

LEGISLATIVE HEARING ON CONSIDERATION OF DRAFT LEGISLATION,
DAVENPORT V. BROWN, VETERAN'S COST-OF-LIVING ADJUSTMENTS,
AND THE COURT OF VETERANS' APPEALS PRO BONO PROGRAM

JOINT HEARING
BEFORE THE
SUBCOMMITTEE ON
EDUCATION, TRAINING, EMPLOYMENT AND HOUSING
AND
SUBCOMMITTEE ON
COMPENSATION, PENSION, INSURANCE AND
MEMORIAL AFFAIRS
OF THE
COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTH CONGRESS
SECOND SESSION

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MAY 8, 1996
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WEDNESDAY, MAY 8, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EDUCATION, TRAINING, EMPLOYMENT
AND HOUSING, JOINT WITH
SUBCOMMITTEE ON COMPENSATION, PENSION, INSURANCE
AND MEMORIAL AFFAIRS,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The subcommittees met, pursuant to call, at 10 a.m., in room 334, Cannon House Office Building, Hon. Steve Buyer (chairman of the Subcommittee on Education, Training, Employment and Housing), presiding.

Present: Representatives Buyer, Everett, Hutchinson, Barr, Weller, Cooley, Filner, Evans, Montgomery, Clement, and Mascara.
Also Present: Representative Fox.

**OPENING STATEMENT OF HON. STEVE BUYER, CHAIRMAN,
SUBCOMMITTEE ON EDUCATION, TRAINING, EMPLOYMENT
AND HOUSING**

Mr. BUYER. This joint Subcommittee will come to order.

Before I begin, I'd like to thank the distinguished Chairman of the Subcommittee on Compensation, Pension, Insurance and Memorial Affairs, Terry Everett, for agreeing to hold this joint legislative hearing. Likewise, I would like to thank the distinguished ranking members of the two subcommittees, Lane Evans and Bob Filner, for their cooperation in this hearing.

We are here today to receive testimony on several legislative proposals which would affect veterans' benefits. First, we have a draft bill to repeal the effects of the case of *Davenport v. Brown*. The proposal would require a veteran's service-connected disability to be responsible for an employment handicap in order to qualify for VA vocational rehabilitation benefits.

Second, we have a draft cost-of-living allowance bill to provide an increase in the rates of compensation and DIC equal to the percentage given to Social Security recipients.

Finally, we have a draft bill to ensure the continuation of the Veterans Pro Bono Program at the Court of Veterans Appeals.

These are all interesting issues, and I'm eager to hear from today's witnesses along with my colleagues.

I'd like to remind all of today's witnesses that their full statements will be entered into the record. And if they would summarize within the 5-minute limit, it would be most helpful to everyone here.

Before we call the first panel, I'd like to recognize Chairman Everett for any remarks he may have this morning.

[The prepared statement of Chairman Buyer appears on p. 56.]

**OPENING STATEMENT OF HON. TERRY EVERETT, CHAIRMAN,
SUBCOMMITTEE ON COMPENSATION, PENSION, INSURANCE
AND MEMORIAL AFFAIRS**

Mr. EVERETT. Thank you, Mr. Chairman.

I, too, would like to thank all of the members, especially the ranking members, for agreeing to this joint hearing. I also would like to thank all of the witnesses for being here today, especially Ms. Peterson of the Gold Star Wives, whom I'd like to thank for their hospitality when I spoke at their regional conference recently.

Today we'll hear testimony regarding several important issues. Proposed legislation affecting the *Davenport* decision, a COLA for 1997, and the Pro Bono Program are all important.

The written testimonies show that there are some differences of opinion on some issues, and I hope we'll have a good discussion on all sides of these debates. I see by the calendar that we are going to markup these proposals in a couple of weeks. So we really need your advice here today.

Thank you, Mr. Chairman.

[The prepared statement of Chairman Everett appears on p. 62.]

Mr. BUYER. Thank you.

I now recognize the ranking member, Mr. Filner.

OPENING STATEMENT OF HON. BOB FILNER

Mr. FILNER. Thank you, Mr. Chairman. I thank you for your remarks and join you in welcoming witnesses to this joint committee meeting. I think it's a good use of our time to have such a joint committee meeting and certainly want to hear the witnesses on these various bills.

I do want to say one thing in advance on the so-called *Davenport* legislation. As I understand it, the measure would generate about \$285 million in savings over 6 years. And we'll hear witnesses about the policy imperatives of that. But I'm concerned, as I know many of the veterans' organizations are, that the savings will not stay within the VA. That is, they will go to other programs in the budget. I'm not sure I can support that kind of use of savings.

All of us on this committee and in the service organizations and the VA want to do things more efficiently to provide better programs for our veterans, but the incentive to do that will be lost if the money just goes to other things. The money saved should go to improving veterans' programs.

I hope that's what this Congress will do as we make advances in policy and advances in efficiency. Then our veterans ought to reap the benefits. So that's what I'll be looking at as this legislation

moves along, and I look forward to what our witnesses have to say on that subject.

Thank you, Mr. Chairman.

Mr. BUYER. I appreciate the remarks of my colleague. I think keeping our eye on the ball, that being policy, is probably of first importance; that, secondly, you're correct, whenever you have over \$280 million in savings, everybody wants their hands on it, especially the Budget Committee. And we have had our debates on the House floor with regard to the lock box issue and whatever you can get from savings. There are some things that we can do within the Veterans' Committee with those, but your concerns are real. And I appreciate your comments.

Did Mr. Evans have a statement to be submitted? If not, we can recognize him when he comes in.

Let's move to the first panel, please. Dr. Stephen Lemons, would you please come forward? He's the Deputy Under Secretary for Benefits of the Department of Veterans Affairs and is accompanied by Mr. Ron Garvin, Assistant General Counsel, and Mr. Dean Gallin, Deputy Assistant General Counsel.

Dr. Lemons, you are now recognized under the 5-minute rule. Thank you for being here this morning.

Dr. LEMONS. Thank you, Mr. Chairman and members of the subcommittees.

STATEMENT OF DR. STEPHEN L. LEMONS, DEPUTY UNDER SECRETARY FOR BENEFITS, VETERANS BENEFITS ADMINISTRATION, DEPARTMENT OF VETERANS AFFAIRS; ACCOMPANIED BY MR. RONALD GARVIN, ASSISTANT GENERAL COUNSEL, AND MR. DEAN GALLIN, DEPUTY ASSISTANT GENERAL COUNSEL

Dr. LEMONS. I'm pleased to be here today to present VA's comments on three legislative proposals affecting our Nation's veterans. I'd ask that my written testimony be made a part of the record.

With me today is the Assistant General Counsel, Ron Garvin, and the Deputy Assistant General Counsel, Dean Gallin.

First let me begin by offering the Department of Veterans Affairs' support for all three of the proposals.

The draft bill to increase the rates payable for compensation and DIC effective December 1, 1996 would match the percentage by which Social Security benefits and veterans' pensions will increase on that same date. The Department wholeheartedly endorses this proposal.

We believe that one of our Nation's most important obligations to veterans and their survivors is to appropriately compensate them for service-connected disabilities and deaths. And we support ensuring that this compensation keep pace with rising costs.

The draft bill that you are considering this morning is consistent in all respects with the proposal included in the President's fiscal year 1997 budget request submitted to the Congress a few months ago. We estimate that the 1997 cost of the increase would be \$228.7 million, with a 6-year cost just over \$2 billion.

The second bill you are considering would clarify eligibility criteria for vocational rehabilitation and would enable us to focus as-

sistance on veterans who need training and rehabilitation services to overcome employment handicaps caused by service-connected disabilities. We strongly support this bill in its entirety.

If enacted, it would reverse the ruling by the Court of Veterans Appeals in the *Davenport* case. That ruling invalidated VA's longstanding which required that a veteran's qualifying service-connected disability substantially contribute to an employment handicap. As it stands now, any veteran with a service-connected disability, who has an employment handicap for whatever reason, may receive vocational rehabilitation services and assistance from the VA.

Our support of this draft bill does not mean we believe that veterans with nonservice-connected disabilities should be denied rehabilitation services, but we do not believe that our Department should be administering those services. Programs exist in each state for this purpose and do not need to be supplemented by an already taxed VA program that should be focusing on assisting service-disabled veterans.

Enactment of this draft bill would restore VA's interpretation of the chapter 31 entitlement criteria and redirect chapter 31 assistance back to those veterans whose service-connected disabilities materially impair their employability. It would also improve our ability to provide them the vocational rehabilitation services they need.

The final draft bill being considered today proposes providing financial assistance to needy veterans for legal representation before the Court of Veterans Appeals. If enacted, this bill would formalize an existing pro bono program. It would authorize the Court to expend annual appropriations specifically for the purpose of providing legal assistance to financially needy individuals who come before the Court. We have no conceptual objection to the bill. VA has supported the Pro Bono Program since it commenced in 1992. We have provided space for case review, photocopying services, and training for attorneys of veterans who are new to veterans' benefits law. We would continue to provide our full cooperation under the proposed legislation if enacted.

We wish to offer two comments, though, as you consider this bill further.

First, if the bill is enacted, we do not believe the pro bono program should be funded or administered through the VA. To do so would create a potential perception of a conflict of interest. Appeals brought before the Court are civil appeals against the Secretary. For VA to represent the Secretary and fund or oversee the veterans' representation could raise concerns about the impartiality of the representation a veteran receives.

Second, Mr. Chairman, we want to ensure that you're aware that the pro bono program is not free. In many cases attorneys have accepted referral of cases on a pro bono basis only to apply for payment of attorney fees and expenses under the Equal Access to Justice Act after completing their representation.

The Court has interpreted that Act as entitling an attorney to bill the Government if the veteran client achieves either a reversal or a remand of the BVA decision. These payments are made from the Compensation and Pensions appropriation. Since 1992, VA has paid nearly \$500,000 to attorneys who initially appeared in veter-

ans' cases on a pro bono basis, at an average of over \$4,000 per case. We expect that the costs of the program will rise due to both a higher Court caseload resulting from an increase in the number of BVA decisions as well as an increase in the statutory rate payable to attorneys under the Act.

Mr. Chairman, this concludes my remarks. We would be pleased to answer any questions you or members of the subcommittee may have for us.

[The prepared statement of Dr. Lemons appears on p. 68.]

Mr. BUYER. I appreciate it, Dr. Lemons. I want to remain very clear here. The administration's position is that of the VA—do you agree with the longstanding regulations that require the causal relationship to exist?

Dr. LEMONS. Absolutely.

Mr. BUYER. All right. Which means that you would support our draft legislation?

Dr. LEMONS. Absolutely.

Mr. BUYER. Where would you propose concentrating the VA's vocational rehabilitation resources?

Dr. LEMONS. Well, we believe that this will allow us to maintain the priority we have on seriously disabled veterans, and, in addition, ensure that the expenditure of benefits and services are directed towards overcoming the disability imposed by a service-connected condition as well as the overall rehabilitation of veterans so affected.

Mr. BUYER. All right. Let me turn to the ranking member. Mr. Filner, you're recognized for 5 minutes.

Mr. FILNER. Just two quick questions. Thank you for being here.

I assume you would support, although it's not part of this particular bill, any savings that result from changes in our policy to stay within the VA.

Dr. LEMONS. I believe that would be at the discretion of the committee, but the important part that I would like to make clear is that what we're trying to do with the excessive caseloads that we have, is ensure that we can direct our efforts towards truly overcoming disabilities imposed by the service-connected conditions. And that's where it becomes a problem for us.

Mr. FILNER. I'm not an expert and still learning these matters, but the requirement for that nexus, is that such a simple thing that you can be so clear about that? I mean, it would seem to me that there's an ambiguity, in many cases an ambiguity, that would want to call for a more wide-ranging kind of eligibility.

Dr. LEMONS. We believe that wide-ranging capability already exists within the counseling process, within the evaluation process. An individual who feels like they're adversely affected will still have the capability of applying for benefits.

In the course of the evaluation itself, you try and determine what is going on with the total individual as well as what role is played by the service-connected aspect of the individual. You could have an individual who has a minimal involvement of the service-connected condition that can truly need rehabilitation services.

We're not saying that those rehabilitation services shouldn't be provided. But there are state-funded programs that exist that we

would effect a satisfactory referral to and not drain scarce resources away from concentrating on the service-connected veteran.

Mr. FILNER. I understand. I would hope that the other witnesses might comment on that. I'm, again, trying to learn this issue. And those kind of direct or specific kinds of tying things together seem to me to be not always in the interest of the person trying to receive those benefits.

Thank you, sir.

Dr. LEMONS. Thank you.

Mr. BUYER. Thank you, Mr. Filner.

Dr. Lemons, I think it is accurate that the President's budget used the savings from the *Davenport*, this legislation, directly to deficit reduction, did it not?

Dr. LEMONS. That's true, yes.

Mr. BUYER. It's true?

Dr. LEMONS. That's true.

Mr. BUYER. All right. Thank you.

I recognize Mr. Montgomery for 5 minutes.

Mr. MONTGOMERY. That's my name. [Laughter.]

Thank you, Mr. Chairman. You know, the closer I get to retirement, I seem to move further down the row there. Mr. Filner is in front of me now. And someday I'll be close to Frank Mascara down on the end.

But I want to congratulate Mr. Filner for being the ranking member on this Subcommittee. As most of us know, Maxine Waters is moving to another committee. So we have another slot on this side for my Democratic colleagues. Bob, I talked to you about coming on this committee about 5 years ago. You keep moving up also.

I want to welcome the witnesses and thank Mr. Chairman.

Mr. BUYER. Thank you.

Mr. Hutchinson, you're recognized for 5 minutes.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Let me just pursue—I didn't get to hear all of the testimony, but I have reviewed the testimony. Regarding the Pro Bono Program, in your testimony you state that a permanently authorized Pro Bono Program should not be funded or administered through the VA. And you make a distinction between criminal matters in the Armed Forces court system, in which a defendant's loss of liberty is at stake, and the civil matters that the Court of Veterans Appeals would be dealing with, where a federal benefit is at stake.

So I understand your concern about the appearance of impartiality. Please expand for me on why the VA is so different from the DOD administering their program. And couldn't the VA be sufficiently isolated to administer a program where a just claim for money is what is involved, as opposed to the DOD, where you have a fundamental liberty interest at stake?

Dr. LEMONS. If I could, sir, I'd like to ask Mr. Ron Garvin, the Assistant General Counsel, to answer that.

Mr. GARVIN. The basic difference there, is maybe a similarity. And the similarity is, as the Secretary has stated in the prepared testimony, a conflict of interest. If you have attorneys acting on behalf of the Secretary, both opposing the representation and then making representations for a claimant, you have the same conflict

of interest. And you're subject to the same criticism as the Court objects to.

Mr. HUTCHINSON. Well, couldn't that objection be raised against the Department of Defense and their—

Mr. GARVIN. It is, sir.

Mr. HUTCHINSON. And, yet, they seem to do this and on a much more fundamental issue of where liberty is at stake, as opposed to benefits.

Mr. GARVIN. The Department of Defense has been fighting that perception of conflict for years, based upon the organization of the defense counsel and the prosecutors.

The Department of the Navy has taken on the greatest concern because up until very recently the prosecutors and the defense counsel were under the organizational arm of the same reporting senior. The other services have separated the prosecution function from the defense function, but they still face the conflict of interest allegation.

Mr. HUTCHINSON. Okay. That's all I have. I may want to follow that up later. Thank you, Mr. Chairman.

Mr. BUYER. Mr. Mascara, you're recognized for 5 minutes.

Mr. MASCARA. Thank you, Mr. Chairman.

Good morning to all of you. I'm glad to be here this morning to discuss with you some of the matters that I read in your opening statement, Mr. Secretary. Would you want to comment a little bit and clarify for me?

And I'd like to enter my opening statement in the record.

Mr. BUYER. So entered.

[The prepared statement of Congressman Mascara appears on p. 67.]

Mr. MASCARA. Eighty percent of the veterans represent themselves in cases before the VA. Could you clarify that, that 80 percent of the—

Mr. GARVIN. The 80 percent figure is taken from testimony that has been presented by letters and previous testimony from the Court, Court of Veterans Appeals.

Mr. MASCARA. Did you agree or disagree with Ranking Member Filner when he spoke about the savings being kept by the VA?

Dr. LEMONS. The Chairman clarified, and I would agree that in the President's 1997 budget proposal, it does redirect those savings into other VA benefits programs.

Mr. MASCARA. Thank you.

I have no further questions, Mr. Chairman.

Mr. BUYER. Thank you.

Mr. Cooley, you're recognized for 5 minutes.

Mr. COOLEY. Thank you, Mr. Chairman. I'd like to also request to enter in my opening statements for the record.

Mr. BUYER. So entered.

[The prepared statement of Congressman Cooley appears on p. 60.]

Mr. COOLEY. Mr. Hutchinson asked the same question I have, and it was answered. So I have nothing to ask, but I appreciate your coming and providing us with your testimony.

Mr. Clement, you're recognized for 5 minutes.

Mr. CLEMENT. Thank you, Mr. Chairman.

Mr. Secretary, will the clarification of this eligibility criteria for vocational rehabilitation displace any veterans currently taking advantage of rehabilitation services as a result of the *Davenport v. Brown* ruling? And if so, how many veterans would be affected?

Dr. LEMONS. We do not believe that it will.

Mr. CLEMENT. At all?

Dr. LEMONS. At all.

Mr. CLEMENT. Some veterans' service organizations feel that the clarification of this eligibility criteria as a result of the *Davenport v. Brown* ruling would unjustly deprive veterans of benefits. What's your response to this allegation?

Dr. LEMONS. We don't believe that it will, sir. We would still receive applications from individuals who feel like they are adversely impacted. It will help us to clarify what role the service-connected condition itself would play in both their employment handicap as well as in their need for rehabilitation services and assistance.

Mr. CLEMENT. All right. Thank you.

Mr. FILNER. Would the gentleman yield?

In response to Mr. Clement's first question, are you saying that the folks who got benefits under the decision are grandfathered in and nobody will lose if they had under a previous decision?

Mr. GALLIN. Yes, sir. That would be prospectively.

Mr. FILNER. So nobody would be taken away—

Mr. GALLIN. They would be grandfathered in.

Mr. FILNER (continuing). Because they did not now qualify under the new? Okay. I think that's what Mr. Clement wanted to assure. Thank you, sir.

Mr. BUYER. The last question I have is for Dr. Lemons. It would be very helpful to me if you could describe the history of vocational rehabilitation in terms of a connection between the service-connected disability and the employment handicap. Could you give a little of that history? It lays the basis for our legislation.

Dr. LEMONS. I'll try and do that, Mr. Chairman. I have a long history with that, having previously been the Director of the Vocational Rehabilitation Counseling Service. Our intent has always been to have an individual have the opportunity to apply for services and assistance because of the fact that they have a service-connected disability.

When we bring an individual in on the basis of that eligibility arising, we do a comprehensive evaluation of their situation, both their education and psychological background and their physical and employment history. We make a determination that says what the situation is that the individual is presently encountering, the cause of the situation, the role the service-connected disability plays in the totality of the evaluation of the individual, and what resources and benefits should be appropriately applied and offered in order to assist the individual in being able to obtain and maintain suitable employment to overcome those limitations.

We feel it is a critical program, a wonderful program that, when properly adjudicated, allows for comprehensive rehabilitation and for individuals, who have suffered a disability because of service to their country, a chance to return to their communities as productive citizens. And we hope that we can continue to do that.

We appreciate the longstanding support of the committee for this program.

Mr. BUYER. I appreciate your support of the draft legislation. And thank you for being here, gentlemen.

Mr. MONTGOMERY. Mr. Chairman, may I just ask—

Mr. BUYER. Yes.

Mr. MONTGOMERY (continuing). One question for the record?

The service-connected disability comes under your Department. Is that correct?

Dr. LEMONS. Yes, sir.

Mr. MONTGOMERY. You know, we've had these problems for years. It takes quite a bit of time from when the claim is filed and it has finally settled and the veteran knows how he stands or she stands. Can you give us a time limit and how you're trying to improve that?

That's the biggest complaints we have out there now as far as I know, even above medical care.

Dr. LEMONS. I would agree with you, Mr. Montgomery. It's a difficult program. It's a sensitive program. We're trying to do everything we can to both streamline the program and eliminate redundant steps in the process. We are focusing our efforts on getting people in as quickly as possible so they know that we're assessing and evaluating their situation; doing an appropriate and timely, comprehensive eligibility determination, and then assisting those individuals with the counseling and program planning to be able to begin the process of rehabilitation. We are drawing upon appropriate contract resources to assist us and to follow up. Where we have difficulty is in initially getting them in. That will help us speed up the process. Once we've done the evaluation and the planning, we must be sure that we're doing the appropriate follow-up with the individual in the counseling support so that our efforts, and the veterans' efforts lead to a successful outcome. That's where we think we'll have the greatest potential improvement in the process itself.

Mr. MONTGOMERY. Several years ago, Mr. Chairman, it wasn't our idea, but a person came to me and said when an active duty service person is discharged from the Service, if his records were to be sent to the Veterans Department at the same time, it will save a lot of time in processing these claims.

We're doing that now. Aren't you getting that? Just little things like that save 2 or 3 months. I'll let you go, but have you shortened the time? That was really my question. And can you give me the time now? Has it come down?

Dr. LEMONS. Yes, sir. That's been one of our most successful initiatives in working with DOD, getting the Service medical records sent directly to us. They are now sent directly to our records management facility in St. Louis. I'm sure we'd be able to provide for the record the appropriate time frames in terms of processing of the chapter 31 claims.

Mr. MONTGOMERY. All right.

Mr. BUYER. Point very well taken, Mr. Montgomery. Mr. Hutchinson.

Mr. HUTCHINSON. Mr. Garvin, if I could just make one follow-up on the Pro Bono Program and your response on that? I understand

DOD has faced criticism. I guess anything in our judicial system, any kind of adjudication system, is going to have those who criticize. Are you aware of any instance, though, in which Department of Defense has lost on that basis of partiality or conflict of interest?

I'm not. To my knowledge, though they have faced that criticism, it has never been the basis of overturning a decision or for them losing.

Mr. GARVIN. I can't give you any citations, but there have been a number of cases litigated on the issue of command influence.

Mr. HUTCHINSON. Litigated?

Mr. GARVIN. Yes, sir, within that—

Mr. HUTCHINSON. If there has been criticism, it's been something that's been challenged. You've got a need. You've got a suggested solution. And because there have been criticisms in that area, it would not be a good basis for throwing the baby out with the bath water.

Again, I think that most would say you have a pretty good judicial system, a pretty good court system that has been operated by DOD, and that because there have been questions raised would not be a basis for us to reject the Pro Bono Program to be administered by VA, at least in my opinion. But thank you.

Thank you, Mr. Chairman.

Mr. BUYER. Mr. Filner.

Mr. FILNER. Just briefly. I was a little surprised that the time frame that Mr. Montgomery asked for is not well-known. The veterans I talk to in my district always seem to concentrate on two things: the fairness of a decision and the time frame in which that decision is made.

We should know, as policy-makers, how long a decision takes and whether that's reasonable or whether we want to devote resources to shortening that time frame. We ought to know that.

I don't have anything to compare it to. I know Mr. Montgomery does.

Mr. MONTGOMERY. I was really trying to get the Secretary to give me a time of the month. See—

Dr. LEMONS. Great. That we have.

Mr. MONTGOMERY. You do have a time. Can you give us that?

Dr. LEMONS. New applications take us 54 days currently to get them in for the evaluation process itself.

Mr. MONTGOMERY. I'm talking about the total, total time. Two years?

Mr. GALLIN. You mean for the average time in rehabilitation from beginning until successful rehabilitation?

Mr. MONTGOMERY. I'm talking about when I file a claim to be eligible for service-connected disabilities. From the day I file a claim until the day that individual gets an answer, you have an average time. What is that?

Dr. LEMONS. Fifty-four days in order for us to get it. And eligibility and for us to—

Mr. GALLIN. The determination of service connection?

Mr. BUYER. Gentlemen?

Mr. MONTGOMERY. Yes, that's correct.

Mr. BUYER. Mr. Montgomery, would you yield for a moment?

Mr. MONTGOMERY. Yes.

Mr. BUYER. Are you referring to the chapter 31 or disability claims?

Mr. MONTGOMERY. Yes, disability.

Mr. BUYER. To disability. Thank you.

Dr. LEMONS. That's taking us about 186 days currently.

Mr. MONTGOMERY. Six months.

Dr. LEMONS. And we are bringing that down. We have specific goals to bring that aspect down.

Mr. FILNER. And what was it 2 years ago?

Dr. LEMONS. Two hundred and fifty-four or——

Mr. FILNER. I'm sorry?

Dr. LEMONS. Two hundred and fifty-four or something of that——

Mr. FILNER. Is there a goal that you have?

Dr. LEMONS. We have a goal of 106 days.

Mr. FILNER. A hundred and six?

Dr. LEMONS. Right.

Mr. FILNER. Okay. So we're getting closer.

Dr. LEMONS. We're getting extremely close.

Mr. FILNER. Keep going.

Mr. BUYER. Thank you.

I just have one last question. In your testimony you state the VA has no conceptual objection to legislatively formalizing the Pro Bono Program. That's somewhat ambivalent. Do you support the enactment of such a bill?

Dr. LEMONS. Yes, we support the enactment of this bill, as we have supported the Pro Bono Program itself.

Mr. BUYER. Very good. Thank you for being here this morning. I appreciate your testimony, gentlemen.

Mr. BUYER. Let's have the second panel come forward, please. The panel is composed of Mr. Richard Schultz of the DAV, Mr. Russell Mank of the PVA, Mr. Jim Magill of the VFW. Gentlemen, we're glad to have you here today. Since Mr. Schultz made it to the table first, we'll start with Mr. Schultz.

Mr. SCHULTZ. I had an advantage. I was on wheels here this morning, Mr. Chairman.

STATEMENTS OF MR. RICHARD F. SCHULTZ, NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS; ACCOMPANIED BY MR. RUSSELL W. MANK, NATIONAL LEGISLATIVE DIRECTOR, PARALYZED VETERANS OF AMERICA; AND MR. JAMES N. MAGILL, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

STATEMENT OF RICHARD F. SCHULTZ

Mr. SCHULTZ. Thank you very much for the invitation to appear here today.

As you know, actions taken by the subcommittees literally affect the lives of millions of veterans and their families. And we certainly do appreciate your efforts on behalf of America's service-connected disabled veterans and their families. I'll be brief this morning.

One, when you talk about the *Davenport* decision, I think one of the problems we would have, obviously, with any legislation that's

enacted is the regulations that are promulgated based on that new law.

We wouldn't have the *Davenport* decision today if it hadn't been for the regulations that VA had put into effect that the Court felt was not in keeping with the law.

And I would also say that we want to make sure that no service-connected disabled veteran currently entitled to vocational rehabilitation would lose that. And, also, any of those individuals who prior to the *Davenport* decision received vocational rehabilitation. We certainly wouldn't want any new regulations that would write those individuals off also.

Vocational rehabilitation is very, very important to our Nation's service-connected disabled veterans. I am the product of vocational rehabilitation. I was able to go to college, come to work for the Disabled American Veterans as a national service officer.

In fact, I have today with me three individuals who recently went through a VA vocational rehabilitation. And they're three new national service officers with the DAV, and they've completed their training. I have a young woman,—do you want to stand up?—an individual from Indianapolis, IN; someone from St. Petersburg, FL; and also one from Buffalo, NY. All three of these individuals are service-connected veterans and used the vocational rehabilitation program. And we again thank the Congress for their efforts on their behalf.

In reference to the COLA, certainly we appreciate your efforts to introduce COLA. And we would like to note that we also appreciate the fact that the K award was included in the COLA. It's not done every year, but it was last year. And it's again included, as I understand, this year. And we certainly support that, as you know, the buying power of America's service-connected disabled veterans, especially those who depend upon their compensation as their sole source of income. COLAs are very, very important to these individuals. And we certainly appreciate Congress' recognition and the committee's recognition of that.

When we talk about the Pro Bono Program, the DAV realized back in the inception of this program—in fact, we became involved in 1993. And we were instrumental in the planning stages of this program. And we have made a decision to work with this program. We have had our individuals who actually are at the consortium reviewing these cases. And we have made a substantial contribution in the form of donations of the Services of one of our advocates on a full-time basis.

I guess the only thing I would add is that this bill, as we understand it, was introduced to authorize the funding of the Pro Bono Program at the Court of Veterans Appeals. And the DAV supports that. We believe, however, that the provisions explicitly authorizing the Court to provide funds for the program proposed should be mandated that the Court provide those funds. And this change can be accomplished by simply changing "may" to "shall" in the legislation.

That completes my prepared remarks, Mr. Chairman. I'd be happy to answer any questions you may have.

[The prepared statement of Mr. Schultz appears on p. 78.]

Mr. BUYER. Thank you, Mr. Schultz.

Mr. Mank, you're recognized for 5 minutes.

STATEMENT OF RUSSELL W. MANK

Mr. MANK. Distinguished Chairman, ranking minority members of the committee, the Paralyzed Veterans of America appreciate this opportunity to comment on the Court of Veterans Appeals Pro Bono Program, *Davenport* decision, and the COLA bill.

The Paralyzed Veterans of America appreciate the COLA adjustment. We fully support that bill.

I would like to devote my time to the Pro Bono Program. As you know, Paralyzed Veterans of America has devoted an extensive amount of time and effort to this particular program. PVA strongly supports the draft legislation that Representative Fox has introduced. We believe very strongly in the program and the veterans that it serves.

The program by any measure has been successful. As of March 31, 1996, more than 700 veterans, every veteran who met program eligibility requirements, have been provided with a free attorney by the program. This represents approximately 20 percent of the total number of cases filed pro se. Veterans not meeting eligibility requirements have been provided some measure of legal advice to guide them in the prosecution of claims before the Court of Veterans Appeals.

The program has demonstrated that representation makes a significant difference in a veteran's chance of successfully pursuing his claim at the Court. During fiscal year 1995, 208 cases assigned at some point by the program were disposed of by the Court; 157 of 201 resulted in a finding of error in the VA's adjudication of the claim. The other seven individuals died before the cases were adjudicated.

While the initial funding for the program was \$950,000, subsequent requests have been less, \$790,000; in 1994 and 1995 the Court had requested \$790,000 to fund the program.

In 1996 the Court requested \$678,000 for the program. As the Court stated, this figure would, "continue the program at approximately the fiscal year 1995 operating level. This represents a reduction of \$112,000 from the 2 prior fiscal years resulting from one-time savings that the grantees and the Legal Service Corporation have been able to make in administrative personnel and equipment-related expenses. The Court notes that this is a nonrecurring reduction. It could not be maintained in future years without programmatic changes that the Court now does not anticipate would be desirable."

Yet, in October of 1995, the Court recognized that because of the budget stalemate, fiscal year 1996 funds might not be available for some time and, consequently, made an informal commitment to the program that the funds would be made available when funds were authorized by Congress. Therefore, the program continued.

In December of 1995, the Court decided that the ongoing budgetary uncertainty precluded it from committing itself to providing any funding and suggested that the program submit a plan for ceasing operation.

Congress became aware of this situation. And on December 14, 1995, the chairman of the Senate Appropriations Subcommittee on

VA, HUD, and Independent Agencies said, "Despite the fact that the Court's budget has been reduced, I believe that the Pro Bono Representation Program should receive full funding in fiscal year 1996. This program has proven very successful in helping the Court to address adequately the very large number of pro se cases. I do not believe it prudent to withdraw federal support."

While the Court continues to express its support for the program, it has not requested any funds for the program in fiscal year 1997. Despite substantial contributions by veterans' organizations and some private law firms, without federal funding, the program will cease to exist. Consequently, the program is requesting an amount not to exceed \$750,000 for fiscal year 1997.

Furthermore, the program in order to alleviate the Court's concern over a potential conflict of interest is requesting that the appropriation for the program be made in a separate line with specific language directing the Court to provide the program with the appropriate amount.

Mr. Chairman, PVA strongly supports the proposed legislation. We have two minor changes that we recommend. And we submitted those in our written testimony.

Mr. Chairman, as PVA submitted in its written statement, we have some concerns with the *Davenport* program; they've been carefully laid out in our statement.

That concludes my testimony. I'd be happy to answer any questions. Thank you.

[The prepared statement of Mr. Mank appears on p. 82.]

Mr. BUYER. Thank you.

Mr. Magill, you're recognized for 5 minutes.

Mr. MAGILL. Thank you.

STATEMENT OF JAMES N. MAGILL

Mr. MAGILL. Inasmuch as you have a copy of my statement, I will be very brief in my oral remarks.

With respect to the *Davenport v. Brown*, the VFW has no objection to the draft bill. We would recommend, though, that VA be required to notify any veterans who had been denied because of a 10-percent rating. They should be notified and invited to reapply for the program. We also agree that any savings should be retained by VA and that no veteran currently in the program be removed from it.

With respect to the Pro Bono Program, we, of course, support the continuation of the program. And we also strongly recommend that the program be funded by its own line item in the budget.

With the COLA bill, we, of course, are strongly in support of that draft bill. We have always had a resolution calling that any COLA be at least equal to the Consumer Price Index. And it appears that would happen with this bill.

That concludes my remarks. I'll be happy to respond to any questions you have.

[The prepared statement of Mr. Magill appears on p. 90.]

Mr. BUYER. This issue has come up several times. Let me address this for a moment. Part of the reason why I left Monticello, IN, to come to Congress deals with the reality of the Congress needing to be fiscally responsible. And the VA or even the work we

do in the VA Committee cannot insulate itself from the responsibilities of streamlining the process and finding savings wherever responsible.

It doesn't matter whether it's the Natural Resources Committee or the DOD or whatever. When you streamline a program, everybody then wants the money for something else when, in fact, where are savings to be achieved?

So I understand and respect the comments of my colleague Mr. Filner and yours also. But we have to share in that responsibility. And I just need to be on the record and say that. We cannot totally insulate ourselves.

Somehow we have to accept the reality. When I take a step back and try to judge where we are in America today, I feel very uncomfortable on how history will judge those of us living today and who will reap the benefits and pass on the bills to future generations or grandchildren who are yet to be born. I don't like how that defines us as a people. We're pretty selfish.

All this passion that many of us have about balancing the budget in 7 years, we don't even address the national debt. It goes to \$7 trillion by 2003. It will take us up to the year 2030 to bring it all back into better balance. We either do that or we move into hyperinflation and devalue our currency.

I guess if Members of Congress start buying gold, the American people had better start buying gold. So I just wanted to address that point for a moment. I just had to.

I've got several questions. Let me turn now to Mr. Filner for any questions he may have or rebuttal.

Mr. FILNER. If it's appropriate, I'd like to yield to the ranking member of the subcommittee that has jurisdiction here, Mr. Evans.

Mr. BUYER. That's fine.

Mr. EVANS. Mr. Chairman, I have an opening statement I'd like to put in the record, don't have any questions.

Mr. BUYER. So entered.

[The prepared statement of Congressman Evans appears on p. 63.]

Mr. EVANS. I don't have any questions.

Mr. BUYER. All right. Mr. Montgomery. Mr. Cooley.

Mr. COOLEY. No questions at this time, Mr. Chairman.

Mr. BUYER. Mr. Mascara.

Mr. MASCARA. I have no questions, Mr. Chairman, but I couldn't pass up the opportunity to rebut your statement, which I usually don't because I have the utmost respect for you, and I share the same passion that you do about balancing the budget and about the rising deficit and the money that this country owes and that we're going to pass that on to future generations.

Where I differ is that perhaps we need to reprioritize. Our priorities apparently aren't channeled in the directions that I might want to go in. And that includes looking at funding the programs that we have for veterans.

So maybe we ought to go back and look at the host of programs that we fund with the \$1.6 or \$7 trillion and redirect some of that money to veterans' programs but at the same time target the deficit reduction and balancing the budget.

Mr. BUYER. Well, I welcome your comments because this Congress will do a much better job than the administration's budget proposals that it's been given. So we will, in fact, do that.

Let me ask several questions. The PVA will receive about \$53,000 from the B grant for its participation in the Pro Bono Program. What does the money pay for? And what is the value of the PVA contribution to the B grant?

Mr. MANK. Mr. Chairman, we view the B grant as a safety net for the entire program.

When exigencies occur, the program turns to the B grant attorneys. It is the B grant that keeps the entire program on track.

Mr. BUYER. Could each of you describe the services your organization provides under the Pro Bono Program?

Mr. MANK. One of the things that we do is provide office space. We provide computer systems. We provide an attorney. We also handle cases, approximately 30 a year. We also serve as screeners for particular cases.

Mr. SCHULTZ. Like the PVA, at DAV also we provide screeners to review those cases to refer them out to pro bono attorneys. And also we take some of those cases. Over the years, we've had several individuals who have worked in the consortium at DAV expense. And also, as I said, we do cases. And all our cases are pro bono.

Mr. MAGILL. The Veterans of Foreign Wars, the only extent that we are is we just inform the veteran that the program is there and that if he should want to take advantage of it explain to him where he can go for help.

Mr. BUYER. Thank you very much.

Mr. Fox, you are recognized for 5 minutes.

Mr. FOX. Thank you, Mr. Chairman. Would you like me to defer my opening statement or give it?

Mr. BUYER. The written one, we can submit it for the record. Otherwise you can use your 5 minutes however you choose.

Mr. FOX. I just want to thank the Chairman, if I could, for your leadership in holding this hearing. And, as you know, we worked closely with you and also Congressman Lane Evans on this issue. And I believe that by having this hearing, we'll be able to continue the programs which have given countless hours of volunteer legal service to our veterans.

[The prepared statement of Congressman Fox appears on p. 67.]

Mr. FOX. In terms of questions, I did want to mention that in their testimony, VA states that the program was not truly a pro bono program in view of the application of the Equal Access to Justice Act to attorneys who initially agree to take cases. From the viewpoint of the veterans who receive legal representation at the Court, do they think this is a pro bono program?

Mr. MANK. Absolutely.

Mr. FOX. Right.

Mr. MAGILL. Yes.

Mr. FOX. Yes, that's the perception. All three agree?

Mr. SCHULTZ. Yes.

Mr. FOX. Okay. And, if I may say, Mr. Chairman, this program gives annually 14,000, almost 15,000 hours of service. A remarkable 77 percent of the veteran clients were successful in demonstrating error in the decisions at the Board of Veterans Appeals.

There is draft legislation. And I hope that other members of the committee, along with the Chairman and Congressman Evans, who have been so actively involved in this program and what it does for veterans, I would hope that we could meet after this meeting and discuss where we go from here. I do appreciate your support of the Pro Bono Program. And I know the veterans do as well.

I yield back the balance of my time and thank the Chairman.

Mr. EVANS. Mr. Chairman?

Mr. BUYER. Mr. Evans?

Mr. EVANS. I just wanted to mention that we appreciate Mr. Fox being the point man on this issue. And I look forward to working with him on this issue and you as well.

Mr. FOX. Thank you, Mr. Evans.

Mr. BUYER. Thank you, gentleman, for your testimony. Yes?

Mr. SCHULTZ. Mr. Buyer, if I could, could I respond to your remarks about the deficit reduction?

Mr. BUYER. Sure.

Mr. SCHULTZ. I think in the DAV especially, we're like other citizens of this Nation. We're taxpayers also. And we certainly don't want to leave a legacy behind that taxes future generations for our excesses.

But I would also like to point out that we don't want our legacy to be that benefits that are provided to service-connected disabled veterans and their families are eroded over the years because of our inability to fund those programs. And I say this only because over the past several years there have been many measures that have been introduced and passed into law.

We have the OBRA 1990, OBRA 1993, and some other reconciliation packages that, the VA and the veterans' community have contributed some \$10 billion in deficit reduction savings. So we're cognizant of the fact that the deficit has to be reduced.

But in my statement today, specifically I say that we want to make sure that these monies, any monies saved as a result of the *Davenport* decision, stay within the VA, stay within the veterans' community because you know and I know we have a pay go situation we're up against.

And there are some inequities in law that we would like to see changed and some enhancements of some benefits. Unfortunately, because of the Budget Enforcement Act and some of those things, we have to come to gimmicks like this, if you will, in order to fund worthy programs.

And I just wanted to state that we're not out here to say that, we want more, more, and more. We're trying to live within the realities of the Budget Enforcement Act. And that's why I put in my statement that any money saved as a result of this would go back to veterans and their programs. And we do appreciate your efforts.

Mr. BUYER. Thank you, Mr. Schultz.

I don't view this as a gimmick. I view this as a good policy decision on this draft legislation. I would also state that I recall that after the President's first State of the Union address, when he called for shared sacrifice of the Nation with regard to addressing budget deficits, that the first organization to come forward and testify was the DAV. I recall that it was at a joint Senate hearing. And I'm sure my colleagues also do.

When you have, in fact, those of whom are first in priority in my eyes and many on this committee with regard to the prioritization Mr. Mascara addressed, when those who come first stand up and say, "We will participate," I mean, they have already given and paid a tremendous sacrifice and, in turn, say, "We will, in turn, do it again." It is great leadership, and I applaud the DAV for doing that.

We also must be very pragmatic. Pragmatism is we're faced with a President who wants all of the money toward deficit reduction. We also have our constraints within the Budget Committee. And we have our pressures within the membership here on this committee so I can see by the end that it will be fractionalized with regard to the pool of the funds.

Part of it probably will be used and kept for particular funding within our Committee. And part of it will also I'm sure go to deficit reduction. That's being very pragmatic with you.

And I respect your statement.

Mr. SCHULTZ. Thank you.

Mr. BUYER. Anyone else have any comments based on mine? Otherwise we'll move to the next panel.

Mr. MASCARA. Mr. Chairman, my statements were made in a bipartisan fashion. I didn't mean to indicate you, or any of the members of this committee or the Republican party, or the majority, or anybody else. That was just a statement that came from my heart. They have given and are willing to give, but they want to maintain the funding for these programs. I just said that from the bottom of my heart from a bipartisan position.

Mr. BUYER. And that's how it was received, Mr. Mascara. Thank you.

Thank you, gentlemen, for being—

Mr. SCHULTZ. Likewise.

Mr. BUYER. Thank you. Thanks for being here.

Mr. BUYER. If we could have our third panel, please? Today's third panel is composed of Mrs. Margaret Murphy Peterson of the Gold Star Wives of America and Mr. Phil Wilkerson of the American Legion. Mrs. Peterson, it's nice to have the Gold Star Wives here with us today. I'm sorry.

Mr. WILLIAMS. Yes.

Mr. BUYER. I guess I should have looked up a little earlier.

Mr. WILLIAMS. It's okay.

Mr. BUYER. Are you the reliever?

Mr. WILLIAMS. Yes, the relief pitcher.

Mr. BUYER. The relief pitcher? No curves, though.

Mr. WILLIAMS. Not today.

Mr. BUYER. This is straight ball?

Mr. WILLIAMS. Yes, sir.

Mr. BUYER. All right. That's all we want in this committee, just the straight ball.

Mr. WILLIAMS. Correct.

Mr. BUYER. Please, ma'am, you may proceed. You're under the 5-minute rule. Thank you.

Ms. PETERSON. Thank you.

STATEMENTS OF MR. CARROLL WILLIAMS, THE AMERICAN LEGION; ACCOMPANIED BY MS. MARGARET MURPHY PETERSON, LEGISLATIVE COMMITTEE MEMBER, GOLD STAR WIVES OF AMERICA, INC.

STATEMENT OF MARGARET MURPHY PETERSON

Ms. PETERSON. Chairman and distinguished members of the subcommittees, Gold Star Wives of America thank you for this invitation to present our views concerning the 1996 cost-of-living adjustment to the DIC Program.

As proposed in the discussion draft, every DIC widow would receive a COLA based on her entire DIC monthly check and the COLA rate would be the same rate as the COLA rate applied to Social Security benefits.

The COLA adjustment is a very important aspect of the DIC Program, for the median annual income of the DIC widow is only \$16,500. Clearly one-half of us do not enjoy a comfortable standard of living.

Gold Star Wives fully support a DIC COLA bill as proposed in the discussion draft. We are pleased that Congress is not again planning to reduce the COLAs to the old-law DIC widows of World War II, Korean, and Vietnam, as happened in 1993.

We believe it is unfair to integrate old-law widows into the new two-tiered structure by reducing their COLAs. Old-law widows lose twice when they're hit with both the inferior benefit package and with reduced COLAs. You must remember that old-law widows did not receive the life insurance benefits of the recent widows.

As explained in my statement, which is part of this record, the two-tiered DIC structure, which awards less to the KIA widow than to the widow of the 100-percent disabled veteran, is discriminatory. We do not believe there is a rational reason for the disparity in benefits paid to the two groups of widows.

Finally and of great concern to Gold Star Wives is the remarriage reinstatement issue. And we would like this opportunity to again express our views.

Gold Star Wives fought for more than 20 years to pass the 1970 law that we affectionately refer to as the Take a Chance on Romance Law. The purpose of our remarriage reinstatement law was to bring combat widows' benefits in line with other federal survivors and to encourage widows to remarry and go off the DIC roles. Yet, before it was repealed, our law had been the most restrictive of all the federal remarriage reinstatement laws.

Then in 1990, without warning, Congress voted as part of the budget bill to repeal our right of reinstatement. Most of the members of both Subcommittees here today were not members of Congress in 1990 and did not vote on that budget act. The effect of this 1990 repeal was to financially punish the widows who remarried.

The retroactive impact on remarried widows was unquestionably intentional. The repeal was to save \$374 million over 5 years. In order to accomplish such a savings, the rug had to be pulled out from under more than 15,000 widows.

Soldiers' widows are now the only class of widows in the federal system who permanently lose all benefits if they remarry. The actual savings, however, has been substantially less, so much less

that one questions, whether the estimate of expected savings was made in good faith or whether it was exaggerated to justify the deception.

We estimate that since January 1991 approximately 4,500 to 5,000 widows, and not 15,000 widows, have been affected by this law. The savings are less than one-half that projected.

Additionally, once word of this treachery circulated, fewer widows remarried. And the number leaving the DIC roles went down 25 percent between 1991 and 1992.

Our husbands' rights to their promised benefits vested when they died. If it is too expensive to honor the commitments made to them, then our country has no business to run up further obligations by sending soldiers to Bosnia and to other places.

We have been told that when we remarry, we are no longer our husbands' widows and that you no longer have responsibility to us. Not only does this attitude fail to take into consideration the indemnification aspect of our compensation, but you are treating us as wards of the government; that is, until such time as we remarry. Then financial responsibility for us would be transferred to the subsequent spouse. This attitude is sexist, is demeaning, and undermines the sacrifices we made to our country when our husbands were killed.

Memorial Day is only 2 weeks away. We ask you to use this time to reflect on how Congress' breach of trust desecrates the very ideals for which our husbands died. Please go to your colleagues and demand repeal of the 1990 law.

Thank you.

[The prepared statement of Ms. Peterson appears on p. 93.]

Mr. BUYER. Mr. Carroll Williams, you are recognized for 5 minutes.

Mr. WILLIAMS. Thank you, sir.

STATEMENT OF CARROLL WILLIAMS

Mr. WILLIAMS. Mr. Chairman and members of the subcommittee, the American Legion appreciates the opportunity to comment on the several draft legislative proposals under consideration this morning.

One proposal addresses the funding mechanism for the Veterans Pro Bono Consortium. Since its establishment in 1992, this program has recruited a pool of pro bono attorneys to provide legal assistance to financially needy veterans who had filed their appeals before the U.S. Court of Veterans Appeals without legal representation or pro se.

Funding for its continued operation has been provided out of monies appropriated to the Court of Veterans Appeals for this purpose. As a result of the congressionally mandated reductions in the Court's fiscal year 1996 budget, support for the program had to be provided out of the Court's operating fund.

The situation has focused attention on a longstanding concern expressed by the Court and some members of Congress that some modifications or alternatives to the current funding mechanism for the program be considered.

The Court believes that its impartiality and independence may in some way be adversely affected by having to balance its own

funding needs with the potentially competing funding issues of the program's operation. It would like to see the budgetary and administrative responsibilities transferred to a more suitable entity.

The draft proposal essentially maintains the current relationship between the Court and the Pro Bono Consortium. We are sensitive to the Court's concerns and believe that it should not be compelled to have funding for the program included in its own appropriation. Rather, we would like to see specific language developed to provide a separate appropriation to the Court for the program.

The Court should then be authorized to enter into an agreement with some nonprofit organization, such as the Legal Service Corporation, to perform necessary administrative and oversight function. The American Legion supports actions to ensure by statute the continued viability of this worthwhile program.

A second measure seeks to overturn two recent decisions of the Court of Veterans Appeals dealing with entitlement to vocational rehabilitation training: *Davenport v. Brown* and *Wilson v. Brown* and the current provisions of Title 38.

Mr. Chairman, the American Legion would not support the proposed restrictions on the current eligibility criteria for vocational rehabilitation or training. This proposal raises a number of issues of concern. However, we basically do not see the change to the current law as being beneficial to service-disabled veterans seeking assistance from VA in an effort to obtain suitable employment.

In these cases the Court determined VA in implementing the provisions of Public Law 96-466 had imposed arbitrary limitations on eligibility criteria which were inconsistent with the provisions of the law, which only required that a veteran have a compensable service-connected disability and need vocational rehabilitation.

The implementing regulation retained that the prior law requirement that the employment handicap be causally related to the service-connected disability. Since 1981 VA has used a regulatory process to effectively hold down the cost of the vocational rehabilitation program by limiting the number of participants. VA is now seeking to reimpose similar limits in the name of budget savings.

The American Legion is concerned by efforts such as this, which raise a call for congressional intervention each time a favorable landmark decision in favor of veterans is rendered by the courts. This is especially true when it is perceived that the Court's actions may have an adverse impact on the VA's budget.

We believe Congress spoke very clearly in the enactment of the Veterans Judicial Review Act of 1988. These and other precedential decisions have shown that thousands of veterans have been denied benefits because VA's actions were not subjected to legal challenge or judicial review.

Mr. Chairman, that concludes my statement this morning. Thank you very much.

[The prepared statement of the American Legion appears on p. 101.]

Mr. BUYER. Thank you, Mr. Williams.

Ms. Peterson, on the defense bill, there were some discussions—and it wasn't marked up—on the issues of the Former Spouse Protection Act. And it was recognized by me that there were some inconsistencies.

You have a husband and wife. They put in their 20 years and end up then with a divorce. And she lays claim and then receives the money. She then remarries and still keeps the money.

Ms. PETERSON. That's right.

Mr. BUYER. And then he's alive.

Ms. PETERSON. Right.

Mr. BUYER. If he were to have died and not be alive, you get treated differently.

Ms. PETERSON. That's right. Essentially what we get is alimony.

Mr. BUYER. Well, essentially what you get is alimony.

Ms. PETERSON. That's what it boils down to. DIC stops on remarriage. It stops forever.

And there is a member in our organization right here in this room who was married 19 years. They moved 19 times in 19 years. Had her husband divorced her, rather than die on her, she would have had a property settlement which would have included one-half times 19/20ths of his pension for either his life, or hers, depending upon whether they took the survivorship option.

It is terrible that widows are treated worse than divorcees are.

Mr. BUYER. Help me here so I can understand the train of thought. I have the sense at the moment—I agree with you because that was going through my mind as we were sitting there on the Personnel Committee. It didn't make sense as to how they get treated if the husband died; if they divorced and lived, they received a higher benefit.

Ms. PETERSON. That's right.

Mr. BUYER. And that didn't make sense to me. We did not follow through. It wasn't really timing in background on the issue of whether to even repeal or begin to address repeals of the former Spouse Protection Act, not complete repeal. I'm talking about addressing that particular issue on remarriage.

So there was no action taken on it at that time. So what I'm saying, what almost happened, rather than change your status to meet that of the Former Spouse Protection Act, they may repeal on the remarriage issue. So rather than you say saying bring it to there, it may, in fact, come back.

What's going through my mind—this is where I want you to help me for a moment—is if, in fact, the government's obligations are saying that if, in fact, the husband or wife who is on active duty dies in the line of duty for their country and our obligations are to care for the widow and the children and, in fact, do that but then they remarry, in your eyes it does not sever that obligation?

Ms. PETERSON. Absolutely not.

Mr. BUYER. All right. Tell me why.

Ms. PETERSON. First of all, Congress established the rules. It said, "If you die, we pay you so much." During Vietnam and before, many soldiers didn't have a choice of whether they did their military duty. They were sent over to Vietnam and other places. Congress wrote the terms of the unilateral contract, a contract of adhesion. The soldiers had no say in its terms. "Here it is. Here are the benefits if you die." And soldiers were sent over there, some of them to certain death.

Certain benefits were promised to them. I remember when my husband went to Vietnam in 1970, and back again in 1971 after

a leave. He explained to me what the benefits were. We considered the benefits in deciding whether to buy extra insurance because it would have been very expensive for an EOD soldier to buy extra insurance.

Now you say, "Thank you. Thank you for giving your life, but, you're really just too expensive. We're going to change the rules on you after you're dead," I think there's a real breach of trust here.

The other reason is that when this was passed in 1970, it was with the intention it would be relied upon, not only for the estate planning, but would be relied upon by the widow who was to be able to remarry and be able to be taken care of for life as a tribute for what her husband and for what she suffered. In reliance on her right to be reinstated, she and her subsequent spouse may fail to select survivorship options and so forth. And these are irrevocable decisions in reliance on that 1970 law.

Then for Congress to repeal the reinstatement law with a retroactive impact is really a violation and a denial of due process. And that's the very ideal for which our husbands died.

I think of any group of widows, the widows you don't fool with or egregiously betray, are the military widows—especially those whose husbands died on active duty while defending these ideals.

Mr. BUYER. Well, Mr. Filner and I, who were not even considering running for Congress way back then—you're talking about 1990; right? We weren't talking about—

Ms. PETERSON. Right. And I acknowledge that.

Mr. BUYER. Or maybe you were considering it back in 1990. I don't know, but I can let you speak for yourself. Oh, you were? Oh, okay.

Let me ask you this: If the widow remarries, benefits are taken away, and she then is divorced, is she reinstated?

Ms. PETERSON. Yes.

Mr. BUYER. All right. What's the problem with—

Ms. PETERSON. She should—

Mr. BUYER. But there's not a problem with that? You like that?

Ms. PETERSON. Right. That's the way the 1970 law was. I mean, no matter how the marriage ended, by death or by divorce, she would be reinstated.

Mr. BUYER. Right now?

Ms. PETERSON. Oh, no, no. Right now, right now, no.

Mr. BUYER. Once she remarries, even if divorced, —

Ms. PETERSON. That's it.

Mr. BUYER (continuing). She's lost it forever?

Ms. PETERSON. That's it. And so those who remarried in reliance on this law have had reinstatement taken out from under them. Many would not have remarried. Some are remarried and are now living a nightmare, knowing that if their husbands predecease them, they are going to be very financially strapped because many of them have already given up their survivorship options with their subsequent spouses.

And they're elderly. The average age of the entrant into the DIC program according to the GAO report is 61 years old. This is hardly a time for her to start earning her own pension.

The average entrant into the program, and the women in Gold Star Wives led very traditional lives. They traveled around with

their husbands from place to place. They helped the soldier be battle-ready by keeping the home, by tending the children. Many of us led de facto single parent lives while we were married.

And now we widows are being told, "Well, the benefits your husband was promised are just not there for you because, frankly, it's inconvenient and you're too expensive."

So yes, we view this as a betrayal.

Mr. BUYER. I appreciate you being here today and your testimony.

Ms. PETERSON. Thank you.

Mr. BUYER. Does anyone have any questions? Mr. Filner?

Mr. FILNER. I appreciate, Mr. Williams, your testimony.

Mr. WILLIAMS. Thank you, sir.

Mr. FILNER. I think I agree with it. Most of all, I appreciate it.

We don't have the answers today, Ms. Peterson. I think you and your group have been very effective in pointing out what I'll say are contradictions in policies. And we have to really focus on that.

I think there's a similar contradiction that you raise with the survivor benefits and the offsets, which I have introduced legislation to change. You earn both your Social Security and your pension and somehow we then offset that.

There are similar kinds of things that may be under—I don't know why they were originally done that way—different conditions, different times. We have to focus in on those injustices and contradictions, betrayals is the word you used, and try to correct them.

So thank you for your testimony.

Ms. PETERSON. May I make one more point? The cost according to the GAO report to reinstate widows with the remarriage provision would be \$43 million.

And we're making no comment on the *Davenport* issue before you. We're not up on it. So if, in fact, you do save money on *Davenport*, that would be more than five times the amount of money needed to fund the remarriage provision.

Mr. WELLER (presiding). Thank you. I see there are no more questions for members of the panel. So I do want to thank you for your testimony, Ms. Peterson and Mr. Williams.

Mr. WILLIAMS. Thank you.

Mr. WELLER. And your panel is excused.

Ms. PETERSON. Thank you very much.

Mr. WELLER. I'd like to ask the Honorable Frank Q. Nebeker, Chief Judge of the U.S. Court of Veterans Appeals, who will be our next witness, if he would come forward.

Judge NEBEKER. Good morning.

Mr. WELLER. Good morning, Judge Nebeker. We very much appreciate your participation as part of a panel today. So welcome to our Subcommittee hearing. We ask if you would proceed with your testimony.

Judge NEBEKER. Thank you.

STATEMENT OF HON. FRANK Q. NEBEKER, CHIEF JUDGE, U.S. COURT OF VETERANS APPEALS; ACCOMPANIED BY JUDGE DONALD IVERS; ROBERT F. COMEAU, ESQ., CLERK OF THE COURT; MR. JAMES L. CALDWELL, JR., CHIEF DEPUTY CLERK; SANDRA P. MONTROSE, ESQ.; AND MS. ANN B. OLSEN, BUDGET OFFICER

Judge NEBEKER. You have my formal written testimony. And I would ask that it be made a part of the record.

Mr. WELLER. Without objection.

[The prepared statement of Judge Nebeker appears on p. 105.]

Judge NEBEKER. And my testimony before you this morning will be relatively brief.

For all the sound and fury that this matter of the Pro Bono Program and the budget and the Court have created, you may find it comforting that I can report that to a great extent we are in agreement. The program, we all agree, is a successful program. It has been well-managed. And a fine job has been done by all involved.

Under the appropriations arrangement for the current fiscal year, the funding has been adequate. And the figures prepared by the program and the Court for funding during fiscal year 1996 are consistent.

The one point that has been the major source of concern has to do with the program's funds being commingled with the Court's operating budget. I'm able to quote from Mr. Isbell's letter of April 12 that, "The program funds should not be part of the Court's own budget nor a responsibility of the Court with respect to justifying the amount of the appropriations requested."

That's a long way towards an agreement. And I guess what it basically boils down to is whether there can be a way of solving the problem of having the funding for the program considered, either directly or indirectly, a part of the Court's operating budget.

And, as the committee is well-aware, the Court has taken the position that it must take—that, in order to preserve the independence of the Court, the situation that we are experiencing in the 1996 fiscal year should not and indeed, cannot be permitted to continue.

Since Mr. Isbell and the program seem to be in agreement that that is so, I guess what we are here to do is to try and figure out a way whereby there can be that separation of appropriations so that, if I may speak somewhat euphemistically, their hand is not in the Court's pocket and the Court's hand is not in their pocket for purposes of operating.

I believe that that situation can be solved. And we are here, I suppose, to ask for your indulgence and your assistance in solving that problem.

Mr. WELLER. Thank you, Judge.

I have one question I'd like to ask of you. The Department has characterized the Court's interpretation of the Equal Access to Justice Act as "entitling an attorney to, in effect, bill the government if the client veteran achieves either reversal or a remand."

Is this an accurate characterization of the Court's interpretation of the Equal Access to Justice Act? And do you agree with the VA's view that due to the EAJA applicability to cases before the Court, the program is not truly a pro bono program?

Judge NEBEKER. In a word, I do not agree. I will explain. The Department position neglects to point out that a major element—there are other elements to entitlement to an EAJA award—but a major element of entitlement to fees and costs is that the Department's position in the matter before the Court must not be substantially justified in law. Of the claims paid by the Department, most are settled by the Department without requiring court decision.

Where an award is made, through settlement or otherwise, the key determination is that the Secretary's legal position was not substantially justified. Accordingly, if there is substantial justification for the Secretary's position at the Board level and before the Court, the occasion for EAJA awards could be drastically reduced or eliminated. In other words, the general counsel needs to make sure up front before taking a legal position in a matter that the Department's position is substantially justified.

If it is, no legal fees under EAJA can be awarded. It is only—I repeat—only when their position is not substantially justified that, under EAJA, the fees are awardable and the costs are awardable.

Mr. WELLER. Well, thank you, Judge.

The chair would recognize Mr. Filner, who had some questions.

Mr. FILNER. Thank you, Mr. Chairman.

I understand some of your concerns. And you're not too happy about choosing between funding the Court's operations and providing sufficient funds for this program. I'm not sure I understand some of your other concerns, though.

For example, would it make any difference in the judicial ethics that you cite if the clerk of the Court, for example, were to administer the program directly?

Judge NEBEKER. That would not be permissible either because he is the clerk of the Court.

Mr. FILNER. So that would not alleviate any concerns you have?

Judge NEBEKER. It would not, sir.

Mr. FILNER. Okay. And, as I understand it, one of your suggestions was that the Legal Service Corporation administer the program. Would that allow it to survive given that situation?

Judge NEBEKER. Allow the Legal Services Corporation—

Mr. FILNER. No. The Pro Bono Program. Would they have sufficient ability to do that?

Judge NEBEKER. They are presently administering the grant. The grant comes from the Court's own operations appropriation. And we have conveyed that money to LSC in the past, including this year, to continue to run the program.

The problem is not who is the Secretariat or who is the grantor of the money. LSC is doing a fine job. The question is: Where does the money come from that goes to the grantee?

Mr. FILNER. I would suspect the funding might be even more questionable if it went directly.

Judge NEBEKER. To?

Mr. FILNER. LSC.

Judge NEBEKER. Oh, the Court would be completely out of the loop. There would be no ethical problems then.

Mr. FILNER. No. I understand that you would be out of the loop, but the funding loop might be jeopardized.

Judge NEBEKER. Well, I understand the appetite with respect to LSC. And in that event, yes, there would be jeopardy there. Another entity would have to be found.

Mr. FILNER. You brought up these issues. If the funding for the program were somehow stable and separated, what's the difference between your court's role and a U.S. district court, for example, which has to assure representation for indigent defendants?

Judge NEBEKER. Under the appropriations for the federal courts, both the district courts and the United States circuit courts, there is a discrete line item in the appropriations for those courts to be administered by the Administrative Office of the United States Courts. There is no competition between the operating funds of those Article III courts and the Defense Services Program as there has been this fiscal year in our situation with respect to the Court's budget and the Pro Bono Program.

The only involvement that the federal district courts or courts of appeals has with respect to the money that is already appropriated is to grant the applications for fees under the Criminal Justice Act.

And when that appropriated amount of money runs out, there is no competition with the Court's operating budget. In other words, the judges don't then say, "Well, we don't have any money to pay these lawyers' fees. So we have to take it out of the clerk's budget or we have to take it out of some other operating budget within the Court itself." No competition exists in that situation.

Mr. FILNER. Okay. I will try to continue to understand your position as we go forth. Thank you very much.

Judge NEBEKER. Thank you, sir.

Mr. WELLER. Well, thank you, Mr. Filner.

The chair would recognize Mr. Cooley if he has some questions.

Mr. COOLEY. Yes. Judge, the Court suggests that Legal Services and/or VA be given the control over the program. Could you explain that to those here who are lay persons what you really meant by that?

What is the difference? To the Court, if it's Legal Services or VA, is there any benefit of having one or the other administer the program?

Judge NEBEKER. There's no difference. As far as we are concerned, if there's a way to channel the money directly to the corporation, fine. If not, we see no real problem with doing it with VA.

They do. In candor, they don't want it. And they maintain that there's an impossibility of walling off a conflict of interest.

Mr. COOLEY. Do you see that as a real—

Judge NEBEKER. I don't see that as a problem. They disagree with the idea that the analogy with the DOD, the Department of Defense, services for prosecution and defense—they don't agree that that is an apt parallel, but I disagree. I think it's quite apt.

There they wall off the defense services from the prosecution services. They're completely separate. There's no conflict of interest that is involved as a practical matter anywhere along the line.

And they're dealing there with liberty. They're dealing there with prosecution in which people can go to jail. Here, we're dealing with money claims. Surely if you could wall off a conflict of interest in-

volving criminal justice, it's far easier to do so when it involves money claims, civil matters.

Mr. COOLEY. Well, let's say looking from the outside in, wouldn't you in your role as justice think that the VA may be better equipped to handle this than going to an outside legal agency?

Judge NEBEKER. You mean like the Legal Services Corporation?

Mr. COOLEY. Right, yes.

Judge NEBEKER. I do not wish to denigrate the ability of the Legal Services Corporation to handle this program. They are used to handling grant funds. And they do and I think can do a very fine job under the circumstances that exist today.

I do not see that the VA would be less able to handle it. I understand they handle grants funding anyway, mostly in the medical research field. But surely there is the mechanism there for the necessary audit to ensure that the grant is being administered in the proper fashion.

From our viewpoint, it really doesn't make much difference so long as it's some other separate entity that's doing it. I would love to be able to say that there's a corporation within the D.C. Bar, which is an official organ, although it's a government organ of the District of Columbia, rather than the federal government. I would love to be able to say that there's an organization within the D.C. Bar that could do this. And we might be able to explore whether or not there is and whether they would be willing to do it.

It really makes no difference to the Court so long as it's some entity that is beyond the Court.

Mr. COOLEY. In your capacity as chief, I know you get involved in the financial part of it and some other parts as manager and head of that function. Do you see any advantage cost-wise or efficiency-wise or administrative-wise over VA handling this over Legal Services?

Judge NEBEKER. I don't.

Mr. COOLEY. You made another point in your testimony that I was interested in. You find that the Pro Bono Program raises some concerns with you at your position. Could you explain that to me?

Judge NEBEKER. I'm not sure I understand your question. The thrust of my point is simply that they are an entity that ultimately winds up finding lawyers to represent appellants before the Court in an adversarial proceeding. In other words, they wind up having clients represented before the Court on one side, the Secretary is on the other.

And, yet, our problem is we are asked to fund that. That gives an appearance that there is no impartiality here because the Court is required to take care of and fund one-half of the litigation that comes before the Court where we've got to be impartial.

If I'm getting at your question,—and I'm not sure I am—look at it this way. What would it be if the Court were appropriated the billions of dollars and then the Court had to give it to VA to run? It would not be a very good situation because the VA is before the Court representing one side of the litigation that we deal with. And I suggest that the same thing is true if you have the other side being funded by the Court.

Mr. COOLEY. I sort of looked at it, I guess, I look at people who are not able to provide legal defense. And the courts provide them

outside legal services. And there doesn't seem to be any kind of bridge there.

Judge NEBEKER. Oh, all right. I think I understand your point. In the criminal justice field, the Constitution requires that counsel be provided. And so the courts are of necessity directly involved in complying with that constitutional provision because if they don't, the prosecution is a nullity. It might as well not have occurred.

The difference is that, in civil litigation, such as the kind that our court is involved with, there is no constitutional requirement of counsel. Counsel are supplied basically by volunteer. The Court does not have a responsibility to ensure that there is counsel. The program has been predicated upon the idea that, if administered properly, volunteer lawyers would appear and take cases. And they have.

Mr. COOLEY. Thank you very much, Judge.

Mr. WELLER. Thank you, Mr. Cooley.

The chair would recognize Mr. Fox if you have any questions for this witness.

Mr. FOX. Thank you, Mr. Chairman.

Judge Nebeker, in your testimony—we appreciate, by the way, your being here today and thank you for your counsel. In your testimony, you state the funding of the Pro Bono Program during fiscal year 1996 placed the Court in a dilemma of choosing between its own needs and the full funding of the Pro Bono Program. You further state that this creates an institutional conflict, which impinges upon the judicial independence of the Court and creates the appearance of partiality in individual cases.

Because these concerns were expressed for the first time as a result of the fiscal year 1996 funding method, would a return to the way the Pro Bono Program was funded prior to 1996; that is, where the Court merely serves as a conduit for the funds, alleviate your concerns?

Judge NEBEKER. Probably if the appropriation process itself separated the judgment as to the needs of the operating demands of the Court and the program. It's awfully easy, it seems to me, to say, "Well, the Court and the Pro Bono Program lumped together need so much money. All right. We're going to give them less than that, of course. And it's up to the Court to then take out of this one-lump sum funds to operate the program."

Mr. FOX. Right.

Judge NEBEKER. Now, what happened in 1996 is that we requested an amount greater than the amount we got. The amount we requested for operation was greater than the amount we got.

Then there was the separate request for the Pro Bono Program. That was forgotten about. We were told that out of the \$9 million that was appropriated for our operations, we must take out the money to fully fund the program as well. When we had requested the appropriations, the program was over and above our operating request.

Mr. FOX. So, therefore, a clear separation of funding for the Pro Bono Program from your court's funding would be a decisive issue in your perception?

Judge NEBEKER. It surely is.

Mr. FOX. Okay. I have no further questions. And I thank the Judge for spending his time here and giving us his counsel.

Mr. WELLER. Thank you, Mr. Fox.

Seeing no other members of the subcommittee are present, I want to thank the Judge very much for your testimony. You're excused.

Judge NEBEKER. Thank you, Mr. Chairman.

Mr. WELLER. Again, thank you for participating and presenting your testimony this morning.

Mr. WELLER. Our final witness is Mr. David Isbell, Chairman of the Veterans Consortium Pro Bono Program. The consortium is the organization that operates the Pro Bono Program at the Court of Veterans Appeals and is made up of the DAV, the PVA, the American Legion, and the National Veterans Legal Services Project.

Mr. Isbell, thank you very much for joining us and presenting testimony. If you would introduce those who are accompanying you and please begin.

Mr. ISBELL. Thank you very much, Mr. Chairman and respected members of the committee.

STATEMENTS OF DAVID B. ISBELL, ESQ., CHAIRMAN, ADVISORY COMMITTEE, VETERANS CONSORTIUM PRO BONO PROGRAM; ACCOMPANIED BY MR. LAWRENCE B. HAGEL, ESQ., DEPUTY GENERAL COUNSEL, PARALYZED VETERANS OF AMERICA; AND MR. BRIAN D. ROBERTSON, ESQ., DIRECTOR, CASE EVALUATION AND PLACEMENT

Mr. ISBELL. We welcome the opportunity to appear before the committee. And we earnestly hope for your support for legislation that will provide authorization for the program.

Mr. Chairman, I've submitted a statement. I do not plan to read it. I would like to emphasize a couple of points that are made in the statement.

Mr. WELLER. Your statement will be entered into the record, full text, without objection.

Mr. ISBELL. Thank you, sir.

[The prepared statement of Mr. Isbell, with attachments, appears on p. 111.]

Mr. ISBELL. Last fall the program suffered a near death experience. We almost went out of existence for want of funds. We had planned a wind-down that would have had us terminate the program entirely. It is in the hope of avoiding that experience again that we would like to have authorizing legislation.

Now, with regard to the draft bill which is the subject of the hearing, our principal suggestion relates to Section 2 of the bill, which states a dollar amount which would be a cap on the appropriation. The dollar amount there set is \$678,000.

That figure obviously is taken from the Court of Veterans Appeals' budget submission. That is the amount that the Court asked for in connection with its budget for fiscal 1996. That amount, as Mr. Mank of PVA pointed out earlier, contemplated that \$112,000 in carryover funds would be available in addition to the \$678,000 in new funds. In other words, the Court submission contemplated that the budget would be \$790,000 this year.

We have attached to my statement a draft budget for next year. At the time that I submitted the statement, it was a draft. The advisory committee which runs the program met yesterday, and we did formally adopt that budget. The budget calls for an appropriation of almost \$744,000, more precisely \$743,838.

That figure is, I point out, \$60,000 less than the Court's budget request was intended to be for this year. It is more than the \$678,000 in supplemental money requested by the Court, but still less than what the Court expected to be available for the program. It is also more than the amount on which we are operating, in fact, at present. We are operating on a budget of \$633,000 because we did not get the entirety of the \$678,000 that Congress, in effect, instructed the Court to give us.

Our present level of operation is truly not a satisfactory level of operation. I would urge the committee to raise the appropriation ceiling in the bill sufficiently to allow the program to operate at a sensible level.

We specifically suggest the figure be set at \$750,000. That's a little more than the \$743,838, but I assume that for authorizing legislation, it's sensible to think in terms of round numbers, rather than the last dollar.

Obviously the authorization doesn't govern the actual amount of the appropriation. And I would assume that the appropriating committee acting pursuant to the authorization would only allocate to us the amount that we asked in the budget.

I might add that we realized after we had made the final decision on the budget that it would have been sensible in light of past experience for us to ask for some cushion. This year we would have gone out of operation on September 30 but for the fact that there was some carryover from previous years. If again the government shuts down, we will shut down.

So it would have been sensible for us to ask for an even larger amount than we are, in fact, asking for. We recognize the budget realities, however, and we have kept our request as modest as we reasonably would do.

Mr. WELLER. Thank you, Mr. Isbell.

Could you identify for all of us those who are accompanying you, please?

Mr. ISBELL. I beg your pardon. On my left, on your right, is Lawrence Hagel, who is Deputy General Counsel of the Paralyzed Veterans of America. He is the member of the advisory committee who represents that one of the four constituent organizations.

On my right and your left is Brian Robertson, who is the head of the case evaluation and placement component, the principal component, of the program.

Mr. WELLER. Thank you, I appreciate that introduction.

Let me just ask a pretty basic question, Mr. Isbell. Can you describe for us how you best determine who gets pro bono representation?

Mr. ISBELL. How we determine whether a particular case should get pro bono?

Mr. WELLER. That's correct. Who should receive pro bono representation?

Mr. ISBELL. Let me describe the first part of that process and ask Mr. Robertson, who evaluates the cases, to describe the rest of it.

When an appellant before the Court is still without counsel; that is, pro se, 30 days after the notice of appeal is filed, a notice is sent to that appellant advising the appellant of the possibility of free representation. If the appellant indicates an interest in free representation—and, curiously, some third of them do not. I think it's a third. But if the appellant does indicate an interest, then the case is evaluated by the case evaluation and placement component under Mr. Robertson.

And let me ask him to give you a more detailed description of that.

Mr. WELLER. All right. Mr. Robertson.

Mr. ROBERTSON. Good morning, Mr. Chairman.

When we receive a request from a veteran for assistance through our program, of course, that is the trigger when we get that request. Then we go through a number of steps. The first, of course, is to make sure that the individual is not represented by a private attorney.

We find out that sometimes they contact us at the same time that they're contacting private attorneys. And if we find out that they have engaged or acquired counsel of their own, then we have nothing to offer them.

We also have a financial test that we apply to determine if they meet our financial eligibility criteria. If the veteran is able to pass that test, then we evaluate the veteran's case for placement through the program.

What we're doing is we review the decision of the Board of Veterans Appeals to determine if in our opinion there was any error committed by the Board of Veterans Appeals that we think that the Court could deal with and could either grant benefits directly to the veteran or could send the case back to the Board of Veterans Appeals or the regional office for further action.

Mr. WELLER. Thank you, Mr. Robertson.

Mr. Isbell, with your long-time involvement with this program, can you give us the dollar value of pro bono services that have been provided since this program's inception?

Mr. ISBELL. We calculate it to be around \$9 million.

Mr. WELLER. Nine million dollars?

Mr. ISBELL. Yes. It's roughly \$2 million a year, 3 and a half.

Mr. WELLER. For a total of \$9 million?

Mr. ROBERTSON. Two and a half to three per year.

Mr. ISBELL. Two and a half to three million a year.

Mr. WELLER. All right. But you estimate about a total of \$9 million worth of pro bono representation has been provided?

Mr. ISBELL. That's right.

Mr. WELLER. Thank you.

The chair would recognize Mr. Cooley for any questions.

Mr. COOLEY. Mr. Isbell, I looked at your Veterans Consortium Pro Bono Program and your budget proposal for 1997. I would like to ask a few questions. I'm just curious. "Salaries for Non-attorney Representatives" has a \$40,000 increase over last budget year. Can you explain that to us? I mean, that's almost a 50 percent increase

over what you had in 1996 to 1997. In 1996 it was 84. And you're proposing for 1997 123.

What I guess I'm getting into because I can go down here and name a lot of the things that had a 50 percent increase over previous years, actually some places a little less, but four or five items. What I'm saying to you is that if the system was changed in any way, would that reflect on any cost savings so we can maintain this program for the benefit of what we're trying to do here? I mean, if we went to a different method, could we still provide the services we need to and not have these increases that I see here on your budget?

Mr. ISBELL. Mr. Cooley, I'm sorry. I don't quite understand your question. When you say "Do you mean if a system were changed?" do you mean if the Department of Veterans Affairs' adjudication system was changed or do you mean if something in our system was changed?

Mr. COOLEY. I don't know where to look. I'm just making a general statement. Like I said before, under "Salaries for Non-attorney Representatives," from 1996 to 1997 you had a 50 percent increase over 1996. Maybe that's justified. I'm just asking.

If you look down here in the bottom, "Others," you had more than the 50 percent increase. And if you look at the "Non-personnel" line here, you picked up another 27,000.

You know, you have some quite large increases. Other places you've done very well across the line. Could you just kind of explain why those increases are there? And if we had some other method within the Department or going outside or whatever, could we look at the funding of the 678,000 and still maybe function totally and provide all full services that you had last time?

Mr. ISBELL. I think Mr. Robertson can probably answer the question best since he has the most intimate involvement with the preparation of the budget.

Mr. ROBERTSON. Mr. Cooley, if I may, sir, with respect to the "Salaries for the Non-attorney Representatives," that increase is predicated on a couple of factors. The first factor is that we're contemplating—and those Non-attorney Representatives basically are my case evaluators, my case screeners, the folks who do the real work in my particular office in evaluating the veteran's case.

We're anticipating that we may have to increase the size of that staff. We currently have billets for four individuals. And we have increased the budget to possibly accommodate four and a half. And the reason that we've gone to that half is that we are expecting that the Board of Veterans Appeals will increase the number of decisions that are handed down, which will result in an increased number of appeals to the Court, which, of course, would result in an increase in the number of requests for services. That's part of it.

The second part is that heretofore mainly the case evaluators have been provided to us by the veterans' service organizations. Some of them have been provided to us at cost. Some have been provided to us at no cost.

For example, we have a screener right now from the American Legion. Those are donated services. We expect to get one case eval-

uator very shortly from Disabled American Veterans who will be completely at no cost to the program.

So the veterans' service organizations are making and have made a diligent effort to work with us on this. The problem that they're confronting, of course, is that they provide the services to the veterans at the Board of Veterans Appeals through their national appeals offices. They are seeing an increased demand for services there, again because Chairman Cragin is trying to process more cases to reduce his backlog. So they're not in a position to give us additional personnel.

If we have to go hire these individuals, basically off the street, it's a very small pool that we can draw from. These individuals have a tremendous amount of expertise. I just can't go to an employment agency such as Telesec and find somebody like that. So the increase in salaries would be an attempt to balance and almost achieve parity or something close to parity with the salaries that are paid over at the Board of Veterans Appeals for their attorney advisers. So that's responsible for that.

You pointed out an increase in the "Other" line. Those are some publication costs that when we send cases out to our pro bono attorneys, we provide them with some educational material. We're expecting that we will be republishing that material. There would be an increased cost there.

And, in addition, we had a peer review analysis by Legal Services Corporation which suggested we send out some additional information about the program. And those would be the publication costs for that as well.

Mr. COOLEY. Could you explain to me "Total Non-Personnel," that increase there? I'm just curious about that. That's 27,000.

Mr. ROBERTSON. Which line, sir?

Mr. COOLEY. The last line, right down at the very bottom, before "Total A Grant," the line above that. Is that a summation of all from "Space Rent" down? It went from last year it was 121,000. This year it's proposed budget 148.

Mr. ROBERTSON. I think that's just a cumulative effect, sir.

Mr. COOLEY. Okay.

Mr. ROBERTSON. And many of those would be slight increases for inflation, in the neighborhood of 2, 3, or 4 percent.

Mr. COOLEY. Thank you very much, gentlemen. I appreciate that.

Mr. ISBELL. Thank you.

Mr. WELLER. Thank you, Mr. Cooley.

The chair would recognize Mr. Fox.

Mr. FOX. Thank you, Mr. Chairman. I appreciate your assistance.

Mr. Isbell, if the Court again becomes a conduit for funding the program, would that be an acceptable funding mechanism to you?

Mr. ISBELL. Absolutely. That is what we feel is the ideal solution.

Mr. FOX. One other item I'd just say parenthetically as a footnote, I think if enough of the members of the local Bar were made more aware and underscored the assistance that they're giving to our veterans by being participants in the Pro Bono Program and perhaps even with an annual opportunity to meet for a thank you from this committee as one of the noncompensation benefits, perhaps we might be able to get more members to be involved in it to know that the Congress is grateful for what they're doing.

I know from programs back in my district, sometimes you have to really educate people about the benefit of service in this area. Not only would they be serving in the sense of giving a service without remuneration, but they're also doing a benefit for the veterans.

Many of these individuals may have served themselves or did not serve and want to help the cause for veterans. And if we can assist in that regard, I'll just say I'm sure that other members of the committee would agree with me that whatever we can do to show our gratitude in some kind of annual ceremony, we'd be glad to.

Mr. ISBELL. We appreciate that, Mr. Fox.

Mr. FOX. Thank you, Mr. Chairman. That concludes my questions.

Mr. WELLER. Thank you, Mr. Fox.

Recognizing that there are no members of the minority here, we do have a tradition in the subcommittee where we allow the minority counsel to ask a question in their absence. Counsel?

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

Mr. Isbell, on behalf of Mr. Evans, I'd like to extend his congratulations to you for all of the fine work you've been doing over the last 4 years.

I have just one question. You expressed concern about the Department of Veterans Affairs having any role in deciding whether the Pro Bono Program receives funds. I'm going to give a hypothetical to you. If the Congress appropriated funds to the Department of Veterans Affairs but gave the Department absolutely no discretion with respect to the funds; that is, the Department was merely a conduit and had to make the funds available for the program without any delay or reduction, would this address your concern about how funds were made available?

Mr. ISBELL. That would reduce the concern, yes.

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

Mr. WELLER. All right. Thank you.

And I have one more question for Mr. Isbell. I was wondering if you think it's time that we establish an accredited course in veterans' law at a local law school?

Mr. ISBELL. Well, it is taught at at least one of the local law schools, taught at Catholic University. There's a Professor William Fox who teaches a course in the subject there. I don't know whether any of the other local law schools have. Larry?

Mr. HAGEL. The program doesn't exist in isolation, Mr. Chairman. First of all, the grant assurances of this program require the program to make contact with law school clinical programs to interest them in the program. In the past 2 years, we have made, I think, in 1 year five contacts, in another year three contacts and in each of those years have actually had law school clinical programs take a case at the Court of Veterans Appeals.

Also other organizations have programs where they promote the study or interest of veterans' law in law schools. And the Pro Bono Program is aware of that. For example, the Paralyzed Veterans has a program where they spend a little over \$50,000 a year to provide scholarship funds for third year law students who promise to provide pro bono services to veterans upon graduation from law school.

That is not to say that we wouldn't obviously support in any way we could the establishment of a course in law school. And anything you could do to promote representation would certainly be beneficial.

Mr. WELLER. Well, thank you. And Mr. Isbell, Mr. Robertson, Mr. Hagel, I want to thank you very much for participating in the panel and your testimony and contribution to today's hearing.

I would also like to thank all the witnesses for the time and advice that they've offered today. I think we've had a pretty good, frank discussion of the issues. And I want to ensure everyone that we intend to do what is in the best interest of our veterans in all future deliberations of these issues.

This joint hearing stand adjourned. Thank you.

[Whereupon, at 11:57 a.m., the subcommittees were adjourned.]

A P P E N D I X

[DISCUSSION DRAFT]

APRIL 17, 1996

104TH CONGRESS
2D SESSION

H. R. _____

IN THE HOUSE OF REPRESENTATIVES

Mr. _____ introduced the following bill; which was referred to the
Committee on _____

A BILL

To amend title 38, United States Code, to clarify that an employment handicap for which an individual may receive training and rehabilitation assistance must be causally related to the individual's service-connected disability, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. DEFINITIONS.**

4 Section 3101 of title 38, United States Code, is
5 amended—

1 (1) in paragraph (1), by inserting “, resulting
2 in substantial part from a disability described in sec-
3 tion 3102(1)(A) of this title,” after “impairment”;

4 (2) in paragraph (6), by inserting “authorized
5 under section 3120 of this title” after “assistance”;
6 and

7 (3) in paragraph (7), by inserting “, resulting
8 in substantial part from a service-connected disabil-
9 ity rated at 10 percent or more,” after “impair-
10 ment”.

11 **SEC. 2. BASIC ENTITLEMENT.**

12 Section 3102 of title 38, United States Code, is
13 amended—

14 (1) in paragraph (1)(A)(i), by striking out
15 “which is” and all that follows through “chapter 11
16 of this title” and inserting in lieu thereof “rated at
17 20 percent or more”;

18 (2) in paragraph (2)(A), by striking out “which
19 is” and all that follows through “chapter 11 of this
20 title” and inserting in lieu thereof “rated at 10 per-
21 cent”; and

22 (3) by amending paragraph (2)(B) to read as
23 follows:

1 “(B) is determined by the Secretary to be
2 in need of rehabilitation because of a serious
3 employment handicap.”.

4 **SEC. 3. PERIODS OF ELIGIBILITY.**

5 Section 3103 of title 38, United States Code, is
6 amended—

7 (1) in subsection (b)(3), by striking out “de-
8 scribed in section 3102(1)(A)(i) of this title” and in-
9 serting in lieu thereof “rated at 10 percent or
10 more”;

11 (2) in subsection (c)—

12 (A) in the matter preceding paragraph (1),
13 by striking out “particular” and inserting in
14 lieu thereof “current”; and

15 (B) in paragraph (2), by striking out “vet-
16 eran’s employment” and inserting in lieu there-
17 of “veteran’s current employment”; and

18 (3) in subsection (d), by striking out “under
19 this chapter” and inserting in lieu thereof “in ac-
20 cordance with the provisions of section 3120 of this
21 title”.

22 **SEC. 4. SCOPE OF SERVICES AND ASSISTANCE.**

23 Section 3104 of title 38, United States Code, is
24 amended—

25 (1) in subsection (a)—

1 (A) in paragraph (1)—

2 (i) by striking out “such veteran’s dis-
3 ability or disabilities cause” and inserting
4 in lieu thereof “the veteran has an employ-
5 ment handicap or”; and

6 (ii) by inserting “reasonably” after
7 “goal is”;

8 (B) in paragraph (7)(A)—

9 (i) by striking out “(i)”; and

10 (ii) by striking out “, and (ii)” and all
11 that follows through “such Act”; and

12 (C) in paragraph (12), by striking out
13 “For the most severely disabled veterans requir-
14 ing” and inserting in lieu thereof “For veterans
15 with the most severe service-connected disabil-
16 ities who require”; and

17 (2) by striking out subsection (b) and redesignig-
18 nating subsection (c) as subsection (b).

19 **SEC. 5. DURATION OF REHABILITATION PROGRAMS.**

20 Section 3105 of title 38, United States Code, is
21 amended in subsection (c)(1), by striking out “veteran’s
22 employment” and inserting in lieu thereof “veteran’s cur-
23 rent employment”.

1 **SEC. 6. INITIAL AND EXTENDED EVALUATIONS; DETER-**
2 **MINATIONS REGARDING SERIOUS EMPLOY-**
3 **MENT HANDICAP.**

4 (a) **IN GENERAL.**—Section 3106 of title 38, United
5 States Code, is amended—

6 (1) in subsection (a), by striking out “described
7 in clause (i) or (ii) of section 3102(1)(A) of this
8 title” and inserting in lieu thereof “rated at 10 per-
9 cent or more”;

10 (2) in subsection (b), by striking out “counsel-
11 ing in accordance with”;

12 (3) in subsection (c), by striking out “with ex-
13 tended” and inserting in lieu thereof “with an ex-
14 tended”; and

15 (4) by redesignating subsections (d) and (e) as
16 subsections (e) and (f), respectively, and inserting
17 after subsection (c) the following new subsection:

18 “(d) In any case in which the Secretary has deter-
19 mined that a veteran has a serious employment handicap
20 and also determines, following such initial and any such
21 extended evaluation, that achievement of a vocational goal
22 currently is not reasonably feasible, the Secretary shall de-
23 termine whether the veteran is capable of participating in
24 a program of independent living services and assistance
25 under section 3120 of this title.”.

1 (b) CONFORMING AMENDMENTS.—Title 38, United
2 States Code, is amended—

3 (1) in section 3107(c)(2), by striking out
4 “3106(e)” and inserting in lieu thereof “3106(f)”;

5 (2) in section 3109, by striking out “3106(d)”
6 and inserting in lieu thereof “3106(e)”;

7 (3) in section 3118(c), by striking out
8 “3106(e)” and inserting in lieu thereof “3106(f)”;

9 and

10 (4) in section 3120(b), by striking out
11 “3106(d)” and inserting in lieu thereof “3106(d) or
12 (e)”.

13 **SEC. 7. ALLOWANCES.**

14 Section 3108 of title 38, United States Code, is
15 amended—

16 (1) in subsection (a)(2), by striking out “follow-
17 ing the conclusion of such pursuit” and inserting in
18 lieu thereof “while satisfactorily following a program
19 of employment services provided under section
20 3104(a)(5) of this title”; and

21 (2) in subsection (f)(1)—

22 (A) in subparagraph (A)—

23 (i) by inserting “eligible for and”
24 after “veteran is”;

1 (ii) by striking out “chapter 30 or
2 34” and inserting in lieu thereof “chapter
3 30”; and

4 (iii) by striking out “either chapter 30
5 or chapter 34” and inserting in lieu there-
6 of “chapter 30”; and

7 (B) in subparagraph (B), by striking out
8 “chapter 30 or 34” and inserting in lieu thereof
9 “chapter 30”.

10 **SEC. 8. EMPLOYMENT ASSISTANCE.**

11 Section 3117(a)(1) of title 38, United States Code,
12 is amended by inserting “rated at 10 percent or more”
13 after “disability”.

14 **SEC. 9. PROGRAM OF INDEPENDENT LIVING SERVICES AND**
15 **ASSISTANCE.**

16 Section 3120 of title 38, United States Code, is
17 amended—

18 (1) in subsection (b), by striking out “service-
19 connected disability described in section 3102(1)(A)”
20 and inserting in lieu thereof “serious employment
21 handicap resulting in substantial part from a serv-
22 ice-connected disability described in section
23 3102(1)(A)(i)”; and

24 (2) in subsection (d), by striking out “and (b)”.

1 **SEC. 10. EFFECTIVE DATE.**

2 (a) **IN GENERAL.**—Except as provided in subsection
3 (b), the amendments made by this Act shall take effect
4 on the date of the enactment of this Act.

5 (b) **APPLICATION.**—The amendments made by sec-
6 tions 1 (other than paragraph (2)), 4 (other than subpara-
7 graphs (A) and (B) of paragraph (1)), and 9 shall apply
8 with respect to claims of eligibility or entitlement to serv-
9 ices and assistance (including claims for extension of such
10 services and assistance) under chapter 31 of title 38, Unit-
11 ed States Code, received by the Secretary on or after the
12 date of the enactment of this Act, including those claims
13 based on original applications, and applications seeking to
14 reopen, revise, reconsider, or otherwise adjudicate or
15 readjudicate on any basis claims for services and assist-
16 ance under such chapter.

[DISCUSSION DRAFT]

APRIL 26, 1996

104TH CONGRESS
2D SESSION**H. R.** _____

IN THE HOUSE OF REPRESENTATIVES

Mr. FOX of Pennsylvania introduced the following bill; which was referred to the Committee on _____

A BILL

To amend title 38, United States Code, to authorize the provision of financial assistance to financially needy veterans in order to ensure that those veterans receive legal assistance in connection with proceedings before the United States Court of Veterans Appeals.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 SECTION 1. LEGAL ASSISTANCE FOR FINANCIALLY NEEDY
2 VETERANS IN CONNECTION WITH COURT OF
3 VETERANS APPEALS PROCEEDINGS.

4 (a) IN GENERAL.—Subchapter III of chapter 72 of
5 title 38, United States Code, is amended by adding at the
6 end the following new section:

7 “§ 7287. Legal assistance for financially needy veter-
8 ans in proceedings before Court

9 “(a)(1) The Court of Veterans Appeals may provide
10 funds in order to provide financial assistance by grant or
11 contract to legal assistance entities for purposes of pro-
12 grams described in subsection (b).

13 “(2) The Court shall seek to provide funds for such
14 purpose through a nonprofit organization selected by it.
15 If the Court determines that there exists no nonprofit or-
16 ganization that would be an appropriate recipient of funds
17 under this section for the purposes referred to in para-
18 graph (1) and that it is consistent with the mission of the
19 Court, the Court may provide financial assistance, by
20 grant or contract, directly to legal assistance entities for
21 purposes of permitting such entities to carry out programs
22 described in subsection (b).

23 “(b)(1) A program referred to in subsection (a) is any
24 program under which a legal assistance entity uses finan-
25 cial assistance under this section to provide assistance or
26 carry out activities (including assistance, services, or ac-

1 tivities referred to in paragraph (3)) in order to ensure
2 that individuals described in paragraph (2) receive, with-
3 out charge, legal assistance in connection with decisions
4 to which section 7252(a) of this title may apply or with
5 other proceedings before the Court.

6 “(2) An individual referred to in paragraph (1) is any
7 veteran or other person who—

8 “(A) is or seeks to be a party to an action be-
9 fore the Court; and

10 “(B) cannot, as determined by the Court or the
11 entity concerned, afford the costs of legal advice and
12 representation in connection with that action.

13 “(3) Assistance, services, and activities under a pro-
14 gram described in this subsection may include the follow-
15 ing for individuals described in paragraph (2) in connec-
16 tion with proceedings before the Court:

17 “(A) Financial assistance to defray the ex-
18 penses of legal advice or representation (other than
19 payment of attorney fees) by attorneys, clinical law
20 programs of law schools, and veterans service orga-
21 nizations.

22 “(B) Case screening and referral services for
23 purposes of referring cases to pro bono attorneys
24 and such programs and organizations.

1 “(C) Education and training of attorneys and
2 other legal personnel who may appear before the
3 Court by attorneys and such programs and organiza-
4 tions.

5 “(D) Encouragement and facilitation of the pro
6 bono representation by attorneys and such programs
7 and organizations.

8 “(4) A legal assistance entity that receives financial
9 assistance described in subsection (a) to carry out a pro-
10 gram under this subsection shall make such contributions
11 (including in-kind contributions) to the program as the
12 nonprofit organization or the Court, as the case may be,
13 shall specify when providing the assistance.

14 “(5) A legal assistance entity that receives financial
15 assistance under subsection (a) to carry out a program
16 described in this subsection may not require or request
17 the payment of a charge or fee in connection with the pro-
18 gram by or on behalf of any individual described in para-
19 graph (2).

20 “(c)(1) Funds for the program under this section
21 shall be provided, and shall be identified separately, in
22 Acts making appropriations for the operations of the
23 Court for any fiscal year. The Court may, out of the funds
24 appropriated to the Court for such purpose, provide funds
25 to a nonprofit organization described in subsection (a)(1),

1 in advance or by way of reimbursement, to cover some or
2 all of the administrative costs of the organization in pro-
3 viding financial assistance to legal assistance entities car-
4 rying out programs described in subsection (b).

5 “(2) Funds shall be provided under this subsection
6 pursuant to a written agreement entered into by the Court
7 and the organization receiving the funds.

8 “(d) A nonprofit organization may—

9 “(1) accept funds, in advance or by way of re-
10 imbursement, from the Court under subsection
11 (a)(1) in order to provide the financial assistance re-
12 ferred to in that subsection;

13 “(2) provide financial assistance by grant or
14 contract to legal assistance entities under this sec-
15 tion for purposes of permitting such entities to carry
16 out programs described in subsection (b);

17 “(3) administer any such grant or contract; and

18 “(4) accept funds, in advance or by way of re-
19 imbursement, from the Court under subsection (c) in
20 order to cover the administrative costs referred to in
21 that subsection.

22 “(e)(1) Not later than February 1 of each year, the
23 Court shall submit to Congress a report on the funds and
24 financial assistance provided under this section during the
25 preceding fiscal year. Based on the information provided

1 the Court by entities receiving such funds and assistance,
2 each report shall—

3 “(A) set forth the amount, if any, of funds pro-
4 vided to nonprofit organizations under paragraph
5 (1) of subsection (a) during the fiscal year covered
6 by the report;

7 “(B) set forth the amount, if any, of financial
8 assistance provided to legal assistance entities pur-
9 suant to paragraph (1) of subsection (a) or under
10 paragraph (2) of that subsection during that fiscal
11 year;

12 “(C) set forth the amount, if any, of funds pro-
13 vided to nonprofit organizations under subsection (c)
14 during that fiscal year; and

15 “(D) describe the programs carried out under
16 this section during that fiscal year.

17 “(2) The Court may require that any nonprofit orga-
18 nization and any legal assistance entity to which funds or
19 financial assistance are provided under this section provide
20 the Court with such information on the programs carried
21 out under this section as the Court determines necessary
22 to prepare a report under this subsection.

23 “(f) For the purposes of this section:

24 “(1) The term ‘nonprofit organization’ means
25 any not-for-profit organization that is involved with

1 the provision of legal assistance to persons unable to
2 afford such assistance.

3 “(2) The term ‘legal assistance entity’ means a
4 not-for-profit organization or veterans service orga-
5 nization capable of providing legal assistance to per-
6 sons with respect to matters before the Court.

7 “(3) The term ‘veterans service organization’
8 means an organization referred to in section
9 5902(a)(1) of this title, including an organization
10 approved by the Secretary under that section.”.

11 (b) CLERICAL AMENDMENT.—The table of sections
12 at the beginning of such chapter is amended by inserting
13 after the item relating to section 7286 the following new
14 item:

“7287. Legal assistance for financially needy veterans in proceedings before
Court.”.

15 **SEC. 2. AUTHORIZATION OF APPROPRIATIONS.**

16 There is authorized to be appropriated to the United
17 States Court of Veterans Appeals for the purpose of pro-
18 viding financial assistance under section 7287 of title 38,
19 United States Code, as added by section 1, for each of
20 fiscal years 1997, 1998, and 1999 the sum of \$678,000.

[DISCUSSION DRAFT]

104TH CONGRESS
2D SESSION**H. R.** _____

 IN THE HOUSE OF REPRESENTATIVES

Mr. _____ introduced the following bill; which was referred to the
Committee on _____

A BILL

To increase, effective as of December 1, 1996, the rates of compensation for veterans with service-connected disabilities and the rates of dependency and indemnity compensation for the survivors of certain disabled veterans.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Veterans' Compensa-
5 tion Cost-of-Living Adjustment Act of 1996".

1 SEC. 2. INCREASE IN RATES OF DISABILITY COMPENSA-
2 TION AND DEPENDENCY AND INDEMNITY
3 COMPENSATION.

4 (a) RATE ADJUSTMENT.—The Secretary of Veterans
5 Affairs shall, effective on December 1, 1996, increase the
6 dollar amounts in effect for the payment of disability com-
7 pensation and dependency and indemnity compensation by
8 the Secretary, as specified in subsection (b).

9 (b) AMOUNTS TO BE INCREASED.—The dollar
10 amounts to be increased pursuant to subsection (a) are
11 the following:

12 (1) COMPENSATION.—Each of the dollar
13 amounts in effect under section 1114 of title 38,
14 United States Code.

15 (2) ADDITIONAL COMPENSATION FOR DEPEND-
16 ENTS.—Each of the dollar amounts in effect under
17 section 1115(1) of such title.

18 (3) CLOTHING ALLOWANCE.—The dollar
19 amount in effect under section 1162 of such title.

20 (4) NEW DIC RATES.—The dollar amounts in
21 effect under paragraphs (1) and (2) of section
22 1311(a) of such title.

23 (5) OLD DIC RATES.—Each of the dollar
24 amounts in effect under section 1311(a)(3) of such
25 title.

1 (6) ADDITIONAL DIC FOR SURVIVING SPOUSES
2 WITH MINOR CHILDREN.—The dollar amount in ef-
3 fect under section 1311(b) of such title.

4 (7) ADDITIONAL DIC FOR DISABILITY.—The
5 dollar amounts in effect under sections 1311(e) and
6 1311(d) of such title.

7 (8) DIC FOR DEPENDENT CHILDREN.—The
8 dollar amounts in effect under sections 1313(a) and
9 1314 of such title.

10 (c) DETERMINATION OF PERCENTAGE INCREASE.—
11 (1) The increase under subsection (a) shall be made in
12 the dollar amounts specified in subsection (b) as in effect
13 on November 30, 1996. Each such amount shall be in-
14 creased by the same percentage as the percentage by
15 which benefit amounts payable under title II of the Social
16 Security Act (42 U.S.C. 401 et seq.) are increased effec-
17 tive December 1, 1996, as a result of a determination
18 under section 215(i) of such Act (42 U.S.C. 415(i)).

19 (2) In the computation of increased dollar amounts
20 pursuant to paragraph (1), any amount which as so com-
21 puted is not an even multiple of \$1 shall be rounded to
22 the next lower whole dollar amount.

23 (d) SPECIAL RULE.—The Secretary may adjust ad-
24 ministratively, consistent with the increases made under
25 subsection (a), the rates of disability compensation pay-

1 able to persons within the purview of section 10 of Public
2 Law 85-857 (72 Stat. 1263) who are not in receipt of
3 compensation payable pursuant to chapter 11 of title 38,
4 United States Code.

5 **SEC. 3. PUBLICATION OF ADJUSTED RATES.**

6 At the same time as the matters specified in section
7 215(i)(2)(D) of the Social Security Act (42 U.S.C.
8 415(i)(2)(D)) are required to be published by reason of
9 a determination made under section 215(i) of such Act
10 during fiscal year 1996, the Secretary of Veterans Affairs
11 shall publish in the Federal Register the amounts specified
12 in section 2(b), as increased pursuant to section 2.

HONORABLE STEVE BUYER
CHAIRMAN
SUBCOMMITTEE ON EDUCATION, TRAINING,
EMPLOYMENT AND HOUSING
JOINT SUBCOMMITTEE HEARING
REMARKS
May 8, 1996

This joint subcommittee will come to order. Before we begin, I would like to thank the distinguished Chairman of the Subcommittee on Compensation, Pension, Insurance and Memorial Affairs, Terry Everett, for agreeing to hold this joint legislative hearing. Likewise, I would like to thank the distinguished Ranking Members of the two subcommittees, Lane Evans and Bob Filner for their cooperation in this hearing. We are here today to receive testimony on several legislative proposals which would affect veterans benefits.

First, we have a draft bill to repeal the effects of *Davenport v. Brown*. The proposal would require a veteran's service connected disability to be responsible for an employment handicap in order to qualify for VA vocational rehabilitation benefits.

Second, we have a draft Cost of Living Allowance bill to provide an increase in the rates of compensation and

DIC equal to that percentage given to Social Security recipients.

Finally, we have a draft bill to ensure the continuation of the veterans Pro Bono program at the Court of Veterans Appeals. These are all interesting issues and I'm eager to hear from today's witnesses. I'd like to remind all of today's witnesses that their full statement will be entered into the record, so if they would summarize within the 5 minute limit, it would be most helpful. Before we call the first panel, I'd like to recognize Chairman Everett for any remarks he may have.

Next, I like to recognize the distinguished Ranking Member of my subcommittee, Bob Filner and the distinguished Ranking Members of Mr. Everett's subcommittee for any remarks they may have

Thank you. Let's have the first panel. Today we have with us Mr. Steve Lemons, Deputy Undersecretary for Benefits, accompanied by Asst. General Counsels Dean Gallin and Don Garvin. Gentlemen welcome and please begin.

Thank you Steve. I have just a couple questions for you.

Gentlemen, thank you for being here today. Let's have the second panel, please. The panel is composed of Mr. Richard Schultz of the DAV, Mr. Russ Mank from the PVA and Mr. Jim Magill from the VFW. Glad to have you here. Please proceed in any order you desire.

Thank you gentlemen. Let's begin with a couple of questions.

Thank you gentlemen. Could we have our third panel, please. Today's third panel is composed of Mrs. Margaret Murphy Peterson of the Gold Star Wives of America and Mr. Phil Wilkerson of the American Legion. Ms. Peterson, its nice to have the Gold Star Wives here today, so why don't you begin.

Thank you. Just a couple of questions.
Thank you for your testimony, and the panel is excused.
The honorable Frank Q. Nebecker, Chief Judge of the U.S. Court of Veterans Appeals will be our next witness.
Judge Nebecker, welcome and please proceed.

Thank you, Judge. Let's begin with a couple of questions.

Thanks for being with us today Judge. Our final witness is Mr. David Isbell, Chairman of the Veterans Consortium Pro Bono Program. The Consortium is the organization that operates the Pro Bono program at the Court of Veterans Appeals and is made up of the DAV, PVA, the American Legion and the National Veterans Legal Services Project. Mr. Isbell , please begin.

I'd like to thank all the witnesses for their time and advice here today. We've had a good, frank discussion of the issues and I want to ensure everyone we intend to do what is best for the veteran in our future deliberations of these issues. The joint hearing stands adjourned.

Statement of
Representative Wes Cooley
Committee on Veterans' Affairs
Subcommittee on Education, Training, Employment and Housing
Joint Hearing on the Court of Veterans' Appeals Pro Bono Program, cost-of-living adjustments, and
the Supreme Court's *Davenport v. Brown* decision

May 8, 1996

Thank you, Mr. Chairman. Thank you, as well, to all of our distinguished guests who are here to testify today. I have listened carefully to your recommendations, and I will study your written submissions. As always, you have presented this committee with a well-considered analysis of the issues before us.

As for the Pro Bono Representation Program, I was impressed by the testimony of Judge Nebeker. This nation must provide adequate representation to financially needy veterans appearing before the Court of Veterans Appeals. In an adversarial system, though, the ethical implications of various funding proposals for the pro bono program are extremely complex. The Court must maintain an appearance of impartiality -- requiring the Court to channel its scarce resources in support of an individual litigant places the Court in an awkward ethical position. At the same time, I'm no proponent for expanding the resources of the Legal Services Corporation. Like Judge Nebeker, I'm perplexed by the Veterans Administration's assertion that it would be unable to administer the pro bono program. The VA, after all, is an entity created to help veterans; and the current head of the VA is fond of saying that he is, above all else, an advocate for the interests of veterans.

The draft COLA bill under discussion today would provide that disabled veterans, as well as those in receipt of dependency and indemnity compensation, will receive a COLA equal to the CPI after November 30, 1996. Certainly, veterans' should receive the same adjustments that are provided for other non-veteran programs. The goal of this Subcommittee should be to ensure that veterans are not faced with a real cut in the buying power of their annual benefits.

I have listened to the testimony today relating to the Supreme Court's recent *Davenport v. Brown* decision. While it may make sense to provide vocational rehabilitation to veterans for their service-connected disabilities, I certainly empathize with the concerns of the Paralyzed Veterans of America. As we consider this legislation, I will thoroughly consider the thoughtful views of our witnesses today.

Thank you Mr. Chairman.

HONORABLE TERRY EVERETT
CHAIRMAN
SUBCOMMITTEE ON COMPENSATION, PENSION,
INSURANCE AND MEMORIAL AFFAIRS
JOINT SUBCOMMITTEE HEARING
REMARKS
May 8, 1996

Thank you Mr. Chairman. I too would like to thank all the members, especially the Ranking Members for agreeing to this joint hearing. I'd also like to thank all of the witnesses for being with us today, especially Ms. Peterson of the Gold Star Wives, whom I'd like to thank for their hospitality when I spoke before their regional conference.

Today, we'll hear testimony regarding several important issues. Proposed legislation affecting the *Davenport* decision, a COLA for 1997 and the Pro Bono program are all important.

The written testimonies show that there are some differences of opinion on some issues, and I hope we'll have a good discussion of all sides of the debate. I see by the calendar that we are going to markup these proposals in a couple weeks, so we really need your advice here today.

Thank you Mr. Chairman.

Statement of Honorable Lane Evans

Joint Legislative Hearing

May 8, 1996

Mr. Chairman, I want to thank you for holding this hearing.

A cost-of-living adjustment for all beneficiaries drawing service-connected benefits is a must-pass bill, and I hope we will see it on the floor in the near future. I am also pleased to note the spirited debate about reversing the outcome in the Davenport case. The outcome in that case shows me that judicial review is working as we intended when we passed that historic legislation in 1988 after many years of hearings. By insuring that VA regulations are consistent with the law, the Court is performing a valuable and much-needed function. That Congress is debating reversing the outcome in one particular case is no reflection on the Court; it is merely that we are assuming our responsibility to set the policy as to who is eligible for VA benefits.

I have also read with great interest the testimony on the pro bono representation program, which has provided effective legal assistance to hundreds of deserving veterans. As a young attorney, I learned first-hand the importance of providing access to legal representation for citizens who do

not have the means to pay for it. Although there is no doubt that veterans deserve this assistance, and that it has been ably administered by the Legal Services Corporation (LSC) for the last five years, the LSC is not directly assigned management of the program in the legislation. I hope that my colleagues were aware of the admirable work done by LSC for veterans when they cast votes to substantially reduce funding for LSC in the 1996 appropriation bill.

In any event, I fully understand Judge Nebeker's concern that he is confronted with an impossible decision of either adequately funding the Court or providing adequate funds for veterans' representation. During House debate on the Court's 1996 appropriation, there was an effort made by Mr. Sanders and Mr. Montgomery to restore some of the funds originally requested by the Court, but those efforts were ultimately unsuccessful. I must also admit that I share the concern of the distinguished Chair of the Pro Bono Advisory Committee about the Department of Veterans Affairs having any substantive role in funding for attorneys who must oppose the VA's position on matters before the Court. I think the most logical thing to do here would be to increase funds for LSC, but I am concerned that a program

specifically benefitting veterans may not get the attention it needs in an appropriations subcommittee with different jurisdiction.

I believe that we can find a way to insure that funds are promptly made available for this program at the same time that the Court's budget is approved, and that the funds do not come at the expense of other important and necessary objectives.

I look forward to working with other members of the committee to assure that this valuable program continues.

Rep. Jerry Weller
Compensation, Pension, Insurance
& Memorial Affairs Sub-Committee Statement
May 8, 1996

I want to add my appreciation to that expressed by my colleagues, to veterans organizations in general for their service, dedication and hard work on behalf of America's veterans. I especially want to thank the veterans groups that are here with us today.

I believe that all of you here today would agree that improving service to our veterans, as well as ensuring sufficient funding for veterans' programs, should be among our sub-committee's top priorities. I want to assure you that I will be working closely with all veterans' service organizations, and in fact, have met with several of these organizations in the last few months to discuss their concerns and suggestions to improve the current system. I have also formed a local veterans' advisory committee that I have found very helpful and insightful in addressing local veterans' concerns and needs.

Mr. Chairman, I look forward to hearing the testimony before us today regarding veteran's cost of living adjustments and the Court of Veterans' Appeals Pro Bono Program.

PREPARED STATEMENT OF HON. FRANK MASCARA

Good Morning Mr. Chairman. I am glad to be here for this hearing called to review drafts of three very important pieces of legislation that would potentially touch the lives of millions of veterans and their dependents.

I am pleased that we are also able to receive the comments of representatives of our Nation's distinguished veterans' service organizations. Having glanced through their prepared statements last evening, I noted that as usual, they cut through to the heart of the matter and again remind us that the main focus of our deliberations should be the veterans who have so courageously served our Nation and now look to our committee for assistance and help.

This is particularly true as it relates to their comments regarding the proposed measure to overturn the *Davenport v. Brown* decision.

I appreciate the fact that this ruling has the potential of posing problems for the Department of Veterans Affairs' efforts to provide quality vocational rehabilitation to veterans.

However, if we come to the conclusion that some correction is required, I would feel more comfortable if the preponderance of the savings could be retained for our veterans.

Needless, to say I am very happy that we are also going to be considering the annual cost-of-living adjustment legislation. The eventual passage of this measure will ensure that those veterans' who rely on the benefits they receive from our Government will have some protection against inflation. I only wish it was moving to the Floor today. That is what I call important and meaningful legislation.

Finally, I concur that it is essential that we take action to see that the Court of Veterans Appeals Pro Bono Program remains intact.

I was amazed to read in the testimony that 80 percent of the cases that come before the Court are veterans trying to represent themselves.

It is clear that those veterans who have been assisted by all those who help with this program have benefited and stand a better chance of receiving a favorable ruling.

I understand the Court's concern that for a variety of reasons this program should be somewhat separate and I am sure by the time we get to mark-up we will have come up with an acceptable solution.

As one of the witness will testify this morning, the legislation we are considering today will have real impact on veterans and their families. I am confident we will keep that fact in mind and do our best to serve those veterans who clearly look to us for leadership.

PREPARED STATEMENT OF HON. JON FOX

Thank you, Chairman Buyer and Chairman Everett, for your leadership in holding this hearing. As you know. I have been working closely with you and your staff as well as Mr. Evans to craft effective legislation to preserve and improve the outstanding Veterans Consortium Pro Bono legal program.

The program provides countless hours of volunteer legal service to veterans who would ordinarily proceed without representation before the Court of Veterans Appeals.

This exceptional initiative helps veterans secure the rights and benefits that they have earned by virtue of their dedicated service to our great Nation. Moreover, the program improves the efficiency of the Court and provides training to lawyers across the Nation.

In fiscal year 1994, the pro bono program volunteer attorneys provided 14,644 hours of service and a remarkable 77 percent of their veteran-clients were successful in demonstrating an error in the decision of the Board of Veterans' Appeals. Not surprisingly, the program has broad support from the Court and veterans' service organizations and has received commendations from Supreme Court Chief Justice William Rehnquist.

I have prepared draft legislation to provide statutory authorization for this tremendous service initiative. I am eager to learn from our witnesses today so that we can further develop this important bill and introduce it in the near future.

Again, I am grateful for the leadership of our chairmen and I look forward to taking action on the much-needed legislation.

STATEMENT OF
STEPHEN L. LEMONS
DEPUTY UNDER SECRETARY FOR BENEFITS
VETERANS BENEFITS ADMINISTRATION
DEPARTMENT OF VETERANS AFFAIRS
BEFORE THE
SUBCOMMITTEES ON EDUCATION, TRAINING, EMPLOYMENT AND HOUSING
AND ON COMPENSATION, PENSION, INSURANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES
MAY 8, 1996

Mr. Chairmen and Members of the Subcommittees:

Thank you for holding this joint Subcommittee hearing and for providing me the opportunity to present VA's comments on three distinct legislative proposals affecting veterans benefits. These include measures that (1) would provide cost-of-living adjustments (COLA's) for veterans' disability compensation and survivors' dependency and indemnity compensation; (2) would, among other changes, clarify that eligibility for chapter 31 vocational rehabilitation requires that a veteran be found to have an employment handicap causally related to his or her service-connected disability; and (3) would allow monetary assistance to financially needy veterans for legal representation before the United States Court of Veterans Appeals.

Mr. Chairmen, I first would like to address the proposed bill amending our vocational rehabilitation program, then comment on the compensation COLA draft bill, and, finally, the appellate representation measure.

**DRAFT BILL CLARIFYING ELIGIBILITY CRITERIA FOR VOCATIONAL
REHABILITATION**

We strongly favor this draft bill that would effectively reverse the ruling by the Court of Veterans Appeals (CVA) in *Davenport v. Brown*, 7 Vet. App. 476 (1995)

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and make other appropriate changes to the vocational rehabilitation program under chapter 31 of title 38, United States Code. As further discussed below, we believe these amendments would enable us to effectively focus assistance on those veterans who have the greatest need of training and rehabilitation services to help them overcome serious impairment to employment caused by their service-connected disabilities. This reflects the historical, and what we believe should be the continuing purpose of the chapter 31 program.

More particularly, this proposed legislation would amend chapter 31 to require a showing that a veteran's qualifying service-connected disability substantially contributes to an employment handicap (or serious employment handicap) in order to demonstrate entitlement to vocational rehabilitation benefits. This is necessary since the *Davenport* decision invalidated VA's long-standing regulations that required such a causal relationship between the veteran's service-connected disability and his or her employment handicap. As a result of that decision, almost any veteran with a service-connected disability whose employability is also impaired, whether from service-connected or nonservice-connected causes, currently may establish entitlement to vocational rehabilitation services and assistance. By way of example, the CVA ruling means that a veteran who might be rated 10 percent for a fungal infection of the feet, service-connected, but who might also have an employment handicap due to the non-service connected disability of substance abuse would be eligible for the full range of the program's services. Another example might find a veteran who has a service-connected disability of lower back strain, rated at 10 percent, but who was severely disabled with a traumatic brain injury, in an automobile accident subsequent to military service, eligible for very extensive, and very expensive, rehabilitation services.

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Our comments are not meant to suggest that veterans with nonservice-connected disabilities should not receive the rehabilitation services they need for those disabilities, but we believe that such services do not fall directly under VA's purview. However, such services could be provided, for example, by the departments of vocational rehabilitation which exist in each State to serve the general population, rather than by the already overwhelmed VA program for service-disabled veterans.

Accordingly, we favor enactment of section 1 of the draft bill. It would amend the chapter 31 definitions of "employment handicap" and "serious employment handicap" to explicitly require that those respective impairments to employment must in each case have resulted in substantial part from the disabled veteran's service-connected disability. We would note here that it has been and remains our interpretation that the term "disability" in this context is meant to also include two or more such disabilities incorporated in a combined disability rating.

As previously indicated, we firmly believe that the chapter 31 program is and should be about assisting veterans to overcome impairments that arise from their service-connected disabilities. VA's *pre-Davenport* regulations reflected this, clearly stating that such disabilities, while they "need not be the sole or primary cause of the employment handicap . . . must materially contribute to the impairment . . ." 38 C.F.R. § 21.51(c)(2). We find that section 1 of this bill would require that the service-connected disability be a substantial, not merely an incidental causative factor of the resulting employment handicap and, thus, would appropriately restore and support VA's position in this regard.

Section 2 of the bill would improve section 3102 of title 38 by simplifying the language concerning qualifying service-connected disabilities and inserting

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language inadvertently omitted from paragraph (2)(B). These are beneficial though not substantive changes. (For example, the proposed simplified reference to service-connected disabilities rated at a particular percentage still would be interpreted by VA to mean such ratings as are, or but for receipt of retired pay would be, compensable under chapter 11 of title 38, in the same manner as we interpret similarly shortened references currently found throughout chapter 17 of the same title.)

Section 3 would make similar simplifying and clarifying language changes, as would sections 4, 5, and 6. In addition, sections 3 and 6 would clarify that provisions on initial evaluations and certain extension of the basic eligibility period, respectively, are intended to apply equally to all eligible chapter 31 participants. Moreover, sections 4 and 5, consistent with the reversal of *Davenport*, would explicitly target certain rehabilitation services and assistance to veterans whose service-connected disabilities pose the most serious impediment to obtaining suitable employment or enabling them to live independently. We endorse these provisions.

Section 7 of the bill would modify section 3108 of title 38 to more effectively use payment of the 2-month post-rehabilitation allowance to facilitate the veteran's transition from chapter 31 training to employment. Under the proposal, instead of automatically receiving the allowance after completing vocational training, only those individuals who thereafter satisfactorily follow a program of employment services would be targeted to receive the additional 2 months of subsistence allowance.

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Section 8 would clarify that employment placement assistance under 38 U.S.C. § 3117 only would be available to veterans with compensable (i.e., at least 10 percent) service-connected disabilities who previously participated in a chapter 31 vocational rehabilitation program or similar program under the Rehabilitation Act of 1973, as amended, and who are found to be employable. Again, we find this an appropriate targeting of resources.

Finally, section 9 of the draft bill would target the most severely service-disabled veterans for placement in a program of independent living by requiring a causal relationship between the service-connected disability of a veteran and his or her serious employment handicap. This focusing of chapter 31 rehabilitation program funds on those veterans with the most serious service-connected disabilities is consistent with the "repeal" of the *Davenport* decision as proposed by this draft bill, and VA fully supports it.

The *Davenport* decision is of nationwide impact. We estimate that approximately 40,000 additional veterans over a 6-year period will pursue programs of vocational rehabilitation to address impairment resulting from nonservice-connected conditions for which eligibility would otherwise have been denied prior to the Court's ruling. It will result in additional program cost of \$285.8 million for the 6-year period from FY 1997 through FY 2002.

Mr. Chairmen, in sum, by restoring VA's interpretation of the chapter 31 entitlement criteria, this draft bill would redirect chapter 31 assistance back to those veterans whose service-connected disabilities materially impair their employability and would improve our ability to provide them the vocational rehabilitation services they need.

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VETERANS' COMPENSATION COST-OF-LIVING ADJUSTMENT

One of our Nation's most important obligations to veterans and their survivors is to see to it they are appropriately compensated for service-connected disabilities and deaths. A high priority of this Administration is to ensure that this compensation keeps pace with rising costs.

The President's FY 1997 budget proposal calls for COLA's in both disability compensation and dependency and indemnity compensation (DIC) rates effective December 1, 1996. The rate increases would be of a percentage equal to that by which VA pension and Social Security benefits are adjusted on that date, currently estimated to be 2.8 percent. Consistent with the FY 1996 compensation COLA, the Administration proposes that all increased compensation and DIC rates as so adjusted, if not even multiples of \$1, be rounded to the next lower whole dollar amounts.

The draft COLA bill the Subcommittees are considering this morning is consistent in all respects with the Administration's proposal, and we wholeheartedly endorse it. We estimate FY '97 costs of this COLA to be \$288.7 million, and six-year costs (FY's 1997 - 2002) to be \$2.01 billion.

**FINANCIAL ASSISTANCE FOR LEGAL REPRESENTATION OF NEEDY
VETERANS BEFORE CVA**

Before discussing this final piece of draft legislation, I believe it would be helpful to provide a brief summary on the current representation of litigants before the CVA.

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When a veteran or other appellant brings an action in the CVA, the Secretary of Veterans Affairs, as the appellee or respondent, is represented by the General Counsel. A staff group of VA attorneys, paralegals, and other legal support personnel, co-located in the same building as the Court, handles all aspects of the litigation on behalf of the Secretary. On the other side, a substantial number of individuals file their appeals with assistance of privately-retained counsel, veterans service organizations, or attorneys funded by the Legal Services Corporation. Many more, however, bring their cases into the Court "pro se"; that is, unrepresented.

Since the General Counsel's computerized database consists of a case-tracking system, not a management analysis system, we cannot readily produce statistics on pro se litigants, especially where the status of a case was changed during litigation (e.g., an appellant initiated a case without representation and later secured a representative). However, the CVA has reported that, in a given year, as many as 80 percent of its cases are filed pro se, or without representation at the outset.

With the encouragement of the CVA, the Veterans Consortium Pro Bono Program was established in 1992. Funded by appropriations which pass through the Court, the Pro Bono Program contacts pro se appellants to ascertain their interest in securing representation. For those who wish to be represented by private counsel, Program personnel screen their cases and refer those that appear meritorious to attorneys who have agreed, in advance, to take such cases on a "pro bono" (without charge) basis.

To date, the Pro Bono Program has existed under the auspices of the CVA, so to speak, without formal statutory status. The draft bill under discussion,

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however, would formalize the Court's authority to expend annual appropriations specifically earmarked to provide legal assistance for financially needy individuals in connection with judicial proceedings before it. The Court would select a nonprofit entity to administer such funds through grants to, or contracts with, organizations capable of providing legal assistance for litigants. If no appropriate organization could be found, the Court would be authorized to initiate grants or contracts directly to legal assistance entities. The ultimate grantees or contractors could include nonprofit legal assistance organizations and veterans service organizations.

While a number of veterans service organizations now provide representation to significant numbers of claimants appearing before the Court, there are situations where veterans and other claimants choose to be represented by private counsel. As previously mentioned, the Pro Bono Program for some time has offered financially needy individuals the opportunity to make this choice. Thus, we have no conceptual objection to legislatively formalizing the Pro Bono Program. If enacted, such legislation, presumably, would result in the Court's continued involvement with the Consortium and other entities engaged in pro bono representation activities.

Since the Pro Bono Program commenced in 1992, the Secretary has cooperated to the fullest extent possible with the Consortium. Facilities are provided in the General Counsel's appellate litigation staff offices for Pro Bono Program staff to come in and review pro se cases for possible referral to pro bono counsel. Limited photocopying services are provided upon request of pro bono attorneys requesting copies of veterans' VA claims files, and our most experienced lawyers are made available for training presentations for attorneys new to veterans benefits law. Thus, appellate attorneys in the VA General Counsel's office already

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are accustomed to dealing with the Consortium and pro bono counsel, and, of course would continue to provide their full cooperation under the proposed legislation, if enacted.

Our position on the need to formalize the Pro Bono Program admittedly is somewhat ambivalent. We would, however, like to comment on two matters we believe to be important to your consideration of this legislation. First, if the Congress finds it essential that the Program have a permanent statutory mandate, it should not be funded or administered through VA. Some have attempted to compare CVA litigation to the court system of the Armed Forces, wherein military personnel (uniformed lawyers) serve as counsel for both the Government and the individual in cases brought under the Uniform Code of Military Justice. However, it must be kept in mind that those cases are *criminal* matters, in which the defendants are involuntarily charged and subject to potential criminal punishment, including confinement at hard labor. The situation in the CVA is vastly different; these are *civil* appeals, brought voluntarily against the Secretary. Appellants are seeking Government benefits. The involvement of VA to fund or otherwise oversee the representation of parties on both sides of CVA litigation could raise concerns among veterans and others, about the impartiality underlying the formulation of litigative positions on both sides. Thus, we would strongly oppose the transfer to VA of responsibility for administering and funding the Program.

Finally, it should be noted that the Pro Bono Program is not without cost. In many cases, attorneys have accepted referral of cases on a pro bono basis, only to apply for payment of attorney fees and expenses under the Equal Access to Justice Act (EAJA) after completing their representation. The CVA has interpreted the EAJA as entitling an attorney to, in effect, bill the Government if the client veteran

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achieves either a reversal or a remand of the Board of Veterans Appeals (BVA) decision. Even in a case remanded for further development for purely technical reasons, where VA readjudication may or may not eventually result in a grant of benefits, the "pro bono" attorney still is eligible for an award under the EAJA.

Between October 29, 1992, the date the EAJA statute was extended to cover CVA cases, and the present, VA has paid nearly \$500,000 to attorneys who initially appeared in veterans' cases on a "pro bono" basis. The average amount paid per case has been in excess of \$4,000. These EAJA payments are made from the Compensation and Pension appropriation, the same fund out of which veterans, their dependents and survivors receive benefits. This cost can be expected to rise, in part because we anticipate that an increasing number of decisions issued by the BVA will lead to a higher CVA caseload. Furthermore, the statutory rate payable to attorneys under the EAJA was recently raised from \$75 to \$125 per hour.

To summarize, while it is questionable whether the proposed formalization of the current Pro Bono Program is essential to assuring adequate representation of financially needy claimants appearing before the court, it certainly will not have an adverse affect on achievement of that objective. As currently implemented, however, the Program does consume a significant amount of resources that otherwise would be available for the payment of benefit claims filed by individuals requesting consideration of their claims by the Court. Moreover, it is not a truly pro bono program in view of the application of the EAJA to attorneys who initially agree to take cases on an uncompensated basis.

Mr. Chairmen, this concludes my testimony. I will be pleased to answer any questions you or the members of the Subcommittees may have.

**STATEMENT OF
 RICHARD F. SCHULTZ
 NATIONAL LEGISLATIVE DIRECTOR
 OF THE
 DISABLED AMERICAN VETERANS
 BEFORE THE
 SUBCOMMITTEES ON COMPENSATION, PENSION, INSURANCE
 AND MEMORIAL AFFAIRS AND
 EDUCATION, TRAINING, EMPLOYMENT AND HOUSING
 OF THE COMMITTEE ON VETERANS' AFFAIRS
 U.S. HOUSE OF REPRESENTATIVES
 WASHINGTON, D.C.
 MAY 8, 1996**

MESSRS. CHAIRMEN AND MEMBERS OF THE SUBCOMMITTEES:

On behalf of the more than one million members of the Disabled American Veterans (DAV) and its Auxiliary, I am pleased to appear here today to present our views on draft legislation to overturn the *Davenport v. Brown* Court of Veterans Appeals (COVA) decision, provide a cost of living adjustment (COLA) for service-connected disability and death benefits and authorizing a COVA pro bono program.

At the outset, Messrs. Chairmen, I wish to commend you and the members of the subcommittees for holding today's hearing. As you know, action taken by the subcommittees literally affects the lives of millions of veterans, their families, and survivors.

The DAV certainly understands the concerns of Congress about the potential impact of the *Davenport v. Brown* COVA decision. We also understand that the subcommittee's draft legislation is designed to overturn the effects of the Court's decision in the *Davenport* case. We must caution, however, that any regulations promulgated as a result of this legislation must not, in any way, diminish the vocational rehabilitation provided to service-connected disabled veterans by the Department of Veterans Affairs (VA) prior to the *Davenport* decision.

In addition, given the current budget constraints and in view of the "pay-go" requirements of the *Budget Enforcement Act*, DAV must insist that any money saved as a result of overturning the *Davenport* decision be used for improving benefits and services for our nation's veteran population, especially those benefits and services derived as a result of a service-connected disability or death.

* * *

Mr. Chairman, DAV certainly appreciates the fact that you intend to introduce legislation to increase, effective December 1, 1996, in the same manner as social security payments, the rates of compensation for veterans with service-connected disabilities, the rates of Dependency Indemnity Compensation for survivors of certain veterans and the additional compensation paid for dependents and the annual clothing allowance payments to certain service-connected disabled veterans.

If enacted, this legislation would offset against the increase in the cost of living incurred by disabled veterans who have incomes part or all of which are fixed and whose buying power would otherwise be eroded. In as far as the provisions of this bill would accomplish that purpose, we applaud it and the subcommittee's efforts on behalf of disabled veterans, their dependents, and survivors. This is certainly a positive and beneficial measure.

* * *

President Reagan signed the Veterans' Judicial Review Act (VJRA), Public Law 100-687, into law on November 18, 1988. This law creates an Article I court with exclusive jurisdiction to review final Board of Veterans' Appeals (BVA or Board) decisions.

The Court received its first appeal in November 1989 and, as of September 30, 1995, had received 8,898 appeals. It received 1,277 new appeals during fiscal year (FY) 1995, about 50 more appeals than in FY 1994. In FY 1996, there appears to be an increase in the number of appeals filed, most likely as a result of an increase in the number of appeals decided at the Board. As the Board increases the number of decisions it produces, the Court could expect an increase in the number of new appeals it receives.

From the outset, DAV has staffed an office of attorneys and non attorneys to handle cases at the Court. During the Court's early years, when the Court's workload was much greater than now, DAV supported a full-time staff of eight people. Today, there are four full-time employees at DAV's COVA office, an extensive legal/medical library and computer hardware and software to assist the staff in providing quality representation to appellants at the Court. DAV has set no limits on the number of cases in which it will provide representation before the Court. It is now, and has always been, DAV's uniform policy to represent all those who seek to appeal to the Court so long as the appeal is not frivolous.

Notwithstanding the efforts of DAV and other veterans service organizations (VSOs) to provide representation before the Court, one of the biggest problems the Court faces is the large number of pro se (unrepresented) appeals filed. These pro se appeals represent 80percent of the Court's docket at the time the appeal is filed. More manpower hours are expended in pro se cases than in cases where VSOs or private attorneys represent veterans, because most pro se veterans have never encountered the legal procedures required in federal appellate courts such as this Court and are unfamiliar with these legal procedures. This situation remains difficult, even though the Court has simplified procedures to enable pro se litigants to present their own appeals.

The Court has benefited as a result of the Court's innovative Pro Bono Program. While 80percent of appeals filed with the Court are pro se, that figure is greatly reduced by the efforts of the Pro Bono Program to screen appeals for merit and to find representation for those cases with merit. Only 54percent of the initial pro se cases remained unrepresented at the time the case was terminated by the Court.

Early on, the Court recognized that the number of veterans appearing before the Court without benefit of representation was much greater than appellants before other federal courts, a situation the Court believed was unacceptable. Consequently, Congress, at the Court's request, passed legislation that permitted the Court to use \$950,000 of funds previously appropriated to the Court to create and administer a program to provide free representation to veterans not able to obtain it on their own. With this authorization, the Court employed the Legal Services Corporation to develop a request for proposals for interested parties to submit bids to receive grants for the purpose of meeting the needs of the Court and pro se appellants. Under the Veterans Consortium Pro Bono Program, attorneys receive training in the subject of veterans benefits and volunteer their time to provide free representation to those individuals who have already filed meritorious appeals with the Court, but cannot afford or are otherwise unable to obtain qualified representation.

While the initial funding to run the Program for 13 months was \$950,000, subsequent years' appropriations and requests for funding have been less (\$790,000 in both FY 1994 and FY 1995 and \$678,000 in FY 1996). In addition to receiving federal funds, the Program is supported by funds and services donated by four veterans organizations, including DAV. Further, as of December 1995, these funds have generated nearly \$8,000,000 in legal services donated by some 384 attorneys to veterans or their dependents.

In FY 1995, a total of 527 cases were screened for representation by the Program. Of these, 201 met the Program's financial and merit eligibility criteria, and all 201 of these appellants were provided an attorney at no cost. The remaining 326 veterans received legal advice regarding the merits of their claims, and, in some instances, suggestions regarding appropriate action other than at the Court. Since the program's inception, 675 veterans have been provided with a free attorney by the Program and more than one thousand have received some form of legal advice.

The Program has demonstrated that representation does, indeed, make a difference in a veteran's chance of succeeding at the Court. During FY 1995, 208 cases assigned at some point by the Program were finally disposed of by the Court. Of those cases, seven were dismissed due to the death of the appellant. Of the remaining 201, 157 (78 percent) resulted in a finding of error in the BVA's adjudication of the case.

Realizing that the pro se dilemma was getting out of hand, DAV elected to participate in the Pro Bono Program when it was established in 1993. DAV had also been instrumental in the planning stage of this program. Since making the decision to participate in the program, DAV has contributed some of its most skilled personnel to the Consortium, has assisted pro bono counsel with free mentoring services and has itself undertaken representation in cases referred to DAV by the Consortium when requested. DAV is now in the process of making an even more substantial contribution to the Consortium in the form of donating the services of one of its advocates on a full-time basis.

In the FY 1996 appropriations for the Court, Congress reduced the Court's funding from the requested \$9.4 million to \$9 million. In its budget submission, the Court requested \$678,000 to run the Pro Bono Program. Despite this decrease, the appropriations committees expressed their intention that funding for the Program be provided from the \$9 million appropriation.

In October 1995, the Court recognized that, because of the budget stalemate, FY 1996 funds might not be available for some time. Consequently, the Court made an informal commitment to the Veterans Consortium Advisory Committee that the Court would continue to provide funds, from those authorized by Congress under continuing resolutions, until the appropriations were finalized or until the expiration of the continuing resolution. As a result, the Consortium continued its regular operation. As uncertainty regarding a final budget mounted with the continuing budget debate, however, the Court advised the Program in December 1995 that the Court could not commit itself to provide any funds from the yet-to-be enacted FY 1996 appropriations and suggested the Program should proceed to submit a plan for ceasing operations. The Chief Judge also expressed concerns that funding provided to the Pro Bono Program through the Court created a conflict of interest by requiring the Court to choose between funding its internal operations and the operation of the Program.

Congress became aware of this situation, and on December 14, 1995, Senator Christopher Bond, Chairman of the Senate VA, HUD, and Independent Agencies Appropriations Subcommittee, made the following remarks in the *Congressional Record*, "Despite the fact that the Court's budget has been reduced, I believe that the pro bono representation program should receive full funding in Fiscal Year 1996. This program has proven very successful in helping the court to address adequately the very large number of pro se cases. . . I do not believe it is prudent to withdraw Federal support."

On December 20, in response to Senator Bond's comments and in a letter to the Advisory Committee of the Veterans Consortium, the Chief Judge informed the Committee that, should the \$9 million appropriation be enacted, it would fund the Pro Bono Program through FY 1996--albeit at a level somewhat less than Congress had anticipated, and funds would be made available as Congress granted the Court spending authority by passing continuing resolutions.

The DAV wishes to acknowledge the vision of Congress and the Court in devising and funding the Pro Bono Program. Without federal funds and the direct efforts of the Court, it is unlikely that a program operating on this scale would have come into existence or have achieved its universally acknowledged success. Further, despite substantial support from veterans organizations and the receipt of donations from some participating law firms, it is clear to us that federal funding must continue or the Program will die.

We recognize the tension, however, that was created when the Court was required to make hard decisions, when it did not receive the full amount of its budget request. Consequently, we believe that Congress should enact legislation that authorizes the Program and provides the Program with a separate funding source. This program provides a very needed service to pro se appellants at the Court, and DAV is committed to its continued success.

The draft bill introduced to authorize funding for the pro bono program at the Court of Veterans Appeals by Representative Fox has the support of the DAV. We believe, however, that the provision explicitly authorizing the Court to provide funds for the program, proposed § 7287(a)(1), should mandate that the Court provide those funds. This change can be accomplished by changing "may" to "shall."

Your favorable consideration of this legislation would be greatly appreciated by the DAV.

Again, Messrs. Chairmen, I wish to thank you for the opportunity to appear before the subcommittees today. I would be happy to answer any questions you or members of the subcommittees may have.

STATEMENT OF
RUSSELL W. MANK, NATIONAL LEGISLATIVE DIRECTOR
PARALYZED VETERANS OF AMERICA
BEFORE A JOINT HEARING OF THE
SUBCOMMITTEES ON
COMPENSATION, PENSION, INSURANCE AND MEMORIAL AFFAIRS
AND
EDUCATION, TRAINING, EMPLOYMENT & HOUSING
OF THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING THE
COURT OF VETERANS APPEALS PRO BONO PROGRAM
COST OF LIVING ADJUSTMENTS
DAVENPORT v. BROWN

MAY 8, 1996

Distinguished Chairmen, Ranking Minority Members, members of the Subcommittees, the Paralyzed Veterans of America (PVA) appreciates this opportunity to express our views on the Court of Veterans Appeals Pro Bono Program, cost-of-living-adjustments (COLAs) for veterans' benefits, and the Davenport v. Brown decision.

PVA strongly supports the draft legislation introduced by Representative Fox (R-PA) which would authorize the Veterans Pro Bono Legal Representation Program (Program). PVA believes very strongly in this Program, and the veterans it serves. We have done our part to make it successful, and we look to Congress to provide the necessary funding.

Some background on the Program may be helpful as you consider this important, and successful, endeavor. Prior to 1988 and the passage of the Veterans Judicial Review Act, veterans whose claims for benefits were denied by the Department of Veterans Affairs (VA) had no right to judicial review of those denials. The Veterans Judicial Review Act created the United States Court of Veterans Appeals (Court), an Article I court with exclusive jurisdiction over appeals of VA decisions.

Because of a combination of years of no judicial review and a statutory prohibition then in effect against charging more than \$10 for representation before the VA, there were very few attorneys familiar with the laws and regulations governing veterans' benefits. Consequently, the number of veterans appearing without legal representation was far greater than the *pro se* rate at other federal courts. The Court, recognizing that veterans would not be afforded the full benefit of judicial review, requested, and Congress passed, legislation permitting the institution of a pilot program permitting the use of Court funds to create and administer a program designed to reduce the Court's *pro se* caseload. The Court employed the Legal Services Corporation to develop a request for proposals for interested parties to submit bids and receive grants for the purpose of meeting the needs of the Court and the *pro se* appellants. The grants provided under this program are collectively called the Court of Veterans Appeals Pro Bono Program (Program). Under the Program, attorneys receive training in the area of veterans law and volunteer their time to provide free representation to those individuals who have already filed meritorious appeals with the Court but cannot afford, or are otherwise unable to obtain, qualified legal assistance.

The Program, by almost any measure, has been successful. As of March 31, 1996, more than 700 veterans, every veteran who met Program eligibility requirements, has been provided with a free attorney by the Program. This represents approximately 20 percent of the total number of cases filed *pro se*. Veterans not meeting eligibility requirements have been provided some measure of legal advice to guide them in the prosecution of their claims outside the Court.

The Program has demonstrated that representation makes a significant difference in a veteran's chance of successfully pursuing his claim at the Court. For example, during fiscal year (FY) 1995, 208 cases assigned at some point by the Program were finally disposed of by the Court. Of these cases, seven were dismissed due to the death of the appellant. Of the remaining 201, 157 (78 percent) resulted in a finding of error in the VA's adjudication of the claim.

While the initial funding for the Program was \$950,000, subsequent years' requests have been less. It is estimated by the Program that funding for FY 1997 should not exceed \$750,000. In addition to federal funding, the Program is supported by monies and services donated by the American Legion, the Disabled American Veterans, PVA, and the National Veterans Legal Services Program. The return on this investment is staggering: as of December 1995 these funds have generated over \$8,000,000 in donated legal services by some 384 attorneys provided to veterans and their families.

In FY 1994 and FY 1995 the Court requested, and received, \$790,000 to fund the Program. For FY 1996, the Court requested \$678,000 for the Program out of a total request of \$9.4 million. As the Court stated, this figure would:

“continue the Program at approximately the FY 1995 operating level. This represents a reduction of \$112,000 from the two prior FYs resulting from one-time savings that the grantees and the LSC [Legal Services Corporation] have been able to make in administrative, personnel, and equipment-related expenses. The Court notes that this is a **nonrecurring reduction** that could not be maintained in future years without programmatic changes that the Court does not now anticipate would be desirable.” (United States Court of Veterans Appeals Fiscal Year 1996 Budget Estimates, at 7.) (Emphasis added).

The Appropriations Committees provided \$9 million, with the Senate Veterans Affairs, HUD, and Independent Agencies Subcommittee expressing its intention that the Program be fully funded. In October 1995, the Court recognized that because of the budget stalemate, FY 1996 funds might not be available for some time and consequently made an informal commitment to the Program that funds would be made available from those authorized by Congress under Continuing Resolutions or

until the appropriation measure was signed into law. As a result, the Program continued its regular operation, counting on reimbursement from the Court under its informal commitment.

In December 1995, the Court decided that the ongoing budgetary uncertainty precluded it from committing itself to providing any funding and suggested that the Program submit a plan for ceasing operations. In addition, the Chief Judge, the Honorable Frank Nebeker, expressed concerns that funding provided to the Program through the Court created a conflict of interest by requiring the Court to choose between funding its internal operations and the operation of the Program.

Congress became aware of this situation, and on December 14, 1995, the Chairman of the Appropriations Subcommittee on Veterans Affairs, HUD, and Independent Agencies, Senator Christopher Bond stated in the Congressional Record that "despite the fact that the Court's budget has been reduced, I believe that the Pro Bono Representation Program should receive full funding in fiscal year 1996. This program has proven very successful in helping the Court to address adequately the very large numbers of *pro se* cases I do not believe it is prudent to withdraw Federal support." 141 Cong.Rec. S18640. In response, the Chief Judge informed the Program that should the \$9 million appropriation be enacted, the Court would fund the Program, but would not provide the full amount requested.

While the Court continues to express its support for the Program, it has not requested any funding for the Program in its FY 1997 budget request. Despite substantial contributions by veterans organizations and some private law firms, without federal funding the program will cease to exist. Consequently, the Program is requesting an amount not to exceed \$750,000 for FY 1997. Furthermore, the Program, in order to alleviate the Court's concerns over a potential conflict of interest, is requesting that the appropriation for the Program be made in a separate line with specific language directing the Court to provide the Program with the appropriated amount.

PVA strongly supports the proposed legislation and would recommend that two minor changes be made. First, that the obligation of the Court to provide funds, intended by Congress, to the Program be more clearly delineated. This could easily be done by changing the word "may" to "shall" on page 2 of the draft legislation, lines 9 and 19. Second, we would recommend a change in the amount authorized for the Program on page 7, line 20. We would recommend setting the amount authorized in FY 1997 at \$750,000, and increase this amount by 5 percent each year in FY 1998 and FY 1999. These figures could be set as a cap, thereby enabling Congress each year to decide on the appropriate amount of funding. It must be noted that the \$678,000 requested by the Court for FY 1996, did not represent the anticipated operating budget for the Program for that year, rather, as noted above, the operating budget was \$790,000, and the \$112,000 difference between the operating budget and what was requested was the amount saved through prudent administration of the Program over its prior years of operation. These savings have been exhausted. In addition, it is important to provide some level of funding flexibility in order to meet future contingencies, especially if the claims made by the Board of Veterans' Appeals concerning their increasing productivity are correct. An avalanche of filings made at the Court may necessitate increased funding.

Passage of authorizing legislation is essential for the continuance of this Program. PVA stands ready to work with you to accomplish this necessary goal, and to work with you in making this Program, so essential if veterans are to be accorded the full benefit of judicial review, as successful in the future as it has been in the past.

Finally, PVA firmly supports an equitable and realistic COLA paid to veterans with service-connected disabilities and survivors receiving Dependency and Indemnity Compensation. PVA notes that the estimated annualized rate of inflation, based upon

the Consumer Price Index (CPI), is currently 2.8 percent. PVA appreciates that Congress is attempting to ensure that veterans' benefits are not eroded by inflation, that veterans are not faced with a real cut when their dollar buys less than the year before. We ask only that veterans receive fair treatment when adjustments are granted to other programs, and ask that veterans not receive a lower increase than other program recipients.

We remain opposed to permanently indexing veterans' compensation COLAs. We believe in Congress' historic authority to annually determine an equitable COLA. This permits Congress to consider all factors in determining the necessary increase to maintain veterans' compensation at current levels. The CPI may, or may not, accurately reflect all the economic and social actions and interactions that affect veterans. At the very least the CPI may not be accurate as it relates to the catastrophically disabled individual, and his or her special needs.

PVA is pleased to be invited to express our general views regarding the Court of Veterans Appeals' decision in Davenport v. Brown, 7 Vet.App. 476 (1995), and to comment briefly upon the Discussion Draft of legislation being contemplated that would amend certain training and rehabilitation sections of title 38. PVA filed an *Amicus Curiae* brief with the U.S. Court of Veterans Appeals. We believed then, and we believe now, that the significance of Davenport rests upon the concept of judicial oversight of Department of Veterans Affairs (VA) regulations. In the Summary of Argument in our brief we stated:

A review of the pertinent regulations, 38 C.F.R. §§ 21.51(c)(2), (e), and the enabling statute, 38 U.S.C. §§ 1500 et seq. [renumbered as §§ 3100 et seq.], demonstrates that the regulations exceed statutory authority and impose impermissible criteria upon veterans applying for benefits under the statute. The plain and unambiguous language of the statute fails to impose the criteria contained in the regulation. The legislative history fails to provide clear and convincing evidence that Congress intended any other meaning than the plain meaning language the statute indicates. Therefore, the regulations should be declared invalid under the standard of review set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), and the reasoning utilized by this Court in *Gardner v. Brown*, 1 Vet.App. 584 (1991), aff'd 5 F.3d 1456 (Fed. Cir. 1993), cert. granted, 114 S.Ct. 1396 (1994). Brief at 3-4.

PVA believes that based upon the regulations and statutes involved, the decision in Davenport was correct. We are mindful that in the future there may be other instances similar to a case, such as Davenport, where a congressional response may be thought efficacious. It is important to note that as this Committee reviews the operations of the VA, care must be given that current benefits and procedures not be altered solely on the basis of anecdotal or aberrant situations. We are disturbed by many of the changes proposed in the draft legislation. The draft of this legislation would limit the rights of veterans to receive vocational rehabilitation, limit the VA's authority to grant vocational rehabilitation, and bestow upon the VA what appears to be an almost unreviewable authority and discretion to grant or deny vocational rehabilitation services to veterans with service-connected disabilities.

Veterans who, in service to this nation, are injured in the course of their service, often need the most help in reintegrating into civilian life, and often need some assistance to once again become productive members of our society. Thousands and thousands of veterans have benefited from employment training and rehabilitation. If this legislation is enacted into law, many deserving veterans will be denied the assistance they need. We believe that a partnership between the Committee, and the veterans that you serve, is the only way to ensure that veterans receive the benefits and fairness that their service has earned.

As we stated upon the Supreme Court decision in Brown v. Gardner, 115 S.Ct. 552, "[it] serves as a powerful impetus to the VA to examine its regulations to ensure that they are consistent with the statutory law upon which they are based, and consistent with the decisions of the Court of Veterans Appeals. As Justice Souter stated in the unanimous decision, quoting from the opinion of the Court of Appeals for the Federal Circuit, "[m]any VA regulations have aged nicely simply because Congress took so long to provide for judicial review." For this, also, is the true message of Davenport.

Again, thank you for this opportunity to present PVA's views. I will be pleased to respond to any questions that you may have.

STATEMENT OF

JAMES N. MAGILL
 DIRECTOR, NATIONAL LEGISLATIVE SERVICE
 VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEES ON
 EDUCATION, TRAINING, EMPLOYMENT AND TRAINING; AND
 COMPENSATION, PENSION, INSURANCE AND MEMORIAL AFFAIRS
 COMMITTEE ON VETERANS' AFFAIRS
 UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

DAVENPORT v. BROWN, VETERANS COST-OF-LIVING ADJUSTMENTS,
 AND THE COURT OF VETERANS APPEALS PRO BONO PROGRAM

WASHINGTON, D.C.

MAY 8, 1996

MR. CHAIRMEN AND MEMBERS OF THE SUBCOMMITTEES:

On behalf of the 2.1 million men and women of the Veterans of Foreign Wars of the United States, I wish to thank these two important subcommittees for affording us the opportunity to express our views on the recent court decision, *Davenport v. Brown*; veterans' cost-of-living adjustments (COLAs); and the Court of Veterans Appeals' Pro Bono Program. The VFW is also appreciative of your continuing concern for our nation's veterans.

DAVENPORT v. BROWN

Recently the Court of Veterans Appeals, in its decision in *Davenport v. Brown*, focused on a conflict between the language of VA regulations and statute on the issue of who is eligible for VA vocational rehabilitation programs. The court struck down a requirement that there be a causal relationship between a veteran's service-connected disability and any employment impairment they experienced. The result of that decision could be interpreted that veterans could receive vocational rehabilitation even if their disability did not cause their employment handicap. Historically, vocational rehabilitation programs for veterans have always been based on a causal relationship between a veteran's service-connected disability and any impairment to his or her employment. This has always been a precondition for entitlement to vocational rehabilitation benefits for service-connected disabled veterans.

As a result of the *Davenport v. Brown* decision, a discussion draft bill is being considered today that would amend title 38, U.S. Code, to clarify that an employment handicap from which an individual may receive training rehabilitation assistance, must be causally related to the individual's service-connected disability. The bill would also reduce the rate of disability from 20% to 10% as the threshold for basic entitlement for acceptance in the rehabilitation program. The Veterans of Foreign Wars has no objection to the draft bill but would recommend that if legislation is introduced, it should instruct VA to notify all of those individuals who were denied enrollment in the vocational rehabilitative program because of their 10% disability rating and encourage them to reapply.

PRO BONO PROGRAM

The Pro Bono program provides legal assistance to financially needy veterans appearing before the Court of Veterans Appeals. It began as a pilot project funded out of excess funds appropriated to the Court in FY '92 in order to reduce the number of *pro se* (unrepresented) appeals filed with the Court. These *pro se* appeals comprise approximately 80% of the Court of Veterans Appeals docket and the Pro Bono Program has cut this number in half. The Legal Services Corporation was created to act as the secretariat and grantor of the funding. Congress included the funding in the Court's appropriation as a discreet line item designated for transfer to the Legal Services Corporation for funding of grants to support the program. Until FY '96, funding was over and above the Court's operational needs, therefore, there was no competition between operating funds and pro bono funds.

In FY '96, Congress eliminated the line item funding with the intent that the Court uses its own operating budget to fund the program. Because of this funding method, a perception of impropriety may possibly arise and also there could be a conflict of interest between the operation of the Court and the Pro Bono Program. Inasmuch as the Pro Bono Program gives those veterans having limited means a vehicle to obtain the best possible representation before the Court, the VFW supports the continuation of this program. We do, however, strongly recommend that funding be authorized as a separate line item in the Court's budget or funding be provided directly through the Legal Services Corporation.

COST-OF-LIVING ADJUSTMENTS

Finally, Mr. Chairman, we were asked to comment on a draft bill to increase, effective December 1, 1996, the rates of compensation for veterans with service connected disabilities and the rates of dependency and indemnity compensation for the survivors of certain disabled veterans.

The VFW has long had a resolution calling for cost-of-living adjustments to veterans compensation payments being commensurate with the Consumer Price Index (CPI). The draft bill under discussion today would provide a COLA at a level at least equal to that provided for Title II of the "Social Security Act". This means, for all practical purposes, disabled veterans and those in receipt of dependency and indemnity compensation would receive a COLA equal to the computed CPI as of November 30, 1996. We therefore support the draft legislation.

This concludes my statement. I will be pleased to respond to any questions you have.



Gold Star Wives of America, Inc.

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Statement of

Margaret Murphy Peterson, Legislative Committee Member
Gold Star Wives of America, Inc.

Before the

Subcommittee on Compensation, Pension, Insurance
and Memorial Affairs
Committee on Veterans' Affairs
United States House of Representatives

And the

Subcommittee on Education, Training, Employment and Training
Committee on Veterans' Affairs
United States House of Representatives

Concerning Legislation to Provide a
Cost-of-Living Adjustment to the
Dependency and Indemnity Compensation Program

May 8, 1996

Messrs. Chairmen and Distinguished Members of the Subcommittees:

On behalf of the members of Gold Star Wives of America, Inc., I wish to thank you for the invitation to present some of our views concerning the Cost-of-Living Adjustment Act of 1996 to the Dependency and Indemnity Compensation (DIC) as contained in the Discussion Draft dated April 25, 1996. Gold Star Wives have other pressing concerns and are taking the liberty to express these concerns in this statement. In particular, we request a more rational DIC structure, reinstatement of DIC after remarriage, and elimination of the 10 year limit in which to pursue education benefits.

Under the Discussion Draft, all DIC widows would receive full cost-of-living adjustments (COLA) and no particular group of DIC widows, whether old-law, new-law, 100% disabled, or killed in action (KIA), would be singled out for disparate or unequal treatment. In addition, the COLA rate to be applied to the DIC program would be identical to the rate to be applied to Social Security benefits, and presumably, to all other federal programs.

THE ENTIRE DIC BENEFIT MUST BE SUBJECT TO A COLA INCREASE

At the time the new-law DIC legislation standardizing the benefit structure for survivors of lower-rank enlisted members was proposed, it was the intent that "[s]urvivors of higher-rank members currently receiving benefits would not be adversely affected." (*The Budget for Fiscal Year 1992, Department of Veterans Affairs, Part Four-961.*) However, each year since 1993, Congress or the Administration proposed to break its commitment to old-law widows by introducing COLA bills which would have eliminated or reduced COLAs for these old-law widows. The withholding of COLAs from old-law rates would result in a completely standardized two-tiered new-law system, and old-law survivors, indeed, would be adversely affected because they would be swallowed up into the new-law structure.

Since 1993, Congress has not limited COLAs in like manner to any other group. For instance, federal employees and retirees all received COLAs on their full salary or retirement, not on any arbitrarily determined lower dollar amount; and, disabled veterans were not selected to receive COLAs on an arbitrarily determined lesser portion of their respective disability ratings.

We have heard Members of Congress and their staffers repeatedly ask, "Why should old-law widows receive higher DIC rates than the new widows?" In the recent past we have had to fight off misdirected attempts to hold down the old DIC rates to allow the new DIC rate structure to gradually absorb them. Our answer is that old-law widows are not similarly situated with new-law widows.

Among the most financially strapped widows in Gold Star Wives are those paid under the old DIC rates. The old DIC rates apply primarily to the widows of senior NCOs and officers killed during WWII, Korea, and Vietnam -- when government sponsored insurance coverage was extremely limited. Unlike the new-law senior NCO and officers' widows, old-law widows received one-twentieth to one-quarter the government sponsored life insurance proceeds now available to the new widows. WWII, Korea, and most Vietnam widows received only \$10,000.00 in government sponsored life insurance proceeds (some Vietnam widows received \$15,000.00). Ten thousand dollars did not go far in WWII, but in the 1960s it was a pittance. Private sector life insurance coverage was generally unavailable to soldiers in combat zones, and when it finally became available in the late 1960s, it was unaffordable for most military families.

An old-law Vietnam widow could not buy a house in a safe neighborhood with her government sponsored life insurance proceeds. The new-law widow however, can purchase not only a home in most areas of the country, but will have enough money left over to invest in an annuity to provide additional substantial income.

Many elderly members of our organization do not receive Social Security benefits or other income, and live exclusively on their old-law DIC. Yet in 1993, these old-law widows, with their inferior benefit packages were singled out to receive less than 1/2 the COLA given to the financially better off new widows.

This year the Discussion Draft for the 1996 COLA legislation acknowledges the fact that new-law widows have significant benefits which were not available to the vast majority of old-law widows. Gold Star Wives of America applauds your recognition that each and every DIC widow deserves the same COLA treatment as is given to every other federal program recipient.

We fully support the COLA bill as proposed in the Discussion Draft.

THE TWO-TIERED NEW-LAW DIC STRUCTURE IS INEQUITABLE

Certain widows receive an add-on of \$177 to the basic amount of their DIC to compensate them for their eight or more years they were married to their 100% disabled veteran. The reasons for the add-on are based on the following factors:

- The widow of the 100% disabled veteran suffers approximately a 50% reduction in income upon her husband's death and the widow of a totally disabled veteran unable to care for himself receives as little as 20% of the veteran's income which may have been as high as \$60,000.00 because of supplemental aid and attendance compensation. (*GAO Report to Congressional Committees, Veterans' Benefits -- Basing Survivors' Compensation on Veterans' Disability Is a Viable Option*, March 1995, p. 4).
- The widow sacrificed her career in order to care for her disabled spouse, and
- Private sector insurance coverage to supplement the veteran's government sponsored life insurance was difficult to obtain.

For these reasons the widow of the 100% disabled veteran was considered more deserving of additional compensation than the KIA widow.

The KIA widow experienced all of the above hardships and is similarly situated with the widow who was married at least eight years to a 100% disabled veteran. Congress is perhaps unaware of the KIA widow's hardships because her dead husband is not a member of any powerful lobbying organization.

The KIA widow concedes it is difficult for the 100% disabled veteran to get private sector life insurance. However, it is not merely difficult, but it is downright impossible for the KIA widow to obtain a private sector policy to insure the life of her husband who is already dead.

Likewise, KIA widows suffer a huge loss of income. Most often the economic loss is sudden and catastrophic. In my particular case, my husband's bring-home pay while he was in Vietnam was \$1400.00 per month. After he was killed in 1971, my DIC was \$234.00 per month, and my Social Security benefits were \$424.00 per month for my infant son and myself. I suffered more than a 50% cut in bring-home income and my DIC payment was less than 20% of my husband's net income. Most of the KIA widows in Gold Star Wives suffered similar catastrophic and sudden cuts in income. Many, especially during WWII, were forced to return to their parents for economic survival. Widows of the 100% disabled have eight additional years to receive the higher disability income before they are subject to the reduction in income.

Widows of the disabled often sacrificed careers to care for their disabled husbands. But, to the extent the veteran required physical care, he received up to \$60,000.00 per year in disability and supplements for aid and attendance. At the time of their injuries, many disabled veterans were not married to the woman who became their widow. The KIA widow, however, sacrificed her career both before and after her husband's sudden death.

These KIA widows often endured long family separations and long bouts of anguish while their husbands served in combat zones; they moved from post to post with such frequency that they sometimes were not unpacked before having to repack for another move. They pulled their children out of school mid-year.

The KIA widows often found themselves in isolated areas with few jobs, or in foreign countries where they could not work because they lacked the required foreign language skills and/or work permit. Once her husband was killed, the KIA widow was expected to pick up the pieces, vacate quarters within 30 days, and singlehandedly raise her children, care for the home, and work or pursue her education.

In recent years life has been made somewhat easier for military spouses. Perhaps that is because more men are military spouses now and won't stand for the outrageous hardships that most KIA widows endured.

Without question, the greatest loss particular to the KIA widow is the loss of not having her husband around for eight additional years after his fatal injury. Even having him around one more day would have been a priceless gift. The loss to the children is especially painful. Many of the KIA children were so young they never knew their fathers. At the very least, they missed the love, guidance and stability of a second parent. KIA widows with children raised their families alone before adequate child care facilities and other support services were available. KIA widows were single parents long before it was an accepted lifestyle.

All groups of DIC widows, have had their own unique hardships. Compensating for some hardships, at the expense of other hardships of equal or greater significance, has resulted in the irrational DIC rate structure we now have.

**MILITARY WIDOWS ARE ENTITLED TO REINSTATEMENT
TO THE DIC PROGRAM AFTER TERMINATION OF
A REMARRIAGE**

In 1970, the "take a chance on romance" bill was passed. This bill removed the bar to reinstatement of DIC and other benefits to widows upon the termination of a subsequent marriage. The liberalized treatment of widows of veterans who died of combat or other service connected deaths and disabilities followed the trend established by similar liberalizations authorized for widows seeking restoration of Social Security benefits and Civil Service Retirement benefits. The passage of the liberalized law permitting reinstatement was in recognition of the harsh results experienced by many veterans' widows.

In many instances, the widow has spent most of her life as the wife of the veteran, as a housewife and mother, and has been unable to engage in any outside employment or establish entitlement to retirement or other old age benefits in her own right. The permanent termination of Veterans' Administration benefits upon her remarriage at an advanced age frequently places her in precarious circumstances when death or divorce follows. In these and similar circumstances it is reasonable to assume that the veteran would have intended that a measure of support be provided for the widow during any period in which she is not married.

H. Rept. 91-1166, pp. 16, 17.

The 1970 law permitting military widows to reinstatement to DIC was passed at a time when serving in the military was extremely unpopular, and extremely hazardous. It was a badly needed "carrot" to recruit and retain qualified military personnel to wage what was then known to be an unwinnable war. Before sending the troops to Vietnam, the Department of Defense informed them of the benefits package to be paid to their survivors in the event of their deaths. Among the claims were that the wives would be taken care of for life, for all those periods when they would be single. (As my husband said, "You'll be taken care of for life, no matter how badly you screw up. Don't worry.") The 1970 law was passed with the intention that it be relied upon by the soldier and his widow.

In 1990, Congress repealed the 1970 law with the express knowledge and intent of its cruel and unconscionable retroactive impact upon the widows who relied on its purpose to "take a chance on romance." The 1990 repeal, according to the House Committee on the Budget, was intended to save \$374,000,000 over the 5 year period, 1991 - 1995. This amount of savings could be realized only if the rug were pulled out from under 15,000 widows over the 5 year period. In fact, the actual savings are much less than half that forecasted because it is estimated that no more than 1200 to 1275 widows per year have,

or would have sought reinstatement since 1991 (See *GAO Report* of March 1995, p. 22 (extrapolation from cost estimate) and *Statement of the Retired Officers Association before the House and Senate Veterans' Affairs Committees*, March 14, 1996).

The number of widows seeking reinstatement do not approach the numbers of 2450 to 3500 per year as predicted by the House Budget Committee. Because the estimates and the actual numbers are at such variance, Gold Star Wives of America believes that Congress, or the former Administration, knowingly over-stated the expected savings in order to justify passage of such an egregious and punitive law.

In 1991, 1284 widows left the DIC rolls due to remarriage. As Gold Star Wives predicted, once widows became aware that Congress changed the rules, fewer would remarry. In 1992, after news of the repeal of the reinstatement law had a chance to travel by word of mouth alone, remarriages suddenly fell to 869 in 1992, and 962 in 1993. For the several years before the repeal, the remarriage rate had been constant.

If current DIC recipients were aware of the change in the law, even fewer would remarry, and the savings would be even more insignificant. Under normal circumstances, it would be fair to argue that the Administration has no obligation to inform its constituents of adverse changes in the law. But, in this case, Congress passed the 1970 law with the expectation that it would be relied upon, not only by the veteran, but by his widow. Certainly, when the government intends to renege on its past obligations to a select group, there must be notice.

DIC recipients are the only group of federal widows who do not have the right to reinstatement of benefits after termination of a remarriage. Our group is perhaps the only almost exclusively female group.

Congressional staffers, as well as some Agency personnel, rationalize that DIC widows should be treated differently from all other federal widows with respect to reinstatement of benefits after remarriage, because DIC is the only death benefit plan in which the participant makes no financial contribution. We Gold Star Wives are appalled at such a bizarre argument.

Over the years, unlike their civilian counterparts, military personnel have not made payroll "contributions" to pay for the various benefits they receive. For instance, there is no payroll deduction for health care. Likewise, military personnel do not make actual payroll contributions for their pension plans or death benefits, to include their widow's right to reinstatement after remarriage. It makes sense for soldiers to receive benefits "automatically" rather than through payroll deductions, in order to maintain a healthy, focused and battle-ready national defense.

In any case, Congress as much as admitted military personnel contribute toward their pension plan in recent years when it authorized and appropriated separation incentives to veterans who participate in the Voluntary Separation Incentive Program, which is part of the military's downsizing efforts. Military personnel contribute toward their statutory benefits no less than civil service, foreign service and other federal employees who die in the course of their employment.

Finally, the moment a soldier dies for this country, all death benefits promised to him vest. What more could a soldier "contribute"? The argument that soldiers who die of combat injuries have not contributed to their deferred compensation and death benefits, and therefore are not deserving of the promised benefits, holds no water.

Fourteen years ago, Madeline Van Wagenen, Founder of Survivors of Sacrifice, testified before the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee, concerning the taking away of promised Social Security benefits to military widows and children. Her words were prophetic:

Unlike any other job, military service can be forced on a man. Even if he volunteers, he is not free to leave when the going gets tough. He cannot bargain for his wage and benefits package, as a union member might. He can never go on strike; indeed, he must provide essential services when others walk off the job – policemen, firemen, and even air-traffic controllers.

It is obvious that a serviceman simply does not have the same full range of options to protect his family as does his civilian counterpart. Current active duty personnel feel alarmed and fearful that the precedent of taking away family benefits after a man has given the ultimate sacrifice will become an acceptable budget solution after they, too, have given their lives. (Emphasis added.)

As Ms. Van Wagenen predicted, the precedent was established, and Congress now considers the taking away of promised family benefits after a soldier has made the ultimate sacrifice, to be an acceptable budget solution.

Gold Star wives of America requests that Congress repeal section 8004 of OBRA of 1990, in its entirety, and reinstate to all DIC widows their right to reinstatement of DIC after termination of a subsequent remarriage.

**ELIMINATE THE DELIMITING DATE FOR ELIGIBLE
SURVIVING SPOUSES FOR EDUCATIONAL BENEFITS
PROVIDED UNDER CHAPTER 35 OF TITLE 38 U.S.C.**

In past years Members of Congress have commented on how few DIC widows used the education benefits. It is the experience of members of Gold Star Wives, that the 10 year restriction in which to use the benefits precludes many widows with young children from using it. Of all eligible widows, the young widows could benefit most by the program. Unfortunately, these widows are raising their children, working, and trying to

maintain the trappings of the "real family" that once was, and do not have time to pursue their education.

Gold Star Wives who used the education benefits agree that it was at great cost to their children. The young mother's time and attention were fragmented. The children did not receive the attention they deserved because there was no father at home, or at the other end of the telephone, to step in. Time spent at school instead of at a paying job resulted in a lower standard of living for the children.

Had our husbands lived to receive their educational benefit they would have received the family rate, which is much higher than the single rate paid to survivors. In addition, widows have not only tuition to pay, but substantial child care expenses. The child care expense is alleviated in two parent households.

By the time the children grow up, it is too late to qualify for the benefit because more than ten years have elapsed.

The educational benefit is a good program and cost effective. Once the children are grown, and the 10 year limit abolished, the middle aged widow would be in a position to use her education benefits to obtain the skills to be self-supporting -- and to return the investment in the form of paying taxes.

Gold Star Wives of America requests that the Subcommittee eliminate the 10 year limit in which to use the education benefit, especially for the survivors with young children.

Thank you for the opportunity to appear on behalf of Gold Star Wives of America, Inc., to present our views on Discussion Draft, dated April 25, 1996, concerning the 1996 COLA for the DIC program, and on other issues important to Gold Star Wives.

**STATEMENT OF PHILIP R. WILKERSON, DEPUTY DIRECTOR
 NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
 THE AMERICAN LEGION
 BEFORE THE
 SUBCOMMITTEES ON COMPENSATION, PENSION, INSURANCE
 AND MEMORIAL AFFAIRS
 AND
 EDUCATION, TRAINING, EMPLOYMENT AND HOUSING
 COMMITTEE ON VETERANS' AFFAIRS
 UNITED STATES HOUSE OF REPRESENTATIVES
MAY 8, 1996**

Mr. Chairman and Members of the Subcommittee:

The American Legion appreciates the opportunity to comment on the several draft proposals under consideration this morning.

One measure would authorize the Court of Veterans Appeals (COVA) to provide funds to nonprofit organizations or legal assistance entities in order to provide legal assistance to financially needy veterans with respect to matters before the Court of Veterans Appeals.

Currently, such services are available to veterans through the Veterans Pro Bono Consortium. The proposed amendment to Chapter 72 of title 38 USC would establish statutory authority for the funding mechanism of this worthwhile program.

In 1992, at the Court's urging and with the support of The American Legion and other veterans service organizations, the Veterans Pro Bono Consortium was established. This program was in response to the high percentage of "pro se" (not represented) appeals filed with the Court of Veterans Appeals. It became apparent that veterans who did not have the assistance of an attorney were at a tremendous disadvantage in presenting their cases to the Court. The Court quickly found that most veteran appellants were not able to understand nor effectively present the often complex legal issues and arguments necessary. Under a provision of PL 102-229, a portion of the funds appropriated for the operation of the Court were authorized to support the establishment and operation of a program intended to reduce the number of appellants not represented through the recruitment and use of "pro bono" attorneys. Administration of the designated funds as well as oversight of this program was provided through the Legal Services Corporation (LSC). Since then, Congress has continued to include funding in the Court's annual appropriations with the LSC as the administrator and grantor for the program.

The activities of the Pro Bono Consortium include: an outreach component to actively recruit attorneys into practice before the Court of Veterans Appeals on a pro bono basis; an education component to provide training to pro bono attorneys in veterans' law and assistance in the preparation and submission of veterans' appeals to the Court; and, a case evaluation and placement component, which screens for potential placement with a qualified pro bono attorney, the cases of veterans who have limited financial resources and who cannot otherwise afford or obtain legal representation. Staffing of the several components and funding for their activities is provided under grants to the National Veterans Legal Services Program, the Paralyzed Veterans of America, and the Disabled American Veterans. Since the Consortium's establishment, The American Legion has assigned an experienced full-time veterans law specialist to the Case Evaluation and Placement Component at no cost to the program.

As a result of the Congressionally mandated reduction in the Court's FY 1996 budget, support for the program had to be provided out of the Court's operating budget. Final action on the FY 1996 budget was recently completed which included the specific provision of \$678,000 for the continued operation of the Pro Bono Consortium through the period ending September 30, 1997. This situation has focused attention on a long-standing concern expressed by the Court and some Members of Congress, that some modification or alternative to the current funding mechanism for the program be considered. The Court believes that its impartiality and independence may in some way be adversely affected by having to balance its own funding needs and priorities with the potentially competing funding issues of the program's operations.

Mr. Chairman, The American Legion hopes this issue can be resolved to everyone's satisfaction. We believe the program has demonstrated its worth during the last four years. We would not want to see its current or future activities jeopardized in any way.

The proposal under consideration today essentially maintains the current relationship between the Court and the Pro Bono Consortium. The Court has testified regarding the need to transfer the budgetary and administrative function currently performed by the Court to another, more suitable entity to oversee the program's operations. We are sensitive to the Court's concerns. In an effort to address these, some modification to this measure may be appropriate.

From a lay perspective, the issue of responsibility for the administration of the funds for a Pro Bono Program and the role of the COVA are not mutually exclusive. We agree that, in the future, the Court should not be compelled to provide funding for the program from its own appropriation nor should it have any direct operational responsibility. In our view, there should be specific language included making a separate appropriations for the Pro Bono Program from that of the Court.

The question of what the Court is to do with such funds then arises. One proposed solution would be to include language authorizing the Court to enter into an agreement with some non-profit organization or entity, such as the LSC to perform oversight and administrative functions. Since its establishment, funds for the program have been channeled by the Court through LSC which has been a very satisfactory relationship. We would like to see this relationship continue.

Mr. Chairman, the Senate Committee on Veterans' Affairs held a hearing last month on S. 1131 which is similar to the measure before the subcommittee today. The American Legion supports action to ensure by statute the continued viability of this program to provide legal assistance to indigent veterans in their appeals to COVA.

A second measure proposes an amendment to 38 USC to require that in order for a veteran to receive vocational rehabilitation his or her employment handicap must be causally related to the individual's service-connected disability. This was one of the budget savings initiatives identified in the FY 1997 VA budget proposal.

Mr. Chairman, the American Legion would not support the proposed restrictions on the current eligibility criteria for VA vocational rehabilitation training or assistance. This proposal raises a number of issues of concern. However, we basically do not see this change to the current law as being beneficial to service disabled veterans seeking

assistance from VA in an effort to obtain suitable employment.

The proposed legislation would, if enacted, overturn two 1995 decisions of the U.S. Court of Veterans Appeals in Davenport v. Brown (7 Vet.App. 476) and Wilson v. Brown (7 Vet.App. 91-2805). In these cases, the Court essentially held that VA's regulations unlawfully imposed limitations that were inconsistent with the provisions of the current law. Congress, when it enacted PL 96-466 in 1980, clearly intended to liberalize vocational rehabilitation eligibility requirements. This is reflected in both the legislative history and the plain language of the statute.

In our opinion, the issue of whether or not PL 96-466 was too liberal and, therefore, too expensive in the context of the current budget debate would have, in all probability, never arisen had it not been for the Court's scrutiny of VA's implementation of this legislation. The American Legion believes that VA is attempting to justify this proposal in the name of budget savings when the real issue is how many service disabled, under employed or unemployed veterans have been unfairly denied access to vocational rehabilitation training and assistance. We feel there are many who have been unfairly deprived of benefits earned by virtue of their military service, and an opportunity to better their lives economically. If anything, the Court's corrective action was long overdue and highlights the continuing need for judicial review of VA.

Since 1981, VA has used the regulatory process to hold down the participation rate and program costs. It should be no surprise that there will be more disabled veterans participating in the vocal rehabilitation program, now that the restrictive regulations have been invalidated. We believe this is what Congress originally intended in 1980. VA is now attempting to use the legislative process to not only overturn these Court decisions, but the current statute.

The American Legion is concerned by efforts such as this which raise a call for congressional intervention each time a favorable landmark decision in favor of veterans is rendered by the courts. This is especially true when it is perceived that the court's action may have an adverse impact on the VA budget. We believe Congress spoke very clearly in the enactment of the Veterans Judicial Act of 1988. These and other recent precedential decisions have shown that numerous veterans have been denied benefits because VA's actions were not subject to legal challenge.

Mr. Chairman, The American Legion also recognizes that Congress has the prerogative of enacting new legislation or amending an existing law. With regard to the draft legislation under discussion, the current requirement of 38 USC 3102 is that a veteran have a compensable service-connected disability and an employment handicap. This bill seeks to reinstitute the same eligibility percentages that were imposed under the Omnibus Budget Reconciliation Act of 1990 which required a 20 percent disability and an employment handicap or a 10 percent disability with a serious employment handicap. The 1980 amendment had removed the prior restriction that required the employment handicap be related to the service-connected disability. This legislation was intended to relieve disabled veterans of the legal burden of first having to prove that they had an employment handicap and then that the employment handicap was due to their service-connected disability. The current proposal would reimpose this burden and uses the term "resulting in substantial part from a service-connected disability."

In addition, we believe service-connected disabled veterans should be able to avail themselves of further vocational rehabilitation assistance in the event they can no longer perform the duties of the occupation for which they were found to be rehabilitated. In many instances, severely disabled veterans make an effort to overcome their disability and seek employment rather than draw individual unemployment compensation. If veterans are unfortunate enough to develop additional problems and can no longer work, it makes good sense, in our opinion, for VA to try and assist them to find more suitable employment which takes into account all of their disabilities, service-connected and nonservice-connected.

The third draft measure for consideration today would increase the monthly rates of disability compensation and dependency and indemnity compensation (DIC) by the same percentage as the cost-of-living adjustment (COLA) for Social Security beneficiaries effective December 1, 1996.

Mr. Chairman, the VA's proposed budget for FY 1997 included a 2.8 percent cost-of-living adjustment for compensation and DIC recipients based on the estimated increase in the Consumer Price Index. The American Legion strongly supports this proposal.

We believe it is both necessary and fair that benefits provided to service disabled veterans and their survivors be periodically adjusted to ensure their continued welfare and well being.

The American Legion is pleased that this proposal does not seek to automatically index the percentage of future COLA's to the percentage which applies to Social Security beneficiaries and recipients of VA nonservice-connected disability and death pension. In our view, it is important that Congress maintain responsibility for specific COLAs, since consideration of such legislation affords an important forum at which to raise and discuss issues and problems affecting service disabled veterans and their families which might not otherwise be available.

Mr. Chairman, that completes our statement.

FOR RELEASE ON DELIVERY
Expected at 10:00 A.M. EDT
May 8, 1996

STATEMENT OF
HONORABLE FRANK Q. NEBEKER
CHIEF JUDGE, UNITED STATES COURT OF VETERANS APPEALS
FOR PRESENTATION BEFORE THE
SUBCOMMITTEE ON EDUCATION, TRAINING,
EMPLOYMENT, AND HOUSING AND THE
SUBCOMMITTEE ON COMPENSATION, PENSION,
INSURANCE AND MEMORIAL AFFAIRS
OF THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
MAY 8, 1996

MESSRS. CHAIRMEN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEES:

On behalf of the Court, I appreciate this opportunity to offer testimony on matters under consideration by the Subcommittee on Education, Training, Employment, and Housing and the Subcommittee on Compensation, Pension, Insurance and Memorial Affairs. The matters are the Court's decision in *Davenport v. Brown*, veterans' cost-of-living adjustments (COLAs), and the Pro Bono Representation Program that provides legal advice to appellants before the Court of Veterans Appeals.

The Court has no comment on matters relating to *Davenport* and to COLAs. As to the vocational rehabilitation benefits addressed in *Davenport*, the Court, as a judicial tribunal, may not offer further comment beyond its own opinion. The issue of COLAs is outside the province of the Court, and we make no comment on that matter. I greatly appreciate, however, the opportunity to provide testimony concerning the draft legislation, presently under consideration, to authorize the Pro Bono Representation Program that provides legal assistance to financially needy veterans appearing before the Court.

As you are aware through my March 29, 1996, testimony before the House Veterans' Affairs Committee, the Court's budget for FY 1997 does not include a request for funds for the Pro Bono Representation Program (Program). The Court supports the Program and, indeed, proposed its creation as a pilot project in 1992. Nevertheless, the Court has felt compelled to decline to seek funds for the Program for FY 1997. I stated the reasons for this action in the testimony I gave on March 29, 1996, to the full House Veterans' Affairs Committee on the Court's budget request for FY 1997. I have also summarized these reasons in a letter I sent on March 21, 1996, to Chairman Stump, and to Representative Montgomery, the Committee's Ranking Minority Member. This letter states my concerns with certain provisions of S. 1131, the pending Senate bill that, like the bill you are presently considering, would provide permanent authorization for the Program, which, until now, has existed by virtue of language in appropriations acts. I have included a copy of my letter to Chairman Stump with this testimony.

Certain provisions in the draft legislation now under consideration by these Subcommittees, like provisions of S. 1131, raise concerns. They are the provisions that would provide for direct funding and administration of the Program by the Court. I will briefly provide some background, and then I will address the provisions of the draft bill you are presently considering.

A brief history of the Program may be helpful in placing the problem in perspective. The Program began as a pilot project funded out of an excess of funds appropriated to the Court in FY

1992. To ensure that our Court would be removed as far as possible from the operation of the Program and the volunteering attorneys, the Legal Services Corporation was enlisted as the administrator and grantor of the funds. In the ensuing fiscal years, funding for the Program was included by Congress in the Court's appropriation as a discrete line item designated for transfer to the Legal Services Corporation for funding of grants to support the Program; the Court merely served as a conduit of specifically identified funds, with discretion to transfer funds up to a specified maximum dollar amount.

Until FY 1996 there was no problem, as additional funds over and above the Court's operational needs were provided for the Program (through the Court's appropriation); there was no competition between the operating funds of the Court and those used to establish and run the Program. Throughout this time, Appropriations Subcommittee members expressed a desire to have the Program funded privately or by an appropriation through the Subcommittee responsible for funding the Legal Services Corporation--the administrator and grantor for the Program.

This changed in fiscal year 1996 when Congress indicated, for the first time, its intent that the Court use its own reduced operating budget to fund the Program. Instead of serving merely as a funding conduit, the Court has been placed in the dilemma of mediating between its own operations and personnel and full funding of the representation Program designed to benefit one side of the litigation before the Court. In addition to giving rise to an institutional conflict between the interests of the Court and those of the Program, this situation impinges upon the judicial independence of the Court and creates at least the appearance of partiality in individual cases in which the Program provides an attorney to appear before the Court on behalf of the appellant veteran.

The Court has followed the stated wishes of Congress, as expressed by the Chairman of the Conference Committee on the FY 1996 appropriations bill for VA, HUD, and the Independent Agencies, and continues to fund the Program directly out of the Court's FY 1996 appropriation. We are now advised by the Program that private funding is deemed not to be feasible, and that they see little chance of funding the Program through the Subcommittee with jurisdiction over the Legal Services Corporation, the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies. Accordingly, the authorizing Committees have been urged to take early action on legislation to authorize the Program and permit it to operate under the administration of the Court.

A situation where the Court funds and manages the Program is inimical to the functioning of an independent judicial tribunal as clearly provided for in the Veterans' Judicial Review Act. Under the arrangement currently in effect in FY 1996, continuation of Court funding and administration would come at the Court's own expense and at significant sacrifice to its independence and to its own internal administration. Indeed, it has been suggested, and could be suggested in the future, that the Court be held accountable to the Program for the Court's administrative expenditures. As long as the Court is in any way involved in funding and administering the Program, this untenable situation can arise.

I will briefly explain why the situation is untenable. In carrying out their statutory duties, the Court's judges exercise a portion of the judicial power of the United States. The judicial discipline provisions of section 372(c) of title 28 apply to the judges of the Court. See 38 U.S.C. § 7253(g). The judges of the Court file their annual financial reports with the Judicial Conference of the United States. And as judicial officers of an independent judicial tribunal, the Court's judges are bound by the *Code of Conduct for United States Judges (Code of Conduct)*.

Under the *Code of Conduct*, Canon 1, "A judge should uphold the integrity and the independence of the judiciary". Given the situation described above, the Court's continued involvement in funding the Program, we believe, presents a real danger of eroding the independence and integrity of the Court by creating pressure, or the appearance thereof, that the Court favors certain parties before it because of a de facto capability on the part of the party's sponsor to affect, potentially and substantially, the apportionment of the Court's operating funds. At the same time, we believe Canons 2 and 3 of the *Code of Conduct* are implicated. Under those Canons, judges must avoid impropriety or its appearance and must perform duties impartially. We do not see how public confidence in the independence and impartiality of the Court can be maintained when the Court is called upon to compromise its overall operations to fund a Program benefitting one side of some appeals.

At this point, all seem to agree¹ that the competition for the Court's operating funds creates an unacceptable friction between the Court and the Program. Direct management of the Program by the Court similarly creates an undesirable tension between the Program and the Court's essential mission. To provide assistance to these Subcommittees, I will comment, in order, on each subsection of the draft legislation.

Section 1:

Subsection (a)(1): As presently drafted, this provision would perpetuate the current untenable situation. I would ask that, in this subsection (draft legislation, page 2, line 9), "The Court of Veterans Appeals" be stricken and "Notwithstanding any other provision of law, the Legal Services Corporation" be inserted in its stead. Alternatively, the Court would suggest that "The Department of Veterans Affairs" be inserted.

Subsection (a)(2): Subsection (a)(2) of the draft legislation would appear to give the Court both fundraising and direct administrative responsibility for the Program. The legislation, as presently drafted, states that "The Court shall seek to provide funds for such purpose through a nonprofit organization selected by it." This proposed language raises serious concerns as to those provisions of the *Code of Conduct* addressed above, and also would raise the issue of violation of Canon 5C(1). This Canon of the *Code of Conduct* provides that a judge "should refrain from financial and business dealings" that would reflect adversely on the judge's impartiality, interfere with the performance of judicial duties, "exploit the judicial position, or involve the judge in frequent transactions with lawyers or other persons likely to come before the court on which the judge serves." By requiring the Court to seek "to provide funds for such purpose" and placing the Court in the position of identifying and persuading a "nonprofit organization selected by [the Court]" to administer the Program, the proposed legislation would create a situation that violates Canon 5C, or--at the very least--would result in the strong appearance of its violation.

¹See my testimony before the House Veterans' Affairs Committee (hearing held March 29, 1996) and before the House Subcommittee on Appropriations for VA, HUD, and the Independent Agencies (hearing held April 19, 1996); see also the April 12, 1996, letter of David Isbell to me, with copies to Chairman Stump, Representative Sonny Montgomery, Representative Jerry Lewis, and Representative Louis Stokes, and to Senator Simpson, Senator Rockefeller, Senator Bond, and Senator Mikulski, at page 1, where Mr. Isbell states, "There is no disagreement on the point that the Program's funds should not be part of the Court's own budget, nor a responsibility of the Court with respect to justifying the amount of the appropriation requested."

Subsection (a)(2), as presently drafted, would also permit the Court, if it determines that there is no appropriate nonprofit organization available or willing to administer the Program, to "provide financial assistance, by grant or contract, directly to legal assistance entities". Such action would also be contingent upon the Court's determination "that it is consistent with the mission of the Court". The Court is neither appropriately staffed to administer grants, nor is it at all clear that such an endeavor would be "consistent with the mission of the Court". Rather, the Court would urge that subsection (a)(2) be stricken and new language be inserted to provide direct appropriation to the Legal Services Corporation or to VA of funds to carry out the Program. Both the Legal Services Corporation and VA are large entities with experience in funding and administering grants.

I note that, in his April 12, 1996, letter to me concerning the Program, Mr. Isbell states his belief that the VA as grant administrator would have a conflict, and that the military justice model (where both prosecutors and defense counsel are from the Judge Advocate General's Corps) would not apply. I must disagree. In his April 12, 1996, letter, Mr. Isbell states that "[t]he military justice system is not concerned with money claims against the Department of Defense; and the Department does not, so far as we are aware, serve as a channel for funding of any program to provide lawyers to persons making such claims. The military does provide counsel for both the prosecution and the defense functions in the military justice system. . . ." I should point out that defense counsel at both the trial and appellate level in the military services are assigned for stabilized tours of duty to permanently established defense counsel organizations. The sole duty of such counsel and the sole purpose of the organization is to provide defense counsel services for servicemen being prosecuted in the name of the United States. The funding for the defense counsel role at both the trial and appellate level comes from DOD appropriations. This includes the salaries of defense counsel and the administrative costs of running defense counsel offices at the Departmental level as well as at all major echelons of command. It also includes travel expenses for counsel, travel expenses for defense-requested witnesses at the trial level and such miscellaneous, but expensive, costs as expert witness fees and training. To ensure adequate funding for the defense counsel role and, of course, non-interference with the presentation of the defense case, statutes and regulations "wall off" the chain of command from the defense counsel establishment. Far from being an inexact analogy to the situation that would prevail if the Program were to be funded through the Department of Veterans Affairs, it is very much the same, including the fact that counsel in both situations are certainly "opposing" in a technical sense, the Department administering the funds, thereby requiring statutory and regulatory controls. If there were such controls in place there is no reason to believe that the Department of Veterans Affairs could not administer the Program as well as the Department of Defense has administered funds that support defense counsel. If conflict or the appearance thereof can be avoided in cases involving individual liberty through the military justice system, then surely, adequate protections can be put in place in situations involving the disbursement of federal funds to a particular program involving principally "money claims". I should also point out that, at no time and at no point in the Department of Defense model is operational funding for the Court of Appeals for the Armed Forces placed in direct competition with funding for counsel for the defense or for the prosecution.

I find it quite puzzling that the Program has taken the categorical position that VA would have an irreconcilable conflict in acting as the funding source. They do not develop the reasoning to justify this position, and in many ways it defies logic. The Program's statement that VA could not serve in this role fails to acknowledge that VA is an entity created to help veterans, and the Department has no interest in denying benefits to any veteran who

is entitled. It is true that, in the process before the Court, VA is the appellant's adversary, but it is certainly consistent with VA's overall goal to assist veterans and their families by helping them get the merits of their cases before the Court and to ensure that Departmental error does not prejudice the adjudication of claims. It should be noted, too, that the private attorneys who would continue to undertake pro bono representation of veterans' benefits appellants have an ethical obligation to place the interests of their clients first. Accordingly, it appears that the Program's resistance to VA's fulfilling such a role is dictated only by a desire to retain elements of the status quo and is not grounded in logic.

No objection has been voiced concerning the performance of the Legal Services Corporation as grantor and administrator of the Program. In fact, members of both Appropriations Subcommittees have, at times, either urged that the Program's funding should be transferred to the Legal Services Corporation or questioned the Court on progress in effecting that transfer.²

Subsection (b): The Court has no comment on the description in the draft legislation of the operations of the Program. I would ask, however, that "by the Court" be deleted from subsection (b)(2)(B) (draft legislation, page 3, line 10). The Program would be free to apply the same criteria as does the Court in determining whether to grant an appellant's motion to waive the Court's filing fee. The Court, however, should not be directly involved in determining whether an appellant qualifies, financially, for participation in the Program, and there are sound reasons for applying different criteria. An appellant who chooses to pay the Court's filing fee may still, for example, be unable to afford the services of a lawyer.

I would also ask that "or the Court," be deleted from subsection (b)(4) (draft legislation, page 4, line 12). The Court should not participate in a determination regarding contributions by participating entities.

Subsection (c)(1): While subsection (c)(1) would, in theory, separate the respective appropriations for the Court's operations and the Program's operations, it would still perpetuate the present situation, which has led to the ethical problems that have been outlined. We believe that implementation of the Court's suggestions, to fund and administer the Program either through the Legal Services Corporation or through VA, would resolve the ethical problems that have developed since the creation of the Program. Thereby, this valuable Program could continue to perform a most beneficial service to appellants with appeals before the Court. At the same time, the Program could continue to help the Court and benefit the entire veteran population by ensuring that VA benefits administration is consistent with the rule of law.

Subsection (c)(2): Subsection (c)(2) should be stricken in its entirety. The language, as presently drafted, reflects the arrangement now in effect under the Memorandum of Understanding between the Court and the Legal Services Corporation and would no longer apply, should the Court's recommendations be adopted.

Subsection (d): Strike "from the Court" wherever it appears in this subsection, and insert "from the Legal Services Corporation" or, in the alternative, "from the Department of

²See, e.g., the comments of Senator Mikulski during the March 4, 1994, hearing on the FY 1995 budget of the Court of Veterans Appeals by the Subcommittee on VA, HUD, and the Independent Agencies of the Senate Committee on Appropriations; see also the colloquy between Representative Stokes and Chief Judge Nebeker during the March 10, 1994, hearing on the Court's FY 1995 budget by the corresponding House Subcommittee.

Veterans Affairs (in subsection (d)(1) (draft legislation, page 5, line 10), and in subsection (d)(4) (draft legislation, page 5, line 19)). Again, the effect of these changes would be to separate the Court from any role as funding source, grantor, or administrator of the Program.

Subsection (e): Strike "the Court" and insert "the Legal Services Corporation" or, in the alternative, "the Department of Veterans Affairs" in subsections (e)(1) and (e)(2) (draft legislation, page 5, line 23; page 6, lines 17, 20, and 21). The purpose of these changes is the same as that stated for the recommended changes in subsection (d).

Subsection (f): The Court has no comments concerning this subsection.

Section 2: The Court would ask that "the United States Court of Veterans Appeals" be stricken from section 2, and "the Legal Services Corporation" or, in the alternative, "the Department of Veterans Affairs" be inserted. The Court has no comment on the level of funding since, if its recommendations are adopted, the justification for the funding level would be the responsibility of the Program or of the funding entity.

In conclusion, I appreciate this opportunity to testify concerning the authorization and funding of the Pro Bono Representation Program. I request the support of these Subcommittees in the matters addressed above and hope that that support will be communicated to the full Committee, to the Appropriations Committee, and the Budget Committee. On behalf of the judges and staff, I thank you for your past support and request your continued assistance. I, or those with me, will be pleased to answer your questions.

STATEMENT OF DAVID B. ISBELL
CHAIR, ADVISORY COMMITTEE
VETERANS CONSORTIUM PRO BONO PROGRAM
FOR PRESENTATION BEFORE
THE COMMITTEE ON VETERANS AFFAIRS
SUBCOMMITTEE ON EDUCATION, TRAINING, EMPLOYMENT AND HOUSING
AND SUBCOMMITTEE ON COMPENSATION, PENSION,
INSURANCE AND MEMORIAL AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
May 8, 1996

MESSRS. CHAIRMEN AND DISTINGUISHED MEMBERS OF THE COMMITTEE:

On behalf of the Veterans Consortium Advisory Committee, let me express our gratitude for this opportunity to appear before the two Subcommittees to address possible statutory authorization for the Court of Veterans Appeals Pro Bono Program -- a program for which the Consortium has, from inception, had operational responsibility.

The History and Operation of the Pro Bono Program

A brief review of the background may be appropriate. As you are aware, the Program was proposed by the Court of Veterans Appeals in 1991, as a means of dealing with the problem presented by the fact that the Court was finding that the overwhelming majority of appellants appearing before it were *pro se* -- that is, without representation. Congress, in a Joint Resolution making a number of supplemental appropriations, authorized the Court to use up to \$950,000 of its funds to establish a pilot project for the provision of legal assistance to *pro se* appellants. See Pub. L. 102-229, 105 Stat. 1710 (1991). The authorizing legislation specifically provided that the Legal Services Corporation would make the grants or contracts for such a program, "pursuant to a reimbursable payment" by the Court. LSC in May 1992 issued two Solicitations for Proposals: one for an umbrella program to evaluate cases and to recruit and train volunteer attorneys (the "A" grant); and one for organizations already providing representation to veterans to expand such representation (the "B" grant). The Consortium, which consists of the American Legion, Disabled American Veterans,

Paralyzed Veterans of America and National Veterans Legal Services Program, submitted a proposal to LSC for the "A" grant that was accepted. Three of the participating organizations, DAV, PVA and NVLSP (plus another organization, Swords to Plowshares, which has since dropped out of the Program), were awarded "B" grants, under which they undertook to provide representation in a specified number of cases. The two grants together comprise the Program, which commenced operation in September 1992.

The Program has three components: Outreach, Education, and Case Evaluation and Placement. The first of these components recruits volunteer lawyers to handle appeals before the Court on a pro bono basis: some 384 attorneys have been recruited so far. The Education component offers a one-day training program, presented in conjunction with the D.C. Bar and also made available in the form of videotapes to lawyers who cannot attend a live presentation; and in addition provides to each volunteer attorney a three-volume Veterans Benefits Manual.

The Case Evaluation and Placement Component, as the name suggests, evaluates the cases of appellants who are *pro se* and who, in response to inquiry routinely sent to those appellants who remain *pro se* thirty days after filing of their notice of appeal, indicate an interest in having representation. In any case where this evaluation turns up an issue deserving argument, a memorandum describing the issue is prepared, and the case is assigned to an attorney who has agreed to provide pro bono representation. (The great majority of the Program's cases are placed with volunteer attorneys recruited and trained by the Program's Outreach and Education Components; a minority, consisting of more difficult cases, are currently placed with PVA, under the "B" grant.) In cases that are determined not to merit pursuit of an

appeal, the appellants are advised as to the most promising course of action for them to pursue.

The volunteer attorneys are provided continuing education in the form of mentoring assistance: that is, they are given the name of an attorney (or non-attorney Court of Veterans Appeals practitioner) in one of the constituent organizations, with whom they can consult as needed. The Case Evaluation and Placement component also monitors all cases referred to program attorneys, to ensure that filing deadlines are not overlooked.

The table attached hereto as Exhibit A presents some significant statistical information regarding appeals to the Court, and the impact thereon of the Program. As it shows, over the 3-1/2 years of its operation, the Program has provided free representation to more than 700 appellants before the Court; and the appellants represented through the Program have prevailed in 78 percent of the completed cases.

The Need for Statutory Authorization

The arrangement contemplated by Pub. L. 102-229 has, in substance, governed the relationship between the Court and the Program ever since, even though the specific authorization provided by Pub. L. 102-229 expired in 1993. Thus, until the current fiscal year, federally appropriated funds for the Program have been included in the Court's appropriation; and the Court has turned the funds over to LSC, which has overseen and administered the Program.

Because last fall the Court found itself in a position that it viewed as being required to provide funding for the Program out of its own operating funds, by reason of a congressionally imposed cut in its budget, the Court is not asking for funds for the Program in its appropriation request

for FY97. Although the Court fully supports the Program and its work, the Court has decided not hereafter to take responsibility for seeking or providing funding of the Program, in order to avoid a situation in the future where it would feel it was competing with the Program for funds.

In consequence, the Veterans Consortium is now seeking both independent funding for the Program and specific legislative authorization for it.

I believe that the Consortium and the Court agree on the following propositions: that the Program should continue; that the Court should not in the future have responsibility for seeking appropriations for the Program; and that the Court should not be in the position, in which it felt itself last fall, of competing with the Program for funds -- at least, not in any more immediate sense than the Court competes with HUD or DVA for funds. There is, however, a divergence of view as to whether it is appropriate for the Court to continue to be, as it has been heretofore, a conduit for the funds appropriated for the Program. This difference of view focuses on the provision of the draft authorizing bill to which this hearing is directed, which draft designates the Court as the recipient of funds for the Program. The Court, in correspondence by Chief Judge Nebeker with Chairman Stump and others, has expressed a preference not to be the recipient, and has suggested instead that the designated recipient be either the Legal Services Corporation or the Department of Veterans Affairs. As explained below, however, we believe that there are serious disadvantages to either of these possibilities; and that the Court's concern about being itself the recipient can be sufficiently allayed by other means.

As to LSC, we believe that it has until now been, and would in the future continue to be, an entirely

satisfactory intermediate agency that directly contracts for and monitors the Program; but we are seriously concerned that if it became the entity to which the appropriation was required to be made, then the pertinent Congressional committees and subcommittees of the Appropriations Committee would no longer be the ones that have heretofore had jurisdiction of the Program; who are familiar with the Court and with the Program; and who are sensitive to the needs of veterans generally. We are, in a word, concerned that the Program might well get lost in a new and unfamiliar legislative environment. Another possible concern would be presented if authorizing legislation specified LSC as the recipient of appropriations for the Program, given the unfortunate fact that the future of LSC is uncertain.

Having the Department of Veterans Affairs serve as the funding channel for the Program would not entail the principal problem that LSC would present, but it appears to us that it would raise an even more serious problem, deriving from the fact that the Department is effectively the opposing party in all the cases in which the Program provides counsel. We find it hard to imagine a sharper conflict of interest than that of a party to litigation exercising any sort of control over the funding of the operations of its opponents. The Court has suggested that precedent for the DVA assuming such a dual role can be found in the system of military justice, where funds of the Department of Defense go to provide support for both prosecution and defense counsel in military justice cases. The parallel seems to us an inexact one, for the military justice system is not concerned with money claims against the Department of Defense, and all the lawyering on both sides of any proceeding is provided by a professional corps of active duty judge advocates, who may serve in either role. In any event, the military justice system has, from necessity, had to provide counsel for each side and so

developed a tradition, for which the DVA has no parallel of which we are aware, of insulating defense counsel from command influence.

We understand the Court has two concerns about its being a conduit for Program funds. One is a concern that it might again find itself competing with the Program for funds. But if the Program's appropriation is separate from that of the Court, then it should not be viewed as competing with the Program for funds any more than it competes with DVA or HUD for funds. The second source of the Court's concern, as we understand, is a sense that if the Court is a conduit for funds, it is in a position of conflict of interest that raises questions under the Code of Conduct for United States Judges, by reason of the Court being in a position of providing, however indirectly, support for one side but not the other in cases that come before the Court. With all respect, we see no meaningful difference between the Court's relationship to the Program in this respect and the relationship of the federal district courts, under the Criminal Justice Act, 18 U.S.C. § 3006(a), to the system of providing defense counsel to indigent criminal defendants, and compensating such counsel.

Suggestions Regarding the Draft Legislation

We believe that the Court's concerns could be met by making several changes in the draft bill. Thus, it would, we suggest, be helpful to add a provision explicitly authorizing the Court to delegate to LSC or to another entity responsibility for oversight and administration of the Program. It would also be desirable to specify that funds appropriated for the Program shall be spent for the Program rather than providing, as in the draft bill, that the Court may so spend the funds (e.g., p. 2, line 9; p. 4, line 23). In addition, separation of the Program's funds from the Court's own funds could be emphasized, both by adding, after

"separately," on p. 4 line 21, "from the Court's appropriation"; and by adding a provision specifying that no portion of the funds appropriated for the Court's operations is to be spent on the Program, or vice versa.

We also respectfully offer several suggestions with respect to the draft bill's treatment of the dollar amount authorized to be appropriated (in Sec. 2). We note that the draft bill specifies a dollar amount to be appropriated in each of the three fiscal years that it covers, of \$678,000. That figure is, of course, the amount that was sought in the Court's budget for the Program for FY96. It should be noted, however, that this figure took into account the fact that the Court had available \$112,000 appropriated for the Program in prior years with carryover authorization, and the Court anticipated that the Program would operate in FY96 with a budget of \$790,000, as it had in FY94 and FY95. The Court observed, in its FY96 Budget Estimates, that "this is a nonrecurring reduction that could not be maintained in future years without programmatic changes that the Court does not now anticipate would be desirable." The proposed (and not yet finalized) budget for the Program for FY97, as shown on attachments B, C and D hereto, however, calls for a total in federal funds of \$743,838. This amount is, of course, larger than the amount sought in the budget for the current fiscal year, but the principal reason for that is that our actual current budget is \$44,000 less than what had been projected: in consequence, there are some expenditures that have been postponed and that should be made in the new fiscal year. Moreover, the amount contemplated by the proposed budget is some \$46,000 less than the amount the Court originally contemplated for the current fiscal year, as explained above. We suggest, accordingly, that the figure specified in the draft bill, at least for FY97, should be increased.

In years subsequent to FY97, it may well be that the level of expenditure could prudently be reduced, perhaps even to the \$678,000 for which a new appropriation was sought for FY96. However, at this point we cannot say with confidence that that will be the case. It should be noted that the Board of Veterans Appeals is expecting substantially to increase its rate of processing cases. See Board of Veterans Appeals Report of the Chairman, Fiscal Year 1995, at 29, 31, 32 (showing a 27.9% increase from FY94 to FY95, and reflecting a 24.8% increase to FY96 that was projected before the government shutdowns). If this occurs, then the Court's caseload can be expected correspondingly to increase, and along with it, the demands on the Program. A second suggestion in this regard, accordingly, is that, rather than specifying the precise level of appropriation to be made in each of the years covered by the bill, the bill should set a cap for each year, leaving to the Appropriations Committee the determination of the amount within that cap that should be appropriated.

Specifically, we suggest \$750,000 for the first year, and a cap for each of the other two years that escalates by 5 percent.

PRO BONO PROGRAM AT THE U.S. COURT OF VETERANS APPEALS					
	FY 93	FY 94	FY 95*	FY 96* (10/1/95- 3/31/96)	PROGRAM TOTAL*
Total Cases Filed at CVA	1,265	1,131	1,213	566	4,175
Cases Filed Pro Se	1,044	914	949	423	3,330
Pro Bono Program Application Forms Sent	836	640	811	369	2,656
Veterans Who Filed Applications For Program Consideration	574	449	609	218	1850
Veterans Who Received Free Attorney	231	187	201	92	711
Veterans Who Received Some Form of Legal Assistance (but no representation due to program ineligibility)	343	262	327	152	1084
Percent of Program Eligible Veterans Who Received Representation	100%	100%	100%	100%	100%
Program Cases Completed During FY	52	147	206	60	465
Program Cases In Which VA Error Found	45	112	161	43	361
Percent Of Cases In Which Veteran Prevailed In Litigation Through Program Efforts	86.5%	76%	79%	72%	78%

*Figures subject to minor revision.

EXHIBIT A

THE VETERANS CONSORTIUM
PRO BONO PROGRAM
Providing Judicial Representation to Veterans

**ADVISORY
 COMMITTEE**

CHAIRMAN

David B. Ibell, Esq.
 Cunningham & Burling

MEMBERS

Carroll Williams
*Director, National Veterans
 Affairs and Rehabilitation
 Commission*
 The American Legion

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April 30, 1996

EXPLANATION OF PROPOSED BUDGET FOR FISCAL YEAR 1997

A proposed budget for operation by the Veterans Consortium of the Court of Veterans Appeals Pro Bono Program for fiscal year 1997 is reflected in the two documents attached hereto: a spreadsheet titled *The Veterans Consortium Pro Bono Program; Proposed Budget -- FY 1977*, and a page titled *FY 1997 Budget Highlights*.^{1/} Although these documents should be largely self-explanatory, some additional explanation may be helpful.

Budget for the Current Year (FY96)

The pertinent figures for the budget under which the Program is operating for FY96 are shown in the third, fourth, fifth and sixth columns of the first attachment. As will be seen, the total expenditures contemplated by that budget, including "B" grant cases, is \$633,931. Those budgeted expenditures will be \$34,278 less than the amount actually expended in FY95.

^{1/}The proposed budget has not yet been formally acted on by the Advisory Committee, but this will occur at the Committee's next meeting, May 7; it is not anticipated that any material change will result.

EXHIBIT B

- 2 -

and \$44,069 less than the \$678,000 that was sought for the Program in the Court of Veterans Appeals' appropriation request for FY96. (That \$678,000 figure comprised \$440,000 which was included in the Court's appropriation request for FY96, plus \$238,000 in funds conserved by the Program and carried forward from previous years.)

Increases in the Proposed Budget

The increases contemplated by the proposed budget as compared to the current year's budget would, generally speaking, restore the Program to its operating level in FY95, but they also reflect an anticipated increase in the salary requirements of the new screeners who must be hired, since they will likely have to be found outside the supporting organizations. The increases also include some capital expenditures that are intended to make up for expenditures that will not be made in the current year because of the \$40,000 shortfall. The increases are addressed in somewhat more detail, by Program component, in the second of the attachments.

The "B" Grants

The Program comprises two separate grants, designated the "A" grant and the "B" grant. A majority of the cases in which representation is provided pursuant to the Program involve volunteer lawyers who

- 3 -

are recruited, trained, and assigned cases pursuant to the "A" grant. The "B" grant has in each year provided for placement of a specified number of cases, at a fixed price, with one or both of two constituent organizations of the Consortium, namely PVA and NVLSP. In the first three years of the Program's operation both of those organizations handled "B" grant cases; in the current year and, it is anticipated, in FY 97, only PVA will undertake such cases. The purpose of the "B" grants is both to assure that competent representation will be available in the event (which, happily, has not yet occurred) that the supply of volunteer lawyers runs out; and in addition, to provide for the placement of unusually difficult or complicated cases with particularly experienced lawyers. The dollar amount of the "B" grant in FY95 was \$53,705 (30 cases @ \$1,790 case); in the current year it is \$31,825 (19 cases @ \$1,675/case) and in the FY97 proposed budget it is \$53,550 (30 cases @ \$1,785/case). The increase in number of "B" grant cases in FY97 compared to the current fiscal year will simply bring us back to the level of FY95.

- 4 -

Cost of Grant Administration

The proposed budget includes an estimated amount of \$20,000 to be paid to Legal Services Corporation or to such other entity as may be delegated to oversee the Program. In each of the fiscal years so far, that entity has been LSC, to which the Court of Veterans Appeals has effectively delegated supervisory and auditing responsibilities. The charge for this service by LSC in FY95 was \$16,181; no allowance is made in the FY96 budget for such a charge, and it's uncertain how such a charge will be handled; and the estimate for FY97 is \$20,000.

Summary

To recapitulate, the key figures in the proposed FY97 budget are as follows:

CE&P	\$536,121
Outreach	18,620
Education	115,547
B Grant	<u>53,550</u>
Subtotal	723,838
LSC Administration	<u>20,000</u>
TOTAL	<u>\$743,838</u>

It should be emphasized that these figures represent the amount of federal funds which it is hoped will be available for the Program. They are over and above the estimated \$225,000 worth of contributions in kind anticipated from the constituent organizations of the Consortium; and do not reflect the estimated

additional \$2,250,000 in free legal services expected to be provided by volunteer attorneys recruited by the Program.

Veterans Consortiums Pro Bono Program
Proposed Budget -- FY 1997

	Outreach FY 97	Education FY 97	Screening FY 97	Proposed Budget 10/1/96-09/30/97	Outreach FY 96	Education FY 96	Screening FY 96	Budget 10/1/95-09/30/96	Actual 10/1/94-09/30/95
1	7,379	48,004	127,845	183,228	2,151	36,694	149,018	187,863	186,183
2	0	0	123,236	123,236			84,632	84,632	90,205
3	1,476	8,691	81,808	91,975	3,198	23,310	61,147	86,655	92,909
4	2,303	11,874	95,954	110,131	1,656	18,263	101,525	121,444	127,071
5	2,042	11,570	0	13,612	0	0	0	0	0
	13,200	80,139	428,843	522,182	7,005	77,267	396,322	480,594	496,368
Total Personnel									
6	1,915	9,000	61,448	72,363	1,824	8,926	58,522	69,272	64,943
Space - Rent									
9	200	1,500	5,253	6,953	172	1,469	7,651	9,292	6,691
Equipment Rental & Maintenance									
10	1,275	4,100	10,000	15,375	642	3,916	9,529	14,087	14,016
Office Supplies & Expense									
11	280	870	7,850	9,000	255	801	7,565	8,621	6,502
Telephone									
12	150	1,500	1,000	2,650	181	1,507	1,009	2,697	1,745
Travel									
15	150	1,000	1,850	3,000	132	743	1,529	2,404	1,808
Library									
16	200	700	4,000	4,900	127	666	3,638	4,431	3,781
Insurance									
17	50	195	50	295	50	179	55	284	209
Dues and Fees									
18	200	623	827	1,650	64	632	803	1,499	802
Audit									
19	0	0	10,000	10,000	0	0	0	0	4,416
Property Acquisition									
21	0	0	5,000	5,000	0	0	2,125	2,125	5,147
Contract Services to Applicant									
22	1,000	15,920	0	16,920	0	6,800	0	6,800	8,076
Other									
Total Non-Personnel									
	5,420	35,408	107,278	148,106	3,447	25,639	92,426	121,512	118,136
Total "A" Grant									
	18,620	115,547	536,121	670,288	10,452	102,906	488,748	602,106	614,504
"B" Grant									
				52,550				31,825	52,705
Oversight									
				20,000				0	16,181
Grand Total									
				743,838				633,931	683,390

EXHIBIT C

**VETERANS CONSORTIUM PRO BONO PROGRAM
FY 1997 Proposed Budget Highlights**

CASE EVALUATION & PLACEMENT (CEPC) \$536,121

CEPC requests a \$47,373 increase over the approved FY 1996 budget.

Budget Increase Summary:

Personnel costs reflect an increase of \$32,521 due to adjustments in salaries and benefits. Salaries for screeners reflect the estimated additional cost of hiring screeners from outside the supporting organizations, which appears likely to be necessary. Two screeners will be provided at no cost to the Consortium and a new position for one screener is budgeted for 6 months.

Property Acquisition for \$10,000 would allow us to upgrade our existing computers and network and to purchase a Pentium 133 MHZ computer. This amount includes hardware and software.

Contract Services to Applicant would increase by \$2,875 to accommodate the need to use additional computer contractors services to improve computers and network.

OUTREACH \$ 18,620

Outreach requests an \$8,168 increase over the approved FY 1996 budget.

Budget Increase Summary:

Personnel increases by \$6,195 because we anticipate an increase in recruiting. We assume a greater need for lawyers in FY '97 because of increased BVA output; the budget also assumes we will increase out-of-town outreach. Recruitment was on hold for most of last summer and late fall. Personnel includes a new line item to account for grant administration done by a consultant (and shifts costs from salaries-other line). (Salaries are based on a 5% increase and benefits were decreased by 6%).

Office supplies and expenses includes \$1,100 to cover the cost of mailing 2000 brochures.

Other includes \$1000 to reprint the standard brochure.

EDUCATION \$115,547

Education requests an increase of \$12,641 over the approved FY 1996 budget.

Budget Increase Summary:

Personnel line increased by \$3,872 because we will produce a new appellant brochure and video tape (and edit tape) for a new training tape. As indicated above base salaries reflect a 5% increase and benefits decreased by 6%.

The **Other** line increases by \$9,120. The *Veterans Benefits Manual* will be revised and printed. We anticipate distributing up to 112 copies through the program and estimate the cost will average \$97.50 per copy (\$10,920). (Until the new VBM is available we will continue to distribute the old manual.) Design and produce a new program brochure for appellants (\$1,500), as recommended by the Peer Review Team. \$3,500 covers the cost for taping one training (not done in 1996) and purchasing tapes for reproduction.

"B" GRANT \$ 53,550

GRANT ADMINISTRATION \$ 20,000

TOTAL \$743,838

STATEMENT OF
PAUL J. HUTTER, CHAIRMAN
VETERANS LAW SECTION
FEDERAL BAR ASSOCIATION
BEFORE A JOINT HEARING OF THE
SUBCOMMITTEES ON
COMPENSATION, PENSION, INSURANCE AND MEMORIAL AFFAIRS
AND
EDUCATION, TRAINING, EMPLOYMENT & HOUSING
OF THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING THE
COURT OF VETERANS APPEALS PRO BONO PROGRAM
MAY 8, 1996

Distinguished Chairman, Ranking Minority Members and members of the Subcommittees, the Veterans Law Section of the Federal Bar Association appreciates this opportunity to express the members' views on the Court of Veterans Appeals Pro Bono Program.

The Federal Bar Association is a national organization composed of more than 15,000 attorneys and judges who share a common interest in the practice of law in federal courts or before or with federal agencies. The FBA's Veterans Law Section is composed of more than 400 attorneys who have a special interest in the area of the law of veterans benefits.

The Section is presenting this testimony to record its ardent support for the continuation of the pilot program initiated by Congress and the Court of Veterans Appeals to provide free representation to veterans who otherwise would be without representation at the Court.

The sad fact is that 80 percent of veterans (or their survivors) who appeal a Board of Veterans' Appeals decision denying their application for benefits, do so without benefit of counsel. On average, this figure is only 25 percent for other federal courts. In most cases, veterans who appeal to the Court do not have sufficient funds to retain counsel. Because federal statutes prior to 1988 prohibited attorneys from charging more than ten dollars to represent veterans regarding their claims for benefits, few attorneys have expertise in this area of the law. Even though Congress has liberalized those fee restrictions, the relatively small retroactive benefit awards available to most veterans do not, in the main,

provide sufficient financial incentive to draw attorneys to this area of practice in numbers sufficient to meet the need for representation.

As a class, veterans are particularly in need of representation before the Court. Prior to reaching the Court, the veteran typically has been unrepresented. Further, the administrative adjudication proceedings leading up to the final agency decision by the Board of Veterans' Appeals is purported to be nonadversarial, with the veteran carried easily from one stage of agency review to the next, with little or no need for representation to move the case through the agency. This all changes when the veteran appeals to the Court of Veterans Appeals.

The Court is a formal, legal setting. The Department of Veterans Affairs is represented at the Court by a full staff of licensed attorneys. Veterans who are unrepresented are overmatched. This does not, however, mean that their cases lack legal merit. For example, veterans who have representation through the Pro Bono Program have prevailed 78 percent of the time. In terms of real live veterans, this means that during the three and one-half years of the Pro Bono Program's existence, more than 550 veterans whose claims otherwise would have been finally denied, have had an adverse Board of Veterans' Appeals decision overturned.

Over the past three and one-half years, the Pro Bono Program has provided free representation to more than 700 veterans and has provided limited legal advice to nearly one thousand more. America's veterans deserve a fair chance to obtain

the benefits that their country has promised them. The Pro Bono Program gives our veterans that chance.

The Veterans Law Section of the Federal Bar Association strongly supports the passage of legislation that would authorize the continuation of the Pro Bono Program at the Court of Veterans Appeals and provide for adequate funding for this worthwhile program.

Statement of Noel C. Woosley, AMVETS National Service Director

Veterans Cost of Living Adjustments

AMVETS supports any action that will provide to disabled veterans and those in receipt of Dependency and Indemnity Compensation an economic boost. While we support an equitable cost of living adjustment (COLA), we have and will continue to oppose permanently indexing veterans' compensation to an annual COLA. Congress' authority to annually review and determine a fair and equitable COLA has and will continue to serve veterans in a positive manner. Congress' ability to consider all the factors in establishing veterans' COLAs is essential if we are to achieve and maintain increases which are acceptable and just. The CPI may not support the economic needs of disabled veterans and therefore Congress must reserve the authority to make appropriate adjustments.

Court of Veterans Appeals Pro Bono Programs

From the Court's inception, there has been a demonstrated need for a Pro Bono program. The need for such a program became very apparent when the Court made it known that approximately 80% of veteran cases were before the Court Pro Se. This was not in keeping with the American judicial history which projects a strong underlying belief that everyone is entitled to legal assistance to ensure the protection of individual rights. The rights of veterans, and especially the financially needy, must be protected on at least the same plateau, if not above, as others seeking justice through the courts.

AMVETS is therefore very supportive of any legislative initiative that would provide much needed legal assistance to those veterans seeking relief via the Court of Veterans Appeals.

Davenport V. Brown

AMVETS appreciates the congressional concerns as to the potential budgetary impact of *Davenport v. Brown* and will not oppose legislation of a corrective nature so long as eligibility for VA's vocational rehabilitation program is in no way reduced or diminished. This proposed legislation has the potential to impose some limitations on access to VA's vocational rehabilitation program that we consider excessive.

We are also somewhat concerned that an unhealthy precedent is emerging where the VA asks the Congress to bail it out every time the Court makes a decision it doesn't like or agrees with. The VA and the Congress must realize that some of the Courts' decisions will not be budget neutral nor will they be viewed in total popularity.

Mr. Chairman, this concludes my statement. Thank you.



NCOA

Non Commissioned Officers Association of the United States of America

225 N. Washington Street · Alexandria, Virginia 22314 · Telephone (703) 549-0311

**STATEMENT OF
LARRY D. RHEA
DEPUTY DIRECTOR OF LEGISLATIVE AFFAIRS
TO THE
SUBCOMMITTEES ON
COMPENSATION, PENSION, INSURANCE AND
MEMORIAL AFFAIRS
AND
EDUCATION, TRAINING, EMPLOYMENT AND HOUSING
COMMITTEE ON VETERANS AFFAIRS
U. S. HOUSE OF REPRESENTATIVES
ON
DAVENPORT V. BROWN, COST-OF-LIVING ADJUSTMENTS,
AND THE COURT OF VETERANS APPEALS
PRO BONO PROGRAM
MAY 8, 1996
*Chartered by the United States Congress***

The Non Commissioned Officers Association of the USA (NCOA) appreciates the opportunity to comment on the three draft proposals under consideration today. The Association salutes the Distinguished Chairmen of both Subcommittees for holding this hearing. Your consideration of NCOA's comments is appreciated also and the Association hopes that our testimony will be useful in the dialogue on these important issues.

DAVENPORT v. BROWN

Historically, a veterans eligibility for vocational rehabilitation programs was predicated on the causal relationship between a veterans service-connected disability and impairment to employment. A recent Court of Veterans Appeals decision in *Davenport v. Brown* overturned the historical precedent associated with rehabilitation training and assistance and struck down the requirement for a such causal relationship. The Court's recent decision is not without confusion and is being broadly interpreted that a veteran may receive vocational rehabilitation training even if their service-connected disability did not cause an employment impairment.

The draft bill under consideration today would codify the historical precept that governed eligibility for vocational rehabilitation training prior to the Court's decision in *Davenport v. Brown*. Specifically, the draft bill would amend 38 USC by requiring that an employment handicap for which a veteran may receive rehabilitation training must be related to the veteran's service-connected disability. The proposal would also take the additional step of reducing the eligibility threshold from 20% to 10%.

NCOA supports the draft proposal on this issue. In NCOA's view, it places the emphasis where it should and must be. Eligibility for rehabilitation training, and indeed all VA benefits and services, should be linked to the veterans military service.

PRO BONO PROGRAM

The Distinguished Chairman and Subcommittee Members are familiar with the history and background of the Court of Veterans Appeals Pro Bono Legal Representation Program. On that basis, NCOA believes that the Subcommittee will agree with the Association's assessment that the program has been successful. Of the cases managed by the Program during Fiscal Year 1995, 78% (157 of 201 cases) resulted in a finding of error in VA's adjudication of the claim.

It is indeed discouraging the President's Budget submission did not request any funding for the Program in FY97. The generous contributions from veterans organizations and some private law firms notwithstanding, the Program will cease unless Congress makes federal appropriations available.

Therefore, NCOA strongly supports the legislation proposed by Representative Fox and commends him for this initiative. Enabling legislation is essential for the continuance of this Program to serve the most needy veterans in pursuit of meritorious appeals with the Court. NCOA is of the impression that strong, bipartisan support exists for the Program within Congress. The Association also supports making appropriations for the Program a separate

budgetary line item with specific language directing the Court to provide the Program with the full appropriation.

COMPENSATION COST-OF-LIVING ADJUSTMENTS

Mr. Chairman, NCOA appreciates the fact that you intend to sponsor and introduce legislation to increase the rates of compensation for veterans with service-connected disabilities, Dependency and Indemnity Compensation, and the compensation paid for dependents and the annual clothing allowance payments to certain service-connected disabled veterans. The proposed increase, effective December 1, 1996, would be in the same amount as social security payments. NCOA wholeheartedly supports this proposal on behalf of disabled veterans, their dependents and survivors.

Thank you.

DEPARTMENT OF VETERANS AFFAIRS

RESPONSES TO POST-HEARING QUESTIONS
CONCERNING THE MAY 8, 1996
JOINT LEGISLATIVE HEARING

FROM THE HONORABLE G.V. (SONNY) MONTGOMERY

TRANSMITTED BY
THE HOUSE VETERANS' AFFAIRS COMMITTEE
SUBCOMMITTEE'S ON
EDUCATION, TRAINING, EMPLOYMENT AND HOUSING
& COMPENSATION, PENSION, INSURANCE AND MEMORIAL AFFAIRS

Question 1: Dr. Lemons some of the testimony today is critical of the proposal to reverse the outcome in the Davenport case. Can you explain who was eligible for this program when it first began?

Answer: When the veterans vocational rehabilitation program first began, veterans were eligible who:

- (1) Had a service-connected disability of compensable degree; and
- (2) Were in need of vocational rehabilitation to restore employability lost by virtue of a handicap due to service-connected disability.

Question 2: Was the requirement that a service-connected disability "must materially contribute" to the employment handicap a long-standing requirement in the law?

Answer: From the beginning of the veterans vocational rehabilitation program in 1917 until the effective date of PL 96-466 (April 1, 1981), the requirement for vocational rehabilitation eligibility was an employment handicap due to service-connected disability. The regulations written for PL 96-466 stated that the veteran's service-connected disability need not be the sole or primary cause of an employment handicap but it must materially contribute to it.

Question 3: Dr. Lemons, can you or one of your colleagues recite the standard under which a Court may award attorneys fees to an attorney representing a veteran? Isn't the standard for an award of fees in such cases that the Government's position was not "substantially justified"? In other words, the Government acted unreasonably in denying the veteran's claim. What is wrong with the Court awarding fees to an attorney who has agreed to represent a veteran without compensation when it is decided that the Government really didn't have any justification for its position in the first place?

Answer: The short answers to your questions are as follows. Yes, under the Equal Access to Justice Act (EAJA), the "prevailing party" in litigation against the Secretary of Veterans Affairs in the Court of Veterans Appeals (CVA), may apply for the payment of "reasonable attorney fees" and the standard for an award of fees is whether the position of the Government was "substantially justified." No, the Government did not necessarily act unreasonably in denying such a claim. Although there is nothing inherently "wrong" with the Court awarding attorney fees, in frequent actual practice, an attorney representing a veteran "pro bono" will, after the Court remands the case on procedural grounds identified by Government counsel, receive an EAJA award even though the veteran may never prevail on the merits of the claim.

A more detailed explanation of our answers appears below.

Just because one is a “prevailing party” in a CVA case does not necessarily mean the veteran was unjustly denied and will now be receiving VA benefits. There are very few cases in which the Court actually reverses the BVA decision and orders benefits awarded to the veteran. Aside from affirmances, the much more frequent disposition is vacation of the BVA decision and remand for further adjudication. The CVA has held that, in essence, any remand of a case appealed to the Court establishes prevailing party status on the veteran. This is so even if the remand is simply on procedural grounds and the claim is simply returned for further development by the BVA or VARO. In a substantial number of appeals filed in the Court, VA’s attorneys recognize a deficiency in the processing of a claim, or in the drafting of the reasons or bases for denial of the claim, and promptly initiate action to file a motion (frequently a joint motion in cooperation with opposing counsel) with the Court to remand the case for correction of those mistakes. In such cases, the readjudication below may or may not result in the veteran’s “winning” the case, but the veteran nevertheless is a “prevailing party” for purposes of the EAJA. Thus, an EAJA fee is often “earned” and awarded to an attorney who took on the veteran’s case on a “pro bono” basis shortly before VA’s counsel identified a basis for remand. Typically, “pro bono” counsel do not continue representation of the veteran before the BVA or VARO, and have no role in whether or not the veteran ultimately receives the benefits sought.

Moreover, once a case is remanded and an application for EAJA fees is submitted, the Government’s ability to question the reasonableness of the fee application is severely restricted. As noted above, often the issue on remand is simply procedural and not the merits of whether an award of benefits should be made. Under the applicable case law, the Government can only challenge such matters as duplication of effort (as when an attorney files multiple pleadings restating the same arguments) and whether the prevailing party unreasonably prolonged the litigation. The hourly rate for EAJA fees has recently been increased by statute to \$125 per hour, and we often see cases in which the “pro bono” attorney claims many more hours of legal time than our VA attorney required for the same case.

Finally, a veteran’s receiving a remand from the Court does not equate to a conclusion that “the Government acted unreasonably.” For various reasons (e.g., backlogs at the VAROs and BVA, changes in interpretation of the law brought about by CVA precedent decisions), cases reach the Court which need to be remanded for technical or procedural reasons. As described above, VA lawyers strive to effect such remands as expeditiously as possible. Clearly, such action by litigation counsel is reasonable; however, EAJA fees are still available in such cases because there was “error” in the adjudication below. Again, it may well be that, after the BVA and/or VARO “dot all the I’s and cross all the T’s” on remand, the result will still be denial of benefits. Thus, it may not be accurate to say that the Government had no justification for its position in the first place.

**RESPONSE TO
 POSTHEARING QUESTION
 FROM THE HONORABLE G.V. "SONNY" MONTGOMERY
 CONCERNING MAY 8, 1996 HEARING
 BEFORE THE
 SUBCOMMITTEES ON EDUCATION, TRAINING,
 EMPLOYMENT AND HOUSING AND
 COMPENSATION, PENSION, INSURANCE,
 AND MEMORIAL AFFAIRS
 OF THE
 COMMITTEE ON VETERANS' AFFAIRS
 FROM RICHARD F. SCHULTZ,
 NATIONAL LEGISLATIVE DIRECTOR
 DISABLED AMERICAN VETERANS**

Question:

Many veterans continue to press their appeals before the Court without representation. Can you recommend changes to the Pro Bono Program to deal with this situation?

Answer:

The veterans' Consortium Pro Bono Program offers pro bono representation to all appellants who meet the program's financial and merit eligibility requirements. If an appellant does not meet both criteria, representation cannot be offered. As noted in my testimony, while 80% of appeals filed with the Court are pro se at the time of filing, that figure is greatly reduced by the efforts of the Pro Bono Program to screen appeals for sufficient merit and to find representation for those cases with such merit. Only 54% of the initial pro se cases remain unrepresented at the time the case is terminated by the Court. Although 54% is still a high percentage for pro se cases, it is impossible to determine how the Pro Bono Program could reduce this number further.

Reportedly, in FY 1995, a total of 527 cases were screened for representation by the Program, and 201 met the Program's financial and merit eligibility criteria. All 201 of these appellants were provided with an attorney at no cost. The Program goes beyond merely screening appeals and providing representation, it also provides legal advice to claimants who do not meet the eligibility criteria regarding the merits of their claim and suggestions regarding appropriate action other than at the Court.

In conclusion, I cannot recommend any changes to the Program that would effectively reduce the Court's pro se docket below the current 54% at the time of termination.



Question for Russell Mank
Paralyzed Veterans of America
From the Hon. G.V. (Sonny) Montgomery
Before the Joint Legislative Hearing on May 8, 1996

Many veterans continue to press their appeals before the Court without representation. Can you recommend changes to the Pro Bono Program to deal with this situation?

Answer:

As required by the grant terms, the Veterans Consortium currently offers its services only to individuals who have already filed an appeal with the Court of Veterans Appeals and who remain unrepresented for between 30 and 45 days after their notice of appeal is filed.

Approximately 75 percent of the individuals who are notified of the existence of the Pro Bono Program request to have their case reviewed for program eligibility; of that 75 percent, 38 percent are ultimately determined to meet program eligibility requirements.

Each year since its conception, the Pro Bono Program has been able to provide an attorney at no cost to every veteran who meets program eligibility requirements and who requests representation.

The Advisory Committee of the Veterans Consortium meets monthly to receive reports on the program's performance, to review policy, and to make policy decisions when necessary. From time to time the Committee has authorized various initiatives to follow-up on the 25 percent of appellants who do not seek assistance from the Pro Bono Program. These initiatives have included additional mailings and personal telephone calls. In large measure these initiatives have failed to appreciably increase the number of appellants seeking the Pro Bono Program's services. The Consortium is currently drafting a brochure to provide additional guidance to veterans regarding the processes of the Court and the desirability of representation.

PVA believes the best hope to reduce the pro se rate is to inform veterans of the distinct change in the nature of the proceedings when an appeal is lodged with the Court and to provide the veteran with the realistic opportunity to find an attorney close to home who is familiar with veterans benefits law. The Pro Bono Program is making some strides in that direction. During the first year of the program attorneys from 17 jurisdictions participated; during the second year attorneys from 20 jurisdictions and during the third year attorneys from 34 jurisdictions participated.

In short, absent passage of legislation that would authorize the Pro Bono Program for the foreseeable future and provide adequate funding to meet its assigned task, PVA recommends no changes to the program.

PARALYZED VETERANS OF AMERICA

Question for Mr. Carroll Williams
The American Legion
From the Hon. G.V. (Sonny) Montgomery
Before the Joint Legislative Hearing on May 8, 1996

Many veterans continue to press their appeals before the Court without representation. Can you recommend changes to the Pro Bono Program to deal with this situation?

In response to the foregoing question, making it easier for attorneys to charge fees for representation before the Court, in my opinion, would reduce the number of pro se cases, and insure that attorneys are allowed to continue to collect 20 percent of the total amount of any past-due benefits awarded on the basis of the claim, even when VA decides on an out of court settlement with the appellate, to resolve the question at issue, as promulgated under the provisions of 38 USC, section 5904(d)(1). Another recommendation is for the Board of Veterans Appeals to slow down its reviews and decision-making process in veterans/claimants appeals. BVA, in an ongoing effort to reduce its backlog of appeals, has committed several procedural errors in their decisions. Secondly, if the regional offices followed precedential court decisions as well as its own regulations and adjudicated the claims right the first time, then the BVA many not have such an enormous case load, and simultaneously be pressured to render more decisions for the sake of reducing the number of appeals pending and improving its timeliness rate.

Finally, we all, including Veterans Service Organizations, can do a much better job in assisting VA and veterans/claimants with the development of claims. Training should be continuously emphasized to all those who are privileged and honored to assist and represent veterans before the various levels of VA's adjudication and appellate process and the Court of Veterans Appeals.

Question for the Record -- David B. Isbell, Esq.

Please explain the effect of the application of the Equal Access to Justice Act to the Court of Veterans Appeals in relation to the Pro Bono Representation Program.

Response:

It was suggested, in the written statement and testimony by Stephen L. Lemons, Deputy Undersecretary of the Department of Veterans Affairs in the joint subcommittee legislative hearing on May 8, 1996, that the Program does not deserve to bear the label "Pro Bono" because, in the 3 1/2 years since the Equal Access to Justice Act, 28 U.S.C. § 2412, became applicable to cases before the Court, the VA has paid some \$500,000 under the Act to lawyers who had taken case (presumably under the Program) in a pro bono capacity. The VA statement also suggested that, evidently for this reason, "the Program does consume a significant amount of resources that otherwise would be available for the payment of benefit claim." And the statement further asserted that the Program "is not a truly pro bono program in view of the application of the EAJA to attorneys who initially agree to take cases on a noncompensated basis."

To take the final observation first, the Program most assuredly is a pro bono program from the point of view of the veterans who are provided free representation before the Court of Veterans Appeals. Moreover, although the possibility of an EAJA recovery may be something of a marginal inducement for lawyers to take cases under the Program, it is surely not the principal reason why we attract volunteer lawyers. Our best information is that EAJA applications have been filed in no more than a third of the completed cases under the Program. It should also be noted in this connection that EAJA recoveries are not automatic: indeed, such recoveries are doubly contingent: not only must the appellant prevail before the Court, but the VA must have been unable to establish that its position was "substantially justified." The hourly fees recoverable in EAJA awards are established by Congress and are currently around \$125/hour, which is a rate below prevailing billing rates for commercial cases. It should also be pointed out that larger firms typically don't keep most of the attorneys fees they are awarded in pro bono matters but rather donate them to law-related charitable organizations.

As to whether, as the VA official's statement referred to above suggests, EAJA awards represent a profligate use of VA funds which could be better spent on benefits, it is perhaps sufficient to point out that EAJA reflects the fundamental policy, adopted by Congress, that where governmental agencies are in the wrong, suits against them should be encouraged, by making the award of attorneys' fees available. It should also be noted that while the VA has paid nearly \$500,000 to attorneys in pro bono cases, it has in the same period paid nearly three times that much in EAJA awards in non-pro bono cases; and, further, that all the fee awards that the VA is required to pay have first been approved by the Court. We agree with the VA that EAJA payments are an undesirable way for its funds to be spent. Veterans would be best served if the VA adjudicated the claims of veterans rapidly and correctly, without the necessity of intervention by the Court. If this goal became a reality, EAJA recoveries would be significantly reduced, if not eliminated altogether.