**Calendar No. 790**

| 100TH CONGRESS *2d Session* | SENATE | REPORT No. 100-418 |
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# VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT

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## REPORT

OF THE

## COMMITTEE ON VETERANS' AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 11

together with

ADDITIONAL VIEWS

JULY 7, 1988.—Ordered to be printed

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# VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT

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JULY 7, 1988.—Ordered to be printed

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Mr. CRANSTON, from the Committee on Veterans' Affairs, submitted the following

## REPORT

together with

## ADDITIONAL VIEWS

[To accompany S. 11]

The Committee on Veterans' Affairs, to which was referred the bill (S. 11) to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a committee substitute, and an amendment to the title, and recommends that the bill, as amended, do pass.

## COMMITTEE AMENDMENTS

The amendments are as follows:
Strike out all after the enacting clause as follows:

[That (a) this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act"

[(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

### [TITLE I—ADJUDICATION PROCEDURES

[SEC. 101. (a) Chapter 51 is amended by adding at the end of subchapter I the following new section:

**["§ 3007. Burden of proof; benefit of the doubt**

["(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.

["(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration involving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.".

[(b)(1) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title are each amended in the item relating to chapter 51 by striking out "Applications" and inserting in lieu thereof "Claims".

[(2) The heading of such chapter is amended to read as follows:

**["CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS".**

[(c)(1) The table of sections at the beginning of such chapter is amended in the item relating to subchapter I by striking out "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

[(2) The heading of subchapter I of such chapter is amended to read as follows:

**"Subchapter I—Claims".**

[(d) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 the following new item:

["3007 Burden of proof; benefit of the doubt."

[SEC. 102. Section 3311 is amended by adding at the end the following new sentence: "Subpenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing a copy thereof by registered or certified mail addressed to such individual at such individual's last known dwelling place or principal place of business. A vertified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service."

[SEC. 103. Section 4001 is amended—

[(1) in the second sentence of subsection (a), by inserting before the period at the end of such sentence "in a timely manner"; and

[(2) by adding at the end thereof the following new subsection:

["(d) The Chairman of the Board shall submit a report to the appropriate committee of the Congress, not later than December 31, 1988, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, information specifying the number of

cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the 24 months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members of, and the professional, administrative, clerical, stenographic, and other personnel employed by, the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for by subsection (a) of this section."

[SEC. 104. Section 4003 is amended—

[(1) in subsection (a), by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information," after "concerned"; and

[(2) in subsection (b)—

[(A) by striking out "When" and inserting in lieu thereof "(1) Except as provided in paragraph (2), when";

[(B) by inserting a comma and "after notice of such additional information is furnishenbnt and the claimant is provided an opportunity to be heard in connection with such information," after "concerned"; and

[(C) by adding at the end thereof the following new paragraph:

["(2) When, without the vote of a temporary member designated under section 4001(c)(1) of this title or the vote of an acting member designated under section 4002(a)(2)(A)(ii) of this title, a section would be evenly divided, such member shall not vote.".

[SEC. 105. Section 4004 is amended—

[(1) in subsection (a)—

[(A) by striking out "involving" in the first sentence and inserting in lieu thereof "for"; and

[(B) by inserting before the period at the end of the second sentence "after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law";

[(2) by striking out subsection (b) and inserting in lieu thereof the following:

["(b)(1) Except as provided in paragraph (2) of this subsection, when a claim is disallowed by the Board, it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be considered.

["(2) Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—

["(A) when new and material evidence is secured, shall, and

["(B) for good cause shown, may authorize the reopening of a claim and a review of the Board's former decision.

["(3) A judicial decision under subchapter II of chapter 71 of this title, upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authority set forth in paragraph (2) of this subsection to authorize the reopening of a claim and a review of the former decision."; and

[(3) by striking out subsection (d) and inserting in lieu thereof the following:

["(d) After reaching a decision in a case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

["(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact and law and on matters of discretion presented on the record; and

["(2) an order granting appropriate relief or denying relief."

[SEC. 106. Section 4005(d)(5) is amended by striking out "will base its decision on the entire record and".

[SEC. 107. Section 4009 is amended by adding after subsection (b) the following new subsection:

["(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with

the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the Board under this subsection, including any such denial, shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, the provisions of subchapter II of chapter 71 of this title to the contrary notwithstanding.".

[SEC. 108. (a) Chapter 71 is further amended by adding at the end thereof the following new sections:

"**§ 4010. Adjudication procedures**

["(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

["(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veteran's Administration, but the Administrator, under regulations which the Administrator shall prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

["(c)(1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

["(A) to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veteran's Administration at such proceeding;

["(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations which the Administrator shall prescribe, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

["(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

["(D) to submit rebutted evidence;

["(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

["(F) to serve written interrogatories on any person, including any employee of the Veteran Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

["(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

["(3) In the event of any objection filed under paragraph (1)(F) of the subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.

["(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this subsection fails to answer or fails to provide responsive answers to any such interrogatories within 30 days service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpena under section 3311 of this title (with enforcement of such subpena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within 100 miles of where such person resides, is employed, or transacts business.

["(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any

time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as part of the record and decision in the case.

["(e) The transcript or recording of testimony and the exhibits, together with all papers and request filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section 400(a) of this title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

["(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

**["§ 4011. Notice of procedural rights**

["In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.".

[(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 4009 the following new items:

["4010. Adjudication procedures.
["4011 Notice of procedural rights.".

[SEC. 109. (a) In order to evaluate the feasibility and desirability of alternative methods of (1) assuring the resolution of claims before the Administrator of Veterans' Affairs for benefits under laws administered by the Veterans' Administration as promptly and efficiently as feasible following the filing of a notice of disagreement pursuant to section 4005 (as amended by section 106 of this Act) or 4005A of title 38, United States Code, and (2) affording claimants the opportunity for a hearing before or review by a disinterested authority at a location as convenient and on as timely basis as possible for each claimant, the Administrator is authorized to conduct a study, commencing not more than 1 year after the date of the enactment of this Act, for a period of 24 months, involving either or both of the alternative methods described in subsection (b) of this section for resolution of claims.

[(b)(1) In not more than three geographic areas, the Administrator is authorized to provide an intermediate-level adjudication process whereby each claimant may, within the time afforded such claimant under paragraph (3) of section 4005(d) or 4005(b) of title 38, United States Code, to file an appeal, request a de novo hearing at the agency of original jurisdiction (as described in section 4005(b)(1) of such title) before a panel of three Veterans' Administration employees, each of whose primary responsibilities include adjudicative functions but none of whom shall have previously considered the merits of the claim at issue. Following such hearing, such panel shall render a decision and prepare a new statement of the case in accordance with the requirements of paragraphs (1) and (2) of section 4005(d) of such title. Such new statement of the case shall, for all purposes relating to appeals under chapter

71 of such title, be considered to be a statement of the case as required by paragraph (1) of such section 4005(d).

[(2) In not more than three other geographic areas, the Administrator is authorized to provide for an enhanced schedule of visits, on at least a quarterly basis each year, by a panel or panels of the Board of Veterans' Appeals to conduct formal recorded hearings pursuant to section 4002 of such title in such areas.

[(c) Not later than 6 months after the completion of such study, the Administrator shall report to the Congress on the results thereof, including an evaluation of the cost factors associated with each alternative studied and with any appropriate further implementation thereof, the impact on the workload of each regional office involved in such study, and the impact on the annual caseload of the Board of Veterans' Appeals resulting from each alternative studied, together with any recommendations for administrative or legislative action, or both, as may be indicated by such results.

[SEC. 110. Section 3010(i) is amended—

[(1) by inserting "(1)" after "(i)"; and

[(2) by adding at the end the following new paragraph:

["(2) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence in the form of official reports from the proper service department, the effective date of commencement of the benefits so awarded shall be the date on which an award of benefits under the disallowed claim would have been effective had the claim been allowed on the date it was disallowed."

## [TITLE II—VETERANS' ADMINISTRATION RULE MAKING

[SEC. 201. (a) Subchapter II of chapter 3 is amended by adding at the end the following new section:

**["§ 223. Rule making**

["Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator, other than rules or regulations pertaining to agency management or personnel or to public property or contracts, shall be subject to the requirements of section 553 of title 5.".

[(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 222 the following new item:

["223 Rule making."

## [TITLE III—JUDICIAL REVIEW

[SEC. 301. Section 211(a) is amended by striking out "sections 775, 784" and inserting in lieu thereof "sections 775 and 784 and subchapter II of chapter 71 of this title".

[SEC. 302. (a) Chapter 71 is further amended—

[(1) by inserting after the table of sections the following new heading:

**["Subchapter I—General";**

and

[(2) by adding at the end thereof the following new subchapter:

**["Subchapter II—Judicial Review**

**["§ 4025. Right of review; commencement of action**

["(a) For the purposes of this chapter—

["(1) 'final decision of the Administrator' means—

["(A) a final determination of the Board of Veterans' Appeals pursuant to section 4004 (a) or (b) of this title; or

["(B) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title; and

["(2) 'claim for benefits' means—

["(A) an initial claim filed under section 3001 of this title;

["(B) a challenge to a decision of the Administrator reducing, suspending, or terminating benefits; or

["(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph.

["(b) Except as provided in subsection (f) of this section, after any final decision of the Administrator adverse to a claimant in a matter involving a claim for benefits

under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after notice of such decision is mailed to such claimant pursuant to section 4004(d) of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

["(c) The complaint initiating in action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.

["(d) Not later than 30 days after filing the answer to a complaint filed pursuant to subsection (a) of this section, the Administrator shall file a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court considers relevant to its consideration of the case.

["(e) In an action brought pursuant to subsection (b) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (d) of this section, to enter judgment in accordance with section 4026 of this title or remand the cause in accordance with such section or section 4027 of this title.

["(f)(1) No action may be brought under this section unless (A) the initial claim for benefits is filed pursuant to section 3001 of this title on or before the last day of the fifth fiscal year beginning after the effective date of this section, and (B) the complaint initiating such action is filed not more than 180 days after notice of the first final decision of the Administrator rendered after the last day of such fiscal year is mailed to the claimant pursuant to section 4004(d) of this title. If the case is reopened pursuant to section 4004(b)(2)(A) of this title within 180 days after such notice is mailed, the next final decision shall, for purposes of this subsection, be considered the first final decision of the Administrator.

["(2) No action may be brought under this section with respect to matters arising under chapters 19 and 37 of this title.

**["§ 4026. Scope of review**

["(a)(1) In any action brought under section 4025 of this title, the court, to the extent necessary to its decision and when presented, shall—

["(A) decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

["(B) compel action of the Administrator unlawfully withheld;

["(C) hold unlawful and set aside decisions, findings (other than those described in clause (D) of this paragraph), and conclusions of the Administrator found to be—

["(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

["(ii) contrary to constitutional right, power, privilege, or immunity;

["(iii) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

["(iv) without observance of procedure required by law; and

["(D) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside.

["(2) Before setting aside any finding of fact under paragraph (1)(D) of this subsection, the court shall specify the deficiencies in the record upon which the court would set aside such finding and shall remand the case one time to the Administrator for further action not inconsistent with the order of the court in remanding the case. In remanding a case under the first sentence of this paragraph, the court shall specify a reasonable period of time within which the Administrator shall complete the ordered action. If the Administrator does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.

["(b) In making the determinations under subsection (a) of this section, the whole record before the court pursuant to section 4025(d) of this title shall be subject to review, and the court shall review those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

["(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the court.

["(d) When a final decision of the Administrator is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

**["§ 4027. Remands**

["(a)(1) In any action brought under section 4025 of this title, the court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (b) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within 90 days after the date of such remand, the matter shall be returned to the court for its action.

["(2)(A) At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator.

["(B) If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator.

["(C) In the case of a remand under subparagraph (A) or (B) of this paragraph, the court may specify a reasonable period of time within which the Administrator shall complete the required action.

["(b) After a case is remanded to the Administrator under subsection (a) of this section, and after further action by the Administrator, including consideration of any additional evidence, the Administrator shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based. Any such modification, supplementation, affirmation, or reversal of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title.

**["§ 4028. Survival of actions**

["Any action brought under section 4025 of this title shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

**["§ 4029. Appellate review**

["The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments of other civil actions."

[(b) The table of sections at the beginning of such chapter is amended—

[(1) by inserting before the item relating to section 4001 the following new item:

["SUBCHAPTER I—GENERAL";

[and

[(2) by adding after the item (added by section 108(b) of this Act) relating to section 4011 the following new items:

["SUBCHAPTER II—JUDICIAL REVIEW

["4025. Right of review; commencement of action
["4026. Scope of review
["4027. Remands.
["4028. Survival of actions.
["4029. Appellate review."

[SEC. 303. Section 1346(d) of title 28, United States Code, is amended by inserting before the period at the end thereof a comma and "except as provided in subchapter II of chapter 71 of title 38"

TITLE IV—ATTORNEYS' FEES

[SEC. 401. Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

["(c) The Administrator shall approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation before the Veterans' Administration in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—

["(1) for any claim resolved prior to or at the time that a final decision of the Administrator is first rendered, $10; or

["(2) for any claim resolved after such time—

["(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 percent of the total amount of any past-due benefits awarded on the basis of the claim; or

["(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

["(i) the fee agreed upon by the claimant and the attorney; or

["(ii) $500, or such greater amount as may be specified from time to time in regulations which the Administrator shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

["(d)(1) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 percent of the total amount of any past-due benefits awarded on the basis of the claim.

["(2) If, in an action brought under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of $750 to be paid to the attorney by the claimant for the representation of such claimant.

["(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision of the Administrator or court making such award.

["(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.

["(g) For the purposes of this section—

["(1) the terms "final decision of the Administrator' and 'claim for benefits' shall have the same meaning provided for such terms, respectively, in section 4025 (a) of this title; and

["(2) claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

["(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of subsection (d) of section 2412 of title 28, as in effect on the day before the effective date of the repeal of such subsection (as provided in section 204(c) of the Equal Access to Justice Act (Public Law 96–481; 94 Stat. 2329; 28 U.S.C. 2412 note))."

[SEC. 402. Section 3405 is amended—

[(1) by striking out "or" after "title,"; and

[(2) by striking out "him" and inserting in lieu thereof "such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective

claimant or beneficiary under this title with reference to any matter covered by this title"

[TITLE V—EFFECTIVE DATES

[SEC. 501. This Act and the amendments made by this Act shall take effect on the first day of the first month beginning not less than 180 days after the date of enactment of this Act.

[SEC. 502. A civil action authorized in subchapter II of chapter 71 of title 38, United States Code (as added by section 302(a) of this Act) may be instituted to review decisions of the Board of Veterans' Appeals rendered on or after April 1, 1987.]

and insert in lieu thereof the following:

That (a) this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act"

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—VETERANS' ADMINISTRATION ADJUDICATION

SEC. 101. (a) Chapter 51 is amended by adding at the end of subchapter I the following new section:

"**§ 3007. Burden of proof; benefit of the doubt**

"(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.

"(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration involving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.".

(b)(1) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title are each amended in the item relating to chapter 51 by striking out "Applications" and inserting in lieu thereof "Claims".

(2) The heading of such chapter is amended to read as follows:

"CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS"

(c)(1) The table of sections at the beginning of such chapter is amended in the item relating to subchapter I by striking out "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

(2) The heading of subchapter I of such chapter is amended to read as follows:

"SUBCHAPTER I—CLAIMS"

(d) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 the following new item:

"3007. Burden of proof, benefit of the doubt.".

SEC. 102. Section 3311 is amended by adding at the end the following new sentences: "Subpenas authorized under this section shall be served by an individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing a copy thereof by registered or certified mail addressed to such individual at such individual's last known dwelling place or principal place of business. A verified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service."

SEC. 103. (a) Section 4001(a) is amended—

(1) by striking out "directly responsible to the Administrator" in the first sentence; and

(2) by inserting before the period at the end of the second sentence "in a timely manner".

(b)(1) Section 4001(b) is amended to read as follows:

"(b)(1) The Chairman of the Board shall be appointed by the President by and with the advice and consent of the Senate, for a term of five years. An individual may serve as Chairman for not more than three complete terms. The Chairman may be removed by the President for good cause.

"(2)(A) The members of the Board shall be appointed by the Chairman of the Board for a term of nine years. A member appointed to fill a vacancy resulting from the resignation, death, or removal of a member before the end of the term for which the original appointment was made shall serve for the remainder of the unexpired term. Members may be reappointed without limitation. The Chairman shall designate one member as Vice Chairman. Such member shall serve as Vice Chairman at the pleasure of the Chairman.

"(B) A member of the Board may be removed only by the Chairman and only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Merit Systems Protection Board. Section 554(a)(2) of such title shall not apply to a removal action under this subparagraph. In such a removal action, a member shall have the rights set out in section 7513(b) of title 5.".

(2) The President shall appoint a Chairman of the Board of Veterans' Appeals under section 4001(b)(1) of title 38, United States Code (as amended by paragraph (1)), not later than one year after the date of the enactment of this Act. The individual who is serving as Chairman of the Board of Veterans' Appeals on the date of the enactment of this Act may continue to serve as Chairman until a successor is appointed. If such individual is appointed as Chairman under such section, none of the service of such individual as Chairman before the date of that appointment shall be considered for the purpose of determining the term of appointment or eligibility for reappointment under such section.

(3) Appointments of members of the Board of Veterans' Appeals under subsection (b)(2)(A) of section 4001 of title 38, United States Code (as amended by paragraph (1)), may not be made until a Chairman has been appointed under subsection (b)(1) of such section. An individual who is serving as a member of the Board on the date of the enactment of this Act may continue to serve as a member until the earlier of the date on which the individual's successor is appointed under subsection (b)(2)(A) of such section or the expiration of the 180-day period that begins on the day after the Chairman is appointed.

(4) Notwithstanding the provision in section 4001(b)(2) of title 38, United States Code (as amended by paragraph (1)), that specifies the term for which members of the Board of Veterans's Appeals shall be appointed, of the first members appointed under such section—

(1) 21 members shall be appointed for a term of three years;

(2) 22 members shall be appointed for a term of six years; and

(3) 22 members shall be appointed for a term of nine years.

The First Vice Chairman of the Board designated under such section shall be selected from among the members appointed for a term of six years or nine years.

(5) Section 5315 of title 5, United States Code, is amended by adding at the end the following:

"Chairman, Board of Veterans' Appeals"

(c) Section 4001 is further amended by adding at the end the following new subsections:

"(d) The Chairman of the Board shall submit a report to the Committees on Veterans' Affairs of the Senate and the House of Representatives, not later than December 31, 1988, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, information specifying the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the 36 months preceding the then current fiscal year, the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members of, and the professional,

administrative, clerical, stenographic, and other personnel employed by, the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for by subsection (a) of this section.

"(e) Notwithstanding any other provision of law no member or temporary or acting member of the Board shall be eligible for or receive, directly or indirectly, bonuses (in addition to salary) relating to service on the Board."

SEC. 104. Section 4003 is amended to read as follows:

**"§ 4003. Determinations by the Board**

"(a)(1) The determination, when concurred in by the requisite number of members of the section, shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record or may reach a contrary conclusion upon the basis of additional information from the service department concerned after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information.

"(2) The requisite number of members of a section that must concur in a final decision is—

"(A) for an allowance of a claim, a majority of the members of the section; or

"(B) for a denial of a claim, all members of the section.

"(b)(1) When there is a disagreement among the members of the section in any case in which unanimity is required for a final determination, the concurrence of the Chairman with the majority of the members of such section shall constitute the final determination of the Board. The Chairman may, instead of voting, expand the size of the section for determination of that case, and the concurrence of a majority of the members of the expanded section shall constitute the final determination of the Board.

"(2) Notwithstanding paragraph (1) of this subsection, the Board on its own motion may correct an obvious error in the record or may reach a contrary conclusion upon the basis of additional information from the service department concerned after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information.

"(c) If, without the vote of a temporary member designated under section 4001(c)(1) of this title or the vote of an acting member designated under section 4002(a)(2)(A)(ii) of this title, a section would be evenly divided in the determination of any claim—

"(1) such member shall not vote; and

"(2) the Chairman shall expand, by not less than two members, the size of the section for determination of that claim."

SEC. 105. Section 4004 is amended—

(1) in subsection (a)—

(A) by striking out "involving" in the first sentence and inserting in lieu thereof "for"; and

(B) by inserting before the period at the end of the second sentence "after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law";

(2) by striking out subsection (b) and inserting in lieu thereof the following:

"(b)(1) Except as provided in paragraph (2) of this subsection, when a claim is disallowed by the Board, it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be considered.

"(2) Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—

"(A) when new and material evidence is presented or secured, shall authorize the reopening of a claim and a review of the Board's former decision; and

"(B) for good cause shown, may authorize the reopening of a claim and a review of the Board's former decision.

"(3) A judicial decision under subchapter II of chapter 71 of this title, upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authority set forth in paragraph (2) of this subsection to authorize the reopening of a claim and a review of the former decision."; and

(3) by striking out subsection (d) and inserting in lieu thereof the following:

"(d) After reaching a decision in a case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact and law and on matters of discretion presented on the record; and

"(2) an order granting appropriate relief or denying relief."

SEC. 106. Section 4005(d) is amended—

(1) by striking out paragraph (4) and inserting in lieu thereof the following: "(4) The claimant may not be presumed to agree with any statement of fact or law contained in the statement of the case to which the claimant does not specifically express agreement."; and

(2) in paragraph (5) by striking out "will base its decision on the entire record and".

SEC. 107. (a) Section 4009 is amended—

(1) by striking out the section heading and inserting in lieu thereof the following:

**"§ 4009. Medical opinions"**

and

(2) by adding at the end the following new subsections:

"(c)(1) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. The claimant may appeal a denial of a request for such an opinion to the Chairman of the Board.

"(2) If the Board or the Chairman upon appeal denies a request for an advisory medical opinion, the Board, or the Chairman after the appeal, shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for the determination together with a notice of the claimant's right to appeal the denial to the Chairman of the Board.

"(3) Actions of the Board under this subsection, including any such denial concurred in by the Chairman (if appealed), shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, the provisions of subchapter II of chapter 71 of this title to the contrary notwithstanding.

"(d) If a member of the Board receives the medical opinion of any physician relating to any appeal under consideration by such member (other than a medical opinion of a physician on the section of the Board considering such appeal) or an employee of the Board in the consideration of such appeal receives such an opinion, the Board shall furnish such opinion to the claimant and shall afford the claimant 60 days in which to submit a response to such opinion before the Board issues a final determination on the appeal. The Board shall consider any such response and shall include in the final determination a discussion of such opinion, the response (if any), and the effect of such opinion and response on the Board's determination."

(b) The table of sections at the beginning of chapter 71 is amended by striking out the item relating to section 4009 and inserting in lieu thereof the following:

"4009. Medical opinions."

SEC. 108. (a) Chapter 71 is further amended by adding at the end the following new sections:

**"§ 4010. Adjudication procedures**

"(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator and the members of the Board may administer oaths and affirmations, examine witnesses, and receive evidence.

"(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator and the Chairman of the Board, under regulations which the Administrator and the Chairman shall jointly prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

"(c)(1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

"(A) to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

"(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations prescribed pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

"(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

"(D) to submit rebuttal evidence;

"(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

"(F) to serve written interrogatories on any person, including any employee of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Chairman of the Board by the person to whom the interrogatories are directed or such person's representative.

"(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Chairman of the Board, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(3) In the event of any objection filed under paragraph (1)(F) of this subsection, the Chairman of the Board shall, pursuant to regulations which the Chairman shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Chairman shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.

"(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this subsection fails to answer or fails to provide responsive answers to all of the interrogatories within 30 days after service or such additional time as the Chairman of the Board may allow, the Chairman, upon determining that the party propounding such interrogatories has shown the general relevance and reasonableness of the scope of the interrogatories, shall issue a subpena under section 3311 of this title (with enforcement of such subpena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within 100 miles of where such person resides, is employed, or transacts business.

"(d)(1) A claimant may request a hearing before a traveling section of the Board. Cases shall be scheduled for hearing before such a section in the order in which the requests for hearing are received by the Board.

"(2) If a claimant makes a request for hearing before a traveling section of the Board and, by reason of limited time for the conduct of hearings by such section at the location for the requested hearing, such claimant's appeal is not scheduled for hearing or the hearing is not conducted, the Board shall afford such claimant an opportunity to present the case to the Board in a hearing conducted by telephone or video connection before a section of the Board or in a videotape of a hearing conducted for the Board by Veterans' Administration adjudication personnel at a regional office of the Veterans' Administration. An audiotape or videotape shall be included in the record of the appeal and considered by the Board in the same manner as recordings of testimony and documentary evidence are considered.

"(e) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration (including employees of the Board of Veterans' Appeals) may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator, as to proceedings other than proceedings before the Board, or the Chairman of the Board, as to proceedings before the Board, shall determine the matter as a part of the record and decision in the case, pursuant to regulations prescribed jointly by the Administrator and the Chairman.

"(f) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section 4004(a) of this

title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Chairman of the Board, pursuant to regulations which the Chairman shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(g) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator, as to proceedings other than proceedings before the Board, or the Chairman of the Board, as to proceedings before the Board, or by the Administrator and the Chairman jointly, under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

**"§ 4011. Notice of procedural rights and other information**

"In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator, as to proceedings other than proceedings before the Board, or the Chairman of the Board, as to proceedings before the Board, shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator or the Chairman, respectively, shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, (3) in the case of an appeal to the Board, the opportunity for a hearing before a traveling section of the Board, and (4) such other information as the Administrator or the Chairman of the Board, respectively, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 4009 the following new items:

"4010. Adjudication procedures.
"4011. Notice of procedural rights and other information.".

SEC. 109. (a) In order to evaluate the feasibility and desirability of alternative methods of (1) assuring the resolution of claims before the Administrator of Veterans' Affairs or the Board of Veterans' Appeals for benefits under laws administered by the Veterans' Administration as promptly and efficiently as feasible following the filing of a notice of disagreement pursuant to section 4005 (as amended by section 106 of this Act) or 4005A of title 38, United States Code, and (2) affording claimants the opportunity for a hearing before or review by a disinterested authority at a location as convenient and on as timely a basis as possible for each claimant, the Administrator and the Chairman of the Board of Veterans' Appeals are each authorized to conduct a study commencing not later than 1 year after the date of the enactment of this Act, for a period of 24 months, involving either or both of the alternative methods described in subsection (b) of this section for resolution of claims.

(b)(1) In not more than three geographic areas, the Administrator is authorized to provide an intermediate-level adjudication process whereby each claimant may, within the time afforded such claimant under paragraph (3) of section 4005(d) or 4005A(b) of title 38, United States Code, to file an appeal, request a de novo hearing at the agency of original jurisdiction (as described in section 4005(b)(1) of such title) before a panel of three Veterans' Administration employees, each of whose primary responsibilities include adjudicative functions but none of whom shall have previously considered the merits of the claim at issue. Following such hearing, such panel shall render a decision and prepare a new statement of the case in accordance with the requirements of paragraphs (1) and (2) of section 4005(d) of such title. Such new statement of the case shall, for all purposes relating to appeals under chapter

71 of such title, be considered to be a statement of the case as required by such paragraph (1).

(2) In not more than three other geographic areas, the Chairman is authorized to provide for an enhanced schedule of visits, on at least a quarterly basis each year, by a panel or panels of the Board to conduct formal recorded hearings pursuant to section 4002 of such title in such areas.

(c) Not later than 6 months after the completion of such study, the Administrator and the Chairman of the Board of Veterans' Appeals, as appropriate, shall report to the Congress on the results of the study, including an evaluation of the cost factors associated with each alternative studied and with any appropriate further implementation thereof, the impact on the workload of each regional office involved in such study, and the impact on the annual caseload of the Board resulting from each alternative studied, together with any recommendations for administrative or legislative action, or both, as may be indicated by such results.

SEC. 110. Section 3010(i) is amended—

(1) by inserting "(1)" after "(i)"; and

(2) by adding at the end the following new paragraph:

"(2) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence in the form of official reports from the department of the Secretary concerned, the effective date of commencement of the benefits so awarded shall be the date on which an award of benefits under the disallowed claim would have been effective had the claim been allowed on the date it was disallowed."

## TITLE II—VETERANS' ADMINISTRATION RULE MAKING

SEC. 201. (a) Subchapter II of chapter 3 is amended by adding at the end the following new section:

**"§ 223. Rule making**

"(a) For the purposes of this section—

"(1) the term 'regulation' includes—

"(A) statements of general policy, instructions, and guidance issued or adopted by the Administrator; and

"(B) interpretations of general applicability issued or adopted by the Administrator; and

"(2) the term 'rule' has the same meaning as is provided in section 551(4) of title 5.

"(b) Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator, other than rules or regulations pertaining to agency management or personnel or to public property or contracts, shall be subject to the requirements of section 553 of title 5.

"(c) Rules and regulations issued or adopted by the Administrator shall be subject to judicial review as provided in subchapter II of chapter 71 of this title.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 222 the following new item:

"223 Rule making.".

## TITLE III—JUDICIAL REVIEW

SEC. 301. Section 211(a) is amended by striking out "sections 75, 784" and inserting in lieu thereof "sections 775 and 784 and subchapter II of chapter 71 of this title"

SEC. 302. (a) Chapter 71 is further amended—

(1) by inserting after the table of sections the following new heading:

"SUBCHAPTER I—GENERAL";

and

(2) by adding at the end thereof the following new subchapter:

"SUBCHAPTER II—JUDICIAL REVIEW

**"§ 4025. Right of review, commencement of action**

"(a) For the purposes of this chapter—

"(1) 'final decision of the Board of Veterans' Appeals' means—

"(A) a final determination of the Board pursuant to section 4004 (a) or (b) of this title; or

"(B) a dismissal of an appeal by the Board pursuant to section 4005 or 4008 of this title;

"(2) 'claim for benefits' means—

"(A) an initial claim filed under section 3001 of this title;

"(B) a challenge to a decision of the Administrator reducing, suspending, or terminating benefits; or

"(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph;

"(3) 'interested party', with respect to a rule or regulation issued or adopted by the Administrator, means any person substantially affected by such rule or regulation; and

"(4) 'disability rating schedule' means the schedule of ratings adopted and readjusted under section 355 of this title and any provision made by the Administrator under section 357 of this title for the combination of ratings.

"(b)(1)(A) Subject to subparagraph (B) of this paragraph, the following matters are subject to judicial review under this subchapter:

"(i) A final decision of the Board of Veterans' Appeals in accordance with subsection (c).

"(ii) A rule or regulation issued or adopted by the Administrator when review of such regulation is requested by a claimant in connection with an action under subsection (c).

"(iii) A rule or regulation so issued or adopted when review of such regulation is requested by any interested party in an action brought only for the purpose of obtaining review of such rule or regulation.

"(B) In an action involving any matter subject to judicial review under this subchapter, a court may not direct or otherwise order that any disability rating schedule issued or adopted by the Administrator be modified.

"(2) Any action for judicial review authorized by this subchapter shall be brought by a claimant or an interested party in the United States Court of Appeals for the circuit in which the plaintiff resides or the plaintiff's principal place of business is located, or in the United States Court of Appeals for the District of Columbia Circuit.

"(c) Except as provided in subsection (g) of this section, after any final decision of the Board of Veterans' Appeals adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after notice of such decision is mailed to such claimant pursuant to section 4004(d) of this title.

"(d) The complaint initiating an action under subsection (c) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.

"(e) Not later than 30 days after filing the answer to a complaint filed pursuant to subsection (d) of this section, the Administrator shall file a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court considers relevant to its consideration of the case.

"(f) In an action brought under subsection (c) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (e) of this section, to enter judgment in accordance with section 4026 of this title or remand the case in accordance with such section or section 4027 of this title.

"(g)(1) No action may be brought under this section unless (A) the initial claim for benefits is filed pursuant to section 3001 of this title on or before the last day of the fifth fiscal year beginning after the effective date of this section, and (B) the complaint initiating such action is filed not more than 180 days after notice of the first final decision of the Board of Veterans' Appeals rendered after the last day of such fiscal year is mailed to the claimant pursuant to section 4004(d) of this title. If the case is reopened pursuant to section 4004(b)(2)(A) of this title within 180 days after such notice is mailed, the next final decision shall, for purposes of this subsection, be considered the first final decision of the Board.

"(2) No action may be brought under this section with respect to matters arising under chapters 19 and 37 of this title.

**"§ 4026. Scope of review**

"(a)(1) In any action brought under section 4025 of this title, the court, to the extent necessary to its decision and when presented, shall, except as provided for in section 4025(b)(1)(B) of this title—

"(A) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

"(B) compel action of the Administrator unlawfuly withheld;

"(C) hold unlawful and set aside decisions, findings (other than those described in clause (D) of this paragraph), conclusions, rules, and regulations issued or adopted by the Administrator, the Board of Veterans' Appeals, the Administrator and the Chairman of the Board jointly, or the Chairman found to be—

"(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(ii) contrary to constitutional right, power, privilege, or immunity;

"(iii) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(iv) without observance of procedure required by law; and

"(D) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside.

"(2) Before setting aside any finding of fact under paragraph (1)(D) of this subsection, the court shall specify the deficiencies in the record upon which the court would set aside such finding and shall remand the case one time to the Board of Veterans' Appeals for further action not inconsistent with the order of the court in remanding the case. In remanding a case under the first sentence of this paragraph, the court shall specify a reasonable period of time within which the Board shall complete the ordered action. If the Board does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.

"(b) In making the determinations under subsection (a) of this section, the whole record before the court pursuant to section 4025(e) of this title shall be subject to review, and the court shall review those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In no event shall findings of fact made by the Administrator or the Board of Veterans' Appeals be subject to trial de novo by the court.

"(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation issued or adopted by the Administrator or the Chairman of the Board, the court shall review only questions raised as to compliance with and the validity of the regulation.

**"§ 4027. Remands**

"(a) If either party to an action brought under section 4025 of this title applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Board of Veterans' Appeals and order such additional evidence to be taken by the Board. The court may specify a reasonable period of time within which the Board shall complete the required action.

"(b) After a case is remanded to the Board of Veterans' Appeals under subsection (a) of this section, and after further action by the Board, including consideration of any additional evidence, the Board shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based.

**"§ 4028. Survival of actions**

"Any action brought under section 4025 of this title shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

**"§ 4029. Appellate review**

"The decisions of a court of appeals pursuant to this chapter shall be subject to appellate review by the Supreme Court of the United States in the same manner as judgments in other civil actions.".

(b) The table of sections at the beginning of such chapter is amended—

(1) by inserting before the item relating to section 4001 the following new item:

"SUBCHAPTER I—GENERAL";

and

(2) by adding after the item (added by section 108(b) of this Act) relating to section 4011 the following new items:

"SUBCHAPTER II—JUDICIAL REVIEW

"4025. Right of review; commencement of action.
"4026. Scope of review.
"4027. Remands.
"4028. Survival of actions.
"4029. Appellate review.".

SEC. 303. Section 1346(d) of title 28, United States Code, is amended by inserting before the period at the end thereof a comma and "except as provided in subchapter II of chapter 71 of title 38"

## TITLE IV—ATTORNEYS' FEES

SEC. 401. Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c) The Chairman of the Board shall approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation, other than in an action brought under section 4025 of this title, in connection with a claim for benefits under laws administered by the Veterans' Administration. In no event may such attorneys' fees exceed—

"(1) for any claim resolved prior to or at the time that a final decision of the Board is first rendered, $10; or

"(2) for any claim resolved after such time—

"(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 percent of the total amount of any past-due benefits awarded on the basis of the claim; or

"(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

"(i) the fee agreed upon by the claimant and the attorney; or

"(ii) $500, or such greater amount as may be specified from time to time in regulations which the Chairman of the Board shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Chairman may determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

"(d)(1) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 percent of the total amount of any past-due benefits awarded on the basis of the claim.

"(2) If, in an action brough under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court shall ensure that only a reasonable fee, not in excess of $750, is paid to the attorney by the claimant for the representation of such claimant.

"(e) To the extent that past-due benefits are awarded in proceedings before the Administrator, the Board of Veterans' Appeals or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits

payable for a period subsequent to the date of the final decision of the Administrator, the Board of Veterans' Appeals or court making such award.

"(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.

"(g) For the purposes of this section—

"(1) the terms 'final decision of the Board of Veterans' Appeals' and 'claim for benefits' shall have the same meaning provided for such terms, respectively, in section 4025(a) of this title; and

"(2) claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

"(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of section 2412(d) of title 28.".

SEC. 402. Section 3405 is amended—

(1) by striking out "or" after "title,"; and

(2) by inserting a comma and "or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title" before "shall"

TITLE V—EFFECTIVE DATES

SEC. 501. This Act and the amendments made by this Act shall take effect on the first day of the first month beginning not less than 180 days after the date of enactment of this Act.

SEC. 502. A civil action authorized in subchapter II of chapter 71 of title 38, United States Code (as added by section 302(a) of this Act) may be instituted to review decisions of the Board of Veterans' Appeals rendered on or after April 1, 1987.

Amend the title so as to read:

To amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain decisions of the Board of Veterans' Appeals; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

## INTRODUCTION

S. 11 the proposed "Veterans' Administration Adjudication Procedure and Judicial Review Act", was introduced on January 6, 1987, by Senator Alan Cranston, Chairman of the Committee, and 25 original cosponsors. Since then, 6 other Senators have joined as cosponsors.

S. 11 as introduced had five titles: Adjudication Procedures, Veterans' Administration Rule-making, Judicial Review, Attorneys' Fees, and Effective Dates. It would amend title 38, United States Code (U.S.C.), to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration, apply the provisions of section 553 of title 5, U.S.C., to rulemaking procedures of the Veterans' Administration, provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs, and provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration.

S. 2292, the proposed "Veterans' Judicial Review Act", was introduced on April 18, 1988, by Senator Murkowski, Ranking Minority member of the Committee

S. 2292 as introduced would apply the provisions of section 553 of title 5, U.S.C., to rulemaking procedures of the Veterans' Administration, provide for judicial review of regulations, provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals in connection with challenges to VA rules and regulations and make changes in the operation of the Board of Veterans' Appeals to increase its authority and foster its independence.

On April 28, 1988, the Committee held a hearing on judicial review legislation—S. 11 and S. 2292. Testimony was received from the following witnesses: Honorable John F. Kerry, United States Senator from Massachusetts; Honorable Thomas A. Daschle, United States Senator from South Dakota; Susan Bennett, Esq.; Eugene Fidell, Esq.; Keith Rosenberg, Esq.; Mr. E. Phillip Riggin, Director of the National Legislative Commission, The American Legion; Mr. James N. Magill, Director of the National Legislative Service, Veterans of Foreign Wars of the United States; Mr. John F. Heilman, National Legislative Director, accompanied by Joseph Zengerle, Esq., Disabled American Veterans; Mr. R. Jack Powell, Executive Director, Paralyzed Veterans of America; Mr. Richard E. O'Dell, Vice Presdient and Chairman, Committee on Advocacy, accompanied by Mr. Paul S. Egan, Legislative Director, Vietnam Veterans of America; Mr. Frank E. G. Weil, National Secretary, American Veterans Committee; Dr. Dorothy Legarreta, Ph.D, of California, President, National Association of Radiation Survivors; Mr. J. Thomas Burch, Jr., Chairman, accompanied by Mr. William Bennett, General Secretary, National Vietnam Veterans Coalition; Mr. Philip Cushman of Oregon, Chairman, accompanied by Mr. Sidney Cooper of New York, National Legislative Director, Veterans for Due Process; Honorable Morris S. Arnold, Judge, U.S. District Court of the Western District of Arkansas, and Honorable Stephen S. Breyer, Judge, U.S. Court of Appeals for the First Circuit, both representing the Judicial Conference of the United States.

The following wintesses submitted written testimony in conjunction with the April 28 hearing: Mr. Charles R. Jackson, Vice President of Governmental Affairs, The Non-Commissioned Officers Association of the United States of America; Jerry L. Mashaw, Esq., William Nelson Cromwell, Esq., Professor of Law, Yale University; Thomas M. Boyd, Esq., Acting Assistant Attorney General, U.S. Department of Justice; Antonio J. Califa, Esq., Legislative Counsel, and Morton H. Halperin, Esq., Director, the American Civil Liberties Union.

On June 9, 1988, the Committee held an oversight hearing focusing in on the operations of the Board of Veterans' Appeals (BVA). Testimony was received from the following witnesses regarding BVA operations: Kenneth Eaton, Esq., Chairman, accompanied by Roger K. Bauer, Esq., Vice Chairman, Mr. Ronald Aument, Special Assistant to the Chairman, and Jan Donsbach, Esq., Legal Assistant, Board of Veterans' Appeals; Mr. E. Phillip Riggin, Director, National Legislative Commission, accompanied by Mr. Philip Wilkerson, Assistant Director, National Veterans Affairs and Rehabili-

tation Commission, The American Legion; Mr. Stephen L. Edmiston, Deputy National Legislative Director, Disabled American Veterans; Mr. John C. Bollinger, Associate Legislative Director, Paralyzed American Veterans of America; Mr. James N. Magill, Director, National Legislative Service, accompanied by, Mr. Fred Juarbe, Director, National Veterans Service, Veterans of Foreign Wars of the United States of America; Mr. Richard E. O'Dell, Vice President and Chairman, Committee on Advocacy, accompanied by Mr. Paul S. Egan, Legislative Director, Vietnam Veterans of America.

After carefully considering the testimony and comments from both hearings and making several amendments to S. 11, the Committee met in open session on June 29, 1988, and voted 11–0 (after an amendment to substitute the text of S. 11 failed in a 4–7 vote) to report favorably S. 11 with a substitute amendment proposed by the Chairman.

## Summary of S. 11 as Reported

### Summary of provisions

The Committee bill has five titles: Adjudication procedures; Veterans' Administration rule making; Judicial review; Attorneys' fees; and Effective dates, as follows:

*Title I: Adjudication procedures.*—This title would codify and establish various internal procedures of the VA and the Board of Veterans' Appeals (BVA) applicable in adjudications of claims for benefits under laws administered by the VA. Included in title I of the Committee bill are provisions that would:

1. Codify the burden of proof and reasonable doubt standards in VA claims adjudication proceedings, currently provided for by regulation (38 CFR 3.102 and 3.103), in order to ensure that the VA's present practices of providing claimants all reasonable assistance in the development of claims and construing the evidence liberally in favor of the claimant are not lost in reaction to the provision, in title III of the Committee bill, authorizing judicial review of final decisions denying claims.
2. Specify procedures for the service of subpenas authorized under section 3311 of title 38, United States Code, including procedures for personal services or service by mail.
3. Remove the provisions of making the Chairman directly responsible to the Administrator.
4. Encourage the Board of Veterans' Appeals (BVA) to dispose of appeals before it in a timely manner.
5. Require the President, by and with the advice and consent of the Senate, to appoint the Chairman for a term of five years and provide that an individual may serve no more than three complete terms, the Chairman may be removed by the President for good cause, and the Chairman is to be paid at Executive Level IV.
6. Require the Chairman to appoint Board members for a term of nine years; provide that a member is appointed to fill a vacancy, whether caused by resignation, death, or removal, would serve for the remaining unexpired term; and allow Board members to be removed by the Chairman for good cause,

subject to the due process protections in title 5 relating to adverse personnel actions.

7. Require the President to appoint the Chairman no later than one year after the date of the enactment of this bill and allow the serving Chairman to continue until his successor is appointed; and provide that, if the serving Chairman is appointed, none of the time served prior to the appointment would count in calculating the terms he or she may serve.

8. Provide that of the first Board members appointed, 21 would be appointed for a three-year term, 22 for a six-year term, and 22 for a nine-year term; and that an individual who is serving as a member of the board may continue to serve until the earlier of the date on which the individual's successor is appointed or the expiration of 180-day period after a Chairman is first appointed under the provision described in item 5, above.

9. Require the Chairman to report annually to the Committees on Veterans' Affairs of the Senate and House on the Board's current and future workload and its ability, based on then current and projected staffing, to dispose of appeals in a timely manner.

10. Eliminate any direct or indirect bonuses (in addition to salary) for Board members and temporary members relating to their service on the Board.

11. Require a final determination to be a unanimous vote for a denial but only a majority vote for an allowance, except that the Board on its own motion may correct an obvious error in the record or may reach a contrary conclusion upon additional information after notice to the claimant and an opportunity for the claimant to be heard.

12. Preclude a temporary or acting member from casting a vote in any case where the votes of the two regular members are split and require the Chairman to expand the section upon such a split.

13. Codify current BVA practice, currently provided for by regulation (38 CFR 19.181), under which the Chairman may either vote with the majority or expand the section when confronted with a disagreement among the members of a section in any case in which unanimity is required for a final determination.

14. Codify a claimant's right to an opportunity for a hearing before the BVA.

15. Require the BVA to provide a claimant with notice and an opportunity for a hearing before making a decision based on additional official information received after the BVA had previously decided the case.

16. Require expressly that BVA decisions must be based exclusively on evidence and material of record and on applicable provisions of law.

17. Make a technical correction in the description of the BVA's authority to reopen a claim by deleting (as inconsistent with present practice) the present requirement that new and material evidence sufficient to reopen a claim be in the form of official reports from the proper service department.

18. Specify that a court decision upholding denial of a claim under title III of the Committee bill not diminish the Board's discretionary authority to reopen a claim.

19. Require the BVA to mail a detailed statement of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and such representative.

20. Expand the present requirement that BVA decisions be in writing and contain findings of fact and conclusions of law separately stated, so as to require that such decisions include findings and conclusions and reasons and based therefore, on all material issues of fact, law, and matters of discretion, as well as an order granting or denying relief.

21. Codify current BVA practice, as testified to by the BVA Chairman, under which the claimant shall not be presumed to agree with any statement of fact or law contained in the Statement of the Case unless the claimant specifically expresses such agreement.

22. Expressly provide a claimant before the BVA with the right, upon request, to have the Board acquire an independent medical opinion when there is a substantial disagreement between the substantiated findings or opinions of two physicians on an issue material to the outcome of the case and with the right to appeal a denial of a request to the Chairman; and provide that notice of any Board, or Chairman's upon appeal of a denial, decision to deny such a request, the basis for such denial, and the right to appeal a denial to the Chairman must be provided to the claimant and the claimant's representative but that such decision would not be subject to judicial review.

23. Require notice to a claimant of any consultation with a physician, other than the physician on the Board section deciding the case, along with the results of that consultation and provide 60 days in which the claimant may respond to the opinion; and require that the information gained through this process be included in the discussion of evidence in the final decision.

24. Authorize the Administrator and BVA members to administer oaths and affirmations, examine witnesses, and receive evidence in VA claims adjudication proceedings.

25. Provide for the admission, even if inadmissible under the rules of evidence applicable in court, of all evidence submitted in VA claims adjudication proceedings subject only to such provisions as the Administrator or Chairman may impose through jointly prescribed regulations for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

26. Provide that, in the course of hearings before the BVA on a claim for VA benefits following initial denial of the claim, the claimant (or other party) shall have the right to review and, on the payment of a fee (waivable by the Chairman of the Board, pursuant to regulations that the Administrator must prescribe, on the basis of inability to pay or for other good cause shown) limited to the costs of duplication, to obtain copies of the case files and all materials to be used by the VA at the hearing, to present witnesses and evidence including

medical opinions and rebuttal evidence, to make argument and to submit written contentions, and to submit to any person written interrogatories which must be answered unless written objections thereto are filed. If the person served with interrogatories files an objection thereto, the Chairman of the Board must, pursuant to regulations that the Chairman must prescribe, evaluate the objection and issue an order directing that answers be given or stating that they need not be given. If the person served with interrogatories fails to comply with such an order or, in the absence of an objection, to answer the interrogatories, the party who served the interrogatories would have the right, upon a statement or showing of good cause, to have the Chairman issue a subpoena (enforceable in Federal district court) for the witness' attendance at a deposition at which the unanswered interrogatories would be asked.

27. Provide that a claimant may request a hearing before a traveling section of the Board and that scheduling of such cases would be on a first-request, first-served basis.

28. Provide that if a claimant requests a hearing before a travel section of the Board, but, due to the limited number of hearings available, is unable to receive such a hearing, the Board shall afford the claimant an opportunity for a hearing conducted by telephone or closed circuit television before a BVA panel or in a videotaped hearing before VA adjudicating personnel at the Regional Office.

29. Allow, in the course of any claims proceeding, any VA employee to disqualify himself or herself on the basis of personal bias or other cause and allow a party to challenge such an employee on such basis.

30. Specify the materials that must be included in the record of VA claims adjudication proceedings and provide that the record for judicial review shall be available for the claimant's inspection and shall be copied for the claimant upon the payment of a fee (waivable by the Chairman, pursuant to regulations that the Chairman must prescribe, on the basis of the claimant's inability to pay or for other good cause shown) limited to the cost of duplication.

31. Specify that the adjudication rights contained in title 38 and prescribed thereunder by the Administrator of Chairman are exclusive.

32. Require the Administrator and the Chairman, at each stage of claims adjudication proceedings before the VA and the BVA, respectively, to provide the claimant with detailed notice, in easily understandable language, of the claimant's procedural rights.

33. Authorize the Administrator and the Chairman to study alternative methods of ensuring the prompt and efficient resolution of claims and affording claimants the opportunity for a timely and convenient hearing or review by a disinterested authority. Under this provision, the Administrator and Chairman could study for a period of 24 months the following two alternative methods of speeding claims resolution at locations convenient to claimants: (A) The Administrator, intermediate review panels which would conduct de novo reviews at VA re-

gional offices prior to appeal to the BVA; and (B) the Chairman, an enhanced schedule of BVA traveling board visits (at least four per year). The report on the study, including the Administrator's recommendations for administrative or legislative actions, or both, would be due to be submitted to the Congress within 6 months after completion of the study.

34. Permit retroactive awards for claims reopened and allowed on the basis of new and material evidence in the form of service records.

*Title II: Veterans' Administration rule making.*—This title would (1) define "regulation" as including statements of general policy instructions, and guidance and interpretations of general applicability issued or adopted by the Administrator and define "rule" as having the meaning set forth in section 551(4) of title 5; (2) provide that rules and regulations issued or adopted by the Administrator shall be subject to judicial review; and (3) require application of the rule-making provisions of the Administrative Procedure Act (APA) to all matters other than those involving agency management, personnel, public property or contracts. Matters such as those involving VA benefits and loans would thus be made subject to certain APA requirements, including requirements of notice to the public of proposed regulations and opportunity for comment on such proposed regulations, notwithstanding the exclusion from such provisions in section 553(a)(2) of title 5, United States Code, of matters involving loans, grants, benefits, or contracts.

*Title III: Judicial Review.*—This title would permit access to the United States Federal court system for review of regulations and decisions of the Administrator on claims for benefits. Included in title III of the Committee bill are provisions that would:

1. Expand the present category of exceptions to the general preclusion of judicial review contained in present section 211(a) of title 38, United States Code.

2. Authorize review of a VA rule or regulation both in connection with a final decision adverse to a VA benefits claimant or in a case brought specifically for the purpose of challenging a rule or regulation, but provide that a court may not direct that a disability rating decision by the Administrator or any disability rating issued or adopted by the Administrator be modified.

3. Authorize review of a final decision of the Board of Veterans' Appeals adverse to a VA benefits claimant in United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) (in either the plaintiff's home circuit or in the District of Columbia Circuit) instituted by a civil action brought within 180 days of the mailing by the VA of notice of such decision.

4. Define a "final decision of the Administrator", which may be appealed to Federal court, to include a BVA final decision on the merits, refusal to reopen a claim, and dismissal of an appeal.

5. Define "claim for benefits" to include not just initial claims, but also subsequent action taken on a claim such as reduction or termination of benefits.

6. Require that a complaint instituting a civil action for court review of a decision relating to a claim for benefits include sufficient information to permit the VA to identify and locate the plaintiff's VA records.

7. Require the VA to file, together with its answer to a complaint, a certified copy of all of the materials that constitute the record or, if the cost of filing all such materials would be unduly expensive, a complete index of all of the materials. In the latter case, the court would, after considering the requests of the parties, order the Administrator to file certified copies of such indexed items as it deemed relevant to its consideration of the case.

8. Authorize a court, in an action for review of a BVA denial of a claim for benefits, to enter a judgment on the pleadings and the records.

9. Preclude judicial review, under the provisions added by this title of the Committee bill unless the initial claim is filed with the Administrator on or before the last day of the fifth fiscal year beginning after the effective date of such provisions and the appeal to a United States Court of Appeals is filed within 180 days of the first BVA decision adverse to the claimant, with respect to matters arising under laws administered by the VA other than matters arising under chapters 19 (insurance) and 37 (home, condominium, and mobile home loans) of title 38, United States Code, which are presently not excluded from judicial review under the provisions of section 211(a) of title 38.

10. Authorize the reviewing court to decide all relevant questions of law; to interpret constitutional and statutory and regulatory provisions as well as other actions of the Administrator, compel action of the Administrator unlawfully withheld; and to hold unlawful and set aside decisions, findings, and conclusions of the Administrator or the Board or its Chairman found to be (A) arbitrary, capricious, an abuse of discretion, or not in accordance with law, (B) contrary to constitutional right, power, privilege, or immunity, (C) in excess of statutory jurisdiction, authority, or limitation, or in violation of a statutory right, (D) without observance of procedure required by law, or (E) in the case of a finding of material fact, so utterly lacking in a rational evidentiary basis that a manifest and grievous injustice would result if the finding were not set aside.

11. Require a reviewing court, before reversing the Board's decision on the basis of the court's finding that a factual determination of the Board is utterly lacking in a rational evidentiary basis, to specify where it finds the record deficient and remand the matter a single time to the Board for further action within a reasonable, specified period of time.

12. Require a court, in making determinations, to review those parts of the administrative record cited by a party and to take due account of the rule of prejudicial error.

13. Preclude a reviewing court from conducting a trial de novo on the Board's findings of fact.

14. Provide that, in a matter resolved by the Board solely on the basis of a party's failure to comply with a VA regulation,

the reviewing court may consider only issues raised as to the validity of or a party's compliance with the regulation.

15. Authorize a remand from the reviewing court to the Board if either party applies for leave to adduce further evidence and the moving party shows "good cause" for the requested remand, and provide that if a case is remanded and the Board takes further action, the Board shall modify the decision accordingly.

16. Provide that any actions brought under the judicial review provisions added by this title of the Committee bill would survive the tenure of any individual as Administrator.

17. Provide that decisions of the courts of appeals pursuant to the judicial review provisons added by this title shall be subject to review in the United States Supreme Court in the same manner as judgments in other civil actions.

18. Specify that the current-law limitation on the jurisdiction of Federal district courts in matters involving pensions shall not apply to VA pension matters.

*Title IV: Attorneys' fees.*—This title would revise the present title 38 limitation of $10 for claimants' attorneys' fees by authorizing reasonable attorneys' fees, within certain limits, for representation of individuals before the VA and the BVA and for representation in a case appealed to court under the judicial review provisions added to title 38 by this title of the Committee bill with a specified limitation in cases in which the matter is resolved in a manner unfavorable to the claimant. Included in title IV are provisions that would:

1. Retain the $10 limitation on the amount an attorney may receive for services rendered prior to a final BVA decision, while removing an ambiguity with respect to whether that limitation applies under current law to attorneys "recognized" for practice before the VA.

2. Permit the Chairman of the Board to approve a reasonable attorney's fee for representation within the VA after a final BVA decision (where, for example, a case remains before the VA for reconsideration or for reopening on the basis of "new and material evidence" offered under section 4004(b) of title 38, United States Code, as amended by title I of the Committee bill, up to a maximum of $500 or, if the claimant and attorney have entered into a contingency-fee agreement, not more than 25 percent of any past-due benefits awarded the claimant.

3. Authorize the Chairman to increase the $500 maximum limitation in future years to reflect changed economic conditions.

4. Authorize the Chairman to disregard the $500 limitation in an individual case involving extraordinary circumstances warranting a higher fee.

5. Require a reviewing court, in a case appealed from the BVA, to approve a reasonable attorney's fee. For cases not resolved in a manner favorable to a claimant, the court would ensure that the claimant pay no more than $750. For cases resolved in a manner favorable to a claimant, the only limitation on the amount of the fee that a court could approve would be

that it must be reasonable, or that, if a claimant and an attorney had entered into a contingent-fee agreement, the fee approved by the court could not exceed 25 percent of the total amount of past-due benefits.

6. Authorize the VA to make payment to an attorney from past-due benefits, but preclude the VA from making payments from benefits received subsequent to the date of the decision entitling the veteran to benefits.

7. Limit the applicability of the attorneys' fee provisions to cases involving claims for benefits.

8. Define, for the purpose of the attorneys' fees provisions, a claim as being "resolved in a manner favorable to the claimant" when any or all of the relief sought is granted.

9. Authorize a court to award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of the Equal Access to Justice Act under which such an award may be made unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

10. Provide criminal penalties for willfully and intentionally defrauding a VA claimant.

*Title V: Effective dates.*—This title provides for an effective date and authorizes the institution of civil actions, under the judicial review provisions added by title III of the Committee bill, for the review of certain Board of Veterans' Appeals (BVA) decisions prior to such effective date. Included in this title are provisions that would:

1. Provide that the provisions added by the Committee bill would become effective 180 days after the date of enactment.

2. Allow for court review of a BVA decision rendered on or after April 1, 1987.

## Discussion

The basic purpose of S. 11 as reported (hereinafter referred to as "the Committee bill") is to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled. The Committee bill is designed to serve that purpose by providing such claimants with an opportunity for judicial review of final decisions of the Board of Veterans' Appeals (BVA) denying claims for benefits, by codifying certain internal procedures of the VA relating to the adjudication of benefit claims, by requiring that VA rulemaking processes comply with provisions of the Administrative Procedure Act relating to notice and comment, and by providing for attorneys to receive reasonable fees for representing claimants before the VA and the BVA following a final denial of the claim by the BVA and for representing claimants in judicial proceedings.

The Committee's involvement with the issue of judicial review of Veterans' Administration decisions began in the 94th Congress and has progressed through five different bills, nine hearings, and extensive consultations with a variety of interested parties. Thus, the present legislation is an attempt to reconcile a wide variety of viewpoints on the issue of judicial review of VA decisions and the

related issues of internal adjudication procedures, attorneys' fees, and VA rulemaking procedures.

The introduction of S. 11 was one in a series of steps dating back to 1975, including the introduction of S. 3392 in the 94th Congress, the introduction of S. 364 in the 95th Congress and 5 days of hearings thereon, the development of a Committee substitute in December 1978, and the introduction of S. 330 in the 96th Congress. S. 330 was favorably reported by the Committee on May 3, 1979, by a vote of 9–1, and was passed by the Senate by voice vote on September 17, 1979.

Again, in the 97th and 98th Congresses, the Committee and the Senate acted on such legislation.

S. 349 as introduced in the 97th Congress was identical to the Senate-passed version of S. 330 in the 96th. It was unanimously reported by the Committee, with an amendment in the nature of a substitute, on April 28, 1982, and was passed by the Senate by voice vote on September 14, 1982.

S. 636 as introduced in the 98th Congress was identical to the Senate-passed version of S. 349, with two exceptions: First, the deletion of title V, providing for a merit pay system exclusion for members of the Board of Veterans' Appeals—a matter which had been resolved administratively since the previous Committee action; and second, a 1-year delay in the effective date.

The Committee bill is not based on a belief that the current preclusion of judicial review of BVA decisions results in wide-spread injustices; to the contrary, there is little evidence that most claimants are not satisfied with the resolution of their claims for VA benefits. Rather, this legislation reflects the Committee's view that the primary original rationale behind the statutory preclusion of judicial review is now obsolete. The preclusion first appeared in the Economy Act of 1933, Public Law 73–2, and reflected the view that veterans' benefits are mere gratuities and that veterans have no interest in or right to such benefits so compelling as to warrant the protection afforded by access to court review. The Committee feels that such a position is no longer tenable, particularly in light of the protection, including access to court, that have been extended to recipients of most other Federal benefits.

In addition, the tremendous volume of applications for benefits that are processed annually by the VA and the many thousands of appeals taken from unfavorable decisions approximately 40,000 per year—suggests that there is a significant opportunity for some injustices to occur. Under current law, a veteran or other claimant aggrieved by a final BVA decision is left without any further recourse.

Beyond the possibility of real injustices without remedy, the Committee has also continued its consideration of judicial review legislation in order to address what some veterans, especially those whose claims for benefits are denied by the VA, perceive as a system with various unjust features. The combination of no judicial review and a statutory limit of $10 on the amount an attorney is permitted to receive for representing an individual before the VA on a claim for benefits, which effectively precludes all but *pro bono* attorney representation of veterans or other claimants in VA

claims matters, has led many claimants over the years to believe that they have been denied their "day in court".

This legislation is designed to ensure that all veterans are served with compassion, fairness, and efficiency, and that each individual veteran receives from the VA every benefit and service to which he or she is entitled under law. There is also an emphasis on eliminating any unwarranted distinctions that exist between protections accorded to veterans and claimants for Federal benefits from other agencies. At the same time, the Committee recognizes that certain of these distinctions have considerable merit, and should be preserved. Many of the VA's internal procedures, particularly in the area of adjudication of claims, have developed over the years in such a way as to afford to VA claimants some advantages not afforded to claimants before other agencies. Advantages most often cited are the VA's very liberal standards for the admission of evidence, and free representation by skilled officers of the various national veterans' service organizations—advantages which are often credited for the informal, "nonadversarial" nature of VA proceedings.

Throughout its consideration of this legislation, the Committee has been keenly aware of these important factors, and has sought to incorporate them into the legislation. S. 11 frames the judicial review and attorneys' fees provisions restrictively in order to reflect the Committee's abiding respect both for the high quality of representation offered by the veterans' service organizations and for the BVA's expertise as an arbiter of factual issues, as well as to minimize the burden that this legislation will impose on the Federal court system.

## TITLE I: ADJUDICATION PROCEDURE AND CHANGES TO THE BOARD OF VETERANS' APPEALS

### *A. Adjudication Procedures*

Title I of the Committee bill contains a number of provisions related to the proposed provision for judicial review of VA decisions under title III of the Committee bill.

Throughout Committee consideration of judicial review legislation, several witnesses expressed concern over the possible detrimental impact that the allowance of court review could have on internal VA claims procedures. Those who voiced this concern noted that, because of the VA's special mission of providing services to veterans and their survivors, the VA has developed regulations and procedures that result in a very supportive, nonadversarial, and informal atmosphere that is generally quite beneficial to veterans. In addition, it has been noted that, because the Board of Veterans' Appeals (BVA) is the final arbiter of veterans' claims, it proceeds with particular care and concern in its evaluation of such claims.

Other witnesses and commentators, although not disagreeing with the viewpoint that the VA's present internal procedures are generally beneficial to veterans, expressed concern that because many of the VA's regulations and procedures relating to the adjudication of claims have no clear statutory basis, and because court review of administrative actions is precluded, claimants' rights may depend on the whim of particular individuals in the adjudica-

tion process. In addition, it was suggested by some witnesses that it was not clear that current VA procedures lead to the development of a sufficient administrative record to provide a reviewing court, in the event of judicial review, with an adequate basis on which to evaluate the VA's decision.

In response to these various concerns, the Committee bill contains provisions relating to VA adjudication procedures that fall into three broad categories—provisions codifying certain VA adjudications procedures (some set forth in regulations and some only a matter of practice) so as to ensure claimants certain procedural protections while preserving the informality that characterizes VA procedures at present; provisions intended to promote the development of an administrative record that should enable a reviewing court to understand and evaluate the VA's proceedings in a given case; and provisions intended to enhance the VA's ability to carry out its mission or service to veterans and their dependents and survivors after judicial review has been authorized.

1. Codification of VA Adjudication Procedures

In the category of provisions codifying present VA adjudications procedures, section 101(a) of the Committee bill includes a provision codifying the burden of proof and reasonable doubt standards currently provided for by VA regulation (38 CFR 3.102 and 3.103(a)). The reason for proposing such codification is to ensure that the VA's present practice of making every effort to award a benefit to a claimant is not abandoned. Many witnesses suggested in response to court review, especially if the agency believed that a reviewing court might apply the benefit-of-the-doubt standard, simply substituting its judgment on factual issues for that of the BVA in cases where evidence clearly failed to establish entitlement. The Committee believes that such a result is highly unlikely, particularly in light of the restricted scope of judicial review that is proposed with respect to factual BVA determinations under title III of the Committee bill, and believes strongly that the existing regulatory standards relating to a claimant's burden and the VA's evaluation of the claim should be maintained.

Under the provision included in the Committee bill, as in current VA regulations, a claimant for benefits has the burden of submitting evidence sufficient to justify a belief that a "claim is well grounded," and the VA has the burden of assisting the claimant in developing the facts pertinent to the claim. Thus, the claimant would have the burden of adducing some evidence on each element necessary to warrant the granting of the benefit at issue. In determining whether this form of a "prima facie" showing requirement has been met, only the evidence favorable to the claimant should be considered; of course, in making the ultimate determination of entitlement to the benefit in question, all of the evidence of record should be considered. Issues regarding the weighing of conflicting and other adverse evidence are to be resolved under the provisions regarding the benefit of the doubt.

In that regard, the Committee bill clarifies and codifies the "reasonable doubt" standard, which, under VA regulation, is stated, in equivocal and sometimes internally inconsistent terms, as follows:

On April 20, 1983, the Committee unanimously voted to report favorably S. 636, with amendments, and it was passed by the Senate by voice vote on June 15, 1983.

S. 367 as introduced in the 99th Congress was identical to the Senate-passed version of S. 636, again with two exceptions: First, deletion of material from title I dealing with the size and membership of the Board of Veterans' Appeals, an issue that was resolved in Public Law 98–223; and second, a 2-year delay in the effective date. S. 367 was passed by voice vote on July 30, 1985.

**§ 3.102 Reasonable doubt.**

It is the defined and consistently applied policy of the Veterans' Administration to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists by reason of the fact that the evidence does not satisfactorily prove or disprove the claim, yet a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not a justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships.

In the Committee's view, the various parts of the VA's present "reasonable doubt" rule are difficult to follow—for example, the statement that the rule is not to be used to reconcile actual conflict or contradiction in the evidence.

In addition, the VA and others have urged that the term "reasonable doubt" be deleted from any statutory codification of the rule in order to avoid confusion with the more familiar usage of that term in criminal matters.

After extensive consultations with the VA in past Congresses with respect to the current VA interpretation of the rule and practices under it, the Committee bill provision has been fashioned to require that where the totality of the evidence is such that "there is an approximate balance of positive and negative evidence regarding the merits" of a material issue, the doubt is to be resolved in the claimant's favor. Thus, under the provision in the Committee bill, where on the basis of all the relevant evidence an element of a claim is neither clearly established nor clearly refuted, the benefit of the doubt is to be given to the claimant. Where the evidence clearly calls for a finding of fact for or against the claimant, such a rule would be unnecessary and would thus not apply; the finding would simply follow the clear direction of the evidence.

The Committee bill further codifies the VA's obligation, currently imposed by regulation (38 CFR 3.103), to provide complete assistance to the veteran or other claimant in the development of a claim. Although the claimant has the burden of submitting evidence in support of the claim, that evidence may be in the veteran's service record or other governmental records and, therefore, in the control of the Federal Government. In such situations, the VA

should be responsible for providing the material—or seeing that it is provided—needed to make the determination on eligibility.

The Committee bill, at section 105(1), also would codify a right currently provided by regulation (38 CFR 19.133) to an opportunity for a hearing before the BVA. In the Committee's view, the right to a hearing is so fundamental to fair proceedings that it should be elevated to the level of a statutory guarantee.

Section 105 of the Committee bill also would codify a requirement that BVA decisions be based "exclusively on evidence and material of record" and on applicable provisions of law. This requirement is consistent with BVA practice. In fact, a provision in current law (section 4005(d)(5) of title 38) requires that the BVA base its decision "on the entire record", but there is no express requirement that decisions be based *exclusively* on the record. Section 106 of the Committee bill would strike that provision as unnecessary in light of the proposed exclusivity requirement in section 105(1). The purpose of these provisions is to clarify that the BVA is restricted to material of record and is not free to review other evidence in reaching its decision. It is proposed to relocate the provision so as to place it under the section (4004 of title 38) that generally deals with BVA decisionmaking.

Section 105(2) of the Committee bill would amend the section of current law that relates to the Board's authority to authorize the reopening of a previously disallowed claim, section 4004(b) of title 38, to remove a requirement that the "new and material evidence" sufficient to authorize a reopening be in the form of "official reports from the proper service department". Current Board practice is to authorize such a reopening when "new and material evidence" is received from any source. This provision would further amend section 4004(b) so as to make a reopening by the Board mandatory rather than discretionary when new and material evidence is presented, and to authorize a reopening on a discretionary basis upon a showing of good cause.

By these changes, the Committee intends to create a more certain basis for the reopening of claims that have been considered and disallowed by the Board. Moreover, under these changes—in connection with the attorneys' fees amendments that would be made by section 401(1) of the Committee bill (pursuant to which a claimant for VA benefits could pay an attorney more than the current $10 limit for services rendered after an initial decision by the Board)—an attorney entering a case following a disallowance by the Board would not always be restricted, in appealing to court, to relying on the administrative record in existence when the attorney entered the case. Rather, by virtue of these proposed changes, an attorney would have an opportunity to attempt to ensure that the administrative decision is made on the basis of all appropriate evidence and arguments, by seeking either a mandatory reopening for new and material evidence or a discretionary reopening for good cause shown.

In this regard, the Committee believes that good cause sufficient to justify a reopening might be shown by a demonstration that the earlier presentation of the claim before the BVA had failed to develop particular evidence in the record, or had inadequately presented important issues or elements of the claim, or was otherwise

deficient in some material (that is, potentially outcome determinative) respect. Upon such a showing, the Board would have the option of reopening the case in order to consider new or modified arguments rather than leaving court review as the only recourse.

The Committee recognizes that, under current practice, the Board routinely refers claims that are being considered for reopening to the regional office that adjudicated the claim in the first instance (described as the "agency of original jurisdiction" in present section 4005(b) of title 38). The Committee does not intend to restrict the Board's discretion in this regard by establishing a mandatory reopening requirement or adding a discretionary reopening authority. Thus, the provision added by section 105(2) of the Committee bill makes reference to the Board's taking action in these respects either "directly or through the agency of original jurisdiction". When either a mandatory or discretionary reopening issue is presented, the Board would be able either to take action iself—that is, decide whether to reopen the claim or, after a decision to authorize a reopening, to review the prior decision, or both—or refer the claim to the regional office for such a decision on either question or both.

The final provision in section 105(2) of the Committee bill provides that a judicial affirmation of a denial of a claim by the BVA "shall not diminish the Board's authorities set forth in paragraph (2) of this subsection to authorize the reopening of a claim and review of the former decision." The purpose of this provision is to preclude any *res judicata* effect of such a judicial decision on any case that is reopened at the agency level for either of the reasons specified in paragraph (2), that is, when new and material evidence is secured (in which case reopening would be mandatory), or when good cause is shown (in which case reopening would be discretionary).

Section 105(3) of the Committee bill would require that the BVA promptly mail notice of its decision to a claimant and the claimant's authorized representative—thus codifying an existing practice of the BVA—in order to serve two purposes: First, such notice of the decision would indicate to a claimant that the BVA has taken final action on the claim and would thus enable the claimant to consider the possibility of seeking court review of an unfavorable decision; and second, the date on which the BVA complies with this statutory obligation by mailing the notice will be the date from which the 180-day period for filing an appeal (as set forth in new section 4025 of title 38, as proposed to be added by section 302 of the Committee bill) would begin to run.

Section 106(1) of the Committee bill would amend present section 4005(d) of title 38 to codify current BVA practice, as testified to by the BVA Chairman at the Committee's June 9 hearing, under which a claimant taking an appeal to the BVA is presumed to disagree with the contentions of law and fact made in the Statement of the Case unless the claimant specifically expresses agreement. Currently, section 4005(d) presumes no disagreement with any statement of fact made in the Statement of the Case to which no exception is taken. Testimony received in connection with the June 9 hearing demonstrated a concern that under current law, failure to enunciate a clear disagreement with each contention in the

Statement of the Case could result in the issues involved not being considered by the BVA.

A final set of provisions intended to codify VA procedural protections while maintaining the informality that presently characterizes VA procedures is included in new section 4010, entitled "Adjudication procedures", as proposed to be added by section 108 of the Committee bill.

In large measure, the procedures specified in the new section are already generally applied in VA proceedings. Those procedures that represent a change in VA proceedings have been included primarily to provide a claimant with a clear opportunity to develop a complete administrative record on the basis of which a reviewing court might understand and evaluate the VA's decision.

Many of the procedures included in the proposed "Adjudication procedures" section are derived from sections of the Administrative Procedure Act (5 U.S.C. 554, 555, and 556). However, before including similar provisions of the Committee bill, the Committee was careful to evaluate each for any detrimental impact on VA proceedings, and rejected provisions that it considered to be potentially disruptive. One example of this approach was in the area of cross-examination of witnesses before the BVA and the concomitant need for authority to subpena such witnesses. A number of witnesses before the Committee strongly emphasized the need for such authorities, basing their position on the belief that cross-examination is a critical tool for testing the assertions and opinions of witnesses. The Committee is well aware that such authority is available in other administrative proceedings for the adjudication of other Federal benefits (for example, under the Social Security Act). However, the Committee believes that such authority could significantly disrupt existing VA adjudications procedures. Thus, in an effort to provide a discovery tool to claimants and to maintain simultaneously the existing informal and supportive tenor of BVA and VA proceedings by not allowing cross-examination but providing a method to gather needed testimonial information, the Committee bill includes authority for a claimant to submit interrogatories to any person, with mechanisms provided for the enforcement of this authority by authorizing the Chairman, after reviewing the interrogatories and determining their reasonableness, to issue a subpena to compel a witness to answer the questions posed by the claimant at a deposition in a location convenient to the witness.

Among the procedures in the proposed new section that are intended to codify existing procedures are those that would: (1) authorize the Administrator to administer oaths and affirmations, examine witnesses, and receive evidence; (2) provide for the admission of any evidence in VA proceedings, even if such evidence were inadmissible under the rules of evidence applicable to judicial proceedings, subject only to exclusions, if the Administrator and Chairman jointly provide by regulation therefore, for irrelevant, immaterial, or unduly repetitious evidence; (3) permit a claimant (or claimant's representative) to examine all of the materials to be considered in the proceeding and—on the payment of a fee, which may be waived in specified circumstances, including the claimant's inability to pay—to receive a copy of any or all such materials; (4) provide authority for a hearing officer to disqualify himself or her-

self on the basis of personal bias or other cause and permit a claimant to challenge a hearing or adjudication officer on such basis; (5) define the contents of the administrative record following Board determination and permit a claimant (or a claimant's representative)—on the payment of a fee, which may be waived in specified circumstances, including the claimant's inability to pay—to receive a copy of the materials constituting the record; and (6) specify that the adjudication and hearing procedures prescribed in title 38 and in regulations of the Administrator, as to proceeding other than before the Board, or the Chairman of the Board as to proceedings before the Board or by the Administrator and Chairman jointly are exclusive.

This last provision is included to reaffirm the Committee's belief that the existing internal adjudications procedures of the VA are generally fair and workable and to preclude, therefore, judicial incorporation of other procedures beyond those codified in title 38 or provided by regulations in accordance with such statutory authority. The Committee believes that such a clear statement of the exclusive nature of VA adjudications procedures is necessary to prevent a court from requiring that VA proceedings be in compliance with all Administrative Procedure Act provisions relating to agency adjudication on the grounds that the "trigger" provision in the Administrative Procedure Act (5 U.S.C. 554(a)), which provides that the requirements of that "section apply * * * in every case of adjudication required by statute to be determined on the record after opportunity for any agency hearing" might otherwise be activated by the amendment to section 4004(a) proposed in section 106 of the Committee bill codifying the claimaint's right to a hearing before the BVA. Upon similar reasoning, the Committee has chosen to address the judicial review issue by amending rather than repealing section 211(a) of title 38, in light of section 701 of the Administrative Procedure Act, which provides that judicial review of an agency action shall be governed by the provisions of chapter 7 of the APA relating to the scope of and procedures for judicial review, "except to the extent that statutes preclude judicial review."

Finally, new section 4011 of title 38, as proposed to be added by section 108 of the Committee bill, would require the Administrator, at each procedural stage of a claim, to provide a claimant and the claimant's authorized representative, if any, with written notice, in easily understandable language, of the procedural rights of the claimant and of the opportunity for further review. By inclusion of the requirement that such notices be "in easily understandable language", the Committee intends that the required notices be available in languages other than English, such as Spanish, when a substantial proportion of a particular VA facility's clientele have a limited English-speaking capacity and generally use such other languages as their primary tongue.

### 2. Development of the Administrative Record

The Committee bill includes provisions designed to promote the development of a record of the agency proceedings that would permit a reviewing court to understand and evaluate the proceed-

ings as part of its review without having to remand the matter for further development by the Administrator. The bill also contains provisions, relating to the administrative proceedings, that provide the claimant with a full opportunity to participate in the development of the record so that all relevant issues would be considered by the BVA prior to any judicial review.

The provision most directly concerned with the development of a sufficient record by the Board is in the form of an amendment to section 4004(d) of title 38, as proposed to be made by section 105(3) of the Committee bill, which would require that each decision of the Board be in writing and include a "statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact, law, and matters of discretion presented on the record", together with the appropriate order in the case. The Committee anticipates that this provision, derived from a similar provision in the Administrative Procedure Act (42 U.S.C. 557(c)), would result in a decisional document from the Board that will enable a claimant to understand, not only the Board's decision but also the precise basis for that decision, and would also permit a claimant to understand the Board's response to the various arguments advanced by the claimant. With such an understanding, the Committee believes that a claimant would be able to make an informed decision on whether or not to request court review, and that, if an appeal is taken, the decisional document should assist the reviewing court to understand and evaluate the VA adjudication action.

New section 4010 of title 38, as proposed to be added by section 108 of the Committee bill, contains provisions intended to provide a claimant with an opportunity to present fully his or her case in support of a claim for benefits. The key provisions would authorize a claimant (or a claimant's authorized representative) to: (1) Present witnesses and evidence (subject only to any regulations that may be jointly prescribed by the Administrator and Chairman of the Board excluding irrelevant, immaterial or unduly repetitious evidence); (2) present arguments, either orally or in the form of written brief or similar documents, on substantive and procedural issues; (3) submit rebuttal evidence; (4) present medical opinions and request an independent medical opinion; and (5) serve written interrogatories to any person. As discussed earlier, the Committee was guided in its decisions relating to procedural matters by a sense that existing VA procedures are generally fair and workable and that any changes should be made with the intent of preserving such procedures and the informal atmosphere of VA adjudications proceedings while providing claimants with statutory assurance of a full opportunity to have their arguments and evidence presented to the Board.

The new authority for a claimant to submit written interrogatories is, as discussed earlier, an attempt to reconcile two conflicting viewpoints: That claimants should have an opportunity to subpena and cross-examine potential witnesses, and that such an authority would lead to serious disruption of the VA adjudications system and would serve to turn supportive, informal hearings into adversarial ones. Under the provision in the Committee bill, a claimant would have the opportunity to submit interrogatories to any person who, unless that person raised an objection thereto, would have to

answer the questions fully and under oath. If the person served with the interrogatories objected to them, the Chairman, pursuant to regulation prescribed by the Chairman, would evaluate the objection, under standards consistent with standards for protective orders applicable in the U.S. district courts (currently set forth in Rule 26(c) of the Federal Rules of Civil Procedure) and accordingly would determine whether the interrogatories were appropriate or were designed to annoy, embarrass, or oppress, or would otherwise place an undue burden or expense on the person to whom they were submitted. Thereafter, the Chairman would issue an order directing that the interrogatories be answered as submitted or as modified or indicating that they need not be answered. If a person served with interrogatories failed to answer them or answered them in an unresponsive manner, the party submitting such interrogatories would be able to request the Chairman to issue a subpena compelling the person's attendance at a deposition on written questions at which the unanswered interrogatories would be asked. The Committee intends that such a subpena would be issued and enforced pursuant to section 3313 of title 38, only if the Chairman was satisfied that the evidence sought by the interrogatories was both relevant and reasonable in scope.

### 3. Study of Methods To Speed Claims Resolution

Section 109 of the Committee bill would authorize the Administrator to test alternative methods of resolving claims for VA benefits in a speedier fashion and at locations more convenient to claimants' residences.

The Committee is aware of the increased success rate of claimants who appear personally before the Board as compared with the rate of allowance where there is no personal appearance (in fiscal year 1987, the Board's overall allowance rate for claims before it was 12.8 percent; in cases where the claimant had a hearing before the Board at VA's Central Office in Washington, D.C., the allowance rate was 19.5 percent; and, for cases heard by BVA traveling panels, the allowance rate rose to 30.6 percent). Although these statistics are not conclusive, they are very suggestive that a personal appearance before the Board makes a significant difference in achieving favorable resolution of a claim. However, the current alternatives for appearing before the Board (travel to Washington, D.C., or waiting for up to a year or more, in some locations, to appear before a traveling panel (see discussion below regarding hearings before more Board panels)) provide little opportunity for such an appearance in a timely manner without the difficulty and expense of travel to Washington, D.C.

This discretionary study would encompass two alternative methods of speeding claims resolution. Under one such alternative the Administrator would be authorized to implement an intermediate review panel procedure in not more than three geographic areas, whereby a claimant, following an initial denial at the regional office, could receive a *de novo* hearing, generally in the same regional office, from a new panel of three regional office adjudication personnel. Under the other alternative, the BVA Chairman would be authorized to provide, in not more than three other geographic

areas, an enhanced schedule of visits by BVA traveling panels. The traveling board would conduct hearings at the selected regional offices on at least a quarterly basis.

The Administrator and Chairman would be directed to report the results of the study, which would be conducted for a period of 24 months, not later than 6 months after the completion of the study. The report of the study would include an evaluation of the cost of each alternative and the impact of each on the workload of the regional offices in question as well as on the BVA, together with recommendations for such administrative or legislative action, or both, as may be indicated by the results of the study.

The Committee bill makes these studies discretionary. The Committee believes it more appropriate at this time to leave the decision of whether to proceed with such a study, and to what extent, to the Administrator and the Chairman, on the basis of their determination as to the need, the resources available, and the appropriate scope of the study especially in light of settlement of the agreement reached in the *Semenchuk* case whereby, effective October 1, 1988, hearing officers assigned to Regional offices are empowered to hold post-decisional, and in selected subject matter areas predecisional, personal hearings on claimants' benefit issues. Under this new program, there would be approximately 37 hearing officers operating out of 33 "hub" Regional offices. Four Regional offices would have two hearing officers assigned to hear cases, while some Regional offices would share a hearing officer assigned to another Regional office. In all situations, a single hearing officer would sit to provide a new hearing to the claimant and be empowered to overturn the decision made by the original hearing panel. (A VA circular (No. 20–88–11) further describing this program is in the Appendix.)

The Committee emphasizes that it continues to be very concerned that alternatives for speeding claims resolution, particularly those that permit the claim to be resolved at a location as convenient as possible for each claimant, should be explored. The Committee is particularly interested in exploring and understanding the basis for the substantially higher allowance rate (by a ratio of nearly 2½-to-1) in cases heard by BVA traveling panels, as compared with the overall BVA allowance rate.

### *B. The Board of Veterans' Appeals*

Over the years since 1977 during which the Committee has actively considered judicial review legislation, those who have opposed such measures have asserted that if the VA system of adjudication is not broken, then there is no need to fix it, especially through the enactment of judicial review legislation. Although the Committee has frequently expressed the belief that judicial review, as a fundamental right, should not be dependent upon whether or not the current system of adjudication is working effectively, it has become apparent that the operations of the Board of Veterans' Appeals (BVA), while not broken, are in need of some fixing.

Witnesses at the Committee's oversight hearing on the BVA expressed support for giving the BVA greater independence from the VA itself in order to ensure a fair hearing for the veteran and an

impartial determination based on the merits of the case. Although the very size and nature of the workload at the BVA does not lend itself to either the complete separation of the BVA from the VA or the transformation of the current BVA into a fully independent Article I court (such as the Court of Military Appeals or the U.S. Tax Court), the Committee determined that a number of changes in the current structure of the BVA are warranted. The Committee considers these changes very important and believes that the Congress should enact them whether or not it also enacts judicial review legislation. Therefore, the Committee included these provisions in title V of S. 2011 as ordered reported (a service-connected disability compensation COLA and omnibus veterans' benefits and services bill).

1. Appointment and Removal of the Chairman and Board Members

Currently, the BVA is composed of a Chairman, a Vice-Chairman, two Deputy Vice-Chairmen, and up to 65 members, along with 430 staff. The Chairman, the Vice-Chairman, and the Members are appointed by the Administrator with the "approval of the President". There are no terms of office and no express provisions for removal from office.

In an attempt to make the Chairman more independent, and yet create a check on the Chairman's power and ensure accountability, the Committee bill would alter the current situation significantly. Section 103 of the Committee bill would, in a provision derived from S. 2292, amend current law so as to provide that the Chairman of the BVA would be appointed by the President, by and with the advice and consent of the Senate, for a term of five years (S. 2292 proposes a 15-year term). A particular individual would be allowed to serve no more than three full terms as Chairman. Appointment of the first Chairman under this process would have to occur within one year after the date of the enactment of S. 11, and the serving Chairman, whom the President would be free to nominate, would be allowed to continue during that period. If the serving Chairman were nominated and confirmed, none of the time served as Chairman prior to that appointment would count in calculating the terms he or she could serve. Under other provisions in the bill, the Chairman would be paid at Executive Level IV (currently $74,500 as compared to the Chairman's current salary of $72,500) and be removed only upon good cause found by the President.

To separate the BVA from the VA as much as possible, and thereby create more independence for the entire Board, the Committee bill would change the manner of appointment and removal of members. Under the Committee bill, Board Members would be required to be appointed by the Chairman, rather than by the Administrator with "the approval of the President" as now required, and, in a provision derived from S. 2292, be appointed for nine-year terms (S. 2292 proposed 15-year terms). In order to provide for a phase-in period, 21 members would initially be appointed for three-year terms, 22 for six-year terms, and 22 for nine-year terms. The Vice-Chairman would be designated by the Chairman from among

those appointed for six-year or nine-year terms, and the Vice-Chairman would serve at the pleasure of the Chairman.

No appointments under this provision could be made until a Presidentially appointed Chairman was confirmed. Once confirmed, the Chairman would then have 180 days in which to make the 66 appointments. Under these changes, a Board Member could be removed only upon a showing of good cause alleged by the Chairman and found by the Merit Systems Protection Board under section 7521(a) of title 5 and would be afforded procedural rights, including a hearing, under section 7513(b) of title 5. This is the same procedure generally designated for use to remove a administrative law judge in the Federal Government. There would be no limit on the number of reappointments that a Board Member could recieve. In the case of a vacancy, a new Member would be appointed to complete the remainder of the term.

Although there is a concern that granting the Chairman the right to appoint the members could create an opportunity for abuse of that power, the Committee believes that the scheme of appointments provides a sufficient check on the Chairman's conduct by requiring the Chairman's reappointment and confirmation every five years. Additionally, the Committee expects that the President would choose, and the Senate would confirm, only an individual of such integrity, honor, and sound judgment that the issue of abuse of power in selecting Board members would not arise.

2. More Control of BVA Operations by the Chairman

In a claim for benefits appealed to the BVA, even with the VA's non-adversarial atmosphere tradition and with the benefit of the doubt being given to the veteran claimant, the Administrator, as head of the VA, is a party to the action being brought by the veteran and as such should not, the Committee believes, be called upon to make judgments about or issue regulations or guidelines governing the proceedings. Accordingly, the Committee has made a number of changes to transfer control over the adjudicatory proceedings at the BVA from the Administrator to the Chairman.

The first such change (in section 103 of the Committee bill amending section 4001(a) of title 38, pertaining to the composition of the Board), would delete language which made the Chairman "directly responsible to the Administrator". Another change (in section 108 of the Committee bill), would assign to the Chairman, rather than the Administrator as under S. 11 as introduced, the responsibility of resolving challenges to the use of interrogatories, including deciding when and under what circumstances subpenas and protective orders should be issued in support of interrogatories. Other changes to grant more control to the Chairman regarding BVA adjudication procedures include having the Chairman decide when fees for copying the record may be waived but do so in accordance with standards established by the Administrator (section 108), when an employee will be disqualified for personal bias in a proceeding before the Board (section 103) and, with the Administrator, jointly prescribe regulations under which evidence is admitted and under which standards for objections to interrogatories that

are consistent with protective orders would be established (section 108).

### 3. BVA Favorable Determinations

One of the fundamental principles in the adjudication of a claim for VA benefits that is set forth in VA regulations (38 C.F.R. 3.102), is that in all matters where there is an approximate balance of positive and negative evidence regarding the merits, the benefit of the doubt in resolving such issues is to be given to the claimant. (The regulation is quoted, above, under the heading "Codification of VA Adjudication Procedures") Under current law, definition of what constitutes a final decision by the BVA requires that all three BVA Members on a Board Section must agree on either a denial or an allowance. The Committee believes that such a practice is inconsistent with the principle of the benefit of the doubt. Accordingly, section 104 of the Committee bill would amend section 4003 of title 38 so that a final BVA decision would be defined as a 2–1 vote in favor of an allowance, but would remain the same for a denial. Thus a 2–1 decision for the veteran would result in an award to the veteran rather than, as now requiring the Chairman to vote with the majority or appoint an expanded panel.

### 4. Medical Opinions and Physician Board Members

Section 107 of the Committee Bill, would expand the availability of independent medical expert's opinions (IME's) of the type authorized under present section 4009 of title 38—outside evaluations of the medical records before the Board generally made by a medical school faculty member. The new provision is intended, in part, to provide claimants with increased statutory opportunity to influence the development of the record before the Board, but it also reflects the view of the Committee that IME's may be a valuable tool to assist in resolving claims involving disputed medical evidence. In fiscal year 1987, the Board requested 138 such IME's, but the BVA predicts that, under the proposal in the bill, it would request approximately 3,000 IME's. These facts indicate to the Committee that current procedures for evaluating the need for an IME may not result in acquiring such opinions as often as might be desirable to provide assurance that the Board's resolution of a disputed medical issue is, in fact, correct.

Under the procedure proposed in the Committee bill, a claimant would be able to request that the Board seek to secure an IME when the evidence before the Board indicates a "substantial disagreement" between the "substantiated findings or opinions" of two physicians on an "issue material to the outcome of the case" and such disagreement cannot be resolved in any other way (by, for example, submitting interrogatories to either physician in order to probe the basis for the physician's findings). It is the Committee's intention that, when the evidence before the Board is as described above, the Board, should secure an IME because, without such an independent opinion, it would appear, in the event that the Board found against the claimant, that it had simply taken the VA physician's view without giving credence to the view expressed by the claimant's physician. In suggesting this position, the Committee

does not mean to suggest that the Board would in all cases be required to resolve the disputed matter in the way that the IME suggests—only that it believes that a well-substantiated IME that disagrees with VA-physician findings or opinions would be entitled to substantial weight.

The limitation of IME's to situations where there is a disagreement between the "substantiated" conclusions of two physicians is intended to reflect the view that a bare statement in the record from a private physician setting forth only a medical or legal conclusion, without stating the diagnostic techniques employed and the specific resulting findings and other facts and reasoning that support the conclusion, would not be sufficient to require the Board to secure an IME. The Committee notes that the Committee bill commits the decision of whether to grant an IME solely to the discretion of the Board and the Chairman of the Board and explicitly precludes judicial review of such decision. In so doing, the Committee recognizes that this preclusion of court review could lead to abuse. However, the Committee believes that the Board and the Chairman will fully and fairly evaluate requests for IME's pursuant to the provisions of the new authority, and the Committee intends to monitor closely the Board's actions in this regard. To further ensure responsible Board action on IME requests, a provision is included in the Committee bill to require the Board, if it denies a request for an IME, to provide a claimant with a statement setting forth the basis for its denial and as discussed below, to inform the claimant of the right to appeal the denial to the Chairman.

As a result of the Committee's oversight activities and witnesses' responses to questions at the oversight hearing, it became clear that Board members and BVA staff attorneys not infrequently seek the medical opinion of BVA Member physicians not serving on the Section deciding the particular case. It appears, however, that it is unusual for a final BVA decision to reflect that such a Member physician's opinion has been taken into consideration when rendering the decision. The Committee believes that, although the utilization of a particular Member physician's expertise may be appropriate on occasion, especially in cases involving very specialized medical areas, such consultation on an *ex parte* basis without informing the claimant of existence and content of such an opinion and allowing a response to that opinion deprives the claimant of a basic due process right. Accordingly, section 107 of the Committee bill provides that if a BVA Member or employee consults with a physician not on the panel considering the case, the claimant would have to be given notice of that consultation along with a copy of any opinion rendered by such a physician and then be allowed 60 days in which to respond to the opinion. The information gained through this process would be required to be included in the discussion of evidence in the final decision. This same requirement would apply to use of IME's.

As discussed above, in cases in which there is a complex medical issue, the Board utilizes IME opinions, sought through the offices of the Department of Medicine and Surgery, from physicians usually affiliated with medical schools outside of the VA system. Not all requests for IME's are granted. Mr. Kenneth Eaton, the current BVA Chairman testified at the Committee's June 9, 1988 hearing

that when a claimant's request for an IME opinion is denied by the Chief Member of a Board Section, the claimant has a right to appeal that decision to the Chairman. It is the Committee's understanding that such a right is not one that is well-known, and that, to this point, the BVA has made no effort to alert claimants to it. The Committee bill thus includes a provision (Section 107) requiring that each claimant and authorized representative receive notification of the right to appeal a denial of a request for an IME opinion by being issued a statement setting forth the basis of the denial and the right to appeal.

The Committee believes that it is vital that the physician Board Members remain familiar with the ever-changing field of medicine in order to ensure that their medical opinions are accurate and up-to-date. To this end, the Committee strongly urges the BVA to place a higher emphasis on continuing education for its physicians. Additionally, it is the Committee's intent that the BVA, to the maximum extent feasible, assign physician Members with a particular specialty to cases involving that specialty, especially in cases of reconsideration or panel expansion.

### 5. Hearings Before Travel Board Sections

As discussed earlier under the heading "Shady Methods To Speed Claims Resolution," one of the drawbacks to the BVA being situated in one location—in Washington, D.C.—is the lack of ability on the part of many veterans to attend personal hearings before the Board. This is particularly the case because of the BVA statistics showing that allowances are statistically far more frequent after personal appearances before the Board in Washington (19.5% in FY 87) and after appearances before a traveling section (30.6% in FY 87). In a general effort to permit an opportunity for more personalized appearances to those who are unable to travel to Washington, D.C., the BVA utilizes two alternative methods. Under the first, the BVA authorizes VA Regional Office adjudication personnel to act as agents for the BVA and, in that capacity, to conduct appellate hearings at Regional offices. The transcripts of these hearings are then sent to the BVA for a decision by a Board panel. Although this does not provide an opportunity for a hearing, the Committee is concerned that it is clearly an inadequate substitute for having the decisionmakers see and hear the claimant and other witnesses. In response to questions from the Chairman, the BVA Chairman testified at the June 16 hearing that there is no method for transmitting to the BVA any information about the hearing personnel's assessments of the credibility of the claimant or other witnesses.

The second alternative involves a BVA Section traveling to various Regional Offices and holding personal hearings for a certain number of days. Due to the limitation on resources, there are a limited number of travel Board hearings available. In FY 1987, 739 such hearings were held. At the Committee's hearing, the BVA Chairman testified that because of the limited number of such traveling Section hearings, the BVA did not routinely tell claimants about this option. Specifically, Mr. Eaton noted, "[I]f you advertise that too much, you are going to get more than you can

handle". In this regard, the Committee notes that the form filled out by claimants to request an appeal to the BVA (Form 1-9) presents only two options to the claimant: One for a field hearing before Regional office personnel, as discussed above, and one for a hearing in Washington, D.C. There is no option presented for selecting a hearing before a traveling Board Section. According to Mr. Eaton, the traveling Board hearings are scheduled by giving veterans' service organizations a certain number of hearings, and allowing the service officers to designate who receives a hearing. When asked at the Committee's hearing why the veterans' service organizations find it desirable to have hearings before the traveling Board Sections, Mr. Eaton replied:

> It is always better in any case to have a personal hearing before the people who are deciding. There are exceptions to that; but generally, if you have a good case and you have a witness who is at all credible, you are better off facing those Board members and telling them all about it. Those are the facts of life.
>
> Not only are travel board allowances higher, but personal hearings in Washington are higher—not as high as travel board—but there is not as much selection in the Washington office as in the travel boards. But they do pick and choose.
>
> They are only allowed a few cases on the travel board for each service organization. They can only have so many because there is only so much time available for the travel board to hear those cases. So, they pick the best cases.

When asked if there is a quota, Mr. Eaton replied, "In effect. It has to be that way."

The Committee believes strongly that this method of allocating hearings before traveling Board sections is contrary to the accepted notions of evenhandness, fairness, and justice in that every individual should have an equal opportunity to obtain the most beneficial process. Accordingly, the Committee bill contains a number of changes to the current scheme regarding notice about allocation of traveling Board hearings.

The first change (in section 108) would add a new section to title 38 to require the BVA to give notice to all claimants of the opportunity for a hearing before a traveling Section of the Board. The second change would be to require that the traveling Board hearings be allocated on a first-request, first-served basis. The Committee recognizes that there are a limited number of such hearings available, but in order to help ensure that the credibility assessments and other first-hand impressions are available in some form to the BVA Section that will actually decide the case, the Committee bill includes provisions to allow a claimant, if not scheduled for a traveling Section, to have a telephonic or closed-circuit television hearing with a BVA Section in Washington, D.C., or a videotaped hearing before Regional Office adjudication personnel. The audiotape or videotape would become part of the hearing record. Notice of these options to the claimant would be required.

### 6. Elimination of Bonuses

Until very recently, the BVA, through an Awards committee composed of the Chairman, Vice-Chairman, two Deputy Vice-Chairman, and three executive assistants, granted cash bonuses to certain Board Members who were eligible for such awards because they had exceeded the production quota of 40 cases per week. These awards were based, first, on exceeding the production quota

and, second, on the quality of the decisions, in terms of writing and format but purportedly not in terms of the judgment exercised by the Member. Concerns were raised, especially in light of Executive branch exemptions which specifically excluded Board members from the Performance Appraisal System, used to evaluate Federal employees, and from the Merit Pay System, prescribed under chapter 54 of title 5, in order to avoid any appearance of the Members being influenced by performance evaluations and merit pay, that the BVA bonuses were improper. (The Executive Branch documents making these exceptions are included in the Appendix to this report.)

The Committee Chairman, in connection with the hearing asked witnesses to address the effects of the bonuses, either real or perceived, and whether they would support the elimination of the use of bonuses for Board Members, especially as tied to production quotas. The answers indicated that while it was unlikely that the decisions by the Board members were actually influenced by the existence and use of the cash bonuses, the appearance of impropriety was enough to warrant the elimination of the use of bonuses. At the June 16 hearing, the current BVA Chairman announced that cash bonuses for BVA Members would be discontinued but the Board was looking for some other method of rewarding and encouraging outstanding performance by Board members.

Although the Committee appreciates that with the sheer number of cases decided by the BVA (approximatelty 40,000 per year) and the need to make those decisions in a timely fashion, the Chairman desires a management tool to encourage production, while ensuring quality, the Committee does not believe that bonuses are appropriate, especially in light of the Executive exemptions. Accordingly, section 103 of the Committee bill, in a provision derived from S. 2292, prohibits members of the Board, including those serving as temporary members, from being ineligible to receive, either directly or indirectly, bonuses (in addition to salary) relating to their service on the Board.

### 7. Timeliness

The Committee bill would add language indicating that the Board should dispose of appeals properly before it in a "timely manner" and requiring that the Chairman of the Board report to the Congress annually on the Board's record of success in achieving that goal, together with an evaluation for the coming fiscal year, of the Board's ability to do so. The language concerning timely disposition of appeals, together with the annual reporting requirement, should afford the Committee the opportunity to monitor closely the Board's ability to handle its caseload after judicial review is allowed so that, if the Board is overwhelmed by new requirements, the Congress will be in a position to take any appropriate remedial action.

## TITLE II: VETERANS' ADMINISTRATION RULEMAKING

Title II of the Committee bill would (1) define "regulation" as including statements of general policy, instructions, and guidance and interpretations of general applicability issued or adopted by

the Administrator and define "rule" as having the meaning set forth in section 551(4) of title 5; (2) provide that rules and regulations issued or adopted by the Administrator shall be subject to judicial review; and (3) require application of the rulemaking provisions (5 U.S.C. 553) of the Administrative Procedure Act (APA) to all matters other than those involving agency management, personnel, public property or contracts. The APA provision (5 U.S.C. 553) generally requires an agency to provide public notice of proposed rule making (or proposed regulation issuance) in the Federal Register and opportunity for public comment on the proposed rule or regulation. As noted by one scholar in the field of administrative law:

> [t]he rulemaking procedure marked out by Administrative Procedure Act . . . is especially successful. . . . The procedure is both fair and efficient. Much experience shows it works beautifully. K. C. Davis, Administrative Law Text 139 (3d ed. 1972).

Under present law, however, the promulgation of rules by the VA is generally excluded from this APA statutory requirement under the so-called "proprietary matters" exception contained in section 553(a)(2) of title 5. By the terms of section 553(a), the rulemaking provisions do not apply to agency matters involving, among other things, "loans, grants, benefits, or contracts", thereby providing an exception from coverage for the great majority of VA benefit matters. The legislative history of this particular exception suggests that the exclusion was grounded on a belief that, in dealing with the excluded matters, the Government "is in the position of an individual citizen and is concerned with its own property, funds, or contracts" (See Administrative Procedure Act—Legislative History, 79th Congress, 1944–46, S. Doc. No. 248, 79th Cong., 2d Sess. 358 (1946).) Based on this analysis of the subject matter in question, it was apparently thought that there was no need or role for public participation in agency rulemaking relating to the excepted matters such as there was in matters involving regulatory agencies, which were seen as having a direct impact on non-Government property interests through regulations governing the conduct of private businesses.

The Committee believes that the continued validity of such a distinction is questionable, particularly in light of court decisions over the last decade, such as the Supreme Court decision in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), that have recognized that individuals have protectible interests in their receipt of various Governmental benefits. In any event, the Committee agrees with Professor Kenneth Culp Davis' analysis that

> [s]ome of the many exceptions [to the rulemaking provisions] are essential, but some of them probably can and should be scaled down or eliminated, now that the realization is widespread and the prescribed procedure is clearly sound and generally desirable.

The VA, which states that, pursuant to regulation (38 CFR 1.12), it has been in voluntary compliance with the requirements of section 553 since April 1972, indicated in its report on S. 11 that,

while it questions the need for this provision, it has no serious objection to having such compliance made mandatory.

## TITLE III: JUDICIAL REVIEW

### *A. Background*

The pros and cons of Judicial Review have been explored at considerable length in the past, and they will not be extensively discussed again here. They have been the subject of much discussion at hearings held before this Committee on June 3, August 25, August 31, September 21, and October 10 of 1977, February 22 and March 22 of 1979, July 15, 1981, March 23, 1983, and April 28, 1988, as well as at hearings before the House Committee on Veterans' Affairs on November 13 and November 19, 1980, July 21 and July 26, 1983, and May 4, June 4, 25, 1986, and were reviewed fairly comprehensively by this Committee in its reports on S. 330 (S. Rept. No. 96–178, 96th Cong., 1st Sess. 35–45 (1979)), on S. 349 (S. Rept. No. 97–466, 97th Cong., 2d Sess.), and on S. 367 (S. Rept. No. 99–100, 99th Cong., 1st Sess.). The Committee's views on the merits of judicial review have not substantially changed since that time, although one concern—that the preclusion of review contained in section 211(a) might ultimately be declared unconstitutional—may no longer be as compelling.[1]

The Committee continues to believe that (1) inasmuch as administrative determinations concerning virtually all other Federal benefits are subject to judicial review (the only significant exception

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[1] The Committee's concern at the time was based on uncertainty about the possible future application of the landmark Supreme Court decision in Johnson *v.* Robison, 415 U.S. 361 (1974) (section 311(a) does not bar Federal courts from deciding the constitutionality of veterans' benefits legislation).

Since that time, however, case law has developed generally interpreting Johnson *v.* Robison broadly, and section 211(a) narrowly, so as to avoid "the specter of unconstitutionality". Kirkhuff *v.* Cleland, 683 F. 2d 544 (1982); *See* de Magno *v.* United States, 636 F.2d 714 (D.C. Cir. 1980). The Supreme Court's analysis in Johnson *v.* Robison has been construed to permit review of the constitutionality of the VA's procedural policies, as in Plato *v.* Roudebush, 397 F. Supp. 1295 (D. Md. 1975), Devine *v.* Cleland, 616 F.2d 1080 (9th Cir. 1980), Dumas *v.* Cleland, 486 F. Supp. 149 (D. Vt. 1980), Jackson *v.* Congress of the United States, 558 F. Supp. (D.C.N.Y. 1983), Marozsan *v.* United States, 635 F. Supp. 578 (N.D. Ind. 1986), Winslow *v.* Walters, 815 F. 2d 1114 (7th Cir. 1987), and Zayas *v.* Veterans' Administration, 666 F. Supp. 361 (D. Puerto Rico 1987). In addition, most Federal courts of appeals that have addressed the question have held that section 211(a) does not preclude judicial review on the issue of whether a particular VA regulation was promulgated in excess of the Administrator's statutory authority. This line of cases started with Wayne State University *v.* Cleland, 590 F.2d 627 (6th Cir. 1978), and continued with Merged Area X (Education) *v.* Cleland, 604 F.2d 1075 (8th Cir. 1979), and University of Maryland *v.* Cleland, 621 F.2d 1002 (9th Cir. 1980). The Court of Appeals for the District of Columbia Circuit has not directly addressed the issue but appears similarly inclined—*see* Carter *v.* Cleland, 643 F.2d 1 (D.C. Cir. 1980), and Ralpho *v.* Bell, 569 F.2d 607 (D.C. Cir. 1977)—while the Court of Appeals for the Fifth Circuit has taken a contrary view and limited Johnson *v.* Robison to challenges to the constitutionality of a statute, in Anderson *v.* Veterans' Administration, 559 F.2d 935 (5th Cir. 1977). As discussed later, the decision of the Court of Appeals for the District of Columbia Circuit in Gott *v.* Walters, 756 F. 2d 902 (D.C. Cir. 1985), holding that section 211(a) bars review of regulations promulgated by the VA, has been decertified.

Section 211(a) has also been held to be ineffective as a bar in cases concerning the validity of an affirmative VA action against an individual—such as a set-off against insurance benefits in order to recover a claim asserted against an individual by the VA, as in de Magno, *supra*—expressly in order to avoid giving section 211(a) what the court felt would have been an unconstitutional reading. *See* DiSilvestro *v.* United States, 405 F.2d 150 (2d Cir. 1968). Otherwise, section 211(a) continues to be construed so as to preclude review of individual factual determinations or even of agency rules and practices that are nonbinding on the BVA. *Compare* Carter, *supra*, with Gott *v.* Nimmo, *supra*. On the other hand, it still remains a possibility that, in a pure individual benefits context, a court may be confronted with a factual determination so shocking that it would feel compelled to reach the constitutional question and invalidate, on due process grounds, the section 211(a) bar on its face. (*See* de Magno, *supra* at 722, n. 13.)

being, under 5 U.S.C. § 8128(b), determinations concerning benefits under the Federal Employees Compensation Act), it is both unjustifiable and fundamentally unfair to deny to veteran claimants such a common and highly valued right; (2) although such disparate treatment may at one time have been justifiable on the basis that veterans' benefits were considered to be, as stated in *Hahn* v. *Gray,* 203 F.2d 625, 626 (D.C. Cir. 1953), "mere gratuities," this notion must be considered to have been substantially eroded by the decision in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), in which the Supreme Court held that welfare benefits are more in the nature of a right than a privilege for purposes of due process protections; and (3) although the Committee has great confidence in the competence and good faith of the individual adjudicators and the adjudicative bodies within the VA, there is and will inevitably continue to be some proportion of cases, however small, that are wrongly decided by the BVA, where the only hope for correcting the resulting injustice lies in judicial review.

The Committee emphasizes that its attitude toward judicial review should not be construed as a major criticism of the way claims are presently adjudicated by, or veterans represented before, the VA. Rather, it reflects a faith in the system of checks and balances embodied in Federal court review, a system which can only enhance the likelihood that the truth will be found and a correct and just decision reached, and which, at the very least, will help overcome the perception, in some claimants' minds, that the present claims adjudication process is unfair in denying veterans their "day in court." As was stated by Mr. Ronald Simon on behalf of The National Veterans Law Center at the Committee's hearing on July 15, 1981:

> The existence of a Supreme Court does not imply the inadequacy, arbitrariness, or wrongness of the lower courts. Nor does the existence of the judicial system imply the wrongness or illegality of the other branches. The existence of the courts and legal system of which they are a part is merely the way in which disputes are resolved in our society. . .
>
> Unfortunately, the prohibition against judicial review has led to a special status for the VA in the minds of veterans and the public. The product of the prohibition against judicial review is mistrust, suspicion and lack of confidence. . . . Review by the courts would provide an explanation of decision-making and a ventilation of the frustrations of veterans.

Thus, in light of all the relevant considerations, the Committee continues to believe that providing an opportunity for those aggrieved by VA decisions to have such decisions reviewed by a court, in a manner similar to that enjoyed by claimants before almost all other Federal agencies, is necessary in order to provide such claimants with fundamental justice. To continue to inform claimants before the VA that benefits to which they are entitled by law could be wrongly denied and that there is no remedy for such a wrongful denial, is no longer a viable position. In addition, the Committee believes that judicial review, by opening the decisions of the VA to

court scrutiny, will have a salutary effect on such decisions and on the VA decisionmaking process in general by involving the judiciary as a check on agency actions. Although the VA has a unique and vital mission of providing service to our Nation's veterans and their survivors, it is, at the same time, a large and complex Federal agency, and providing an opportunity for independent outside review of the processes and procedures of the agency should prove beneficial to those with claims or other matters before the VA.

Finally, the Committee believes that VA claimants in all parts of the country should have uniform access to the judicial system rather than having to litigate before various district courts and appellate court panels the questions of whether and to what extent section 211(a) operates as a bar in a particular case.[2] Not only does this litigation consume considerable time and money of the claimant—as well as of the government—but it has and may continue to yield conflicting results on the jurisdictional question. This lack of uniformity is further aggravated by the Department of Justice's continued practice of raising the section 211(a) bar in cases where no individual adjudications are involved.

### *B. Provisions of the Committee Bill*

Although the Committee has long believed that providing opportunity for judicial review was an appropriate action, it has also been concerned that the specific formula chosen must reflect the Committee's intention to retain the BVA as the primary, expert arbiter of VA claims matters. The Committee is aware of the criticism of the experience in cases appealed to court involving disability benefits under the Social Security Act, and particularly of concerns that have been expressed in that regard that reviewing courts have felt too free to substitute their judgment for that of the administrative tribunal, without having seen or heard the witnesses and without the expertise of the administrative decisionmakers.

The Committee believes that such a situation must be avoided in relation to VA claims, and the provisions of the Committee bill have been framed accordingly.

### *C. Availability of Judicial Review of Veterans' Administration Regulations*

In the Committee report accompanying S. 367, the Committee addressed the issue of whether section 211(a) of title 38, United States Code, the provision of law which bars court review of certain VA decisions under certain laws administered by it, acts as a bar to review of VA actions that involve only regulations and not individual claims for benefits. At that time, as in previous reports, the Committee expressed the view that section 211(a) did not bar such court review, although the Committee noted that the 2-to-1 decision by a 3-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit, in *Gott* v. *Walters*, 756 F.2d 902 (D.C. Cir., 1985) held that review of regulations was barred by section 211(a). Subsequent to the filing of that report, the panel's decision in the *Gott*

[2] *See generally* footnote 1, *supra*, and materials cited therein.

case was decertified as part of a settlement prior to a rehearing by the Court of Appeals sitting *en banc*. Thus, this decision no longer has any precedential value.

This issue of the reviewability of VA regulations has been addressed in two other Federal Courts of Appeals cases. In *Traynor* v. *Turnage,* 791 F.2d 226 (1986), the Court of Appeals for the Second Circuit held that section 211(a) was a bar to review of regulations, and in *McKelvey* v. *Turnage,* 792 F.2d 194 (1986), the Court of Appeals for the District of Columbia Circuit held that it was not. Both cases involved veterans who had not exhausted their G.I. Bill educational assistance benefits within 10 years following their military service—the so-called "delimiting period" under section 1662(a)(1) of title 38. Under that section, a veteran may obtain an extension of the delimiting period if he or she was prevented from using G.I. Bill benefits by a "physical or mental disorder which was not the result of his or her own willful misconduct". Traynor and McKelvey sought to receive benefits after the expiration of their delimiting periods on the ground that they were disabled by alcoholism during much of that time. The VA ruled that the veterans had suffered from "primary" alcoholism, that is, alcoholism which is unrelated to an underlying psychiatric disorder, and under a VA regulation (38 CFR 3.301(c)(2)) is considered "willful misconduct", and that they, therefore, were not entitled to extensions. Each brought suit challenging the VA regulation as violating section 504 of the Rehabilitation Act of 1973, which, as amended in 1978, prohibits federal programs from discriminating against handicapped persons solely because of their handicaps. Under the Rehabilitation Act, alcoholism is considered a handicap.

Appeals were taken from the decisions noted above and the Supreme Court, on April 20, 1988, issued its decision in *Traynor* v. *Turnage* (which has been joined with *McKelvey* v. *Turnage,* 99 L. Ed. 2d 618, 108 S. Ct. 1372, 56 U.S.L.W. 4319). The Court construed the language of section 211(a) precluding review of the Administrator's decisions "under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors" as being inapplicable to the Rehabilitation Act and held that review of the validity of a VA regulation under that law was not barred. However, the Court did not specifically address whether section 211(a) bars judicial review of the validity of a VA regulation under a law described in that section. In footnote 9, however, the Court, noting that four circuits allow such review, stated:

> "[P]etitioners submit that, in the four Circuits that have held that section 211(a) does not bar judicial review of statutory challenges to Veterans' Administration regulations, only eight such challenges have been filed. See Brief for Petitioners 46–47, n. 32 (citing *American Federation of Government Employees, AFL–CIO* v. *Nimmo,* 711 F.2d 28 (CA4 1983); *Plato* v. *Roudebush,* 397 F. Supp. 1295 (Md. 1975); *Tinch* v. *Walters,* 573 F. Supp. 346 (ED Tenn. 1983), aff'd 765 F.2d 599 (CA6 1985); *Taylor* v. *United States,* 385 F. Supp. 1035 (ND Ill. 1974), vacated and remanded, 528 F.2d 60 (CA7 1976); *Arnolds* v. *Veterans' Administration,*

507 F. Supp. 128 (ND Ill. 1981); *Burns* v. *Nimmo,* 545 F. Supp. 544 (Iowa 1982); *Waterman* v. *Roudebush*, No. 4–77–Civ. 70 (Minn. 1979)).

Although this reference suggests no disagreement with the holdings of the lower courts permitting court challenges to VA regulations, the Committee does not believe that any inference that may be drawn from this footnote is sufficient assurance that veterans will uniformly be or regulation may be brought by any "interested party", and that term is defined, with respect to a VA rule or regulation, as "any person substantially affected by such rule or regulation". Since 1 U.S.C. 1 provides that "[in] defining the meaning of any Act . . . of Congress, . . . the word 'person' may extend and be applied to partnerships and corporations . . .", the Committee provision is intended to include incorporated veterans' organizations where some of their members are so affected.

The Committe bill contains one restriction on the scope of review of VA rules and regulations: A court would not be permitted to direct or otherwise order that any part of a disability rating schedule issued or adopted by the Administrator be modified. It is the Committee's intention that a court should not substitute its judgment for that of the Administrator as to what rating a particular type of disability should be assigned. For example, if a veteran was assigned a service-connected disability rating of 10 percent by the BVA and in court argued that his or her disabling condition (condition A) is as disabling as that of condition B which has a disability rating of 30 percent under the rating schedule, the court would be prohibited from changing the veteran's rating from 10 percent to 30 percent because the veteran would, in effect, be asking the court to rewrite the provisions of the rating schedule to classify condition A at the 30-percent rate. In this situation, there would be no underlying factual disagreement as to the disabling condition itself, only as to where it should fall on the rating schedule. In contrast, if the BVA assigned a veteran a disability rating of 30 percent and the veteran went to court to argue that his or her rating was incorrect because the facts underlying the BVA's decision were determined incorrectly (for instance, arguing that the rating should be 50 percent because the facts demonstrate that the extension of his or her leg was limited to 45 degrees—not the 20-degree limitation the BVA found—and under the rating schedule, a 45-degree limitation is rated at 50 percent and not 30 percent), the court could modify the decision (after the appropriate mandatory initial remand to the BVA to reconsider its finding and decision).

*D. Right of Review in Individual Cases*

Section 302 of the Committee bill would provide for juidicial review of a final decision of the Administrator adverse to a claimant in a matter involving a claim for benefits under any law administered by the VA. An action to commence such a review would have to be brought within 180 days of the date the notice of the Board's decision was mailed to the claimant pursuant to section 4004 of title 38, as proposed to be amended by section 105 of the Committee bill. The term "claim for benefits" would be defined to include not only decisions relating to an initial claim for benefits,

but also decisions concerning a reduction in the amount of a benefit, or a suspension or termination of benefits. The purpose of this provision is to address a judicial inclination, exhibited prior to the 1970 amendment of section 211(a) of title 38, to define "claim for benefits" to include only the claim as initially filed and not any challenge to—or request for—subsequent VA action thereon.

Final action of the Administrator, a prerequisite to bringing an action under the authority proposed in the Committee bill, would be defined to include not only a decision on the merits pursuant to section 4004(a), as proposed to be amended by section 105 of the Committee bill, but also a refusal to reopen a claim pursuant to section 4004(b), as proposed to be amended by section 105 of the Committee bill, or a refusal—on the basis of nonconformity with present chapter 71 provisions relating to the form or manner of appeals action, pursuant to present section 4008, or a lack of timeliness, pursuant to present section 4005—to consider a claim. Of course, the Committee bill specifies that if a court reviews a final decision rendered on a basis other than the merits of the claim, its review would be restricted to a review of the lawfulness of the Board's action on that basis and it could not consider the merits of the claim, but would have to return the matter to the Board for a decision on the merits if it held the Board's action unlawful.

In connection with the availability of judicial review of VA benefits decisions, concern has been expressed about the discrimination inherent in the current state of Federal law that allows individuals receiving post-service benefits from the Armed Services to obtain judicial review of decisions denying their applications for benefits but bars individuals receiving benefits from the VA from obtaining judicial review of VA decisions. Under current law, many veterans have the option of receiving benefits for a service-connected disability from the Service department concerned or from the VA. The amount of disability-retirement provided by the Service departments depends upon the veteran's base pay at the time of separation or retirement. The VA's system provides disability compensation tied to the amount of disability and not the veteran's military rate of pay. A veteran generally may not receive both military retirement pay and VA compensation except to the extent that a veteran waives a portion of his or her military retirement pay in order to receive VA compensation in an amount equal to the amount of retirement pay waived. Decisions made in the military retirement program are reviewable in the U.S. District Courts or the U.S. Claims Court after administrative remedies are exhausted, whereas, under section 211(a) of title 38, decisions by the VA regarding benefits are not reviewable outside the VA.

The effect of this disparate treatment is that higher ranking military officers who generally find it beneficial to elect to receive military retirement disability benefits rather than VA disability compensation have an avenue of judicial recourse open to them which is denied to enlisted personnel and lower ranking officers for whom VA disability compensation is generally the more beneficial benefit.

The Committee also notes that concerns were raised at the hearing regarding the availability of appellate review of decisions of the Department of Medicine and Surgery (DM&S) concerning the fur-

nishing of health care services. In discussions with the VA, it has become apparent that some DM&S decisions are currently appealable to the BVA, while the majority are not. The Committee shares the concerns about the availability and appropriateness of appellate review with respect to DM&S decisions and will continue its consideration of the many complex issues involved with a view toward widening the review that is available. One promising approach that the Committee urges the VA to consider is the establishment of a regional pilot program where prompt recourse could be had locally to some objective and qualified appellate entity with respect to various types of DM&S decisions.

*E. Scope of Review*

In framing the fudicial review provisions of the bill, the Committee's single greatest concern was defining the scope of review to be applied by a reviewing court. As discussed above, the Committee is keenly aware of the criticism of the experience with court review of disability claims under the Social Security Act, and the Committee wishes to prevent such a situation from arising in the area of VA claims cases.

In its effort to address this situation, the Committee has examined numerous potential formulations of the scope of review, and the provision contained in the present bill is the third such formulation to have actually been incorporated into this legislation since its introduction in the 95th Congress.

The first formulation was the "substantial evidence" test presently applied under the Administrative Procedure Act generally and, in particular, in social security disability cases. In its agency report on S. 364, 95th Congress, the VA advocated "that the scope of review of individual cases should be based on the substantial evidence test" and S. 330, as introduced in the 96th Congress, included that formula in the scope of review provision. Under that test, as set forth in the Administrative Procedure Act (5 U.S.C. 706), a court is required to set aside an agency decision "unsupported by substantial evidence". However, the exact meaning of that phrase and court application of it have been far from clear or consistent. There has been substantial criticism that courts use this standard in reviewing disability claims cases under the Social Security Act so as to freely substitute their judgment for that of the Secretary. As Professor Kenneth Culp Davis noted:

> Whatever impression a literal-minded reader may get form the words in the statute book, the plain reality is that the substantial-evidence rule as the courts apply it is a variable. K.C. Davis, Administrative Law Text 530 (3d ed. 1972).

Based on a review of the testimony received at the hearings on S. 330 and concerns expressed by various commentators, including cautions presented by the VA in its 1979 testimony, the Committee rejected the "substantial evidence" test.

Consideration was given to replacing it with a formula that was then (during the 96th Congress) being proposed by the Administration for review of disability cases under the Social Security Act,

under which questions of law would be subject to review but not questions of fact. However, the Committee was quite concerned that this formula—might be far easier to describe than to apply in actual practice. It is the Committee's view that most VA cases, while involving resolution of factual issues, present a mixture of legal and factual questions. For example, a claim for service-connected compensation could require resolution of some simple factual issues, such as whether the veteran had the requisite service in the Armed Forces and whether, in fact, the veteran is currently suffering from a disability. However, the same claim could also require the application of a complex rating schedule to the apparent disability to determine the degree of service-connection, which would not be a simple factual determination. Likewise, the decision as to the time of the onset of the disability might be very difficult if the veteran's military records did not contain a clear statement describing an occurrence during the period of service—again, a question that is not simply factual in its makeup, expecially if the disability in question is listed in present section 321, which provides for statutory presumptions of service-connection if the disability became manifest within a stated period of time after the end of the individual's period of service.

In addition, the same claim for service-connected compensation could ultimately be resolved on the basis of the legal sufficiency of evidence relating to a factual matter—for example, whether particular affidavits from individuals with whom the veteran served, relating to an alleged occurrence, are sufficient to support a finding of service connection in the absence of any supporting evidence in the veteran's military records—another situation in which a formula of permitting review of legal questions while precluding review of questions of fact might prove unworkable. A court, feeling bound by the precise terms of such a preclusion, might refuse to review mixed questions of law and fact so as to avoid any review of a factual issue thereby leaving a claimant with incomplete judicial review; or a court might feel free to examine all questions on the record by characterizing some facet of a particular question as legal, thereby allowing review, under no significant restraints. As Professor Kenneth Culp Davis has written, describing civil actions for damages:

> In any particular case the question whether the defendant was negligent may be a question of fact or a question of law or both, depending on whether the parties are in dispute about what the defendant did or whether they agree on what he did and are in dispute about the legal consequences, or both. The same kind of analysis can be made of all questions of application of legal concepts to facts. K.C. Davis, Administrative Law Text 545 (3d ed. 1972).

For these reasons, the Committee decided against including a provision permitting review of questions of law only.

The version of S. 330 that was finally marked up, reported by the Committee and passed by the Senate in September 1979 contained a scope of review provision that would have permitted review of the Administrator's findings of fact, but would have allowed them to be reversed only if they were determined to be arbitrary and ca-

pricious or to constitute an abuse of the Administrator's discretion. In addition S. 330 included a provision specifying that, even on a finding by the reviewing court that a BVA factual determination was arbitrary or capricious or constituted an abuse of discretion, the court would not have been authorized to reverse the Administrator's determination on the issue without first remanding the case, for a time-limited period, to the Administrator, so as to provide the Administrator with the opportunity to reconsider or substantiate the record. This formula was intended to strike a balance between the proper functions of the reviewing court and the Administrator by permitting the court to exercise its own judgment in resolving issues of law but restricting narrowly the court's review of questions of fact.

It was this standard to review that was contained in title III of S. 349, as introduced in the present Congress. The Committee felt, however, that some further refinement and clarification of this standard was necessary. Accordingly, section 302 of the Committee bill contains a totally new scope-of-review formulation for factual determinations made by the BVA: That a finding of fact made in connection with an individual benefits determination may be set aside by a reviewing court only when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if it were not set aside. The Committee bill retains the automatic remand provision from S. 330.

Although it continues to favor a very restrictive standard of review for factual questions, the Committee was concerned that use of the "arbitrary and capricious" formulation might result in some substantial confusion as to its precise meaning and application. As far as its application is concerned, the Committee notes that the "arbitrary and capricious" standard was directly derived from the Administrative Procedure Act, at title 5, United States Code, section 706(2)(A). However, the "arbitrary and capricious standard was generally intended to be applied in the review of fact determinations made in rulemaking processes—not those made in individual claims adjudications. Thus, the Committee is concerned that, if that standard were lifted out of the rulemaking context and made applicable to court review of factual findings in veterans' claims adjudications, courts might not appreciate the narrowness of the scope of review intended by the Committee in light of the special circumstances surrounding the VA adjudications process.

But more importantly, the "arbitrary and capricious" standard has been the subject of a considerable amount of judicial confusion concerning its precise meaning. One interpretation—that favored by the Committee in its report on S. 330—is that the "arbitrary and capricious" standard represents a narrower judicial inquiry than is available under the "substantial evidence" test. As the Supreme Court stated in *Abbot Laboratories v. Gardner,* 387 U.S. 136, at 143 (1967), in discussing the APA provisions relating to scope of review:

> The act as it was finally passed compromised the matter by allowing an appeal on a record with a "substantial evidence" test, affording a considerably more generous judi-

cial review than the "arbitrary and capricious" test available in the traditional injunctive suit.

There is also some support for the conclusion that the "arbitrary and capricious" standard calls for a broader judicial inquiry than is available under the "substantial evidence" test. This review originated with the Supreme Court's statement in *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, at 416 (1971) that an administrative decision may be found to be arbitrary and capricious when it appears to have been based on a "clear error of judgment." The confusion has arisen from the similarity of this language to the "clearly erroneous" test used to review the factual findings of a trial court sitting without a jury—a test which is treated in the case law as permitting a broader judicial inquiry than even the "substantial evidence" test. The Court added to this confusion by stating in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 284, (1974), that "though an agency's finding may be supported by substantial evidence . . . it may nonetheless reflect arbitrary and capricious action."

Still a third supportable point of view is that there is no real difference between the "arbitrary and capricious" and "substantial evidence" tests. This view seems to derive primarily from the Supreme Court's use of similar terms to define the two tests: The latter encompasses such evidence as a "reasonable mind" would accept as persuasive (see *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 620 (1966)), while the former requires such evidence as would furnish a "rational basis" for the agency action (see *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra* at 290).

The present status of the relative scopes of these two tests has been summarized by Professor Kenneth Culp Davis as follows:

> The practical question for administrative law is whether the substantial evidence test and the arbitrary or capricious test are equivalents or whether they differ, and, if they differ, which one calls for broader review. Four possibilities and a quick reason for each are: (1) The Overton Park language is inadvertent, so that the Supreme Court's remark in the Abbott case, long accepted by all, continues, and the substantial evidence test means "more generous" review than the arbitrary or capricious test. (2) Exactly the opposite is the law, for the Court in Overton Park treated the arbitrary or capricious test as equivalent to the clearly erroneous test, which has consistently been treated by the courts as calling for a broader judicial inquiry than is proper under the substantial evidence test. (3) The two tests become equivalents, because some law makes one broader than the other but some law makes the other broader than the one. (4) Refined differences in the two tests do not matter, because all federal judges understand the broad theory that they should refrain from substitution of judgment except on questions of law on which they are especially qualified, and the degree of intensity of review of other questions inevitably depends far more on other factors than on somewhat unreal refinements in the

> formulas; a judge who gets the impression that an administrator has been conscientious, careful, and fair is unlikely to make a full inquiry into the possibility that a judgment may be "clearly wrong," whereas a judge who has reason for little confidence in an administrator may come close to substituting judgment.

K.C. Davis, Administrative Law in the Seventies 649 (1976).

Thus, the Committee was concerned that the "arbitrary and capricous" standard, if incorporated into this judicial review legislation, would carry with it this confused body of law. Moreover, although the Committee might include language in its report expressing with great clarity its intentions regarding the scope or definition of the standard, the Committee recognizes some risk that a reviewing court, confronted with a scope of review provision identical to a familiar APA provision, might feel no compulsion to look as far as the legislative history, following the settled judicial doctrine of statutory construction that only those statutes which are of doubtful meaning are subject to the process of statutory interpretation. (See *Jay* v. *Boyd,* 351 U.S. 345 (1956), Sutherland Statutory Construction § 45.02 (3d.ed. 1973)).

The new scope of review provison added by the Committee amendment to S. 349—"so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if (the finding) were not set aside"—represents an effort to address these concerns. It is not patterned after any scope of review provision in any existing statute (the Committee notes, however, that the phrase "rational basis" is derived from case law using that phrase in articulating a narrow construction of the "arbitrary and capricious" standard, as in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc. supra,* at 283, 285, and 290), largely in order to increase the likelihood that the Committee's intention to allow only a very narrow review of factual determinations in individual benefits adjudications will be followed by the courts and will not be frustrated by judicial practice developed in other contexts. The Committee emphasizes its view that judicial review of VA decision presents a unique situation in several respects—most notably, the informal nature of proceedings before the VA, and the availability of free representation by skilled service officers of the major national veterans' organizations—and that a central theme in drafting this legislation has been to preserve those unique and desirable aspects as much as possible while enhancing them by the addition of a right of judicial review. Moreover, by framing a new standard of review, the Committee expects that, to the extent that the Committee's intentions regarding the scope of review are not plain on the face of the statute, reviewing courts will seek clarification from the legislative history of this legislation, thus simplifying to some extent the court's task of ascertaining the precise meaning of the provision and avoiding the risk that it will be given an unduly broad interpretation.

This new scope-of-review provision is intended to permit a reviewing court to reverse a VA claims decision on the basis of a finding of fact made in the adjudication process only when the court is certain that the decision was wrong. It is intended to be a

substantially narrower standard than the "substantial evidence" test. It is intended to afford the maximum possible deference to the BVA's expertise as an arbiter of the specialized types of factual issues that arise in the context of claims for VA benefits, while still recognizing and providing for the possibility of error in BVA factual determinations, and the need, however seldom it may arise, for some avenue of redress against glaring errors. The Committee strongly believes that some form of meaningful factual review is an essential component of any scheme to afford to veterans a comparable measure of the judicial review rights now afforded to claimants for virtually all other Federal benefits.

The Committee notes that, although this standard of review for factual findings is new, the other major scope of review provisions contained in proposed section 4026(a)(1) through (a)(3) are derived specifically from section 706 of the APA. Thus, it is the Committee's intention that the court shall have the same authority as it would in cases arising under the APA to review and act upon questions other than matters of material fact made in reaching a decision on an individual claim for VA benefits—such as questions concerning the validity of a rule or regulation, (including the application of the "arbitrary and capricious" standard to a challenge to an agency factual determination made in the context of issuing a rule or regulation) constitutional challenges, or challenges to VA procedures. The principal substantive differences from section 706 of the APA are the substitution of the new "rational basis" test of the "substantial evidence" test and the initial remand requirement applicable to such factual review situations, as well as the express preclusion of trial de novo by the reviewing court and the elimination of the requirement that the court review the whole administrative record, both of which are discussed below.

In addition to providing for a narrow scope of review of factual findings in individual benefits adjudications, the Committee bill includes several other provisions intended to give deference to the BVA's role as the final, expert arbiter of fact. Proposed section 4026(a) of title 38 contains a provision, as mentioned above, specifying that, even on a finding by the reviewing court that a BVA factual determination lacked a sufficient rational basis, the court may not reverse the determination on the issue without first remanding the case, for a time-limited period, to the BVA, which shall then have an opportunity to reconsider or substantiate the record.

Moreover, another change from S. 349 as introduced is that the court would not be required to review the entire administrative record, as is presently the case under section 706 of the APA, but only such portions as the parties bring to the court's attention in support of their arguments. The entire record would of course be before the court pursuant to subsection (d) of proposed section 4025 of title 38 and subject to review in the event that the court wishes to examine portions of the record other than those cited by the parties. The purpose of this provision is to minimize the burden imposed on reviewing courts by this legislation and to preserve judicial time and resources, by generally relying on the parties to identify and focus attention on the issues and the relevant factual elements.

The Committee is aware that some commentators have suggested that allowing a court any review of the facts in a case would ultimately encourage a de novo review and court substitution of its findings on factual determinations for that of the administrative decision maker. However, the Committee believes that such a result is highly unlikely—especially in light of the specific preclusion, set forth in subsection (c) of proposed section 4026 of title 38, of trial de novo by the court on the Administrator's findings of fact—and the totally new scope-of-review provisions, and suggests that this view indicates a belief that reviewing courts will not follow Congressional mandates in conducting statutorily-authorized review of administrative proceedings. The Committee does not accept such a view and believes that a court, using the standards set forth in the Committee bill, will not disturb findings of fact made by the BVA unless it determines that such findings are clearly lacking a rational basis in the evidentiary record. Even upon making such a finding, the Committee would stress, the court would be required to return the matter to the Administrator for a further opportunity to reconsider the record or to substantiate the finding in question.

A final provision included in the Committee bill under the scope-of-review provisions in section 302 would incorporate a reference to the "rule of prejudicial error" as included in the APA (5 U.S.C. 706) so as to limit still further a court's role on review. Acting in accordance with the prejudicial error rule, a court should pass over errors in the record of the administrative proceedings that the court finds not to be significant to the outcome of the matter. As the U.S. Court of Appeals for the Ninth Circuit noted in *NLRB* v. *Seine and Line Fishermen's Union of San Pedro,* 374 F.2d 974, 881 (9th Cir. 1967):

> [A] court, on review of an administrative determination, should I take due amount of the rule of prejudical error. Procedural irregularities are not per se prejudicial; each case must be determined on its individual facts and, if the errors are deemed to be minor and insubstantial, the administrative order should be enforced notwithstanding.

Thus, by an express inclusion of a reference to the rule of prejudicial error, the Committee is suggesting that a reviewing court should consider reversal only after determining that the identified error caused substantial prejudice to the claimant's case.

At the June 9, 1988, hearing, the Honorable Morris S. Arnold, Judge, U.S. District Court for the Western District of Arkansas and the Honorable Stephen S. Breyer, Judge, U.S. Court of Appeals for the First Circuit, testified on behalf of the Judicial Conference of the United States. During questioning, Senator DeConcini, then Acting Chairman at Senator Cranston's request and in his absence, asked them:

Judges, do you believe the standard for factual review as articulated in S. 11 would invite you to substitute your judgment for what the Board of Veterans' Appeals has rendered?"
Judge Breyer No.
Judge Arnold No.

Senator De Concini then asked:

Do you think then that you would be required to use a more stringent judgment?
Judge Breyer Stringent in the sense that it would be very, very, very, very hard to overturn what the VA did.
Judge Arnold Yes, almost impossible.

Given this testimony, the Committee believes that it has succeeded in drafting a standard of review narrow enough to discourage judges from substituting their judgment for that of the BVA.

### *F. Remand Provision*

Section 302 of the Committee bill contains provisions authorizing an additional form of remand, in addition to the one discussed above in connection with the scope-of-review provisions, that would apply once a matter has been appealed to court.

The provision would require a court to remand a matter when either party applies for leave to adduce further evidence and shows good cause for the requested remand.

The other remand provisions in S. 11 as introduced were deleted as unnecessary: The first would have required a court to remand the case to the BVA, upon its request, after the appeal was filed but before the Administrator had answered, for a single reconsideration, with such reconsideration to be completed within 90 days of the remand or the matter would be returned to the court. The second would have permitted the court, in its discretion, to remand a case at any time after the Administrator files an answer. The court has this authority inherently.

### *G. Sunset Provision*

Section 302 of the Committee bill would provide that the jurisdiction of Federal courts to review decisions of the VA relating to claims for benefits as provided for in the new subchapter II of chapter 71 added to title 38 by the Committee bill will not apply to claims for benefits, the initial claim for which is filed with the Administrator pursuant to present section 3001(a) after the end of the fifth fiscal year following the fiscal year in which the Act becomes effective. This 5-year "sunset" provision on new claims is designed to require a thorough Congressional evaluation of the operation and effects of the new judicial review provisions before they are made permanent or are further extended.

Although the Committee recognizes that "sunset" provisions are normally associated with specific programmatic rather than procedural efforts, the Committee believes that, particularly in light of the implications of permitting judicial review for the VA's procedures, the 5-year "sunset" provision provides an important safeguard to ensure further Congressional scrutiny of the full impact of the changes made by the Committee bill.

## TITLE IV: ATTORNEYS' FEES

### *A. Background*

Title IV of the Committee bill contains provisions that would substantially revise the current title 38 provision that generally limits to $10 the amount an attorney may receive for representing an individual in connection with a claim for benefits (present sec-

tion 3404). This current limitation, which has statutory precedents dating back to the Civil War, was set in 1924 as part of the codification of the War-Risk Insurance Act as the World War Veterans' Act, 43 Stat. 628 (June 7, 1924). Present section 3404(c) limits the amount an attorney may receive for services rendered in connection with "any one claim" to a maximum of $10; to be eligible for this fee, which is paid to the attorney from the monetary benefits awarded to the claimant, the claim must be allowed.

Although the limit on the amount an attorney may receive under current law is not directly linked to preclusion of judicial review, it seems clear that the bar to judicial review has contributed to nonparticipation of attorneys in VA claims matters. In fiscal year 1987, for instance, only 705 claimants out of approximately 40,000 cases, were represented before the BVA by attorneys, a phenomenon that is undoubtedly attributable to the limit on the fee that an attorney may receive. Thus, the new right to judicial review as proposed in title III of the Committee bill would be a hollow right indeed without some easing of the limitation on attorneys' fees. Without the assistance of an attorney, a claimant would effectively be precluded from filing a proper appeal of an adverse VA decision in Federal court and, without a change in the $10 limitation, there would continue to be little or no attorney representation in VA claims cases.

Recognizing this fact, the Committee is concerned that any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of nonattorney resources that has evolved in the absence of significant attorney involvement in VA claims matters. The mainstays of that network are veterans' service officers, employees of national veterans' service organizations, and other organizations approved pursuant to present section 3402 of title 38, who provide representation without charge to veterans and other claimants before the VA, without regard to whether the individual claimant is a member of the service officer's organization. It is widely recognized, as the VA noted in its testimony at the April 28, 1988 hearing, that "Veterans are represented institutionally by well-organized veterans groups that not only scrutinize the operation of the Agency but also actively represent the views of the veterans before Congress and the Executive Branch." The Committee strongly believes that the availability of their services should be maintained and fostered.

The Committee, in its consideration of the issue of attorneys' fees also recognized that the existing limit on attorneys' fees is generally appropriate with respect to the initial claims stage in the sense that applying for VA benefits is a relatively uncomplicated procedure, with the VA generally securing the relevant military records as well as evaluating the merits of the claim. In light of the availability of national service officers and other nonlegal forms of free assistance, 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 expenses 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 the BVA. However, once the BVA renders a decision adverse to the claimant on the merits, the need for the assistance of an attorney is then markedly greater with respect to such issues as seeking a reopening and reconsideration and deciding whether to proceed to court. Thus, continuing to discourage attorney representation at the initial application, decision, and appeal stages would, the Committee believes, appropriately serve to protect claimant's benefits without prejudicing the claimant's ability to obtain effective legal representation at a later point.

The basis for Congressional action, first after the Civil War and then after World War I, limiting the amount an attorney could receive for representing a claimant before the VA was grounded in a belief that the lawyers of that day were unscrupulous and were taking unfair advantage of veterans by retaining an unwarranted portion of the veterans' statutory entitlement in return for very limited legal assistance. Whatever the merits of such a view at the time that the limitation was imposed, and despite numerous court opinions upholding the validity of the statutory limitation in the face of challenges to its constitutionality (see, e.g., *Gendron* v. *Saxbe,* 389 F. Supp. 1303 (C.D. CAL.), *aff'dmen. sub nom, Gendron* v. *Levi,* 423 U.S. 802 (1975); *Staub* v. *Roudebush,* 574 F. 2d 637 (D.C. Cir. 1978 but see discussion below of *National Assoc. of Radiation Survivors (NARS)* v. *Walters,* 589 F. Supp. 1302 (1984) and *Walters* v. *NARS,* 473 U.S. 305 (1985)), it is the Committee's position that such a view of today's organized bar, particularly in light of the widespread network of local bar associations that now generally police attorney behavior, is no longer tenable.

The Committee is also of the view that the current statutory limitation is an undue hindrance on the rights of veterans and other claimants to select representatives of their own choosing to represent them in VA matters. As noted above, there is a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants. The Committee fully expects and believes that this system will continue and prosper, undiminished by the new right of judicial review and opportunity for attorney participation created in this legislation. However, an individual should not be arbitrarily restricted in retaining an attorney, whether such representation is desired for reasons of personal preference or because of a concern that the claim is likely to be denied a second time by the BVA and will be appealed to court. A claimant could well conclude, for example, that some further development of the administrative record in a complex case would be of critical importance while the matter is still before the agency and that an attorney would be better able to so develop the record.

Based on these various considerations and after reviewing and incorporating suggestions from a wide variety of sources, the Committee developed a formula for allowable attorneys' fees for representation of a VA benefits claimant. This formula is intended to continue to restrict attorney representation in the initial claims process, and to authorize reasonable attorneys' fees as approved by the BVA Chairman, thereafter, within certain specified limits, for representation before the BVA and the VA and for court approval

of a reasonable fee, within certain limitations, for attorney representation in court proceedings.

*B. Fees for Attorney Representation at the VA and the BVA*

The Committee bill contains provisions authorizing two levels of fees for representation in conjunction with claims resolved within the VA. For a claim resolved either prior to or in the first BVA decision on the merits, the Committee bill would retain the present $10 limit on the amount an attorney may receive. As discussed above, the Committee believes that there is no compelling justification for attorney representation at this initial level since, in most instances, all a claimant need do is file the claim and the agency will obtain the military service and medical treatment records, where appropriate, necessary to make an initial evaluation of the merits of a claim. Should the materials in the records be insufficient to support a decision on the claim, an effort is made to inform the veteran or other claimant as to the nature of the additional evidence that is required and the possible means of acquiring such evidence.

If an initial application for a claim is denied, all a claimant need do to initiate an appeal is to file a notice of disagreement pursuant to present section 4005. The notice of disagreement is a very simple document; and described in the applicable VA regulation (38 CFR 19.113):

> The notice should be in terms which can be reasonably construed as evidencing a desire for review of that determination. It need not be couched in specific language. Specific allegations of error of fact or law are not required.

Following the filing of a notice of disagreement, the VA office that made the original determination (called the agency of original jurisdiction) reviews the matter, pursuant to present section 4005(d)(1), in a final attempt to resolve the disagreement. Again at this stage, no compelling need for attorney representation is foreseen since the VA assumes the primary responsibility for ensuring that the claim is properly considered. Should such further review action not resolve the matter in a manner acceptable to the claimant, the VA prepares and provides to the claimant a statement of the case pursuant to present section 4005(d)(1). A statement of the case must include:

> (A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed;
>
> (B) A citation or discussion of the pertinent law, regulations, and, where applicable, the provisions of the Schedule for Rating Disabilities;
>
> (C) The decision on such issue or issues and a summary of the reasons therefor.

If the claimant is still not satisfied after receiving the statement of the case, an appeal may be taken to the Board of Veterans' Appeals pursuant to the provisions of present section 4005. If the Board's decision is adverse to the claimant, it is at that point that section 401 of the Committee bill would lift the $10 fee limitation. At that time, the claimant would be afforded a realistic opportuni-

ty to obtain legal representation for purposes of proceeding further, either at the agency level (to the extent that reopening or reconsideration is authorized under section 4004, as proposed to be amended by section 105 of the Committee bill) or at the courts of appeals level. For claims so pursued and resolved at the agency level, the amendment to the Committee bill would allow the BVA Chairman to approve a reasonable fee not in excess of $500 or, in the event that a claimant and an attorney have entered into a contingent-fee agreement, an amount not in excess of 25 per centum of any past-due benefits awarded in the case. Under the proposal in the Committee bill, a claimant and an attorney would still be able to agree to a fee lower than the maximum authorized and the Chairman would be limited to approving the agreed-upon amount.

The committee wishes to note that to foster further the independence of the BVA from the VA, the Committee bill provides for the Chairman, rather than the Administrator, as in S. 11 as introduced, to approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation, other than under the court review provisions, in connection with claims for benefits. Also, the Chairman, rather than the Administrator as in S. 11 as introduced, would have the power to determine and approve a fee in excess of $500 in extraordinary circumstances warranting a higher fee based on regulations which the Chairman, rather than the Administrator, as in S. 11 as introduced, would be required to prescribe including changes in national economic conditions.

Under section 401 of S. 349 as introduced in the 97th Congress, the $10 fee limitation would have been lifted at the time that the statement of the case was issued. The bill as reported then as well as the current Committee bill would postpone that change in the fee limitation until after the BVA has decided the case once—a provision that is intended to be viewed in conjunction with the provision made in section 105 of the Committee bill under which two separate authorities would exist for the reopening and reconsideration of a final BVA decision. Thus, the Committee intends that at any time after the BVA has issued a final decision—that is, its first decision on the merits, as distinguished from subsequent decisions rendered after a reopening—the claimant would have the option of retaining an attorney, under fee limitations far less restrictive than the existing $10 limitation, to proceed further before the BVA or the VA if the claimant can demonstrate either that there is new and material evidence that was not considered in the earlier adjudication of the claim (in which event the reopening of the claim would be mandatory once the existence of such evidence is established), or that there is other good cause to reopen (in which case the reopening would be discretionary). This provision is the result of a balancing of two important considerations: On the one hand, the Committee's wish to preserve, to as great an extent as possible, the present system of claims adjudication within the VA, relying primarily on representation by service officers of the veterans' organizations and with minimal attorney involvement; and, on the other hand, the appropriateness of permitting the attorney, whose job will be to present the case on appeal to the court of appeals, to have some meaningful opportunity to shape the administrative record on which he or she will be arguing.

The formula proposed in the Committee bill for approval of fees for claims resolved in the VA after the $10 limit is lifted is similar to that provided for in section 206(a) of the Social Security Act (42 U.S.C. 406(a)), with the one significant difference that, in addition, to the contingent-fee percentage amount authorized under the Social Security Act, the proposal in the Committee bill incorporates a separate dollar maximum of $500 as an alternative to the percentage figure. This difference is incorporated because, in many VA benefit cases, the relief sought, in terms of the dollar amount of past-due benefits at stake, may be quite small or even nonexistent (as in a case establishing a service-connected disability with a 10- or zero-percent rating) while still being quite significant to the claimant in terms of eligibility for VA health care and related service-connected benefits under chapter 17 of title 38.

The $500 limit provided for in the Committee bill would be subject to being increased in two different ways. First, the BUA Chairman, as discussed above, might, by administrative action, raise it in future years in response to changed economic conditions. The Committee anticipates that the Chairman would use great care in the exercise of this authority.

The second way in which the $500 limit might be increased would be in unusual cases that require extraordinary effort and time on the part of the attorney. The Committee expects that occasions for use of this authority would be extremely rare. An approval of a fixed fee award above $500 should occur only when the Chairman is persuaded that the attorney, due to the complexity of the case, was required to expend such time and effort that the $500 limitation is plainly inadequate. In making such a determination, the Committee expects that the Chairman would remain mindful that the claimant and the attorney negotiated an agreement with presumed awareness of the fee limitation and that, at that time, the attorney had an opportunity to evaluate the claim and determine if he or she wished to pursue it. Clearly, this authority in the Committee bill should not be used to relieve an attorney of the consequences of an ill-advised decision to devote great amounts of time to a poorly-founded claim or any aspect thereof. Further, the Committee does not believe that this extraordinary authority would be appropriately applied to compensate an attorney, who, because of an unfamiliarity with VA or BUA proceedings, the provisions of title 38, or the regulations issued hereunder, devotes a great number of hours to what is otherwise an ordinary claim for benefits, primarily to make up for a lack of a basic understanding of the applicable law.

The Committee emphasizes, with respect to the provisions of the Committee bill applying to attorneys' fees that are to be paid by or on behalf of the claimant to the attorney, that these fees are subject to the process of arms-length negotiation between the attorney and the client and may be presumed to have been freely negotiated. Thus, the Committee believes that minimal governmental supervision of the reasonableness of the fees is appropriate. Accordingly, under the Committee bill, the Chairman's role with respect to attorneys' fees is limited to approving—but not determining the amount of—a reasonable fee. The Committee does not believe that there will be a need for judicial review of fees that are so negotiat-

ed and are in compliance with the various provisions of the Committee bill limiting attorneys' fees and hence has not provided for any judicial review of the fee amount approved by the Chairman for representation before the agency. To the extent that disputes between attorneys and clients do arise with regard to issues other than compliance with the statutory fee limitations, the Committee expects that state and local bar association disciplinary mechanisms should prove adequate for the resolution of such disputes.

*C. Fee Approved for Attorney Representation in Court*

For claims cases appealed to court, the Committee bill provides for court approval of a reasonable fee, subject to specific limitations in particular types of cases. First, if an attorney and claimant have entered into a contingent-fee agreement, the same limitations would apply as in cases resolved before the BUA or VA, that is, 25 per centum of any past-due benefits awarded.

Testimony from the Judicial Conference of the United States at the April 28 hearing raised significant concerns about the amount of court involvement in deciding attorneys' fees. S. 11 as introduced provided that in a case in which the outcome in court was unfavorable to the claimant, the court would take into consideration the likelihood at the time such action was filed that the claimant would prevail and then determine a reasonable fee not in excess of $750. According to the Judicial Conferences testimony, such a provision would involve a difficult and time-consuming determination involving a relatively small sum of money. To address this concern, the Committee bill limits the court's role in a case in which the outcome is unfavorable to the claimant to ensuring that only a reasonable fee, not in excess of $750, is paid to the attorney by the claimant for representation of the claimant.

In cases appealed to court when the matter is resolved in a manner favorable to the claimant, which is defined in a proposed new subsection (g) of present section 3404 to include the granting of all or any part of the relief sought, the Committee bill would authorize court approval of a resonable fee with no other restriction. It is the Committee's intention, by this formulation, to allow courts to exercise their expertise in evaluating, under standards prevailing in the various circuits of the Federal judicial system for the determination of a reasonable attorneys' fee under other Federal laws, such as section 1988 of title 42, United States Code, relating to proceedings to vindicate civil rights, the difficulty of the case, and the attorneys' performance in order to arrive at a reasonable fee.

*D. Punitive Award of Attorneys' Fees*

The Committee bill includes a provision whereby a court could, as an extraordinary remedy in a matter involving a claim for benefits appealed to court, award a claimant, who has prevailed in court, reasonable attorneys' fees to be paid by the VA as part of the court's award of costs following judgment. This authority is intended to be used very sparingly—only in situations where the reviewing court is persuaded that the claimant clearly should have prevailed when the matter was before the agency and that the only

necessity for having to seek court review and thus incur attorneys' fee costs was patently unwarranted action on the part of the VA in its consideration of the claim.

This provision is derived from language used in the Equal Access to Justice Act, title II of Public Law 96–481, and is intended to provide the same standard for punitive award of attorneys' fees as is set forth in section 204 of that Act (codified at section 2421(d)(1)(A) of title 28, United States Code).

*E. Ancillary Attorneys' Fees Provisions*

Title IV of the Committee bill contains two other provisions relating to the approval of attorneys' fees which are intended to clarify the application of the new fee-approval provisions. The first such provision would provide that, to the extent past-due benefits are awarded in a claim, by either the Administrator, the BVA or a court, the Administrator is required to direct payment of the approved fee to the attorney out of the past-due benefits. This authority, similar to that provided for cases under the Social Security Act in section 206 of the Social Security Act (42 U.S.C. 406), would not be applicable if no past-due benefits were awarded so that, even if the resolution of the claim resulted in a claimant qualifying for a monthly payment from the VA for, for example, service-connected disability compensation, the Administrator or the Chairman would not be authorized to arrange for any portion of such future benefits to be paid to the attorney. Thus, in a case with no award of past-due benefits, the claimant and the attorney would have to make their own arrangements for payment of any fee that is approved.

The second ancillary provision in title IV would specify that the provisions proposed in the title are applicable only to cases involving claims for VA benefits and that where no claim for benefits is involved (for example, in constitutional challenges to regulations, Freedom of Information Act cases, and other nonclaim cases), the individual and the attorney would not be restricted by the provisions proposed by the title.

*F. National Association of Radiation Survivors vs. Walters*

The trial was conducted in the District Court for the Northern District of California by Judge Marilyn Patel. Closing arguments were made in October 1987, and the Judge has taken the case under submission.

The Committee bill would lift the fee limitation "once the BVA renders a decision adverse to the claimant on the merits"—which includes representation with respect to such issues as seeking a reopening and reconsideration as well as in judicial proceedings.

On June 28, 1985, Supreme Court decided a case, *Walters* v. *National Association of Radiation Survivors* (No. 84–571) (hereinafter referred to as "NARS"), in which three veterans seeking service-connected-disability compensation, a veterans' surviving spouse seeking dependency and indemnity compensation (DIC) (based on a claim that the veteran died from a service-connected disability), and two organizations (the National Association of Radiation Survivors and Swords to Plowshares Veterans Right Organization) challenged the constitutionality of the provisions of section 3404(c) of

title 38 limiting to $10 the fee that an attorney may receive for representing an individual with respect to a claim for VA benefits.

The United States District Court for the Northern District of California had determined prior to the conduct of a trial that it was likely that the plaintiffs would prevail with respect to their claim that the fee limitation violated the due process requirements of the Fifth Amendment and VA claimants' rights to freedom of speech under the First Amendment. *National Association of Radiation Survivors* v. *Walters,* 589 F. Supp. 1302 (1984). On that basis, the District Court granted a nationwide preliminary injunction against the enforcement of section 3404(c).

The Supreme Court voted 6-to-3 to reverse the District Court's grant of a preliminary injunction, and the case was returned to the lower court for a full evidentiary hearing and decision directly on the merits of the claim that the fee limitation is unconstitutional.

### MISCELLANEOUS

#### *Venue for Judicial Review*

In each of the predecessor measures to S. 11, judicial review was to take place in the Federal district courts. The Committee, in connection with the April 28 hearing, asked witnesses to address whether it would be preferable to provide for review by the U.S. Courts of Appeals rather than the district courts. The responses generally indicated a preference for review in the former foreign. Among the reasons expressed in support of such a change was the view that judicial review under S. 11 is based solely on the record as developed at the BVA and, as a result, there is no need for fact-finding, a function with which the Federal district courts have significant experience. Courts of appeals, on the other hand, have significant experience reviewing cases based on the record before them. A second reason in support of this change was the view that, because the courts of appeals are the experts in reviewing cases on the record, making the veteran go through a district court would only add an additional, unnecessary layer to the process of receiving a final determination. Finally, the number of courts of appeals—compared to district courts—should result in the more timely development of a uniform body of law than if the cases were first taken to a district court.

The Committee is aware that this change may restrict veterans' ability to appear before the court deciding their cases, but believes, give the lack of need for a personal appearance, such a change is desirable on balance.

With further reference to this issue of which court should review VA decisions, there has been some suggestion—for example in section 5 of S. 2292, legislation considered by the Committee at its April 28 hearing, that such review as to direct challenges to VA regulations occur in the U.S. Court of Appeals for the Federal Circuit. However, because the Court of Appeals for the Federal Circuit was formed by merging the Court of Claims and the Court of Customs and Patent Appeals, thereby creating a court of special jurisdiction, defined not by geography but by subject matter because of a special need for nationwide uniformity, providing for review of VA claims in that forum does not seem as desirable as providing

for review in the Federal Circuits generally in order to provide wider access for veteran-plaintiffs. The Committee notes that, as part of the process creating the Court of Appeals for The Federal Circuit, special note was made by the Senate Judiciary Committee (Report No. 97–275) that any expansion of its jurisdiction should be predicated on an adequate showing of the need for nationwide subject matter jurisdiction. The Committee, notwithstanding that no objection was raised by The Federal Circuit to its being given exclusive jurisdiction over direct challenges to VA regulations, is not satisfied that such a need exists in the context of VA claims.

## Cost Estimate

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee, based on information supplied by the Congressional Budget Office, estimates that the costs resulting from the enatment of the Committee bill during the first 5 years following enactment would be $4 milion in fiscal year 1989; $11 million in fiscal year 1990; $13 million in fiscal year 1991; $13 million in 1992; and $13 million in fiscal year 1993. The cost estimate provided by CBO, setting forth a detailed breakdown of the costs, follows:

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, DC 20515

July 7, 1988

Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Congressional Budget Office has prepared the attached cost estimate for S.11, the Veterans Administration Adjudication Procedure and Judicial Review Act, as ordered reported by the Senate Committee on Veterans Affairs, June 29, 1988.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

James L. Blum
Acting Director

Attachment

cc: Honorable Frank H. Murkowski
Ranking Minority Member

CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

July 7, 1988

1. BILL NUMBER: S.11

2. BILL TITLE:

Veterans Administration Adjudication Procedure and Judicial Review Act.

3. BILL STATUS:

As ordered reported by the Senate Committee on Veterans' Affairs, June 29, 1988.

4. BILL PURPOSE:

To establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans Administration (VA); to apply the provisions of sections 553 of Title 5, U.S.C., to rulemaking procedures of the VA; to provide for judicial review of certain final decisions of the VA; and for other purposes.

5. ESTIMATED COST TO THE FEDERAL GOVERNMENT:

| | (By fiscal years, in millions of dollars) 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|
| Function 700 | | | | | |
| Estimated Authorization Level | 1 | 3 | 4 | 4 | 4 |
| Estimated Outlays | 1 | 3 | 4 | 4 | 4 |
| Function 750 | | | | | |
| Estimated Authorization Level | 3 | 8 | 9 | 9 | 9 |
| Estimated Outlays | 3 | 8 | 9 | 9 | 9 |

The cost of this bill would fall in budget functions 700 and 750.

Basis of Estimate

The cost of this bill would be generated by Title III, which would authorize access to the federal court system for

veterans and their survivors to appeal disputed decisions of the VA's Board of Veterans Appeals (BVA). This provision would increase the workload of the BVA, the Department of Veterans Benefits, and the staff of the VA General Counsel and would add to the caseload of the federal district and circuit courts.

The above estimate employs data from the VA pertaining to the number of appeals denied by the BVA, the salary levels of personnel performing various activities affected by the bill, and the average workhours involved in those activities. Data from the Social Security Administration (SSA) regarding the disposition in the courts of appeals of their decisions were also used, as well as data from the Judicial Conference on the cost of establishing new district and circuit court judgeships.

The following assumptions were made in connection with this estimate:

- The provision of the bill allowing judicial review of BVA denials since April 1, 1987, would make approximately 60,000 denied claims eligible for review.
- The BVA would render about 33,000 new decisions a year.
- The denial rate for appeals to the BVA would drop from its present level of 67 percent to around 62 percent with the use of independent medical opinions and precedent decisions.
- Approximately 8 percent of the claims denied from 1987 to enactment would be appealed to the courts; around 15 percent of future denials would be appealed. The SSA has experienced an appeal rate of 20 percent of denials. It is expected that a lower appeal rate would occur with VA claims, because, unlike SSA, the VA resolves in favor of the claimant issues in which the evidence is equally balanced.
- Of cases appealed to the court, 3 percent would be remanded to the VA, based on the remand rate experienced by the SSA.
- The staff of the BVA would increase by 1 clerical position and 1 attorney position.
- The staff of the VA General Counsel would increase by 52 attorney positions and 40 clerical positions. After 1990, when the backlog of retroactive appeals has been litigated, the staff increase would drop to 48 and 36, respectively.

- o A staff increase of 13 positions would be needed in the Department of Veterans Benefits.

- o Approximately 12 new district court judgeships and 1 new circuit court judgeship would be needed to handle the influx of veterans' cases into the courts. Although S.11 does not authorize any new judgeships, this estimate assumes that the authorization would be forthcoming. Should no new judgeships be established, the budgetary impact of this bill would be quite different from that estimated. Without the additional judges, the veterans' claims appeals would significantly increase the backlog in the courts and would be litigated far more slowly than estimated above. As a result, there would be no significant budgetary impact in function 750, and the cost in function 700 would be substantially reduced.

- o Full operation and staffing levels would not be reached until the latter half of 1990.

- o All personnel costs were inflated by the CBO assumptions for federal pay raises.

- o Non-salary personnel costs were assumed to be 30 percent of salary costs.

- o All other operating costs were increased in the outyears by the CBO projection of the GNP deflator.

If funds were appropriated to finance the new judgeships and expanded staff levels that are estimated to be needed under this bill, there would be an increase in direct spending to cover those denied claims that are reversed by the judicial review process. It is estimated that increased benefit costs in the amounts shown below could result from S.11.

| | (By fiscal years, in millions of dollars) | | | | |
|---|---|---|---|---|---|
| | 1989 | 1990 | 1991 | 1992 | 1993 |
| Budget Authority | * | 5 | 13 | 22 | 31 |
| Estimated Outlays | * | 4 | 12 | 21 | 30 |

* Less than $500,000.

6. ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS:

The Congressional Budget Office has determined that the budgets of state and local governments would not be significantly affected by enactment of this bill.

7. ESTIMATE COMPARISON: None.

8. PREVIOUS CBO ESTIMATE: None.

8. PREVIOUS CBO ESTIMATE: None.

9. ESTIMATE PREPARED BY: K.W. Shepherd (226-2820).

10. ESTIMATE APPROVED BY:

James L. Blum
Assistant Director
for Budget Analysis

## REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Veterans' Affairs has made an evaluation of the regulatory impact which would be incurred in carrying out the Committee bill. The results of that evaluation are described below.

S. 11 as reported has five titles: I—Adjudication procedures; II—Veterans' Administration rule making; III—Judicial review; IV—Attorneys' fees; and V—Effective dates.

A. *Estimates of the number of individuals and businesses who would be regulated, and a determination of the groups and classes of such individuals and businesses:*

*Title I.*—Title I would codify internal adjudications procedures with respect to VA benefits within the VA for the purpose of providing statutory procedural protection for claimants while maintaining the informality that characterizes VA proceedings at present; would provide for the development of an administrative record in claims adjudications that would enable a reviewing court to understand and evaluate the proceedings in a particular case; would enhance the agency's ability to carry out its mission after provision is made for judicial review of agency decisions; would provide for the appointment and, removal of the Chairman and Board members; would add new procedures protecting veterans due process rights with regards to medical consultations, including the right, and notice thereof, to appeal to the BVA Chairman a denial of a request for an IME opinion, and notice of the opportunity to request a hearing before a traveling Board Section; and would ensure that veterans receive the benefit of the doubt by designating a 2-to-1 vote for an allowance as a final determination by the Board. This title would not result in any regulation of individuals or businesses.

*Title II.*—Title II would require the VA's rulemaking procedures to be in accord with the relevant provisions in the Administrative Procedure Act. This means that the VA regulations would be required to be promulgated in accordance with the requirements of section 553 of title 5, United States Code, which includes requirements relating to public notice and opportunity for comment in the rulemaking process. The VA states that it has been in voluntary compliance with these requirements for a number of years. Under this title, rules and regulations issued or adopted by the Administrator would be subject to gradual review. This title would not result in the regulation of any individuals or businesses.

*Title III.*—Title III would provide access to the Federal court system for review of VA decisions and VA rules and regulations. No individuals or businesses would be regulated.

*Title IV.*—Title IV would revise the present limitation of $10 contained in title 38, United States Code, on the amount an attorney may receive for representing an individual with a claim for benefits under laws administered by the VA by providing for the approval by the Chairman of limited attorneys' fees, for representation of individuals before the VA, and for court approval of fees for the representation of such claimants in court proceedings authorized by the new judicial review provisions added to title 38 by

title III of the Committee bill. Attorneys representing claimants before the VA or BVA would be permitted to receive more than $10 only after a claim had been denied by the BVA; at that point receiving attorneys' fees for representation before the VA or BVA would be a matter of right if there were new and material evidence presented in support of the claim, and a matter of discretion with the Chairman if the claimant were to demonstrate good cause for the reopening of the claim. It is not possible to predict with any certainty the numbers of claimants who would retain attorneys to represent them in such subsequent proceedings before the BVA or regional offices, or in the Federal courts. The Committee anticipates that the system of veteran service officer representation (free representation provided by employees of various veterans' groups and other organizations) would remain a very strong and vital force and, as a result, that most claimants would not retain private attorneys in connection with VA proceedings.

*Title V.*—Title V contains an effective date provision and authorizes court review of final VA decisions rendered on or after April 1, 1987. Nothing in this title would result in the regulation of any individuals or businesses.

B. *Determination of the economic impact of such regulations on individuals, consumers and businesses affected:*

*Title I through V.*—No significant economic impact on claimants before the BVA or VA (the "consumer" BVA or of VA adjudication procedures and judicial review) is expected to result from regulations under these titles.

C. *Determination of the impact of the personal privacy of individuals affected:*

*Title I.*—There would be no significant impact on the personal privacy of individuals affected by this title beyond any loss of privacy ordinarily entailed in claiming VA benefits.

*Title II.*—This title would have no impact on the personal privacy of any individuals.

*Title III.*—There would be no significant impact on the personal privacy of individuals affected by this title beyond any loss of privacy ordinarily entailed in pursuing a civil remedy in Federal court for the denial of a Federal benefit.

*Title IV.*—There would be no significant impact on the personal privacy of individuals affected by this title. Individual attorneys would be required, in certain instances to provide justification for fees claimed in conjunction with representing individuals, but such a requirement is in accord with the normal practice in cases in which agency or court approval of a fee award is required.

*Title V.*—There would be no significant impact on the personal privacy of individuals affected by this title.

D. *Determination of the amount of additional paperwork that will result from regulations to be promulgated under the bill:*

*Title I.*—Regulations to be promulgated under this title will generate little or no additional paperwork beyond that ordinarily involved in VA claims adjudication processes. However, additional paperwork will be required of the VA in the form of an annual report on certain aspects of Board of Veterans' Appeals operations from the Chairman of the Board to the Congress by December 31, 1986, and annually thereafter; a report following a discretionary

study of alternative methods of speeding claims resolutions at locations convenient to claimants' residences; and in the form of ruling on requests for additional independent medical opinions and the opinions themselves.

*Title II.*—Since the VA has generally been in voluntary compliance for a number of years with the procedures added to title 38 by this title, mandating such compliance should result in no additional paperwork.

*Title III.*—The authorizations in this title for judicial review in Federal courts should not result in the promulgation of any additional regulations. However, it is anticipated that this access to court review will result in a significant increase in internal VA paperwork as files are prepared for courts and cases are defended in court.

*Title IV.*—Pursuant to this title, the Administrator will be required to either approve or deny attorneys' fees for representation of claimants before the VA, resulting in additional paperwork in the form of applications from attorneys and decisions thereon regarding approval of fees. Although all attorneys who represent claimants in matters resolved within the VA will submit such paperwork, it is not anticipated that this requirement will constitute an undue burden on any individual attorney, nor should the paperwork result in significant management problems for the agency.

*Title V.*—It is not anticipated that any regulations will be promulgated under this title.

## Tabulation of Votes Cast in Committee

In compliance with paragraph 7 of Rule XXVI of the Standing Rules of the Senate, the following tabulation of votes were cast in person or by proxy by members of the Committee on Veterans' Affairs at a June 29, 1988, meeting with respect to S. 11.

The Committee agreed to report S. 11, with a substitute amendment proposed by the Chairman, favorably to the Senate by a vote of 11 to 0, as follows:

| YEAS (11) | NAYS (0) |
|---|---|
| Alan Cranston | |
| Spark M. Matsunaga | |
| Dennis DeConcini | |
| George J. Mitchell | |
| John D. Rockefeller IV | |
| Bob Graham | |
| Frank H. Murkowski | |
| Alan K. Simpson | |
| Strom Thurmond | |
| Robert T. Stafford | |
| Arlen Specter | |

During consideration of S. 11, the Committee took a roll call vote on an amendment offered by Senator Murkowski to substitute the text of S. 2292 for the Chairman's proposed substitute amendment for the text of S. 11. The amendment was defeated by a vote of 4 to 7, as follows:

| YEAS (4) | NAYS (7) |
|---|---|
| Frank H. Murkowski | Alan Cranston |
| Strom Thurmond | Spark M. Matsunaga |
| Robert T. Stafford | Dennis DeConcini |
| Arlen Specter | George J. Mitchell |
| | John D. Rockefeller IV |
| | Bob Graham |
| | Alan K. Simpson |

### Agency Reports

On February 9, 1987, and April 22, 1988, the Committee Chairman requested the Administrator of Veterans' Affairs for reports setting forth the agency's views on S. 11 as introduced and S. 2292, respectively. No responses have yet been received. In lieu of such reports, the agency's testimony submitted in connection with the April 28, 1988, hearing and its testimony relating to the Board of Veterans' Appeal submitted in connection with the June 9, 1988, hearing follow.

STATEMENT OF DONALD L. IVERS
GENERAL COUNSEL
VETERANS ADMINISTRATION
BEFORE THE
SENATE COMMITTEE ON VETERANS' AFFAIRS
APRIL 28, 1988

Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the views of the Veterans Administration on S. 11, 100th Congress, entitled the "Veterans' Administration Adjudication Procedure and Judicial Review Act," and regarding Senator Murkowski's bill, S. 2292.

S. 11 contains four substantive titles: First, the measure would codify, with some changes, the procedures now used by the Agency in making benefit determinations. Second, it would statutorily subject VA rulemaking to the provisions of the Administrative Procedure Act, 5 U.S.C. § 553. Third, it would repeal section 211(a) of title 38, United States Code, to authorize judicial review of individual VA benefit decisions in Federal courts. Finally, the proposal would substantially revise the current $10 statutory limit on the fee an attorney may receive from a claimant for representation in a claim matter.

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The provision of overriding significance to veterans and to this Agency is title III, which would involve Federal courts in determinations concerning VA benefits. The remaining aspects of the bill essentially facilitate judicial review. For the reasons that follow, the VA is strongly opposed to enactment of S. 11.

Mr. Chairman, in past reports to this Committee we have identified many technical problems related to similar legislation, and I refer the Committee to our testimony on H.R. 585, 99th Congress, as well as our report on S. 367, 99th Congress. In the short time allotted to us this morning, I will forego discussion of the details of the bill and, instead, elaborate generally on the bases for the Agency's opposition to judicial review under S. 11.

At the outset, I wish to put to rest a popular myth that the statute barring judicial review denies veterans their right to due process of law. That simply is not the case. The courts have consistently held that constitutional guarantees of due process do not require a judicial remedy for contesting all administrative actions.1/ In fact, there are approximately 80 Federal statutes prohibiting judicial review in other spheres of government activity. The Federal Employees

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Compensation Act, 5 U.S.C. § 8128(b), for example, provides that a government employee, including members of this Committee and staff, claiming disability compensation for work-related injury may not seek judicial review of the Secretary of Labor's denial of the claim. Over 156,000 such claims were filed last year. Thus, there is nothing unique or unfair about an exclusively administrative process for rendering VA benefit decisions.

It is noteworthy that section 211(a) does not infringe upon the right of a veteran to go to court to challenge the constitutionality of VA statutes, thereby preserving the balance of power between the branches of government.

Moreover, the VA adjudication system contains essential procedural protections to ensure fairness. Claims for VA benefits can be reviewed, often on multiple occasions, on two separate administrative levels. The Agency assists in the procurement of evidence to support a claim, and claimants may take advantage of the skilled advocates provided free of charge by the veterans service organizations. Claimants are advised of the law and regulations pertinent to their claims and may request oral hearings to present their arguments personally to the adjudicators. In addition, internal quality

4.

control programs assure that VA decisionmaking is kept to a high standard of accuracy. We are unaware of any administrative process operated by any other Federal agency that is more pro-claimant, simpler to use, or more equitable, regardless of the presence of judicial review.

Generally speaking, veterans have a special advantage over claimants for other types of gratuitous benefits. Veterans are represented institutionally by well-organized veterans groups that not only scrutinize the operation of the Agency, but also actively represent the views of veterans before Congress and the Executive Branch. Moreover, congressional committees continuously provide aggressive oversight of the VA. They focus public attention on trends, policies, and programs, and hold the Agency accountable. Thus, veterans who utilize the system enjoy special access and input into the system that provides the benefits they justly deserve.

The VA's primary objections to enactment of S. 11 are that judicial review will, over time, cause the entire administrative system to become more adversarial and will cause the processing of all claims, whether allowance or denial, to become burdensome and protracted. Judicial scrutiny of the record prepared administratively, particularly with increased

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involvement of attorneys whose training and experience are geared to adversarial proceedings, will alter the claim process in a fundamental and pervasive manner.

For instance, VA would be thrust into the unaccustomed adversarial role of developing evidence to refute a claimant's contentions in order to assure that the record supports denial of an unmeritorious claim to the satisfaction of a reviewing judge. The Agency would have to document every factor and consideration that led to denial of a claim, that is, "build the record." Each procedural step would have to be recorded, including minor ministerial actions. Unable to rely on judicial deference to the medical judgment of its adjudicators, who include doctors of medicine, VA would have to develop and introduce additional record evidence, such as consultative opinions and scientific treatises or journal articles contrary to the claimant's theory, for the benefit of judges untrained in the medical profession.

This adversarial posture would, conceivably, be most evident in cases in which eligibility turns upon the credibility of a witness, perhaps the claimant himself or herself. If, for whatever reason, VA found the witness' testimony less than persuasive, it could be forced to examine the witness in a

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manner designed to expose the basis for VA's disbelief. Direct, probing questioning by the rating board or BVA members would be needed to create a record to support a denial. The examination, with a view toward withstanding judicial scrutiny, will, at a minimum, place us in an antagonistic role that renders the process more acrimonious. Further, the VA will have to make thorough, explicit findings on the credibility of witnesses and cogency of self-serving statements. Overall, the assistive relationship with veterans that we currently enjoy would be undermined.

We are also concerned that S. 11 would increase participation in the administrative process by private attorneys. It may be anticipated that they will become involved at the earliest stages of preparing and presenting claims for benefits. Moreover, section 108 of S. 11 seems to presuppose active involvement of attorneys in the administrative stages, by calling for the submission of briefs, service of interrogatories, etc. This may also require the early involvement in the adjudication process of attorneys on behalf of the VA, an entirely new and, we feel, undesirable element to be added to the VA benefit claim process.

The Supreme Court in the case of Walters v. National Association of Radiation Survivors, 105 S. Ct. 3180, 3191-3192 (1985), observed that the introduction of attorneys inevitably gives

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administrative proceedings a more adversary character. In rejecting a constitutional challenge to the current attorney-fee limitation, the Court concluded:

> 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

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> might have been a short conference leading to an amicable result into a protracted controversy." Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1287-1290 (1975).

Furthermore, judicial review may result in the loss of a certain amount of administrative flexibility in the review of claims. For example, the Agency liberally applies standards of particularity in the filing of appeals and the proferring of "new and material" evidence to reopen a case. This means the VA often expends extra effort in a host of cases that, technically, might be viewed as not complying with the rules for obtaining review. With the likely change in our relationship with the veteran following enactment of the bill, increased pressure to handle cases as expeditiously as possible, and the participation of attorneys, who should be held to a higher standard for compliance with such "jurisdictional" rules, the relaxed approach may be expected to change.

In addition, judicial review will likely require the VA to alter procedural and organizational aspects of the decision process. The need to build the record will require VA to secure additional documentary evidence, time-consuming clinical examinations and field examinations, and, in some cases, compel

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claimants' or other witnesses' attendance at hearings deemed necessary by the Agency. Some courts have been hostile to adjudicators who take administrative notice of facts based upon their own experience and training when rendering a decision. At the very least, then, the VA will also have to put on the record the testimony of medical experts, no matter how mundane. This will protract proceedings and increase costs. Ultimately, the Agency may be forced to conclude the presence of medical doctors on its adjudication panels is unnecessary, if not antithetical to the notion that deciding officials may not rely on their own knowledge and expertise.2/

The use of interrogatories will also protract the claim process. It is almost certain that claimants will serve interrogatories on a host of individuals who are believed to have knowledge pertaining to a claim, including military personnel, VA officials, private citizens, physicians, independent medical experts, adjudicators, or service organization members. The process of answering interrogatories, of course, can be burdensome and time-consuming, and may cause some recipients to seek compensated counsel for advice. Subjecting the pool of independent medical experts to interrogatories may also strain that valuable VA resource. Moreover, service of interrogatories upon VA or fee-basis

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physicians will require them to interrupt their professional services. Similarly, service of interrogatories upon VA adjudicatory employees will take them away from their claim-processing duties.

In addition to the detrimental effect the bill will have on the claim process and VA's relationship with veterans, we are greatly concerned with the forum given responsibility for judicial review under S. 11. In our view, the U.S. district courts are an inappropriate and disadvantageous venue for appeals of VA benefit decisions.

Vesting authority in the 575 judges of the 94 Federal district courts will result in inconsistent case law and geographically-based decisions, thereby causing an individual's entitlement to benefits to be governed, at least in part, by where the claimant resides. As now, courts will differ on procedural rules, evidentiary requirements, and interpretation of substantive law. Lost will be the constancy fostered by having final authority vested in a single, collegial administrative review board with uniform procedural rules, guided by a consistent interpretation of substantive law.

The increase in the caseload of the district courts brought about by the enactment of judicial review would not only threaten the quality and timeliness of decisions, but also

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encourage the use of summary procedures to lighten the burden. Judicial rules of self-restraint, e.g., waiver, laches, exhaustion, or standing, may become rules of self-preservation.3/ In our view, the resultant product would not always be the "day in court" promised by the proponents of this legislation. A secondary effect may be a need to expand the courts in areas where caseloads increase dramatically.

Finally, a consequence of the participation of compensated attorneys under S. 11 will be an increase in costs for VA claimants. The primary purpose of the present attorney-fee limitation is, of course, to preserve a claimant's award of benefits to the greatest extent possible. VA's relatively simple, nonadversarial procedures as well as the availability of free expert representation from the veterans service organizations obviate the need for legal counsel.

With increased attorney participation under the bill, however, those who retain counsel will obviously bear greater expense, and those who do not will feel the effects of the burdens and delays brought about by attorney participation. Moreover, we believe that such representation would eventually become the norm, regardless of whether a claimant actually needs a lawyer. As the Supreme Court has observed in regard to increased attorney participation:

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> 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.

Walters v. National Association of Radiation Survivors, 105 S. Ct. 3180, 3192 (1985).

In conclusion, we are concerned that S. 11 would work to the great detriment of the vast majority of veterans who seek benefits from the VA as it formalizes and delays the processing of claims, and alters the cooperative relationship between claimants and the Agency. The bill is particularly inappropriate at this time when thoughtful, conscientious observers are calling for alternatives to litigation in the district courts and advocating more reliance on nonlawyer

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representation in claims for Government benefits.4/ It is important to bear in mind that the VA is a "mass-justice" agency, processing approximately 5 million claims annually. While judicial review may be a compelling notion when parochially thinking of an individual case, the magnitude of the anticipated caseload and impact on the handling of all the millions of claims require a more thoughtful approach to this issue.

Furthermore, judicial review of VA benefit decisions is a veterans issue. Yet, the issue of judicial review is being championed by small groups representing a miniscule segment of the veteran population, a few attorneys, and a corps of editorial writers. The vast majority of veterans are generally satisfied that they have a fair and impartial forum in the present system. What is more, the present system, while imperfect, is informal and assistive. It works for veterans, it works with veterans, and it is monitored by veterans. So uniquely beneficent a system should not be jeopardized for the philosophical end of guaranteeing a few unsuccessful claimants the opportunity of having their claims again considered -- and probably denied -- in a court of law.

You have specifically asked us to consider the merits of providing direct appeal of final VA decisions to the U.S. circuit courts of appeals. In our view, such a plan would

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provide the inherent advantage of collegial decisionmaking and the greater degree of consistency in decisions rendered by the courts of appeals. In addition, the panels of the courts of appeals have more familiarity with record-review of administrative actions, although their experience is most often with administrative records heavily influenced by preliminary review in the district courts.

The VA's objections to judicial review under S. 11, however, would continue to apply if the bill were amended to merely substitute the courts of appeals for the district courts. The prospect of court scrutiny and increased participation by attorneys would likewise make the adjudication system more adversarial, formal, and time-consuming. It, too, would impose additional, unnecessary costs upon claimants, the VA, and the courts. In addition, the demands of the caseload would further tax the resources of the courts and, perhaps, affect the collegial nature of the courts.

To the extent such a proposal is being considered, we would observe that existing law provides discretionary review authority in the courts of appeals in some cases, e.g., review of interlocutory orders under 28 U.S.C. § 1292(b) or decisions of the Merit Systems Protection Board under 5 U.S.C. § 7703(d). Given the potentially staggering number of appeals

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of VA benefit decisions, it may be preferable to similarly provide for discretionary, rather than mandatory, review limited to cases involving issues of law or policy having broad implications.

Mr. Chairman, we have also given thought to S. 2292, the "Veterans' Judicial Review Act," which was introduced last week by ranking minority member Murkowski. In his remarks upon introducing the bill, Senator Murkowski emphasized that veterans deserve a quick, convenient and responsive appellate process. Although we of course agree, we must oppose S. 2292 in its current form because of its serious shortcomings.

Under section 5 of the bill, for example, the BVA would no longer be bound by VA regulations, instructions of the Administrator, or precedent opinions of the General Counsel. Hence, the BVA would not be bound by essential regulations such as the Schedule for Rating Disabilities, doctrine of reasonable doubt, or even the Agency's liberal rules of practice and procedure. While there may be some sentiment for rendering the BVA more independent, the complete abrogation of VA regulations in the context of the Board goes too far and could lead to confusion, if not chaos.

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The provision would also undermine the crucial role of regulations and General Counsel opinions in clarifying the law and maintaining consistency in the adjudication of claims. Without the binding effect of regulations and General Counsel opinions, the law applied to claims may vary depending upon the stage of adjudication; that is, rating boards may apply different interpretations of VA statutes than the BVA. In addition, the interpretations of law may differ significantly even among the 21 sections of the Board. One of the primary purposes of regulations and General Counsel opinions is to foster a constancy in the Agency's interpretations of the law so that veteran claimants are treated equally. Where disagreements with these interpretations arise, section 223 would provide for an appropriate, judicial remedy.

Moreover, the inference raised by section 5 and fostered by the more vocal advocates of judicial review that the General Counsel, a political appointee, would render legal opinions on benefit claims issues based on political and budgetary motivation, rather than sound legal reasoning, is without merit.

For these reasons, the current interpretative primacy of regulations and General Counsel opinions at the administrative stages must be maintained. Accordingly, if the Board, as we believe, should be bound by VA regulations, it follows that they should not be permitted to invalidate those regulations.

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We also believe that proposed section 4010, which would grant claimants a right of review on top of that afforded by proposed section 223, is both unnecessary and undesirable. The judicial review of Agency regulations provided by proposed section 4010 essentially duplicates the remedy provided by proposed section 223. Moreover, judicial review under the latter section would be divisive and in some cases pit the Administrator against the veteran.

To facilitate review of regulations under proposed section 4010, it would be necessary for the Administrator to be represented by counsel before the BVA to properly develop and present the Agency's interpretation of regulations. This would place the Administrator in a directly adversarial role vis-a-vis veterans, a situation that should never be permitted. We anticipate that the Agency, as rulemaker, would have to brief and argue the broad policies, program concerns, and administrative histories underlying challenged regulations for the BVA's benefit as well as to establish a record for judicial review purposes.

We are also troubled by the attorney-fee provisions of the bill. It is important to note that S. 2292 would authorize attorney fees in excess of $10 for any challenge to the validity of a regulation under proposed section 4010,

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regardless of the merits of the challenge or the ultimate disposition. We believe that this economic incentive may encourage attorneys to make regulation challenges as a matter of course, regardless of the nature of the veterans' claims.

Proposed section 4010 also contains several ambiguities that may inadvertently broaden the scope of judicial review beyond the narrow bounds intended by the drafters of the bill. The definition of "regulation" in proposed section 4010(b)(8), for example, goes beyond the traditional concept of formal rules adopted by notice-and-comment rulemaking and may conceivably include manual provisions, circulars or policy statements issued by departments of the VA, but which do not have the force of law.

In addition, we foresee that veterans may use proposed section 4010(b) to seek judicial review of the validity of VA regulations as applied by the Agency to their particular circumstances. Such challenges would put extensive factual and administrative records before the courts. This will enable the courts to more easily interpose themselves in fact-finding and individual benefit determinations.

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Judicial review of Agency regulations under the bill and the provisions respecting the independence of the BVA will also raise important questions of deference. In challenges brought under proposed section 4010, for example, there is no guidance as to the weight to be given by the BVA to statutory and regulatory interpretations of the VA. The issue will be even more problemmatical in appeals from the BVA to the courts of appeals, wherein the courts will have to resolve the question of deference between the interpretation of the rulemaker (VA) on the one hand or the judgment of the independent arbiter (BVA) on the other. In our view, the bill should explicitly state that the VA's interpretation of its statutory authority and regulations is to be given conclusive weight unless clearly shown to be arbitrary, capricious, an abuse of discretion, or contrary to law.

Finally, the provisions respecting appointment, tenure, and compensation of BVA officers and members would be difficult to phase-in and manage. For example, it is not clear how current members would be affected and, if all new appointments would be required, how the Board should proceed in the interim. Likewise, the 15-year terms of BVA officers and members, without specific authority for reappointment or removal for cause or disability, could complicate recruitment and employment of qualified personnel. Even more

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important, the 15-year limitation could operate to undermine their independence. In addition, we are concerned that the preclusion of bonuses as a managerial prerogative may ultimately have an adverse impact on the timely handling of appeals.

For the foregoing reasons, the VA opposes enactment of the bill

FOOTNOTES

1/ See Lynch v. United States, 292 U.S. 571 (1934); Tutun v. United States, 270 U.S. 568 (1926); Kline v. Burke Constr. Co., 260 U.S. 226 (1922); Milliken v. Gleason, 332 F.2d 122 (1st Cir. 1964), cert. denied, 379 U.S. 1002 (1965).

2/ See generally Stewart v. Harris, 508 F. Supp. 345 (D. N.J. 1981); Chism v. Sec. of HEW, 457 F. Supp. 547 (C.D. Cal. 1978); Lightfoot v. Mathews, 430 F. Supp. 620 (N.D. Cal. 1977).

3/ See generally H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings on H.R. 585 before the House Committee on Veterans' Affairs, 99th Cong., 2d Sess. 179-184 (1986) (Statement of Keith A. Rosenberg, Esq.).

4/ See 1986 A.C.U.S. Recommendation 86-3; Burger, Isn't There a Better Way?, 68 A. B. A. J. 274 (March 1982); Wright, Judicial Review and the Equal Protection Clause, 15 Harv. C. R. - C. L. Rev. 1 (1980).

5/ See Traynor v. Turnage, No. 86-622 (S. Ct., Apr. 20, 1988); McKelvey v. Turnage, No. 86-737 (S. Ct., Apr. 20, 1988).

VETERANS ADMINISTRATION
Statement of Kenneth E. Eaton
Chairman, Board of Veterans Appeals
To the Committee on Veterans' Affairs
United States Senate

June 9, 1988

Mr. Chairman, I appreciate having this opportunity to meet with your Committee to discuss the operations and performance of the Board of Veterans Appeals, particularly in view of the attention recently directed to the VA in connection with proposals for judicial review and for the establishment of the VA as a cabinet level Agency.

In order to assure proper responsiveness to the needs of our veterans, the Board has developed a system to monitor and measure productivity which has been an integral part of the BVA's management operations for many years. The Board regularly examines productivity at a variety of levels ranging from the micro-level, where the productivity of individual employees is measured, to the macro-level, where the entire BVA operation is examined as a single productive unit. Within the Board's Professional Service operations, the two forms of productivity measurement that are most universally employed are: (1) productivity measurement reports for individual staff attorneys; and (2) measurements of BVA Board Sections' performances in actual decision production relative to decision production goals.

BVA productivity measurement at the individual attorney level is a relatively simple process. At the time an appeal is first received at the Board, it is categorized into one or more of approximately 90 different issue classifications that are used for document tracking and productivity measurement purposes. Standard unit time values have been assigned to each of these appellate issue categories based upon analyses of the attorney work requirements associated with these various issue categories. At the conclusion of an evaluation period, summaries are developed showing each staff attorney's decision production during that time period. Included in these summaries are totals of the standard unit time values associated with each staff attorney's decision production. Productivity for each individual attorney is then determined by computing the ratio of his or her total standard unit hours to the hours that individual was actually on duty and actively engaged in decision production activities.

Individual productivity calculations are routinely developed for each BVA staff attorney in grades GS-9 through GS-14 on both a quarterly and an annual basis. These calculations are then provided to the individual attorneys and their supervisors, Board Section Chief Members, in a report format that also incorporates a formal rating of the quality of their work products, as determined by their supervisors. The two numerical factors in these reports representing productivity and quality constitute two of the significant elements of the formal performance plans applicable to BVA staff attorneys. In addition to the regularly recurring, annual performance

evaluations, productivity data are utilized in determining attorney eligibility for career ladder promotions through grade GS-14. Productivity data is also used by BVA management for a variety of other purposes unrelated to personnel evaluations, such as Board Section assignments.

Productivity measurement at the Board Section level is a less formally developed process, and the Board's uses of productivity-related information are oriented towards motivation rather than evaluation needs. A weekly production goal of 40 decisions has been established for each Board Section, and feedback is provided to the Board Sections at regular intervals showing their progress towards meeting the production targets. A production year running from April 1 through the following March 31 has been established for Board Section production purposes. At the conclusion of the production year, the relative performance of the respective Board Sections over the preceding year is helpful in determining the effectiveness and efficiency of the entire BVA operation.

At the risk of over simplification, it can be said that the three most critical aspects to management of the Board from a production perspective are the characteristics of quantity, quality and timeliness. These three characteristics are so closely interrelated that a significant change in any one of these areas is likely to affect some other. This interrelationship aspect is particularly relevant to the characteristics of production quantity and production timeliness. BVA Response Time of Appeals has long been a matter of considerable interest to many parties. Because the Board's expected workload can be projected with some degree of accuracy on at least a short-term basis, any BVA slippage in meeting production targets will ultimately result in an increased response time on appeals. The BVA has organizational production goals that must be met if we are to accomplish our mission in a satisfactory manner. We believe that the best way to assure that the Board accomplishes its mission is to provide clearly defined and reasonable production goals at each definable organizational subunit.

The BVA has come under some criticism in the recent past for being excessively preoccupied with production matters, and that, ultimately, veterans are the ones who will suffer as a result of our excessive emphasis on productivity. We believe that this is an unfair characterization. Management of the BVA as an organization and accomplishment of its organization mission require a broad perspective. The essential role of management in this process is to be able to view the VA appellate program in this broad perspective and then to determine an appropriate balance between imperatives for productivity and timeliness and the requirements for review, research, and thoughtful deliberation on the part of both attorneys and Board Members.

A significant accomplishment of the BVA has been the successful reduction in Response Time of Appeals. BVA Response Time of Appeals, our most commonly used indicator of the Board's capacity for handling appeals on a timely basis, had risen to an intolerable level by the early 1980's due to steady increases in the rate of appeal filings experienced nationwide beginning in the mid-1970's. The structural expansion to 21 board sections facilitated by the passage of Public Law 98-223, combined with the increased budgetary resources necessary to support this expansion, allowed us to turn the tide on the appeals backlog and reduce our response time to roughly 125 days.

We believe that our response time of 125 days strikes a reasonable balance between appellants' desires for a prompt resolution of their appeals and the time requirements for thorough review and the correction of any due process defects by the Board. Our response time has remained relatively constant over the past 2 years despite some rather wide fluctuations in the Board's average employment level that resulted from the staffing restrictions we had to apply during FY 1986 to accommodate the funding constraints associated with the Gramm-Rudman-Hollings funding sequestrations of that year. We began FY 1987 at an employment level of only 392 FTEE, which was 35 FTEE below our congressionally authorized strength of 427 FTEE. Consequently, our first order of business in FY 1987 was to begin the process of recruiting qualified replacement staff and providing them with the training necessary to play productive roles in the Board's operations. This process was completed by the middle of FY 1987, and our response time and other production indicators for the second half of last fiscal year reflected the restoration of our previously impaired productive capacity. For the current fiscal year, the Board's personnel strength is approximately at our fully staffed and congressionally authorized level. I have included a table (Table 1) with this prepared statement summarizing some of our most relevant production related statistics over the past 5 fiscal years to provide you with an overview of our productive endeavors.

Our overall timeliness, as indicated by our response time, is quite respectable. I believe that the term, "backlog," which we have grown to accept over the years to describe the VA appellate program's pending workload, is somewhat misleading. We have come to refer to all appeals that are pending in any phase of the appellate process as part of an appeals "backlog," when it is only natural to expect some volume of appeals to be in process and awaiting final decision under the highest capacity and most streamlined appellate system that would be theoretically conceivable.

Over this past year we have had an average of approximately 15,500 cases physically on hand at the Board in various processing phases. To provide an example of how these appeals are distributed at the Board from a processing standpoint, we have broken down the Board's 15,302 cases that were pending as of the end of August 1987. Of these cases, 6,433 or 42.0% were charged to our Hearing Section, the majority of which were in the hands of the various veterans service organizations for review and preparation of briefs on behalf of the appellants; 1,411 or 9.2% were under the control of our Correspondence and Special Correspondence and Review Sections, which are responsible for handling much of the Board's voluminous correspondence requirements, including appeal-related inquiries from congressional offices, veterans and their families, veterans service organizations, and a host of other correspondents; 970 or 6.3% were in the hands of other sections of the Board's Administrative Service for some required procedure; and 4,847 or 31.8% were located either in a Board Section or elsewhere in the BVA Professional Service. Only 1,641 cases or 10.7% of the Board's total volume were in a pending docket action status awaiting BVA action. Given the BVA's average weekly production of between 800 and 850 appellate decisions, the 1,641 cases that were pending docket action amount to approximately a 2-week workload. We have found through experience that, given our present size and section configuration, the Board

operates most efficiently when our physical case inventory is between 12,000 and 16,000 appeals. When our inventory drops much below this ideal level, our efficiency begins to drop. When viewed from this inventory perspective, I feel that the 15,500 decisions we have pending at the BVA on the average cannot in all fairness be categorized as a backlog.

This same inventory rationale is applicable to the volume of appeals that are pending in the field in varying appellate process stages. For the past 2 years there have been roughly 45,000 appeals pending in the field at all times awaiting final action, if we include in this figure all pending Notices of Disagreement and all Substantive Appeals that have not yet been perfected for certification to the BVA. It is misleading to classify these cases as a backlog, however, because the appeals are not yet ready for BVA certification. Under the arrangements that have been in effect between the Department of Veterans Benefits and the Board for the past 2 years, DVB field stations are instructed to immediately forward to the Board all cases that have been certified for BVA action. Over the past 3 years, 287 calendar days elapsed on the average appeal between the time that a Notice of Disagreement was first received and the time that the Substantive Appeal was certified to the BVA. While I cannot speak for DVB as to the processing time that ideally should be necessary between receipt of a Notice of Disagreement and certification of a Substantive Appeal to the Board, it is reasonable to assume some volume of appeals will always exist in this pre-certification status.

I believe that real progress has been made in recent years in reducing the overall time required to decide appeals within the entire VA system. There is always room for improvement, and we intend to continue to press for such improvement wherever we can identify delays in the appellate system. As mentioned earlier, we feel that the response time level at which we have been operating for the past 2 years strikes a reasonable and desirable balance between the needs for timeliness in the resolution of appeals and the allowance of a sufficient timeframe on each appeal to assure adequate standards of due process consideration and thoughtful deliberation on the part of the Board. We do not want to seek timeliness at the expense of quality.

Over the past few years we have intensified our focus upon the Board's quality review program. Our reasoning behind this increased attention is that as the Board has grown to meet the increased demands placed upon it by VA appellants, it has become more difficult yet simultaneously more important to ensure that we retain high standards of quality and a certain degree of consistency among Board Sections in their treatment of veterans' appeals. We have formalized this program and included it in our annual Program Operating Plan that we provide to the Administrator. The specific objectives we have set forth for this program are as follows: (1) to assure that all appellate decisions will meet the Board's standards of substantive accuracy and legal sufficiency; (2) to assure that all written decisions convey the Board's findings clearly and effectively with compassion and sensitivity towards the veterans and their dependents; and (3) to assure that a certain level of consistency is maintained among decisions and Board Sections, while still preserving the Board Members' decision-making independence. Before commenting on the effectiveness of this program, I will briefly describe how our quality review system works.

The Board's quality review program is a multi-tiered operation. After a signed decision leaves a Board Section but prior to its dispatch from the Board, it is forwarded to our Appellate Index and Retrieval Staff (AIRS) where it undergoes editing and examination by a rotating group of predominately junior attorneys who form the first level of our quality review structure. 100% of BVA decisions are subjected to a "preliminary screening" at this level. Any decision that appears to contain any defect of either a substantive or nonsubstantive character is withdrawn from the normal processing flow and directed to the next level of quality review. This next level of quality review is staffed with select senior attorneys who will analyze in depth each decision referred to their attention. Decisions found to contain any minor or nonsubstantive errors will be returned to the initiating Board Section for correction and returned to the normal processing flow. Decisions that appear to be substantively flawed or that contain any significant error will be forwarded to one of the Board's two Deputy Vice Chairmen (DVCs), who constitute the highest level of quality review. A random sample of two decisions from each Section, or 42 decisions a week, are automatically referred to the DVCs. In addition, all decisions of a certain type are referred to the DVCs, including reconsiderations, administrative allowances, dismissals of an issue and decisions involving certain subject matter, such as radiation and loan guaranty waivers. The DVCs will review and analyze decisions that reach their level within the quality review chain, and any issues that remain doubtful will be resolved between the DVCs and the Chief Members of the originating Board Sections, after which they will be dispatched as a final decision. Copies of all dispatched decisions are then sent to AIRS where they again undergo a final 100% screening by BVA professional staff members in the course of being indexed for inclusion in the Board's decision data base. Should any discrepancy be discovered during this procedure, the decision would be referred to one of the DVCs for a determination as to whether some corrective action is appropriate.

I believe that our quality review program has become an invaluable part of the BVA system that is providing us with demonstrable, if not entirely measurable, results. Quantitative program indicators for any quality review program are tenuous at best. Recognizing this limitation, one approach we have taken for evaluating our quality review operation is to first establish certain program indicators that will clearly reflect the breadth and intensity of our quality review effort. The percentage of BVA decisions subjected to intensified quality review refers to the group of decisions that, as a minimum, have gone to the second level of quality review. The second indicator (i.e., number of BVA decision categories subjected to 100% quality review) consists of appeal categories which, due to the topical content, may have a higher propensity for error or may be more highly visible as a result of public interest.

In addition to these indicators which are intended to quantitatively measure the extent of the Board's effort applied to quality review, we have only recently attempted to close the feedback loop by establishing, on a trial basis, two indicators of quality that originate from sources external to the BVA. The first of these two indicators is legitimate motions for reconsideration received which allege obvious decision errors. Please note that our use of the term "legitimate" in this context is not intended to be an evasive measure; we merely wish to exclude any frivolous reconsideration requests that

we may receive. The second indicator consists of post-decision referrals from indexers in AIRS to the DVCs identifying substantive decision errors. Lastly, these somewhat quantitative indicators are supplemented by the non-quantitative indicators that have traditionally served as measures of our performance. Prominently included in this group is the feedback we receive in a variety of forums from various interest groups, including veterans service organizations, Members of Congress, and other interested parties, our critics included.

I believe that our quality review program has influenced the general quality of the Board's decisions in a very positive manner and that we are achieving the objectives set out for the program. One of the few external quantitative performance measures that we have tentatively established for the program, i.e., reconsideration requests, have been running at a rate that is between 5% and 10% below that of the preceding year. From a content standpoint, BVA decisions are longer, more complex, and more detailed. The average decision dispatched during the first half of FY 1987 was over 10% longer than the average decisions dispatched 2 years ago at the outset of our efforts to enhance the quality review effort. Ultimately, however, the final analysis of the effectiveness of our program will rest with the judgment of others and will be made through more qualitative and intuitive processes.

There has been considerable interest generated in the recent increase in the number of remands ordered by the Board of Veterans Appeals. Our ongoing observations indicate that the quality level of the appeals function at VA field stations is consistently high, with certain minor exceptions that we will enlarge upon in one area of our remand discussion. An indicator that we believe exemplifies the generally high quality level of the field station appeals function is the number of BVA allowances reversing field station decisions compared to the number of field station adjudicative decisions made during the same period. In FY 1986, there were a total of 5,362 BVA allowances versus a total of 5,147,182 adjudicative decisions for an overall reversal rate of .1%. Similarly, there have been 5,270 BVA allowances versus 4,970,556 adjudicative decisions, resulting in a reversal rate of .1% for FY 1987. I believe that these statistics are indicative of a high quality field station appellate program.

The fact that BVA remand rates have risen in recent years is a matter that is of both interest and concern to the BVA. Without speculating at this point as to the reasons underlying this rise in the BVA remand rate, we have first reviewed the indicator that we consider to be most indicative of whether the Board's remand rate is generally well-founded. The indicator we use for this purpose is the Benefits Granted Rate, which is an expression on a percentage basis of the rate at which benefits are granted on remanded appeals (e.g., during FY 1987, benefits were granted in 1,781 remanded appeals and a total of 8,564 appeals were remanded). For FY 1982 through FY 1987, BVA remand rates and benefits granted rates were as follows:

| | FY 82 | FY 83 | FY 84 | FY 85 | FY 86 | FY 87 |
|---|---|---|---|---|---|---|
| BVA Remand Rate | 15.6% | 15.5% | 14.9% | 16.3% | 18.8% | 20.7% |
| Benefits Granted Rate | 22.1% | 22.0% | 20.9% | 24.1% | 21.9% | 20.8% |

Although the Benefits Granted Rate has dropped slightly from the peak rate of 24.1% experienced in FY 1985, the overall rate has not varied nearly as much as the BVA remand rate during the extended time period.

While we would like to be able to point to some single factor that we have identified as the principal cause behind our remand rate increase, this, unfortunately, is not possible. Our examinations and analyses of this issue have led us to several factors that we believe are all partially responsible for the changing trends in our remand rate. These factors are as follows:

(1) Effectiveness of Advocacy. Veterans service officers and other representatives are becoming increasingly more effective as advocates on behalf of VA appellants. Improved training and other resource and staffing changes have clearly resulted in enhanced levels of representational services to veterans. Like all of us, veterans service officers are being evaluated "by the numbers" within their own organizations relative to their performances in the representational aspects of their positions. They too are aware that 20% to 25% of all remanded appeals result in an allowance of benefits in the field and that some percentage of those appeals that return to the Board from remand will also be allowed. Consequently, service officers will logically press for a remand of an appeal where an allowance does not appear likely. Our experience indicates that service officers in general have become more tenacious and effective in pursuing remands.

(2) Aging Appeal Base. As we draw further away time-wise from the periods of armed conflict that have been responsible for a significant number of the appeals that appear before the Board, we tend to see fewer appeals, as a percentage of the Board's overall appellate workload, in which the issues are relatively simple and the BVA can render a correspondingly simple decision to either allow or deny with no further development requirements. Events and supporting evidence tend to become hazy with the passage of time, thus lending an additional element of complexity to the Board Members' decision-making responsibilities. We believe that such added complexities will inevitably lead to some additional remands.

(3) BVA Handling of Special Category Appeals. Certain special categories of appeals have tended to attract considerable attention from within the veteran community and the public at large. We must frankly admit that the BVA has a somewhat heightened awareness of case development needs when confronted with appeals within these special categories, which at various times have included Agent Orange appeals, ionizing radiation appeals, appeals of former POWs, and PTSD appeals. While the remand rates for most of these special category appeals are currently in line with the Board's overall remand rate, our remand rate for PTSD appeals rose from 18.8% in FY 1984 to 23.5% in FY 1985 to 33.0% in FY 1986, and to 37.0% for FY 1987. We suspect that this trend may result, in part, from the combined influences of evolving attitudes towards this disorder on the part of medical professionals and increased Board Members' sensitivity to assuring that exhaustive levels of detail are followed in the development of this high profile area of appellate activity.

(4) Other Notable Appellate Issue Areas. Another area that we believe has contributed to the rise in the BVA remand rate is waiver of recovery of overpayments. Our remand rate for appeals connected with waiver of recovery of overpayments has grown from a

rate of 24.8% in FY 1984 to 29.7% in FY 1986, and to 35.9% in FY 1987. Since the Board annually decides over 2,000 appeals involving waiver of recovery of overpayments, a significant change in the remand rate for this category of appeals will have some affect on the overall remand rate. We suspect that there may be several factors responsible for this high remand rate, including some of the various computer matching programs that have been activated for the purpose of detecting improper payments. A second important factor here concerns the functional area at the regional office level that is responsible for development of appeals involving waiver of recovery of overpayments. The fact that development of these appeals is the functional responsibility of the Committees on Waivers and Compromises rather than the Adjudication Division may have some bearing on their potential for remand.

Another appeal category that we feel may be relevant to this matter is loan guaranty appeals. Although the Board's remand rate on loan guaranty appeals has remained relatively constant, it has always been high (i.e., roughly 35%). What has changed, however, is the volume of loan guaranty appeals that are being decided by the Board. In FY 1983 the BVA decided 226 loan guaranty appeals. This figure rose to 317 in FY 1984; to 414 in FY 1985; to 713 in FY 1986; and to 945 in 1987. This appellate activity level is not particularly surprising, given the general level of activity in the real estate and mortgage fields in recent years, and we believe that this has contributed to the rise in our remand rate.

Mr. Chairman, this completes my prepared statement. I will be happy to answer any questions that you may have.

Table 1 Board of Veterans Appeals - Appeals Statistical Data

| | FY 1983 | FY 1984 | FY 1985 | FY 1986 | FY 1987 |
|---|---|---|---|---|---|
| FIELD WORKLOAD DATA* | | | | | |
| Appeals Filed (NODs) | 69,391 | 61,328 | 63,045 | 63,850 | 63,570 |
| Dispositions | 64,919 | 64,621 | 67,534 | 60,677 | 62,487 |
| % Allowed | 13.5% | 12.7% | 12.4% | 12.5% | 12.5% |
| % Closed | 20.3% | 21.7% | 26.4% | 22.0% | 22.0% |
| % Withdrawn (and Other) | 10.7% | 10.2% | 10.4% | 0.5% | 10.5% |
| % Certified to BVA | 55.5% | 55.4% | 50.8% | 55.0% | 55.0% |
| Pending - End of Period | 49,498 | 46,818 | 44,145 | 45,737 | 46,625 |
| BVA WORKLOAD DATA | | | | | |
| Receipts | 41,226 | 43,811 | 43,457 | 43,584 | 41,491 |
| Dispositions | 38,591 | 44,064 | 45,273 | 42,003 | 41,296 |
| % Allowed | 13.7% | 13.8% | 13.3% | 12.8% | 12.8% |
| % Remanded | 15.5% | 14.9% | 16.3% | 18.8% | 20.7% |
| % Withdrawn (and Other) | 1.0% | 0.9% | 1.1% | 1.2% | 1.4% |
| % Denied | 69.9% | 70.4% | 69.3% | 67.2% | 65.1% |
| Pending - End of Period | 14,750 | 14,497 | 12,681 | 14,262 | 14,457 |
| Travel Board Hearings | 464 | 587 | 708 | 645 | 665 |
| Offices Visited | 34 | 48 | 50 | 48 | 51 |
| Categories of Appeals | | | | | |
| Disability Compensation | 76.6% | 76.3% | 75.7% | 75.2% | 75.7% |
| Disability Pension | 6.4% | 7.1% | 6.9% | 6.5% | 6.1% |
| Medical | 1.3% | 1.6% | 1.7% | 1.6% | 1.3% |
| Insurance | 0.4% | 0.3% | 0.3% | 0.3% | 0.2% |
| Death | 5.7% | 6.0% | 6.1% | 6.1% | 6.1% |
| Training | 2.3% | 2.2% | 1.8% | 1.8% | 1.4% |
| Waiver | 5.3% | 4.5% | 5.3% | 5.4% | 5.2% |
| Loan Guaranty | 0.6% | 0.7% | 0.9% | 1.7% | 2.3% |
| Reconsiderations | 0.5% | 0.6% | 0.7% | 0.7% | 0.7% |
| Character of Discharge | 0.2% | 0.2% | 0.2% | 0.2% | 0.2% |
| FIELD AND BVA COMBINED | | | | | |
| Final Dispositions | 61,518 | 66,152 | 71,095 | 61,411 | 60,851 |
| % Allowed | 22.8% | 21.6% | 20.2% | 21.1% | 21.5% |
| % Closed | 21.5% | 21.1% | 25.0% | 21.7% | 22.6% |
| % Withdrawn (and Other) | 11.9% | 10.5% | 10.6% | 11.2% | 11.7% |
| % Denied | 43.8% | 46.8% | 44.2% | 46.0% | 44.2% |
| Pending - End of Period | 64,248 | 61,315 | 56,826 | 59,999 | 61,082 |
| Field: NODs | 21,609 | 22,236 | 20,707 | 25,448 | 25,949 |
| Subs. Appeals | 27,889 | 24,582 | 23,438 | 20,289 | 20,676 |
| BVA: Subs. Appeals | 14,750 | 14,497 | 12,681 | 14,262 | 14,457 |

* Field workload data estimated for FY 1986 and FY 1987

## ADDITIONAL VIEWS OF SENATORS FRANK H. MURKOWSKI, STROM THURMOND, AND ROBERT T. STAFFORD

### INTRODUCTION

These views are submitted for three purposes: to explain our vote to report S. 11, as amended; to explain the amendment which we voted for at the Committee's June 29, 1988 markup, which will be offered again as a floor amendment; and to demonstrate the fact that, despite its title, S. 11 simply does not provide judicial review.

### THE VOTE ON S. 11

At its markup on June 29, 1988, the Committee, for the fifth time in as many Congresses, considered the issue of judicial review of Veterans' Administration decisions. For the fifth time in as many Congresses, the Committee had before it a bill which would permit factual determinations to be reviewed in federal court.

But for the first time, the Committee had before it a true compromise on an issue which has polarized its adherents for a decade. Senator Murkowski offered the text of S. 2292, "The Veterans Judicial Review Act"—a copy of which is attached to these views—as a substitute for S. 11. The 7–4 vote reflects, we believe, growing sentiment for a compromise which will lead to enactment of legislation providing judicial review of Veterans' Administration decisions.

The Committee also voted unanimously to report S. 11. Our vote does not reflect acceptance of that bill, but rather a recognition of two realities: First, under the unanimous consent agreement as reported at pages S 8738–39 of the June 28, 1988 Congressional Record (daily ed.), the consideration of S. 533—the VA Cabinet-level bill introduced by Senator Thurmond which has been awaiting floor action since it was reported by the Governmental Affairs Committee on May 12—is contingent upon prior disposition of S. 11; we will do nothing which will even further impede the progress of that important legislation. Second, we believe that the rising tide of support for compromise deserves full and open debate on the Senate floor; unless S. 11 is reported, it is not at all clear that those voices will have an opportunity to be heard.

### S. 2292: A REASONABLE COMPROMISE AND GOOD POLICY

S. 2292 has four chief aspects: First, it provides for review of VA regulations and regulatory processes in the United States Courts of Appeals. Second, it increases the independence of the Board of Veterans' Appeals (BVA). Third, it grants BVA the authority to rule on the validity of VA regulations in the context of an appeal, with review of such rulings available in the United States Courts of Appeals. And fourth, it authorizes reasonable attorney's fees for serv-

ices rendered in connection with challenges to VA regulations before both BVA and the Courts of Appeals.

In addition to the fact that S. 2292 is a compromise with the potential for enactment—rather than yet another expression of the sense of the Senate that judicial review is a good idea—the bill makes good policy sense for several reasons.

In the first place, the bill would submit the VA's institutional decisions—i.e., regulations—to court review. Notwithstanding the assertions of some proponents of S. 11, regulatory review exists only to a limited extent today, and certainly not under the fairly rigorous standards of the Administrative Procedure Act. Indeed, a fair reading of the Supreme Court's latest pronouncement in this area, *Traynor* v. *Turnage,* 56 U.S.L.W. 4321 (April 19, 1988), appears to allow review of a VA regulation on non-constitutional grounds only where the regulation conflicts with a subsequently-enacted statute which is, in addition, not administered by the VA. Under that standard, not many VA regulations are subject to review because the vast majority of VA regulations interpret statutes codified in Title 38 of the United States Code, which *is* administered by the VA.

While it is true that S. 11, as reported by the Committee, finally provides for review of regulations, it does so under a regime which is tied to what is left of that bill's judicial review procedures, rather than simply following the established procedures and developing jurisprudence of the Administrative Procedure Act. We believe that, when the issue is raised outside the context of an individual claim for benefits, no special system is required to challenge VA regulations and that S. 2292's approach of moving that process into established jurisprudential circles is far superior to creating yet another special world for VA rules.

Second, S. 2292 makes important changes to increase the independence of the Board of Veterans' Appeals. In effect, the bill transforms BVA to a de facto legislative (sometimes referred to as "Article I") court which can consider every challenge a veteran might have, including a challenge to the validity of regulations. Specifically, the bill would delete 38 U.S.C. 4004(c), which currently binds BVA decisions to VA regulations, the "Administrator's instructions"—whatever *that* means—and the VA General Counsel's precedential opinions.

S. 2292's approach to *factual review*—relying on the specialists of executive agencies rather than the generalists of the federal bench—is both distinct from S. 11's and in line with the reason that adjudication even *exists* in the Executive Branch. At the Committee's April 28 hearing on S. 11 and S. 2292, Judge Stephen G. Breyer of the United States Court of appeals, a recognized expert in administrative law, reminded us that Congress originally gave agencies fact-finding authority because federal judges were unable to devote the time to become sufficiently expert in some of the specialized federal programs. S. 2292 accords BVA the authority to provide veterans independent, as well as expert, decision on claims for benefits.

Third, in light of what we *really* know about problems within the VA system, it is not at all clear that federal court litigation is the answer. The experience of review of Social Security disability deci-

sion in federal district courts—the program most analogous to the S. 11 approach—is not one we should be anxious to repeat. Those cases constitute a significant percentage of civil filings in an already overburdened court system and can take three to five years to run their course.

The concept of fitting the legislative solution to the problem was addressed specifically by the Administrative Conference of the United States in its submission to the Committee in connection with the April 28 hearing:

> If Congress believes . . . that there are inherent problems with the law governing veterans' benefits, changes in the law rather than judicial review is a more reasonable solution. If Congress believes, instead, that there is arbitrariness in the VA's interpretation of the statutes, judicial review limited to questions of law, such as the VA's interpretation of its statute, might be a useful alternative. If the problem is inconsistency, bias or other weaknesses in the VA's decisional process, judicial review under a narrow standard of review could likewise provide some relief. But improved managerial controls, a specialized reviewing body, or, perhaps, an agency ombudsman, might be equally, if not more constructive, solution. Finally, if Congress believes that the problem lies essentially in the VA's governing regulations, it could adopt the appraoch of S. 2292, or require notice and comment rulemaking for such regulations and allow aggrieved parties to challenge the VA's rules in court in the same way that affected parties may not attack the promulgation of regulations, or the denial of a petition for repeal or amendment of existing regulations, by other agencies.

We do not believe that the VA's decisional processes are biased against veterans or their interests. Indeed, we believe that there are aspects worth preserving in the admittedly special system which has served veterans for more than fifty years. The system of claims adjudication is set up to be non-adversarial. The Veterans' Administration has—and, we believe recognizes—a responsibility to assist veterans in developing their claims. We believe that S. 2292 preserves those important aspects while still providing meaningful review of policies which affect millions of veterans and dependents.

On the other hand, we strongly believe that an agency of the size, constituency and effect of the Veterans' Administration could profit from court review of its regulations. Concerns about maintaining a non-adversarial system and ensuring that the agency assists veterans in developing individual claims are simply not relevant when what is at stake are institutional decisions affecting millions of eligible persons. That is why S. 2292 focuses its review provisions on those kinds of decisions.

At the same time, we are aware of the fact that issues of regulatory validity are as likely—if not more so—to arise in the context of an individual adjudication as in the context of a careful review of the Federal Register. That is why S. 2292 provides a special procedure for challenging regulations in the context of the veteran's appeal to the newly-independent Board of Veterans' Appeals.

In all, we believe that S. 2292 is a concept whose time has come. Legislation is compromise; the time for effective compromise on this vital issue is now.

### VIEWS ON S. 11: THERE IS NO JUDICIAL REVIEW

Probable the most ironic aspect of the entire judicial review controversy is this: S. 11 doesn't really provide judicial review of individual fact situations.

Section 302 of S. 11 adds to Title 38 a new standard of review for factual findings. That standard says that a Court of Appeals cannot—we repeat, *cannot*—set aside a factual finding by the VA unless that finding is

> so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such findings were not set aside.

The federal bench has some thoughts on that standard. At the Committee's April 28, 1988 hearing, U.S. District Judge Morris Arnold addressed the Committee on behalf of the Judicial Conference of the United States. This is what Judge Arnold had to say about whether factual findings by the VA would ever be reversed by a court under S. 11's test:

> I would suggest to you that *almost any factual finding* could survive such a test; and therefore, I think that the real work that would be done under this standard would not be deciding whether the decision below could survive it, *but rather would have to do with and focus on the matter of attorneys' fees,* because even if a claimant's suggestion that the court below erred was not accepted, nevertheless the court would be required to award a reasonable fee. . . .

We do not believe that justice is served when all that is left are attorney's fees to be paid by the veteran. That is not judicial review; that is the illusion of judicial review.

### VIEWS ON S. 11, AS REPORTED

We are pleased to see that many of the improvements set forth in S. 2292 have been incorporated in S. 11, as reported. Most of these changes have to do with the independence of the BVA. Indeed, in many ways, S. 11 is now very close to S. 2292 with two chief exceptions: First, under S. 11, the BVA continues to be bound in its decisionmaking by the strictures of 38 U.S.C. 4004(c), i.e., VA regulations, the instructions of the Administrator and General Counsel opinions. Second, S. 11 permits federal courts—three-judge panels of the Courts of Appeals in this latest iteration—to review the facts of individual cases.

We continue to believe that review of individual fact situations in federal court is not the way to proceed, particularly when there is no particular likelihood that such an approach is going to solve a problem. And while placing such factual review in the Courts of Appeals arguably decreases the possibility that courts will substitute their judgment for the VA's, there are serious drawbacks.

The Judicial Conference of the United States was clear as to the primary drawback of this approach: Courts of Appeals are simply not equipped to deal very well with such cases. As Judge Breyer told the Committee:

> [T]he reason that [the Judicial Conference has] taken this position is because reviewing factual findings in a court of appeals is something I, as a Court of Appeals judge, don't do very well. . . .
>
> I know what I do each day, and I tell you what I do each day is not to do this very well. Now, maybe I shouldn't admit that, but it is true. I know it because I know the Social Security cases, and I don't think I do them very well, and I think that is unfortunate.

In addition, we believe that it is an inefficient use of already strained judicial resources to place thousands of veterans' benefits claimed on civil dockets. We believe that it is even more inefficient to transform a three-judge panel of a United States Court of Appeals into a board which must decide whether particular circumstances justify an increase in a disability rating, the kind of case which constitutes nearly 40% of the 40,000 claims BVA considers every year.

Courts of Appeals exist primarily to review questions of law, not fact. S. 2292 takes advantage of that expertise, while S. 11, unfortunately, gives those bodies a task for which they are simply ill-equipped. Even with its salutary changes, S. 11 is not the vehicle for meaningful and efficient judicial review.

## Conclusion

We are pleased with the work the Committee has done to present a real choice to the Senate, to provide the opportunity for compromise which is long overdue. But we are most pleased with the growing recognition by our colleagues that the time to make that compromise is now.

Through careful articulation of the right to review of VA institutional decisions and the granting of true independence for the Board of Veterans' Appeals, S. 2292 provides a compromise with real effect on the entire system of veterans' benefits.

On the other hand, between opening already burdened Courts of Appeals to thousands of factual appeals and a standard of review which the federal bench believes will result in no reversals, what S. 11 really does is to create the illusion, but not the reality of judicial review.

In our view, S. 2292 is a compromise which provides broad, meaningful change and which has the potential, after nearly a decade, to become law.

Frank H. Murkowski,
*Ranking Minority Member.*

Strom Thurmond.
Robert T. Stafford.

II

100TH CONGRESS
2D SESSION

# S. 2292

To amend title 38, United States Code, to provide for judicial review of rulemaking by the Veterans' Administration, to allow attorneys' fees in cases involving veterans' claims for benefits, and to make other improvements in the provision of veterans' benefits.

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IN THE SENATE OF THE UNITED STATES

APRIL 18 (legislative day, APRIL 11), 1988

Mr. MURKOWSKI introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

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# A BILL

To amend title 38, United States Code, to provide for judicial review of rulemaking by the Veterans' Administration, to allow attorneys' fees in cases involving veterans' claims for benefits, and to make other improvements in the provision of veterans' benefits.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Veterans' Judicial Review Act".

**SEC. 2. REFERENCES TO TITLE 38, UNITED STATES CODE.**

Except as otherwise expressly provided, whenever in this Act an amendment or a repeal is expressed in terms of an amendment to, or a repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision to title 38, United States Code.

**SEC. 3. JUDICIAL REVIEW OF AGENCY RULEMAKING.**

(a) APA PROCEDURES.—(1) Chapter 3 of title 38, United States Code, is amended by inserting after section 222 the following new section:

**"§ 223. Rulemaking: procedures and judicial review**

"(a) The provisions of section 553 of title 5 (other than subsection (a)(2) thereof) shall apply, according to the provisions of that section, to any matter relating to loans, grants, or benefits under the jurisdiction of the Administrator.

"(b) Any action of the Administrator subject to subsection (a) (other than the adoption or readjustment of the schedule of ratings for disabilities under section 355 of this title) may be reviewed in accordance with chapter 7 of title 5. Such review shall be brought in the United States Courts of Appeals.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 222 the following new item:

"223. Rulemaking: procedures and judicial review.".

(b) CONFORMING AMENDMENT.—Section 211(a) of such title is amended by striking out "except as provided in sections 775, 784" and inserting in lieu thereof "except as provided in sections 223, 775, 784, 4010,".

SEC. 4. ATTORNEYS' FEES.

(a) Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c) The Board of Veterans' Appeals shall approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation before the Veterans' Administration (including representation before the Board of Veterans' Appeals) in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—

"(1) for any services rendered prior to the issuance of a statement of the case under section 4005(d) of this title, or for any services not otherwise provided for, $10; or

"(2) for services in connection with a challenge to the validity of regulations of the Veterans' Administration provided in section 4010, rendered on or after the issuance of a statement of the case under section 4005(d) of this title—

"(A) if the claimant and an attorney have entered into an agreement under which no fee is

payable to such attorney unless the challenge is resolved in a manner favorable to the claimant, 25 percent of the total amount of any past-due benefits awarded on the basis of the claim; or

"(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

"(i) the fee agreed upon by the claimant and the attorney; or

"(ii) $500, or such greater amount as may be specified from time to time in regulations which the Board shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Board may, in its discretion, determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

"(d) Actions before the Court of Appeals—

"(1) If, in an action brought in a United States Court of Appeals under section 223 or 4010 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for

such representation to be paid to the attorney by the claimant.

"(2) If, in an action brought in a United States Court of Appeals under section 223 or 4010 of this title, the matter is not resolved in a manner favorable to a claimant who was represented by an attorney, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of $750 to be paid to the attorney by the claimant for the representation of such claimant.

"(3) For the purposes of this subsection, a matter shall be considered resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

"(4) In an action brought in a United States Court of Appeals under section 223 or 4010 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of subsection (d) of section 2412 of title 28.

"(e) To the extent that past-due benefits are awarded in proceedings before the Veterans' Administration (including proceedings before the Board of Veterans' Appeals), the Administrator shall direct that payment of any attorneys' fee

that has been determined and allowed under this section (including allowances made by a Court of Appeals pursuant to subsection (d)(1) or (d)(2) of this section) be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision in such case.

"(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, including petitions for review by the Administrator pursuant to section 4010, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply with respect to cases in which a statement of the case is issued after the date of enactment of this Act.

SEC. 5. BOARD OF VETERANS' APPEALS.

(a) REVIEW OF REGULATIONS OF THE VETERANS' ADMINISTRATION.—(1) Section 4004 of title 38, United States Code, is amended:

(A) by striking out subsection (c); and

(B) by redesignating subsection (d) as subsection (c).

(2) Chapter 71 of such title is amended by adding at the end the following new sections:

**"§ 4010. Review of regulations**

"(a) RIGHT OF REVIEW.—Where an appellant before the Board has challenged the validity of regulations of the Veterans' Administration involved in his or her case (other than the validity of the schedule of ratings for disabilities under section 355 of this title), he or she shall be afforded the right to have such challenges adjudicated and resolved by the Board, subject to review by the United States Court of Appeals.

"(b) PROCEDURE.—(1) When challenges to the validity of regulations of the Veterans' Administration involved in an appeal (other than challenges to the validity of the schedule of ratings for disabilities under section 355 of this title) have been raised, the Board shall adjudicate and resolve such challenges separately from the adjudication and resolution of all other issues in the appellant's case.

"(2) Upon the final resolution of the case of which the challenge referred to in subsection (b)(1) is a part, the Board's determination of the validity of the regulations challenged shall be subject to review in the United States Court of Appeals. The subject matter of such action shall be limited to the validity of the regulations of the Veterans' Administration involved in the appeal, to include the Board's determina-

8,

tion, separate from its adjudication of all other issues in the appellant's case, of the validity of those regulations.

"(3) The appellant shall have 60 days from the date of the final resolution referred to in subsection (b)(2) within which to initiate a petition for review before the United States Court of Appeals—

"(A) If such action is not initiated within such period, the Board's determination shall be final and conclusive and no other official or any court of the United States shall have power to review any such decision by an action in the nature of mandamus or otherwise, except as provided in subsection (b)(4).

"(B) Where the reviewing court has reviewed and resolved the questions raised, the case shall be remanded to the Board for further proceedings.

"(C) Notwithstanding any other provision of law, the Board's determination of all other issues on appeal shall be final and conclusive and no other official or any court of the United States shall have power to review any such determination by an action in the nature of mandamus or otherwise.

"(4) In any case in which the Board rules that a regulation of the Veterans' Administration is invalid, the Administrator may, upon the final resolution of such case, petition for review of such ruling to the United States Court of Appeals

for the Federal Circuit. Such petition shall be filed within 60 days from the date of the final resolution referred to in subsection (b)(2). The appellant before the Board shall be notified of such filing and shall be entitled to appear in such action.

"(5) In the case of an appellant, a request for review pursuant to this section shall be brought in the United States Court of Appeals where the appellant resides, or in the United States Court of Appeals for the Federal Circuit.

"(6) To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of the terms of the regulations challenged. The reviewing court shall hold unlawful and set aside regulations found to be—

"(A) contrary to constitutional right, power, privilege, or immunity; or

"(B) in excess of statutory jurisdiction, authority, or limitations, short of statutory right; or

"(C) resting upon a policy judgment, reasoning or factual premise so unacceptable as to render the regulation arbitrary.

In no event shall the facts of the appeal or the application of any law or regulation to those facts be subject to review by the reviewing court unless they raise a constitutional issue,

nor shall the validity of the schedule of ratings for disabilities under section 355 of this title be subject to review under this section.

"(7) The right of review granted under this section is in addition to the right of review under section 223 of this title.

"(8) For the purposes of review under this section, the term 'regulation' includes those statements of general policy and interpretations of general applicability which have been adopted by the Administrator.".

(b) REVIEW OF ATTORNEYS' FEES.—Chapter 71 of such title is amended by adding at the end of the following new section:

**"§ 4011. Review of attorneys' fees**

"The Board may review the reasonableness of any fee arrangement for payment of attorneys' fees by a claimant during proceedings within the Veterans' Administration or before the Board. If the Board finds that any amount to be payable from past due benefits is excessive or unreasonable, the Board may reduce such amount. A decision of the Board under this section is final and may not be reviewed by any court.".

(c) CHANGES TO THE BOARD.—(1) Section 4001 of such title is amended:

(A) in the first sentence of subsection (a), by striking the words "directly responsible to the Administrator";

(B) by amending subsection (b) to read as follows: "(b) The Chairman and Vice Chairman of the Board shall be appointed by the President with the advice and consent of the Senate for a term of 15 years. Members of the Board shall be appointed by the Chairman with the approval of the President for a term of 15 years.";

(C) in the first sentence of paragraph (3) of subsection (c) of such section, by striking out "In each annual report to the Congress under section 214 of this title, the Administrator shall provide" and inserting in lieu thereof "The Chairman of the Board shall submit an annual report to the Congress providing";

(D) in the second sentence of paragraph (3) of subsection (c) of such section, by striking out "the Administrator" and inserting in lieu thereof "the Chairman"; and

(E) by adding the following new subsections at the end of such section:

"(d) Notwithstanding any other provision of law, no member of the Board, and no temporary member while so serving, shall be eligible for or receive, directly or indirectly, bonuses in addition to salary.

"(e) The Administrator shall allocate sufficient resources (including sufficient personnel with the necessary skills and qualifications) to enable the Board to carry out its responsibilities under this chapter.".

(3) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 4009 the following new items:

"4010. Review of regulations.
"4011. Review of attorneys' fees."

## ADDITIONAL VIEWS OF SENATOR ALAN CRANSTON

The essence of judicial review is *factual* review—however narrow—of an individual *claim* for *benefits*. S. 11, as did the predecessor measures reported by our Committee and passed by the Senate—once before when I was Chairman, twice while Senator Simpson was Chairman, and once while Senator Murkowski was Chairman—provides for such review. The measure introduced by Senator Murkowski, S. 2292, does not. Interestingly, Senator Murkowski opposes S. 11, in part, because he says that the standard for factual review is too narrow, and may result in too few cases receiving review by the courts. Yet, ironically, S. 2292 provides for no factual review.

This reminds me of the old saw: "Who's kidding whom?"

### COMPARISON OF S. 11 AND S. 2292

In my view, the most significant difference between S. 11 and S. 2292, both in philosophic and real terms, is the inclusion in S. 11 of provisions for judicial review of a final decision of the Board of Veterans' Appeals (BVA), the VA's highest appeals tribunal, that is adverse to a claimant in a matter involving a claim for benefits under any law administered by the VA. S. 2292 would continue the current prohibition of any such review except to the extent a claimant wishes to challenge a VA regulation or its interpretation.

Addressed in both bills is the concern, as repeatedly expressed by various veterans organizations as well as the VA itself, about intrusion

Addressed in both bills is the concern, as repeatedly expressed by various veterans organizations as well as the VA itself, about intrusion by a federal court into the VA's fact-finding process. S. 2292's answer to this concern is to exclude any court review of an individual's claim, except on the rare occasion where the lawfulness of a VA regulation or its interpretation is at issue. Such an approach, however, fails to identify or understand the most fundamental reason for judicial review: The need for an avenue of independent review for claimants who are the victims of errors which are so egregious and lacking in a rational basis in the evidence that a manifest and grievous injustice to the claimant would result if the findings by the VA were not set aside.

S. 11's approach recognizes, as do virtually all who are familiar with the operations of the VA, that on some occasions serious errors are made by the BVA which result in the totally unfair or arbitrary, or even unlawful, denial of benefits to veterans or other claimants. The scope of review available under S. 11 would allow for the correction of those errors by providing for review of legal issues and, if the case meets a very demanding standard which I will discuss in more detail later, for review of the facts in the case.

In my view, the appropriate way to address the difference between S. 11 and S. 2292 on this issue is by asking the following question:

> Does the Congress wish to allow a manifestly unjust result in a VA claims decision to be immune from being challenged and reviewed in court?

I believe veterans deserve the opportunity to present such challenges which I believe are fundamental to our system of checks and balances and precepts of basic fairness. The right to court review is a right that most all other citizens have in other directly analogous areas and that veterans themselves enjoy in their dealings with almost all parts of the Federal Government but the VA. It is long past time that veterans were granted first-class citizenship in this element of their relationship with the government they fought to preserve and defend.

Whereas S. 11 would allow an attorney to receive more than $10 in a fee only after an initial final decision has been rendered by the Board of Veterans' Appeals, S. 2292 would allow a veteran or other claimant to pay an attorney more than $10 after a notice of disagreement had been filed following a decision at the VA Regional Office level. The attorney could then be paid for representing the claimant in front of the BVA. Theoretically, the representation would be limited to legal issues, but in reality would more likely expand to include all issues in the case. Such a system raises a number of concerns, including the desirability of attorney involvement at this stage of the claim and the possibility of disparate treatment.

Under S. 2292, the veteran who wishes to challenge a VA regulation could pay an attorney to represent him or her with regard to that challenge and also receive representation on the factual issues, whereas a veteran who does not opt to challenge a regulation or cannot find one to challenge would have no right to pay an attorney more than $10 for representing the veteran's entire claim. This could lead to the filing of non-meritorious challenges to VA regulations or laws in order to secure paid representation by an attorney.

A final point in comparing the two bills—S. 2292 seeks to reform the BVA and to give it more independence from the VA. Although I think that the BVA is in need of some changes in order to ensure that it is more independent of the VA—and I believe that the Committee, in its adoption of my substitute amendment to S. 11, has taken many appropriate steps toward that goal—I do not believe that the proposals contained in S. 2292, which are billed as being designed to elevate the BVA to the status and stature of an Article I court and attempt do so overnight, are the right ways to go about making the needed change.

Merely declaring in the law that something is so does not make it so and certainly does not make it workable. Even if it were practical and workable to convert the 65-Member (Judge) BVA into an Article I court as S. 2292 purports to do, there is nothing to be gained from empowering the BVA to overrule the Administrator and the VA General Counsel on interpretations of law and regulation.

Providing for such review by the BVA prior to a review by a court raises concerns (1) about overburdening the BVA, which currently takes an average of over 400 days to reach a decision on a case from the time the veteran first expresses disagreement with the Regional Office decision; (2) about asking BVA members, one third of whom are physicians, to make the type of legal decisions (i.e. ruling on the lawfulness or regulations or the correctness of the General Counsel's interpretation of applicable law) for which few have special training and competence; (3) about a veteran possibly receiving dividend representation before the BVA—from a service officer on factual issues and a lawyer on legal issues; and (4) about adding an unnecessary layer to the process of a veteran receiving a final determination on a legal issue.

BVA review of VA law and regulations would serve just to drag out the adjudication of a case involving such issues with absolutely no gain for the veteran claimant. Certainly, if the BVA, under S. 2292, were to disagree with the General Counsel's legal interpretation on an issue, that matter would be appealed to court and the judicial body would make the final decision on the legal question. Indeed, that's what courts are for. The BVA was never set up for that purpose.

In my view, the upshot of the very novel approach to reforming the BVA proposed in S. 2292 would be, without doubt, either no more justice for the veteran, or justice even further delayed. Instead, the questions of law should go directly to court to be decided. That is as it would be under S. 11. There is no reason to waste claimants' time and the time of the BVA in a futile effort to pretend that the BVA is really a court of law, rather than what it is—a mass-justice adjudicator of *factual* questions.

### Scope-of-Review Provision in S. 11

As I noted above, Senator Murkowski has raised concerns about the scope-of-review provision in S. 11. This issue was also discussed by other members of the Committee at our June 29 markup on S. 11.

As is discussed in more detail in the body of the report, the current scope-of-review provision—which precludes a reviewing court from disturbing a VA finding on a factual issue unless the court finds that finding to be "so utterly lacking in rational basis in the evidence that an manifest and grievous injustice would result if such finding were not set aside"—was first adopted by the Committee in 1982 during the Committee's consideration of S. 349 and was expressly intended by the Committee to be very narrow so as to keep reviewing courts from substituting their views for those of the BVA on a routine basis. I believe that the Committee succeeded in reaching that goal, but, at the same time, I believe that the Committee succeeded in crafting a standard which is *wide* enough to allow review of those decisions which must be reviewed—those resulting in a manifest and grievous injustice. I am satisfied that providing for factual review even of a narrow scope will have a very salutary effect on the operations of the BVA—on the evenhandedness of its decisions and on the thoroughness and clarity of its opinions.

It is true that review of most agency determinations is conducted according to the provisions of the Administrative Procedure Act which provides a scope of review that is much broader than S. 11 would provide for—that of the "substantial evidence" test; that is, is the agency's finding supported by substantial evidence? The S. 11 provision was written to allow the BVA the greatest freedom from interference in its factual determinations, while still providing both a measure of hope and justice for the individual claimant with a case that fits within the narrow category as well as an ever-present check and balance on the BVA in its day-to-day operations. Prior Committee reports on S. 11's predecessors have been, and this Committee report is, very careful and clear to state that a court is not to substitute its judgment for that of the VA except in those narrowly defined circumstances when justice demands it—and only then after first remanding the case to the BVA for its further review.

I realize that two Federal judges who appeared on behalf of the Judicial Conference of the United States at the Committee's April 28 hearing testified that the scope-of-review provision is remarkably narrow and that they were unclear as to whether any factual determination could fail to survive scrutiny under such a standard. Although I have great respect for their individual views and for the official views of the Judicial Conference, I submit that no one can fairly predict how VA factual decisions will fare when tested against the S. 11 standard.

Because cases involving VA claims matters are almost never before the Federal courts, there is a very scant body of decisions to review. However, the facts of one such case, *DeMagno* v. *United States,* a case decided by the U.S. Court of Appeals for the D.C. Circuit, would, I believe, clearly fit within the narrow scope of review in S. 11. The court made the following statement regarding the VA decision that was challenged in the case:

> We have read and reread the administrative record and the briefs of the parties, and confess ourselves mystified at the action taken by the VA in this case. Either the VA is withholding, both from us and from de Magno, *all* evidence which would justify its conduct, or this woman has been the victim of wholly arbitrary administrative ineptitude, leaving her impoverished for nearly four years. 636 F.2d 714, 717, (D.C. Cir. 1980) (Emphasis in original; footnote omitted).

Inasmuch as this case reached the court only because of a procedural fluke—the VA was recouping a claimed indebtedness by reducing insurance payments, and matters relating to VA insurance are open to review in court—I have no doubt that there are other cases in which the BVA's decision on factual matters is as greviously flawed.

With further reference to the testimony of the two federal judges, both raised concerns—which Senator Murkowski has highlighted—about a provision in S. 11 as introduced which could have involved substantial amounts of court time in evaluating the appropriateness of attorneys' fees for representation in court in cases in which the veteran claimant does not prevail. I recognized the valid-

ity of those concerns and proposed a change to that provision, which the Committee adopted at our June 29 markup, in order to limit judicial involvement with this issue to no more than ensuring that the fee paid in such a case does not exceed a certain amount. Thus, that element of the judges' concerns has been mooted.

As I noted above, it is my view that providing some avenue for review of factual determinations, albeit a very narrow window, would have a most desirable impact on the BVA. I do not believe that under S. 11 the Members of the Board would judge the possibility of court review as so remote as to justify their rendering incorrect decisions on factual matters, just so long as such decisions remained outside the standard of reviewability in S. 11. Rather, I would expect BVA Members to strive even harder to do their best to be fair, evenhanded, and articulate because the truth is that they would never be able to predict exactly what a particular reviewing court would do under the S. 11 standard.

Finally, should this scope-of-review provision be enacted and prove to be unreasonably and unfairly restrictive, I am certain that our Committee could and would revisit the issue and take steps to remedy such a situation.

ALAN CRANSTON,
*Chairman.*

CHANGES IN EXISTING LAW MADE BY S. 11 AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

## TITLE 5—UNITED STATES CODE

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### PART III—EMPLOYEES

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### Subpart D—Pay and Allowances

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#### CHAPTER 53—PAY RATES AND SYSTEMS

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SUBCHAPTER II—EXECUTIVE SCHEDULE PAY RATES

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**§ 5315. Positions at level IV**

Level IV of the Executive Schedule applies to the following positions, for which the annual rate of basic pay shall be the rate de-

termined with respect to such level under chapter 11 of title 2, as adjusted by section 5318 of this title:

Deputy Administrator of General Services.
Associate Administrator of the National Aeronautics and Space Administration.
Assistant Administrators, Agency for International Development (6).
Regional Assistant Administrators, Agency for International Development (4).
Under Secretary of the Air Force.
Under Secretary of the Army.
Under Secretary of the Navy.
Assistant Secretaries of Agriculture (7).
Assistant Secretaries of Commerce (11).
Assistant Secretaries of Defense (11).
Assistant Secretaries of the Air Force (3).
Assistant Secretaries of the Army (5).
Assistant Secretaries of the Navy (4).
Assistant Secretaries of Health and Human Services (4).
Assistant Secretaries of the Interior (6).
Assistant Attorneys General (10).
Assistant Secretaries of Labor (10), one of whom shall be the Assistant Secretary of Labor for Veterans' Employment and Training.
Assistant Secretaries of State (15).
Assistant Secretaries of the Treasury (7).
Members, United States International Trade Commission (5).
Assistant Secretaries of Education (6).
General Counsel, Department of Education.
Inspector General, Department of Education.
Director of Civil Defense, Department of the Army.
Deputy Director of the Office of Emergency Planning.
Deputy Director of the Office of Science and Technology.
Deputy Director of the Peace Corps.
Deputy Director of the United States Information Agency.
Assistant Directors of the Office of Management and Budget (3).
General Counsel of the Department of Agriculture.
General Counsel of the Department of Commerce.
General Counsel of the Department of Defense.
General Counsel of the Department of Health and Human Services.
Solicitor of the Department of the Interior.
Solicitor of the Department of Labor.
General Counsel of the National Labor Relations Board.
Legal Adviser of the Department of State.
General Counsel of the Department of the Treasury.
First Vice President of the Export-Import Bank of Washington.
Members, Council of Economic Advisers.
Members, Board of Directors of the Export-Import Bank of Washington.
Members, Federal Communications Commission.

Member, Board of Directors of the Federal Deposit Insurance Corporation.
Members, Federal Home Loan Bank Board.
Members, Federal Energy Regulatory Commission.
Members, Federal Trade Commission.
Members, Interstate Commerce Commission.
Members, National Labor Relations Board.
Members, Securities and Exchange Commission.
Members, Board of Directors of the Tennessee Valley Authority.
Members, Merit Systems Protection Board.
Members, Federal Maritime Commission.
Members, National Mediation Board.
Members, Railroad Retirement Board.
Director of Selective Service.
Associate Director of the Federal Bureau of Investigation, Department of Justice.
Members, Equal Employment Opportunity Commission (4).
Chief of Protocol, Department of State.
Director, Community Relations Service.
Members, National Transportation Safety Board.
General Counsel, Department of Transportation.
Deputy Administrator, Federal Aviation Administration.
Assistant Secretaries of Transportation (4).
Deputy Federal Highway Administrator.
Administrator of the St. Lawrence Seaway Development Corporation.
Assistant Secretary for Science, Smithsonian Institution.
Assistant Secretary for History and Art, Smithsonian Institution.
Deputy Administrator of the Small Business Administration.
Assistant Secretaries of Housing and Urban Development (8).
General Counsel of the Department of Housing and Urban Development.
Commissioner of Interama.
Federal Insurance Administrator, Federal Emergency Management Agency.
Executive Vice President, Overseas Private Investment Corporation.
Members, National Credit Union Administration Board (2).
Members, Postal Rate Commission (4).
Members, Occupational Safety and Health Review Commission.
Deputy Director of the Office of Drug Abuse Policy.
Deputy Under Secretaries of the Treasury (or Assistant Secretaries of the Treasury) (2).
Members, Consumer Product Safety Commission (4).
Commissioner of Social Security, Department of Health and Human Services.
Assistant Secretary for Oceans and International Environmental and Scientific Affairs, Department of State.
Administrator for Federal Procurement Policy.
Members, Commodity Futures Trading Commission.

Director of Nuclear Reactor Regulation, Nuclear Regulatory Commission.
Director of Nuclear Material Safety and Safeguards, Nuclear Regulatory Commission.
Director of Nuclear Regulatory Research, Nuclear Regulatory Commission.
Executive Director for Operations, Nuclear Regulatory Commission.
President, Government National Mortgage Association, Department of Housing and Urban Development.
Associate Secretary of Commerce for Oceans and Atmosphere, the incumbent of which also serves as Deputy Administrator of the National Oceanic and Atmospheric Administration.
Commissioner of Immigration and Naturalization, Department of Justice.
Director, Bureau of Prisons, Department of Justice.
Assistant Secretaries of Energy (8).
General Counsel of the Department of Energy.
Administrator, Economic Regulatory Administration, Department of Energy.
Administrator, Energy Information Administration, Department of Energy.
Inspector General, Department of Energy.
Director, Office of Energy Research, Department of Energy.
Assistant Secretary of Labor for Mine Safety and Health.
Members, Federal Mine Safety and Health Review Commission.
President, National Consumer Cooperative Bank.
Assistant Secretary for International Narcotics Matters, Department of State.
Inspector General, Department of Health and Human Services.
Inspector General, Department of Agriculture.
Special Counsel of the Merit Systems Protection Board.
Inspector General, Department of Housing and Urban Development.
Chairman, Federal Labor Relations Authority.
Inspector General, Department of Labor.
Inspector General, Department of Transportation.
Inspector General, Veterans' Administration.
Deputy Director, Institute for Scientific and Technological Cooperation.
Director of the National Institute of Justice.
Director of the Bureau of Justice Statistics.
Chief Counsel for Advocacy, Small Business Administration.
Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.
Inspector General, Department of Defense.
Assistant Administrator for Toxic Substances, Environmental Protection Agency.
Assistant Administrator, Office of Solid Waste, Environmental Protection Agency.

Assistant Administrators, Environmental Protection Agency (8).
Director of Operational Test and Evaluation, Department of Defense.
Special Representatives for Arms Control and Disarmament Negotiations, United States Arms Control and Disarmament Agency (2).
Administrator of the Health Care Financing Administration.
Director, National Bureau of Standards, Department of Commerce.
Assistant Directors, United States Arms Control and Disarmament Agency (4).
Inspector General, United States Information Agency.
Inspector General, Department of State.
Director of Defense Research and Engineering.
*Chairman, Board of Veterans' Appeals.*

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# TITLE 28—UNITED STATES CODE

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## PART IV—JURISDICTION AND VENUE

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### CHAPTER 85—DISTRICT COURTS; JURISDICTION

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**§ 1346. United States as defendant**

(a) * * *

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(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a [pension.] *pension, except as provided in subchapter II of chapter 71 of title 38.*

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# TITLE 38—VETERANS' BENEFITS

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## CHAPTERS OF TITLE 38

PART IV GENERAL ADMINISTRATIVE PROVISIONS

## TABLE OF SECTIONS

### PART I. GENERAL PROVISIONS



### PART IV. GENERAL ADMINISTRATIVE PROVISIONS



### PART V. BOARDS AND DEPARTMENTS

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# TITLE 38—UNITED STATES CODE

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## PART I—GENERAL PROVISIONS

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### CHAPTER 3—VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES

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SUBCHAPTER II—ADMINISTRATOR OF VETERANS' AFFAIRS



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## SUBCHAPTER II—ADMINISTRATOR OF VETERANS' AFFAIRS

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### § 211. Decisions by Administrator; opinions of Attorney General

(a) On and after October 17, 1940, except as provided in sections [775, 784,] *775 and 784 and subchapter II of chapter 71 of this title,* and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

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### *§ 223. Rule making*

*(a) For the purposes of this section—*
*(1) the term "regulation" includes—*

*(A) statements of general policy, instructions, and guidance issued or adopted by the Administrator; and*

*(B) interpretations of general applicability issued or adopted by the Administrator; and*

*(2) the term "rule" has the same meaning as is provided in section 551(4) of title 5.*

*(b) Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator, other than rules or regulations pertaining to agency management or personnel or to public property or contracts, shall be subject to the requirements of section 553 of title 5.*

*(c) Rules and regulations issued or adopted by the Administrator shall be subject to judicial review as provided in subchapter II of chapter 71 of this title.*

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## PART IV—GENERAL ADMINISTRATIVE PROVISIONS



### CHAPTER 51—[APPLICATIONS,] *CLAIMS, EFFECTIVE DATES, AND PAYMENTS*

SUBCHAPTER I—[APPLICATIONS] *CLAIMS*



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SUBCHAPTER I—[APPLICATIONS] *CLAIMS*

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***§ 3007. Burden of proof; benefit of the doubt***

*(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.*

*(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration in-*

*volving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.*

SUBCHAPTER II—EFFECTIVE DATES

**§ 3010. Effective dates of awards**

(a) * * *

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(i)*(1)* Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence resulting from the correction of the military records of the proper service department under section 1552 of title 10, or the change, correction, or modification of a discharge or dismissal under section 1553 of title 10, or from other corrective action by competent authority, the effective date of commencement of the benefits so awarded shall be the date on which an application was filed for correction of the military record or for the change, modification, or correction of a discharge or dismissal, as the case may be, or the date such disallowed claim was filed, whichever date is the later, but in no event shall such award of benefits be retroactive for more than one year from the date of reopening of such disallowed claim. This subsection shall not apply to any application or claim for Government life insurance benefits.

*(2) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence in the form of official reports from the department of the Secretary concerned, the effective date of commencement of the benefits so awarded shall be the date on which an award of benefits under the disallowed claim would have been effective had the claim been allowed on the date it was disallowed.*

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**CHAPTER 57—RECORDS AND INVESTIGATIONS**

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SUBCHAPTER II—INVESTIGATIONS

**§ 3311. Authority to issue subpenas**

For the purposes of the laws administered by the Veterans' Administration, the Administrator, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and ex-

amine witnesses upon any matter within the jurisdiction of the Veterans' Administration. Any person required by such subpena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States. *Subpenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing a copy thereof by registered or certified mail addressed to such individual at such individual's last known dwelling place or principal place of business. A verified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service.*

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## CHAPTER 59—AGENTS AND ATTORNEYS

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**§ 3404. Recognition of agents and attorneys generally**

(a) * * *

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[(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

[(1) shall be determined and paid as prescribed by the Administrator;

[(2) shall not exceed $10 with respect to any one claim; and

[(3) shall be deducted from monetary benefits claimed and allowed.]

*(c) The Chairman of the Board shall approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation, other than in an action brought under section 4025 of this title, in connection with a claim for benefits under laws administered by the Veterans' Administration. In no event may such attorneys' fees exceed—*

*(1) for any claim resolved prior to or at the time that a final decision of the Board is first rendered, $10; or*

*(2) for any claim resolved after such time—*

*(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 percent of the total amount of any past-due benefits awarded on the basis of the claim; or*

*(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—*

*(i) the fee agreed upon by the claimant and the attorney; or*

*(ii) $500, or such greater amount as may be specified from time to time in regulations which the Chairman of the Board shall prescribe based on changed national economic conditions subsequent to the date of enact-*

*ment of this subsection, except that the Chairman may determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.*

*(d)(1) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 percent of the total amount of any past-due benefits awarded on the basis of the claim.*

*(2) If, in an action brought under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court shall ensure that only a reasonable fee, not in excess of $750, is paid to the attorney by the claimant for the representation of such claimant.*

*(e) To the extent that past-due benefits are awarded in proceedings before the Administrator, the Board of Veterans' Appeals or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision of the Administrator, the Board of Veterans' Appeals or court making such award.*

*(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.*

*(g) For the purposes of this section—*

*(1) the terms "final decision of the Board of Veterans' Appeals" and "claim for benefits" shall have the same meaning provided for such terms, respectively, in section 4025(a) of this title; and*

*(2) claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.*

*(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of section 2412(d) of title 28.*

**§ 3405. Penalty for certain acts**

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, **[**or**]** (2) wrongfully withholds from any claimant or

beneficiary any part of a benefit or claim allowed and due to the claimant or beneficiary, *or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title,* shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

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## PART V—BOARDS AND DEPARTMENTS

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### CHAPTER 71—BOARD OF VETERANS' APPEALS

*SUBCHAPTER I—GENERAL*



*SUBCHAPTER II—JUDICIAL REVIEW*



*SUBCHAPTER I—GENERAL*

**§ 4001. Composition of Board of Veterans' Appeals**

(a) There shall be in the Veterans' Administration a Board of Veterans' Appeals (hereafter in this chapter referred to as the "Board") under the administrative control and supervision of a [chairman directly responsible to the Administrator.] *chairman.* The Board shall consist of a Chairman, a Vice Chairman, such number (not more than 65) of members as may be found necessary, and such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the [Board.] *Board in a timely manner.*

[(b) Members of the Board (including the Chairman and Vice Chairman) shall be appointed by the Administrator with the approval of the President.]

*(b)(1) The Chairman of the Board shall be appointed by the President, by and with the advice and consent of the Senate, for a term of five years. An individual may serve as Chairman for not more*

*than three complete terms. The Chairman may be removed by the President for good cause.*

*(2)(A) The members of the Board (including the Vice Chairman) shall be appointed by the Chairman of the Board for a term of nine years. A member appointed to fill a vacancy resulting from the resignation, death, or removal of a member before the end of the term for which the original appointment was made shall serve for the remainder of the unexpired term. Members may be reappointed without limitation. The Chairman shall designate one member as Vice Chairman. Such member shall serve as Vice Chairman at the pleasure of the Chairman.*

*(B) A member of the Board may be removed only by the Chairman and only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Merit Systems Protection Board. Section 554(a)(2) of such title shall not apply to a removal action under this subparagraph. In such a removal action, a member shall have the rights set out in section 7513(b) of title 5.*

* * * * * * *

*(d) The Chairman of the Board shall submit a report to the Committees on Veterans' Affairs of the Senate and the House of Representatives, not later than December 31, 1988, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, information specifying the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the 36 months preceding the then current fiscal year, the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members of, and the professional, administrative, clerical, stenographic, and other personnel employed by, the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for subsection (a) of this section.*

*(e) Notwithstanding any other provision of law no member or temporary or acting member of the Board shall be eligible for or receive, directly or indirectly, bonuses (in addition to salary) relating to service on the Board.".*

* * * * * * *

**§ 4003. Determinations by the Board**

(a)*(1)* The [determination of the section,] *determination,* when [unanimously] concurred in by the *requisite number of* members of the [section] *section,* shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the [record,] *record* or may [upon the basis of addi-

tional official information from the service department concerned] reach a contrary [conclusion.] *conclusion upon the basis of additional information from the service department concerned after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information.*

*(2) The requisite number of members of a section that must concur in a final decision is—*

*(A) for an allowance of a claim, a majority of the members of the section; or*

*(B) for a denial of a claim, all members of the section.*

(b)*(1)* When there is a disagreement among the members of the section *in any case in which unanimity is required for a final determination,* the concurrence of the Chairman with the majority of *the* members of such section shall constitute the final determination of the [Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion.] *Board. The Chairman may, instead of voting, expand the size of the section for determination of that case, and the concurrence of a majority of the members of the expanded section shall constitute the final determination of the Board.*

*(2) Notwithstanding paragraph (1) of this subsection, the Board on its own motion may correct an obvious error in the record or may reach a contrary conclusion upon the basis of additional information from the service department concerned after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information.*

*(c) If, without the vote of a temporary member designated under section 4001(c)(1) of this title or the vote of an acting member designated under section 4002(a)(2)(A)(ii) of this title, a section would be evenly divided in the determination of any claim—*

*(1) such member shall not vote; and*

*(2) the Chairman shall expand, by not less than two members, the size of the section for determination of that claim.*

**§ 4004. Jurisdiction of the Board**

(a) All questions on claims [involving] *for* benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the [Board.] *Board after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law.*

(b)*(1) Except as provided in paragraph (2) of this subsection,* [When] *when* a claim is disallowed by the Board, it may not thereafter be reopened and [allowed,] *allowed* and no claim based upon the same factual basis shall be [considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.] *considered.*

*(2) Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—*

*(A) when new and material evidence is presented or secured, shall authorize the reopening of a claim and a review of the Board's former decision; and*

*(B) for good cause shown, may authorize the reopening of a claim and a review of the Board's former decision.*

*(3) A judicial decision under subchapter II of chapter 71 of this title, upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authority set forth in paragraph (2) of this subsection to authorize the reopening of a claim and a review of the former decision.*

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer.

**[**(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated.**]**

*(d) After reaching a decision in a case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—*

*(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact and law and on matters of discretion presented on the record; and*

*(2) an order granting appropriate relief or denying relief.*

**§ 4005. Filing of notice of disagreement and appeal**

(a) * * *

* * * * * * *

(d)(1) * * *

* * * * * * *

**[**(4) The appellant will be presumed to be in agreement with any statement of fact contained in the statement of the case to which no exception is taken.**]**

*(4) The claimant may not be presumed to agree with any statement of fact or law contained in the statement of the case to which the claimant does not specifically express agreement.*

(5) The Board of Veterans' Appeals **[**will base its decision on the entire record and**]** may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

* * * * * * *

**§ 4009. [Independent medical] *Medical* opinions**

(a) * * *

* * * * * * *

*(c)(1) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings*

*or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. The claimant may appeal a denial of a request for such an opinion to the Chairman of the Board.*

*(2) If the Board or the Chairman upon appeal denies a request for an advisory medical opinion, the Board, or the Chairman after the appeal, shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for the determination together with a notice of the claimant's right to appeal the denial to the Chairman of the Board.*

*(3) Actions of the Board under this subsection, including any such denial concurred in by the Chairman (if appealed), shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, the provisions of subchapter II of chapter 71 of this title to the contrary notwithstanding.*

*(d) If a member of the Board receives the medical opinion of any physician relating to any appeal under consideration by such member (other than a medical opinion of a physician on the section of the Board considering such appeal) or an employee of the Board in the consideration of such appeal receives such an opinion, the Board shall furnish such opinion to the claimant and shall afford the claimant 60 days in which to submit a response to such opinion before the Board issues a final determination on the appeal. The Board shall consider any such response and shall include in the final determination a discussion of such opinion, the response (if any), and the effect of such opinion and response on the Board's determination.*

***§ 4010. Adjudication procedures***

*(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator and the members of the Board may administer oaths and affirmations, examine witnesses, and receive evidence.*

*(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator and the Chairman of the Board, under regulations which the Administrator and the Chairman shall jointly prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.*

*(c)(1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—*

*(A) to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and*

*all documents and records to be used by the Veterans' Administration at such proceeding;*

*(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations prescribed pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;*

*(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;*

*(D) to submit rebuttal evidence;*

*(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and*

*(F) to serve written interrogatories on any person, including any employee of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Chairman of the Board by the person to whom the interrogatories are directed or such person's representative.*

*(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Chairman of the Board, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.*

*(3) In the event of any objection filed under paragraph (1)(F) of this subsection, the Chairman of the Board shall, pursuant to regulations which the Chairman shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Chairman shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.*

*(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this subsection fails to answer or fails to provide responsive answers to all of the interrogatories within 30 days after service or such additional time as the Chairman of the Board may allow, the Chairman, upon determining that the party propounding such interrogatories has shown the general relevance and reasonableness of the scope of the interrogatories, shall issue a subpena under section 3311 of this title (with enforcement of such subpena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within 100 miles of where such person resides, is employed, or transacts business.*

*(d)(1) A claimant may request a hearing before a traveling section of the Board. Cases shall be scheduled for hearing before such a section in the order in which the requests for hearing are received by the Board.*

*(2) If a claimant makes a request for hearing before a traveling section of the Board and, by reason of limited time for the conduct of hearings by such section at the location for the requested hearing, such claimant's appeal is not scheduled for hearing or the hearing is not conducted, the Board shall afford such claimant an opportu-*

*nity to present the case to the Board in a hearing conducted by telephone or video connection before a section of the Board or in a videotape of a hearing conducted for the Board by Veterans' Administration adjudication personnel at a regional office of the Veterans' Administration. An audiotape or videotape shall be included in the record of the appeal and considered by the Board in the same manner as recordings of testimony and documentary evidence are considered.*

*(e) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration (including employees of the Board of Veterans' Appeals) may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator, as to proceedings other than proceedings before the Board, or the Chairman of the Board, as to proceedings before the Board, shall determine the matter as a part of the record and decision in the case, pursuant to regulations prescribed jointly by the Administrator and the Chairman.*

*(f) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Chairman of the Board, pursuant to regulations which the Chairman shall prescribe, on the basis of the party's inability to pay or for other good cause shown.*

*(g) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator, as to proceedings other than proceedings before the Board, or the Chairman of the Board, as to proceedings before the Board, or by the Administrator and the Chairman jointly, under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.*

***§ 4011. Notice of procedural rights and other information***

*In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator, as to proceedings other than proceedings before the Board, or the Chairman of the Board, as to proceedings before the Board, shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a*

*statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator or the Chairman, respectively, shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, (3) in the case of an appeal to the Board, the opportunity for a hearing before a traveling section of the Board, and (4) such other information as the Administrator or the Chairman of the Board, respectively, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.*

*SUBCHAPTER II—JUDICIAL REVIEW*

***§ 4025. Right of review; commencement of action***

*(a) For the purposes of this chapter—*

*(1) "final decision of the Board of Veterans' Appeals" means—*

*(A) a final determination of the Board pursuant to section 4004 (a) or (b) of this title; or*

*(B) a dismissal of an appeal by the Board pursuant to section 4005 or 4008 of this title;*

*(2) "claim for benefits" means—*

*(A) an initial claim filed under section 3001 of this title;*

*(B) a challenge to a decision of the Administrator reducing, suspending, or terminating benefits; or*

*(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph;*

*(3) "interested party", with respect to a rule or regulation issued or adopted by the Administrator, means any person substantially affected by such rule or regulation; and*

*(4) "disability rating schedule" means the schedule of ratings adopted and readjusted under section 355 of this title and any provision made by the Administrator under section 357 of the title for the combination of ratings.*

*(b)(1)(A) Subject to subparagraph (B) of this paragraph, the following matters are subject to judicial review under this subchapter:*

*(i) A final decision of the Board of Veterans' Appeals in accordance with subsection (c).*

*(ii) A rule or regulation issued or adopted by the Administrator when review of such regulation is requested by a claimant in connection with an action under subsection (c).*

*(iii) A rule or regulation so issued or adopted when review of such regulation is requested by any interested party in an action*

*brought only for the purpose of obtaining review of such rule or regulation.*

*(B) In an action involving any matter subject to judicial review under this subchapter, a court may not direct or otherwise order that any disability rating schedule issued or adopted by the Administrator be modified.*

*(2) Any action for judicial review authorized by this subchapter shall be brought by the claimant or an interested party in the United States Court of Appeals for the circuit in which the plaintiff resides or the plaintiff's principal place of business is located, or in the United States Court of Appeals for the District of Columbia Circuit.*

*(c) Except as provided in subsection (g) of this section, after any final decision of the Board of Veterans' Appeals adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after notice of such decision is mailed to such claimant pursuant to section 4004(d) of this title.*

*(d) The complaint initiating an action under subsection (c) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.*

*(e) Not later than 30 days after filing the answer to a complaint filed pursuant to subsection (d) of this section, the Administrator shall file a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court considers relevant to its consideration of the case.*

*(f) In an action brought under subsection (c) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (e) of this section, to enter judgment in accordance with section 4026 of this title or remand the case in accordance with such section or section 4027 of this title.*

*(g)(1) No action may be brought under this section unless (A) the initial claim for benefits is filed pursuant to section 3001 of this title on or before the last day of the fifth fiscal year beginning after the effective date of this section, and (B) the complaint initiating such action is filed not more than 180 days after notice of the first final decision of the Board of Veterans' Appeals rendered after the last day of such fiscal year is mailed to the claimant pursuant to section 4004(d) of this title. If the case is reopened pursuant to section 4004(b)(2)(A) of this title within 180 days after such notice is mailed, the next final decision shall, for purposes of this subsection, be considered the first final decision of the Board.*

*(2) No action may be brought under this section with respect to matters arising under chapters 19 and 37 of this title.*

***§ 4026. Scope of review***

*(a)(1) In any action brought under section 4025 of this title, the court, to the extent necessary to its decision and when presented, shall, except as provided for in section 4025(b)(1)(B) of this title—*

*(A) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;*

*(B) compel action of the Administrator unlawfully withheld;*

*(C) hold unlawful and set aside decisions, findings (other than those described in clause (D) of this paragraph), conclusions, rules, and regulations issued or adopted by the Administrator, the Board of Veterans' Appeals, the Administrator and Chairman of the Board jointly, or the Chairman found to be—*

*(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;*

*(ii) contrary to constitutional right, power, privilege, or immunity;*

*(iii) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or*

*(iv) without observance of procedure required by law; and*

*(D) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside.*

*(2) Before setting aside any finding of fact under paragraph (1)(D) of this subsection, the court shall specify the deficiencies in the record upon which the court would set aside such finding and shall remand the case one time to the Board of Veterans' Appeals for further action not inconsistent with the order of the court in remanding the case. In remanding a case under the first sentence of this paragraph, the court shall specify a reasonable period of time within which the Board shall complete the ordered action. If the Board does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.*

*(b) In making the determinations under subsection (a) of this section, the whole record before the court pursuant to section 4025(e) of this title shall be subject to review, and the court shall review those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.*

*(c) In no event shall findings of fact made by the Administrator or the Board of Veterans' Appeals be subject to trial de novo by the court.*

*(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation issued or adopted by the Administrator or the Chairman of the Board, the court shall review only questions raised as to compliance with and the validity of the regulation.*

***§ 4027. Remands***

*(a) If either party to an action brought under section 4025 of this title applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Board of Veterans' Appeals and order such additional evidence to be taken by the Board. The court may specify a reasonable period of time within which the Board shall complete the required action.*

*(b) After a case is remanded to the Board of Veterans' Appeals under subsection (a) of this section, and after further action by the Board, including consideration of any additional evidence, the Board shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based.*

***§ 4028. Survival of actions***

*Any action brought under section 4025 of this title shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.*

***§ 4029. Appellate review***

*The decisions of a court of appeals pursuant to this chapter shall be subject to appellate review by the Supreme Court of the United States in the same manner as judgments in other civil actions.*

* * * * * * *

APPENDIX

MAIL DVB PCU

Department of Veterans Benefits
Veterans Administration
Washington, D.C. 20420

DVB Circular 20-88-11

June 17, 1988

HEARING OFFICER PROCEDURAL INSTRUCTIONS

1. GENERAL. This circular provides procedural instructions for the conduct and processing of hearings by the Hearing Officer (HO).

2. AUTHORITY.

a. General. The HO is empowered to hold post-decisional personal hearings on DVB benefit issues under the HO's jurisdiction. The HO shall also hold a pre-determination hearing if the issue is a proposed decision to reduce, suspend, or terminate compensation or pension, or if the issue is a reduction in educational assistance allowance or subsistence allowance due to the loss of a dependent. The HO may not hold any other pre-decisional hearing.

b. Scope. Subject to the limitations below, the HO has the authority to amend, reverse or affirm the decision (or proposed decision) in question, after holding the hearing. A HO decision to amend a proposed reduction, termination or suspension of benefits will not serve to extend the time a claimant has to submit evidence to show that the proposed decision should not be made. The HO also has the authority to decide whether evidence submitted before or as a result of the hearing is new and material.

c. Limitations.

(1) If a hearing is not held, the HO has no authority over the case in question. Therefore, if the person requesting the hearing cancels the hearing request or fails to show up, handle the case in the usual manner. If the HO had initiated development before the hearing, refer the new evidence to the responsible activity for action.

(2) The HO is bound to follow applicable regulations and DVB instructions (manuals, circulars, interim issues, etc.). Thus, if the HO is of the opinion that a decision should be changed based on difference of opinion (no new and material evidence of record), the HO shall recommend to the AO that the AO submit the case to Central Office under M21-1, par. 19.05. The decision of the AO is controlling and if the AO does not agree with the HO's position, the HO shall affirm. (See M22-2, Part IV, par. 2.05 for education cases.)

(3) In the absence of new and material evidence the HO is bound to follow a decision of the BVA in an individual claim. A BVA decision is final based on the evidence of record. Therefore, if a person files a reopened claim after a BVA decision, the decision of the BVA is binding on the issues

that were decided by the BVA based on the evidence before the BVA. The HO is, of course, not bound by a BVA decision if the claimant submits new and material evidence.

(4) The HO's authority is also limited by the filing of VA Form 1-9, Appeal to the Board of Veterans Appeals. The filing of VA Form 1-9 confers jurisdiction on the BVA. Therefore, if a VA Form 1-9 is filed, the HO holds a requested hearing for the BVA unless the claimant wishes to go to Washington, D.C. and appear before the BVA (or appear before a traveling board). Since the HO is holding the hearing for the BVA, the HO cannot recommend a change based on difference of opinion under 38 CFR 3.105(b). (See M21-1, par. 18.17h.) However, if new and material evidence is received before or as a result of the hearing, the HO has the authority to amend the decision after holding the hearing.

3. JURISDICTION.

a. Compensation and Pension Issues. The HO has jurisdiction over personal hearings involving all authorization and rating decisions and basic eligibility determinations which affect entitlement to other VA programs. This includes character of discharge decisions, the clothing allowance, the automobile allowance, specially adapted housing and special allowance under Section 412a.

b. DM&S Benefits. A hearing request concerning an adjudicative decision which affects DM&S benefits is under the jurisdiction of the HO. A hearing request concerning a denial of benefits from a medical determination for the clothing allowance, automobile, adaptive equipment, and specially adapted housing is under the jurisdiction of the DM&S.

c. COWC Cases. The HO has post-decisional jurisdiction over a COWC personal hearing. Pre-decisional COWC hearings are held by a COWC panel.

d. Insurance. The HO does not have jurisdiction over insurance issues. The Veterans Service Division shall continue to hold these hearings.

e. Vocational Rehabilitation and Education Issues.

(1) The HO will hear and decide (as appropriate) vocational rehabilitation issues in connection with all adjudicative decisions pertaining to basic entitlement, periods of eligibility and monetary assistance.

(2) The HO has jurisdiction over personal hearings involving all education-related authorization decisions. These include, but are not limited to, basic eligibility

determinations, suitability of program determinations, and change of program determinations.

f. Loan Guaranty. The HO has no jurisdiction over loan guaranty issues including overpayment issues which may come under COWC jurisdiction.

g. Duration of Jurisdiction. The HO's jurisdiction ends when the HO makes a decision. Any evidence received after the HO's decision is made is to be handled in the usual manner.

h. Subsequent Hearing Request. A HO may hold a subsequent hearing involving the same case and the same issue. This applies even if the subsequent hearing is held after the HO makes a decision as a result of a prior hearing.

4. DUTIES OF THE HEARING OFFICER. The HO is under the direct supervisory control of the Adjudication Officer who is responsible for the assignment and scheduling of hearings and other routine supervisory controls. The duties of the HO include reviewing the file before the hearing, holding the hearing, evaluating the evidence of record including the need for additional evidence as a result of information obtained during the hearing, making a decision, and preparing a decisional document. (On a time available basis, the Adjudication Officer may assign a Hearing Officer to duties appropriate to the Hearing Officer's grade level and position, provided that such duties do not conflict with the HO's status as an impartial and independent decision maker.)

5. REVIEW OF FOLDER BEFORE HEARING. The HO shall review the file before holding the hearing. (The provisions of M21-1, par. 18.18(d) and M22-2, Part IV, par. 2.06 are applicable to this review.) This review may disclose that additional evidence should have been obtained in connection with the decision that is the subject of the hearing and/or that another issue that should have been considered was not.

a. If the HO believes additional evidence should have been obtained, the HO shall direct that it be requested. The RO is required to satisfy the HO's request for additional evidence. The HO may also order a VA exam. Do not delay holding the hearing until the evidence is received. If the claimant cancels the hearing request or does not appear for the hearing, refer the new evidence to the appropriate activity for action.

b. If HO review discloses that an issue other than the one that is the subject of the hearing has not been considered or properly developed, the HO shall refer it to the appropriate activity with a short explanation on a routing slip. The HO shall not control these referrals for follow up. The HO,

however, shall take jurisdiction over a rating issue that the veteran brings up during the hearing provided the issue was part of the rating decision that is the subject of the hearing (or the issue was part of another rating decision and the 1 year appeal period has not expired).

6. CONDUCT OF THE HEARING.

a. General. All procedural and regulatory guidelines which govern the conduct of hearings apply to the HO. See 38 CFR 3.103 and M21-1, par. 18.17.

b. Advisors. The HO may request other adjudication staff members to be present during the hearing. Supervisory personnel and trainees may observe a hearing for supervisory/training purposes. However, the decision is solely for the HO to make.

c. Witnesses. A claimant may bring as many witnesses as the claimant wants to the hearing.

d. Discussion with Claimant. The HO can, of course, ask pertinent questions consistent with the ex parte nature of the hearing. See M21-1, par. 18.18. If the HO feels that the claimant should have a VA exam, the HO shall ask the claimant if he/she will report for the exam. If the claimant agrees, the HO has the authority to request the exam. (The HO shall prepare the VA Form 21-2507.)

7. REVIEW OF THE EVIDENCE OF RECORD.

a. General. The claimant can present documentary evidence as well as oral testimony at the hearing. After the hearing, the HO shall review all of the evidence now of record. If there is an additional source of evidence on the issue in question that was not obtained (e.g., claimant said he was treated by Dr. John Smith and Dr. Smith's report is not in file), the HO shall direct the appropriate activity to obtain it.

b. New Issues. If new issues are raised by the claimant at the hearing (i.e. separate from the decision in question and not encompassed under par. 5b), the HO shall refer them to the appropriate activity for development and a decision. Use a routing slip for this purpose. The HO shall not delay making a decision on the issue that was the subject of the hearing pending a decision on new issue.

8. MAKING THE DECISION - NOTIFYING THE CLAIMANT.

a. General. The HO shall use the format in Exhibit A and succinctly state the issue, facts and decision. If the

claimant has a representative, prepare a copy of the decision for the representative. Do not send a copy of the decision to the claimant. See subparagraph c, below, for claimant notification.

b. Implementing the Decision. The HO shall attach the decision to the outside of the claims folder and refer it to the appropriate activity for action. If a new rating is required, the rating board shall show "Hearing Officer Decision" for jurisdiction. If the HO affirms a rating decision, the HO's decision takes the place of a C & C rating.

c. Notifying the Claimant. The authorization activity (or COWC activity) shall write to the claimant and inform him/her of the HO's decision. If benefits are allowed or increased, tell the claimant that an award letter will be forthcoming. If the HO's decision fully or substantially grants benefits sought on appeal, follow M21-1, par. 18.20b and c.

9. NOTICE OF DISAGREEMENT AND STATEMENT OF THE CASE. If a hearing request is received with a notice of disagreement, coordinate the hearing date to take place after receipt by the claimant of the statement of the case (SOC). The activity making the original decision should prepare and send the SOC to the claimant before the hearing date. The activity responsible for the decision shall also prepare supplemental statements of the case when required. A SOC released in conjunction with a hearing will contain a notice (Exhibit B) that it is being sent in advance of the scheduled hearing date to enable the claimant to better prepare his/her case. Preparation of a supplemental statement of the case, the need for which results from a HO decision, is to be done by the RO activity of jurisdiction (authorization or rating board).

10. ABSENCE OF THE HO. The Adjudication Officer of the station where the hearing is scheduled may appoint an acting HO during the temporary absence or disqualification of the HO. The acting HO shall have considerable adjudicatory experience in the issues that are the subject of the hearing(s) and should not be less than a grade 12 except in extraordinary circumstances. The acting HO, of course, cannot have participated in the issues that he/she hears. During the beginning of the HO program the AO may have to frequently appoint an acting HO since the HO on station may have participated in many of the cases scheduled for a hearing.

Note: The HO is expected to hold all personal hearings encompassed under par. 2.a. above. However, the AO may assign a rating board or authorization panel (the members of which did not participate in the decision) to hold a personal hearing in unusual or emergent circumstances.

11. HO REQUESTS FOR REVIEW BY CO. Upon completion of a hearing, the Hearing Officer may seek administrative review (M21-1, par. 19.01a), or if additional evidence has been submitted, may request an advisory opinion from Central Office (M21-1, par. 19.02a and b). In either instance, the submission will be with the concurrence of the Adjudication Officer.

12. AO REVIEW REQUESTS. The Adjudication Officer is responsible for the quality of decisions in the adjudication division (M21-1, par. 19.06). This responsibility extends to ensuring decisions rendered by hearing officers properly apply all laws, regulations, and instructions. As with a rating decision, if the Adjudication Officer disagrees with the substantive decision of a Hearing Officer, he or she may request reconsideration, but may not direct a change in the decision. If appropriate, the Adjudication Officer may seek administrative review or administrative appeal (M21-1, par. 19.06b(1)).

13. WORK MEASUREMENT. Hearing Officers will be responsible for maintaining a careful record of actual hours spent away from their hub station. A report will be prepared and given to the Adjudication Officers at both the hub station and outbased stations. These stations will borrow/loan the corresponding amount of time. The Hearing Officers should be included under the cost center for the rating activity. Completed end-product credit will continue to be recorded by the regional office having jurisdiction of the claim. Control HO cases under EP 174. Establish the issue upon receipt of the hearing request and take the 174 after the hearing is held and the HO decision received. If the claimant does not appear for the hearing or cancels the request, take the 174 at that time.

14. MONTHLY REPORT. Each station shall maintain a report of requested and completed hearings. Prepare a separate report for each calendar month. The report shall consist of the following data:

Veteran's name
Claim number
Date of hearing request
Was hearing held? (Yes or no)
If yes, give date
Was additional development ordered by HO? (include 2507 requests) (Yes or no)
Was decision affirmed? (Yes or no)
Were benefits increased or awarded as a result of hearing?

Send a copy of the report to VACO (20lA) within 5 working days after the end of each calendar month. RCS 20-0800 is assigned to this report.

15. SCHEDULING. Each station will appoint (designate) a person responsible for scheduling hearings, maintaining records and coordinating the hearing schedule with the Hearing Officer. Hearings should be held at visited stations at least monthly.

16. PLANNING. Each station will review its current hearing schedule and workload. Based on historic workloads, no-show rates and current hearing schedule, the station will project monthly hearings. Current and projected workload information will be furnished to the Hearing Officer's home station. This information will be used in developing the Hearing Officer's schedule.

17. TYPING. Transcription will be done at the station where the hearing is held.

18. BUDGET CONTROLS. Each station with a Hearing Officer will establish FCP 518 for Hearing Officer travel.

R. J. VOGEL
Chief Benefits Director

Distribution: CO: RPC 2900
SS (2138) FLO: DVBFS, 1 each (Reproduce and distribute based on RPC 2068)

DVB Circular 20-88-11
Exhibit A

June 17, 1988

(Designation of VA Office)
(Location of VA Office)

(File Number)
(Veteran's Name)
(Claimant's Name if not veteran)

HEARING OFFICER'S DECISION

DATE OF HEARING:

ISSUE:

(State the issue(s).)

FACTS:

(Summarize evidence pertinent to the determination of each issue. Segregate as well as possible each issue with its evidence arranged chronologically.)

DECISION:

(Succinctly state the decision.)

(Signature)
NAME
HEARING OFFICER

DATE

Copy to:

June 17, 1988

DVB Circular 20-88-11
Exhibit A, Example 1

VA CENTRAL OFFICE
810 VERMONT AVE NW
WASHINGTON DC 20420

SS 987-65-4321
D. I. VETERAN

HEARING OFFICER'S DECISION

HEARING DATE: 3/3/88

ISSUE:

Increased evaluation of service connected postoperative right knee injury, evaluated at 10% disabling.

FACTS:

The veteran and his DAV service representative argued that the medical evidence of record warrants a greater evaluation than presently assigned. The veteran's chief complaint was pain in the right knee after walking a couple of blocks. He states he continues to wear an elastic knee bandage on the knee.

DECISION:

The evidence of record, including the testimony and argument presented at the hearing, does not support a higher evaluation. Therefore, the rating decision dated 1/15/88 affirming the 10% evaluation assigned to the service connected PO right knee injury is confirmed and continued.

_____ _____

I. A. INDEPENDENT
HEARING OFFICER

DATE

Copy to: DAV

DVB Circular 20-88-11
Exhibit A, Example 2

June 17, 1988

VA CENTRAL OFFICE
810 VERMONT AVE NW
WASHINGTON DC 20420

SS 987-65-4321
D. I. VETERAN

HEARING OFFICER'S DECISION

HEARING DATE: 2/12/88

ISSUE:

Increased evaluation for SC herniated disc, L5-S1, PO, evaluated at 20 percent disabling.

FACTS:

The veteran appeared before the Hearing Officer and the veteran complained of pain in the lumbosacral area which radiated down into this right foot. A medical report was submitted from Dr. J.J. Jones. The treatment report showed the veteran was seen on 12/8/87 and 12/18/87 for complaints of back and leg pain. The HO ordered a VA examination.

The VA examination was conducted on 3/23/88. The veteran complained of intermittent right sciatica pain radiating down the right leg to the lateral aspect of the right foot. No calf atrophy was noted. Neurological examination revealed absent ankle jerk on the right with weakness in the flexion and extension of the toes. Decreased sensation noted to the dermatome S1. SLR limited to 20 degrees, LS forward flexion limited to 35 degrees. X-ray revealed degenerative disease at L5-S1 compatible with an old fracture and loss of lordotic curve.

DECISION:

The evaluation assigned for the SC herniated disc, L5-S1, PO is increased to 40 percent.

_____ _____

I. A. INDEPENDENT
HEARING OFFICER

DATE

June 17, 1988

DVB Circular 20-88-11
Exhibit B

ADVANCE NOTICE OF HEARING DATE INCLUDED WITH THE SOC.
ADD NOTICE TO FL 1-25A OR FL 1-28A AFTER ISSUE.

This statement of the case is furnished in advance of the personal appearance you have requested so that you will be fully informed of the evidence we have considered and the reasons for the decision with which you have disagreed. This will give you an opportunity to prepare for your oral presentation at the hearing. You will be advised in the next few days of the day and time your hearing is scheduled.

TO THE CONGRESS OF THE UNITED STATES:

Supervisors and management officials in GS-13, 14, and 15 positions throughout the Federal government are covered by the Performance Management and Recognition System as required by Chapter 54, Title 5, U.S. Code, unless otherwise excluded by law.

Upon proper application from the heads of affected agencies and upon the recommendation of the Director of the Office of Personnel Management, I have excluded, pursuant to 5 U.S.C. 5402(b)(1), three agencies, units of agencies, and classes of employees from coverage under the Performance Management and Recognition System.

In accordance with Section 205 (d) of P.L. 98-615, any agency or unit of an agency that was excluded from merit pay immediately prior to enactment of this legislation is excluded from coverage under the Performance Management and Recognition System for the 12-month period beginning on the date of enactment. However, such exclusion may be revoked at any time in accordance with 5 U.S.C. 5402(b)(5). Upon request of the heads of the affected agencies and upon recommendation of the Director of the Office of Personnel Management, I have revoked the exclusion of seven agencies and units of agencies so that they may implement the Performance Management and Recognition System in fiscal year 1986.

Attached is my report describing the agencies to be excluded and the reasons therefor. I am also providing the names of those agencies for which the exclusion is revoked.

RONALD REAGAN

THE WHITE HOUSE,
October 30, 1985.

REPORT OF THE PRESIDENT
TO CONGRESS
ON EXCLUSIONS AND REVOCATIONS OF EXCLUSIONS
OF AGENCIES OF THE GOVERNMENT
FROM THE PERFORMANCE MANAGEMENT AND RECOGNITION SYSTEM

I have excluded three agencies from coverage under the Performance Management and Recognition System that applies to the Federal workforce. In addition, I have revoked the exclusions of seven agencies that would otherwise have been excluded from the Performance Management and Recognition System until November 9, 1985. All these actions were taken at the request of the heads of the agencies involved, and upon the recommendation of the Director of the Office of Personnel Management.

Background

As required by Chapter 54, Title 5, United States Code, supervisors and management officials in GS-13, 14, and 15 positions throughout the Federal Government are covered under the Performance Management and Recognition System. As an exception to this requirement, 5 U.S.C. 5402(b)(1) provides that the President may exclude an agency, a unit of an agency, or a class of employees in a unit of an agency or a class of employees in a unit from the Performance Management and Recognition System as follows:

"(b)(1) Upon request filed under paragraph (3) of this subsection, the President may, in writing, exclude an agency, any unit of an agency, or any class of employees within any such unit, from the application of this chapter, if the President considers such exclusion to be required as a result of conditions arising from —

"(A) the recent establishment of the agency, unit, or class, or the implementation of a new program;

"(B) an emergency situation; or

"(C) any other situation or circumstance.

"(2) Any exclusion under this subsection shall not take effect earlier than 30 calendar days after the President transmits to each House of the Congress a report describing the agency, unit, or class to be excluded and the reasons therefor.

"(3) A request for exclusion of an agency, any unit of an agency, or any class of employees within any such unit, under this subsection shall be filed by the head of the agency with the Office of Personnel Management, and shall set forth reasons why the agency, unit, or class should be excluded from the application of this chapter. The Office shall review the request and reasons therefor, undertake such other review as it considers appropriate to determine whether the agency, unit, or class should be excluded from the application of this chapter and, upon completion of its review, recommend to the President whether the agency, unit, or class should be so excluded.

"(4) Any agency, unit, or class which is excluded pursuant to this subsection shall, insofar as practicable, make a sustained effort to eliminate the conditions on which the exclusion is based.

"(5) The Office shall periodically review any exclusion from coverage and may at any time recommend to the President that an exclusion under this subsection be revoked. The President may at any time revoke, in writing, any exclusion under this subsection."

In addition, Section 205(d) of Public Law 98-615 provides that:

"(1) Except as provided in paragraph (2), any agency or unit of an agency which, immediately before the date of enactment of this Act, was excluded from coverage under the merit pay system shall be excluded from coverage under the performance management and recognition system for the 12-month period beginning on such date of enactment.

"(2) An exclusion under paragraph (1) may be revoked at any time in accordance with section 5402(b)(5) of title 5, United States Code, as amended by this Act."

Exclusions

The heads of three agencies have applied for exclusions. The Director of the Office of Personnel Management has reviewed their respective applications and has found them to be in proper form and of merit. She has transmitted them to me for my review and, upon her recommendation, I have concluded that the exclusions requested should be granted. There follows a discussion of each of the three cases involved.

(1) Veterans Administration; Board of Veterans Appeals, affecting 19 employees.

The members of the Board of Veterans Appeals of the Veterans Administration hear claims for benefits under the laws administered by the Veterans Administration. Decisions of the Board of Veterans Appeals are not reviewed by any official subordinate to the Administrator of Veterans Affairs and are subject to judicial review. It is essential that the Board members be free of institutional bias and of pressures that could influence or be seen to influence their decisions. Inclusion of the Board members in the Performance Management and Recognition System might create an appearance that their decisions are affected by prospects of receiving lesser or greater remuneration in consequence of rendering determinations that are pleasing to superior officials, that is, favorable to the Government. Such an appearance might destroy the public's confidence in the integrity of the Board's decisions.

(2) North Atlantic Treaty Organization/Supreme Headquarters Allied Powers Europe; including NATO International Staff, Evere, Belgium, affecting 8 employees; NATO Integrated Communications System Management Agency, affecting 4 employees; NATO Supply Center, Capellen, Luxembourg, affecting 6 employees; and SHAPE, affecting 4 employees.

The 22 affected employees of NATO/SHAPE report to managers most of whom are not themselves American personnel or, in some instances, to international committees, boards, groups, or panels who do not use the United States Government's performance appraisal system. These employees also supervise personnel who are employees and citizens of one or more of the 14 members of NATO in addition to the United States. All employees of NATO/SHAPE must comply with NATO international civilian personnel agreements, rules, regulations, and procedures, including those that pertain to performance appraisal. Thus, if it is imposible to appraise the performance of these employees under the performance appraisal system applicable to the United States Civil Service, it is derivatively impossible to make performance pay, incentive, and related decisions that depend upon it. NATO/SHAPE was excluded from the Merit Pay System that preceded the current Performance Management and Recognition System.

(3) Department of the Interior; Bureau of Indian Affairs; Indian Arts and Crafts Board, affecting 3 employees.

The Indian Arts and Crafts Board is directed by five Commissioners who are not Federal employees but are, instead, private citizens who, appointed by the Secretary of the Interior, serve on a part-time basis without compensation. Because these five Commissioners, who supervise the Commission's three employees, have little, if any, day-to-day familiarity with Federal personnel management matters, it would be difficult to obtain accurate performance appraisals and performance pay decisions.

## Revocations of Exclusions

The heads of the following agencies have requested that I revoke their exclusions from the Performance Management and Recognition System under Section 205(d) of Public Law 98-615. These agencies will participate in the pay provisions of the Performance Management and Recognition System in Fiscal Year 1986.

97th Congress
2d Session

COMMITTEE PRINT

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S-82 12728

# AGENCIES EXCLUDED FROM THE FEDERAL MERIT PAY SYSTEM

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MESSAGE

FROM

## THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A REPORT ON AGENCIES AND UNITS OF AGENCIES EXCLUDED FROM THE FEDERAL MERIT PAY SYSTEM, PURSUANT TO 5 U.S.C. 5401(b)(2)(B)

SEPTEMBER 1, 1982

Printed for the use of the Committee on Post Office and Civil Service

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U.S. GOVERNMENT PRINTING OFFICE
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## REPORT OF THE PRESIDENT TO CONGRESS ON AGENCIES AND UNITS OF AGENCIES EXCLUDED FROM THE FEDERAL MERIT PAY SYSTEM

I have excluded 9 agencies and units of agencies from coverage under the Federal Merit Pay System. One of these agencies and units is excluded because of the need for adjudicatory independence; 7 are excluded because of small size; and one is excluded because of emergency conditions.

As required by Chapter 54, Title 5, United States Code, supervisors and management officials in GS–13, 14, and 15 positions throughout the Federal Government are covered under the Merit Pay System. As an exception to this requirement, 5 U.S.C. 5401(b)(2) provides that the President may exclude an agency or a unit of an agency from merit pay as follows:

> (A) Upon application under subparagraph (C) of this paragraph, the President may, in writing, exclude an agency or any unit of an agency from the application of this chapter if the President considers such exclusion to be required as a result of conditions arising from—
>
> (i) the recent establishment of the agency or unit, or the implementation of a new program,
>
> (ii) an emergency situation, or
>
> (iii) any other situation or circumstance.
>
> (B) Any exclusion under this paragraph shall not take effect earlier than 30 calendar days after the President transmits to each House of the Congress a report describing the agency or unit to be excluded and the reasons therefor.
>
> (C) An application for exclusion under this paragraph of an agency or any unit of an agency shall be filed by the head of the agency with the Office of Personnel Management, and shall set forth reasons why the agency or unit should be excluded from this chapter. The Office shall review the application and reasons, undertake such other review as it considers appropriate to determine whether the agency or unit should be excluded from the coverage of this chapter, and upon completion of its review, recommend to the President whether the agency or unit should be excluded.
>
> (D) Any agency or unit which is excluded pursuant to this paragraph shall, insofar as practicable, make a sustained effort to eliminate the conditions on which the exclusion is based.
>
> (E) The Office shall periodically review any exclusion from coverage and may at any time recommend to the President that an exclusion under this paragraph be revoked. The President may at any time revoke, in writing, any exclusion under this paragraph.

The heads of 9 agencies and units of agencies have applied for exclusion. The Director of the Office of Personnel Management has reviewed their applications and have found them to be in proper form and of merit. Upon his recommendation, I have reviewed these cases and I have concluded that the exclusions requested should be granted.

*Board of Veterans Appeals—Veterans' Administration.*—Affects 19 employees.

The members of the Board of Veterans Appeals hear claims involving benefits under the laws administered by the Veterans' Administration and their decisions are not reviewable by any official other than the Administrator of Veterans' Affairs or by the Courts. It is essential that the Board members be free of institutional bias and pressures that could be viewed as influencing their decisions. By including the Board members under merit pay, it could appear that their decisions are controlled by the prospect of receiving lesser or greater salary increases as a result of rendering determinations that are unfavorable or favorable to the Government. Such a perception could destroy the public's confidence in the integrity of the Board's decisions.

*Advisory Committee on Federal Pay.*—Affects 2 employees.

*National Mediation Board.*—Affects 3 employees.

*NATO, International Staff*, Evere, Belgium.—Affects 5 employees.

*NATO Integrated Communications System Management Agency*, Brussels, Belgium.—Affects 3 employees.

*NATO Maintenance and Supply Agency*, Luxembourg City, Luxembourg.—Affects 1 employee.

*NATO Supply Center*, Capellen, Luxembourg.—Affects 7 employees.

*Supreme Headquarters Allied Powers Europe*, SHAPE, Belgium.—Affects 4 employees.

Organizations with extremely small merit pay populations would have to devote an inordinate proportion of resources to implement merit pay systems, and the resultant pools of merit pay funds are likely to be too small to maintain equitable merit pay adjustments.

The problem with very small pools lies in their potential insufficiency to support merit pay systems that meet the intent of Congress; that is, to fund adjustments to salaries of covered employees that appropriately reflect their overall performance. Since the size of the total pool of funds available for merit pay increases is fixed by the population rather than the performance ratings, the size of an individual's merit pay adjustment is affected to some degree by the overall performance of the group as well as by his or her own performance. Normally, this effect will average out, but with very small groups another individual's performance has nearly as much impact on one's increase as his or her own, and merit pay cannot be confidently administered.

*Federal Aviation Administration—Department of Transportation.*—The Federal Aviation Administration has requested a second one year exclusion from merit pay under the emergency provisions of 5 U.S.C. 5401(b)(2). The FAA reports that the conditions created by the strike of the Air Traffic Controllers continues to place extraordinary demands on the workforce, in particular, the requirements placed on supervisory personnel to operate a safe and efficient air traffic system while, at the same time, training thousands of new employees. The FAA states that the exceptional demands placed on managerial and supervisory employees at this time make it imperative that the additional workload required by the implementation of merit pay be postponed for another year.

O