VA's strategic goal of 78 days by the end of fiscal year 2008.

VA's reported performance on accuracy is better: 87 percent of claims were decided accurately in fiscal year 2004, close to its goal of 90 percent. But despite improvements in accuracy, consistency remains a significant problem.

To ensure that similarly situated veterans who submit claims in different regional offices for similar conditions receive reasonably consistent decisions, we recommended in August 2002, and again in November 2004, that VA undertake systematic review of the consistency of its decisions. Just last Thursday, the IG published

the first study of disparities in average payments between States, which was initiated by the Secretary following the adverse publicity at the end of last year.

Our work also shows that program design and other aspects of the current system may constrain how much VBA can improve its performance, especially in the timeliness dimension. First, as you have heard, the law and court decisions, which have tended to protect veterans' rights and expand their entitlement to benefits, have at the same time adversely affected VBA's workload.

For example, presumptive eligibility for certain benefits has increased the volume of claims, and certain court decisions have added administrative complexity to the decisionmaking process. In addition, veterans are filing claims at a growing rate, as Admiral Cooper testified. And VA reports that the number of disabilities per claims is also increasing, compounding the complexity of the decisions they need to make.

Second, we reported that VBA will need to rely on productivity improvements to achieve its claims processing goals. VA assumes a 16 percent increase in rating related claims decided per FTE this year. However, based on available information, we believe it is unclear whether this is an achievable goal.

Third, program design may limit performance improvements in both timeliness and consistency. For example, timeliness is affected by the overall size of the workload, which consists mainly of claims filed for increases in disability ratings. Most of these claims are for veterans who have less severe disabilities.

We and others believe that consistency could be improved by consolidating regional offices. In fact, in 1995, VA listed more complete claims development and improved accuracy and consistency of decisions among the potential benefits of consolidation.

To sum up, the system we have today has evolved over several decades. Like other Federal disability programs, VA needs to modernize, and faces persistent and perhaps intractable problems improving timeliness and consistency. Tackling these issues will be critical to assuring that VA's disability programs meet the needs of 21st century veterans.

In addition, we believe that more fundamental reform, while a daunting task, presents an opportunity to achieve more than incremental gains in performance of VA's disability programs. That concludes my remarks.

[The prepared statement of Ms. Bascetta follows:]

PREPARED STATEMENT OF CYNTHIA BASCETTA, DIRECTOR, EDUCATION, WORKFORCE,
AND INCOME SECURITY, GOVERNMENT ACCOUNTABILITY OFFICE

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss claims processing issues in the Department of Veterans Affairs' (VA) disability compensation and pension programs. Through these programs, VA provided almost \$30 billion in cash disability benefits to more than 3.4 million veterans and their survivors in fiscal year 2004. For years, the claims process has been the subject of concern and attention within VA and by the Congress and veterans service organizations. Many of their concerns have focused on long waits for decisions, large claims backlogs, and inaccurate decisions. Our work and recent media reports of significant discrepancies in average disability payments from State to State has also highlighted concerns over the consistency of decisionmaking within VA. In January 2003, we designated modernizing Federal disability programs as a high-risk area, in part because of VA's continuing challenges to improving the timeliness and consistency of its disability decisions.

You asked us to discuss the current state of VA's disability claims process and factors that may impede VA's ability to improve performance. My testimony today draws on numerous GAO reports and testimonies on VA's compensation and pension claims-processing operations. (See related GAO products.) To update our work, we reviewed recent claims processing performance data, VA's fiscal year 2006 budget justification, and VA's fiscal year 2004 Performance and Accountability Report. We did not perform independent verification of VA's data. We conducted our work in May 2005 in accordance with generally accepted government auditing standards.

In summary, VA continues to have disability claims processing problems. For example, as of the end of March 2005, rating-related claims¹ were pending an average of 119 days, 8 days more than at the end of fiscal year 2003, and far from its strategic goal of 78 days. During the same period, the rating-related inventory grew by about 86,000 claims to a total of about 340,000 claims. While VA has improved the accuracy of its decisions to 87 percent in fiscal year 2004, it is still below its strategic goal of 96 percent in fiscal year 2008. Further, we have identified concerns about the consistency of decisions across VA's regional offices. VA has begun studying one indicator of inconsistency, the wide variations in average payments per veteran from State to State, in response to adverse media coverage.

We identified factors that may impede VA's ability to improve its disability claims processing performance. The impacts of laws, court decisions, and the filing behavior of veterans can significantly affect VA's ability to decide claims, as well as the volume of claims received. Also, VA's ability to improve the productivity of its claims processing staff may affect its ability to improve performance. More dramatic gains in timeliness and inventory reduction might require fundamental changes in the design and operations of VA's disability programs.

BACKGROUND

VA's disability compensation program pays monthly benefits to veterans with service-connected disabilities (injuries or diseases incurred or aggravated while on active military duty) according to the severity of the disability. Also, VA pays dependency and indemnity compensation to some deceased veterans' spouses, children, and parents and to survivors of service members who died on active duty. The pension program pays monthly benefits based on financial need to wartime veterans who have low incomes, served in a period of war, and are permanently and totally disabled for reasons not service-connected (or are aged 65 or older). VA also pays pensions to surviving spouses and unmarried children of deceased wartime veterans.

When a veteran submits a claim to any of VA's 57 regional offices, a veterans' service representative (VSR) is responsible for obtaining the relevant evidence to evaluate the claim. Such evidence includes veterans' military service records, medical examinations and treatment records from VA medical facilities, and treatment records from private medical service providers. Once a claim is developed (i.e., has all the necessary evidence), a rating VSR, also called a rating specialist, evaluates the claim and determines whether the claimant is eligible for benefits. If the veteran is eligible for disability compensation, the rating specialist assigns a percentage rating based on degree of disability. Veterans with multiple service-connected disabilities receive a single composite rating. For veterans claiming pension eligibility, the regional office determines if the veteran served in a period of war, is permanently and totally disabled for reasons not service-connected (or is aged 65 or older), and meets the income thresholds for eligibility. A veteran who disagrees with the regional office's decision for either program can appeal sequentially to VA's Board of Veterans' Appeals (BVA), the U.S. Court of Appeals for Veterans' Claims, and the U.S. Court of Appeals for the Federal Circuit.

In January 2003, we designated modernizing VA's disability programs, along with other Federal disability programs, as high-risk. We did so, in part, because VA still experiences lengthy processing times and lacks a clear understanding of the extent of possible decision inconsistencies. We also designated VA's disability programs as high-risk because our work over the past decade found that VA's disability programs are based on concepts from the past. VA's disability programs have not been updated to reflect the current state of science, medicine, technology, and labor market conditions.

In November 2003, the Congress established the Veterans' Disability Benefits Commission to study the appropriateness of VA disability benefits, including disability criteria and benefit levels. The commission held its first public hearing in May 2005.

PROBLEMS IN CLAIMS PROCESSING CONTINUE

VA continues to experience problems processing veterans' disability compensation and pension claims. These include large numbers of pending claims and lengthy processing times. While VA made progress in fiscal years 2002 and 2003 in reducing the size and age of its inventory of pending claims, it has lost some ground since the end of fiscal year 2003. As shown in figure 1, pending claims increased by about one-third from the end of fiscal year 2003 to the end of March 2005, from about 254,000 to about 340,000. During the same period, claims pending over 6 months increased by about 61 percent from about 47,000 to about 75,000.

Figure 1. Rating-Related Claims Pending at End of Period, Fiscal Year 2000 through March 2005

Similarly, as shown in Figure 2, VA reduced the average age of its pending claims from 182 days at the end of fiscal year 2001 to 111 days at the end of fiscal year 2003. Since then, however, average days pending have increased to 119 days at the end of March 2005. This is also far from VA's strategic goal of an average of 78 days pending by the end of fiscal year 2008. Meanwhile, the time required to resolve appeals remains too long. While the average time to resolve an appeal dropped from 731 days in fiscal year 2002 to 529 days in fiscal year 2004, close to its fiscal year 2004 goal of 520 days, but still far from VA's strategic goal of 365 days by fiscal year 2008.

Figure 2. Average Days Pending for VA Compensation and Pension Rating-Related Claims, Fiscal Year 2000 Through March 2005

In addition to problems with timeliness of decisions, VA acknowledges that the accuracy of regional office decisions needs to be improved. While VA reports² that it has improved the accuracy of decisions on rating related claims from 81 percent in fiscal year 2002 to 87 percent in fiscal year 2004—close to its 2004 goal of 90 percent. However, it is still below its strategic goal of 96 percent in fiscal year 2008.

VA also faces continuing questions about its ability to ensure that veterans receive consistent decisions—that is, comparable decisions on benefit entitlement and rating percentage—regardless of the regional offices making the decisions. The issue of decisionmaking consistency across VA is not new. In a May 2000 testimony³ before the Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs, House of Representatives, we underscored the conclusion made by the National Academy of Public Administration in 1997⁴ that VA needed to study the consistency of decisions made by different regional offices, identify the degree of subjectivity expected for various medical issues, and then set consistency standards for those issues. In August 2002, we drew attention to the fact that there are wide disparities in State-to-State average compensation payments per disabled veteran. We noted that such variation raises the question of whether similarly situated veterans who submit claims to different regional offices for similar conditions receive reasonably consistent decisions.⁵ We concluded that VA needed to systematically assess decisionmaking consistency to provide a foundation for identifying acceptable levels of variation and to reduce variations found to be unacceptable. Again, in November 2004, we highlighted the need for VA to develop plans for studying consistency issues.⁶ VA concurred in principle with our findings and recommendation in the August 2002 report and agreed that consistency is an important goal and acknowledged that it has work to do to achieve it. However, VA was silent on how it would evaluate and measure consistency. Subsequently, VA concurred with our recommendation in the November 2004 report that it conduct systematic reviews for possible decision inconsistencies.

In December 2004, the media drew attention to the wide variations in the average disability compensation payment per veteran in the 50 States and published VA's own data showing that the average payments varied from a low of \$6,710 in Ohio to a high of \$10,851 in New Mexico. Reacting to these media reports, in December 2004, the Secretary instructed the Inspector General to determine why average payments per veteran vary widely from State to State.⁷ So, VA's Veterans Benefits Administration began another study in March 2005 of three disabilities believed to have potential for inconsistency: hearing loss, post-traumatic stress disorder, and knee conditions. VA assigned 10 subject matter experts to review 1,750 regional office decisions. After completing its analysis of study data, VA plans to develop a schedule for future studies of specific ratable conditions and recommend a schedule for periodic follow-up studies of previously studied conditions.

FACTORS THAT MAY IMPEDE VA'S ABILITY TO IMPROVE CLAIMS
PROCESSING PERFORMANCE

Several factors may impede VA's ability to make, and sustain, significant improvements in its claims processing performance. These include the potential impacts of laws, court decisions, and the filing behavior of veterans; VA's ability to improve claims processing productivity; and program design and structure.

LAWS, COURT DECISIONS, AND FILING BEHAVIOR OF VETERANS IMPACT
WORKLOAD PERFORMANCE

Recent history has shown that VA's workload and performance is affected by several factors, including the impacts of laws and court decisions expanding veterans' benefit entitlement and clarifying VA's duty to assist veterans in the claims process, and the filing behavior of veterans. These factors have affected the number of claims VA received and decided. For example, court decisions in 1999 and 2003 related to VA's duty to assist veterans in developing their benefit claims, as well as legislation in response to those decisions, significantly affected VA's ability to produce rating-related decisions. VA attributes some of the worsening of inventory level and pending timeliness since the end of fiscal year 2003 to a September 2003 court decision that required over 62,000 claims to be deferred, many for 90 days or longer. Also, VA notes that legislation and VA regulations have expanded benefit entitlement and as a result added to the volume of claims. For example, presumptions of service-connected disabilities have been created in recent years for many Vietnam veterans and former Prisoners of War. Also, VA expects additional claims receipts based on the enactment of legislation allowing certain military retirees to receive both military retirement pay and VA disability compensation.

In addition, the filing behavior of veterans impacts VA's ability to improve claims processing performance. VA continues to receive increasing numbers of rating-related claims, from about 586,000 in fiscal year 2000 to about 771,000 in fiscal year 2004. VA projects 3 percent increases in claims received in fiscal years 2005 and 2006. VA notes that claims received are increasing in part because older veterans are filing disability claims for the first time. Also, according to VA, the complexity of claims, in terms of the numbers of disabilities claimed, is increasing. Because each disability needs to be evaluated, these claims can take longer to complete. VA plans to develop baseline data on average issues per claim by the end of calendar year 2005.

ABILITY TO IMPROVE PRODUCTIVITY MAY AFFECT FUTURE PERFORMANCE
IMPROVEMENTS

In November 2004, we reported that to achieve its claims processing performance goals in the face of increasing workloads and decreased staffing levels, VA would have to rely on productivity improvements.⁸ However, its fiscal year 2005 budget justification did not provide information on claims processing productivity or how much VA expected to improve productivity. VA's fiscal year 2006 budget justification provides information on actual and planned productivity, in terms of rating-related claims decided per direct full-time equivalent (FTE) employee, and identifies a number of initiatives that could improve claims processing performance. These initiatives include technology initiatives, such as Virtual VA, involving the creation of electronic claims folders; consolidation of the processing of Benefits Delivery at Discharge (BDD) claims at 2 regional offices; and collaboration with the Department of Defense (DOD) to improve VA's ability to obtain evidence, such as evidence of in-service stressors for veterans claiming service-connected Post-Traumatic Stress Disorder.

It is still not clear whether VA will be able to achieve its planned improvements. VA's fiscal year 2006 budget justification assumes that it will increase the number of rating-related claims completed per FTE from 94 in fiscal year 2004 to 109 in fiscal year 2005 and 2006, a 16-percent increase. For fiscal year 2005, this level of productivity translates into VA completing almost 826,000 rating-related decisions. Midway through fiscal year 2005 VA had completed about 373,000 decisions.

PROGRAM DESIGN AND REGIONAL OFFICE STRUCTURE MAY LIMIT PERFORMANCE
IMPROVEMENTS

Program design features and the regional office structure may constrain the degree to which improvements can be made in performance. For example, in 1996, the Veterans' Claims Adjudication Commission⁹ noted that most disability compensation claims are repeat claims—such as claims for increased disability percentage—and most repeat claims were from veterans with less severe disabilities. According

to VA, about 65 percent of veterans who began receiving disability compensation in fiscal year 2003 had disabilities rated 30 percent or less. The Commission questioned whether concentrating claims processing resources on these claims, rather than on claims by more severely disabled veterans, was consistent with program intent.

In addition to program design, external studies of VA's disability claims process have identified the regional office structure as disadvantageous to efficient operation. Specifically, in its January 1999 report, the Congressional Commission on Servicemembers and Veterans Transition Assistance¹⁰ found that some regional offices might be so small that their disproportionately large supervisory overhead unnecessarily consumes personnel resources. Similarly, in its 1997 report, the National Academy of Public Administration found that VA could close a large number of regional offices and achieve significant savings in administrative overhead costs.

Apart from the issue of closing regional offices, the Commission highlighted a need to consolidate disability claims processing into fewer locations. VA has consolidated its education assistance and housing loan guaranty programs into fewer than 10 locations, and the Commission encouraged VA to take similar action in the disability programs. In 1995 VA enumerated several potential benefits of such a consolidation. These included allowing VA to assign the most experienced and productive adjudication officers and directors to the consolidated offices; facilitating increased specialization and as-needed expert consultation in deciding complex cases; improving the completeness of claims development, the accuracy and consistency of rating decisions, and the clarity of decision explanations; improving overall adjudication quality by increasing the pool of experience and expertise in critical technical areas; and facilitating consistency in decisionmaking through fewer consolidated claims-processing centers. VA has already consolidated some of its pension workload (specifically, income and eligibility verifications) at three regional offices. Also, VA has consolidated at its Philadelphia regional office dependency and indemnity compensation claims by survivors of servicemembers who died on active duty, including those who died during Operation Enduring Freedom and Operation Iraqi Freedom.

CONCLUDING OBSERVATIONS

VA has had persistent problems in providing timely, accurate, and consistent disability decisions to veterans and their families. To some extent, program design features that protect the rights of veterans have also increased the complexity of and length of time needed to process their claims. In addition, expanding entitlements have increased VA's workload as more veterans file claims. As a result, major improvements in disability claims processing performance may be difficult to achieve without more fundamental change. We have placed VA's disability programs on our high-risk list along with other Federal disability programs. Modernizing its programs would give VA the opportunity to address many longstanding problems. At the same time, VA could integrate any changes to disability criteria and benefit levels that the Veterans' Disability Benefits Commission may propose. This is important because significant changes in the benefits package and disability criteria are major factors affecting VA's disability claims process and its claims processing performance.

Mr. Chairman, this concludes my remarks. I would be happy to answer any questions you or the Members of the Committee may have.

Chairman CRAIG. Cynthia, thank you very much.

Now, let's turn to Robert Chisholm, past President, National Organization of Veterans' Advocates.

Robert.

STATEMENT OF ROBERT CHISHOLM, PAST PRESIDENT, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES

Mr. CHISHOLM. Thank you, Mr. Chairman and Members of the Committee, for the opportunity to present the views of the National Organization of Veterans' Advocates on the current state of VA claims adjudication and, more particularly, the appeals process.

For the past 14 years, I have been representing claimants at all stages of the veterans benefits system that Chief Judge Kramer just outlined; from the initial stages, right through to appeals, to

the Federal Circuit. My testimony is based on my experiences, and members of NOVA's experiences, in this process.

On pages 2 and 3 of my written testimony, I outline the general appeals process, which has already been discussed here. On average, from start to finish, it takes about 3 years. Unfortunately, most of the claims I see take much longer than that. With the average age of a veteran now approaching 58 years old, the problem is that many claimants do not survive the protracted adjudicatory process. Those claimants that do survive are fatigued and discouraged by interminable delays before the VA. If a claimant then appeals a final Board decision to the Court of Appeals for Veterans' Claims, it may easily take another 12 to 18 months.

I would like to first discuss a number of problems that we see in the VA claims adjudication process, and then outline a couple of changes we would recommend.

First, there are no real deadlines imposed on the VA to complete any steps in the adjudication of a claim. One famous decision reported that the claim had been contested for more than 7 years at that point. In another case, one of the colleagues of Judge Kramer stated at oral argument that a 14-year delay is not unknown.

The multi-step process to appeal a case is redundant and unnecessarily complicated, because it imposes upon a veteran a specific pleading requirement; namely, that the veteran must assert an additional affirmative intent to seek appellate review.

There are, too many cases; not enough staff. According to the recent survey in the IG report of rating specialists and decision review officers, the so-called "front line" at the VA, 65 percent of them that answered stated that they had insufficient staff to ensure timely and quality service. The same survey reported that 57 percent believed it was too difficult to meet production standards if they adequately developed claims and thoroughly reviewed the evidence before issuing a ratings decision.

The regional offices are not getting decisions right the first time, and this results in claimants filing appeals to the Board which are then remanded back to the regional office. Many of these claimants are stuck on a proverbial hamster wheel for years.

In my experience, those people then appeal their cases to the court. And then the court, because of its limited jurisdiction, remands those claims, as well; adding another layer to that process.

The Board of Veterans' Appeals causes delay in the adjudication of claims by failing to follow judicial precedent and forcing veterans to appeal their claims to the court; and by failing to handle claims expeditiously, as Congress intended when it enacted the Veterans' Benefits Act of 2003.

The Appeals Management Center, in my opinion, has become a parking lot for both court and BVA remanded cases. As of October 2004, there were about 21,000 claims at the AMC, a number far in excess of what was originally planned for the AMC. As caseloads increase at the Appeals Management Center, longer delays are inevitable.

NOVA's recommendations to alleviate some of these problems:

No. 1, we believe Congress should impose mandatory timeframes for each step of the adjudication process. These time limitations

should be subjected to some limited extension when the delay is clearly not caused on the part of the VA.

No. 2, we believe that one appeal from a denial by the regional office should be all that is required that claimants file two documents to obtain appellate review. Right now, you need to file a notice of disagreement, and then a substantive appeal. The claimant should not be required to appeal the matter twice in order to bring the case before the Board.

No. 3, even though the VA has not asked for increased staff, it seems that it is necessary, based upon the questions asked to the first panel and based upon what was testified to in the IG report.

No. 4, NOVA believes that the Board of Veterans' Appeals should be replaced by independent administrative law judges, as in the Social Security system. Alternatively, Congress should consider decentralizing the Board of Veterans' Appeals, and placing the veterans law judges at the regional offices.

And No. 5, this Committee should consider legislation permitting a veteran to hire an attorney earlier in the process. Presently, a veteran cannot retain counsel until after the Board of Veterans' Appeals issues the first final decision in a case. This is too late in the process for counsel to be truly effective because, by the time, the Board makes a decision on the claim, the record is effectively closed.

As the VA Inspector General's report has shown, the initial adjudicators do not have enough time and staff to make timely and quality decisions. The same report noted that it is not possible for adjudicators to fully develop the claim and meet production deadlines.

Attorneys would be helpful in obtaining, organizing, and presenting records on behalf of the veteran to make sure the VA processes the claim in a timely and accurate manner. An amendment to 38 U.S.C. § 5904 is necessary.

I would like to thank the Committee for this opportunity to present this testimony, and those conclude my remarks. Thank you.

[The prepared statement of Mr. Chisholm follows:]

PREPARED STATEMENT OF ROBERT CHISHOLM, PAST PRESIDENT, NATIONAL
ORGANIZATION OF VETERANS' ADVOCATES

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates ("NOVA") on the current state of VA claims adjudication and the appeal process. NOVA is a not-for-profit educational organization created under 26 U.S.C. § 501(c)(3) for attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents before the Court of Appeals for Veterans' Claims ("CAVC") and on remand before the Department of Veterans' Affairs ("VA"). NOVA has written many amicus briefs on behalf of claimants before the CAVC and the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). The CAVC recognized NOVA's work on behalf of veterans when it awarded the Hart T. Mankin Distinguished Service Award to NOVA in 2000. The positions stated in this testimony have been approved by NOVA's board of directors and represent the shared experiences of NOVA's members.

For the past 14 years I have been representing claimants at all stages of the veteran's benefits system from the VA regional office to the Board of Veterans' Appeals to the CAVC as well as before the Federal Circuit. My testimony, which has been approved by NOVA's board of directors, is based on my experiences during those 14 years, which have been shared by my colleagues in NOVA.

THE APPEALS PROCESS BEFORE THE VA

The VA appeals process begins with the filing of the “notice of disagreement.” A disappointed claimant has 1 year from the date of the unfavorable decision in which to file the “notice of disagreement.” The VA is then required to respond to the “notice of disagreement” with a new decision or with an explanation to the claimant in greater detail why the claim was denied. If the claimant remains dissatisfied with the response from the VA, the claimant is required to file a substantive appeal (in essence a second appeal letter) to bring the case before the Board of Veterans’ Appeals. The Board can grant the claim, deny the claim or remand the claim back to the regional office if it determines the regional office erred in deciding the claim. It is not uncommon to see claims remanded from the Board back to the regional office multiple times before a final decision is made on the claim. The *Chicago Tribune* ran a story on May 16, 2005 illustrating how the repeated remand process harms veterans.¹

When the case is denied by the Board, the claimant has a 120-day window to appeal the case to the CAVC. It will ordinarily take another 12 to 18 months for the CAVC to decide the appeal. When the Court acts in the claimant’s favor, the result will most likely be a remand back to the Board of Veterans’ Appeals. See *Swiney v. Gober*, 14 Vet. App. 65 (2000) (wherein the CAVC acknowledged “outright reversal on the merits has been very rare” and remands are the norm). The remand from the CAVC provides the claimant with the opportunity to submit additional evidence and arguments in favor of the claim at issue, and it preserves the claimant’s favorable effective date if there is an award of benefits. With the average age of a veteran now at 58², the problem is that many claimants do not survive the protracted adjudicatory process. Those claimants who do survive are fatigued and discouraged by interminable delays before the VA. The chart below shows average time periods for each stage of the administrative process (i.e., excluding time at court).³

Time Interval	Responsible Party	Average Elapsed Processing Time (days)
Initial Claim to Issuance of Rating Decision	Regional Office	165 days
Notice of Disagreement Receipt to Statement of the case.	Regional Office	165 days
Statement of the case issuance to Substantive Appeal receipt.	Veteran	48 days
Substantive Appeal Receipt to Certification of Appeal to Board of Veterans’ Appeals.	Regional Office	521 days
Receipt of Certified Appeal to Issuance of BVA decision.	Board of Veterans’ Appeals	203 days
Total	* 1102 days (3.02 years)

* 3.02 years.

If a claimant appeals a Board decision to the Court of Appeals for Veterans Claims, it may easily take another 12 to 18 months for the Court to decide the appeal.

PROBLEMS IN CURRENT VA CLAIMS ADJUDICATION

1. There are no deadlines imposed on the VA to complete any of the steps in the adjudication of a claim. One famous decision reported that the claim had been contested for more than 7 years at that point. *Dambach v. Gober*, 223 F.3d 1376, 1381 (Fed. Cir. 2000). One CAVC Judge commented during an oral argument that a 14-year delay is not unknown.

2. The multi-step appeals process is redundant and unnecessarily complicated because it imposes upon the veteran a specific pleading requirement; i.e, the veteran must assert an additional affirmative intent to seek appellate review.

3. Too many cases, not enough staff. According to a recent survey of rating specialists and decision review officers at the regional offices, 65 percent stated that they had insufficient staff to “ensure timely and quality service.”⁴ The same survey reported that 57 percent believed “it was too difficult to meet production standards if they adequately develop claims and thoroughly review the evidence before issuing rating decisions.”⁵

4. The regional offices are not getting the decisions right the first time and this results in claimants filing appeals to the Board which are then remanded back to the regional office. Many claimants are stuck on this proverbial hamster wheel⁶ for years.

5. The Board of Veterans' Appeals causes delay in the adjudication of claims by: (1) failing to follow judicial precedent and forcing veterans to appeal their claims to Court, and (2) failing to handle claims expeditiously as Congress intended when it enacted the Veterans Benefits Act of 2003.

6. The Appeals Management Center has become a "parking lot" for both Court and BVA remanded cases. As of October 2004, there were about 21,000 claims at the AMC.⁷ As the caseload increases at the Appeals Management Center, longer delays are inevitable.

NOVA'S RECOMMENDATIONS TO ALLEVIATE PROBLEMS IN THE VA ADJUDICATION
OF CLAIMS

1. Congress should impose mandatory timeframes for each step in the VA adjudication process. These time limitations should be subjected to limited extension when the delay is clearly not due to any inaction on the part of the VA.

2. Have one appeal from a denial by the regional office and eliminate the requirement that the claimant file two documents to obtain appellate review, the "notice of disagreement" and the "substantive appeal." The claimant should not be required to appeal the matter twice in order to bring the case before the Board of Veterans' Appeals. This proposal would require an amendment to 38 U.S.C. § 7105.

3. Even though the VA has not asked for it, an increase in staff is necessary at the regional office level. Specifically, NOVA believes that increasing the numbers of decision review officers at the regional offices would be helpful because they can clear cases and have the authority to review the case *de novo* at the regional office level. The use of decision review officers at the regional office level has been successful.

4. NOVA believes that the Board of Veterans' Appeals should be replaced by independent Administrative Law Judges like those in the Social Security system. This would eliminate the delay inherent in the centralized Board. Alternatively, Congress should consider decentralizing the Board of Veterans' Appeals by placing the Board Members at the regional offices. Instead of having to transfer cases from the regional offices to the Board in Washington, the Board Member would be co-located at the regional office.

5. This Committee should consider legislation permitting a veteran to hire and compensate an attorney earlier in the process. Presently, a veteran cannot retain counsel until after the Board of Veterans' Appeals issues the first final decision in the case. This is too late in the process for counsel to be truly effective because by the time the Board makes a decision on the claim, the record is effectively closed. As the VA Inspector General's Report has shown, the initial adjudicators do not have enough time and staff to make timely and quality decisions. The same report noted that it is not possible for the adjudicators to fully develop the claims and meet production deadlines. Attorneys would be helpful in obtaining, organizing and presenting records on behalf of the veteran and making sure that the VA processes the claim in a timely and accurate manner. An amendment to 38 U.S.C. § 5904 is necessary.

CONCLUSION

On behalf of NOVA, I would like to thank the Committee for the opportunity to present this testimony. Oversight of the VA adjudication process is critical and necessary to ensure that the VA fulfills the intent of Congress that it compensate veterans and their families for all benefits which can be supported in law. NOVA believes that the most effective means is to permit all claimants to hire an attorney from the beginning of the claims process. The current system merely reinforces the adjudicatory errors of the VA and compounds needless delay of these claims. NOVA submits that amendments to 38 U.S.C. §§ 5904 and 5905 to permit legal representation at the initial claim level are necessary.

Chairman CRAIG. Robert, thank you very much.

Rick, we will now hear from you, Rick Surratt, Deputy National Legislative Director, Disabled American Veterans. Welcome.

**STATEMENT OF RICK SURRETT, DEPUTY NATIONAL
LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS**

Mr. SURRETT. Good afternoon, Mr. Chairman and Members of the Committee. Today's hearing addresses one of the greatest challenges facing the Department of Veterans' Affairs: overcoming the

persistent claims and appeals backlogs, to allow for more timely resolution of benefit claims.

The numbers demonstrate the problem. Various studies have identified the causes. The causes dictate the solutions. But we either have not applied effective solutions, or have not applied solutions effectively.

The consequences impact most negatively on veterans seeking relief from the economic effects of disability. Of the nearly 502,000 compensation and pension claims pending as of May 21, 2005, nearly 343,000 are the claims that require rating decisions. Of the rating cases, more than 71,000, or 20.9 percent, have been pending for more than 6 months. The average time to process rating cases was 166 days in fiscal year 2004.

Comparing this claims backlog to backlogs of the past few years, the numbers show there has been no maintained reduction in the pending workload. A maintained reduction does not appear likely over the long term, if the causes are not targeted more decisively and effectively with the appropriate solutions.

The various studies have identified several factors that contribute to VA's problems and inability to overcome them. These factors are such things as management weaknesses, lack of accountability within VA, inadequate training, and inexperienced decision makers.

Some of these factors are a consequence of, and others compound the root cause of the inefficiency, which are inadequate resources. The VA does not have adequate staff to train new employees, conduct quality reviews, and decide claims accurately and in a timely fashion.

With ensuing backlogs, management's priority becomes the quantity of cases decided. With the emphasis on production, quality is compromised; requiring rework and adding to the appellate workload, which impacts adversely on VA field offices and the Board of Veterans' Appeals.

To break this escalating cycle of increased inefficiency from higher error rates, more rework, additional demand on limited resources, and even greater focus on quantity at the expense of quality, VA must reorder its priorities.

Quality must be the first priority, even if the backlogs become worse in the short term. But VA cannot achieve quality without adequate resources. If VA could begin to attack two principal deficiencies and break the cycle of failure with added resources, why doesn't it get them?

The simple answer is: Because OMB dictates staffing requests as a political decision, for purposes of budget targets. And that too often becomes what VA gets, rather than the resources necessary to cover VA's real needs.

I don't mean to suggest that added resources would be a panacea; just that they are an essential ingredient. VA management will have to take decisive steps to impose and enforce accountability for the positive reforms indispensable to reversing these stubborn and longstanding problems.

Forming specialized rating teams, continually shifting resources to trouble spots, farming work out from overloaded stations, overtime, and other such stopgap measures only temporarily treat the

symptoms. They do not cure the underlying disease. That will take serious reforms.

Mr. Chairman, that concludes my testimony. I will be happy to answer any questions that the Committee may have.

[The prepared statement of Mr. Surratt follows:]

PREPARED STATEMENT OF RICK SURRATT, DEPUTY NATIONAL LEGISLATIVE DIRECTOR,
DISABLED AMERICAN VETERANS

Mr. Chairman and Members of the Committee:

In response to your invitation to testify today, I am pleased to present the views of the Disabled American Veterans (DAV) and its Auxiliary on the functioning and performance of the claims and appeals processes of the United States Department of Veterans' Affairs (VA).

Unlike any other group of beneficiaries seeking government assistance, our military veterans inherently and justly deserve special status, special benefits, and special treatment by and on behalf of the grateful citizens of the Nation whose interests they served to protect and preserve. We are beholden and duty bound to honor this national debt above all others. This principle resides at the very core of and is inseparable from our patriotic American values.

Congress created VA to serve the interests of this special group of government beneficiaries in a manner consistent with our irrevocable indebtedness to them and our profound moral obligation to bestow upon veterans the benefits and services they so rightfully deserve consequent to and in return for their extraordinary sacrifices and contributions to our society. Because of this special status of the veteran as a claimant, VA has the objective of ensuring the veteran obtains benefits to which he or she is entitled. VA therefore has a higher responsibility to its claimants than the ordinary administrative agency. VA has the responsibility of being supportive and helpful to veterans in their efforts to obtain benefits, rather than leaving it to the veteran to prosecute his or her claim without guidance and without government aid.

With this duty upon VA to assist the veteran in the full development and prosecution of his or her claim and with the obligation upon the government to ensure all avenues of entitlement are entertained and all pertinent legal authorities are considered, the proper outcome should be all but assured in a perfect world. However, a mass adjudication system as large and burdened as VA's that often involves judgments on complex questions, and sometimes conflicting evidence, is unavoidably imperfect. That is why one of the DAV's principal functions as a veterans' service organization is its program of assistance to veterans in benefits counseling and claims representation.

For this purpose, the DAV employs a corps of 260 National Service Officers (NSOs) who are stationed principally in Veterans Benefits Administration (VBA) regional offices nationwide. From our fleet of Mobile Service Office vehicles, our NSOs also provide counseling and claims assistance in rural communities, intercity locations, disaster areas, Native American reservations, NASCAR races, conventions, and other various holiday and community events. To expand the availability of assistance, the DAV instituted a program of training and certification of State and chapter service officers. We certified 889 service officers in 2003 and 1,078 service officers in 2004.

For assistance to service members separating from active duty, the DAV employs 23 Transition Service Officers (TSOs). In conjunction with Transition Assistance Programs and Disabled Transition Assistance Programs, our TSOs provide benefits counseling and claims assistance at more than 80 military installations throughout the Nation.

Our free services include representation before the Board of Veterans' Appeals (BVA) for our clients who elect to appeal unfavorable VA field office decisions. We employ attorneys and a non-attorney practitioner to provide representation to appellants before the United States Court of Appeals for Veterans' Claims (CAVC or the Court). Our attorneys also take appeals to the United States Court of Appeals for the Federal Circuit.

From our involvement in benefits counseling and the claims and appellate processes at all levels, we are in a position to observe the strengths and weaknesses of the VA's system for administering the benefit programs, particularly the compensation and pension program. Benefits for disabled veterans and their dependents and survivors are at the core of the programs VA administers. The effective administration of these programs, including appellate review of claims decisions, is essential to the fulfillment of VA's momentous mission to care for our Nation's veterans.

Historically, VA has struggled in this mission. Problems with claims processing, accurate decisions, and timely benefits delivery have plagued and challenged VA for several years. Many underlying causes acted in concert to bring about this now intractable problem. In the early 1990s, judicial review of BVA decisions began to expose arbitrary and unlawful practices. The Court of Veterans' Appeals, now CAVC, imposed requirements that VA decisions be better reasoned, better explained, and better supported by the record. In turn, BVA began to reverse and remand more field office decisions, requiring more rework. Military downsizing resulted in additional claims. Despite an increasing workload, annual appropriations provided for reduced staffing levels. VA also began to lose many of its experienced adjudicators to retirement, without sufficient remaining proficient adjudicators to both decide the pending claims and train new employees. These factors combined to increase pressure on adjudicators to increase production with an even further compromise of quality. More errors required more rework and resulted in more appeals, leading to even greater backlogs and declines in timeliness with a consequent vicious cycle of increasing inefficiency.

These increasing problems in compensation and pension claims processing triggered various studies to identify the underlying problems and recommend remedial courses of action. In 1993, VA created its Blue Ribbon Panel on Claims Processing. In 1994, Congress established the Veterans' Claims Adjudication Commission to carry out a study of the claims adjudication system. In 1995, Congress commissioned a study by the National Academy of Public Administration (NAPA) of veterans' claims processing. In response to concerns about the quality of its service to claimants, VA created a Business Process Reengineering (BPR) Office in November 1995.

The Blue Ribbon Panel on Claims Processing made more than 40 proposals to improve efficiency in claims processing. These proposals included improved technology, redesigned work processes, and additional training.

The Veterans' Claims Adjudication Commission transmitted its final report to Congress in December 1996. Unfortunately, the Commission's study was poorly focused and strayed away from its charge to evaluate the efficiency of the existing claims adjudication processes and procedures. The recommendations received little serious consideration.

After conducting a study of the claims processing system, the BPR team issued its report in December 1996. The report called for comprehensive changes in the way VA processed compensation and pension claims. The report acknowledged that poor quality and the resulting necessity to rework claims were the primary problems accounting for overload on the system. The BPR team identified several core problems leading to poor quality. The team found that the segmented or compartmentalized claims process left no one accountable for quality in the final product. Because the claims and supporting evidence passed through multiple steps and many hands, errors often occurred. The team found that management placed the emphasis on production and timeliness standards, or "making the numbers," instead of producing quality decisions. This lack of emphasis on quality resulted in high error rates, inconsistent decisions, and the appearance of arbitrariness in VA's decisions, which led to a relatively high number of appeals and necessitated more rework of claims.

The recommended plan adopted process changes designed to remove the conditions responsible for errors and inefficiency. Quality—and thus efficiency—and improved service to claimants were to be the primary goals, supported by training and a certification process for adjudicators, along with better quality review and accountability mechanisms. Implementation plans were compiled in a report issued in June 1997, and the BPR plan was incorporated in the Compensation and Pension Service's (C&P's) business plan and later in VA's first 5-year strategic plan under the Government Performance and Results Act (GPRA), submitted to Congress in September 1997.

In its strategic plan, VA indicated that it planned to attack quality problems in its products by "doing it right the first time." However, if a mistake did occur, it would be candidly acknowledged and corrected as a priority. VA would assess and improve the level of accuracy for all work and correct errors in the shortest possible time as appropriate for each business line. Some of VA's performance goals were to make correct decisions 97 percent of the time; decrease the BVA remand rate from 43.7 percent to 20 percent; and improve the quality of disability examinations so that 99 percent were sufficient to adjudicate claims. The DAV and other veterans' service organizations strongly supported the BPR initiative.

From its comprehensive study of VBA's operations, NAPA issued its report to Congress in August 1997. NAPA was critical of VBA's past and planned staff reductions. NAPA noted that no sound basis existed for VA to conclude fewer employees

would be able to handle the future workload. The NAPA study also concluded that VBA's most fundamental need was to develop the leadership and organizational capacities necessary to enable it to plan and manage its functions strategically.

NAPA found that VBA management had a history of operating in a reactive rather than a proactive mode. NAPA observed that VBA focused principally on short-term issues, without any comprehensive, effective long-term strategy to solve its problems and permanently improve program performance and service delivery. NAPA saw a repetitive pattern in which VBA was good at generating plans but not good at carrying them out. According to NAPA, VBA's efforts to develop comprehensive performance improvements had failed because of a lack of precision planning and the discipline required to push a generalized vision through to operational reality. During the implementation process, systematic oversight, tracking, and coordination had been inadequate. No systematic cycle had existed for review of effectiveness of the results of implementation. No management action was taken to keep the organization focused on achieving its goals.

Additionally, because lines of accountability were not clear, VBA leaders were not held firmly accountable for high levels of performance. NAPA noted that VBA's operational control is decentralized, with power residing in the area and regional office directors. NAPA found that a sense of powerlessness to take action permeated VBA. In turn, field personnel perceived VBA's Central Office staff as incapable of taking firm action. NAPA said that a number of executives interviewed by its study team indicated VBA management officials have difficulty giving each other bad news or disciplining one another. NAPA concluded that, until VBA is willing to deal with this conflict and modify its decentralized management style, it will not be able to effectively analyze the variations in performance and operations existing among its regional offices. Neither would it be able to achieve a more uniform level of performance. Regarding C&P service especially, NAPA concluded that the C&P director's lack of influence or authority over the field office employees would greatly hamper any efforts to implement reforms and real accountability. NAPA recommended that the Under Secretary for Benefits strengthen C&P influence over field operations and close the gaps in accountability.

NAPA observed that accountability is the key. A no-nonsense approach to accountability disciplines the strategic management cycle. Top leaders must establish clear, unequivocal accountability for performance and provide full support to executives and organizations charged with accomplishing goals. However, leaders must be willing to discipline those who are not succeeding, according to NAPA.

NAPA acknowledged some steps in the right direction, such as efforts to implement GPR methods and the BPR plan. The real question, according to NAPA, was whether VBA could implement these initiatives successfully.

In May 2001, VA Secretary Anthony Principi created the VA Claims Processing Task Force to identify and recommend to the Secretary steps that VA could take to increase productivity, reduce processing times, and shrink the disability claims backlog without compromising the accuracy of decisions or service to veterans. Acknowledging the several prior studies and efforts to implement their recommendations, the Task Force observed that VBA had developed many initiatives in the belief that they would produce a better capability to adjudicate claims. Regarding these efforts, the Task Force concluded:

While some of VBA actions have been important first steps, the Task Force believes that VBA Central Office decisions regarding choices about how to improve the processing of claims has exacerbated the claims backlog crises. VBA has also created many problems through poor or incomplete planning and uneven execution of claims processing improvement projects. VBA Central Office choices have essentially served to reduce the availability of skilled labor for processing claims, while diverting experienced staff to implement unproven process changes that were poorly planned or managed. . . .

VA Claims Processing Task Force, Report to the Secretary of Veterans Affairs, iii (Oct. 2001). The Task Force summarized the essence of its own findings: "The basic overarching theme of the Task Force findings is that flaws exist in Accountability, Communications, and Change Management." Task Force Report, at iii.

The Task Force's specific findings echoed many of the same deficiencies and challenges identified in the previous studies of the compensation and pension claims processing system. For example, the Task Force acknowledged the fundamental flaw in the system in which rework overloads the system: "The current C&P sequential workflow was not designed to deal efficiently with rework reintroduced into the process. Rework includes such items as remands, cases under special review, and pending cases that have aged for some reason, requiring that they be introduced back into the workflow more than once over a period of time." Task Force Report, at 28. The Task Force also acknowledged the detrimental effect of appeals upon the

system. Beyond the added workload, the Task Force noted the unfairness to claimants from delays due to appeals: “Currently, both the time delays to handle appeals and the time to correct remanded decisions are both unreasonable and unfair to veterans awaiting decisions.” Task Force Report, at 14.

The Task Force identified several systemic deficiencies contributing these core problems. Like NAPA, the Task Force observed that VBA improvidently reduced its staffing:

The effective management of paper documents is a critical success factor in C&P efforts to process claims in a timely manner. However, VBA reduced the size of its Regional Office administrative workforce based on unrealistic assumptions about the benefits of case management and information technology. As a result, VBA Regional Offices are not staffed with the number and types of personnel with the skills necessary to plan and manage a complex administrative support process. Task Force Report, at 49.

The Task Force found that limited staffing for claims adjudication also poses a difficult problem. Referring to the dilemma of investing employee time in training and implementing process reforms versus the crisis of completing the existing workload, the Commission characterized the challenge facing VA as follows:

With increasing workload, VBA Regional Offices face the practical problem of having to allocate a fixed level of direct labor hours to accomplishing an increasing volume and complexity of work. . . . Additionally, VBA’s workforce is faced with the challenge of having to allocate direct labor hours to non-claim tasks, such as the planning and implementation of training and modernization initiatives. Task Force Report, at 3.

In this regard, the Task Force stated further: “VBA took trainers from the service centers to conduct training. This has naturally reduced productivity significantly. . . . VBA must develop a strategy to bring on new employees in a manner that allows for timely and effective training of new employees with minimum impact on the performance of Regional Offices.” Task Force Report, at 78. “Training new C&P employees pulls experienced staff out of the direct claims processing system, which leads to increased time to process claims.” Task Force Report, at 82.

The Task Force also noted the threat to the viability of VA’s aging data system, the Benefits Delivery Network (BDN), as a consequence of reduced resources and limited staffing:

BDN operations and support are approaching a crisis stage with the potential for BDN operational performance to degrade and eventually cease. This situation has occurred because of documented VBA Central Office policy decisions that limited the funding of BDN upgrades, reduced the size of the Hines ITC workforce, and stopped new hiring for the past 5 years. Task Force Report, at 61.

In addition to the need for a solution to the problem of dedicating staff to the chore of training new employees, the Task Force pointed to the need for more effective training: “VBA appears to have no apparent fully integrated training plan and program. The VBA Office of Employment Development and Training appears to be neither encouraged, nor equipped, to develop a comprehensive plan. . . . VBA has not put together a sorely needed training infrastructure.” Task Force Report, at 24. The Task Force summarized some of the defects in adjudicator training:

The training program was not geared to grade levels or competencies at each grade level in a job series. Employees were not certified as having the skills needed to do their jobs. Many of the instructors were not certified. In addition, VBA did not have mandatory training hours for all employees. This creates a gap for employees at the journeyman levels, as training programs are not required. No effort was made to link the learning activities to increased performance. Some measure is needed to verify the content of educational programs is achieving the learning objectives of the organization. Task Force Report, at 79.

Lack of accountability also figured prominently in the defects the Task Force found: “there is little evidence of accountability for decisions and operations.” Task Force Report, at 50. “This single attribute—accountability—is the most serious deficiency in the VBA organization.” Task Force Report, at 17. The Task Force described the nature and intended effect of real accountability:

The term accountability includes not only the proposition that a leader is responsible for the actions of the group but also is accountable for the results of those actions or inactions. Accountability also assumes that systems are in place to both measure results and to require positive actions when the objective is not achieved or when adjustments must be made. It is important to establish direction, to expect that action will be taken, and to provide the tools necessary to execute the action. Task Force Report, at 16.

In addition to a general lack of accountability, the Task Force attributed much of the inability to enforce accountability to a weak management structure. Pertinent comments were as follows:

[T]he VBA Office of Field Operations (OFO) is not organized properly to function in a leadership role. . . . Not only do the incumbents have an exceptionally large span of control which cannot be exercised effectively but also the obvious friction that seems to exist between the OFO offices and the Central Program Offices (especially C&P) which is debilitating to both headquarters and Regional Office organizations. Task Force Report, at 17.

C&P directives are specifically undermined by tepid support or no support from members of the OFO organization. Task Force Report, at 18.

At present, two Deputy Assistant Under Secretaries (Office of Field Operations) directly oversee the 57 Regional Offices. The fact seems to be that oversight is neither effective nor really expected. Task Force Report, at 70–71.

VBA's Central Office leadership gives the impression of neither demanding adherence to nor of being completely aware of the actual compliance to directives at the individual Regional Office level. . . . If there is no base structure, there cannot be reliable measurement or any reasonable assurance that claims decisions will be made as uniformly and fairly as possible to the benefit of the veteran. Task Force Report, at 16.

With this lack of accountability, the Task Force found a lack of enforcement of program directives and policies: "Inconsistent and inadequate implementation of VBA Central Office directives at Regional Offices was prevalent. Not only did interpretations differ as to their meaning, but also many at the working level frequently seemed unaware of the existence of certain policy changes or did not realize the importance of the information when it was received." Task Force Report, at 18. "It is apparent to the Task Force that there is wide variance in implementing instructions and directives, as well as IT programs, at the Regional Office level, which has led to confusion and lack of uniform adherence to accepted procedures." Task Force Report, at 71.

The Task Force found that management weaknesses were an underlying cause of the poor lines of communication: "As an example of the need for clear lines of communication and control, VBA has no effective method of direct oversight to ensure consistent implementation of directives." Task Force Report, at 71.

Similarly, there was a failure to manage change for the purpose of bringing about the reforms necessary to overcome the persisting claims processing problems:

Much of the problem of transforming the current claims processing system into an efficient system rests on an inadequate management plan; implementation that too often has been undisciplined and incoherent; and a failure to establish priorities and achievable completion dates. Additionally, there were insufficient requirements for feedback reporting and accountability by Regional Office managers to the Under Secretary and senior VBA managers. The variability within the system and among the Regional Offices indicates a lack of follow-through at VBA Central Office. Task Force members frequently found programs that had not been implemented fully or according to schedule and, at times, not implemented at all. Task Force Report, at 55.

The Task Force noted NAPA's identification of this lack of accountability and recommended solution: "It should be noted that the NAPA recommendation (4NAPA–5) stated that the Under Secretary for Benefits should develop a formal organizational chart for VBA and its components that closes the gaps in accountability between the Regional Offices and VBA Central Office." Task Force Report, at 71.

From these findings, the Task Force made several recommendations to correct the problems. Some were stopgap measures, such as specialized adjudication teams, to reduce backlogs of older cases, and others involved permanent reforms. Some were to be done as soon as possible, and others were to be implemented over time. The Task Force warned that failure to address the fundamental flaws in the system involving accountability, communications, and change management, "will ensure that VBA continues to be perceived as a reactive, short-term focused, uncoordinated entity." Task Force Report, at iii.

In the DAV's view, many of these recommendations appropriately targeted and addressed administrative deficiencies contributing to the overall problem. On the other hand, some recommendations were shortsighted in our view. For example, greater resources were to be allocated to higher performing regional offices only. Conversely, poorer performing offices would generally receive no increases in staffing or other resources to aid in improvement. To us, that represented continued acceptance of management failures. Instead of assisting in and insisting on improvement in performance, VBA would simply punish the poorer performing regional offices with fewer resources. In addition to acceptance of management inability to in-

duce change, this would seem to exacerbate poor performance and put improvement beyond the ability of underachieving regional offices. Moreover, it would punish veterans under the jurisdiction of the less proficient offices.

In any event, the Task Force was calling upon an entrenched bureaucracy to change its ways, and, while many of the recommendations were beneficial, they did not focus enough on correcting the primary, or root, causes of claims backlogs in our view. Although the Task Force recommended improvements in training, recommended the imposition of means to measure and enforce individual accountability, and recommended a stronger management structure, the necessary improvements in quality and timeliness have not been forthcoming. We believe VBA still has not taken the steps necessary to ensure adjudicators “get it right the first time.”

VA has been unable or unwilling to break the cycle in which production pressures drive a short-term quest for production that compromises quality for quantity and, over the long term, proves counterproductive. In The Independent Budget (IB) for fiscal year 2005 at pages 28–29, we observed that emphasis on production targets with a corresponding compromise in quality had apparently begun to cause anew a decline in timeliness as we had warned in the IB for the previous year. These persisting problems have prevented disabled veterans from receiving, within a reasonable time, the financial assistance they often urgently need to relieve the economic effects of disability. We also emphasized that VA cannot overcome these problems without adequate resources.

As of May 14, 2005, there were 506,105 compensation and pension claims pending. Of these, 345,237 were claims requiring disability rating actions, with 72,701 of the rating cases, or 21.1 percent, in a pending status for more than 180 days. This number of currently pending rating cases represents a substantial increase above the 253,597 cases pending at the end of fiscal year (FY) 2003 and the 321,458 cases pending at the end of fiscal year 2004. In its fiscal year 2006 Budget Submission, VA projected that it would reduce the number of rating claims pending at the end of fiscal year 2005 to 282,876. With this backlog increasing and a little more than one-third of the fiscal year remaining, it appears VA will finish the year with a loss of ground rather than a gain against the backlog.

According to the “Budget Highlights” in the President’s Budget Submission, one of VA’s highest priorities is to “[i]mprove the timeliness and accuracy of claims processing.” The Budget Submission states: “Funds are included in the Veterans’ Benefits Administration to sustain progress made under the Secretary’s priority of improving timeliness and accuracy of claims.” In another statement, the Budget Submission declares: “As a Presidential initiative, improving the timeliness and accuracy of claims processing remains the Department’s top priority associated with our benefit programs.” However, it appears that this budget abandons efforts to improve on the intolerable situation in which VA has large backlogs of pending claims and in which benefits awards to veterans are delayed as a consequence. The Budget Submission for fiscal year 2004, for example, set a goal of reducing the average processing time for compensation and pension claims from a projected 165 days in fiscal year 2003 to 100 days in fiscal year 2004, with a strategic target of 90 days. The Budget Submission for fiscal year 2005 set a goal of reducing the average processing time for compensation and pension claims from a projected 145 days in fiscal year 2004 to 100 days in fiscal year 2005, with a strategic target of 90 days. The fiscal year 2006 Budget Submission revises these figures to show that average was actually 166 days in fiscal year 2004, that the time will be reduced to 145 days in fiscal year 2005, and that the goal for fiscal year 2006 is also 145 days. The strategic target has been increased from 90 days to 125 days. This demonstrates that the resources requested are insufficient to meet a goal that VA portrays as a “top priority.” These figures call into question the genuineness of this stated goal.

Adequate resources are a key element of an efficient and effective benefits delivery system. Adequate resources permit VA to perform training to bring the proficiency of adjudicators up to acceptable levels. Undeniably, veterans’ benefits law and the medical questions involved in disability decisions are often complex; inescapably, adjudicators must be well trained. Effective training requires resources, that is, knowledgeable and experienced instructors who have the necessary time to devote to instruction and who utilize uniform lesson plans and available technology. In turn, well-trained adjudicators must have adequate time to thoroughly review evidence and make well-researched and well-reasoned decisions. With the unavoidable variations in proficiency, competent quality reviewers must review a sample of the decisions of each adjudicator and overseers must impose remedial measures where quality reviews demonstrate deficiencies, if the system is ever to be efficient. Management, from the regional office level to the top, must constantly monitor performance and enforce accountability. Though there always must be a reasonable balance between time allowed for decisionmaking and the necessity to stay abreast of

the workload, quality cannot take a backseat to the blind pursuit of production quotas. As obvious as these realities are, VBA seems to set them aside in its reactive mode of management where field offices are directed to reduce backlogs at all cost.

To complement its Systematic Technical Accuracy Review (STAR) program, which measures quality at the national level, VA announced in the year 2000 a new initiative for quality review at the individual level. Acknowledging that management needed a tool to consistently monitor individual performance, VA created the "Systematic Individual Performance Assessment" (SIPA) program. Under this program, VA would review an annual sample of 100 decisions for each adjudicator to identify individual deficiencies, ensure maintenance of skills, promote accuracy and consistency of claims adjudication, and restore credibility to the system. The reviewers would perform related administrative functions, such as providing feedback on reviews, maintaining reports, and playing a role in employee development and ongoing training. Unfortunately, VA abandoned this initiative during 2002, and proficiency is now apparently subjectively assessed by supervisors based on their day-to-day perceptions of employee performance. Without any actual systematic review of samples of an individual adjudicator's decisions, deficiencies are more likely to go undetected and unremedied. Here again, we must question whether the culprit behind abandonment of SIPA was inadequate resources.

The VA Claims Processing Task Force addressed inadequacies in adjudicator training in substantial detail. Task Force Report, at 77–81. From its findings, the Task Force recommended centralization and integration of VBA training. This recommendation included a comprehensive list of specific measures to improve the content and delivery of training. Our understanding is that many of these measures have not been implemented, that VA has no structured or ongoing training for journeyman adjudicators, and that no procedure exists to target training to deficiencies demonstrated by STAR reviews. Therefore, we believe the Committee may wish to specifically query VA about its training program, with specific reference to the details of the Task Force recommendation.

Again, the lack of a methodical and ongoing assessment of individual proficiency, the lack of a structured and uniform national program of training for journeyman adjudicators, and the lack of any feedback connection between training and STAR assessments can be expected to lead to and tolerate poor quality and a lack of national uniformity in claims decisions. Recent print media articles by investigative reporters using VA-generated data exposed geographical variations in the average compensation levels of veterans.

This media attention prompted VA to have its Inspector General (IG) investigate the claims adjudication system. The IG's office found that demographic factors accounted for some of the variance. Differences between claims processing characteristics of the States studied generally did not reveal correlations to variances. However, the inconsistency between States was significant for veterans rated 100 percent for post-traumatic stress disorder, for example. The IG report attributed this to the subjectivity of the rating criteria. Sixty-five percent of the adjudicators who responded to a survey by the IG's office reported insufficient staff to ensure timely and quality service. Fifty-seven percent of the adjudicators responded that it was difficult to meet production standards if they took the time to adequately develop claims and thoroughly review the evidence before deciding the claim.

To aid us in providing the Committee information for this oversight hearing, we asked the supervisors of our national service offices to provide assessments of the strengths and weaknesses of their VA regional offices. Rather than have them respond to a list of issues compiled by our headquarters staff, we allowed them to report based on their individual perceptions and views of the most notable or prominent factors responsible for the performance of their regional offices.

Among the favorable comments, the experience, competency, attitudes, and decisionmaking of decision review officers (DROs) were the most frequently mentioned. Many of our supervisors also reported good cooperation between veterans' service organizations and regional office management, although there were also several who reported less cooperative relationships and open communication.

The number of comments about inadequate VA staffing by far exceeded all others, favorable and unfavorable. About two-thirds of our supervisors pointed specifically to overworked VA employees as a serious problem responsible for poor performance. Associated with this inadequate adjudication staff were frequent comments that management pushed for production over quality and that there were timeliness problems in developing and deciding claims, as well as authorizing awards, and completing actions on appeals and remands. Several offices reported that VA managers diverted DROs from their regular duties to work these older claims and constantly required employees to concentrate on reducing the backlogs of certain types

of claims that had been neglected or allowed to remain pending for the longest periods of time. The second most frequently mentioned problem was inexperienced and inadequately trained adjudicators due to a high rate of employee turnover, complicated by insufficient staff or time for training. Many of our supervisors reported low morale among VA employees consequent to the burdens and problems stemming from understaffing. Poor quality in VA disability examinations was mentioned by some of the supervisors. A frequently occurring criticism was the observation that, contrary to law, VA adjudicators insist on ordering VA examinations where treatment records provide all the medical findings necessary for a decision. Another recurring comment was that adjudicators do not actually consult the laws, regulations, and other legal authorities to make decisions, but rather rely almost totally on standard formats in the computer-assisted rating tool, Rating Board Automation 2000, to make decisions, thereby omitting consideration of pertinent laws and regulations in some instances.

Appellate workloads and dispositions provide insight into the quality of VA regional office claims decisions. In our testimony here, we focus on compensation and pension claims processing inasmuch as that is where the challenges are the greatest and the problems persist. Approximately 95 percent of BVA's workload involves disability compensation and pension claims. Because appellate review is so essential to ensuring justice in an unavoidably imperfect adjudication system, the proper functioning of appellate processes is of major importance, especially where the rights and benefits of our veterans are involved.

As a statutory board, BVA was created in recognition of the importance of an effective appellate body within the VA administrative process and after experiments with other variations of appellate review had proven unsatisfactory. By consolidating and centralizing the appellate board in Washington, DC., under the authority of the agency head, then the Administrator of VA, the problems of decentralization, lack of uniformity, and the lack of finality were addressed through a clearer sense of direction. By Executive Order issued July 28, 1933, promulgated as Veterans Regulation No. 2(a), President Franklin D. Roosevelt established BVA. That Executive Order later became law through operation of a special statutory provision. By Veterans Regulation No. 2(a), the President mandated that BVA would sit at VA's Central Office, be directly under the Administrator, provide one review on appeal to the Administrator, afford "every opportunity" for a "full and free consideration and determination," provide "every possible assistance" to appellants, have final authority, and take final action that would be "fair to the veteran as well as the Government." Since its inception, BVA has operated separate and independent from the other elements of VA. While there have been some changes in its configuration since 1933, BVA has retained its basic concept and mission.

As it exists today, BVA's mission is still to make the final decision on behalf of the VA Secretary in claims for benefits. Section 7104 of title 38, United States Code, provides: "All questions in a matter which . . . is subject to a decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board." The Board operates under various statutory provisions codified at chapter 71 of title 38, United States Code, as well as regulations in part 19 and rules of practice in part 20 of title 38, Code of Federal Regulations.

Although BVA generally makes the final decision in an appeal, the appellate process begins with the VA field office that made the decision appealed, referred to as the agency of original jurisdiction, and, in some instances, action by the agency of original jurisdiction in an appealed case alleviates the need for a final decision by BVA. An appeal may be favorably resolved by the agency of original jurisdiction before the case is transferred to BVA or after the case has been sent back, "remanded," to the agency of original jurisdiction to cure some procedural omission or record defect. Up to 50 percent of the appealed cases are resolved by the agencies of original jurisdiction and never reach the Board. About 75 percent of the remanded cases are returned to the Board for a final decision, however.

A veteran or other claimant initiates an appeal by filing a "notice of disagreement" with the agency of original jurisdiction. The agency of original jurisdiction may then take such additional development or review action as it deems proper. If such action does not resolve the disagreement, the agency of original jurisdiction issues to the appellant a "statement of the case" that contains a summary of the pertinent evidence, a citation of the pertinent legal authorities along with an explanation of their effect, and an explanation of the reasons for the decision on each issue. To complete, or "perfect," the appeal, the appellant must then file with the agency of original jurisdiction a "substantive appeal," a written statement specifying the benefit or benefits sought and the bases of the appellant's belief that he or she is legally entitled to the benefit or benefits. Upon receipt of the substantive appeal,

VA enters the case on the BVA docket. The BVA docket is a list of cases perfected for appellate review compiled by the chronological order in which the substantive appeal was received. The Board receives these cases for review by their order on the docket, although a case may be advanced on the docket for demonstrated hardship or other good cause. The Board must afford each appellant an opportunity for a hearing before deciding his or her appeal. The hearing may be held before the BVA at its principal office or at a VA facility located within the area served by appellant's VA regional office. The Board may enter a decision that orders the granting of appropriate relief, denying relief, or remanding the appeal for further action by the agency of original jurisdiction.

The Board may reconsider its decision upon an order by its chairman on the chairman's initiative or upon a motion by the claimant, and the Board may correct an obvious error in the record without regard to an order for reconsideration. The Board is also empowered to revise its decision on grounds of clear and unmistakable error. The Board may undertake review on grounds of clear and unmistakable error on the Board's own initiative or at the request of the claimant.

Claimants for veterans' benefits who believe BVA made factual or legal errors in deciding their claims may appeal to CAVC. The Court may affirm or reverse the BVA decision, or remand for further action. The landmark legislation enacted in 1988 that subjected BVA decisions to the scrutiny of an independent court has necessitated positive reforms in BVA decisionmaking. Because the Board's decisions must be justified with an explanation of the factual findings and legal conclusions and because VA must defend its decisions in court, denials that go against the weight of the evidence or law have declined. The Board allows and remands substantially higher percentages of appeals than it did before judicial review.

During 2004, 2,234 claimants appealed to CAVC. The Court decided 1,780 cases, with an average processing time from filing of the appeal to disposition of 392 days. Of that total, 1,087 cases, or 61 percent, were either reversed/vacated and remanded or remanded because of some substantive error or procedural defect. This reflects a high error rate among those BVA decisions appealed to the Court.

During fiscal year 2004, 108,931 new notices of disagreement were received by VA, 49,638 appeals were perfected and added to BVA's docket, 39,956 cases were physically transferred from agencies of original jurisdiction to BVA, and the Board decided 38,371 cases. The Board began fiscal year 2004 with 27,230 cases pending before it and ended the year with 28,815 cases pending. Accordingly, the number of new appeals added to the Board's docket during the year exceeded the number of cases it decided by 11,267, and the number of new appeals added to the Board's docket exceeded the number of cases transferred to the Board for a decision by 9,682. The Board decided 1,585 fewer cases than it received from field offices.

At the end of fiscal year 2004, there were more than 161,000 cases in field offices in various stages of the appellate process, including the 31,645 on remand. Some of these appeals will be resolved at the field office level, but about three-quarters of them will come before the Board. At the end of March 2005, there were 51,508 cases on the BVA docket.

During fiscal year 2004, the average time for resolving an appeal, from the filing of the notice of disagreement to the date of the decision, was 960 days. Of this total, 734.2 days was the average time an appeal was pending in the field office, from the notice of disagreement to the transfer of the case to BVA, with an average of 225.6 days from the date of receipt of the case at BVA to the date of the decision. As of April 30, 2005, the average total days for cases pending in the field was 830 days and the average time at BVA was 204 days. Of course, for those cases remanded, the total processing time is considerably longer. In fiscal year 2004, an additional 155.6 days were added to the total processing time of appeals for the time the case spent at BVA the second time following the remand, and this did not include the number of days the case was on remand at the field office. During fiscal year 2004, 7,140 cases were returned to the Board following remands. The remands took an average of 22 months. As noted, there were 31,645 cases on remand at the end of 2004. Of the 38,371 cases decided by BVA in fiscal year 2004, approximately 21 percent had been previously remanded. With these long processing times, far too many disabled veterans die before their appeals can be decided. Three obvious conclusions follow from these numbers: (1) most of the delay in these unreasonably protracted appeals processing times is at the field office level, (2) far too many cases must be remanded more than once, and (3) multiple remands add substantially to the workload of BVA.

The Board allowed 17.1 percent of the cases it decided during fiscal year 2004. Approximately 24 percent of those allowed cases had been previously remanded. The Board remanded 56.8 percent of the cases it reviewed during fiscal year 2004. Of those remanded cases, 18 percent had been remanded previously, suggesting that

the field office did not fulfill the Board's instructions in the remand order. Together, the allowed and remanded cases represented 73.9 percent of the Board's total case dispositions in 2004. Denials amounted to only 24.2 percent of the total dispositions. In addition to noting the high percentage of cases remanded multiple times, three conclusions can be drawn from these percentages: within these appealed cases, (1) agencies of original jurisdiction have denied many meritorious claims, (2) agencies of original jurisdiction have denied many cases without proper record development, and (3) only a relatively small percentage of these appellants had unwarranted appeals.

While the high remand rate can be viewed generally as an indicator of poor quality, it must be noted, however, that not all remands are appropriate. For example, 6,355 cases involved a remand for a new examination and "current findings" because of a "stale record" in fiscal year 2004. That is an invalid reason to remand an appeal. When a veteran appeals, he or she is challenging the propriety of the decision on the record at the time the agency of original jurisdiction made the decision. If the examination or other medical evidence provided adequate medical information for an adjudication at that time, no additional evidence is necessary to decide the appeal. The time that lapses between the time of the initial decision and the decision on appeal, while often protracted, has no bearing on the merits of the appeal and is irrelevant as a matter of law. Only when BVA finds an inadequacy in the examination, or the record otherwise, is a remand appropriate to gather additional evidence. Appellants have the option to submit additional evidence to corroborate evidence already of record, shed additional light on the factual questions, or otherwise strengthen or reinforce the appeal, and that evidence is for consideration, of course, but that rule does not provide any grounds to remand where the existing record is complete and the evidence is sufficient for a fair and sound decision. Again, with an adequate record, the question on appeal is not the factual state of affairs today or degree of disability currently, but whether the decision was correct or incorrect when it was made.

In, VAOPGCPREC 11-95, a decision that is legally binding upon VA and Board, the VA General Counsel held that BVA is "not required to remand an appealed disability-benefit claim solely because of the passage of time since an otherwise adequate examination report was prepared." Other rules such as those in sections 3.104 (a) and 3.105(e) of title 38, Code of Federal Regulations, prescribe procedures and due process requirements for addressing actual demonstrated changes in disabilities that occur following final rating actions. Remands on the premise that an examination is "stale" are unlawful, waste resources, and unnecessarily delay appellate decisions and benefit awards. Where an examination at the time of an initial adjudication was adequate for a determination on the degree of disability then present, where that examination supported a rating higher than the one assigned by the agency of original jurisdiction, and where BVA affirms that erroneous rating based on a later examination—perhaps years later—that showed intervening improvement in the disability, the BVA decision is unlawful. The decision is unlawful because its effect is one of a retroactive reduction in a disability evaluation contrary to section 5112(b)(6) of title 38, United States Code, and without observance of due process mandated under section 3.105(e).

In fiscal year 2004, BVA remands were for new examinations in 22,987 cases. Of that total, 16,632 were for reasons other than stale records or examinations, such as for clarification of diagnoses and to correct incomplete medical findings. The most prevalent reason for remand was to obtain additional evidence beyond that obtained by the agency of original jurisdiction. Among the cases remanded in fiscal year 2004, 48,624 included remands to obtain additional evidence. Other reasons for remands were to complete various procedures or actions previously omitted or required by intervening changes in law or circumstances.

Our service officers tell us that a greater portion of the appeals could be resolved at the regional office level if adjudicators there actually read and considered the statements on the substantive appeal and the service officers' arguments on the "Statement of Accredited Representative in Appealed Case." These arguments are entered while the appeal is still before field office and are directed at field office adjudicators. Based on arguments of inadequate exams, incomplete record development, and other errors, BVA will summarily remand a case where the error complained of is fairly clear on its face. Conscientious field office adjudicators could resolve such errors more promptly and without necessity for BVA review by merely reading the arguments. Apparently, time constraints and the lack of any production credit for such reviews act as a disincentive for another look by an adjudicator at these stages of the appeal. Reduction of the workload on BVA and avoidance of the added cost of consideration by BVA should provide an incentive for VBA management to correct this problem, however.

In addition to the burden of an increasing workload, reductions in its staffing levels for BVA in the past few years add to the strain upon the Board. Despite these increasing workloads, the President's fiscal year 2006 budget again calls for a further decrease in staffing from 440 fulltime employees (FTE) to 434 FTE. This would be down from 455 FTE in fiscal year 2001. If future backlogs and delays in appellate processing are to be avoided, BVA must have the additional resources necessary to meet this greater workload.

In August 2001, VA proposed to amend the Board's regulations to enable the Board to perform record development itself and make a decision on that evidence rather than remand the case to the agency of original jurisdiction for these purposes. For several reasons related to unfairness and inefficiency, the DAV urged VA not to issue a final rule to authorize this practice. We also noted that such a rule would be unlawful because it would deprive claimants of the statutory right to have a decision by VA and one administrative appeal from that decision. The DAV proposed an alternative in which a special unit of VBA personnel in Washington could perform the remand development and make a new decision on the additional evidence. This would be a shortcut to avoid the delay of a remand to the regional office. The goal of speeding up the process could be accomplished without any denial of due process for the claimant. VA brushed aside our objections and recommendations and issued a final rule for this purpose in January 2002. To handle this work, BVA created its Evidence Development Unit, which began operations in February 2002. The DAV, joined by three other organizations, challenged this rule in the United States Court of Appeals for the Federal Circuit. In its May 1, 2003, decision, the Federal Circuit invalidated the rule as unlawful. As a result, VA created a special VBA unit, the AMC, to perform remand functions.

The AMC develops and decides approximately 96 percent of the BVA remands. The issues involved in the other 4 percent are more appropriately handled by the field offices. Although the average time a case was in remand status during fiscal year 2004 was 22 months because a portion of the cases were old ones remanded to field offices, the portion of the remanded cases that were developed and decided by the AMC were on remand an average of approximately 203 days. As of April 23, 2005, the average days a case is on remand before the AMC had more than doubled, to 412.6 days. The AMC currently completes work on an average of 231 cases a week, and 20,970 cases were assigned to AMC as of April 25, 2005.

This backlog resulted from the bulk transfer of approximately 9,000 cases from the Board to the AMC in the first quarter of fiscal year 2004. These were cases in which further development was pending at the Board. Of course, the AMC had both the responsibility to develop and adjudicate these cases. In the beginning when the AMC was first organized, it had to cope with new processes and adjudicators, and it was understandably not up to full efficiency. As a consequence, cases began to back up.

Because the volume of work at the AMC was higher than expected, VBA developed a plan in December 2004 to have three VA regional offices do a portion of the remands. These offices are located in Huntington, West Virginia; St. Petersburg, Florida; and Cleveland, Ohio. Initially, the plan was that cases already developed and ready to adjudicate would go to the Huntington and St. Petersburg offices. Huntington was expected to adjudicate and authorize awards for 300 cases per month. St. Petersburg was expected to adjudicate and authorize 500 cases per month. Cleveland was expected to develop, adjudicate, and authorize 600 cases per month. The Huntington and St. Petersburg offices found that some of the cases they received from the AMC were not actually ready to adjudicate. These offices began to undertake development also. The AMC currently sends 1,300 cases a month to the AMC teams at the three regional offices.

Our DAV representatives at BVA observed that some of the earlier cases returned to the Board from the AMC were not developed in compliance with the remand orders. However, with AMC employees gaining experience, the quality of development has improved. The AMC is viewed as an improvement over the prior procedure in which all cases were remanded to agencies of original jurisdiction because cases are more strictly controlled and not left to languish in field offices for years, as too often happened before. Our representatives at the AMC also report that AMC adjudicators are granting the benefits sought in many of these appeals.

When the BVA allows an appeal, it returns the case to the AMC rather than the agency of original jurisdiction to effectuate the award of benefits. The case often must go to the AMC because the appeal also involves a remanded issue. A major complaint is that the AMC delays the award of benefits on the allowed portion of the appeal for an average of 90 days. Even where the case involves no remanded issue, the case is sent from BVA to the AMC for the award of benefits, and this results in unnecessary delay. In instances where an allowed appeal involves no sep-

arate remanded issue, the case should be returned to the agency of original jurisdiction for a prompt award. Many of these claims have been pending for years.

Currently, VBA has 134 FTE devoted to the AMC and its three outstations. The AMC has 87 FTE. St. Petersburg has 25 FTE, Huntington has 8 FTE, and Cleveland has 14 FTE devoted to their AMC Resource Units. If the BVA remand rate remains at or near 50 percent of its dispositions, it is projected that VBA will need to increase its staffing for this activity to 145–150 FTE in fiscal year 2006.

The foregoing information suggests that VBA still reactively expends too much of its resources fighting brushfires and not enough on fire prevention. When the effects of a bottleneck become a public embarrassment, VBA creates a “Tiger Team” or “brokers” work from the overloaded activity to another station. This may serve to cosmetically level out the mountains, but it does not appear to substantively reduce the total volume of work across the system. When VBA does push to reduce the backlog in the short term, it increases work in the long term by compromising quality. This necessitates more rework and triggers more appeals, which overloads the system even more, and causes a further decline in timeliness. The timeliness and propriety of actions on appeals by agencies of original jurisdiction in preparing the case for BVA review and in completing remand actions after BVA review account for much of the overall appellate processing time and necessity to rework the case. The available data show the error rates in appealed cases are high and that the process takes an inexcusably long time, thereby delaying disability and other benefits for many veterans with meritorious claims and immediate needs. The problem of appeals languishing in regional offices for years is not a new one. The responsible VBA officials need to take more decisive action to correct this problem. Board officials need to take the necessary steps to reduce error rates in BVA decisions and to ensure binding court mandates are carried out. With recent increases in the appellate caseloads and no corresponding increase in staffing, timeliness at BVA and the AMC is likely to suffer even more. Congress needs to address BVA staffing more seriously.

We appreciate the Committee’s interest in these issues, and we appreciate the opportunity to provide you with the DAV’s views. We hope our views will be helpful to the Committee.

Chairman CRAIG. Rick, thank you very much.

Judge Kramer, in your comments and in your testimony, during your service in the court you saw cases that had been remanded numerous times previously, and had been pending in appellate status for up to 10 years. It is my understanding that even under those circumstances, the court generally does not set specific timeframes within which a claim must be completed after it is remanded by the court.

Do you believe it would be beneficial for the court to set specific timeframes in these types of cases? And does the court have the authority currently to do so?

Mr. KRAMER. That is a very good question. To answer the last part first, I think there is probably disagreement among the judges of the court, at least when I was there, as to whether the court has that authority. I believe, personally, that it does.

I think that for those that believe the court does have the authority, I think many are reluctant to exercise that authority in every case. It puts an institution of less than 100 people in a situation where they are, in essence, micro-managing one of the largest bureaucracies in the Federal Government. It is almost an impossible task. And then, of course, by putting dates of specificity on it, it is really making a decision as to which claim is more important than the other.

You can see from some of the previous witnesses here that how to pick which claim to do first is a very difficult task, indeed.

I, personally, in conducting my own caseload, did sort of that, time-limiting in the most egregious cases, by suggesting in some of my orders that if certain results hadn’t been accomplished by a cer-

tain date, that a writ to the court might be accepted. And then generally, when I did that, the job got done within the requisite timeframe. But it was a mechanism that I used, like I say, only in the most egregious cases and in relatively rare situations.

Chairman CRAIG. When you used that, did you get pushed back? Or were they handled within a reasonable timeframe?

Mr. KRAMER. No, I think generally it worked. But if the court were to do that in every case, I think you would just find, quite honestly, that bureaucracy of writing memos to itself about which cases ought to be treated first probably would create more paperwork than to do the job that has to be done and get the cases resolved.

I think the problems are probably more systemic. The Congress has already provided several provisions of law that say that there shouldn't be delay; that cases are to be handled with dispatch, and so forth. And it still hasn't happened. And I don't know that the court, if it imposed deadlines in any other case, would be any better at accomplishing that.

Then you would have a situation where people would be coming, asking that sanctions be imposed against the Department for failure to comply with all these timeframes set. I think that would just result in additional secondary litigation that didn't really resolve the true litigation that needed to be resolved, and that is litigation on behalf of the veteran.

Chairman CRAIG. Thank you, Ken.

Cynthia, VA has reported that it expects to receive over 800,000 claims in 2005. You noted in your testimony that a single claim may involve numerous disabilities, and that claims with multiple disabilities may take longer to complete.

Considering that VA has reported a recent increase in the number of claims involving multiple disabilities, do you believe that VA's method of reporting the number of claims received accurately reflects the true size of the caseload? And also, does VA set different strategic goals for claims that involve more disabilities?

Ms. BASCETTA. Mr. Chairman, no, we think that VA's method definitely understates its workload. All the claims are aggregated, regardless of the number of issues. And they basically use two end products: the first for cases that have one to seven issues; and the second for cases that have eight issues or more.

I would also point out that not all issues are equally complex. Some are much more objective, and could be decided more quickly; while others, the ones that are more difficult to resolve, require more judgment. And one would expect that they would require more time to adjudicate.

So we have recommended that they take a look at how they can disaggregate their workload, and perhaps even report on different timeliness goals; so that honestly it could be that they are doing a better job than their aggregate statistics show. We also think that if they had better information on where the problems were, they could focus in on reducing timeliness, as well as improving accuracy and consistency.

And with regard to your second question, they could set strategic goals for more complex claims, by using the numbers of issues as a proxy for complexity. But right now, we think that they would

possibly have some IT obstacles that they would have to overcome before they could look at their workload that way.

Chairman CRAIG. Thank you very much.

Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

Mr. Surratt, as you know from my appearance at the Commission earlier this month, I am very interested in the work of the Disability Benefits Commission. To follow up on Senator Salazar's question, what is your assessment of the Commission's ability to truly examine the benefits system and make recommendations to benefit veterans?

Mr. Surratt. Well, Senator, I don't believe the law calls for the Commission to examine the system, but I believe it will anyway. If you look at the statute that created the Commission, it tells the Commission to look at the standards for service connection and to look at the disability rating schedule to see if it is appropriate. And it speaks of the effectiveness of the substance of the programs, rather than how they are administered.

I understand that we are going to probably hear testimony from the VA IG, and I suspect that we will probably get into the process some. But in my opinion, that is not the primary purpose of the Commission.

Senator AKAKA. When I visited the Commission, it was a very active group. I am, of course, interested in what they do and how they can continue to help veterans. And my question is along that line.

Judge Kramer, it is good to see you again.

Mr. KRAMER. Good to see you, sir.

Senator AKAKA. What would be the immediate effects if the U.S. Federal Court review of U.S. Court of Appeals for Veterans' Claims cases is eliminated? And I am asking that because you made the comment that judicial review is a problem, and even suggested that the Federal Circuit should be removed. So what would happen if that occurred? And what would be the long term effects?

Mr. KRAMER. Well, I want to make clear that I am not advocating the elimination of appellate judicial review. What I am suggesting is that there are too many layers of appellate judicial review, just as there are too many layers in the VA administrative system itself.

I don't believe that the elimination of Federal Circuit review, which is above the veterans' court, would do any damage whatsoever. But I do believe that it would improve the timeliness of decisionmaking for those cases that are brought to it by anywhere from, in many instances, 2 to 5 years.

So that some of these horror stories that you hear about, about cases going back and forth between all of these different appellate levels, some of those could be ameliorated and mitigated against to some significant degree, I think, by only having one appellate court level of review.

Senator AKAKA. Mr. Surratt and Mr. Chisholm, would you please comment on Chief Judge Kramer's idea that would place an administrative law judge at a regional office so that a claim could be sent for more development earlier, with the intent of eliminating the time a claim is considered by the Board of Veterans' Appeals?

Mr. Surratt.

Mr. Surratt. I am not so sure—Judge, if I may ask you a question?

Mr. Kramer. Surely.

Mr. Surratt. Did you mean that the ALJs would replace the Board of Veterans' Appeals?

Mr. Kramer. No. What I meant was that the object would be to try to keep many fewer cases from going to the Board, by getting the matter resolved fully at the earliest possible time in the decisionmaking process at the local level; and that in order to really do that, you would need many more capable people at the RO level than are presently there now. You would have to have a formal decision at the RO level, which could then only be attacked at the Board level by an appeal of great specificity.

Mr. Surratt. Well, I mean, that to me adds another layer. Certainly, my experience with administrative law judges in the Social Security system is that they are good, they make good decisions, and they make sure the cases are developed well in most instances.

I would say, though, if VA did it right with the people they have, you have an initial decisionmaker, you have a decision-review officer, and then you go to the Board. Obviously, an administrative law judge may be more trained in the law, and it would be beneficial in that effect.

The regional office adjudicators are essentially fact finders. They don't rule on questions of law in any real sense, like courts do. Administrative law judges perhaps would approach that more deeply, in looking at questions of law.

But it would be quite costly, I would think. That is a consideration that you are always faced with.

Senator Akaka. Mr. Chisholm.

Mr. Chisholm. Yes. I think in the situation that I described in my testimony, where the Board members are decentralized to the regional offices or replaced by independent administrative law judges, and then with the direct appeal to the court, that could be successful. Otherwise, it seems to me that you are adding another layer, and I would not be in favor of that.

If I could just address one other issue, as someone who has represented veterans before both the court and the Federal Circuit, I think Federal Circuit review of claims has been critical in those limited circumstances where the veteran is challenging legal interpretations that the court has made. And in one particular instance in 1998, the Federal Circuit reviewed the standard of new and material evidence, and changed the entire way the court and the VA was interpreting that. And it was critically beneficial to veterans. So I do not believe that the elimination of the Federal Circuit would be a wise idea.

Senator Akaka. Thank you very much, Mr. Chairman.

Mr. Surratt. Mr. Chairman, I would like to speak on that issue, also, if I may.

Chairman Craig. Please.

Mr. Surratt. I have great respect for Judge Kramer, but I have to respectfully disagree with him on that issue. First of all, the number of cases that go to the Federal Circuit from the Court of Appeals for Veterans' Claims are not that great.

Secondly, the Court of Appeals for the Federal Circuit has made some very important decisions; not all of which we agree with, of course. But it has proven valuable, I think.

And as to that effect upon timeliness, I don't think it will help that, because if you lose at Judge Kramer's court and you don't have a higher appeal, that is the end of the road. But if you can go to the Federal Circuit, sure, that takes more time, but it doesn't extend the time that it would otherwise take. I mean, that case, because the appellant chose to go to a higher level, of course prolongs the ultimate disposition of his appeal; but he certainly has another chance to have it allowed. So I don't see as much benefit in removing the jurisdiction of the Federal Circuit as Judge Kramer does.

In addition, the Federal Circuit has jurisdiction to take direct challenges on VA regulations. And there are two ways you can do that. I mean, you can challenge a regulation in connection with a case being appealed that goes to the Federal Circuit, arguing that the regulation is not consistent with the law, or is arbitrary and capricious, or something of that nature. So you have two tracks. You would still have the Federal Circuit reviewing direct rule challenges. So all in all, I don't see that that would be as beneficial as Judge Kramer does.

Chairman CRAIG. Thank you.

Ms. BASCETTA. Mr. Chairman, may I make an observation?

Chairman CRAIG. Yes, Cynthia.

Ms. BASCETTA. I am not an attorney, so I would not tread into this discussion at this level of detail. But before I did VA disability work, I did Social Security disability work. And I would just like to make the observation that one of the things that we found in both situations is that there seems to be a difference in the model that the decisionmakers use at the initial and at the first level of appeal; in that there tends to be more of a medical model and approach to weighing the medical evidence that the VA regional offices—or the DDS in Social Security's case—use, as opposed to the more legal approach at either the Board or at the ALJ level.

And I do think there is something there at the conceptual level about trying to get more legal expertise earlier in the process, to try to resolve what the differences might be between those two levels of adjudication.

And part of what I think would be helpful would be some training about why there are inconsistencies in decisions on the same cases between adjudicators at those levels. And some kind of resolution and feedback about what is going on there could be ultimately helpful in trying to resolve some of the consistency and quality issues, as well as reducing rework.

Chairman CRAIG. Cynthia, are you suggesting that the Social Security model is a better model, or a different model?

Ms. BASCETTA. It doesn't work, either.

[Laughter.]

Ms. BASCETTA. They have the same problems. They take too long. They take a little less time. I think they are at about 95 days now. But they have an all-or-nothing decision. It is not as complicated as VA in doing a partial disability decision.

But in terms of inconsistency, they have precisely the same problem as VA. And their award rate on appeal is very high. I think it is about 63 percent now. So they definitely have significant differences in how they are weighing the same evidence.

Chairman CRAIG. Thank you.

Senator Thune, welcome.

Senator THUNE. Thank you, Mr. Chairman. And thank you and Senator Akaka for focusing on this very important issue. Reducing the backlog of claims at the VA is essential to making sure that our veterans are getting the compensation to which they are entitled.

And I commend the VA for the efforts that have been made to mitigate that problem, from hiring new staff to trying to automate records and streamline some of the case management. But we still have an awful long way to go, and that backlog still exists.

There are, as I think have been enumerated today, a number of reasons perhaps for that backlog, from ineffective methods of adjudicating claims to inefficient appeals process. But I think in my State of South Dakota there are veterans who wait over 3 months to have their claims processed. We have a backlog of over 1,500 claims, and 175 claims that are currently over 6 months old. So I would say, Mr. Chairman, that this simply isn't efficient. It is not good enough. And America's veterans deserve better. And I know that you are, and I believe this Committee is committed to making sure that we are providing them with a system that works.

So this hearing is not about assessing blame. It is really about trying to get to the problem, and trying to figure out a solution. So thank you for your good work.

A question, perhaps, for Mr. Surratt and Mr. Chisholm. And that is, many of these issues are resource-oriented issues. If you have more money, you can hire more staff; you can do more automation, new computers, that sort of thing.

I guess my question would be, if you had more money, if we had more resources to allocate to this problem, what would you do with it? I mean, what is the most efficient way of achieving a higher level of success, if we were able to find funds to do that?

Mr. Surratt. Well, the money should be invested in training, more training. The VA has a problem of a large turnover in adjudicators. Many of their older, experienced adjudicators are at retirement age and are leaving. And the experienced adjudicators do not have time to conduct training and decide cases and do quality reviews, all three at the same time.

So somewhere along the line, VA may have to slow down on the claims processing, unfortunately, in the short term, to have experienced people, maybe retirees, come back—they have done that before—and train the new adjudicators better; focus on, as we have heard today, getting it right the first time.

So that takes an investment of resources up front, and perhaps some loss of timeliness in the short term for a long-term strategy of greater efficiency. So with more people, as you get them trained to decide claims and train other new people, then eventually you will catch up, if you are ever to catch up.

So again, devoting resources to training, to better quality control, and to not push production. As I have stated in my testimony,

what the problem is, when VA starts getting these large backlogs, they start pressing their adjudicators to put out larger numbers of cases. And when they do that, they start making more mistakes. And then their cases have to be reworked, and that in the long term just creates a vicious cycle.

Senator THUNE. Slows it down, right. OK. Anything to add, Mr. Chisholm?

Mr. CHISHOLM. I think training is critical. The other thing that I think is working at the regional office level is the decision-review officers. These are the folks that have the second—you can have sort of an internal appeal, if you will, at the regional office. And the decision-review officer has the power to do *de novo* review. And I am seeing a lot of success at that level.

And I think the VA should increase the number of DROs in the regional offices. And I think you will see more cases cleared as a result of that, and not being appealed.

Senator THUNE. All right. Judge Kramer, in some of your series of recommendations you talk about ALJs and consolidating at the appellate level adjudication. Just curious, would there be an argument to be made for allowing folks to go directly to the circuit court of appeals wherever they are, as opposed to going through the current process?

Mr. KRAMER. Well, one of the points that I put in my written testimony, that I didn't include in my 5-minute version for lack of time, was that I do believe in a single level of appellate review. I know that obviously people who lose, as you can tell from some of the other testimony here—and I understand that—if you lose at our level, you would like another opportunity to win at an additional level. But you also have to balance that against cost, time, and efficiency.

The other alternative suggestion I made, which I think is more draconian than to eliminate Federal Circuit review, is to simply merge the veterans court into the Federal Circuit; increase the expertise of the Federal Circuit in veterans' law. I don't favor that as a method of one level of appellate review over the method that I most recommended because, one, I believe that most people feel that review focused exclusively on veterans' cases is a good thing; and No. 2, the primary focus of the Federal Circuit, even if you merged the veterans' court into the Federal Circuit, would still be intellectual property law, which is the basis for which they were created in the first place.

But if you had to choose, I think, between two levels of judicial review, or one level conducted only by the Federal Circuit with a merged Federal Circuit court, I think that would be preferable. In fact, if you look at the Federal Circuit history, its own growth is one of merger and spin-off, merger and spin-off, among Article I and Article III courts.

Senator THUNE. Thank you, Mr. Chairman. I see my time has expired.

Chairman CRAIG. Senator Obama, welcome back.

Senator OBAMA. Thank you very much, Mr. Chairman. Thank you to the panel. I am sorry I missed your live testimony, but I had an opportunity to read the written testimony.

My first question, I guess, is for Mr. Surratt. We had the Secretary out to Illinois at a town hall meeting in response to some of the discrepancies that we were seeing in terms of benefits across the country. And I had an opportunity to review the IG report on this problem.

One of the things that was striking was the huge gap between veterans' benefits for those who had VSOs representing them, and those who did not. And I am wondering what you think we can do to make sure that all veterans are aware of the need for an advocate in these circumstances.

And I am wondering whether that is something that the VSOs have done to actively encourage their use. Why it is that there might be big differences in some States versus others in terms of the utilization of VSOs.

Mr. Surratt. What I would speculate—and that is purely what it is—is that those people who are not represented by VSOs or attorneys do so because they choose not to be represented. We certainly put out, all organizations put out, literature. I think the VA notifies veterans of their right to free representation from VSOs. And as the figures demonstrate, there is a better chance of getting higher benefit levels if you are represented. And the VSOs look behind the VA decision, and the VA is pressured to make fast decisions. And in the appellate process, they catch errors.

Senator Obama. I guess what I am wondering is, do we let veterans know that, you know, if you just look at the studies, that there may be \$6,000 more in benefits if you use a VSO or an attorney than if you don't? I mean, because my suspicion is that you might have a veteran going in there feeling like, "Well, this is something I can handle myself," but if somebody told him, "You know, on average—may not happen here, but on average—you are going to get \$6,000 more if you are using an attorney or a VSO advocate," that that might make some difference in terms of what they decide to do.

Mr. Surratt. Well, we have never put it in terms of money. We didn't have the data.

Senator Obama. Right.

Mr. Surratt. But we have put it in terms of, "You have a better chance of getting your case allowed and getting the proper decision, if you are represented." I, personally, wouldn't want to use money as a selling point. We have the data before us, and I am sure that that will be widely disseminated.

But, yes, we should encourage veterans to seek VSO representation in any way we can, and I think we do that. And again, I would just guess that the majority of those who are not represented are not represented because of lack of knowledge, but because of choice.

Senator Obama. OK. Judge Kramer, I just had a quick question for you. I was intrigued by your suggestion that VA physicians fill out a standard form addressing causation when treating new conditions. How much, in your opinion, is the delay that exists caused by a lack of medical verification?

Mr. Kramer. Well, there is a long-term provision in the law—certainly predates me; and not much does that—for the VA to do what other governmental entities don't do, and that is help a claim-

ant gather evidence for their claim. And in my experience, the evidence most often missing is evidence of causation.

And right now, the rules are very murky and ambiguous, despite the passage of the Federal Claims Assistance Act, as to exactly when such a medical opinion must be rendered. And it has been the cause over my career of much litigation, many remands, and elongating the claims history of claims significantly. And so I think an early resolution of when that kind of a medical opinion has to be offered, clarification by the Committee as to that law, would be extraordinarily helpful.

Now, as you can tell—and as some of the commentators, and correctly so, suggested—at least there is some front-end cost to some of the things that I have suggested. You have 800,000 new claims. You know, not all of them will involve medical causation, of course. But you would have to put some parameters on when such an opinion was going to be rendered, because you can't, obviously, issue 800,000 opinions from the get-go.

But I do believe that the fight over when you should get an opinion—and we found many cases at the court, for example, that the key questions had never been addressed.

Right now, under the law, VA has, in essence, huge discretion as to when to obtain such an opinion. Under the old law, you had to have, in essence, what they call a rounded claim in order to get VA assistance. As the court interpreted it, you had to have possible evidence of a present disability, possible evidence of an event in service, possible medical evidence in most cases of a relationship between the two.

There was a lot of complaint about that; a lot of cause for dismay. The Veterans' Claims Assistance Act, I think its primary objective was to fix that problem. And yet, the very provision in the Veterans' Claims Assistance Act that deals with the obtaining of medical opinions, in essence, requires evidence of a medical connection before the VA is required to go get an opinion. So we are right back where we started from.

So I would suggest that a lot could be gained on changing this specific provision, clarifying the rules as to when such a medical opinion has to be rendered.

Senator OBAMA. Thank you, Mr. Chairman.

Chairman CRAIG. Lady and gentlemen, we are running out of time, and I am disappointed in that. I have several more questions I would like to ask. So I am going to beg your indulgence, to submit them to you in writing to gain your response.

Mr. Chisholm, I am curious about your suggestion to provide legal counsel earlier on, and the ramifications of that; and a variety of other aspects of some of the comments that Mr. Surratt has made. So I will do that. And I understand our Ranking Member has other questions he would like to ask, also. So we will submit some questions to you in writing.

Let me thank you all very much for your time here today and your preparation. It is extremely important to all of us that we might nudge this system a little further into responsiveness. I know that the cry for resources is always there, and that is a difficulty. So we are examining it from two levels; both resources, and structure and function. And I think that those are all important as-

pects as to the process that will best render our veterans as immediate adjudication of their claims as is possible.

And the backlogs are at times, by number, overwhelming to try to understand why we can't get a handle on them; but we have seen the Veterans' Administration push forward very aggressively. We hope that will continue. We will continue to nudge them and observe and, if need be, appeal to the Congress to make some statutory changes.

Judge Kramer, I appreciate your insight into it. Your experience obviously is very valuable to us, and your offer to stay in touch. We will do just that with you, as I know we will with these other gentlemen and with Cynthia, as we work through this issue.

Thank you all very much for your time, and the Committee will stand adjourned.

[Whereupon, at 4:16 p.m., the Committee was adjourned.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LARRY E. CRAIG TO DANIEL L. COOPER

Question 1. Currently, priority access to VA health care is given to combat theater veterans who are within two years of their military discharge date. To be consistent with that policy, and to encourage veterans to file claims within close proximity to their service discharge, should there be priority treatment of claims that are filed within two years after service, especially if that service occurred during a wartime period.

Answer. The Veterans Benefits Administration (VBA) is giving top priority to the benefit claims of all returning war veterans who are seriously injured, and certainly providing the best possible service to these returning heroes must remain our highest priority. VBA also gives priority to claims from terminally ill veterans, homeless veterans, veterans with severe financial hardship, former prisoners of war, and veterans over age 70.

VBA has a number of initiatives to assist service members separating from active duty in filing claims promptly. Under the Benefits Delivery at Discharge (BDD) program—in place at 140 military installations around the country and overseas—active duty service members within 180 days of separation are encouraged to file disability compensation claims with Department of Veterans Affairs (VA) staff who are serving at military bases either on a full-time or itinerant basis. Service members can complete the necessary physical examinations and have their claims evaluated before or closely following their military separation dates. In most cases, disabled service members participating in the BDD program begin receiving VA disability compensation benefits within 60 days of their separation from active duty, which serves to ease the transition from active duty to civilian status. In fiscal year (FY) 2004, the BDD Program received approximately 40,000 claims from separating service members.

Through the joint VA/Department of Defense (DOD)/Department of Labor (DCL) Transition Assistance Program (TAP) and Disabled Transition Assistance Program (DTAP), VBA conducts extensive outreach to ensure separating service members file claims for VA benefits. Service members are fully briefed on the VA benefits available to them and encouraged to apply for the benefits. Since October 2002, VBA military services coordinators have conducted nearly 20,000 briefings, which were attended by almost 700,000 service members and families including members of the Reserve and National Guard. VBA also conducted 1,500 briefings attended by 40,000 service members based overseas.

In view of the fact that VA currently gives priority to claims filed by seriously injured service members who participated in Operation Enduring Freedom (OEF) or Operation Iraqi Freedom (OIF) and the measures already in place to assist service members leaving service in filing claims for VA benefits, VA does not believe it is necessary to provide priority handling of all claims filed within two years after service in order to encourage filing for VA benefits. VA's goal is to provide quality, timely, and compassionate service to all claimants.

Question 2a. At the hearing, Judge Kramer recommended that Congress amend the duty-to-assist provision contained in 38 U.S.C. § 5103A(d) to clarify the circumstances under which VA must provide a medical opinion as to whether there is a causal link (or nexus) between a current disability and service. Under what circumstances does VA provide a medical nexus opinion? In general, must there be some medical evidence of a causal relationship between a current disability and service before such an opinion is provided?

Answer. VBA requests a medical nexus opinion when it is deemed necessary to decide a claim, depending on the facts of the individual case. 38 U.S.C. § 5103A(d). The statute and the implementing regulation 38 CFR § 3.159(c)(4) provide guidelines on when a medical examination or medical opinion is necessary to decide a claim.

This regulation was found valid by the Federal Circuit Court in *Paralyzed Veterans of America ("PVA") v. Secretary of Veterans Affairs*, 345 F.3d 1334 (Fed. Cir. 2003). VA will obtain a medical examination or a medical opinion if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim but:

- The record contains competent lay or medical evidence of a current diagnosed disability or symptoms of a disability;
- The evidence establishes that the veteran suffered an event, injury, or disease in service that the veteran contends is associated with the claimed condition; and
- The evidence indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

It would be helpful for a claimant to submit medical evidence of a causal relationship between a current disability and service, but that is not required to justify a request for an examination or opinion. VA regulations, however, require that the record contain some evidence indicating a possible association between the claimed disability or symptoms and the occurrence of the event, injury or disease in service. VA regulations also state that competent evidence of post-service treatment or other evidence could satisfy this requirement.

Question 2b. What modifications, if any, could be made to improve or clarify that duty-to- assist provision?

Answer. At the present time, VA has no statutory modifications to suggest.

Question 3. Since 2000, VA has reported a sharp increase in the number of rating claims filed each year and VA has attributed that increase in part to "older veterans" filing claims for the first time. What factors have led to this increased filing rate by older veterans?

Answer. An increase in claims from older veterans may be attributable to several factors. VA has increased its outreach efforts to prisoners of war, 90 percent of whom served during World War II, and other older veterans. Additionally, a number of changes in VA statutes and regulations have led to increased claims by older veterans. In 2001, VA amended its regulations to provide a presumption of service connection for type 2 diabetes based on herbicide exposure. This presumption largely benefits Vietnam-era veterans. Also in 2001, a change in law authorized VA to pay pension to veterans of a period of war who are 65 years of age or older irrespective of whether the veterans are permanently and totally disabled. Congress has also added diseases to the statutory list of disabilities that VA is authorized to presume are related to being a prisoner of war. VA also believes it receives more claims for increased benefits as veterans' service-connected disabilities worsen with age.

Question 4. The Government Accountability Office has identified external sources, such as court decisions and laws, as factors that may impede VA's ability to improve its disability claims processing performance. What measures can VA take to better respond to these external events?

Answer. VA agrees that court decisions and changes in laws can adversely affect VBA's claims processing performance. VBA monitors legislative and judicial developments and works with VA's Office of Congressional and Legislative Affairs and Office of the General Counsel to try to analyze the anticipated effects of pending legislation and court cases on VBA and to explain these effects to Congress. When VBA disagrees with a court decision, it works with the Office of the General Counsel and Department of Justice to determine whether an appeal is viable. VBA also actively participates in offering views on pending bills.

Question 5. At the May 26 hearing, Judge Kramer and Mr. Chisholm each provided recommendations for improving the VA claims adjudication and appeal system, including placing Administrative Law Judges or Veterans Law Judges at the regional offices. Do you have any comments regarding those recommendations?

Answer. Judge Kramer and Mr. Chisholm made a number of recommendations at the hearing. These recommendations included placing Veterans' Law Judges (VLJs) of the Board of Veterans' Appeals (BVA) in VA regional offices, closing the record at an earlier stage in the appeal process, eliminating the right to appeal U.S. Court of Appeals for Veterans' Claims (CAVC) decisions, imposing statutory time limits for each step in the adjudication process, simplifying VA appeals procedures, and taking steps that will encourage claimants to retain private attorneys earlier in the claims process.

As to the first of those recommendations, neither VBA nor BVA believes that VLJs should be based at regional offices. The existing appeals process with layers of review was established, in part, to ensure fairness and integrity and promote claimant confidence in the decisions. Decentralization or regionalization of BVA by placing VLJs at the ROs could affect the appearance of BVA independence by creating a perception in the minds of appellants and their representatives that BVA

is an extension of the regional office and not a separate and independent body that exists to fairly and impartially consider their appeals.

Decentralization or regionalization would also pose substantial challenges to BVA in maintaining the efficiency of its operations. Given the rapid changes in veterans law and the complexity of the VA disability system, it is advantageous for VLJs to work in a single location where they have the opportunity for a quick and free exchange of ideas and information and can quickly adapt to changes in the law. This kind of environment fosters consistency in understanding and application of the law. Additionally, regionalization of BVA would create logistical problems, increase expenditures for support services and legal research resources, and make management of the case flow and the conduct of quality reviews more difficult.

Judge Kramer also recommended closing the record at an earlier stage in the appeal process. This recommendation has been explored a number of times in recent years. VBA will continue to explore this possibility as it looks for ways to improve the process. VA is committed to maintaining a veteran-friendly benefits system in which all relevant evidence is available to decision makers. VA recognizes, however, that an open record contributes to protracted appeal processing and therefore to delay in deciding appeals. VA will consider ways to prevent the protracted piecemeal submission of evidence and the delays it causes, while protecting due process rights of claimants.

The remaining suggestions offered by Judge Kramer and Mr. Chisholm would require amendments to VA statutes. At this point, VA does not propose any statutory changes. If VA does in the future, it will be with the goal of providing the best possible service to and ensuring the rights of our Nation's veterans and their families.

Question 6a. Following up on our discussion regarding the increase in Total Disability due to Individual Unemployability (TDIU) cases, what, if any, collaboration is there with VBA's Vocational Rehabilitation and Employment (VR&E) Counselors prior to a TDIU rating being assigned?

Answer. There is no systematic or institutionalized collaboration currently between regional office rating staff and vocational rehabilitation and employment (VR&E) counselors prior to a total disability due to individual unemployability (TDIU) rating being assigned. However VBA is looking into how it might use vocational assessments in making determinations of TDIU entitlement.

Question 6b. After a TDIU rating has been assigned, is there any collaboration with VR&E Counselors to monitor whether VR&E services, such as independent living, would be appropriate?

Answer. By statute (38 U.S.C. §1163) and regulation (38 CFR §3.341(c)), each time a veteran is rated totally disabled on the basis of individual unemployability, the VR&E staff is notified so that an evaluation may be offered to determine whether the achievement of a vocational goal by the veteran is reasonably feasible or if independent living services would be appropriate.

Question 6c. How frequently is a veteran with an assigned TDIU rating re-evaluated to determine whether barriers to employment continue to exist?

Answer. There is no uniform set schedule for re-evaluating veterans rated totally disabled based on individual unemployability. VA requests re-examinations when there is a need to verify either the continued existence or the current severity of a disability. Generally, re-examination is required if it is likely that a disability has improved or if evidence indicates there has been a material change in a disability or that the current rating may be incorrect.

VA regulations, 38 CFR §3.327(b), provide general guidelines for requesting VA examinations in compensation cases and explaining when future periodic examinations will not be scheduled, such as when the disability is permanent and there is no likelihood of improvement. This is discussed in more detail in response to question number 13.

Question 6d. Please comment on whether there should be an age-appropriate limit on the award of a TDIU rating.

Answer. VBA has looked into whether to place an age-appropriate limit on the award of a total rating based on individual unemployability. While it seems intuitive that individuals who have reached retirement age could be considered to have likely retired and that those who are considered retired are no longer in need of a supplemental compensation payment due to a disproportionately disabling effect of service-connected conditions on employability, in consideration of this question VA has found that establishing such an age cut-off point would be difficult. In the past, age 65 was considered retirement age. However, the age at which workers retire has increased overtime. In recent years, legislative changes, new types of retirement plans, and increases in life expectancy have led to differences in retirement ages. Also, according to the Bureau of Labor Statistics, the employment patterns of older Americans suggest that one can be "retired" and still be employed, at least part

time. In addition, rates of self-employment rise with age. VA believes that focusing on improving adjudication of claims for total ratings based on unemployability and ensuring adequate controls on cases where total ratings based on individual unemployability have been established (including consideration of age) will better serve veterans.

Question 7a. I understand that VA has 57 regional offices (or 'ROs') that administer disability compensation benefits. Over the last decade, have you observed that some ROs are consistent in their good performance whereas others are consistent in their poor performance? If so, how can VA take advantage of attributes of the ROs that, on a year-to-year basis, consistently outperform the others?

Answer. There are regional offices that consistently demonstrate high performance year after year. VBA analyzes the practices and performance of these offices in order to identify best practices that can be shared across the organization. As one example, VBA conducted a cycle-time study which involved analyzing each segment of the claims process in an effort to identify ways to reduce the overall processing time. The study initially focused on higher performing stations, observing and documenting best practices. The study then concentrated on offices experiencing performance difficulties to compare and validate findings. The results of the cycle-time study were shared with all regional offices for use in improving performance.

VBA also calls on high-performing offices to provide instructors for centralized training sessions. These sessions are held throughout the year for specific groups of employees, including those newly hired, those recently promoted to first-line supervisory positions, and new division level managers. Additionally, senior leaders within the organization are asked to enter into structured mentoring relationships with employees selected for formal development programs, including VBA's Assistant Director Development Program and VA's Senior Executive Service Candidate Development Program. VBA further leverages the knowledge and skills of the top-performing offices by frequently looking to those offices for people who can fill leadership positions at other offices.

Question 7b. Should more work and, consequently, more staff resources be directed towards the higher performing ROs?

Answer. VBA does employ a strategy of shifting workload and resources to the highest performing regional offices. This is accomplished through our resource allocation model, a brokering strategy, and the use of overtime funds.

Over the last few years, VBA has emphasized a performance-based resource allocation methodology that provides additional resources to high-performing regional offices. Regional offices are evaluated in terms of their weighted share of workload receipts and their ability to meet and/or exceed operational performance indicators in accuracy, timeliness, appeals resolution, and appeals timeliness. By linking the resource allocation process to strategic performance measures, higher performing stations receive additional resources. This ensures VBA is reinforcing its commitment to the organizational mission.

VBA also uses a "brokering strategy" to balance the inventory of pending claims across stations. Cases are sent from stations with high inventories to other stations with the resources to take on additional rating work. This strategy allows the organization to address both local and national inventory by maximizing resources where they exist.

Overtime funds are targeted to specific goals throughout the year. Regional offices that meet specified performance targets in a given month are allocated overtime the following month. This approach allows higher performing stations to receive additional resources and also helps the organization make progress toward achieving its national performance targets.

Questions 8a-8b. Your testimony cited the recently released VA Office of Inspector General report which found that the VA disability compensation program does not reflect modern concepts of disability. If the disability system is not based on "modern concepts of disability," then on what is it based?

If the disability system is outmoded, how do we know whether we are paying veterans enough, or too much, disability compensation?

Answer. The VA disability system is based on 38 U.S.C. § 1155, which requires VA to adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The VA rating schedule provides, for each listed medical or psychological disability, the symptoms or specific findings that warrant a particular disability level, and Congress sets the amounts of compensation for each percentage of disability. The determination by VA of the range of disability percentages available for each condition is, in essence, a determination of how disabling the condition is deemed to be, on average, to a person working in a civil occupation.

To give an example, a person whose knee may have pain with limitation of extension to 10 degrees (so that the leg cannot be fully straightened without pain) is considered 10 percent disabled. VA determined that painful limitation of extension causes, on average, a degree of disability from the average civil occupation sufficient to assign a 10 percent evaluation, and Congress determined that a 10 percent evaluation justifies a payment of \$108 per month.

VA thinks it is a fair criticism that civil occupations may mean something different today than it did when the rating schedule was first created. The work done by Americans today is certainly different in some respects than it used to be. It may not also hold true that all disabilities of a particular percentage can be said to be equivalent in terms of the degree to which they impair average earnings in civil occupations.

VBA has worked to update the criteria for assigning different percentages of disability for particular conditions. The rating schedule is comprised of 15 body systems, 13 of which have been updated since 1994. VA has made the rating criteria more objective and incorporated current ideas about the manifestations, course, and treatment for diseases and injury residuals.

The Inspector General report mentioned concerns that the rating schedule better reflects functional impairment instead of impairment to earnings capacity. VA recognizes that it may be the case that a person with a particular level of symptomatology is more or less disabled from his or her work than is indicated by the rating assigned. A person with a 100 percent evaluation (which on average indicates total disability) may not necessarily be unable to do his or her job. Also, in compensating based on an assessment of average impairment, VA will always overcompensate some for the actual effect of a set of symptoms on particular employment and under compensate others. A veteran who is totally disabled due to a service-connected condition will receive \$2,299 a month in 2005 or \$27,588 a year tax free. If the veteran was earning \$24,000 a year and now cannot work due to the totally disabling service-connected condition, the VA compensation rate is more than their previous wages. However, if the veteran was earning \$150,000 a year and now cannot work due to the totally disabling condition, the VA compensation rate is not nearly enough to cover his or her actual wage loss.

VA expects that the Veterans' Disability Benefits Commission established by Congress in 2003 will study this issue.

Question 9. In your statement, you noted that eligibility for disability compensation drives eligibility for other programs, such as vocational rehabilitation. Does that serial approach to eligibility provide an effective means of restoring the capability of veterans with disabilities to the greatest extent possible? Would creating a more integrated system of programs better serve that purpose?

Answer. Recently there has been an increased focus on the seamless transition of service members leaving military service and entering the civilian world. The provision of benefits, including vocational rehabilitation benefits, has been integrated into the process early on. Regional office employees visit injured service members at their local military treatment facilities to provide information about the VA benefits and services available. Where possible, vocational rehabilitation and employment (VR&E) staff meet with injured service members while they are still on active duty to begin the vocational assessment and counseling process. VR&E and veterans' service center staffs work closely together to expedite a memorandum (temporary) rating which projects a 20 percent or greater service-connected rating. This memorandum rating provides the vocational rehabilitation counselor with the authority to evaluate a service member and to write a plan for vocational rehabilitation services prior to making a final compensation determination.

VA partners with the Department of Defense (DoD) and the Department of Labor to conduct transition assistance program workshops to provide comprehensive veterans' benefits and program information to service members. In addition, VA conducts disabled transition assistance program workshops to provide information about disability benefits and vocational rehabilitation to those service members who could potentially be medically discharged or have a service-connected disability.

In addition, a memorandum of understanding (MOU) between DoD and VA for the purposes of defining data sharing between the departments is currently in the concurrence process. This MOU establishes the respective responsibilities and authorities of DoD and VA to share data as defined by the Health Insurance Portability and Accountability Act (HIPAA). The MOU describes those circumstances in which it is appropriate to share protected health information and other identifiable information between the departments.

Question 10. One key measure of performance that VA tracks and reports with regard to all rating claims is the "average number of days to complete." Does VA track separately the average number of days to complete rating claims that are

processed through special units or programs, such as the claims processed through the Benefits Delivery at Discharge initiative.

Answer. VBA does track the “average days to complete” for the benefits delivery at discharge (BDD) program. In most cases, disabled service members participating in the BDD program begin receiving VA disability compensation benefits within 60 days of their separation from active duty.

Question 11. As a complicating factor of, and a partial explanation for, a rapidly growing disability compensation program, your testimony cites the 110 diseases that are presumptively related to special military service. How many service-connected ratings has VA awarded since fiscal year 2000 on the basis that diseases were presumptively related to service?

Answer. Data identifying disabilities granted on a presumptive basis is available only for decisions rendered on or after May 2003. With the full use of rating board automation 2000 (RBA2000), one of the VETSNET applications, VBA is now capturing and retaining greater levels of detailed information on disability determinations. For the timeframe May 2003 through May 2005, VBA identified a total of 89,344 rating decisions granting presumptive service connection for 94,411 disabilities to 82,378 veterans.

Question 12a. I understand that VA has the authority, in individual cases, to rebut the presumption that a presumptive disease is related to special military service. Does VA keep track of how frequently it rebuts a presumption of service connection?

Answer. VBA does not track how frequently it rebuts a presumption of service connection. VBA believes it to be exceedingly rare.

Questions 12b and 12c. Does VA request evidence that it believes exists that may rebut a presumption of service connection?

Does VA solicit medical opinions about presumptive conditions that may be explained by post-service events?

Answer. In response to parts B and C of this question, VA decisionmakers, if put on notice that evidence may exist that would rebut the presumption, may request such evidence from the claimant or may request a medical opinion. VA’s policy as stated in 38 CFR § 3.103(a) is that, in proceedings before VA, it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law, while protecting the interests of the government. VA regulations require the claimant to cooperate fully with reasonable attempts to obtain relevant records and to attend examinations that are deemed necessary. Title 38 CFR § 3.307(d)(1) provides that evidence that may be considered in rebuttal of service incurrence of a presumptive disease will be “any evidence of a nature usually accepted as competent to indicate the time of existence or inception of a disease and medical judgment will be exercised in making determinations relative to the effect of intercurrent injury or disease.

Question 13a. Your testimony notes that almost 2.6 million veterans are receiving disability compensation today, more than at any time in U.S. history. I understand that a veteran may, at any time, file a claim to increase a service-connected rating if the veteran believes that the condition has worsened. Conversely, VA may require that a service-connected veteran be re-examined to determine if the effects of a service-connected disability have improved or still exist, thereby necessitating a decreased rating. What is VA’s current policy on requesting that veterans appear for reexamination?

Answer. VA’s policy on requesting re-examinations is stated in our regulations, 38 CFR § 3.327. In general, that provision states that re-examinations, including periods of hospital observation, will be requested whenever VA determines that there is a need to verify either the continued existence or the current severity of a disability. Generally re-examinations will be required if it is likely that a disability has improved or if the evidence indicates that there has been a material change in the disability or that the current rating may be incorrect.

The decision maker has discretion to request a re-examination between 2 years and 5 years after the initial examination or any other scheduled or future examination; however, re-examination can be scheduled by a VA decisionmaker within a shorter period of time. One example cited in the regulation is that a pre-stabilization rating requires re-examination within the second 6-month period following service. Certain cancers also have a 6-month future examination schedule.

The regulation also provides guidance on when a future examination should not be requested. A future examination should not be requested when a disability is established to be static or persisting without material improvement for a period of 5 years or more. When disability is permanent with no likelihood of improvement, re-examination is also inappropriate. Under the regulations, re-examinations should

also not be ordered when there is only a minimum rating in place or when a combined rating would not be affected by reduction of the rating for a particular disability. For example, if a disability was reduced from 10 percent to 0 percent this might not reduce a combined evaluation. The regulations instruct that VA not re-examine veterans over 55 years of age for improvement except in unusual circumstances.

Question 13b. Does VA track the results of these re-examinations?

Answer. VA does not track and analyze the results of re-examinations in any systematic way. VA does generate examination reports, and these would be associated with the claims folder of the person who is re-examined.

Question 13c. How many veterans has VA requested appear for reexamination since fiscal year 2000? Is that a decline over previous periods?

Answer. For the period October 1999 through May 2005, VBA scheduled 95,899 routine future examinations. This represents a decline from the number of re-examinations scheduled in fiscal year (FY) 1997 through fiscal year 1999.

Question 13d. Because of the growing number of original and repeat claims, has VA been reluctant to add to that workload by requesting that veterans appear for re-examination?

Answer. In response to a recommendation by the VA Claims Processing Task Force, VBA temporarily requested that decision makers in the field apply a longer future examination suspense period because of workload considerations. However, VA resumed establishing the normal time periods for re-examinations in fiscal year 2004.

RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY HON. LARRY E. CRAIG
TO ROBERT V. CHISOLM

Question 1a. Would attorneys be limited to charging fees on a contingent basis?

Answer. Contingent fee agreements would seem to be the most practical solution. First, many veterans lack the money to pay either a flat fee or an hourly fee. That is of course why the veteran is usually seeking disability compensation and similar benefits. Second, Congress has already provided for the use of contingent fees in the present version of 38 U.S.C. §5904. Contingent fees have the additional benefit of linking the attorney's fee to success on the veteran's claim. If the veteran does not receive an award of past-due benefits, the attorney will not be paid. This also incentivizes the attorneys to learn this area of the law. Finally, Congress has provided that Social Security applicants can hire attorneys on a contingent-fee basis.

However, NOVA recognizes there may be a practical problem of contingent fees in situations where the benefit the veteran is seeking may not be a monetary benefit such as a vocational benefit, an offset issue or a waiver of an overpayment. In these instances, it might be appropriate to permit a fee other than a contingent fee.

Question 1b. Would the current authority of the U.S. Court of Appeals for Veterans' Claims and the Board of Veterans' Appeals to review the reasonableness of attorney fees provide adequate protection for veterans against being charged unreasonable fees?

Answer. Under the present system, when an award of past due benefits is made at the Regional Office and there is an attorney fee contract, the Regional Office will make the initial decision regarding entitlement to a fee. If the veteran does not agree with that decision of the Regional Office he can file an appeal to the Board of Veterans' Appeals. In addition, the Veteran can ask the Board at any time to review a fee agreement for reasonableness directly. Thus, there are two separate avenues for the veteran to have a fee agreement reviewed. Finally, for cases filed in Court, the CAVC has the power to review a fee agreement on its own or on the motion of either party. For these reasons, NOVA believes the current system is adequate for reviewing fee agreements.

Question 1c. What other measures could be taken to ensure only reasonable fees would be charged, particularly for services provided to veterans at the regional office?

Answer. Answer not provided.

Question 2. You testified that attorney representation throughout the VA adjudication and appeal process would help ensure that veterans receive all benefits to which they are entitled. On the other side of the coin, particularly considering the increasing number of claims being filed and the trend of an increasing number of claims involving numerous disabilities, would attorney representatives have an ethical obligation to counsel their clients against filing claims that may not be meritorious?

Answer. The American Bar Association's Model Rules 1.1 regarding competence; 1.3 regarding diligence and 3.1 regarding meritorious and the parallel State provisions impose an ethical obligation upon an attorney to examine a claim for its merit and to counsel the client against filing a claim if it is frivolous and without merit. Moreover, as practical matter an attorney working on a contingent basis is going to counsel a veteran against filing a frivolous claim. Thus, the combined effect of the ethical obligation and the practical considerations of working on a contingent basis necessarily would mean a veteran's claim would be screened for merit.

Question 3. You also recommended that Congress amend 38 U.S.C. §7105 to eliminate the requirement that a claimant submit a Substantive Appeal (or Form 9) in addition to filing a Notice of Disagreement (NOD) in order to perfect an appeal to the Board. Under current law, the filing on an NOD triggers certain actions by the regional office. Under the scenario that you have proposed, what means, if any, would VA have to determine if a claimant wishes to continue with an appeal to the Board after the VA has taken action in response to an NOD?

Answer. Once an NOD is filed, the burden should not be on the veteran to show that he wants to continue the appeal. The burden should be on the VA to show that he does not want to appeal. Hence the case should be sent to the Board within some mandatory timeframe once the NOD is filed. If the veteran is satisfied with the action the VA has taken after the filing of the NOD, the VA could implement a procedure allowing the veteran to withdraw his appeal after filing the NOD. But any such procedure should permit the veteran to revoke his withdrawal within 1 year to ensure that any perceived withdrawal is truly voluntary.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LARRY E. CRAIG
TO RICK SURRETT

Questions 1a-1b. In the VA Office of Inspector General's May 19, 2005, report, it was emphasized that the VA Schedule for Rating Disabilities is based on a 60-year-old model that does not reflect modern concepts of disability. If the disability system is not based on "modern concepts of disability," then on what is it based?

If the disability system is outmoded, how do we know whether we are paying veterans enough, or too much, disability compensation?

Answer. The VA Office of Inspector General (OIG) raised several issues in connection with its effort to identify the causes of substantial variations from State to State in the average annual compensation payments of veterans of those States. Although somewhat tangentially linked to the factors underlying the variances, that is, demographic variances and rating practice variances, the OIG raised questions as to whether the VA's Schedule for Rating Disabilities accords with "modern concepts of disability."

Parroting the concerns raised by various other critics, OIG observed that the rating schedule is based on a 1945 model (the 1945 edition of the rating schedule) that itself is founded on a concept of disability measurement that dates back to 1919 (average impairment of earning capacity). According to the view OIG adopted from others, the last major modification to the rating schedule occurred in 1945, when it was revised to reflect advances in medicine, science, and technology and to add new coding and indexing for disabilities. Although OIG acknowledged VA has, in the past few years, systematically revised most of the schedule to incorporate current medical terminology and revise the rating criteria to reflect advances in medicine, OIG stated "these more recent revisions have not changed the basic relationship between disabilities and average earnings impairment established in the 1945 rating schedule." The OIG cited a concern previously raised about the appropriateness of use of average impairment rather than the "individual veteran's specific impairment in earning capacity" or "actual earnings or income" as the basis for rating disabilities. Somewhat different from basing compensation on the individual veteran's actual earnings or income, the OIG repeated a familiar theme from at least one outside critic of the schedule that the ratings should be based on "earnings-based estimates of economic impairment associated with specific service-connected disabilities." However, the OIG also cited a recommendation from another study that the rating schedule "be revised based on factual data to ensure it reflected the average reduction in earning capacity." In short, the OIG cited a common complaint that the schedule needs "major restructuring" based on a variety of different views of what exactly is wrong with the current schedule.

Though admittedly imperfect, the current rating schedule is the product of perhaps the most extensive, longstanding, and enduring experience in disability assessment by any agency or authority. According to statute, the schedule is based on what has proven to be the most practical and equitable standard for gradation of

disability among military veterans with a wide diversity of vocational backgrounds and variations in impairment from diseases and injuries. It has been adjusted according to experience rather than in reaction to untested notions urged from time to time by outside critics who have no in-depth knowledge of the schedule or experience with disability evaluation.

Although historical information indicates various provisions for benefits based on graded, or partial, disability date back to the Civil War period, the basic concept of today's disability rating schedule was established in the War Risk Insurance Act of October 6, 1917. Where prior provisions resulted in lack of uniformity, the new schedule was to employ an average impairments standard. Section 302 of the Act provided:

A schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature shall be adopted and applied by the bureau. Ratings may be as high as 100 per centum. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of permanent injury. The bureau shall from time to time re-adjust this schedule of ratings in accordance with actual experience.

This provision was modeled somewhat on the emerging workers' compensation program, which provided payments based on either individual loss of earnings due to disability or loss of earning capacity as a measure of presumptive need. It should be noted that the statute then, at it does today, referred to disability from "injuries" and included no reference to diseases. See 38 U.S.C.A. § 1155 (West 2002). This is perhaps because it was modeled on workers' compensation programs that had at that point not embraced coverage for occupational diseases. However, the Act provided that the term "injury" included disease.

While the "average impairments of earning capacity" standard of the rating schedule authorized under the War Risk Insurance Act was based on medical assessments of disability, a rating schedule authorized by legislation enacted in June 1924 experimented with incorporation of occupational factors into disability ratings. Section 202(4) of the World War Veterans' Act, 1924, provided that the ratings would be based, as far as practicable, upon the average impairments of earning capacity resulting from injuries in civil occupations "similar to the occupation of the injured man at the time of enlistment and not upon the impairment in earning capacity in each individual case." Under this concept, the percentage ratings for the medical or functional impairments were modified by values representing occupational variants so that a disability at a given level would be rated differently for veterans with different pre-service occupational histories. Many veterans had no pre-service occupation, and the scheme proved impractical for a variety of other difficulties concerned with accurately classifying occupational characteristics and assessing the effect of mental and physical disabilities upon persons with these varying factors. Instead of grades of disability in multiples of 10 percent, this schedule provided for ratings in multiples of 1 percent. Rather than improve upon the prior standard, this attempt to add precision added complexity, unforeseen problems, and unintended consequences. With the next version of the rating schedule, the scheme was abandoned, and VA reverted to the average person basis for ratings.

With the first and second editions of the 1933 rating schedule, established under authority of Veterans' Regulation No. 3 and No. 3(a), the ratings were to be based, as far as practicable, upon average impairments in earning capacity. The first edition, issued in accordance with Veterans Regulation No. 3 (March 31, 1933), provided for five grades of disability, 10 percent, 25 percent, 50 percent, 75 percent, and 100 percent. The second edition, issued in accordance with Veterans Regulation No. 3(a) (June 6, 1933), provided for 10 grades of disability, from 10 percent to 100 percent.

Under the authority in Veterans Regulation No. 3(a), the VA Administrator issued in 1945 a readjustment of the 1933 rating schedule to be known as the 1945 edition. Though the ratings from the 1933 schedule were reorganized and given new coding, many of the percentage ratings were the same or only slightly different from those in the 1933 schedule. The authority for the rating schedule in Veterans Regulation No. 3(a) was later codified in statute without substantive change.

In 1957, VA issued a reprint of the 1945 edition with all extensions (changes and additions) through January 16, 1957. With that publication, it was "planned to readjust the schedule, page by page, or section by section, to incorporate the results of medical advances and the experience of the Veterans Administration." In his July 20, 1971, report to Congress entitled *Economic Validation of the Rating Schedule*,

the VA Administrator noted there had been 15 revisions since issuance of the 1957 Loose Leaf Edition of the schedule. The Administrator explained:

It was left to the Administrator to determine what is meant by “the average impairments of earning capacity.” Its meaning was developed within the Veterans’ Administration as a result of studies and conferences undertaken by rating personnel, mostly medical, as well as physicians in the Department of Medicine and Surgery [now the Veterans Health Administration], and other VA offices. It can be said that the rating schedule’s description of disability and its evaluation represents a distillate of informed opinion with many compromises among the views of the various consultants. Committee on Veterans’ Affairs, VA Report, Economic Validation of the Rating Schedule 16 (Comm. Print No. 109 1971) [hereinafter ECVARS].

Between 1971 and 1988, VA made changes to most of the individual sections dealing with the individual bodily systems. In 1988, the United States General Accounting Office, now the Government Accountability Office (GAO), found that VA needed to undertake a more comprehensive update of the medical criteria in the rating schedule. GAO’s recommendations stated:

To better ensure that the rating schedule serves as a practical tool in assigning uniform disability ratings to veterans, GAO recommends that the Administrator:

- Prepare a plan for a comprehensive review of the rating schedule and, using the results of the review, revise medical criteria accordingly.
- Implement a procedure for systematically reviewing the rating schedule to keep it up-to-date in the future.

VA agreed to perform a methodical review and revision of the rating schedule by body system and agreed to establish a procedure for systematic review thereafter on an ongoing basis. As a result, the next major overhaul of the rating schedule began in 1991. VA developed a plan to review and revise the schedule section by section. Since then, VA has completed the laborious process through promulgation of final regulatory changes for most of the 15 body systems and has proposed rules outstanding for visual disabilities, leaving only one complete bodily system and part of two other systems to be addressed.

It should be noted here, incidentally, that scientific advances in treatment do not necessarily call for revision of the rating schedule because scientific advances do not change the pathology and basic characteristics of the diseases. Such advances may improve therapies and simply mean that the symptoms are more responsive to treatment under some or most circumstances, in which case the veteran’s disability should be rated lower under the existing criteria. Improved treatments do not change the range of possible degrees of disability or remove the possibility that other cases will still be encountered that meet the criteria for the ratings reflecting poorer responses to treatment. However, improved treatment methods and therapies do often shorten convalescent periods, and VA has adjusted the rating schedule to shorten the time for which it pays post-surgical and convalescent ratings.

With the publication of each revision of sections of the rating schedule in the Federal Register, VA explained that it was updating that portion of the schedule to ensure that it uses current medical terminology, unambiguous criteria, and that it reflects medical advances that have occurred since the last review. Despite the fact that VA followed GAO’s recommendation, GAO now urges that VA develop an earnings-based rating schedule, and others who do not understand the issue have readily subscribed to the superficial view and mistaken assumption that “average impairments of earning capacity” means average wage loss attributable to disability.

Contrary to OIG’s assertion that today’s rating schedule is based on a 60-year-old model, the rating schedule is actually based on a much older standard for disability measure, that is, average impairment of earning capacity, but its longevity does not mean the standard no longer has utility. Indeed, it demonstrates to the contrary. Experience has shown this time-tested standard to be the best available for fair and practical evaluation of disability. Moreover, it seems clear that Congress intended that VA adopt a schedule of ratings based on medical judgments as to the average effect on earnings capacity that can be expected for given injuries or diseases existing at various degrees, and never contemplated that it be based on individual or average loss of earnings. Several points support this view as to Congressional intent, and practicality, fairness, and experience demonstrate that this congressional intent continues to be the best solution to the assessment of veterans’ disabilities.

In 1917, when Congress first provided for a rating schedule founded on average impairment in earnings capacity, there was no data then available to base the ratings on actual average wage loss attributable to the numerous diseases and injuries at various grades. There was no such system of gradation under which disabilities in society could be classified and tabulated, and thus there was no means to correlate various disabilities at various degrees of severity with wage levels:

There were few workmen's compensation laws in existence and almost no data based on scientific analysis and factual studies. There was little suitable material for guidance and training of those who were to adjudicate cases. Lists of medical diseases upon which evaluation and standards could be established and incorporated into the schedule were non-existent. There were no sound scientific data available to measure average impairments of earning capacity resulting from injuries in civilian occupations.

ECVARS, at 11.—Because this authority for the rating schedule was based on the “social insurance” principles of early workers’ compensation law, Congress was surely aware of the paucity of data of this type, and thus did not intend that the many grades and combinations of disabilities be based on wage loss comparisons between disabled veterans and non-disabled workers.

Perhaps the language Congress adopted or adapted from workers’ compensation programs also reveal intent. Congress’ choice of average “impairments” of earning capacity may be revealing. “Impairment” is “[t]he fact or state of being damaged, weakened, or diminished.” Black’s Law Dictionary 754 (7th ed. 1999). When something is “impaired,” it is “[d]iminished, damaged, or weakened.” The American Heritage Dictionary of the English Language 878 (4th ed. 2000). In workers’ compensation law, impairment is often used to refer to an abstract medical measure of disability rather than a concrete wage loss measure of disability: “Unlike disability, impairment usually refers to medical function and not to earning capacity. In some States, impairment is a purely medical condition reflecting any anatomical or functional abnormality or loss, and may be either temporary or permanent, industrial or non-industrial.” Mod Work Comp §200:2.

Workers’ compensation benefits are either based on a “medical-loss” or “wage-loss” theory: “Disability benefits are designed to provide compensation for the loss of earnings or earning power, and they are usually determined on the basis of either medical loss or wage loss theories.” Jack B. Hood, Benjamin A. Hardy, Jr. & Harold S. Lewis, Jr., *Workers’ Compensation and Employee Protection Laws* 85 (4th ed. 2005). “A medical loss theory, dictates, for example, that in the case of one who has lost an arm, compensation is required for the loss of that limb regardless of whether there has been an adverse impact upon earning capacity or lost wages. On the other hand, the wage loss theory is based upon the idea that a person should be compensated for loss of wages. . . .” Id. 29.

Workers’ compensation programs that pay benefits under a medical loss theory often do so in accordance with schedules. “[T]he award of scheduled loss is exclusive, payable on the basis of a loss of physical function, and is payable regardless of whether the employee has suffered a loss in earning capacity.” Mod Work Comp at §200:11.

A workers’ compensation treatise explains the principle as set forth by the Supreme Court of the United States:

Scheduled benefits are payable without proof of actual wage loss or impairment of earning capacity. In effect, the schedule provides a conclusive presumption that a worker will sustain wage loss that justifies compensation in the prescribed amount. The Supreme Court explained the rationale underlying the use of schedules as follows: “The lump-sum awards for total and permanent disability under [the Alaska] Compensation Act ignore wage losses. Whatever the employee may have made before, whatever his wages may be after the injury, the award is the same. To that extent it is an arbitrary amount. But it is the expression of a legislative judgment, that on the average there has been a degree of impairment, and whatever may be the fact in a particular case, the lump-sum should be paid without more.” *Alaska Industrial Board v. Chugach Electric Ass’n, Inc.*, 356 U.S. 320, 323–24 (1958). Joseph W. Little, Thomas A. Eaton & Gary R. Smith, *Workers’ Compensation* (4th ed. 1999).

With VA’s rating schedule, there is a legislative judgment of what disability rating should apply, and Congress delegated to VA the authority to make that legislative judgment.

Such rating schedules are a practical solution to disability assessment. With regard to Vermont’s scheduled loss basis for compensation, the Supreme Court of Vermont explained the principle thoroughly:

[P]ermanent disability benefits are calculated solely on the basis of physical impairment: “(The permanent disability) statute has arbitrarily fixed the amount of compensation to be paid for scheduled specific injuries regardless of loss of present earning power.”

The claimant challenges the validity of these different standards set forth in Vermont case law. He asserts that permanent disability, like temporary disability, should be evaluated by reference to any factor which restricts capacity for work. In support of this position, he advances several arguments. First, he contends that the

Act's use of the word "disability" connotes more than physical impairment, thereby requiring evaluation of ability to work. Second, he asserts that by allowing compensation for unscheduled injuries, see 21 V.S.A. §§ 644(b), 648(20), the Act sanctions consideration of factors other than physical injury. Third, he argues that the purpose of the statute is to compensate for lost wages, which requires consideration of capacity for work. Thus, he concludes that the Commissioner erred in failing to consider the claimant's ability to work, and in relying solely on physical impairment in setting compensation.

The claimant's arguments do not persuade us to reject our precedent. Earning capacity is significant to the Workmen's Compensation Act, but it performs a far different function than envisioned by the claimant.

The claimant correctly assigns protection against wage loss as one of the Act's purposes. The Act, however, also seeks to establish an expedient, efficient remedy for injured workers. Simplifying the elements of recovery is the Act's mechanism for achieving efficiency. To be entitled to benefits, a claimant need only establish that he suffered "a personal injury by accident arising out of and in the course of his employment by an employer subject to (the Act)." 21 V.S.A. § 618. . . . Because resolution of these issues on a case by case basis would impede the process, thereby delaying awards to needy beneficiaries, the legislature has chosen a "scheduled benefits" system. The rate of compensation for listed injuries has been conclusively determined in the Act. See 21 V.S.A. §§ 644, 648. The system still protects against wage loss, but it fulfills this aim by awarding permanent disability benefits on the basis of physical impairment as a means to insure against wage loss. Professor Larson explains how a scheduled benefits system, such as Vermont's, insures against wage loss:

(Exclusion of individual wage loss evidence) is not, however, to be interpreted as an erratic deviation from the underlying principle of compensation law—that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience. A. Larson, *Workmen's Compensation Laws* 58.11, at 10–173 to 174 (1981) (footnotes omitted).

The yardstick is general, not particular. *Bishop v. Town of Barre*, 140 Vt. 564, 442 A.2d 50 (1982) (citations omitted).

Obviously, VA could not use a wage-loss system for compensating veterans to whom it awards compensation upon military discharge, and not following civilian employment in many instances. Workers' compensation programs use schedules that are based on medical judgments as to impairment in earning capacity, and VA's rating schedule is not based on an outdated concept. Suggestions that it is are based on misconceptions.

In an adjudication system as large as VA's, simplicity is essential. The more complex schedule that factors in occupational variants or individual circumstances have proven counterproductive:

For reasons similar to those dictating the use of schedules, experience indicates the desirability of keeping them as simple as possible. The admirable urge to build into the schedule a maximum amount of individual equity has at different times caused some States and the veterans' program to adopt multifactor schedules which vary awards for similar injuries in accordance with the disabled person's occupation, age, or other factors.

The trend has been sharply away from schedules of that type. Today only California, among workmen's compensation jurisdictions, maintains such a schedule, and the Veterans' Administration abandoned it some years ago. Yet proposals keep recurring for the reintroduction of occupational variation in disability rating schedules. The logic of the argument for such variations is attractive. The experience—that of California has been described in detail in this paper—does not, however, support the logic.

A persuasive case for occupational or other variations must succeed in explaining away not only the California experience but also the unsuccessful attempt of the Veterans' Administration to adopt the principle.

The President's Commission on Veterans' Pensions (Bradley Commission), *Compensation for Service-Connected Disabilities: A General Analysis of Veterans' and Military Disability Benefits, Mortality Rates, Disability Standards in Federal Programs, Workmen's Compensation, and Rehabilitation*, Staff Report Number VIII, Part A, H.R. Comm. Print No. 84–281, at 243 (1956) [hereinafter *Bradley Commission Report No. VIII*].

In its quest for the most simple, practical, and equitable rating schedule possible, Congress also apparently chose to base the ratings on average impairment in earning "capacity" rather than average loss of earnings: "Actual earnings are a relatively

concrete quantity. . . . Earning capacity, however, is a more theoretical concept. It obviously does not mean actual earnings, since the legislature deliberately chose a different phrase for the post-injury earnings factor.” Joseph W. Little, Thomas A. Eaton & Gary R. Smith, *supra* 375.

Certainly, it would be unwise to adopt the suggestion by some, as cited by the OIG, that veterans’ disabilities should be compensated based on individual impairment in earning capacity:

Despite the fact that no two disabilities are likely to be precisely alike, influencing the future of the disabled persons in exactly the same fashion, a mass compensation program cannot be administered by attempting independent judgment in each case on the particular and special facts which may be involved. A social insurance program cannot be turned into a judicial system.

To achieve administrative efficacy, social insurance relies on the “magic of averages” to arrive at overall equity and social justice. This means inescapably that one individual may get somewhat more and another somewhat less than precise individual justice would indicate. Bradley Commission Report No. VIII, at 242.

Neither would it be fair or practical to base compensation on individual earnings or income. Again, for those veterans awarded compensation upon military discharge, there would be no civilian pre-injury wage for comparison with post-injury wages. Compensation, by definition, is not a needs-based gratuity, and the level of compensation should in no way be based on income, earned or otherwise. A veteran who, despite service-connected paralysis and confinement to a wheelchair, works and earns wages higher than the average wage of non-disabled counterparts should not be denied compensation on that basis. Moreover, some critics who call for a new rating schedule do so in the name of improved consistency, but there would be no consistency if veterans were compensated based on individual earnings or income. In addition, there would be no fairness in paying a veteran who overcomes disability less than another veteran with the same disability who has been unable to overcome it. VA’s rating schedule is built on the principle that veterans are to be compensated as uniformly as possible with no penalty for individual ability to overcome disability.

The history shows that, though those formulating and updating the rating schedule may have taken some general account or notice of changes in the American workplace, it is fairly clear that, other than the quickly abandoned rating schedule authorized in by the World War Veterans’ Act of 1924, the ratings were not founded on any average among the range of mental, physical, educational, and skill requirements of jobs existing in the national marketplace. Disability grading founded on earnings-based estimates of the effects of injuries and diseases would be unfair to veterans because such rating criteria would ignore the diminishment of quality of life and shortened life expectancy from disability. Though loss of earning capacity may be the primary basis of disability ratings, it has been recognized, and it is particularly true in today’s society, that disability adversely affects veterans in other ways that cannot and should not be ignored. The Bradley Commission observed that there are other compensable elements of disability that should be recognized, such as loss of physical integrity, loss of physical vitality, pain and suffering, social inadaptability, and shortened life expectancy. Bradley Commission Report No. VIII, at 134–35; ECVARS, at 16. We believe any attempt to base ratings on wage comparisons between disabled veterans and non-disabled persons would present many problems and inequities, which we will not belabor here given the length of the discussion already required to explain our answer to the question presented to us.

The recommendations cited by OIG are based on overly simplistic views, faulty assumptions, and misunderstandings about the principles of the VA rating schedule and ignore issues relating to the equitable and practical bases for those principles. The proponents of radical change themselves have no expertise in formulating disability assessment models. There is a solution in search of a problem.

Though there are areas in which VA could improve its Schedule for Rating Disabilities, it is based on contemporary concepts of disability; it is not outmoded. We know of no better model in other disability programs, and in recent testimony before the Veterans’ Disability Benefits Commission, GAO conceded that it knew of no better model. Congress has wisely rejected prior calls to change the basis of VA’s rating schedule and should continue to do so.

Question 2. The panelists joining you on our second panel during the hearing suggested that some significant changes in the system should be considered in order to improve its performance. Do you have any response to their suggestions?

Answer. Yes, I think the suggestions that I did not have an opportunity to address or to address thoroughly during the hearing merit a response.

Judge Kenneth B. Kramer presented three recommendations:

- revision of section 5103A(d)(2)(B) of title 38, United States Code, to make it clear that VA has an obligation to provide an examination or obtain a medical opin-

ion to resolve the question as to whether a current disability is causally linked to a disability or event of service origin;

- stationing of administrative law judges (ALJs) at VA regional benefit offices to make the final decision on a claim for the VA agency of original jurisdiction; and
- removal of the jurisdiction of the United States Court of Appeals for the Federal Circuit to review decisions of the United States Court of Veterans' Claims.

The DAV has no objection to Judge Kramer's first recommendation. From our experience, any problems with section 5103A(d)(2)(B) are more with VA practice than with the language of the statute itself. We believe VA requires evidence of a link between current disability and military service when such evidence should not be required as matter of law, and we believe VA may well shirk its responsibility to obtain evidence on the point when such evidence is necessary for resolution of the claim. Evidence of a connection between current disability and military service is not required under VA regulations when the veteran now claims service connection for an injury in service that left permanent residuals or claims service connection for a chronic disease contracted or aggravated during service in the Armed Forces. See 38 CFR § 3.303(b) (2004). However, where there is a valid question as to whether current residuals of injury are attributable to injury during service or where there is a valid question as to whether current disease is related to disease in service because the disease in service was not shown by the military medical record to be chronic, expert opinion is required to resolve the question. Actually, it was a line of erroneous decisions by the Court that imposed a three-part test for service connection, contrary to § 3.303(b), that caused VA to deviate from these simple principles and longstanding rules.

While having ALJs as the last decisionmakers at the VA field office level might mean that the record development and decisions would be better at that level, and thereby avoid some appellate workload and many Board of Veterans' Appeals remands, we suspect that the cost would outweigh the benefit.

Under current law, the Court of Appeals for the Federal Circuit has jurisdiction to review decisions of the Court of Appeals for Veterans' Claims on legal challenges but not on questions of fact. That review has proven beneficial and has resulted in reversal—and affirmance—of decisions of the Court of Appeals for Veterans' Claims on important points of law. In some instances where the Court of Appeals for Veterans' Claims chose, in its decision, to sidestep questions of law raised, the Court of Appeals for the Federal Circuit decided the matter and resolved the question. VA cannot appeal its own decision to the Court of Appeals for Veterans' Claims, but, once that Court makes a decision on a point of law in connection with an appeal brought by a veteran, VA should have some recourse if it believes the legal point to have been wrongly decided. Without Federal Circuit jurisdiction, VA would have no right of appeal and would be left to petition for review by the Supreme Court of the United States where review is granted in only a fraction of the cases in which it is sought. The premise for removing Federal Circuit jurisdiction was that appeals there add to the already protracted process. However, appeals to the Federal Circuit are not responsible for the length of time a case spends in the VA's administrative process, and in the rare case a decision by the Federal Circuit brings the case back within the administrative process, that is at the election of the veteran and is preferable to an absence of recourse beyond the Court of Appeals for Veterans' Claims. The DAV opposes this recommendation.

Mr. Robert Chisholm, representing the National Organization of Veterans Advocates, presented five recommendations:

- imposition of mandatory timeframes for each step in the VA adjudication process;
- elimination of the requirement that the claimant file two documents to obtain appellate review, the "notice of disagreement" and the "substantive appeal";
- increase in staff at the regional office level, particularly decision-review officers;
- replacement of the Board of Veterans' Appeals (BVA) with ALJs, or alternatively, decentralization of BVA by placing the Board members at the regional offices; and
- enactment of legislation to permit attorneys to charge veterans for assistance in filing claims and representation at the regional office level.

Frustration with delays have prompted recommendations from the veterans' community that Congress impose mandatory time limits upon VA. The recommendation sounds attractive, but its practicality is questionable. The DAV believes the better solution is sufficient resources and the reforms we have recommended to improve quality and timeliness.

We have no objection to changing the process to alleviate the need for both a notice of disagreement and a substantive appeal. However, we believe Mr. Chisholm's recommendation is from the perspective of an attorney and does not consider the

situation in which a claimant is unrepresented. A notice of disagreement, like a notice of appeal, simply initiates the appellate process. VA then provides the appellant with a statement of the case to explain the reasons for its decision. With a complete understanding of the bases for the decision, the appellant then files a substantive appeal to set forth his or her specific arguments as to where VA erred. Occasionally, VA discovers its error when it receives the notice of disagreement alleviating the need for a statement of the case and a substantive appeal. Where a claimant is represented, elimination of one step in the process would perhaps be without adverse consequences.

The DAV agrees that VA needs more adjudicators. We also agree that, on the whole, the decision review officer program has proven successful.

The DAV opposes Mr. Chisholm's recommendation to replace BVA with ALJs, like those of the Social Security Administration, who would be stationed at VA regional offices, or, in the alternative, to decentralize BVA and station its members in regional offices. From the standpoint of an attorney whose practice is not in Washington, D.C., it would be more convenient to have the appellate authority located at the regional office, but it would not be beneficial for veterans or VA. The resolution adopted by DAV's members explain the essential reasons we oppose decentralization:

RESOLUTION NO. 182.—OPPOSE REGIONAL DISPERSION OF THE BOARD
OF VETERANS' APPEALS

WHEREAS, veterans and other claimants for veterans' benefits may appeal erroneous decisions of the various and geographically dispersed benefit offices and medical facilities of the Department of Veterans Affairs (VA); and

WHEREAS, inaccuracy and lack of uniformity are pervasive among the claims decisions of the many VA field offices; and

WHEREAS, one board, the Board of Veterans' Appeals situated adjacent to VA's central office and policymaking center in Washington, D.C., hears all appeals; and

WHEREAS, appellants, Board members, and taxpayers derive numerous benefits from an appellate board housed in one centralized location, some of the more obvious of which are:

- availability of the collective expertise of the entire board;
- professional interaction and association among Board members and staff;
- shared and uniform training;
- common and shared goals and responsibilities;
- economies of scale from pooled resources and the most efficient workload distribution, with the flexibility and capacity to readjust the workload as necessary between members and support staff;
- a positive environment and employee incentives for developing creative solutions and innovations to meet and overcome the challenges inherent in a system of mass adjudication of claims;
- more efficient and effective centralized case management and storage;
- more effective centralized board administration and hands-on employee oversight; and

WHEREAS, Congress created the Board of Veterans' Appeals after repeated failed experiments with various configurations of regional appellate panels that were plagued by persistent inefficiencies and problems and were proven impractical and poorly suited to properly dispose of veterans' appeals; and

WHEREAS, indications are that consideration is being given within certain quarters of VA to dismember the board and scatter its decisionmakers among the VA field offices or among various regions of the Nation; and

WHEREAS, such regional reorganization of the Board would be extremely unwise, wholly unwarranted, and not in the best interests of veterans or taxpayers; NOW

THEREFORE BE IT RESOLVED, that the Disabled American Veterans in National Convention, assembled in Reno, Nevada, July 31–August 3, 2004, categorically opposes any decentralization of the Board of Veterans' Appeals.

We also see no benefit in replacing Board members with ALJs who would be stationed in regional offices. ALJs perform adjudications under the more formal procedures of the Administrative Procedure Act. Social Security ALJs are not located in the same offices as the initial decisionmakers, and we believe locating appellate personnel with the adjudicators whose decisions they will review could be detrimental.

The DAV opposes Mr. Chisholm's recommendation to amend the law to permit attorneys to charge claimants for claims assistance and representation at the regional office level. As you know, current law does not bar attorney representation in the initial administrative proceedings before VA, but it does prohibit an attorney from charging for that representation. On behalf of the National Organization of Vet-

erans' Advocates, Mr. Chisholm seeks amendment of section 5904 of title 38, United States Code, to remove the prohibition against charging veterans for claims counseling, assistance in filing benefit applications, and representation in benefit claims at the regional office level.

Section 5904(a) provides that the Secretary of Veterans' Affairs may recognize attorneys for the preparation, presentation, and prosecution of claims. However, subsection (c)(1) of that section provides "a fee may not be charged, allowed, or paid for services of agents or attorneys with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case."

The change NOVA seeks would not be in the best interests of veterans for several reasons, and would be detrimental to the administrative processes. The principal reason for the DAV's opposition is founded in the public policy underlying the current prohibition against charging veterans for claims assistance. Reviewing the history of pensions provided to veterans, the Supreme Court of the United States observed the enduring principle that this monetary assistance should go solely for the benefit of the veterans for which they were provided:

"Enough appears in these references to the legislation of the Congress under the Constitution to show that throughout the entire period since its adoption it has been the unchallenged practice of the Legislative Department of the Government, with the sanction of every President, including the Father of the Country, to pass laws to prevent the diversion of pension money from inuring solely to the use and benefit of those to whom the pensions are granted." *United States v. Hall*, 98 U.S. 343, 354 (1879).

"The Government interest, which has been articulated in congressional debates since the fee limitation was first enacted in 1862 during the Civil War, has been this: that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985).

Veterans and their dependents should not have to resort to hiring and paying lawyers to obtain veterans' benefits to which they are rightfully entitled. Through a variety of social programs, our Nation unselfishly provides benefits to assist citizens disadvantaged for one reason or another. Veterans' benefits are more than a matter of relief provided out of generosity. Because veterans make special sacrifices, subject themselves to extraordinary risks, and bear unusual burdens for the benefit of the rest of us, and because we owe our very existence as a Nation to our veterans, they earn special rights and special treatment. Veterans, who fought for our country, should never have to fight our Government to get the benefits our grateful citizens have provided as a reward for veterans' sacrifices and service. It is intended that these benefits be provided with a minimum of difficulty for the veteran claiming them. Veterans are therefore accorded a privileged status and are due more personal assistance from VA than claimants receive when seeking benefits from other Government sources. It is important, we believe, to remain mindful that veterans obtain their benefits through an informal, nonadversarial, and benevolent claims process, not a litigation process. The fundamental distinctions between the VA process and litigation reflect a calculated congressional intent and design to permit veterans to receive all the benefits they are due without any necessity to hire and pay lawyers.

The nature and purpose of the distinctions between the VA process and other forums are well known and understood by those who are familiar with veterans' benefits law. Generally, veterans have the burden of proof, but, in the VA context, that only connotes the measure of evidence that will or will not warrant a grant of the benefits sought. It merely means VA cannot award benefits without the existence of evidence to reasonably confirm the veteran is entitled. Its effect is to prevent the burden from being put on VA to disprove entitlement when no affirmative evidence exists to show entitlement. If the burden is not met, it is the veteran that suffers the consequences in that the claim fails.

The difference between the meaning of burden of proof for veterans and what burden of proof connotes in the traditional usage is much more than an insignificant subtlety. In its broadest traditional sense, the term includes (1) the obligation to fill the void by physically producing enough evidence to demonstrate the issue warrants formal consideration and (2) by producing enough evidence to convince the fact finder of the truth of the claim. These two elements of the burden of proof are known respectively as the "burden of production" and the "burden of persuasion." In a judicial proceeding, if the party asserting a claim fails to produce enough evidence to even suggest a valid claim, the matter may be summarily decided against him or her without necessity of full consideration of the merits. If the party's evidence is

sufficient to meet the burden of production but insufficient to convince the decision-maker of the truth of the facts alleged, the party loses on the merits.

In judicial proceedings, each party must discover and physically present to the court his or her own evidence. It is not the court's place, nor proper role, to discover and obtain evidence for either of the parties or itself, because the court must be impartial and disinterested. Thus, in judicial proceedings, the burden of proof includes both the mechanical aspect of the duty of evidence production and the standard of persuasion upon the party having the burden of proof. The burden of proof in the traditional usage entails much more than is required of veterans seeking benefits.

Under a proper interpretation and application of VA law, the veteran need only claim entitlement to a benefit, supply VA with the basic information necessary to confirm veteran status, and inform VA of the pertinent circumstances on which entitlement is claimed and sources of evidence that will support the claim. VA has the duty to inform the veteran of what facts and evidence are pertinent so the veteran can in turn help VA identify sources of evidence. VA has the duty to assist the veteran in obtaining available evidence. As such, the veteran has no burden of production. For the veteran, having the burden of proof simply means that it is he or she that bears the risk of nonpersuasion and stands to lose if the evidence is insufficient to convince the adjudicator of entitlement.

Two more aspects of the VA process that fundamentally distinguish it from litigation and other administrative proceedings are the formalities and the obligations upon the parties. In court proceedings, the party must specify the precise legal grounds for the claim and know the proper venue, jurisdiction, and legal authorities on which the action rests. The parties must carefully negotiate a structured process governed by extensive formal and complex procedural rules filled with pitfalls and obstacles. The assistance of attorneys is essential. In judicial or other administrative proceedings, professional legal advice is usually required even before an action is brought; in the VA process, its employees counsel veterans on the bases of eligibility and their potential entitlement to the various benefits. VA will assist a veteran in completing and filing the relatively informal application for the benefit sought. VA personnel determine which activity has jurisdiction and direct the claim to the proper location. VA takes the initiative to advance the claim forward through the appropriate procedural steps. VA will inquire of the veteran if additional information is needed and will advise him or her of any necessity for additional evidence, again assisting in obtaining it if the veteran desires. Otherwise, the matter is completely in VA's hands once the claim is filed, and the veteran has no responsibility to take any further action to prosecute it. Congress placed the duty on VA to ensure all alternative theories of entitlement are exhausted and all laws, regulations, and other legal authorities pertinent to the case are considered and applied.

Theoretically, because it is ultimately VA's duty to ensure all pertinent law is correctly applied, a veteran should have the same result with good representation, bad representation, or no representation. We all know, nonetheless, that no legal system is perfect, and veterans service organization representation is therefore advisable so errors can be discovered, but that does not relieve VA of the ultimate duty to ensure that all law is properly applied and all legal theories of entitlement are explored and considered.

Therefore, it is the Government's responsibility to ensure that veterans are given every reasonable consideration and awarded every benefit to which they can be shown entitled. To accomplish that, we must have an agency that is fully devoted to serving veterans. The agency that serves veterans must do so with a sense of gratitude and with a duty to help rather than hinder veterans seeking benefits. It would be inconsistent with our indebtedness to veterans, our deep sense of gratitude, and the special honor we accord veterans to make them feel like their claims are unwelcome, require them to fight for their benefits, or even to require them to deal with a burdensome process. It would be shameful if a veteran seeking disability compensation for war wounds, for example, was confronted by a passive, indifferent, resistant, or contentious bureaucracy and was expected to have to pay a lawyer to get what was due from the Government. We firmly believe it would be inappropriate for us to condone a situation in which lawyers were needed to obtain veterans' benefits. We believe it would be equally inappropriate for us to agree to allow lawyers to interject themselves into the claims process so they could charge veterans for assistance in obtaining benefits.

On the issue of the inappropriateness and lack of need of attorney representation in the initial administrative proceedings, our view from a practical and fairness standpoint, is similar to the view of Congress:

"There would seem to be no need for the assistance of an attorney in order to initiate the claims process by completing and filing an application. Moreover, even if the initial decision is adverse, the Committee believes that it may be

unnecessary for a claimant to incur the substantial expense for attorney representation that may not be involved in appealing the case for the first time to the BVA. The claimant may well prevail, as many claimants currently do, without legal representation when the case is first before BVA." S. Rep. No. 100-418, at 63-64 (1988).

Obviously, no benefits delivery system can be perfect. Admittedly, VA has fallen far short of serving veterans in the manner intended. VA sometimes denies veterans' claims erroneously, even arbitrarily. Veterans sometimes do have to fight an aloof bureaucracy to obtain what they are clearly due. However, if we agreed to permit attorneys to charge veterans fees for claims assistance, that would be an abandonment of the effort to force VA to reform and to force the system to work as intended. It would be viewed as a concession that the system cannot be made to fully work for veterans. With that concession, all efforts by Congress to force VA to perform as it was intended would likely cease. There would likely be an acceptance of circumstances and a system in which it was expected that veterans would have to pay lawyers and fight to obtain their benefits. VA would no longer grant benefits without being prodded to do so. Veterans would come to be treated as ordinary litigants rather than a special group entitled to special treatment.

As we have already experienced somewhat from judicial review and involvement of lawyers in that connection, the informal pro-veteran process would gradually evolve into a formal, legalistic, and adversarial one. If that were ever to occur, the probable result would be an increase in money spent on administration because of the back and forth that would take place between lawyers and VA on cases. In addition, VA would quite probably have to devote a substantial amount of its scarce resources—including a whole legion of employees—to the review of attorneys' fee agreements. The result would be increased administrative costs, perhaps being paid for by a reduction in benefits elsewhere, and more benefits diverted away from the intended beneficiaries into the pockets of attorneys and agents. Agreeing to that would constitute an abandonment of our responsibility to work for the best interests of veterans.

Our position is one based entirely on the goal of preserving the special status veterans enjoy and promoting sound public policy. Veterans service organizations have nurtured the system from its inception. We have an investment in and appreciation for the system that attorneys simply do not have. That proprietary interest in the system ensures that, though we will aggressively and fully prosecute veterans' claims, we will not do so blindly and with total disregard of the consequences for the system just to gain some perceived advantage for an individual claimant. On the other hand, lawyers handling individual claims will more likely "hit and run," and possibly be more inclined to resort to tactics against VA that one might typically employ in adversarial proceeding to intimidate, overwhelm, or wear down an opponent. It would be difficult to criticize such an approach when it is billed as zealous representation. The open VA procedures designed for more gentle, gracious, and paternalistic dealings with claimants would probably have to be replaced with formal safeguards and restrictive rules to define prohibited practices and protect VA against such methods by zealous representatives. Veterans would lose the special considerations they are now accorded and lose rather than gain procedural advantages. Ultimately, it would be a "lose-lose" situation. The Court recognized the probable adverse effects in *National Ass'n of Radiation Survivors*:

There can be little doubt that invalidation of the fee limitation would seriously frustrate the oft-repeated congressional purpose for enacting it. Attorneys would be freely employable by claimants to veterans' benefits, and the claimant would as a result end up paying part of the award, or its equivalent, to an attorney. But this would not be the only consequence of striking down the fee limitation that would be deleterious to the congressional plan.

A necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. . . . The regular introduction of lawyers into the proceedings would be quite unlikely to further this goal. Describing the prospective impact of lawyers in probation revocation proceedings, we said in *Gagnon v. Scarpelli*, 411 U.S. 778, 787-788, 93 S.Ct. 1756, 1762, 36 L.E.d.2d 656 (1973):

"The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself . . . may become more akin to that of a judge at a trial, and less attuned to the rehabilitative

needs of the individual. . . . Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, . . . a longer record, and the possibility of judicial review—will not be insubstantial.”

We similarly noted in *Wolff v. McDonnell*, 418 U.S. 539, 570, 94 S.Ct. 2963, 2981, 41 L.Ed.2d 935 (1974), that the use of counsel in prison disciplinary proceedings would “inevitably give the proceedings a more adversary cast. . . .”

Knowledgeable and thoughtful observers have made the same point in other language:

“To be sure, counsel can often perform useful functions even in welfare cases or other instances of mass justice; they may bring out facts ignored by or unknown to the authorities, or help to work out satisfactory compromises. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client’s cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the Government to provide one—or at least to cause the Government’s representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy. . . .”

“These problems concerning counsel and confrontation inevitably bring up the question whether we would not do better to abandon the adversary system in certain areas of mass justice. . . . While such an experiment would be a sharp break with our tradition of adversary process, that tradition, which has come under serious general challenge from a thoughtful and distinguished judge, was not formulated for a situation in which many thousands of hearings must be provided each month.” Friendly, “Some Kind of Hearing,” 123 U.Pa.L.Rev. 1267, 1287–1290 (1975).

Thus, even apart from the frustration of Congress’ principal goal of wanting the veteran to get the entirety of the award, the destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible. It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation. It is only a small step beyond that to the situation in which the claimant who has a factually simple and obviously deserving claim may nonetheless feel impelled to retain an attorney simply because so many other claimants retain attorneys. And this additional complexity will undoubtedly engender greater administrative costs, with the end result being that less Government money reaches its intended beneficiaries. 473 U.S. at 323–26.

Undoubtedly, an attorney may very well provide some benefit in an individual case. Our consideration involves the good of the whole, however. We do not see how permitting attorneys to charge veterans for claims assistance could be beneficial for veterans or the system generally. Apart from the likely adverse effect discussed above where it will come to be accepted that benefits cannot be obtained without a fight and the services of a lawyer, lawyers are unlikely to have any other beneficial effect upon the system. Unlike nonprofit veterans organizations, which work for the good of the system and represent veterans free and without regard to the prospects or amount of monetary benefits, lawyers will participate for the purpose of earning fees. Because they will be representing veterans for a fee, they may only assist veterans in fee-producing claims, leaving veterans on their own in other matters. For example, it is unlikely that lawyers will be willing to spend great amounts of time counseling veterans, just listening to their problems, or helping them resolve all sorts of difficulties with VA that do not involve awards of monetary benefits. Veterans service organization representatives, whose sole function is assistance to veterans and their dependents, do these things every day. Veterans service organization representatives are not “on the clock” for purposes of charging fees and are therefore less concerned with taking a little additional time to explain matters and discuss veterans’ concerns. Much of what service officers gladly do for VA claimants would not be fee producing if done by attorneys, unless, of course, the veteran was foolish enough to pay an hourly fee for this service.

It is unlikely that an attorney would be willing to assist a veteran in obtaining service connection for a condition that would only be rated 0 percent and would therefore result in no award of benefits. It is unlikely that an attorney would assist a widow in applying for a burial flag or VA headstone. It is unlikely that an attorney would assist a widow in a claim for a \$300 burial allowance, or a veteran in obtaining the small annual clothing allowance. If an attorney did provide assistance with such matters, his or her fee might consume most or all of the benefit, or actu-

ally cost the claimant a substantial sum where the benefits had no monetary value. A veteran should not have to pay to get assistance in completing an application, especially when the benefit might be one about which there is no dispute as to entitlement. A lawyer might charge to help file an application where legal representation per se may never be necessary. In any event, VA benefits should go to the intended beneficiaries and should not come to be viewed as a source of fees for the legal profession.

It is understandable why some attorneys advocate changing the system. Perhaps veterans who advocate it do so under the belief that they would generally receive better representation by attorneys. Data on the subject simply do not support that belief. Attorneys presumably choose only the cases they believe more meritorious, where most veterans service organizations essentially represent any claimant and do not refuse representation in cases merely because of a lower likelihood of favorable outcome. Nonetheless, historically and currently, attorneys still have no greater success rate in BVA appeals, for example, than veterans service organization representatives. Indeed, the few veterans service organizations that are selective in who they represent have substantially higher success rates than attorneys, and even veterans service organizations that represent essentially any claimant that requests representation, such as DAV, generally have greater percentages of allowances on appeal than attorneys. In 2004, the average BVA allowance rate among veterans service organizations was 19.38 percent. The allowance rate for attorneys was 16.6 percent. All but one VSO had higher allowance rates than lawyers.

These are some of the reasons for our position. We believe the value of preserving the beneficial aspects of the current VA system and maintaining the special status veterans enjoy outweigh any benefit of permitting individual veterans to choose attorney representation. In public policy considerations, the right of personal choice is, of course, favored except when the good of the whole clearly outweighs any benefit to the individual or the value of individual choice.

Those who understand and appreciate the unique nature and purpose of the VA process also know that the formalities necessary to ensure a level playing field and referee proceedings between competing adversaries are not only superfluous to the VA process but actually operate to create inefficiencies and inhibit justice.

Thus, the foreseeable consequences of introducing lawyers in the administrative process are far reaching and almost uniformly undesirable. No positive tradeoff would result. It would not only, on the whole, be detrimental to the administrative claims processing system and the veterans it serves, it would decrease the efficiency of the system and ultimately cost taxpayers more, with no benefit except as a new source of fees for lawyers.

Our goal is to put veterans' benefits in the pockets of veterans; NOVA's goal is to put veterans' benefits in the pockets of attorneys. We are taking a public policy position for veterans; NOVA is taking a public policy position for lawyers. We believe it would be a major mistake for Congress to change the law to permit attorneys to charge veterans for assistance in filing claims and prosecuting claims in the initial administrative proceedings.

Question 3. It is my understanding that VA decides some disability compensation claims on a priority basis. What is DAV's position on the appropriateness of providing priority to certain veterans' disability claims?

Answer. With the situation of claims backlogs, we believe it is appropriate for VA to give some claims priority, such as those of elderly veterans pending for a long time. As you know, section 7107 of title 38, United States Code, authorizes BVA to advance the case of a seriously ill veteran on the docket. As a general rule, we believe VA should decide all claims in such a timely fashion as to make priorities unnecessary. Although the work of VA's "Tiger Teams" in reducing the backlog of certain claims is commendable, the necessity for Tiger Teams is a reflection of the poor functioning of the system overall.

Questions 4a-4b. Currently, priority access to VA health care is given to combat theater veterans who are within 2 years of their service discharge date. Does DAV support that priority access?

Would DAV support the same kind of priority for disability claims filed by combat veterans, or any recently separated veterans, who are within 2 years of their service discharge date?

Answer. In the situation that exists, DAV supports priority access to health care for recently discharged combat theater veterans. We believe these veterans should be given needed health care promptly to aid in their successful transition to civilian life. However, this practice raises some concerns. Though we approve of the preferences given to combat veterans in connection with proof of claims, we continue to be concerned with other practices that distinguish between combat and non-combat veterans. In today's circumstances, many members of the Armed Forces are ex-

posed to risks similar to those in combat theaters. Also, with the insufficient resources provided for veterans' medical care, we are concerned that care for older veterans must be delayed to give priority to recently discharged combat theater veterans. The better solution would be to provide VA with enough resources to enable it to treat all veterans promptly.

Veterans who file claims at military discharge centers receive faster service on their claims. This is efficient, and we support it. Veterans who file claims with regional offices sometime after discharge should have no priority, however, because that would be unfair to the other veterans whose claims would be delayed as a result. Again, if VA had sufficient resources, all claims could receive the prompt attention they deserve.

Question 5. At the hearing, I asked Admiral Cooper about the degree of collaboration there is between VBA's Rating Veterans Service Representatives and Vocational Rehabilitation Counselors prior to a veteran receiving a Total Disability due to Individual Unemployability (TDIU) rating. Does DAV believe that a veteran should receive employment counseling and, if necessary, training through the Vocational Rehabilitation & Employment program prior to being assigned a TDIU rating?

Answer. Some veterans who have become unable to work because of their service-connected disabilities could be trained for other employment. We believe most of these veterans would prefer earning a wage to living on the very modest monthly compensation paid to totally disabled veterans. Many other veterans are too disabled to work, however, and attainment of a vocational goal is simply not feasible. Vocational rehabilitation counselors could prescreen these veterans and afford counseling in those cases where it appears that training is feasible, considering the veteran's disability, age, and other factors favorable to rehabilitation. The disability rating should not be delayed pending this review.

As you know, section 1163 of title 38, United States Code, already requires VA to make vocational rehabilitation counseling services available to veterans rated totally disabled by reason of unemployability. Under this section a veteran may attempt work without any loss of benefits until the veteran has demonstrated an ability to maintain employment for more than 12 consecutive months.

Questions 6a-6b. It is my understanding that a veteran's age may not be considered in a determination of individual unemployability (IU). Is that an appropriate limitation when considering IU claims from veterans who are at or beyond a commonly accepted retirement age?

Should there be an age-appropriate limit on the payment of IU?

Answer. Disability compensation is an age-neutral benefit, unlike Social Security disability benefits where a person of advanced age is more likely to be found disabled than a younger person with the same disability. The disability compensation program seeks to treat all veterans the same. Age should be neither a favorable nor unfavorable factor. Entitlement to compensation at any level should be based solely on the nature of the disability. VA's regulation provides:

Age may not be considered as a factor in evaluating service-connected disability; and unemployability, in service-connected claims, associated with advancing age or intercurrent disability, may not be used as a basis for a total disability rating. Age, as such, is a factor only in evaluations of disability not resulting from service, i.e., for the purposes of pension. 38 CFR § 4.19 (2004).

If a veteran became unemployable at some time before normal retirement age, the veteran will not have had the opportunity to save for or earn retirement benefits and certainly should not have the compensation reduced upon reaching retirement age. Also, in today's society, many people work well beyond what was once considered retirement age. It is to be expected that progressive disabilities will worsen with age, and some veterans will become unemployable as they get older. Individual unemployability is not a retirement benefit, however, and VA's rules require evidence that the veteran became unable to work because of service-connected disability. To be found entitled to a total rating based on individual unemployability, a veteran must demonstrate that cessation of work was because of the service-connected disability. See 38 CFR §§ 4.16, 4.18 (2004). A veteran who claims individual unemployability upon normal retirement and without any demonstrated worsening of his or her service-connected disability would properly be denied the benefit. Nonetheless, a veteran of any age should be awarded the benefit if service-connected disability causes the veteran to terminate employment. Age should be a factor only with respect to whether the veteran should be considered for vocational rehabilitation.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LARRY E. CRAIG
TO KENNETH B. KRAMER

Question 1a. At the hearing, you suggested that Congress should consider eliminating the role of the United States Court of Appeals for the Federal Circuit in reviewing appeals involving veterans' benefits claims. Would you please comment further on what problems you perceive with the current judicial review structure?

Answer. The optimal structure for the judicial appeal process should achieve the best possible balance between having as many layers of appeal as required for the best possible decision and the need for reaching finality of result as quickly as possible.

There can be no true dispute that the present structure, insofar as it allows appeals to both the U.S. Court of Appeals for Veterans' Claims (Court) and the U.S. Court of Appeals for the Federal Circuit (FC), delays finality from a matter of months to a matter of years. As to the latter, in some cases, such as where the Court affirms, but the FC overturns the Court and mandates a return of the case to the VA administrative process, the number of additional years involved could extend to a decade. Clearly, if the sole consideration is expeditious review, one layer of Federal Court review, rather than two, short of the Supreme Court, will provide that result 100 percent of the time.

The question then becomes whether there is sufficient value added as to accuracy of decisionmaking, to justify the inherent additional time needed for review in both the Court and the FC. Judicial accuracy, unfortunately, is really an art-form, rather than a science, and like beauty, is in the eye of the beholder. In most situations, the winning party believes that the decision is accurate and the losing party takes a contrary view.

Moreover, because accuracy is an art-form, its presence is not usually the readily apparent clear-cut, black or white kind of stuff, but rather is dependent on the kind of analysis involving subtle shades of gray. And it is these subtle shades of gray which form the basis for an "accurate" result to be "distinguished" in future cases. Whether such a distinction justifies a different result in a different case again rests in the eye of the beholder, whether the beholder be litigant, judge, or academic.

As such a beholder, it is my view that judicial decisions, sometimes under the rubric of being "distinguished" and sometimes because judges are fallible, are at times not only inconsistent between appellate courts, but inconsistent within the same court. Accordingly, other than for perceptual purposes to the outside world and for losing litigants to obtain one more bite at the apple, I see little value added in having both the Court and the FC involved in review of veterans' cases. Even assuming that the FC is always more accurate than the Court, a review of the FC website shows that the FC reverses the Court in approximately 11 percent of the cases it reviews. It is debatable whether a better result in about 1 of every 10 cases can justify the additional delay and confusion inherent in multiple layers of appellate review. But this debate need not be waged. Recognizing that I am speaking as a beholder and one indeed who might be viewed as nonobjective, it is my view, after 15 years of fulltime participation in veterans' law, that because of the exclusive nature of its work, many times the Court will have a greater understanding of the subject matter and awareness of the systemic impact of its decisions on the adjudication system than the FC. Accordingly, I would conclude that a significant number of reversed cases should not have been reversed so that the value-added accuracy of FC review is a much lower percentage than that reflected on the website.

The old axiom about too many cooks spoiling the broth rings true. Here the presence of cooks in different kitchens creates not only delay, but confusion as to the state of the law.

Question 1b. Do you believe the current judicial review structure affects the ability of the VA system to provide prompt, accurate, or consistent decisions?

Answer. Yes and for the worse. Given the situation described in my answer to Part A, the VA is often euphemistically caught between what its supervisor, the Court, and its big boss, the FC, tells it to do. Anyone or anything trapped in such an environment reacts with delay, indecision and inconsistency. The VA is never sure whether the big boss will back the supervisor or scold him. And even where the matter under consideration is not brought to the attention of the big boss, the VA still must contend with prior edicts of the boss that seem inconsistent with what the supervisor is now telling it to do.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV
TO DANIEL L. COOPER

Question 1. I am intrigued by the recommendations in former Chief Judge Kenneth Kramer's testimony, including his suggestion to improve the claims process at the regional office level by having an Administrative Law Judge or a Veteran's Law Judge working at the regional office on the disputed cases. What do you think of this proposal?

Answer. Judge Kramer made a number of recommendations at the hearing; including placing Veterans' Law Judges (VLJs) of the Board of Veterans' Appeals (Board) in VA regional offices. Neither the Veterans Benefits Administration (VBA) nor the Board supports this recommendation. The existing appeals process with layers of review was established, in part, to ensure fairness and integrity and promote claimant confidence in the decisions. Decentralization or regionalization of the Board by placing VLJs at the regional offices could affect the appearance of Board independence by creating a perception in the minds of appellants and their representatives that the Board is an extension of the regional office and not a separate and independent body that exists to fairly and impartially consider their appeals of regional office decisions.

Decentralization or regionalization would also pose substantial challenges to the Board in maintaining the efficiency of its operations. Given the rapid changes in veterans law and the complexity of the VA disability system, it is advantageous for VLJs to work in a single location where they have the opportunity for a quick and free exchange of ideas and information and can quickly adapt to changes in the law. This kind of environment fosters consistency in understanding and application of the law. Additionally, regionalization of the Board would create logistical problems, increase expenditures for support services and legal research resources, and make management of the case flow and the conduct of quality reviews more difficult.

Question 2. Has VA reviewed the costs of the large numbers of remanded decisions, and can you provide me with estimates?

Answer. VBA created the Appeals Management Center (AMC) in July 2003 to serve as a centralized processing site for appeals remanded from the Board for further development. AMC has 87 employees and receives approximately 18,000 remands per year. VBA currently has a total of 26,000 remands pending, approximately 19,000 of which are at AMC. Because of the large inventory of pending remands, an additional 46 employees now assist AMC in processing remands.

The fiscal 2005 operating budget for AMC totals \$6.9 million. The salary cost for the additional 46 employees currently assisting AMC is estimated at \$2.2 million annually.

Question 3. What is VA doing to respond to the GAO report earlier this month raising questions about the consistency of decisionmaking in various regional offices across the country?

Answer. On May 5, 2005, the General Accountability Office (GAO) issued report GAO-05-655T, "Board of Veterans' Appeals Has Made Improvements in Quality Assurance but Challenges Remain for VA in Assuring Consistency." The report concluded that VA still lacks a systematic method for ensuring the consistency of decisionmaking within VA as a whole. GAO did find that VA has begun efforts to understand why average compensation payments per veteran vary from State to State. The report also noted that in response to inquiries from the media and members of Congress about rating variation, the Secretary of Veterans' Affairs asked the Office of Inspector General (IG) to determine why there are differences in VA's average monthly disability compensation payments made to veterans living in different States. The IG made a number of recommendations. VBA actions undertaken or planned in response to the recommendations are summarized below:

Recommendation 1: Conduct a scientifically sound study using statistical models of the major influences on compensation payments to develop baseline data and metrics for monitoring and managing variances, and use this information to develop and implement procedures for detecting, correcting, and preventing unacceptable payment patterns.

Actions Taken/Planned: VBA worked closely with the Office of Policy, Planning and Preparedness to award a contract to the Institute for Defense Analyses (IDA) in May 2005 to conduct the recommended study. IDA has initiated work on the contract. It is estimated that the study will take at least 18 months to complete.

Recommendation 2: Coordinate with the Veterans' Disability Benefits Commission to ensure all potential issues concerning the need to clarify and revise VA's Schedule for Rating Disabilities are reviewed, analyzed, and addressed.

Actions Taken/Planned: VBA is prepared to provide the Veterans' Disability Benefits Commission whatever information or assistance is needed to fulfill its statutory

charge. The Under Secretary for Benefits addressed the Commission on July 22, 2005, on disability compensation trends and developments, and on May 9, 2005, the Director of the Compensation and Pension (C&P) Service briefed the Commission about VA compensation and related benefits. VBA will work with the Office of Policy, Planning and Preparedness to ensure that the Commission has the required information and support to review, analyze, and address all potential issues concerning the need to clarify and revise the Schedule for Rating Disabilities.

Recommendation 3: Conduct reviews of rating practices for certain disabilities, such as PTSD, individual unemployability (IU), and other 100 percent ratings, to ensure consistency and accuracy nationwide. At a minimum, these reviews should consist of data analysis, claims file reviews, and on-site evaluation of rating and management practices.

Actions Taken/Planned: VBA will review post traumatic stress disorder (PTSD) cases adjudicated between 1999 and 2004 in which the veteran was awarded disability compensation for PTSD at the 100 percent rate; or was awarded 100 percent disability compensation based on a determination of individual unemployability (IU), with PTSD as the veteran's primary disability. These are the specific areas where the IG found problems in VBA's processing of PTSD claims. The initial stage of this review is underway.

Additionally, during its regularly scheduled oversight visits to VBA regional offices, the C&P Service will review cases involving other disabilities that received a 100 percent scheduler or IU rating. This review will focus on whether evidence to substantiate the claim was sufficiently developed and whether the disability evaluation assigned was appropriate, as well as on relevant management practices.

Recommendation 4: Expand the national quality assurance program by including evaluations of PTSD rating decisions for consistency by regional office, and to ensure sufficient evidence to support the rating is fully developed and documented, such as verifying the stressor event.

Actions Taken/Planned: Using the findings from the review of the PTSD cases, VBA will develop additional procedural guidance and training for our decision-makers and make appropriate systemic and regulatory changes to improve the consistency and accuracy of our decisions. We will also analyze rating and claims data from VBA claims-processing systems on an ongoing basis to identify any unusual patterns or variance by regional office or diagnostic code for further consistency review. To support these consistency reviews, the C&P Service is developing new review protocols to monitor and review rating variations with regard to particular diagnostic codes.

Recommendation 5: Coordinate with the Veterans' Health Administration (VHA) to improve the quality of medical examinations provided by VA and contract clinicians, and to ensure medical and rating staff are familiar with approved medical examination report templates and that the templates are consistently used.

Actions Taken/Planned: VBA continues to work with VHA to improve the quality of medical examinations performed to support disability compensation evaluations. VBA is working with the Compensation and Pension Examination Program (CPEP) Office to ensure that all automated examination report templates thoroughly and accurately solicit the medical evidence needed to consistently evaluate the disability that is the basis of a claim. VBA is also working with VHA to establish a formal approval process for the templates and to obtain agreement on the mandatory use of approved templates.

Recommendation 6: In view of growing demand, the need for quality and timely decisions, and the ongoing training requirements, re-evaluate human resources and ensure the VBA field organization is adequately staffed and equipped to meet mission requirements.

Actions Taken/Planned: VBA is carefully reviewing its budget formulation and resource allocation methodologies. VBA will refine and make appropriate changes to the methodologies to ensure the resource needs are accurately projected and the field organization is appropriately staffed and funded. While it is critically important that the field organization be staffed and equipped to meet our high expectations for service delivery, VBA will also work to ensure the adequacy of the resources devoted to investment in information technology, training, and oversight—all essential components for achievement of our quality and consistency goals.

Recommendation 7: Consider establishing a lump-sum payment option in lieu of recurring monthly payments for veterans with disability ratings of 20 percent or less.

Actions Taken/Planned: It is expected that the Veterans' Disability Benefits Commission will consider this public policy issue. The Veterans' Disability Benefits Commission report is expected 15 months following its initial public meetings, which were held on May 9 and 10, 2005.

Recommendation 8: Undertake a more detailed analysis to identify differences in claims submission patterns to determine if certain veteran sub-populations, such as World War II, Korean Conflict, or veterans living in specific locales, have been underserved, and perform outreach based on the results of the analysis to ensure all veterans have equal access to VA benefits.

Actions Taken/Planned: The Veterans' Benefits Improvement Act of 2004 requires VA to submit a report to Congress on servicemembers' and veterans' awareness of benefits and services available under VA laws. The VA Office of Policy, Planning and Preparedness is conducting a 1-year research study to determine servicemember and veteran awareness of VA benefits and services and how they can be obtained. The study will include recommendations for improving VA outreach and awareness for servicemembers and veterans of benefits available to them.

VBA will use the results of this study and other information and data related to claims submission patterns by period of service and specific locales to identify any significant differences. VBA will then initiate outreach and focused campaigns specifically directed at any population of veterans potentially underserved.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV
TO KENNETH B. KRAMER

Question 1. As to your suggestion to place an Administrative Law Judge or a Veterans' Law Judge working at the Regional Office on the disputed cases, can you explain in further detail how you believe this will help the system?

Answer. The help will not come in the form of ultimately better decisionmaking; but rather, in faster decisionmaking that will maintain the quality of the existing system. In other words, the purpose of using an Administrative Law Judge (ALJ) or Veterans Law Judge (VLJ) is to finalize the maximum possible number of decisions at the local level in order to minimize the number of appeals.

The present appellate process frequently results in a case being caught in a cycle of remands that causes tremendous delay before a final decision results. Each time a case changes its level of adjudication—from the Regional Office (RO) to the Board of Veterans Appeals (BVA) or the reverse—from the Board of Veterans' Appeals to the U.S. Court of Appeals for Veterans' Claims (Veterans Court) or the reverse—or from the Veterans Court to the U.S. Court of Appeals for the Federal Circuit (FC) or the reverse—there is inherent delay which can range from months to years. Each level has its own rules, procedures, and way of doing business that translates into backlog producing delay.

What I am suggesting, in essence, is to produce as the last step at the RO, where there is disagreement, an ALJ or VLJ decision of at least the same quality as a decision presently produced at the Board. After that kind of decision is rendered, and it still results in disagreement, an appeal to the Board will require the same specificity as is presently required for an appeal from the Board to the Veterans Court.

Such a change will put substantial down the chain, rather than up the chain, momentum on final administrative (VA) decisionmaking. This kind of momentum is highly beneficial in two regards: first, it provides for an expert decision much earlier in the process; and second, it permits for a second level of expert decisionmaking in those cases in which there is a significant legal question.

With such a change, another derivative benefit is also potentially available. Under the existing system, there are three levels of expert decisionmaking—one at the administrative level and two at the judicial level. Once two levels of expert administrative decisionmaking are implemented, there is no basis on which to continue two levels of judicial decisionmaking, unless one believes that four, rather than three, levels of experts are now necessary. Assuming that adding another layer is counterproductive if the goal is reducing backlog and delay, either the FC, as I recommended during the hearing, or the Veterans Court, can be eliminated from the judicial review process.

PREPARED STATEMENT OF QUENTIN KINDERMAN, DEPUTY DIRECTOR, NATIONAL
LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

On behalf of the 2.7 million members of the Veterans of Foreign Wars of the United States (VFW) and our Ladies Auxiliary, I appreciate the opportunity to submit a statement for the record on this important topic. I congratulate the Committee for the decision to devote the time and effort to focus attention on what has been a chronic problem for the Veterans' Benefits Administration (VBA) and for America's veterans. The backlogs of case work and the resultant delays have been, for a decade or more, resistant to efforts to solve the problem, and most veterans and

their survivors have to wait longer than a reasonable period of time for a decision on their claims for disability or death benefits.

I will not dwell on the statistics regarding the VA's performance, or the number of cases pending, other than to clarify an apparent conflict between numbers that the VFW provided in previous testimony, and numbers provided by the VA.

VBA often provides the rating workload number. As of May 20, 2005, this was 342,811 cases. It is only part of what the 7,336 employees have to face in workload. What concerns the Veterans of Foreign Wars is that the same employees also have 122,882 pending cases not involving ratings, 153,456 pending appeals, which quite frankly, each takes much more time and effort than an original or reopened claim, and 79,335 education claims, in the rapidly growing GI bill program. This adds up to over 700,000 claims for the same 7,336 employees.

The VFW has long supported providing adequate resources to the VBA to provide highly accurate and timely benefit decisions. We realize that VBA is often forced to suffer problems that are directly related to the austerity of their funding. This includes the consequences of addressing in the short run, critical situations that are a consequence of the inability to assume that the proper long term resources will be available. However, we also believe that the current situation of persistent backlogs and delays in claims processing are not entirely related to resource levels.

The recent IG report, styled as State Variances in VA Disability Compensation Payments, but including material far from that topic, documents as part of a VBA decisionmaker survey, the growing discomfort in VBA with the workload, and the imbalance to the staffing available to work on it, especially at the decisionmaker level. These dedicated employees have our sympathy and support. From their point of view, there is truly a never-ending supply of already old work to do. However, this has been the situation for many years. The emphasis from the top of the organization has persistently been on moving the cases along, to reduce the overall count, to bring down the backlog. VFW believes that an unintended price has been paid for this emphasis, both in the quality or accuracy of the decisions, and in VBA's institutional ability to address these chronically high caseloads. The growing frustration and stress of workload pressure have inspired some dedicated VBA employees to find early retirement attractive. The cumulative effect of subordinating training and guidance to production has taken its toll.

Compared to the compensation program of a decade or more ago, the work is much more complicated. It is now a complex thicket of court decisions, and statutory requirements that occasionally require the readjudication of thousands of cases. Veterans' claims adjudication is no longer a business that can be managed simply by the numbers. Our impression of management by the numbers is, in essence, a balancing of the numbers to even out workload, nationwide. Old work is "brokered" from one office to another office that is relatively advantaged in the age and volume of casework. The reward for work done is more work from another office. Perhaps this is effective in the short term, but after a decade or so, we think that it is possible that the office people may have figured out how to stay in the middle of the pack, low enough not to need to broker out work, but high enough not to be a broker in station as well.

We also believe that, in the difficult situation of constant workload pressure, some confounding factors may have established themselves in the claims processing system. VBA operates a rather imposing quality monitoring system, acronym "STAR" which finds, on a sampling basis, that about 15 percent of the cases have a significant error. There is little actual constructive feedback to the decisionmakers. The VFW thinks that, for a claims process that profoundly affects the lives of the veteran claimants, 15 percent is a very high error rate. It suggests that for 15 out of every 100 veterans or their survivors, after waiting many months, or even years, for a decision from VA, they receive a decision that is significantly flawed.

The IG, in its recent study, found an association between a higher average compensation payments, and representation by veteran's service organizations (VSO). We believe that this may in part reflect the VSOs success in identifying rating decisionmaker's errors, and insisting on their correction, either locally, or on appeal. While we are proud of the efforts that VSOs make to assist veterans and their survivors, we have serious reservations about VA's tolerance for a level of errors that most people would not accept in most of life's other transactions, like one's bank account or virtually any consumer product or service.

Furthermore, we do not believe that this deficiency in the ability to produce consistently accurate decisions can be divorced from the more public issue of the claims backlog. Clearly, a significant and cumulative portion of the work must be adjudicated more than once, often in an adversarial and inefficient situation leading to even more burdensome appeals. As pointed out in the VSO's Independent Budget,

fiscal year 2006, the emphasis on production at the expense of quality leads only to short-term gains. The evidence of this is obvious, and need not be repeated here.

Also regarding this IG report, we are informed that the VA plans to do a massive review of PTSD and Individual Unemployability claims, based on the IG's findings. The VFW believes that this massive review, to be accomplished using VBA's claims processing resources and people, will significantly increase VA's caseload backlogs. Moreover, the review, which VA has apparently decided to do, is based on IG findings in a small sample of cases, using expertise that appears, to our knowledgeable people, to be exceedingly thin. We urge the VA to at least review the IG's cases using experts from VBA and the BVA before committing to this questionable plan. We are a country at war. Many of our soldiers and Marines are experiencing sustained urban combat of the worst kind. Some of them will need the VA's help when they return. An investigation that slanders the wartime experiences of their parents and older siblings will not encourage them to come to the VA.

Through most of the recent history of claims processing in the VBA, appeals have been the storm looming on the horizon. We have observed in VBA the normal tendency to focus on what is the immediate priority, often at the expense of other essential tasks. Too often in recent years, the priority has been new claims, and the other task has been appeals. As with the other claims, the backlog of appeals has been confounded with a larger than appropriate error rate, incessant remands, and in many cases, extraordinary delays in processing. VBA has sought to address these problems by creating an Appeals Management Center (AMC) here in Washington. By all accounts, the AMC and its dedicated and committed staff have begun to make a difference. The AMC was, however, necessarily created from the best available trained employees in VBA, and its mission is to meet a need in the appeals process that frankly was not being successfully addressed before. The AMC addresses the problem of appeal remand development, and with the cooperation of VFW and other VSOs, even successfully addresses some claims prior or instead of returning them to BVA. Creation of the AMC does, however, reduce VBA's capacity in the other offices to deal with claims, perhaps even affecting VBA's existing efforts to improve quality, by the number of employees transferred to the AMC. This should be cause for concern for officials with overall responsibility for VBA's mission.

We supported the establishment of the AMC, and continue to work with their people to improve the appeal process, but we are concerned that the resources in VBA are finite, their people require long and complex training and are not easily replaced, and that the organization is eroding as a result of crisis management, an aging workforce, and a program that seems to be growing relentlessly more complex and adversarial, and is now threatened with the possibility of massive and perhaps, from the veterans' point of view, catastrophic change. Perhaps the answers lie in some combination of technology, more effective and enlightened training, and a new generation of employees, committed to serve a new generation of wartime veterans.

VBA indeed faces a dilemma. They have a complex and often modified program, a frustrated workforce, myopic focus on production to address backlogs to which training and quality control are subordinated, and a reliance on brokering work from office to office to avoid short-term crises. Added to this is an increasing burden of appeals, and a new generation of wartime veterans deserving of the best service. The future is indeed challenging for VBA.

We do know, however, that the answer does not lie in the dismantlement or diminishment of America's commitment to our heroes, either in the programs necessary to support them, or the organization necessary to provide these earned benefits.