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VETERANS ACT OF 1979, S. 330

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HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 330

JUNE 20, 1979

Serial No. 96-19

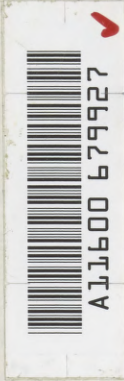
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CONFIDENTIAL

MEMORANDUM FOR THE DIRECTOR

DATE: 10/15/54

1. The following information was obtained from a review of the files of the Federal Bureau of Investigation (FBI) regarding the activities of the Communist Party, USA (CP, USA) in the State of New York.

2. The CP, USA has been active in the State of New York since the early 1930s. It has been found that the CP, USA has been active in the State of New York since the early 1930s. It has been found that the CP, USA has been active in the State of New York since the early 1930s. It has been found that the CP, USA has been active in the State of New York since the early 1930s.

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VETERANS ACT OF 1979, S. 330

WEDNESDAY, JUNE 20, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 1:12 p.m. in room 2228, Dirksen Senate Office Building, Hon. Patrick J. Leahy, presiding.

Present: Senator Leahy.

Also present: James Davidson, chief counsel and staff director, Subcommittee on Administrative Practice and Procedure; Gary Knell, counsel; Sam Kinzer, counsel to Senator Leahy, and Gary Crawford, minority counsel, Veterans' Affairs Committee.

Senator LEAHY. I apologize for being late. We had a vote on the floor.

OPENING STATEMENT OF SENATOR LEAHY

Today, we meet to discuss an issue which has been the subject of debate in this country for over 50 years. It is an issue which could very well affect the lives of thousands of our Nation's most important citizens—the veterans of the United States.

For a long time, the Veterans' Administration has served its constituents well; it has carried forward its statutory mandate to give veterans the benefit of every doubt, to provide adequate benefits as a repayment for the years that they sacrificed for us all, and to pay disability claims to those individuals who sacrificed more than just their time for their country.

As well, the veterans' service organizations have provided assistance and understanding in coming to the aid of the veteran in presenting his case for much-needed and much-deserved assistance.

Yet, there are those who feel that that rare instance has arisen too often. I refer to the situation where a veteran is left with no legal recourse to challenge a finding of the VA even though he may feel that the finding is a clear abuse of discretion.

S. 330, introduced by my distinguished colleague, Senator Hart of Colorado, is a bill which tries to address this problem. It creates a mechanism providing for judicial review of benefit and disability claim denials. In addition, the bill before us provides for the payment of reasonable attorneys fees and requires VA compliance with rulemaking procedures being followed in every other Federal agency. Each of these proposals is aimed at safeguarding the procedural due process rights of veterans. Senator Cranston and the Veterans' Affairs Committee staff have done a commendable job in exploring these issues over the last 3 years.

In our hearing today at the Judiciary Committee, we hope to ask the right questions; that is, to establish a record, laid out by experts in the field, as to whether S. 330 addresses the problems correctly. Specifically, and most importantly, we wish to find out whether court review will be necessary to safeguard their rights.

We wish to find out what the impact of judicial review in veterans cases will have upon the courts and upon the VA itself. This is why we have invited the Commissioner of the Social Security Administration, Mr. Ross, to discuss some of the workload problems of his agency and to outline the similarities which exist between his agency and the VA.

We are, of course, here to consider S. 330 and its mechanism to provide judicial review of benefit and disability claim denials.

Commissioner Stanford Ross of the Social Security Administration is here.

Mr. Commissioner, I am delighted to have you here. Your statement will be part of the record.

In the "Study of the Social Security Administration Hearing System" conducted by the Center of Administrative Justice in 1977, the authors concluded that although social security legislation is a large and increasing component of the civil business of the Federal district courts, they said: "It is clear the caseload statistics give an inflated measure of the burden social security litigation places on the time and energies of the district courts."

The report lists the following reasons why the caseload burden is inflated: The small amount of time expended by the courts on the average SSA case, the fact that a significant percentage are remanded, and that 15 percent are assigned to magistrates.

Now, under current practice, U.S. magistrates are handling the social security appeals. And it has been my experience in talking with members of the bar that the procedures work quite well.

The Senate has passed S. 237, the Magistrates Act of 1979, which would allow, among other things, increased use of magistrates in those district courts in a sudden surge of legislation.

Isn't it a fact that the average case is small, since most disability cases present simple issues?

STATEMENT OF STANFORD ROSS, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION

Commissioner Ross. Mr. Chairman, first of all, I am pleased to be here and will try to clarify some of these matters for you.

I think that it is hard to cut right in on the significance of the social security cases in the Federal courts other than to say it is the final stage of an elaborate process. We start off every year with about 1.3 million disability claims.

[The prepared statement of Mr. Ross follows:]

PREPARED STATEMENT OF STANFORD G. ROSS

Mr. Chairman and members of the committee, it is a pleasure to be here this morning as you take up S. 330 concerning the terms of judicial review for the veterans program. I will discuss with you Social Security Administration's experience with judicial review of decisions under the social security program. I believe that it is important to describe both our experience with judicial review and the nature of the administrative appeals process under the social security program in order for you to understand our current views on judicial review. You are aware that the administration has proposed changing the Social Security

Act with respect to judicial review as part of a major reform of the decision process in the social security disability program.

I would like first to describe the proposal and why we have recommended this change. I want to emphasize that we are not proposing an elimination of judicial review. Rather we are proposing that the Federal district courts will continue to review questions of constitutional or statutory interpretation (including procedural issues). However, the Secretary's findings of fact would be final and unreviewable by the court.

Under our proposal, the courts would continue to decide matters such as whether regulations issued by the Secretary are a valid interpretation of the statute. Procedural and due process issues would also be determined by the courts. For example, the cases based on SSA delays in holding hearings and issuing hearings decisions would still be matters for the courts.

We studied all of the social security cases that were decided by the Supreme Court in recent years and were satisfied that our proposal would not have precluded judicial consideration in a single case.

The basic reasoning behind the administration's proposal is that the administrative process is the appropriate place to make determinations of fact under the social security program. We believe that the original intent of the statute was that resolution of disputes over constitutional and statutory issues would be left to the judicial system but that the administrative appeals process would be the appropriate, and most efficient, means to develop and resolve questions of fact. Our proposal would clarify the role of the courts in reviewing social security matters and, at the same time, provide a process that is fair to all claimants and protective of their rights.

SSA'S EXPERIENCE WITH JUDICIAL REVIEW

Under present law, the Secretary's findings of fact are final if supported by substantial evidence. However, the substantial evidence rule has not worked well.

Disability cases have become a substantial burden on the Federal district courts. New filings are now running at about 8,000-9,000 cases a year and about 19,000 cases are pending in the Federal courts. In some jurisdictions, disability cases constitute more than 20 percent of Federal court filings. Court review under the present system places a heavy burden on limited judicial resources.

Although the courts are theoretically limited in reviewing the facts to determine whether there is substantial evidence in the record to support the agency's determination, in a great many cases district court judges examine the facts de novo and reverse or remand—which may often be an effort to do "rough justice" and to mitigate the strictness of the definition of disability in the law.

Few cases involve questions of law or result in decisions that contribute to the development of law in this area. Almost all turn on the facts.

Because most of these cases turn on the facts and have little precedential effect, the Federal Government rarely appeals any adverse decisions. The result is occasional intervention by Federal district judges for the benefit of a relatively small number of claimants.

Judicial review of the facts does not improve the integrity of the system. Over 60 percent of the cases reviewed by the courts are initially referred to a magistrate, who does not have the same expertise in the disability area as the administrative law judge, and who simply reviews the record.

THE ADMINISTRATIVE APPEALS PROCESS IN SOCIAL SECURITY

Under current law and regulations, the final decision of the Secretary on social security matters is reached after an elaborate four-stage process including a full-fledged evidentiary hearing before a Federal administrative law judge (ALJ). Our review of the present decision process convinced us that, with a few improvements in the process, we could continue to safeguard the rights of claimants and yet make the Secretary the final arbitrator of determinations of fact. The issue we are really deciding is at what point the claimants should have their "day in court" so far as presenting the facts in their case. We believe that it would be more efficient and claimants would have full protection of their rights if the administrative process were the sole forum used to resolve any issues of fact.

Let me describe the present decisionmaking mechanism and the steps that we are taking to improve that mechanism. The essential thrust of all these steps is to improve the accuracy of the decisions and to get these better decisions earlier in the process, while at the same time streamlining that process.

The initial determination in a disability case is made by skilled professionals in an agency of the State in which the claimant resides on the basis of medical

and vocational evidence provided by the claimant. At all of the administrative stages, if there is need to verify medical evidence, we refer the claimant for a consultative examination by an expert at our expense.

We are proposing to strengthen administration of the disability decision process by permitting the Secretary to establish by regulation performance standards and procedures for the States to follow.

If the claim is denied, the claimant can request a reconsideration. A new individual in the State agency will then review the case, taking into consideration any additional medical or vocational evidence the claimant may submit.

We are proposing that applicants whose claims are denied at the initial level, and who request reconsideration, be provided the opportunity for a face-to-face informal conference with a decisionmaker who will reconsider the case. Allowing the claimant to supply information directly to the decisionmaker should result in more accurate decisions and in a complete factual record.

A claimant denied at the reconsideration level can request a full-fledged evidentiary hearing before a Federal ALJ. The claimant can present medical and vocational evidence, including oral testimony, before the ALJ. Social security claimants get full due process of law, in effect their day in court, at this hearing, which is conducted under the Administrative Procedure Act. The ALJ's are appointed under the strict requirements of the Administrative Procedure Act and are afforded the protections provided by that legislation.

At the hearing stage we are proposing that the reconsideration decision will be presented and defended by an SSA representative. SSA plans to test this approach, beginning at four locations. The hearings will still be conducted by the ALJ in compliance with the Administrative Procedure Act. In this way claimants' rights of due process will be fully protected. The objective of this approach is to permit the ALJ to play a more judicial role rather than be responsible for the development of the Government's case, assisting claimants in presenting their case, and then deciding the outcome of the appeal. Claimants currently are represented over 40 percent of the time and the rate is over 60 percent in some regions. Moreover, this trend is growing rapidly. To the extent that claimants are not otherwise represented, provision will be made by the ALJ to ensure that the claimant's case is adequately presented.

If denied at the hearing level, the claimant can request a review of the ALJ's decision by the Social Security Appeals Council. Again the claimant can present any medical and vocational evidence pertaining to his or her condition.

We are proposing to replace the present Appeals Council with an SSA Review Board, which would accept requests for review from claimants who are denied at the hearings level. The Board would also review ALJ allowances on its own motion. It is envisioned that the Board will serve more like an appellate body than the Appeals Council currently does.

CONCLUSION

Mr. Chairman, I would stress that the proposal to limit judicial review would not interfere with a claimant's administrative appeals rights. We believe that if decisions are the product of a careful adjudicatory process, which we are moving toward, claimants will be adequately protected by still being able to take questions of law into the courts. The only change would be that the courts could not operate as a fifth level of administrative review of the facts.

Commissioner Ross [continuing]. The importance of the court review in my judgment is not so much the number of cases that get there, but how it influences the entire system.

Senator LEAHY. I understand that. Could you tell me whether the average case that goes up on appeal is a relatively small case?

Commissioner Ross. Small relative to the amount of money involved in other cases, but probably not small to the individual claimant.

Senator LEAHY. Mr. Ross, I don't question that a bit. In fact, a great deal of my own time and the time of the members of my office, both here and in Vermont, is spent handling such social security cases

and helping people on them because we do realize that with most people, this is the most significant aspect of their connection with the Federal Government.

Commissioner Ross. It may be small in terms of the amount involved in the typical Federal case; it is a significant sum to the individuals involved.

Senator LEAHY. Mr. Ross, we are perfectly agreed on that; no question about it.

Are the opinions fairly short on these cases?

Commissioner Ross. I believe they are, but the issues are not simple because the courts are choosing to review in many cases de novo complicated factual issues.

Senator LEAHY. I understand on the legislation we are talking about for veterans' benefits, it would not be a de novo appeal.

Commissioner Ross. Well, there is not supposed to be in social security matters either, Mr. Chairman. What we find is because of the nature of the cases, the substantial evidence rule is not adhered to.

Senator LEAHY. Then, why does the Social Security Administration appeal those cases where the substantial evidence rule is not—

Commissioner Ross. Well, it is very difficult.

Senator LEAHY. Does that just encourage the courts to keep on doing it, then?

Commissioner Ross. Well, it may be that we could do a little bit more, but it is very hard to take these cases onto appeal because so much does turn on the facts.

Senator LEAHY. But if the courts aren't following the law, doesn't the Social Security Administration have a duty to take that matter up on appeal?

Commissioner Ross. Well, we do appeal some when it is very clear, but the problem is that about one-half of the cases, which are either reversed or remanded, are so bound up and involved in the facts that we do not appeal most of them.

Senator LEAHY. Well, what percentage of the social security cases did the Social Security Administration lose between, say, the years 1970 and 1975—

Commissioner Ross. We lost about—

Senator LEAHY [continuing]. On appeal?

Commissioner Ross. Oh, you mean on appeal from the district court?

Senator LEAHY. No; on appeal to the district court.

Commissioner Ross. About 50 percent are reversed or remanded. But that, I think, has to be put in context. You are making determinations where reasonable people can differ. And I submit to you that the more interesting way of looking at it is that we have administrative law judges who conduct a full evidentiary hearing. They reverse about 50 percent of the initial determinations that are made by State agencies.

Then, the administrative law judges are reversed 50 percent of the time. And what you are really seeing is that each time you get somebody to go on back through the facts, you are dealing with judgments.

Senator LEAHY. It kind of makes you wish you were right the first time around. I was thinking that when I was district attorney, if I had an assistant of mine that got reversed 50 percent of appeals, he would be lucky if he got to handle traffic cases.

Commissioner Ross. We agree with that. It is not the subject of your hearing, but we have proposed, and the House Ways and Means Committee has approved, some proposals to improve the whole disability determination process to get better decisions earlier. So there will be fewer cases, both going to administrative law judges and to the courts. So, we fully agree that the entire process needs to be improved.

Senator LEAHY. Is this typical throughout the Government?

Commissioner Ross. No; our experience in social security in the disability area is quite unique. We have over 600 administrative law judges. We have more administrative law judges than all of the judges in the Federal judiciary, I believe. We run a very big litigation system there.

Senator LEAHY. Kind of a sloppy one, it sounds like, if they overturn 46 or 50 percent.

Commissioner Ross. I think it is one that over the years has grown and does need a fresh look and rethinking which the Secretary and I propose. And it does need change, including some legislative change as well as changes in our administrative procedures.

Senator LEAHY. If the amount of social security questions and followups that come through my office—and I am, remember, the third smallest State in the country—is any indication, all those—

Commissioner Ross. It is being tightened up.

Senator LEAHY. You spoke of a—

Commissioner Ross. We are doing that generally outside the disability area, too. Senator Nelson recently conducted a hearing in the Social Security Subcommittee of the Senate Finance Committee, and there is some testimony there which I will have sent to your office which goes through a number of the actions we are taking in trying to tighten up that process.

[The material referred to above can be found in the appendix.]

Senator LEAHY. As I was saying, you had mentioned an amendment that you proposed to the House. When was that—back in May?

Commissioner Ross. You mean our hearings before the House? It was earlier—in April.

Senator LEAHY. What did the House subcommittee do with that amendment?

Commissioner Ross. They moved in the direction we suggested, although they did not adopt the proposal we made.

Senator LEAHY. They soundly defeated the proposal you made, did they not?

Commissioner Ross. No; there was a mixed vote in the subcommittee.

Senator LEAHY. So, you won? Did you win or lose?

Commissioner Ross. We got some things and not other things.

Senator LEAHY. How did you do in the judicial review issue?

Commissioner Ross. That is what I was referring to. We got some things, but not the entire proposal we made.

Senator LEAHY. The cases that are appealed, are the opinions short—two-, three-page opinions?

Commissioner Ross. Yes; I would assume so.

Senator LEAHY. Trials fairly rare?

Commissioner Ross. Yes; most of the cases are handled by magistrates who, as we note in my testimony, mainly go over a written record and, therefore, are less in a position to prejudge those facts than are

our own administrative law judges who see the witnesses, including the claimant, and conduct a full evidentiary hearing.

Senator LEAHY. But they are not allowed to do a trial de novo as such anywhere, are they, under the law?

Commissioner Ross. Who is that, the magistrates?

Senator LEAHY. Right.

Commissioner Ross. That's correct.

Senator LEAHY. Under S. 330 which is before us, judicial review would be limited to cases where the court finds that the decision has been "arbitrary and capricious." Doesn't that pretty well almost limit you to a question of law decision? I mean, an arbitrary final decision; that is, finding a decision to be arbitrary or capricious.

Commissioner Ross. I am not in a position to comment on that bill as such.

Senator LEAHY. If I can just finish with my question—

Commissioner Ross. Yes, sir.

Senator LEAHY. What the arbitrary and capricious standard would basically do is require a very restrictive finding as a matter of law, would it not? We are not talking about legislation that would require factfinding and second guessing except in rare, rare instances. Is that not correct?

Commissioner Ross. I am not prepared to comment on what your bill would do. All I can tell you is that in the social security area the substantial evidence rule has not worked well because it has too often, in our judgment, involved substituting a second judgment on the facts, and it has not been strictly adhered to the way one would think it should be.

Part of the reason is the context in which these cases arise. We have a very strict definition of disability in the social security area. It is a very tough legal definition, and perhaps in the interests of doing rough justice judgments on the facts are substituted.

Senator LEAHY. Well, if they went from a substantial evidence test to an arbitrary or capricious test, would that not keep the courts on a tightened rein?

Commissioner Ross. Logically, it should, because it is a tougher standard.

Senator LEAHY. And if they didn't keep to that tougher standard, would that not give your agency a pretty substantial right of appeal?

Commissioner Ross. It would except that the right of appeal is something that is not always a real right of appeal because you don't want to take these cases on unless it is a very clear record of what was done.

But it certainly would increase the number of appeals we could take if the present practice continued.

Senator LEAHY. Let me make sure I fully understand you. Would you feel that an arbitrary and capricious rule would be a far tighter rule for a court to follow than the substantial evidence rule?

Commissioner Ross. Yes, sir, but in the social security area, I would submit that with four layers of review of the facts, we will stick by our judgment that it would be better if only questions of law went to the courts and the Secretary's determination as to factual matters was final.

We don't think a fifth level of review of facts, even under a very tight standard, is appropriate within the context of our system. I would not

comment on whether that standard would make sense in another system. I am just confining myself to social security matters.

Senator LEAHY. You understand the Veterans' Administration cases we talk about are rating of disability rather than out and out denial of disability? We talk about 10, 20, 30, 40 percent of disability and so forth. And might that put those kinds of cases somewhat in a different light as far as judicial review than cases from the Social Security Administration?

Commissioner Ross. That really would be beyond my area of expertise if I commented upon the veterans situation. I am not that familiar with their entire process. And I am convinced—I practiced law up until October of last year when I became Commissioner of Social Security—that at least our area has some very unique characteristics that I certainly was not fully aware of until I took this job. And I would be very cautious myself about moving into an area that I hadn't studied deeply with judgments about how judicial review should work.

Senator LEAHY. I appreciate that. I have used my 5 minutes. I will yield to Senator Thurmond.

Senator THURMOND. Mr. Chairman, thank you.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. It is a pleasure to be here today and to welcome the witnesses who have come here to testify on S. 330, the Veterans Administration Adjudication Procedure and Judicial Review Act. Some of the witnesses have testified on S. 330 or its predecessor S. 364 several times before. We, therefore, appreciate their willingness to repeat here today their views on this subject.

My remarks will be brief. We have several witnesses, a considerable hearing record on S. 330 has already been built; and time is precious. I merely want to state where my interest in S. 330 lies from the perspective of the ranking minority member of the Senate Judiciary Committee.

My interests in S. 330 from the perspective of the jurisdiction of the Judiciary Committee stem from my concern of the implications of S. 330 for the Federal judiciary. S. 330, if enacted, will add to the workload of the Federal courts.

At the same time, the Senate Veterans' Affairs Committee was working on S. 330, the Department of Health, Education, and Welfare was working on a proposal, and eventually submitted a proposal to Congress, that would have repealed authority for Federal court review of social security benefit determinations.

In my view, those two significant developments, one which seeks to repeal judicial review of a large Federal benefits program, and one which seeks to establish such review, should be scrutinized by the Senate Judiciary Committee in view of the Judiciary Committee's own notions of what role the Federal judiciary ought to play, if any, in the review of benefit determinations by Federal administrative agencies.

Mr. Chairman, that is the issue as I see it here today, and that concludes my statement. For the benefit of the committee, I would like to insert three things into the record at this time:

A letter to the chairman from William E. Foley, Director of the Administrative Office of the U.S. Courts, stating the position of the Judicial Conference's Subcommittee on Federal Jurisdiction with respect to S. 330; a letter to me from Robert A. Anthony, Chairman of the Administrative Conference of the United States, regarding S. 330, and a copy of the Judicial Impact Statement given by Deputy Assistant Attorney General Paul Nijelski on S. 364, which was given at a field hearing of the Senate Veterans' Affairs Committee in Columbia, S.C., on August 31, 1977.

That is my opening statement, Mr. Chairman.

[The John Pressley three documents referred to above appear in the appendix.]

Senator THURMOND. Mr. Chairman, do you want to ask some other questions?

Senator LEAHY. I have no further questions.

Senator THURMOND. Commissioner Ross, we are glad to have you with us.

Commissioner Ross, in arriving at its legislative recommendations with respect to finality of findings of fact by the Secretary, did the Department of Health, Education, and Welfare rely, in any significant way, upon the present structure in which benefit determinations and appeals therefrom are handled by the Veterans' Administration?

Commissioner Ross. I am pleased to be here and have an opportunity to clarify the way things are handled in Social Security.

The answer, Senator Thurmond, is that our recommendations were based entirely on the way the courts have functioned in the social security area. This is a very large litigation system in itself, starting with some 1.3 million disability claims every year and winding up with some 8,000 to 10,000 going to the Federal courts after a four-step administrative process.

Our recommendation was based on the fact that after four levels of review of the facts, we thought the facts in the case should be final and only questions of law should go to the Federal courts.

Senator THURMOND. I find very interesting your statement on page 2 to the effect that a review of decisions by the Supreme Court in recent years indicated that no appeals that were decided by the Court would have been precluded if Court review were limited to questions of constitutional or statutory interpretation, including procedural issues.

Could you provide the committee more information concerning this study? Would you go so far as to say that, from the experience of the social security cases which reach the Federal appeals courts, only those cases involving questions of law appear to have any substantial merit for purposes of setting precedents and so forth?

Commissioner Ross. We will be glad to supply that, and I do agree with that statement.

[The information requested by Senator Thurmond appears in the appendix.]

Senator THURMOND. Commissioner Ross, do you find, as has been alleged in discussions on S. 330, that a premise underlying the proposal to subject final VA benefit determinations to Federal court review is that judges are better at determining facts than the administrative process?

Commissioner Ross. I am not familiar enough with the administrative process in the veterans' area to want to comment on that. But in the social security area, I think it is clear to us that the administrative process which involves a full evidentiary hearing before an administrative law judge is in our mind a much better forum to make factual determinations than the Federal courts.

Senator THURMOND. In my view, if Mr. McMichael would come up at the same time—

Senator LEAHY. Well, we are going to have Mr. McMichael following him.

Senator THURMOND. Is S. 330 based on a somewhat fallacious notion?

Commissioner Ross. I will defer to the person from the Veterans' Administration. I am not prepared, as I told the chairman, to comment on the process in the veterans area because it is outside my area of expertise.

Senator THURMOND. Commissioner Ross, what would be the cost savings if the HEW proposal with respect to repeal of judicial review of social security benefit determinations were enacted?

Commissioner Ross. It would be very substantial. Our estimates are that 80 or 90 percent of the 8,000 to 10,000 cases a year that are going in the Federal courts would be eliminated. We also believe that because it is part of a general reshaping of the administrative structure that would greatly improve decisionmaking on social security cases—getting, in effect, better decisions, earlier, and streamlining the whole process—that our entire set of proposals would be very beneficial from the standpoint of saving costs.

Senator THURMOND. Do you have an estimated dollar figure?

Commissioner Ross. We do not have a dollar figure on the part that would affect the courts. Overall, what we would be doing would be shifting resources to be used earlier in the process to get better decisions earlier.

But we do not have a figure on the judicial review part.

Senator THURMOND. Has this cost savings been translated in terms of its impact upon the Federal courts?

Commissioner Ross. Well, it would obviously eliminate a very large caseload. How large that it, is something on which I think people may vary in their judgments. As Senator Leahy was pointing out, a good number of these cases are handled primarily by magistrates, and I think it would probably affect the workload of magistrates more than judges themselves.

Our experience is that 60 percent of the social security cases go to a magistrate who would, I noted, do the review on a written record which is probably duplicative of what the administrative law judge has already done in the case.

Senator LEAHY. If the Senator would yield just a second, I would like to follow up on that question. If the Social Security Administration didn't lose 50 percent of their cases on appeal, might that in and of itself cut down the number of appeals? Isn't there really encouragement for people to appeal if they get a 50-50 shot of winning?

Commissioner Ross. I think that is correct. There is encouragement to take appeals to the administrative law judges because they reverse 50 percent. I think it is absolutely true that if we get better decisions

earlier and then lower reversal rates, it will improve the entire process in every stage.

Senator LEAHY. I wonder if it is not a better case to tighten up internal procedures than take steps which some may consider eliminating due process.

Commissioner ROSS. I think the case is strong to do all those things. We would never eliminate due process. It is just a question of when someone has had their day in court and when finality should prevail. Somebody can always submit a new claim through the Social Security Administration even after the courts turn them down.

Senator LEAHY. Senator Thurmond, do you have anything further?

Senator THURMOND. Yes; I have two more questions.

The Veterans' Affairs Committee in enacting S. 330 adopted a rule whereby the finding of the VA would be required to be upheld on appeal unless the VA had acted arbitrarily or capriciously or had abused its discretion in arriving at its determination. Some question has been raised, however, as to where there is any real difference in the practical application (and note I said "practical application" because here we are talking about workload and costs, considerations that extend beyond the legal niceties of hornbook law) of the arbitrary and capricious standard versus the substantial evidence rule.

There was some discussion of this during the plenary session of the administrative conference's discussion on S. 330. Would you speak to this issue?

Commissioner ROSS. I can only say that in the social security area, the substantial evidence rule has not worked well. Once the facts are reviewed by another decisionmaker, the question of whether there is substantial evidence or not tends to fade into whether you agree with the factual determination, and a second judgment is substituted.

That is why we made our proposals. We felt that since the substantial evidence rule had not worked well that we would prefer to make the Department's decision on the facts final and not simply opt for a tougher standard which is obviously arbitrary and capricious.

Senator THURMOND. Commissioner Ross, the determination by the Veterans' Administration is made pursuant to regulations which, of course, are uniform throughout the system. This system is to be contrasted to the social security system when the initial determination in disability cases is made by agencies of the States.

Do you think the VA's system renders the greatest likelihood of uniformity with respect to benefit determinations?

Commissioner ROSS. I don't know enough about the VA system, but I do know that with respect to the social security system an important part of the House bill is our proposal to establish Federal standards under regulations for the State performance so that we would get more uniformity.

We do have a problem today in social security of inconsistencies in the determinations that we are getting out of various areas of the country, and we are trying to change the process to give everybody in this country a chance to apply under the same standards and get the same degree of integrity into the decision.

Senator THURMOND. Commissioner Ross, do you know enough about the VA appeals system to compare it with what you are proposing with respect to social security benefit determinations?

Commissioner Ross. I don't really believe that I do. I have only been Commissioner since last October. And while I have studied our system very carefully, I have not had the opportunity to study the veterans' system. And I would defer to the administration's next witness on that, who is an expert in that area.

Senator THURMOND. Commissioner Ross, how many social security cases are presently appealed annually to the Federal courts? What percentage are reversed?

Commissioner Ross. It is about 8,000 to 10,000. And those that are reversed and remanded are about 50 percent.

A remand may be very much in the nature of a reversal because under those circumstances in about half of the remands we allow the claim based on new evidence.

Senator THURMOND. You say about 50 percent are reversed?

Commissioner Ross. Yes. Well, reversed or remanded. In this context, it amounts to about the same thing.

Senator THURMOND. What is your interpretation of that?

Commissioner Ross. My interpretation is that we are dealing with cases which are highly complex, where there is no statutory flexibility under the law, and where I dare say the more levels of appeal you put in under present processes, you will always get higher reversal rates because we have a very strict legal definition.

People sometimes attempt to do justice. They feel the legal definition is too strict. And you get judgments that are attempts to do rough justice, if you will.

Senator THURMOND. Commissioner Ross, does the administration feel that an even balance between the right of claimants to have fair and uniform determinations made with respect to social security benefits and the interests in maintaining a reasonable, workable, and efficient workload in our Federal courts would be achieved if its proposals with respect to reform of benefit determinations were enacted?

Commissioner Ross. Yes; we think the full due process can be given at the ALJ hearing which we see as a day in court. And we think that the Federal courts should quite properly continue to consider appeals based on legal issues which have precedential value.

We think both the administrative process would be benefited by putting more responsibility there and the judicial process would be benefited by concentrating on the workload that is appropriate for them, questions of law.

Senator THURMOND. Commissioner Ross, what is the explanation of the Social Security Administration for the tripling of the number of court filings for review of social security benefit cases since 1974?

Commissioner Ross. It is a series of factors. One major one was we had a tremendous increase in the number of disability claims generally. The incidence of disability claims rose in totally unexpected ways; the more cases you get in at the front part of the system, inevitably, the more cases you will have that go through all four layers on into the courts. So it was really an increase in the number of social security matters in this area generally.

Senator LEAHY. Thank you very much, Mr. Ross.

Senator THURMOND. Mr. Chairman, I have just one or two more questions for the Commissioner.

Has it been the experience of the Social Security Administration that Federal judges are merely engaged in second-guessing on the appeals process with respect to facts?

Commissioner Ross. I think that happens in too large a number of cases, yes, sir. That is our judgment.

Senator THURMOND. Thank you very much, Commissioner, for your appearance here and your testimony.

Senator LEAHY. Mr. Ross, instead of being a substantial evidence rule, if cases were limited to arbitrary or capricious, might that cut down on second guessing?

Commissioner Ross. I would have to guess as a matter of logic, it would.

Senator LEAHY. You are a practicing attorney. Just on your own experience, wouldn't that put a much, much tighter burden on the courts?

Commissioner Ross. Yes; it would.

Senator LEAHY. If you had a situation where de novo review is expressly prohibited, and if you have an arbitrary and capricious rule in operation, wouldn't that very substantially limit the court?

Commissioner Ross. Yes; it would come much closer to where we would like to go than present practice or the provisions adopted by the House Ways and Means Committee. Yes, sir.

Senator LEAHY. Thank you very much.

Commissioner Ross. Thank you, sir.

Senator LEAHY. Mr. McMichael?

STATEMENT OF GUY H. McMICHAEL III, GENERAL COUNSEL, VETERANS' ADMINISTRATION, ACCOMPANIED BY JAN DONSBACH, BOARD OF VETERANS' APPEALS AND DONALD ZEGLIN, GENERAL COUNSEL'S OFFICE

Mr. McMICHAEL. Good afternoon, Mr. Chairman.

I am Guy McMichael, General Counsel. I am accompanied by, on my left, Donald Zeglin from the General Counsel's Office, and by Jan Donsbach from the Board of Veterans' Appeals.

[The prepared statement of Mr. McMichael follows:]

PREPARED STATEMENT OF GUY H. McMICHAEL III

Mr. Chairman and members of the committee, I am pleased to be here today on behalf of the Veterans' Administration to discuss S. 330, the "Veterans' Administration Adjudication Procedure and Judicial Review Act."

Four major changes are contemplated by this measure. First, the bill would change the internal adjudication procedures now used in making Veterans' Administration benefit decisions. Second, Veterans' Administration rulemaking would be subject to the provisions of 5 U.S.C. § 553. Third, the bill would provide access to the courts to claimants who are dissatisfied with Veterans' Administration benefit decisions as well as eliminating the operation of 38 U.S.C. § 211(a) as a bar to any civil action otherwise authorized by law. Finally, this legislation would substantially revise the current \$10 statutory limitation an attorney may receive for representing an individual claimant in prosecuting a claim for veterans' benefits.

As you know, we submitted a report on S. 330 to the Senate Veterans' Affairs Committee on March 21, 1979, and I presented testimony to that committee at a hearing held on March 22, 1979. Although S. 330 has been substantially amended

since our report, the Veterans' Administration's position on the basic issues addressed by the bill remains unchanged from that presented to the Veterans' Affairs Committee. Thus, a brief review of the agency's current position on these issues may prove helpful.

Until 1977, the agency has been in agreement with the longstanding congressional policy to preclude judicial review of the decisions of the Administrator. However, on October 7, 1977, in a report to the Senate Veterans' Affairs Committee on S. 364, 95th Congress, the Veterans' Administration Administrative Procedure and Judicial Review Act, the agency's position was substantially revised. We now believe that the finality statute, 38 U.S.C. § 211, should be amended to provide veterans with access to the Federal courts to resolve any constitutional questions arising from the administration of Veterans' Administration programs. Moreover, if Congress deems it appropriate, we no longer oppose limited judicial review of individual benefit decisions not involving constitutional questions.

In addition, although we believe that our current adjudication procedures meet all of the requirements of fundamental fairness and comply with the evolving concept of "due process," we are not opposed to additional procedural requirements if Congress believes them desirable. Finally, we do not object to a modification of the present attorney fee limitation provided the best interests of the veterans are protected.

It is obvious that S. 330 attempts to address these complex issues in a manner consistent with the agency's position. In addition, S. 330 attempts to implement many of the recommendations made in our report on S. 364 which we believe should be included in any legislation intended to expand judicial review to individual benefit decisions, change our adjudication procedures, or modify the present attorney fee limitation. In this regard, it is noted that the changes in our adjudication procedures proposed in title I of S. 330 would be clearly specified in title 38 of the United States Code rather than merely subjecting the Veterans' Administration to the general constraints of chapter 5 of the Administrative Procedure Act. This, of course, provides for a more precise specification of these changes predicated upon conformity with the nature and realities of unique Veterans' Administration functions and procedures.

Likewise title III of S. 330 incorporates many of our recommendations by addressing several areas of concern that arise as a consequence of expanding judicial review to individual benefit decisions not involving constitutional questions. For example, the nature and extent of such review is codified in title 38 and expressly requires exhaustion of administrative remedies before institution of legal proceedings. Judicial review is limited to a review of the administrative record, and thereby eliminates de novo court review of the Administrator's decisions on questions of fact. Thus, these provisions as well as others found in S. 330 should allow the Veterans' Administration to retain the informal characteristics of our claims procedures, the acceptance of evidence which would not be admissible under the formal rules of evidence, and the nonadversary tone at all stages of claims processing, including hearings. In our opinion, the retention of the informal, nonadversary nature of Veterans' Administration adjudication procedure is in the best interest of both the veteran and the Government.

The provisions of title IV of S. 330 also accomplish many of the objectives we believe important in modifying the present statutory attorney fee limitation. Following the Social Security attorney fee model with some modifications, as is done in S. 330, is preferable to other approaches because the system appears to work. Modification of the attorney fee limitation as proposed in S. 330 would, to an extent: (1) assure the continued nonadversary character of the Veterans' Administration adjudicatory procedures; (2) protect the claimant's award of benefits from being consumed by expensive legal fees; and (3) continue to encourage the competent free assistance rendered veterans by nonprofit service organizations.

Thus, in many respects, S. 330 as introduced was consistent with the recommendations made in our report on S. 364 and which we believe should be included in any legislation dealing with the complex issues involved in the areas of judicial review, adjudication procedures, and attorney fees. Nevertheless, we perceived certain problems with S. 330 which we reported to the committee.

The most significant problems perceived in title I, Adjudication Procedures, involved the possible confusion that could result from the language used to

codify the reasonable doubt doctrine because of the more familiar usage of the term "reasonable doubt" in criminal matters. We also viewed the adoption of an extra level of adjudication as authorized in title I as a significant shortcoming. Finally, in regard to title I, we indicated our concern that the extremely broad provisions authorizing increased use of independent medical opinions could operate to the detriment of the current program which we believe is very valuable.

These problems have been largely eliminated by the committee's amendments. In S. 330 as reported, the term "reasonable doubt" has been deleted, thereby eliminating possible confusion with the standard of proof required in criminal matters. Likewise, in place of the authority to adopt an extra level of adjudication, S. 330 as reported mandates a study of two alternative methods of speeding claims resolution. Such a study should provide an opportunity to evaluate not only the need for a change in our procedures but also the effect of judicial review on our current procedures. We can also support the provisions of S. 330 as reported concerning the independent medical opinion program. By committing the decision on whether to grant an independent medical opinion solely to the discretion of the Administrator and explicitly precluding judicial review of such decisions, the committee has provided for the increased use of this valuable tool while insuring that the program remains both administratively and practically workable.

The provisions of title III of S. 330, Judicial Review, have been amended or clarified in the committee's report to eliminate some of our reservations with that title. In this regard, we note that the scope of review provisions found in new section 4026 have been amended to incorporate a reference to the "rule of prejudicial error" as is included in the Administrative Procedure Act (5 U.S.C. § 706). New sections 4025 and 4026 have also been amended to eliminate the ambiguous and redundant language which we believed likely to produce confusion by reviewing courts with respect to the intent of Congress. Likewise, the committee in its report has clarified its intent in regard to the phrase "claim for benefit" which is used throughout the bill. The report also clarifies the committee's intent that the provisions of new subsection 4025(b), which precludes the use of 38 U.S.C. § 211(a) as a bar to any civil action otherwise authorized by law, is not a jurisdictional grant and would not prevent the Veterans' Administration from asserting any defense generally available to any Federal agency to resist judicial review such as standing, ripeness, or exhaustion of administrative remedies.

Notwithstanding the committee's action described in the preceding paragraph and its rejection of the "substantial evidence" test, we continue to have concern about the scope of review provisions of title III as reported. This concern is focused on the issue of whether the Administrator's findings of fact in benefits decisions should be judicially reviewable. As explained in our report on S. 330, we believe that the scope of review provisions finally adopted should permit judicial review in those few cases in which a Veterans Administration benefit may have been unjustly denied. At the same time, we believe it is equally important that judicial review is limited to only those questions suitable for judicial determination, and that the complex and technical factual questions that can be best decided by the agency not be subject to second guessing by the courts.

The committee attempts to meet these objectives by restricting a reviewing court's authority to reverse a decision of the Veterans' Administration on a factual issue only upon a finding that the agency's decision was arbitrary, capricious, or an abuse of discretion, and only after remanding the case to the Administrator to reconsider or substantiate the record. We recognize that the committee's intent in selecting the arbitrary and capricious standard is to restrict reviewing courts to a much more narrow scope of factual review than that permitted under substantial evidence. However, as noted in both the committee's report and ours, legal scholars are still undecided on such basic questions as whether the substantial evidence test and the arbitrary or capricious test are equivalents or whether they differ and, if they differ, which one calls for broader review. K. Davis, "Administrative Law of the Seventies," supplementing "Administrative Law Treatise," § 29.00 (issued June 1976). In view of this uncertainty, we are concerned that, notwithstanding the committee's attempt to narrow the court's reviewing authority by eliminating the substantial evidence test and leaving only the arbitrary and capricious test, granting the courts the authority to engage in review of agency fact-finding

may encourage some courts to examine the facts de novo and substitute their findings on factual determinations for those of the administrative decision maker.

It is our belief that the scope of review provisions of S. 330 as reported, may well create a situation similar to that which has developed in court review of disability claims under the Social Security Act. In the context of social security cases, court review of the agency's findings of fact has resulted in substantial criticism that the courts freely substitute their judgment for that of the agency. The Department of Health, Education, and Welfare has recently submitted a legislative proposal to Congress that would preclude judicial review of the agency's findings of fact and thus restrict the courts to review only questions of law.

In rejecting a similar formula for judicial review of Veterans' Administration benefit decisions, the committee, in its report, expressed its view that such a formula might be far easier to describe than to apply in actual practice. According to the committee report, the committee believes that many Veterans' Administration cases, while involving resolution of factual issues, present a mixture of legal and factual questions. The committee apparently believes that in some situations a court, authorized to review only questions of law, might refuse to review mixed questions of fact and law, thereby leaving a claimant with incomplete judicial review, or a court might feel free to examine all questions on the record by characterizing some facet of a particular question as legal, thereby allowing review under no significant restraints.

While we agree that a number of Veterans' Administration decisions involve mixed questions of fact and law, it is our opinion that limiting the reviewing court's authority to questions of law would seldom, if ever, result in either of the above situations. Distinguishing mixed questions of fact and law in individual cases would be a function that the courts are well suited to perform. In addition, given the liberal tendency of the courts, we find it unlikely that a court would refuse to review a mixed question of fact and law. It is our belief that limiting court review to questions of law would encourage the courts to review only those questions suitable for judicial determination while discouraging them from substituting their judgment for that of the agency on complex and technical factual questions.

Finally, it must be recognized that the additional opportunity to correct factual decisions by judicial review may be particularly inappropriate and unnecessary for Veterans' Administration benefit decisions in view of the agency's liberal policy of assisting a claimant to establish his or her entitlement to every benefit that can be supported in law. It is our belief that the necessity for judicial review of agency fact determinations is substantially reduced in a benefits program which follows as a basic tenet, the principle that whenever the evidence raises a reasonable doubt, such doubt is to be resolved in favor of the claimant. (38 C.F.R. § 3.102.)

In concluding our discussion of title III of S. 330, we would like to note one area which was not covered in our original report. This is the provision of new subsection 4026(a) which authorizes claimants to institute actions for review of Veterans' Administration benefits decisions not only in the judicial district in which they reside or have their principal place of business but also in the judicial district where the principal offices of the Board of Veterans Appeals are located. While we have no major objection to this provision, it should be recognized that it may create a disproportionate burden on the caseload of a single district court.

The committee's amendments to title IV of S. 330 and its report have addressed some of our concerns with its original attorney fee provisions. In our report we expressed reservations as to: (1) judicial review of attorney fee determinations made at the administrative level, (2) assessment of attorney fees as court costs against the Veterans' Administration when it fails to prevail at the court level, and (3) the open-ended discretion of the courts in setting attorney fees.

Our concern with the provision authorizing a court to assess attorney fees as costs to be paid by the Veterans' Administration has been eliminated. In the committee's bill, the assessment of attorney fees against the Veterans' Administration is to be used only as "an extraordinary remedy." The committee's report further clarifies this intent that the court's authority in this area is to be used very sparingly.

Our reservations as to judicial review of administrative attorney fee determinations and the court's open-ended discretion in setting fees at the court level

continue. In regard to administrative fee determinations, we believe that the Veterans' Administration, as is the Social Security Administration, should be exempt from judicial review. Opening the door to review of attorney fee determinations may engender a significant number of cases. In an attempt to circumvent administratively determined fees, attorneys will undoubtedly avail themselves of this opportunity to increase their fees. Although the scope of review is limited to "abuse of discretion," we believe this limitation will neither serve as a deterrent nor appreciably lessen the number of cases filed for review. Thus, our opposition to this provision, as more fully explained in our report on S. 330 as introduced, remains unchanged.

Likewise, we remain opposed to the open-ended discretion of the court in setting attorney fees at the court level where the attorney and claimant have not entered into a contingency fee agreement. We believe that even if no attorney-client agreement is involved, a court should be limited to awarding either 25 percent of the past due benefits, such as is required in social security cases, or some finite dollar or percentage amount.

In conclusion, we note that the committee's version of S. 330 has addressed and eliminated most of our reservations with its original provisions. Nevertheless, as just discussed, we still perceive problems with the scope of review and attorney fee provisions.

Mr. Chairman, this concludes my statement. I will be pleased to answer your questions.

Senator LEAHY. Mr. McMichael, your statement will be made part of the record.

I am wondering, what would be your opinion of the creation of a new court similar to the U.S. Tax Court to just hear veterans' appeals? Is that necessary or could the procedure be provided within the present court system?

Mr. McMICHAEL. Well, you could do it either way, and there are arguments in favor of both. The arguments for a separate court are that you can have expertise in the handling of claims.

The arguments against are that you sometimes get parochial viewpoints; there is less access to the court system by a veteran who is aggrieved. The Department of Justice in general, I think, has some questions about the wisdom of going to a special court.

Senator LEAHY. The Department of Justice has expressed its concern about who would handle appeals at a reviewing court level if we had such for veterans' appeals. Would the VA handle appeals or would Justice handle the appeals?

Mr. McMICHAEL. As it stands right now, the Justice Department would have the authority to handle such appeals. If judicial review were provided for, the Veterans' Administration, I think, very much would like to have the ability to represent the agency in court.

Senator LEAHY. Which do you think would be better?

Mr. McMICHAEL. I think it would be better for the Veterans' Administration to represent the agency in the court.

Senator THURMOND. I can't hear.

Mr. McMICHAEL. The question was, if judicial review were authorized, who should represent the government in court, the Department of Justice or Veterans' Administration?

I have expressed the opinion which is, of course, my personal opinion, Senator, that the Veterans' Administration would like to handle those appeals.

Senator LEAHY. Mr. McMichael, do you think that by adopting a "question of law" review standard, you would create a great divergence

between the district courts; that is, would the precise questions handled as questions of law in one district be handled as questions of fact and, therefore, not reviewed by another?

Wouldn't this be unfair to the veteran who didn't do any kind of forum shopping? He might be stuck in a restrictive jurisdiction.

Mr. McMICHAEEL. Of course, the way the bill is presently structured, the veteran has some ability to forum shop. He can either appeal in the district in which he lives, the district in which his principal place of business is located, or in the District of Columbia. So, there would be some ability to forum shop.

Senator LEAHY. On my basic question, if we adopt a question of law standard for appeals, would we re-create such a great divergence between the district courts and the reasoning they use for undertaking appeals. Would this in turn lead to forum shopping?

Mr. McMICHAEEL. I don't think you would have any greater desire to forum shop than you would under any standard of review. Obviously, some courts are more favorable to claimants than others.

I don't believe that that would be necessarily increased if you adopted questions of law as a reviewing standard.

Senator LEAHY. Will attorneys have a problem in pleading their cases so they meet the review of law only restriction?

Mr. McMICHAEEL. It has been my experience, Senator, that attorneys are quite skillful in framing the issues in ways which allow them to bring issues before the court. And they would frame these in ways that would suggest these are issues of law rather than issues of fact.

Senator LEAHY. So really, the restriction wouldn't stop them at all; they would just frame the issue of fact in a legal term?

Mr. McMICHAEEL. It certainly wouldn't stop them from making that claim. Whether the courts would then so regard that as an issue of fact or issue of law, of course, is another matter.

Senator LEAHY. You said in your testimony that the scope of review in S. 330 as reported may "well create a situation similar to that which has developed in court review of disability claims under the Social Security Act."

Don't most disability cases present fairly simple issues?

Mr. McMICHAEEL. That depends. In a number of cases, we think they do present essentially factual questions as opposed to complex legal questions. But there are sometimes very difficult and technical factual questions that must be resolved.

Senator LEAHY. In the social security area, as I understand it, there is usually no trial; there is often not even an oral argument, and the opinions are very short, as has been testified to earlier here this afternoon. So isn't the real problem one of volume rather than case-by-case workload? Won't the VA cases really be a tiny fraction of the number of social security cases?

Mr. McMICHAEEL. We certainly have many fewer cases than does social security. We have approximately 35,000 cases which reach our Board of Veterans' Appeals each year.

Senator LEAHY. When a veteran loses his appeal before the Board of Veterans' Appeals and he has the option under the bill before us, S. 330, to file a complaint in Federal court, the VA Administrator is then given the opportunity to request a remand to reopen the case before filing an answer.

Would the threat of judicial review, in your opinion, create frequent use of this provision by the VA?

Mr. McMICHAEL. We are going to deny them all.

Senator LEAHY. Isn't there incentive in this legislation for the VA to ask for reconsideration of cases?

Mr. McMICHAEL. The provision, as I understand it, in S. 330 as reported, is a time-certain limitation on remand to the Veterans Administration. We must act on that remand within a specified period—within 90 days.

So the Veterans' Affairs Committee has included that provision to make sure that it doesn't allow us to sit on it for a long time.

Senator LEAHY. Might the temptation still be to remand cases to the VA before an extensive Federal court hearing were held?

Mr. McMICHAEL. It is my understanding that under the attorney fee provisions, the fees would be pretty well set at that point so it would not make any difference.

Senator LEAHY. Thank you.

Senator THURMOND?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. McMichael, how long has the Board of Veterans' Appeals been in operation?

Mr. McMICHAEL. I will refer to Mr. Donsbach for that.

Mr. DONSBACH. Senator Thurmond, I think the Board of Veterans' Appeals has been in operation since 1933.

Senator THURMOND. 1933? The same system that we have now has been in operation since 1933?

Mr. DONSBACH. Essentially, Senator.

Senator THURMOND. Would you supply for the record the total number of decisions rendered by the Board to date?

Mr. McMICHAEL. For fiscal year 1978, the Board disposed of 35,634 cases.

Senator THURMOND. How many members are there presently on the Board of Veterans' Appeals?

Mr. DONSBACH. There are 48 members on the Board of Veterans' Appeals today.

Senator THURMOND. Forty-eight?

Mr. DONSBACH. Forty-eight members, 16 sections, 3 members each.

Senator THURMOND. Sixteen sections, three members each?

Mr. DONSBACH. Yes, sir.

Senator THURMOND. In other words, when a veteran appeals a case, he or she has three persons to hear the case.

Mr. DONSBACH. That's right, a three-member board.

Senator THURMOND. What are the grades, generally, of the Board members and how much are they paid?

Mr. DONSBACH. They are all grade 15, and—

Senator THURMOND. What is the salary?

Mr. DONSBACH. I don't remember the first level of grade 15, but—

Senator THURMOND. Can you supply that for the record?

Mr. DONSBACH [continuing]. Approximately \$45,000 or \$47,000 a year.

Senator THURMOND. Would you supply that?

Mr. DONSBACH. Yes; the salary range for members of the Board is from \$39,432 per year [GS-15, step 2] to \$47,500 [GS-15, step 10].

Senator THURMOND. Does the Board of Appeals keep a running file on criticisms of their decisions by Members of Congress or legal organizations?

Mr. DONSBACH. At the current time, we keep a file based on the particular constituent. If there has been correspondence, it is usually postdecision. And that correspondence and any answers would be kept in the file under the veteran's or appellant's name.

Senator THURMOND. What I am trying to get at is what has been the level of criticism, over the years, of the work of the Board of Veterans' Appeals?

Mr. DONSBACH. I don't know the answer to that, but I could check to see whether any figures are kept at the Board with respect to the type of—

Mr. McMICHAEL. I would say generally that congressional criticism with respect to our decisions, Senator, have been fairly moderate. We don't receive large numbers of complaints.

Senator THURMOND. That is the impression I have. I have heard very little criticism of the present Board by members of Congress.

Has any committee of Congress ever called the Board of Veterans' Appeals in for an oversight hearing with respect to the way it has done its job, do you know?

Mr. McMICHAEL. There has been hearings in the past with respect to the operation of our claims adjudication procedure, and I believe in the early sixties, the House Committee on Veterans' Affairs held fairly extensive hearings. As a result of those hearings, there was some modifications that were made with respect to our procedures.

Senator THURMOND. Have any been held since the early sixties?

Mr. McMICHAEL. Not that I am aware of.

Senator THURMOND. Has an oversight hearing ever been conducted by either the House or Senate Veterans' Affairs Committee other than those conducted in the sixties, which you mentioned?

Mr. McMICHAEL. Not that I am aware of with respect to the operation of the Board of Veterans' Appeals. Obviously, in various hearings, questions sometimes arise about the adjudication of our claims and how we go about adjudicating them. But there have been no specific oversight hearings of which I am aware.

Senator THURMOND. Has either committee ever sent the Administrator an oversight letter on the work of the Board of Veteran's Appeals?

Mr. McMICHAEL. No; we did get quite a lot of correspondence recently on the question of moving the Board, but that has been—

Senator THURMOND. I might say for the record, I want to say along this line, I can recall only receiving one letter urging court review of the decisions. And I don't mean any disrespect by this because I am only telling you facts as I know them. The lady had just moved to South Carolina from California.

Senator LEAHY. Living in California, and moved to South Carolina?

Senator THURMOND. We have drawn a map all over the United States.

Senator LEAHY. I tell them all to vote for you every time.

Senator THURMOND. Thank you very much. I reciprocate.

Am I correct that under the committee proposal, the increased workload on the BVA would require the doubling of the size of that body over an 8-year period?

Mr. McMICHAEL. Yes; we estimate if S. 330 is enacted, we would increase our Board, and the bill authorizes an increase to 65 members.

Senator THURMOND. You would have to increase it to 65 members, you say?

Mr. McMICHAEL. That's what the committee report to S. 330 contemplates, yes.

Senator THURMOND. If the court review were limited to questions of law, including constitutionality and questions of the legality of VA procedures, would it be likely that the size of the BVA would remain close to what it is today?

Mr. McMICHAEL. I would have to supply that for the record. I think with any form of judicial review you are going to have some increase in the size, although my suspicion would be it would be less of an increase, and the scope would be somewhat narrower.

Senator THURMOND. Mr. McMichael, is there a good likelihood that under the arbitrary and capricious test, given the tendency of Federal judges to employ similar mental processes at arriving at determinations under that test and the substantial evidence test, the workload imposed upon the Federal courts as a result of enactment of S. 330 would not be significantly reduced over what would be obtained under the less strict rule of review?

Mr. McMICHAEL. Again, that is a difficult thing to try to quantify, Senator. But I would assume that the broader the scope of the review, the larger the workload we would be faced with and the courts would be faced with.

Senator THURMOND. Mr. McMichael, for the record, what would be the position of the Administration on an amendment to S. 330 that would limit court review of VA benefit determinations to questions of law? What questions of law does the Administrative favor for Federal court review?

Mr. McMICHAEL. We think any question of law, including constitutional questions, statutory interpretation, procedure, are appropriate for review. We do not have a formal policy position with respect to an amendment limiting it simply to questions of law.

But I believe the Administration would be inclined to support that if the committee so chose that course of action.

Senator THURMOND. I want to hand an amendment to you, if you could take it down there, and let you look at it and see what you think about that.

Mr. McMichael, is it the view of the Administration that Federal court judges could handily dispose of issues involving mixed questions of law and fact?

Mr. McMICHAEL. Yes, we believe they could make the appropriate distinction to handle these questions.

Senator THURMOND. How could you distinguish the VA's liberal policy of assisting claimants establish his or her entitlement to veterans' benefits versus the practice of the Social Security Administration?

Mr. McMICHAEL. I am not thoroughly familiar with the practices of the Social Security Administration. We do have a tradition in the Veterans' Administration; certainly, it is policy to attempt wherever possible to grant benefits to veteran claimants. I wouldn't suggest to you that policy has always been adhered to, but I do think we have a generally liberal policy.

We attempt wherever possible to grant benefits, and we attempt to view the claims' process as nonadversarial in nature.

Senator THURMOND. Do I read your reservation regarding the institution of suits in the judicial district where the principal offices of the BVA are located to mean that the VA is now considering moving the BVA to Alexandria or McLean?

Mr. McMICHAEL. No, we at one time considered moving it, not for purposes of what judicial district it would be in, but in order to obtain additional space in the central office. The Administrator, upon review of that proposal, has decided not to move to the location that the General Services Administration had located for us.

We have asked them to go back and locate additional space for us within the District of Columbia. So we anticipate that we will continue to be located within the District of Columbia.

Senator THURMOND. What is your view of the creation and proliferation of specialized bars? Is this something the Congress should be encouraging?

Mr. McMICHAEL. Well, I don't know whether Congress should be encouraging or not encouraging specialized bars. It strikes me that they grow by their own accord in response to what members of the bar assume to be a profitable enterprise.

Senator THURMOND. In estimating the costs of S. 330, did the Administration include the cost of litigation involving court review of attorney fee determinations?

Mr. McMICHAEL. I do not—

Senator THURMOND. And what would be your estimate of the number of such cases that would be filed each year?

Mr. McMICHAEL. We have not estimated it, and I think we would have some difficulty in arriving at an estimate. We can go back and try, but I think it would be very difficult to arrive at such an estimate.

Senator THURMOND. In his well-reasoned letter to the committee, Mr. William E. Foley, Director of the Administrative Office of the U.S. Courts, states the position of the Judicial Conference's Court Administration Subcommittee on Federal Jurisdiction on S. 330. That subcommittee favors judicial review of VA cases involving constitutional questions related to substantive and procedural due process issues and questions of statutory interpretation only.

The subcommittee also recommended establishment of a Court of Veterans' Appeals to review questions of fact.

What would be the position of the Administration on such a title I court?

Mr. McMICHAEL. We haven't been faced with that situation so we have no official position as of this moment. That certainly could be one avenue that the Congress could consider.

I did mention earlier in my testimony that the Justice Department has expressed reservations about such an approach.

Senator THURMOND. Mr. Foley also raises a question with regard to the remand provision in S. 330. He insists that the concept of finality should be a countervailing consideration. I am sympathetic to this notion since a claimant, once he left the court, would know where he stood.

What is your view of this?

Mr. McMICHAEL. Are you speaking now with respect to remands or his comments with respect to res adjudicata? If you are discussing the question with respect to remand, we think that it would be valuable for the Veterans' Administration to be able to have matters remanded to it for further consideration.

With respect to the question of res adjudicata, as I understand the position of the subcommittee, it was that they thought there should be some finality involved there.

I would only point out to you that one of the concerns expressed by veterans' organizations concerning judicial review has been that there would be a finality of opinion and that that would take away from them the right they now have which is to reopen claims on a fairly liberal basis.

So, I believe we would still wish to maintain the situation in which a veteran could under fairly liberal rules reopen a claim even if that claim had been affirmed by a reviewing court.

Senator LEAHY. Would the Senator yield for a moment? I understand those views were not the views of Mr. Foley or of the Judicial Conference. They were only the preliminary views of the subcommittee and have not been accepted by the Judicial Conference itself.

Is that correct?

Mr. McMICHAEL. That is correct. That is my understanding.

Senator THURMOND. Mr. McMichael, Mr. Carroll, chief attorney of the Legal Aid Bureau in Baltimore, gave a somewhat extensive treatment in his testimony to the facility with which a factual question may be characterized as a question of law. Do you think such practices would result in the wholesale upheaval of the Federal judiciary or do you think the courts would be able to screen the questions of law that would be appropriate for their scrutiny?

Mr. McMICHAEL. Well, I certainly think attorneys would attempt to characterize questions as questions of law. And I think in some courts they would probably be more successful than others, depending on the quality of the court.

Senator THURMOND. Mr. Carroll at page 5 of his testimony indicates current VA regulations indicate that discharges due to homosexual acts are "generally of a dishonorable nature and, therefore, automatically bar Veterans' Administration benefits to veterans who were discharged due to homosexual acts."

Would you clarify this for the committee?

Mr. McMICHAEL. Well, that is accurate only with respect to veterans who present themselves to the Veterans' Administration with an undesirable discharge and ask that the Veterans' Administration determine the character of their military service. Any veteran who has an upgraded discharge from the military discharge review board, even if that discharge were granted by reason of homosexuality, would be granted benefits.

With respect to those veterans who present themselves to the Veterans' Administration with undesirable discharges and ask for a characterization of their military service, we are presently revising our regulations and expect within the next 30 days to provide that that homosexuality would not automatically bar benefits.

Senator THURMOND. Mr. Carroll also indicates that a BVA denial of a 10- or 20-percent increase in the rating would not be a case which would be appealed to the Federal courts. He then concludes that the "burden of the courts" argument is not justified.

Would you comment on this, too?

Mr. McMICHAEL. Well, it is very difficult to know which cases would be appealed and which would not. We do know that we have veterans who reopen claims again and again on matters which when viewed objectively, one would wonder why they continue to press the point.

In attempting to arrive at an estimate of the caseload, we have been guided in part by the appellate experience from social security. To the extent that this is a valid indicator, we would estimate that approximately between 4,000 and 5,000 cases a year would be appealed to the Federal courts.

Senator THURMOND. To what extent do the issues presented in the cases before the BVA involve questions of law?

Mr. McMICHAEL. I think, by and large, they involved questions of fact. But I would defer to Mr. Donsbach if he would like to characterize it.

Mr. DONSBACH. Senator Thurmond, we attempted to review the types of decisions the Board of Veterans' Appeals renders each year, and we tried to identify those kinds of decisions where a question of law or mixed question of fact and law would arise. Of the 35,000 decisions rendered by the Board in a year, we identified approximately 13,800 cases that might contain questions of law or mixed questions of fact and law.

Senator THURMOND. What percent is it approximately?

Mr. DONSBACH. I don't have percent, but it looks like it is about 30 or 40 percent. Out of 35,000, 13,800 would contain questions of law or mixed questions of fact and law.

Senator THURMOND. A little less than a third.

Mr. DONSBACH. It is about a third, it appears.

Senator THURMOND. In round figures, what is the estimated caseload for the BVA under the arbitrary and capricious standard?

Mr. DONSBACH. I think that we had an estimate that approximately 30,000 would be possibly reviewed by the courts.

Mr. McMICHAEL. Let me say about this whole question of an arbitrary and capricious standard as opposed to a substantial evidence, that a lot depends on how the courts are going to interpret that. Perhaps the leading authority on administrative law, Kenneth Culp Davis, has suggested that the courts have so thoroughly interchanged these provisions, that there is no significant difference between arbitrary and capricious and substantial evidence test. And it is difficult to tell which might be the tighter standard.

It is clear from some cases that arbitrary and capricious has traditionally been regarded as a somewhat tighter standard than substantial evidence. Also it is my understanding that the Veterans' Affairs

Committee in reporting S. 330 expressly intended that arbitrary and capricious be a tighter standard.

Whether or not the courts would so interpret it that way, particularly in light of judicial precedent which confuses the two standards, remains to be seen. That really is the essence, I think, of the concerns we have raised, Senator: That there is a great confusion in case law as to the extent to which arbitrary and capricious really differs from substantial evidence.

Senator THURMOND. Mr. McMichael, have you had a chance to review this amendment?

Mr. McMICHAEL. I have, Senator Thurmond. It would limit court review of questions of law, including constitutional and statutory interpretations.

Senator THURMOND. What would the administration position be on this amendment?

Mr. McMICHAEL. This amendment would be consistent with the amendment being advocated by the Social Security Administration.

Senator THURMOND. Would be what?

Mr. McMICHAEL. It would be consistent with the amendment being advocated by the Social Security Administration with respect to its claims adjudication. So to that extent, it is consistent with Administration position with respect to social security. And I believe we could, if the committee decided to adopt this standard, support this standard.

Senator THURMOND. Mr. McMichael, let me get your position clear. As I understand, does the administration support the amendment or not, would you say?

Mr. McMICHAEL. This is the first time we have seen the amendment, Senator, and we would have to get back to you with an official position.

What I am attempting to say is that based on the administration's previous position with respect to amendments of the Social Security Act, this amendment would appear to be consistent with that, and I believe we can support that amendment.

Senator THURMOND. Now, when you say "this amendment"—

Mr. McMICHAEL. The amendment to which you have referred me.

Senator THURMOND. You mean the amendment which I offered in the committee?

Mr. McMICHAEL. Yes, sir.

Senator THURMOND. The Administrator would support that amendment?

Mr. McMICHAEL. I believe we could support it, yes.

Senator THURMOND. Well, the committee didn't go along quite with that.

Mr. McMICHAEL. Yes, sir.

Senator THURMOND. You might say part of the way.

Would the administration favor, then, what the committee did or not?

Mr. McMICHAEL. Well, again, it is difficult for me to place things in a situation of approving one and not approving another. Certainly, the committee attempted to meet our concerns with the bill it reported, and I think the amendments go a long way to meeting our concerns that we expressed.

We continue, however, to be concerned about how courts might interpret that provision, and it appears to us that your amendment

would more effectively prevent judicial intervention into those areas which we don't believe judicial intervention is appropriate.

Senator THURMOND. Have you seen a copy of a letter of Judge Haynsworth, chief of the Fourth Circuit Court of Appeals, on S. 330?

Mr. McMICHAEL. I haven't had an opportunity to see that, sir.

Senator THURMOND. You have seen that?

Mr. McMICHAEL. No, I have not.

Senator LEAHY. While they are looking for that, if I can just cut into your 5 minutes just for a moment on two things—

One, to put into the record at the part we spoke of substantial evidence test a letter to Senator Alan Cranston, chairman of the Committee of Veterans' Affairs, Fred Davis, University of Missouri Law School.

Second, to ask Mr. McMichael, under the proposal of Senator Thurmond that you limit judicial review to questions of law, what do you do about the 13,800 or so cases that you have testified were all mixed issues of law and fact? How do we handle those?

Mr. McMICHAEL. It would be my assumption that the courts would deal with those cases.

Mr. McMICHAEL. That didn't answer the question. What do you do if we limit review to questions of law with 13,800 cases of mixed questions of law and fact? What do we do?

Mr. McMICHAEL. I would assume the questions that present questions of mixed questions of law and fact, the courts would review those cases.

Senator LEAHY. How? I don't understand how they would do it because if they followed what Senator Thurmond suggested, they would review only questions of law. How would they review these mixed questions of law and fact cases?

Don't they have to just send them back and say, "There are questions in there we can't review, therefore, we can't give a final decision in 13,800 cases, tough?"

Mr. McMICHAEL. That could be a possibility. I think the likelihood would be that the courts would characterize many of those as questions of law or would deal with those issues that they felt were legal issues. I think as a practical matter, no court will be sending back questions it believes it ought to review. And I think the tendency is it would review those questions where we can find any question that is a question of law.

Senator LEAHY. So what you are really saying is that either the amendment of Senator Thurmond is not workable or the court is going to dishonor 13,800 cases?

Mr. McMICHAEL. I think what is going to happen, if you adopted Senator Thurmond's amendment as opposed to the committee amendment, you would have fewer cases reviewed. How many fewer cases, I guess is the question.

Senator LEAHY. Not 13,800?

Mr. McMICHAEL. I am not sure I accept that figure.

Senator LEAHY. 20,000? Give me a figure.

Mr. McMICHAEL. Well, I would like to supply something for the record.

[The material referred to above follows:]

It is, of course, difficult to predetermine which BVA decisions would be subject to court review under Senator Thurmond's amendment. Such a limited form of review would eliminate review of the majority of BVA decisions which deal with the question of whether the disease is present or not. In these cases, there is no question as to the correct interpretation of a statute or the validity of a regulation, but rather whether the appellant has the disease and when it began. BVA decisions involving the following types of issues appear most likely to be subject to court review under Senator Thurmond's amendment:

- (a) Service connection—presumptions.
- (b) Increased rating.
- (c) Vocational rehabilitation and education.
- (d) Legal relations.
- (e) Pension.

Of the 35,634 BVA decisions rendered in fiscal year 1978, approximately 13,800 involved the above issues. Applying the Social Security appeal rate, we estimate that approximately 20 percent of these decisions (2,760) would find their way into court.

Senator LEAHY. You supply it for the record and also tell me how many of those cases you think would no longer be reviewed under Senator Thurmond's amendment if it is workable.

Mr. McMICHAEL. Do I assume the courts are attempting to honor the spirit of the intent of Congress or not?

Senator LEAHY. Well, we assume that, too. That is why we don't want to propose—and I am sure Senator Thurmond, the author of the amendment, doesn't want to propose, something that is going to be either unworkable or put the court into the untenable position of not being able to fulfill the spirit and intent of the law as passed by Congress.

Thank you. If there is nothing further—

Senator THURMOND. I have a few more questions.

Senator LEAHY. I will let Senator Thurmond finish his 5 minutes. Go ahead.

Senator THURMOND. I notice Judge Haynsworth says S. 330 authorizes judicial review of claims that the Administrator's decisions, findings, and conclusions were unsupported by substantial evidence or arbitrary and capricious and abusive discretion.

Under those provisions, the court would be called upon to review findings for sufficiency, the very kind of thing which I think is an unnecessary burden in the social security cases. In other words, the chief judge of the Fourth Circuit Court of Appeals expressed an opinion I believe in line with what you have said in here and which is in line with the proposals that have been recommended by the social security system for changes.

Mr. McMICHAEL. Yes.

Senator THURMOND. Let's be very practical, Mr. McMichael, because I have no personal interest whatever in the amendment I have offered. I just felt that it would save a lot of time of the courts and would be adequately protective of evidence, and I am very interested in that.

Shouldn't we let the court of appeals only hear cases where there is a question of law involved rather than going for the facts? And that is virtually what Judge Haynsworth said here in the statement.

Well, if you pass the bill as passed by the committee, would that not allow the Federal judges to be required to go into all the facts again? Whereas under my amendment, they would just review the questions of law.

Mr. McMICHAEL. I think your proposal would be a more narrow amendment. I don't think there is any standard which can be developed, to be frank with you, Senator, that would totally preclude courts from taking a look at the facts developed in the case.

But it is, I think, clear that your amendment would be a tighter amendment, would be more difficult for a court to get into any kind of extensive review of the facts, than would be the case with the bill as reported.

Senator LEAHY. Excuse me. It would be impossible to get review of the facts if you followed the exact wording of the amendment, would it not?

Mr. McMICHAEL. Well, I don't think that is the literal result, just as the standards "arbitrary and capricious" or "substantial evidence" are not always followed in literal terms. And I think that is what Kenneth Culp Davis has been saying. I don't think it would work in literal terms.

Senator LEAHY. Is it a good legislative policy to pass a law that we know is not going to be followed or be honored only partially and the courts are going to have to kind of wink at the major provisions of it?

Mr. McMICHAEL. I think the real question is the extent to which you can legislate human nature. I just think courts are going to get into an area they want to get into, and you simply cannot legislate against human nature.

Senator LEAHY. Well, the courts will get into it if the Congress goes on the assumption that they will pass a piece of legislation because it is politically feasible to pass it, figuring that once having done that, the courts will go ahead and use it any way they want and get the Congress off the hook.

Mr. McMICHAEL. I don't think that is necessarily the result. I do think, however, that it is very difficult in legislating something like this to be as specific and clear as intended.

Senator LEAHY. I agree with that.

Senator THURMOND. Under the present procedure, to make it simple now, the adjudication staff first makes a decision, doesn't it, in hearing these cases? And if the veteran is not pleased, he can appeal to the Board of Veterans' Appeals?

Mr. McMICHAEL. That is correct.

Senator THURMOND. And under the law, I believe they more or less call that decision a conclusion by the Administrator, don't they? In other words, as stated under section 211(a), "the decision of the Administrator on any question of law or fact shall be final and conclusive." We are speaking of the Board of Veterans' Appeals, are we not?

Mr. McMICHAEL. That's correct. The Administrator has delegated that to the Board of Veterans' Appeals.

Senator THURMOND. So, in simple language, you have the adjudication staff of the VA that goes into the merits of a claim and hears it.

Then, if the claimants are displeased, they can appeal to the Board of Veterans' Appeals, which is the Administrator, so to speak.

Mr. McMICHAEL. That's correct.

Senator THURMOND. The Board of Veterans' Appeals represents the Administrator.

Now, under the amendment I offered, I believe the question for the reviewing court would be to decide all relevant questions of law and interpret constitutional and statutory provisions. In other words, the facts would be determined by the Board of Veterans' Appeals.

Mr. McMICHAEL. That is correct, although I think I ought to refer back to the point I was trying to make to the chairman, which was that it is very difficult at times to delineate what is a question of fact and what is a question of law.

Senator THURMOND. In such case, the court, of course, would take that into consideration?

Mr. McMICHAEL. Yes.

Senator THURMOND. Thank you very much.

That's all, Mr. Chairman.

Senator LEAHY. Thank you. I won't use any more of my 5 minutes, and I will give it back. And I will go to the next panel.

Thank you very much.

[The complete statements of Messrs. Addlestone, Carroll, and Harrison follow:]

PREPARED STATEMENT OF DAVID F. ADDLESTONE

Mr. Chairman and members of the committee: Thank you for the opportunity to present the views of the National Veterans Law Center (NVLC) on Senate Bill 330, as amended by the Senate Committee on Veterans' Affairs. My testimony also represents the views of the American Civil Liberties Union (ACLU) and the National Association of Concerned Veterans (NACV). In addition to my role as co-director of the National Veterans Law Center, I am generally responsible for the ACLU's military and veterans' law work and I am general counsel to NACV.

Accompanying me are Barton Stichman, Deputy Director of NVLC and Deputy General Counsel of NACV, and Kitty Juniper, a law clerk with the NVLC and the ACLU.

Since the questions concerning this committee appear to be in that range of issues where quantifiable answers are impossible, you will have to rely, in part, on judgments based on the conclusions of those with practical experience. Before I give you my views, I would briefly like to outline my background in military and veterans' law as it relates to my ability to reach general conclusions as to S. 330.

I have been a member of the South Carolina bar since 1965 and the District of Columbia bar since 1969. I served as an Air Force Judge Advocate for 3 years from 1966 through 1968.

I have tried courts-martial and administrative boards in every branch of the Armed Forces; appeared before all of the Discharge Review Boards (DRB), the Board for the Corrections of Military Records (BCMR), Courts of Military Review, and the Court of Military Appeals; and assisted veterans before the Board of Veterans Appeals, in the Court of Claims, and the U.S. District Court for the District of Columbia. I have had an exclusively military/veteran's law public interest practice since 1970; consequently, I, my officers or my associates have had contact with approximately 5,000 active duty military people seeking assistance, have been associated with attorneys who have presented several hundred DRB and BCMR cases, have been requested as counsel in approximately 1,000 more such cases, have had contact with approximately 300 attorneys or paralegals who were seeking my advice on military or veteran's law matters, and maintain close contact with more of those who specialize in similar matters.

Over the past 9 years, I have had approximately 1,000 requests from veterans seeking an attorney for VA-related problems and have conducted 40 seminars for veterans' counselors and lawyers. During the course of the latter, I have had occasion to discuss veterans' matters with almost all lawyers and nonlawyers who assist veterans on behalf of organizations not related to the traditional service organizations. My full resume is appended hereto.

In 1978, I co-authored the "Rights of Veterans," which has dramatically increased the flow of mail and calls from dissatisfied veterans to my office (and home, unfortunately).

While some may suspect that I have become sort of a flypaper for the small percentage of malcontented veterans, I think I have kept enough perspective to be able to discern the paranoid from the righteously indignant; and I am fairly certain that I understand what the average veteran, as opposed to the professional veteran, wants. In short, they are screaming for the VA to be subject to judicial accountability. It is inconceivable to me that a majority of any veteran's organization members, when polled, would oppose an opportunity to have the same access to Federal courts as veterans with less than honorable discharges, dissatisfied BCMR applicants, and other citizens who feel that they have been improperly denied public benefits.

Recently while on vacation in South Carolina, I met a Vietnam veteran. His reaction was similar to that of most veterans when they learn that they are the only class of citizens, corporate and private, who do not have complete access to the courts. Astonishment!

I will not reiterate our comments concerning judicial review and some of the minor aspects of S. 330 that we previously presented; however, we ask that our testimony before the Committee on Veterans' Affairs be included in the record of these hearings.

Before I address the specific issues in Senator Kennedy's letter of June 15, I would like to make one additional point concerning judicial review. Some of the opponents of judicial review make a large issue of leaving the Board of Veterans' Appeals (BVA) as the sole expert and final arbiter of technical questions of veterans' law. This overlooks the fact that the BVA currently is not the final arbiter of such matters.

Section 4004(c) of Title 38 provides: "The Board (BVA) shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer."

Thus, it is quite clear that unpopular BVA decisions can be nullified through a variety of VA procedures.

SCOPE OF REVIEW

I will now address the question of scope of review currently contained in S. 330, as reported.

We strongly support the original draft of the bill which included the "Substantial Evidence Test" as the standard for review of the VA's factual determinations. We believe that the adoption of the weaker arbitrary and capricious standard would be detrimental to the establishment of quality case development and factfinding within the VA.

The committee's stated objective in narrowing the scope of judicial review was to avoid the situation in which a court would substitute its judgment on factual questions for that of the VA. However, the provisions in the bill precluding reviewing courts from reversing factual determinations without remanding to the Administration for further action would seem to satisfy that objective by itself without the need to weaken the standard which would be applicable. While the substantial evidence standard is sometimes considered to be somewhat broader than the arbitrary and capricious test, the former is itself a limited form of review. All that is required under this standard is that VA decisions be reasonable. See *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966). Since VA proceedings are nonadversarial, it is imperative that reasonableness in decision-making be required.

It is not clear that the arbitrary and capricious standard is any more precise than the substantial evidence test. The committee itself stated that "the precise impact of restricting a court's ability to review factual determinations using the arbitrary, capricious, or abuse of discretion standard is not clearly predictable in all cases." (Report at 49.) Courts are familiar with the substantial evidence, and it is used to review actions of other agencies not formally subject to APA adjudication requirements. In reviewing VA decisions, this standard could be easily

applied by the courts. Section 106 of S. 330 requires that Board decisions include a written statement of the findings and conclusions and reasons therefore on all material issues of fact. Thus, a full record will be established which would enable the courts to effectively apply the substantial evidence test.

We have attached a copy of the comments of the National Veterans Law Center made to the Administrative Conference on October 23, 1978, which explains in more detail the reasons for substantial evidence standard of review of VA determinations.

While there is a significant body of opinion that the substantial evidence test and the arbitrary and capricious test are in reality very much different ways to say the same thing about the judicial review of informal decisionmaking,¹ we feel that as a practical matter the former test is more manageable and would in the long run work to the benefit of more veterans. By this I mean how will the average judge and the average small practice attorney face an individual veteran's case. Most small practitioners I meet or who call me are not terribly sophisticated in the sophistry of proving what is arbitrary and capricious much less the finer aspects of the review of agency decisions. If lawyers cannot carefully analyze a record for a court, there is a substantial likelihood that the Court also will not have time to do so. In my view, the average attorney would have an easier time in analyzing facts within the framework of what evidence is substantial enough to support a factual finding. Hence, veterans would be more likely to find low price or pro bono assistance if highly honed skills of legal semantics are not required. In a related area, I would recommend that the committee review the congressionally mandated Legal Services Corporation (LSC) study of the delivery of legal services to veterans. The conclusion reached was that the involvement of LSC attorneys would be beneficial.

As a final comment here, I would like to suggest that the arbitrary and capricious standard is so nebulous that it would lead to nonuniform decisionmaking and would probably permit judges to substitute their judgments for that of the BVA.

REVIEW RESTRICTED TO QUESTIONS OF LAW

We also understand that there is some sentiment supporting the removal of factual review altogether. One result of that approach is that the judicial review practice will be limited to those attorneys highly specialized in administrative law and the art of making questions of fact into questions of law. We feel that it would be undesirable to encourage the isolation of such a practice of law since veterans are fairly evenly distributed throughout the country and these type attorneys are more likely to be found in large firms in big cities. The average practitioner doing a favor or a brother-in-law or a fellow vet would thus be discouraged from trying to weave and dodge to turn fact situations x into a "denial of due process."

While some people may argue that there is no need for factual review until it is proven that there is such a need, all I can say is that it is an unfortunate state of affairs if veterans are the only class of citizens against whom the "presumption of bureaucratic correctness" is involved. Every bureaucratic action affecting any corporation can be challenged in court; prisoners get court hearings with ease; public assistance recipients are entitled to Federal court review; and bad paper veterans denied relief by a DRB and BCMR can seek Federal court review on questions of fact. See *Robinson v. Resor*, 469 F. 2d 945 (D.C. Cir. 1972) where the court held it to be factual error not to upgrade an undeservable discharge. I could go on, but try explaining this to a Vietnam combat veteran.

¹In *Aircraft Owners and Pilots Association v. Federal Aviation Administration*, No. 77-1904, (D.C. Cir. 5/17/79) the Court of Appeals for the District of Columbia Circuit said:

"We note, however, that this court recently has ascribed to the view that the functional distinction between the substantial evidence and the arbitrary and capricious standards may be largely semantic in the limited class of cases involving challenges to the validity of factual findings made through informal proceedings. See *Public Sys. v. Federal Energy Regulatory Comm.*, No. 76-1609, slip op. at 13-14 n.34 (D.C. Cir. Feb. 16, 1979); *Pacific Legal Foundation v. Department of Transp.*, No. 77-1797, slip op. at 10-11 & n.35 (D.C. Cir. Feb. 1, 1979); *American Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1028-29 (D.C. Cir. 1977), cert. denied, 435 U.S. 907 (1978). See also *Paccar, Inc. v. National Highway Traffic Safety Administration*, 573 F.2d 632, 636 (9th Cir.), cert. denied, 99 S. Ct. 94 (1978); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 705 (2d Cir.) (Lumbard, J., concurring), cert. denied, 423 U.S. 927 (1975); *Associated Indus. of New York State, Inc. v. Department of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973) (Friendly, J.), cert. denied, 416 U.S. 942 (1974). Slip Opinion at 14, n.28.

The final issue raised is, as I acknowledged at the beginning, one that is not likely given to a quantifiable answer. I will, however, try to speculate and offer some facts not presented in the past.

The VA is so generous in its granting of rehearings that many disgruntled veterans reapply every year at great expense to the VA. In my experience, once a would-be-litigant is rejected by enough lawyers who bluntly say "you have no case," they cease their unproductive efforts. The same is even more true for the litigant who loses in court. Thus, judicial review would provide two avenues to stop frivolous re-adjustments of many claims.

The elimination of the current criminal penalty for charging more than \$10 for representation of a veteran before the VA will also tend to weed out frivolous litigation. The entry of attorneys at early stages of a VA case will likely provide many veterans with the answer that "you have no case" before a Federal court complaint is filed to make the filing deadline. I suspect many attorneys will be called upon because of the current high pro se appeal rate despite the presence of free nonlawyer counsel indicates a desire on the part of many veterans to have representation from "outside the building." It is not an uncommon phenomenon that lay people are leery of free government-sponsored assistance. I learned this as a judge advocate and public defender.

The early rush to the courthouse that will occur will abate after the courts begin to define the limits of relief available. Examples can be seen in the review of decisions of the DRBs and BCMRs. These agencies handle tens of thousands of cases a year; and to my knowledge, fewer than 100 cases are pursued in Federal court. My intelligence is fairly good on this issue because it is my business to monitor closely such cases.

I suppose the question of expertise is related to this issue. This is a red herring. Courts review the most arcane of agency subjects with general ease and the Court of Claims has been reviewing BCMR denials of disability claims for years.

Thus, in my view, reliance on this point to close veterans out of the third branch of the Government would lead to further societal inequities. The poor would remain without assistance while the well-off or persistent and articulate can continue to find Washington-based attorneys to end run the VA by a variety of methods. Those include utilizing the Privacy Act to correct erroneous records, application to the BCMRs for record correction, and challenges to VA rules as not having been prepublished pursuant to VA regulations. An example of the latter is the suit we recently filed on behalf of a number of veterans denied Agent Orange-related claims based in part on an unpublished VA rule (or "guidance" as the VA calls it). *White v. Cleland*, CA No. 79-1426 D.D.C. These alternatives to judicial review are simply not in the best interests of orderly decision-making. Another unfortunate alternative would be malpractice suits against service officers of veterans organization. See *Rodriguez v. Marine Corps League*, CA No. 79-98-A (E.D. Va.).

In sum, I believe that judicial review would make the BVA more cautious in its decisionmaking to a beneficial degree and more importantly give the BVA more authority to control the often inconsistent and uncontrolled decisionmaking by the regional offices. This I believe is the unofficial view of the BVA.

If we must prove our case by showing a percentage of abuses, we will be hard pressed. Such a thing could not be proven. Given veterans the benefit of the doubt and let the sunshine clause be the solution.

I would be happy to answer your questions.

PREPARED STATEMENT OF DENNIS W. CARROLL

My name is Dennis W. Carroll and I am the chief attorney of the Administrative Law Center, Legal Aid Bureau, Inc. of Baltimore, Maryland. The Administrative Law Center is a unit of a legal services program which specializes in the administrative law problems of low-income persons. We represent hundreds of low-income clients annually before State and Federal administrative agencies, as well as before State and Federal courts for judicial review final agency action. I am here today to testify on behalf of our clients who are low-income recipients of and claimants for various forms of veterans' benefits in the Baltimore, Maryland area.

I am convinced that judicial review final decisions of the Administrator of Veterans' Affairs is both necessary and appropriate. The need for judicial review in the Veterans' Administration context is amply demonstrated by the testimony presented by numerous witnesses to the Committee on Veterans' Affairs during both the 95th and 96th Congresses. During the hearings on S. 330 and on S. 364, the predecessor of S. 330, numerous witnesses cited examples of cases in which they believed that judicial review of final decisions of the Veterans' Administration was necessary in order to assure justice for veterans. In view of the already existing record, and in view of this committee's request, I will not today discuss why I believe judicial review is important but will instead focus on the provisions of S. 330 now before the committee.

The most important portion of the bill is, in my view, the scope of judicial review provisions contained in title III, § 302. The bill basically provides judicial review of questions of law, whether they be constitutional, statutory or regulatory questions and review of fact and mixed fact-law questions under an "arbitrary and capricious" standard. Review under the "substantial evidence" test, now available in many contexts including social security cases, has not been provided. There seems to be little question but that an arbitrary and capricious standard of review is more restrictive than the familiar substantial evidence test. I believe that the substantial evidence test, which is widely available in similar administrative law contexts, including cases involving social security, black lung, welfare and unemployment insurance benefits, would be more advantageous to veterans and would permit a greater level of judicial inquiry. Nonetheless, the arbitrary and capricious standard would permit a reviewing court to set aside the most egregious decisions and would greatly benefit claimants. Thus, while I would prefer the substantial evidence test, the arbitrary and capricious standards contained in the bill would be an acceptable method of review.

There has been some suggestion that the scope of review be limited to questions of law. In my view, this proposal would be both unfair and unwise. Review of factual determinations is available in most public benefit systems. To continue to single out veterans, by providing significantly less judicial review than is now available to welfare recipients and social security applicants, is simply inequitable. If Congress does provide, at long last, for some form of judicial review, it should at a minimum permit reviewing courts to set aside the most egregious factual determinations.

Moreover, it is difficult to see how this proposal would work in practice. In cases of this nature there simply is not a perfectly clear line between questions of law and questions of fact. In social security cases, for example, many of the cases which are today decided under the substantial evidence test, could just as easily be characterized by counsel and reviewing courts as questions of law. In social security cases, the Secretary of HEW is required to consider, in weighing medical evidence, the qualifications of the physician in question and several rules have been developed, e.g., a treating physician's opinion is entitled to more weight than a doctor who has examined the claimant only on one occasion. See *Vitek v. Finch*, 438 F. 2d 1157 (4th Cir. 1971). When a court remands or reverses a decision using this rule, it is normally phrased in terms of substantial evidence:

"This court has emphasized that the opinion of a claimant's treating physician is entitled to great weight, for it reflects an expert judgment based on a continuing observation of a patient's condition over a prolonged period of time. * * * There is no basis for the Appeals Council's rejection of the expert opinion of the claimant's treating physician that Vitek was unable to work. * * * We hold there is no substantial evidence, on the record as a whole, to support Secretary's denial of benefits * * *." (*Vitek, supra*, at 1160.)

This same result could be reached by transforming the very same question, which has been characterized as a question of fact, into a question of law: "As a matter of law, the Secretary failed to afford sufficient evidentiary weight to the expert opinion of the claimant's treating physician and the decision must be reversed."

Unfortunately, this situation would leave the scope of review totally in the hands of plaintiff's counsel and the particular judge who was assigned the case.

I am currently representing an individual who received an Other than Honorable Discharge from the Marine Corps due to the commission of homosexual acts. His discharge has recently been upgraded by the Naval Discharge Review Board since the military has, since my client was discharged, significantly altered their

policies regarding discharges due to homosexual acts and since there were no aggravating circumstances in my client's case, it was clear that he was entitled to a discharge under honorable conditions.

Previously, however, this client applied for Veterans' Administration benefits and was denied through the entire administrative process including the Board of Veterans' Appeals. In cases in which the veteran has received an Other than Honorable Discharge (as distinguished from a Dishonorable Discharge or a Bad Conduct Discharge), the Veterans' Administration is required to adjudicate on a case-by-case basis those discharges to determine whether they were issued under "dishonorable conditions." Despite this requirement, the Veterans' Administration has, by regulation, provided that discharges due to homosexual acts are generally of a dishonorable nature and therefore automatically bar Veterans' Administration benefits to veterans who were discharged due to homosexual acts.

If judicial review was available to this client, he could have sought review in two separate ways to achieve the same results. First, he could assert that there was no substantial evidence, or it was arbitrary and capricious to determine, that this discharge was under "dishonorable conditions." Alternatively, he could have asserted, as a matter of law, in view of the military's change in policy, that discharges due to homosexual acts are not generally of a dishonorable nature. The result would be precisely the same for the client but if review of questions of law only were provided, the client would have to carefully characterize his case in order to convince the judge that a question of law was in fact involved.

Another example is contained in a recent decision of the Veterans' Administration which held that service connection had not been established for the veteran's seizure disorder. The veteran attempted to establish service connection through the testimony and statements of friends, relatives and former service members, to the effect that his seizures increased while in the military service. His claim was denied on the basis that: "In the absence of official service records showing the diagnosis of, or the treatment for epilepsy, the statement of others would be insufficient to substantiate a claim for service aggravation for this preservice condition."

If this individual was entitled to review of questions of law, his argument would be that, as a matter of law, statements of friends or relatives are legally sufficient evidence to establish service connection even without official service records. If the same individual was entitled to factual review, he would assert that it was arbitrary and capricious to determine that there was no service connection for his condition in view of the entire record, including the statements of friends, relatives and former service members.

The inevitable result of an attempt to restrict review of cases of this nature to strictly legal questions will be to foster needless litigation. Judges in some districts courts will be reviewing the precise question under a question of law rule, which judges in another district will dismiss as questions of fact. The skill and awareness of counsel in constructing the theory of the case will no doubt greatly affect the availability of review for particular veterans. Moreover, a wide disparity of judicial treatment could be expected to occur among the numerous district and circuit courts.

It would be extremely unfortunate in my view to create this situation and would be enormously unfair to veterans living in districts in which the court took a restrictive view of what constitutes a question of law. I thus urge the committee to retain review of factual determinations under the arbitrary and capricious standard.

Another concern raised by some is the burden S. 330 would create for the Federal district court system. No one would suggest that congestion in the Federal court is not a problem. However, I am in complete agreement with the Committee on Veterans' Affairs that:

"The Committee . . . fails to see the justification for veterans and their survivors with claims for VA benefits being singled out to bear the burden of efforts to protect the federal judiciary from too high work loads. There are a wide variety of other methods for dealing with judicial work load problems, such as eliminating or further limiting federal court diversity jurisdiction, without precluding a certain class of claimants from any judicial recourse at all." (See Report of the Committee on Veteran Affairs, U.S. Senate, No. 96-178.)

In addition, however, I believe that the "burden on the courts" argument is simply not justified. First, many Veterans' Administration cases involve simply

an increase in the rating of disability. The denial of a 10 or 20 percent increase in rating simply is not the kind of case which would be easily challenged under an arbitrary and capricious standard. This is in stark contrast to the social security system where there is an all or nothing method of determining disability and in close cases Federal judges may give a social security claimant the benefit of the doubt since the claimant would otherwise receive no benefits. This situation would certainly not apply to Veterans' Administration cases in which increased rating was the only issue.

Second, Veterans' Administration cases, like social security cases, will not involve the level of judicial resources that the statistics might suggest. What the Center for Administrative Justice noted in regard to social security cases would be applicable as well to Veterans' Administration cases:

"It is clear, however, that case load statistics give an inflated measure of the burden social security litigation places on the time and energy of the district courts. The amount of time invested in the average case is undoubtedly very small. Most disability cases present simple issues. There is no trial and often not even an oral appearance. The opinions are very short, averaging less than three pages. Moreover, about twelve percent of all actions filed are automatically remanded to the Secretary on its own motion before answer, consuming no judicial time at all. And another fifteen percent or so are assigned to magistrates. These suggestions suggest that—except in a few districts which experience the heaviest concentration of Title II and black lung cases—disability litigation is not as burdensome as the case load figures indicate." (See Study of the Social Security Administration Hearing System, Center for Administrative Justice (October, 1977, at 257).)

My experience in litigating numerous social security in Federal district and circuit courts confirms the Center for Administrative Justice's analysis of social security cases.

Overall, I believe S. 330 as written will provide for an orderly, efficient and equitable system of judicial review for Veterans' Administration claimants. I thus urge the committee to act favorably on this bill without significant change.

Thank you very much for providing me the opportunity to comment on this most important legislation.

PREPARED STATEMENT OF MARION EDWYN HARRISON

Mr. Chairman, members of the committee, we appreciate this opportunity to present the views of the American Bar Association on S. 330. I am Marion Edwyn Harrison, past chairman of the association's section of administration law and currently a member of its house of delegates.

In 1958, the house of delegates adopted a resolution expressing its support of legislation which would permit judicial review of decisions of the Veterans' Administration (appendix "A"). In 1975 the House of Delegates reaffirmed that position (appendix "B").

§ 211(a) of title 38 of the United States Code presently pertinently provides that decisions of the Veterans' Administration under any benefits program "... shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise." The effect of this statutory provision is to put the Veterans' Administration above the law in the administration of its benefits programs and in the distribution of benefits authorized by Congress. Because the American Bar Association is committed to the proposition that no one should be beneath or above the law, it opposes this restriction. Because S. 330 would change this and subject the decisions of the Veterans' Administration to judicial review, the American Bar Association supports S. 330.

S. 330 also would reverse what the American Bar Association considers an ominous trend. Although ABA adopted a resolution in 1958 supporting legislation which would make VA decisions subject to judicial review, in 1970 a last-minute amendment to a Veterans' Administration appropriation bill further narrowed the reviewability of VA decisions. This change was made without notice or hearing for those persons adversely affected by the amendment. The amendment principally was prompted by the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Tracy v. Gleason*, 379 F. 2d 469 (D.C. Cir. 1967), which construes the no-review clause as applying only to initial claims for benefits. In view of the regressive nature of this 1970 amendment the

ABA was moved to reaffirm its position by adopting the 1975 resolution, once again expressing its support for legislation which would subject decisions of the VA to some judicial review.

The American Bar Association believes that there is no place in American Government for a closed system. The Freedom of Information Act and the Sunshine (Open Meetings) law represent significant advances in assuring the American people that their governmental officials are complying with the law. To make the VA answerable in the courts to a legitimately based assertion of unlawful action on the part of the VA would be a similar advance.

Although most judges who have faced challenges to VA benefits decisions have given a literal effect to the no-review clause (see *e.g.*, *Hahn, Gray*, 203 F. 2d 625, 626 (D.C. Cir. 1953) "It was the purpose of that statute to remove the possibility of judicial relief even if the action of the Administrator was arbitrary and capricious . . .") recent opinions have hinted that in a proper case involving an egregious interference with a constitutional right, the language might be disregarded. (See *Johnson v. Robison*, 415 U.S. 361, 368 (1974).)

It is obvious, however, that our courts are inclined to avoid this constitutional issue if at all possible, and that a ruling on that issue would involve a direct conflict between what Congress has said and what the courts believe to be a constitutional limitation. Adoption of S. 330 would avoid such an unnecessary confrontation by making it clear that it was never the intention of Congress to put the VA above the law.

We note that § 106(2) of S. 330 effectively deals with one of the most frequently expressed fears of those who are skeptical about the value of judicial review; namely, the fear that judicial decisions will destroy VA flexibility by establishing precedents which the VA is not free to disregard. That provision makes it clear that the VA is free to allow a claim even though its earlier disallowance is upheld on a judicial appeal.

Although the section of administrative law of the American Bar Association takes the position that the principles of the Federal Administrative Procedure Act should apply to all on-the-record adjudications, it may be that there are special reasons for exempting the VA from requirements which might not harmonize with the other procedures stipulated by S. 330. For this reason we take no position, at the present time, on the provisions of § 4010(f) of § 109 of S. 330 which provides that the procedural provisions of S. 330 shall be exclusive.

The venue provisions of § 4025 of sec. 302(a) are consistent with the position long endorsed by the American Bar Association that forums convenient to the plaintiff should be made available whenever possible. Similarly, the use of the district court as the review forum tracks American Bar Association suggestions. Although S. 330 provides for a record, the administrative processing anticipated by S. 330 does not reach the level necessary for direct appeal to the courts of appeal.

One writer has predicted a dire impact upon the dockets of the Federal courts if review of VA decisions be allowed. A Deputy Assistant Attorney General, appearing before the Senate Veterans' Affairs Committee in the 95th Congress, 1st Session, in 1977, prophesied 4,600 appeals if the VA decisionmaking process were open to judicial review—a total increase in cases filed in the federal district courts of 3.4 percent.

The prediction is unrealistic:

1. The number of filings rarely is an accurate measure of drain. Many cases routinely are remanded or withdrawn because settled or for other reasons. Cases decided on the merits may be decided summarily, without trial and with lesser impact upon judicial manpower. (J. Mashaw et al., *Social Security Hearings and Appeals* 127 (1978).)

2. VA benefits decisions are not forged in the same trial-type crucible as social security benefits decisions, thus providing fewer technical or procedural grounds for judicial appeal. Social security benefits decisions are subject to the trial-type procedures of 5 U.S.C. §§ 556 and 557. Under S. 330 VA benefits decisions are specifically exempted.

3. Of the 23,000 claims rejected by the Board of Veterans Appeals, 20,000 are rejections of routine appeals made without a hearing. If the claimant did not think his case important enough to seek a hearing before the VA board, it would not be likely he would retain counsel and go to court.

4. The typical VA rejected claim does not compare in severity to the typical social security rejected claim. In social security, the claimant's disability either

prevents him from engaging in a gainful occupation or it does not—he receives disability benefits or he does not. The vast majority of VA rejected claims involve upgrading of previously awarded percentage disability ratings. The veteran either gets a little more money or he continues to receive the amount he has been receiving. The incentive to litigate in the courts is inevitably less.

ABA supports complete judicial review of VA decisions. We would not like to see the proposed legislation rewritten to limit review to question of law.

1. It often is impossible to separate a question of law from a question of fact. Much scholarly work has been written on this illusive dichotomy. The courts wrestle with it intermittently. Legislation that attempts the severance invites lawyer-like complication. One of several reasons why much litigation is complicated is because the underlying statutes create or portend the complication. This is to be avoided.

2. More often than not, review by a court of a final agency decision invokes the substantial evidence rule. The test is not what the court would have found as fact based upon the evidence—in other words, no secondguessing—but only whether the court finds substantial evidence in the agency record to support the decision of the agency. This test allows the agency far broader judgment than any other standard of review. It is established in administrative law. It is uncomplicated.

The court also looks to arbitrary or capricious agency action, in other words, irrationality. That ground for reversal is infrequent.

In conclusion, we mention that ABA fully supports the basic principles of S. 330—to remove the existing \$10.00 limitation of attorneys fees and to open VA decisions to judicial review.

On behalf of the American Bar Association we appreciate the opportunity to testify on the judicial review provisions of S. 330.

We would be glad to answer any questions you may have.

APPENDIX A—RESOLUTION OF THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION, ADOPTED 1958 MIDYEAR MEETING

Be It Resolved, That the American Bar Association supports the enactment of H.R. 272, 85th Congress, First Session, a bill to permit judicial review of decisions of the Administrator of Veterans' Affairs, with a recommended amendment which would substitute review in the appropriate United States District Court for review in the appropriate Circuit Court of Appeals and that it authorize the Section of Administrative Law to appear before the committees of Congress and to take such other steps as it deems appropriate to carry out this resolution.

APPENDIX B—RESOLUTION OF THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION ADOPTED AUGUST 1975

Be It Resolved, That the American Bar Association reaffirms its endorsement of the principle of judicial review of the decisions of the Administrator of Veterans Affairs; and

Be It Further Resolved, That the President of the Association or his designee is hereby authorized publicly to urge enactment of this proposal of law.

Senator LEAHY. Mr. Addlestone, I understand you are a member of the South Carolina bar and have been since 1965.

STATEMENT BY DAVID ADDLESTONE, NATIONAL VETERANS LAW CENTER; DENNIS W. CARROLL, ADMINISTRATIVE LAW CENTER, BALTIMORE, MD.; AND MARION HARRISON, AMERICAN BAR ASSOCIATION

Mr. ADDLESTONE. That's correct, Senator.

Senator THURMOND. He is a good man, then, I'm sure.

Senator LEAHY. I know that you served in the Air Force as judge advocate for 3 years. And I know Senator Thurmond's strong regard for the Air Force as well as the Army, the Navy, the Marines, the WACS, WAVES, and WAFS.

We are delighted to have you here, of course. We are going to put your statements in the record. When you were on vacation recently in South Carolina, you were talking with Vietnam veterans. Just tell us a little bit about it.

Mr. ADDLESTONE. It was really a simple matter. When I speak to veterans, it is usually the Vietnam-era veteran, but not exclusively. They are usually astonished to learn that the agency that is supposed to assist them in making a transition back into civilian life is the only agency that doesn't have its decisions reviewed by the Federal courts.

The common expression is, "It seems to me the Federal judges review every nitpicking agency rule that involves corporations and other groups of citizens, why do we have to prove we need judicial review?"

Senator LEAHY. What you are saying is that the VA is the only one that doesn't have judicial review, and when you were talking with the veteran in South Carolina, he seemed amazed at this point; is that a fact?

Mr. ADDLESTONE. That's right.

Senator THURMOND. Mr. Chairman, may I interrupt just a moment? This morning the South Carolina congressional delegation set a meeting of the delegation for 2 o'clock on the independent truckers' strike. Our people in South Carolina are losing millions of dollars a day because some of the independent truckers are preventing other truckers from carrying fresh fruits and vegetables. It is a very urgent matter. The meeting of the congressional delegation was only scheduled this morning to discuss this problem.

I would like to go over there for a few minutes, and I will return. I have a few questions. If I don't get back, you could let counsel here ask them.

Senator LEAHY. And if by any chance we finish prior to your coming back, we will submit those questions to the record, so they can answer back.

Senator THURMOND. I would like for the minority to expound these questions if you have no objection.

Senator LEAHY. We could propound them for the record if you are not here.

Senator THURMOND. Then, if he wants to come back for a little bit, if you give him that chance.

We always allow counsel to do it, and I did it this morning for Senator Metzenbaum.

Senator LEAHY. You know my feelings, anything you ask for, you always get. You know that.

Senator THURMOND. Thank you.

I will try to get back as soon as I can.

Senator LEAHY. We will miss you during the time, but I will struggle along.

Incidentally, the reaction that you get from the veterans of South Carolina is very similar to the reaction I have from the veterans of

Vermont and actually was quite similar to my own reaction when I first found out.

Title IV contains language which authorizes attorneys fees to be taken from past-due benefits if the claimant is successful. What is your position on this section?

What I am wondering is, do you feel that adequate representation will result from this contingency fee provision? Won't the veteran be destitute when he or she seeks this advice?

Mr. ADDLESTONE. I have been wrestling with this for about 6 months. I am not sure what the answer is as public interest attorneys, we always favor having government assessed fees when we prevail. But I guess to be candid, I think attorneys will act as a screening device for bad cases.

If someone comes to you with a bad case, the response is don't waste my time, the court's time, or your money. So, I think in some respects, it will make attorneys be somewhat conservative about going into court because the fees are going to be somewhat limited, and they are normally going to be based on fees prevailing in the case. To that extent, it would limit the flow of cases to Federal court.

Senator LEAHY. I see.

The opponents of this bill raise the argument that there is no hue and cry from the veterans population regarding the outrageous and unfair determinations by the BVA. Is that your experience? Do those instances frequently arise?

Mr. ADDLESTONE. Well, the traditional organizations have opposed judicial review. And I don't think if they polled their members that would be their position. I think their problem is difficulty in just bureaucratically changing the policies.

I think without the large veterans organizations changing their position, the opponents are always going to say it is not a hue and cry. I have been handling military and veterans' cases for the last 9 years, and most of the veterans' cases that go to the American Civil Liberties Union, many affiliates or similar organizations somehow get to my desk by referral. I have also received many telephone calls and I am in close contact with attorneys who have similar practices.

Literally, we have had thousands of veterans, and this is a rough estimate, but an accurate one, who have contacted me, the offices I have been associated with, the attorneys I have been associated with, and others, say about 100 attorneys in the country that specialize in military veterans' law, and the theme is always the same: Any place we can go with this case; and surprise that court is not an alternative. As a practical matter, there is a place we can go. That is to the Board for Correction of Military Records. They have the authority under 10 U.S.C 1552 to correct any error or injustice in military records.

But it is a highly specialized practice located here in Washington. The Board has never traveled, and rarely grants hearings. So only the well-to-do veteran, usually former officers concerned about promotion or medical retirement problems, can resort to that Board.

Senator LEAHY. Mr. Carroll, do you have a view on that?

Mr. CARROLL. Yes, Senator. I am not sure why there is not a flood of veterans writing Senator Thurmond, for example. I believe part of the reason is because they have been told by somebody in the VA, or a

service organization, that they don't meet the requirements of law, and that there is nothing further they can do.

People in the same circumstances in social security context know they have certain rights, know they have the right to appeal, and have the right to go to Federal court. Because they are advised of these rights, I think they insist on pursuing their claim.

The other thing is that the Veterans' Administration has a liberal reopening policy so in some respects, the case is never over, although it stays within the agency, and they are able to file another application and start the process over again.

Senator LEAHY. Any other member feel free to answer this. Would you expect a reviewing court to substitute its judgment for the Board of Veterans' Appeals even though it would be far less familiar with the everyday body of cases dealt with at the VA? Would a specialized court of Veterans appeals be preferable to review these cases?

Mr. CARROLL. I would like to respond to that.

The concept of a specialized court dealing simply with veterans' cases does not seem to me to be appropriate. There is a certain value in having nonspecialized, noninstitutional Federal judges reviewing the evidence submitted against the legal standards Congress provided in the statute.

The danger of specialized courts is, first, veterans will have very little access to it since it presumably would be located in Washington. Second, the delays would probably be great. Third, the judges wouldn't have the broad experience a Federal judge brings to review of general agency practices and decisionmaking.

I just don't think a specialized court for veterans' cases alone is the way to go. I also don't think that Federal judges would be—I know the complaint has been made here today and the fear is that Federal judges would be substituting their judgment on factual issues for the judgment in the Veterans' Administration's decision. I don't think that fear is justified.

I think it stretches it a great deal to use the social security experience as a perfect analysis because I think the 50-percent reversals rate by Federal courts demonstrates that the Social Security Administration is not properly deciding cases, and for a lot of reasons that don't apply to the VA. The social security system of appeal is quite different from the Veterans' Administration system of appeal. The Board of Veterans' Appeals is far more of a true appellate body than its counterpart in the social security.

So in the VA context you have more consistency on appeal, and you have less decisions escaping the agency that were totally wrong. So I don't think you can use the 50-percent reversal rate as a standard because the VA is probably more often right than the Social Security Administration.

Senator LEAHY. Mr. Harrison, did you want to add to that?

Mr. HARRISON. Senator Leahy, as to your two questions, the ABA section of administrative law would oppose the creation of a special court.

If I may amplify, the general experience has been that special courts present two problems as a minimum, sometimes more than two.

One is the degree to which they are swept up by the specialized bar

that appears before them and by the agency whose decisions are reviewed. The other is the lack of interest or perhaps lesser interest among the outstanding lawyers and judges of the country in serving upon them. For both of those reasons and others, the ABA administrative law section, acting under blanket authority, meaning it is cleared with all other interested sections and committees in the ABA, has always opposed special courts.

If I may speak personally, I would say if there were to be a special court established in addition to those now existing, this would not be a particularly beneficial place to experiment.

As to the more substantive question that you asked, Senator Leahy, I think there is an awful lot of criticism, much of it unfounded, that judges substitute their own opinions for those of the agency. My experience, both in and out of government over some 25 years at the bar, has been that most Federal district judges and most Federal appellate judges are wrestling sometimes rather desperately with problems as they perceive them, problems which sometimes are created by confusion in the record, problems which sometimes are created by complicated or vague or both vague and complicated statutes.

Although one does face the predilection that one judge might be an activist in the sense of trying to maximize the opportunity he perceives Congress gave him, whereas another might be more disposed to strictly construe a statute, nevertheless, most of them are attempting to achieve the route that they perceive Congress intended.

I think it is perhaps a certain measure of sour grapes when you have people contending that the judge has substituted his views for the views of the agency or his view of the evidence over the agency's view of the evidence.

Senator LEAHY. The American Legion claims that they and other national veterans' organizations have a success rate almost identical to attorneys in arguing cases before the VA. As you know, attorneys can be more selective in accepting clients.

Does the need really exist for lawyers to be present at the administrative level?

Mr. HARRISON. Could you repeat that question?

Senator LEAHY. Does the need really exist for lawyers to be present at the administrative level?

Mr. HARRISON. Within the Veterans' Administration?

Senator LEAHY. Yes.

Mr. HARRISON. I frankly can't answer it because so far as I know, no lawyer has ever been privileged to be there.

Mr. ADDLESTONE. Senator Leahy, I supplied a copy to the committee staff of a relevant report. The Legal Services Corporation recently reported to Congress in a section 1007(b) study of the delivery of legal services to certain groups of Americans. Veterans are included in that. And their analysis indicated that in the very few veterans cases that attorneys are getting into, they are enjoying a higher success rate than the service organizations.

They did a slightly different and later analysis, and I think the study itself is very instructive on the whole issue. It is based largely on interviews with BVA, Discharge Review Board and Board of Corrections of Military Records personnel. They generally were very sup-

portive of adding a new level or new type of representation to the system as long as it didn't supplant what already exists.

Mr. CARROLL. Senator, if I may respond to that?

Senator LEAHY. Certainly.

Mr. CARROLL. It is true, attorneys can be more selective. I know that in legal services programs where I work, we have tremendous case-loads, and many of the straight VA disability cases we refer to the service organizations for their representation.

So we are selective, but what we select are the more difficult cases involving more difficult questions of law, questions of State law, marriage, divorce, that kind of thing.

So, you know, the statistic does not necessarily reflect attorneys selecting easy cases.

Senator LEAHY. Following Senator Thurmond's suggestion, I will turn this over to counsel because I have to go and vote in a matter that is before another subcommittee.

Counsel for the majority will take the remaining amount of my time, and then counsel for the minority. If Senator Thurmond returns, he may follow whatever procedure he wants.

I appreciate the fact that you were here as always, and I will probably have further questions to submit for the record.

At the conclusion of questions of majority counsel and minority counsel or any that Senator Thurmond might have, the committee will stand in recess subject to the call of the chair.

Mr. CRAWFORD. Mr. Addlestone, I am going to ask these questions for Senator Thurmond. His first question asks if you are from Sumter, South Carolina.

Mr. ADDLESTONE. That's correct.

Mr. CRAWFORD. I knew you were from Sumter from the days when the Veterans' Affairs Committee worked on S. 1307. We are glad to have you here today.

I notice that the volume of cases which your organization has handled is very large. What would be your estimate of the number of cases handled by The American Legion and the Veterans of Foreign Wars annually?

Mr. ADDLESTONE. I know we did an analysis. I believe each national service officer of the DAV handled about five cases a day, and I don't know one lawyer who would feel he or she could competently handle that many cases in a day.

Mr. CRAWFORD. I don't know the number myself, but I intend to write those organizations and determine that information for the record. He would be pleased to send you a copy if you would be interested.

You indicate on page 3 of your testimony that one Vietnam veteran whom you encountered in South Carolina, and I quote your phrase, "like most veterans," I was astonished to learn that he or she could not appeal final determinations of the Veterans' Administration to the Federal courts."

Isn't that assertion, "like most veterans," a rather careless assertion for an attorney of your caliber? Do you not mean that most veterans, of the veterans who you have personally queried on the question of judicial review, have expressed, to use your term "astonishment" over this fact?

I ask you this, Mr. Addlestone, because you know we have in excess of 30 million veterans. And when most of 30 million people are astonished over something, we in the Congress usually hear something about it.

Take the Panama Canal, for example. Most of the people who wrote to me, and I got a lot of letters, were astonished that the United States was going to give the canal away. The people were more than astonished; they expressed outrage in their letters. The Senate voted to give it away, anyway.

Needless to say, the people who now write to me on this matter, and I still get a lot of letters, are still astonished.

Mr. ADDLESTONE. In response, I have no opinion on the canal, but most veterans don't really have to be concerned about it because they are satisfied with the service they get at the VA. So the question as a practical matter is relatively rare.

I was only referring to those people who are turned down. When they find out and write or call me and say, "I want to take this case to court," and I say, "No, you can't."

"Not no I won't, but you can't."

They are astonished. And I bring it up, too, in conversation with veterans and say, "Did you know that"? and their reaction is astonishment.

Mr. CRAWFORD. I think the point the Senator wanted to make is the veterans constituency is very large. And when you make an assertion that most veterans are astonished, that assertion should perhaps be qualified.

Mr. ADDLESTONE. I can only speak for the ones that I represent and the National Association of Concerned Veterans which represents about 20,000 Vietnam-era veterans. Most of them are not members of the traditional organizations.

Mr. CRAWFORD. That was the point the Senator wanted to make.

Would you characterize Federal employees as a class of citizens? You indicate in your statement that veterans as a class of citizens are unique in that they are denied access to the Federal courts to address their grievances with the VA. Would not the fact that Federal employees subject to the unreviewable determinations of the Federal Employees Compensation Board make them a class of citizens who do not have complete access to the Federal courts?

Mr. ADDLESTONE. That is a limited aspect of their employment.

Mr. CRAWFORD. Right, but in that respect, are they not considered to be a class of citizens who are denied access to the Federal courts?

Mr. ADDLESTONE. I guess it would be possible to so define them.

Mr. CRAWFORD. How do you respond to the view of some experts that there is really no difference in the application of the substantial evidence and the arbitrary and capricious tests? I want to say that I think your analysis of this subject in your testimony is very good.

Mr. ADDLESTONE. I think the courts are pretty much mixing the two together. It maybe no difference which you use. I think as a practical matter, it is a lot easier to use the substantial evidence test in these cases. They are going to go to general practitioners. These are small cases. They are going to be handled by a brother-in-law on a pro bono basis or by a small practitioner doing a favor for a friend. She or he is not making

any money out of this. And it is a lot easier to make a factual analysis based on substantial evidence. You line the appropriate facts on one side of the page and the contrary facts on the other.

I think it makes for an easier analysis. With the arbitrary and capricious standard, you start dealing with sophistry. When you start dealing with sophistry, it takes up a lot of legal time. Probably there is no practical difference in the decision of the court. I just find it an easier test.

The Court of Claims uses it to review Board for Correction of Military Records decisions which are very similar in many respects to the VA cases.

So, we have got a different standard being used for one group of people that manage to take the fight into the Court of Claims than in the proposed bill.

It just seems to me it would be easier to have a single body of case law so we would not have the possibility of judges substituting their judgment for that of the VA. I think the arbitrary and capricious standard allows them to do so. A district court judge in South Carolina recently used that standard to overrule a government agency.

Mr. CRAWFORD. Judge Leventhal in his discussion of the Judicial Conference's recommendation with respect to S. 330 indicated that he used approximately the same minimal processes to arrive at a determination under substantial evidence as that under arbitrary and capricious.

In view of Judge Leventhal's observation, I wonder if there would be any reduction of the court's workload as a result of the adoption of arbitrary and capricious standard.

Mr. ADDLESTONE. I think it would be a lot easier, again, if the practitioner talked about substantial evidence. He would be more inclined to present a decent brief to the Federal judge. It will make it easier work for the courts if a lawyer will go through an analysis saying, "We have these facts to support this conclusion, or we have no facts to support the ultimate conclusion." The arbitrary and capricious analysis sometimes takes the forms if there is no "scintilla of evidence" to support this conclusion.

It seems to me likely to be easier for people to use the former analysis and easier for Federal judges to place the decisionmaking in a framework that is more meaningful.

Mr. CRAWFORD. One final question, Mr. Addlestone.

As a practical matter, don't attorneys specializing in administrative law handle a great many of the administrative law cases today? How would limiting the scope of review to questions of law change this in any major respect?

Mr. ADDLESTONE. Well, I think the answer is almost the same as the last one. The very clever always are going to say this particular factual pattern is a denial of due process of the law. Therefore, it is a matter of law and not a factual question.

I don't think the average general practitioner is going to be willing to engage in that sort of very, very fine-honed sophistry that is required to come within the issue of law test.

I think what we end up doing is closing out the poor veterans, people dispersed in small cities who are not going to have access to the administrative law specialists.

Mr. CRAWFORD. In a great many instances, this is a very general question, in the legal profession, is it not a fair statement to make that the likelihood that a claimant's rights being vindicated may very well depend upon the skill of the practitioner?

Mr. ADDLESTONE. I think that is a fair statement.

Mr. HARRISON. We would like to think that, anyway.

Mr. CRAWFORD. Then, this situation presented by the questions of law, presenting a characterization problem to the attorney, may not be very much different from other areas of law. Similar problems are presented in the areas of taxation, and practice in Federal courts.

For example, you may want to characterize a particular set of facts as presenting a Federal question. Isn't this situation similar to the one presented in your testimony with respect to characterization of an issue as a legal or factual one?

Mr. ADDLESTONE. I won't agree with that totally. I think the average practitioner is, if anything, at least trained to marshal facts to support a conclusion, the conclusion being a factual conclusion for example that the onset of the illness occurred on day *x*. Of course, I could turn that into a question of law very easily.

I daresay I don't think the average practitioner could do it as easily. It would require skills which they are not called upon to use.

I mean, we have gotten to a very sophisticated level in the practice of law, and I don't think the average citizen is getting the delivery of quality legal services. As a consequence, I don't think the average veteran will get adequate delivery of legal services if the courts are limited to review of questions of law.

It astounds me the veteran should be the scapegoat for this experiment in judicial restraint.

Mr. CRAWFORD. Would anyone else care to respond to that question? There were a couple nodding their heads. I don't believe I could recall the entire question at this time.

Would you care to?

Mr. CARROLL. The question was the difficulty in distinguishing between questions of law and questions in fact, and I would agree with Dave Addlestone that the task is going to depend on the hands of the skill and awareness of the practitioner and the willingness of the judge to accept review.

Many people when they talk about questions of law envision the question of statutory interpretation, but the question of law review could also include questions of legal sufficiency of certain evidence, burden of proof, the weight to be accorded in certain types of evidence, and that kind of thing.

When you accept the proposition of the question of law included much more than just the interpretation of Government statute, then you are leaving it up to the skill of the practitioner constructing the theory of this case in presenting his case as a question of law as opposed to a question of fact. So I would agree with what Mr. Addlestone said generally.

Mr. CRAWFORD. The point again the Senator wanted to make is not altogether different. Is that not practically the same as is presented in a number of other areas in the law such as an individual getting the Federal court, for instance, on a Federal question?

Aren't you presented with a similar problem—one of characterizing a problem as presenting a Federal question, for instance?

Mr. CARROLL. It is a matter of degree, I think. In some cases, it is more difficult than other cases. If you have a difficult constitutional case, the skill of the attorney representing you may have more effect on the ultimate outcome than a traffic case.

The point I am making is if you are trying to walk a line between questions of law and fact in a lot of cases, it would be very difficult.

Mr. DAVIDSON. Thank you.

Before concluding, at the direction of the chairman, I would like to ask the panel if they would care to respond to the committee in writing on a couple of issues that were raised earlier.

One, we would appreciate it if you would elaborate on the use of the substantial evidence versus the arbitrary and capricious standard because two or three members of the panel have discussed that issue. And particularly since Mr. McMichael suggested that the differences between the two are very difficult to discern.

You also might want to put your comments in the context of a memorandum by Prof. Fred Davis that was inserted in the record which we would make available to you.

And the other issue on which we would welcome comment is the testimony by Mr. Harrison which provided some very good examples of the difference between the factual record provided in the Social Security Administration cases versus the factual record provided in a Veterans' Administration case.

And if the other members of the panel would like to comment on that difference from the standpoint of reviewability, I think that would be very useful to the committee.

We may also have two or three other questions that we would submit in writing for response.

Thank you.

[Whereupon, at 3 p.m., the hearing was adjourned.]

APPENDIX

96TH CONGRESS
1ST SESSION**S. 330**

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 19, 1979

Referred to the Committee on Veterans' Affairs

AN ACT

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

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That (a) this Act may be cited as the "Veterans' Administra-
- 4 tion Adjudication Procedure and Judicial Review Act".

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

6 TITLE I—ADJUDICATION PROCEDURES

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

9 **“§ 3007. Burden of proof; benefit of the doubt**

10 “(a) Except when otherwise provided by the Adminis-
11 trator in accordance with the provisions of this title, a claim-
12 ant for benefits under laws administered by the Veterans’
13 Administration shall have the burden of submitting evidence
14 sufficient to justify a belief by a fair and impartial individual
15 that the claim is well grounded.

16 “(b) When, after consideration of all evidence and mate-
17 rial of record in any proceeding before the Veterans’ Admin-
18 istration on a claim for any benefit under laws administered
19 by the Veterans’ Administration, there is an approximate
20 balance of positive and negative evidence regarding the
21 merits of an issue material to the determination of such
22 claim, the benefit of the doubt in resolving each such issue
23 will be given to the claimant, but nothing in this section shall
24 be construed as shifting from a claimant to the Administrator
25 the burden described in subsection (a) of this section.”.

1 (b)(1) The table of chapters at the beginning of title 38,
2 United States Code, and the table of chapters at the begin-
3 ning of part IV of such title are each amended by striking out
4 in the item relating to chapter 51 "Applications" and insert-
5 ing in lieu thereof "Claims,".

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

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

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

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

16 **"Subchapter I—Claims".**

17 (d) The table of sections at the beginning of such chap-
18 ter is amended by adding after the item relating to section
19 3006 a new item as follows:

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

20 SEC. 102. Section 3311 is amended by adding at the
21 end thereof the following new sentence: "Subpenas author-
22 ized under this section shall be served by any individual au-
23 thorized by the Administrator by (1) delivering a copy thereof
24 to the individual named therein, or (2) mailing by registered

1 or certified mail addressed to such individual at such individ-
2 ual's last dwelling place or principal place of business. A
3 verified return by the individual so serving the subpoena set-
4 ting forth the manner of service, or, in the case of service by
5 registered or certified mail, the return post office receipt
6 therefor signed by the individual so served shall be proof of
7 service.”.

8 SEC. 103. Section 4001 is amended by—

9 (1) amending subsection (a) by striking out “(not
10 more than fifty)” and inserting in lieu thereof “(not
11 more than sixty-five)”, striking out “associate”, and
12 inserting before the period at the end of the second
13 sentence “in a timely manner”; and

14 (2) adding at the end thereof the following new
15 subsection:

16 “(c) The Chairman shall submit a report to the appro-
17 priate committees of the Congress, not later than February 1,
18 1980, and annually thereafter, on the experience of the
19 Board during the prior fiscal year together with projections
20 for the fiscal year in which the report is submitted and the
21 subsequent fiscal year. Such report shall contain, as a mini-
22 mum, the number of cases appealed to the Board during
23 the prior fiscal year, the number of cases pending before the
24 Board at the beginning and end of such fiscal year, the
25 number of such cases which were filed during each of the

1 twenty-four months preceding the prior fiscal year and the
2 then current fiscal year, respectively, the average length of
3 time a case was before the Board between the time of filing
4 of an appeal and the disposition during the prior fiscal year,
5 and the number of members and other professional, adminis-
6 trative, clerical, stenographic, and other personnel employed
7 by the Board at the end of the prior fiscal year. The projec-
8 tions for the current fiscal year and subsequent fiscal year
9 shall include, for each such year, estimates of the number of
10 cases to be appealed to the Board and an evaluation of the
11 Board's ability, based on existing and projected personnel
12 levels, to ensure timely disposition of such appeals as re-
13 quired by subsection (a) of this section."

14 SEC. 104. Section 4002 is amended by striking out "as-
15 sociate" wherever it appears.

16 SEC. 105. Subsections (a) and (b) of section 4003 are
17 amended by inserting a comma and "after notice to the
18 claimant of such additional information together with an op-
19 portunity to be heard in connection with such information,"
20 after "concerned" both places it appears.

21 SEC. 106. Section 4004 is amended by—

22 (1) inserting before the period at the end of the
23 second sentence in subsection (a) "after affording the
24 claimant an opportunity for a hearing and shall be

1 based exclusively on evidence and material of record in
2 the proceeding and on applicable provisions of law”;

3 (2) amending subsection (b) by striking out “in the
4 form of official reports from the proper service depart-
5 ment” and adding at the end thereof, the following
6 new sentence: “A judicial decision upholding, in whole
7 or in part, the disallowance of a claim under chapter
8 72 of this title shall not diminish the Board’s discre-
9 tionary authority under this subsection to reopen the
10 claim and review the Board’s former decision.”; and

11 (3) amending subsection (d) to read as follows:

12 “(d) After reaching a decision in each case, the Board
13 shall promptly mail notice of its decision to the claimant and
14 the claimant’s authorized representative, if any, at the last
15 known address of the claimant and at the last known address
16 of the claimant’s authorized representative, if any. Each deci-
17 sion of the Board shall include—

18 “(1) a written statement of the Board’s findings
19 and conclusions, and reasons or bases therefor, on all
20 material issues of fact, law, and matters of discretion
21 presented on the record; and

22 “(2) an order granting appropriate relief or deny-
23 ing relief.”.

1 SEC. 107. Paragraph (5) of subsection (d) of section
2 4005 is amended by striking out "will base its decision on the
3 entire record and".

4 SEC. 108. Section 4009 is amended by adding after sub-
5 section (b) the following new subsection:

6 "(c) Whenever there exists in the evidence of record in
7 an appeal case a substantial disagreement between the sub-
8 stantiated findings or opinions of two physicians with respect
9 to an issue material to the outcome of the case, the Board
10 shall, upon the request of the claimant and, after taking ap-
11 propriate action to attempt to resolve the disagreement, ar-
12 range for an advisory medical opinion in accordance with the
13 procedure prescribed in subsection (b) of this section. If the
14 Board denies the request of such claimant for such an opin-
15 ion, the Board shall prepare and provide to the claimant and
16 the claimant's authorized representative, if any, a statement
17 setting forth the basis for its determination. Actions of the
18 Board under this subsection, including any such denial, shall
19 be final and conclusive and no other official or any court of
20 the United States shall have the power or jurisdiction to
21 review any aspect of any such decision by an action in the
22 nature of mandamus or otherwise, chapter 72 of this title to
23 the contrary notwithstanding."

24 SEC. 109. (a) Chapter 71 is further amended by adding
25 at the end thereof the following new sections:

1 "§ 4010. Adjudication procedures

2 “(a) For purposes of conducting any hearing, investiga-
3 tion, or other proceeding in connection with the consideration
4 of a claim for benefits under laws administered by the Veter-
5 ans’ Administration, the Administrator may administer oaths
6 and affirmations, examine witnesses, and receive evidence.

7 “(b) Any oral, documentary, or other evidence, even
8 though inadmissible under the rules of evidence applicable to
9 judicial proceedings, may be admitted in a hearing, investiga-
10 tion, or other proceeding in connection with the consideration
11 of a claim for benefits under laws administered by the Veter-
12 ans’ Administration, but the Administrator, under regulations
13 of the Administrator, may provide for the exclusion of irrele-
14 vant, immaterial, or unduly repetitious evidence.

15 “(c) In the course of any proceeding before the Board,
16 any party to such proceeding or such party’s authorized rep-
17 resentative shall be afforded opportunity—

18 “(1) at a reasonable time prior thereto as well as
19 during such proceeding, to examine and, on payment of
20 a fee prescribed pursuant to section 3302(b) of this title
21 (not to exceed the direct cost of duplication), obtain
22 copies of the contents of the case files and all docu-
23 ments and records to be used by the Veterans’ Admin-
24 istration at such proceeding;

25 “(2) to present witnesses and evidence, subject
26 only to such restrictions as may be set forth in regula-

1 tions of the Administrator, pursuant to subsection (b) of
2 this section, as to materiality, relevance, and undue
3 repetition;

4 “(3) to make oral argument and submit written
5 contentions, in the form of a brief or similar document,
6 on substantive and procedural issues;

7 “(4) to submit rebuttal evidence;

8 “(5) to present medical opinions and request an
9 independent advisory medical opinion pursuant to sec-
10 tion 4009(c) of this title; and

11 “(6) to serve written interrogatories on any
12 person, including employees of the Veterans' Adminis-
13 tration, which interrogatories shall be answered sepa-
14 rately and fully in writing and under oath unless writ-
15 ten objection thereto, in whole or in part, is filed with
16 the Administrator by the person to whom the interro-
17 gatories are directed or such person's representative.

18 The fee provided for in clause (1) of this subsection may be
19 waived by the Administrator, pursuant to regulations which
20 the Administrator shall prescribe, on account of the party's
21 inability to pay or for other good cause shown. In the event
22 of any objection, filed under clause (6) of this subsection, the
23 Administrator shall, pursuant to regulations which the Ad-
24 ministrator shall prescribe establishing standards consistent
25 with standards for protective orders under rule 26(c) of the

1 Rules of Civil Procedure for the United States District
2 Courts, evaluate such objection and issue an order (A) direct-
3 ing that, within such period as the Administrator shall speci-
4 fy, the interrogatory or interrogatories objected to be an-
5 swered as served or answered after modification, or (B) indi-
6 cating that the interrogatory or interrogatories are no longer
7 required to be answered. If any person upon whom interroga-
8 tories are served under this section fails to answer or fails to
9 provide responsive answers to any such interrogatories
10 within thirty days after service or such additional time as the
11 Administrator may allow, the Administrator shall, upon a
12 statement or showing by the party who served such interro-
13 gatories of general relevance and reasonable scope of the evi-
14 dence sought, issue a subpoena pursuant to section 3311 of
15 this title (with enforcement of such subpoena to be available
16 pursuant to section 3313 of this title) for such person's ap-
17 pearance and testimony on such interrogatories at a deposi-
18 tion on written questions, at a location within one hundred
19 miles of where such person resides, is employed, or transacts
20 business.

21 “(d) In the course of any hearing, investigation, or other
22 proceeding in connection with the consideration of a claim for
23 benefits under laws administered by the Veterans' Adminis-
24 tration, an employee of the Veterans' Administration may at
25 any time disqualify himself or herself, on the basis of personal

1 bias or other cause, from adjudicating the claim. On the filing
2 by a party in good faith of a timely and sufficient affidavit
3 averring personal bias or other cause for disqualification on
4 the part of such an employee, the Administrator shall deter-
5 mine the matter as a part of the record and decision in the
6 case.

7 “(e) The transcript or recording of testimony and the
8 exhibits, together with all papers and requests filed in the
9 proceeding, and the decision of the Board shall constitute the
10 exclusive record for decision in accordance with section
11 4004(a) of this title, and shall be available for inspection by
12 any party to such proceeding, or such party’s authorized rep-
13 resentative, at reasonable times and places and, on the pay-
14 ment of a fee prescribed pursuant to section 3302(b) of this
15 title (not to exceed the direct cost of duplication), shall be
16 copied for the claimant or such claimant’s authorized repre-
17 sentative within a reasonable time. Such fee may be waived
18 by the Administrator, pursuant to regulations which the Ad-
19 ministrator shall prescribe, on account of the party’s inability
20 to pay or for other good cause shown.

21 “(f) Notwithstanding section 4004(a) of this title, section
22 554(a) of title 5, or any other provision of law, adjudication
23 and hearing procedures prescribed in this title and in regula-
24 tions prescribed by the Administrator under this title for the
25 purpose of administering veterans’ benefits shall be exclusive

1 with respect to hearings, investigations, and other proceed-
2 ings in connection with the consideration of a claim for bene-
3 fits under laws administered by the Veterans' Administration.

4 **"§ 4011. Notice of procedural rights**

5 "In the case of any denial, in whole or in part, of a
6 claim for benefits under laws administered by the Veterans'
7 Administration, the Administrator shall, at each procedural
8 stage relating to the disposition of such a claim, beginning
9 with denial after an initial review or determination and in-
10 cluding the furnishing of a statement of the case and the
11 making of a final determination by the Board, provide to the
12 claimant and such claimant's authorized representative, if
13 any, written notice of the procedural rights of the claimant.
14 Such notices shall be on such forms as the Administrator
15 shall prescribe by regulation and shall include, in easily un-
16 derstandable language, with respect to proceedings before the
17 Veterans' Administration, (1) descriptions of all subsequent
18 procedural stages provided for by statute, regulation, or Vet-
19 erans' Administration policy, (2) descriptions of all rights of
20 the claimant expressly provided for in or pursuant to this
21 chapter, of the claimant's rights to a hearing, to reconsider-
22 ation, to appeal, and to representation, and of any specific
23 procedures necessary to obtain the various forms of review
24 available for consideration of the claim, and (3) such other
25 information as the Administrator, as a matter of discretion,

1 determines would be useful and practical to assist the claim-
2 ant in obtaining full consideration of the claim.”.

3 (b) The table of sections at the beginning of such chap-
4 ter is amended by adding at the end thereof the following
5 new items:

“4010. Adjudication procedures.

“4011. Notice of procedural rights.”.

6 SEC. 110. (a) In order to evaluate the feasibility and
7 desirability of alternative methods of (1) assuring the resolu-
8 tion of claims before the Administrator of Veterans' Affairs
9 for benefits under laws administered by the Veterans' Admin-
10 istration as promptly and efficiently as feasible following the
11 filing of a notice of disagreement pursuant to section 4005 (as
12 amended by section 107 of this Act) or 4005A of title 38,
13 United States Code, and (2) affording claimants the opportu-
14 nity for a hearing before or review by a disinterested authori-
15 ty at a location as convenient and on as timely basis as possi-
16 ble for each claimant, the Administrator shall conduct a study
17 for a period of between twenty-four and thirty-six months, in
18 at least six geographic areas and at at least six regional of-
19 fices of the Veterans' Administration, involving two alterna-
20 tive methods for resolution of claims.

21 (b)(1) In at least three such geographic areas, the Ad-
22 ministrator shall provide an intermediate-level adjudication
23 process whereby each claimant may, within the time afforded
24 such claimant under paragraph (3) of such section 4005(d) or

1 4005A(b) to file an appeal, request a de novo hearing at the
2 agency of original jurisdiction (as described in section
3 4005(b)(1) of such title 38) before a panel of three Veterans'
4 Administration employees, each of whose primary responsi-
5 bilities include adjudicative functions but none of whom shall
6 have previously considered the merits of the claim at issue.
7 Following such hearing, such panel shall render a decision
8 and prepare a new statement of the case in accordance with
9 the requirements of paragraphs (1) and (2) of such section
10 4005(d). Such new statement of the case shall, for all pur-
11 poses relating to appeals under chapter 71 of such title 38, be
12 considered to be a statement of the case as required by para-
13 graph (1) of such section 4005(d).

14 (2) In at least three other such geographic areas, the
15 Administrator shall provide for an enhanced schedule of
16 visits, on at least a quarterly basis each year, by a panel or
17 panels of the Board of Veterans' Appeals to conduct formal
18 recorded hearings pursuant to such section 4002 in such
19 areas.

20 (c) Not later than forty-two months after the date of
21 enactment of this Act, the Administrator shall report to the
22 Congress on the results of this study, including an evaluation
23 of the cost factors associated with each alternative on an
24 annual basis, the impact on the workload of the regional
25 office in question, the impact on the annual caseload of the

1 Board of Veterans' Appeals resulting from both alternatives,
 2 together with any recommendations for administrative or leg-
 3 islative action, or both, as may be indicated by the results of
 4 such study.

5 **TITLE II—VETERANS' ADMINISTRATION RULE**
 6 **MAKING**

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

9 **"§ 221. Rule making**

10 "Notwithstanding the provisions of subsection (a)(2) of
 11 section 553 of title 5, the promulgation of rules and regula-
 12 tions by the Administrator shall be subject to the require-
 13 ments of section 553 of title 5."

14 (b) The table of sections at the beginning of such chap-
 15 ter is amended by adding at the end thereof the following:

"221. Rule making."

16 **TITLE III—JUDICIAL REVIEW**

17 **SEC. 301.** Subsection (a) of section 211 is amended by
 18 striking out "sections 775, 784" and inserting in lieu thereof
 19 "sections 775 and 784 and chapter 72 of this title".

20 **SEC. 302.** (a) Part V is amended by adding after chap-
 21 ter 71 the following new chapter:

22 **"CHAPTER 72—JUDICIAL REVIEW**

"Sec.

"4025. Jurisdiction.

"4026. Scope of review.

"4027. Remands.

"4028. Survival of actions.

"4029. Appellate review.

1 **"§ 4025. Jurisdiction**

2 “(a) Except as provided in subsection (h) of this section,
3 after any final decision of the Administrator (as defined in
4 subsection (c) of this section) adverse to a claimant in a
5 matter involving a claim for benefits under any law adminis-
6 tered by the Veterans' Administration, such claimant may
7 obtain a review of such decision in a civil action commenced
8 within 180 days after the mailing to the claimant of notice of
9 such decision pursuant to section 4004 of this title. Such
10 action shall be brought against the Administrator in the dis-
11 trict court of the United States for the judicial district in
12 which the plaintiff resides or the plaintiff's principal place of
13 business is located, or in the district court of the United
14 States for the judicial district where the principal offices of
15 the Board of Veterans' Appeals (established under section
16 4001 of this title) are located.

17 “(b) In any matter not directly involving a claim for
18 benefits under any law administered by the Veterans' Admin-
19 istration, section 211(a) of this title shall not operate as a bar
20 to a civil action otherwise authorized by law.

21 “(c) For the purposes of this chapter, 'final decision of
22 the Administrator' means—

23 “(1) a final determination of the Board of Veter-
24 ans' Appeals pursuant to section 4004 (a) or (b) of this
25 title; or

1 “(2) a dismissal of an appeal by the Board of Vet-
2 erans’ Appeals pursuant to section 4005 or 4008 of
3 this title.

4 “(d) The provisions of this chapter shall not apply to
5 matters arising under chapters 19 and 37 of this title.

6 “(e) The complaint initiating an action under subsection
7 (a) of this section shall contain sufficient information to
8 permit the Administrator to identify and locate the plaintiff’s
9 Veterans’ Administration records.

10 “(f) The Administrator shall file, together with the
11 answer to a complaint filed pursuant to subsection (a) of this
12 section, a certified copy of the records upon which the find-
13 ings of fact and decision complained of are based or, if the
14 Administrator determines that the cost of filing copies of all
15 such records is unduly expensive, the Administrator shall file
16 a complete index of all documents, transcripts, or other mate-
17 rials comprising such records. After such index is filed and
18 after considering requests from all parties, the court shall re-
19 quire the Administrator to file certified copies of such indexed
20 items as the court deems relevant to its consideration of the
21 case.

22 “(g) In an action brought pursuant to subsection (a) of
23 this section, the court shall have the power, upon the plead-
24 ings and the records specified in subsection (f) of this section,
25 to enter judgment in accordance with section 4026 of this

1 title or remand the cause in accordance with section 4026 or
2 4027 of this title.

3 “(h) No action may be brought under this section as to
4 which the initial claim for benefits is filed pursuant to section
5 3001(a) of this title after the last day of the fifth fiscal year
6 beginning after the effective date of this section.

7 **“§ 4026. Scope of review**

8 “(a) In any action brought under section 4025 of this
9 title, the reviewing court to the extent necessary to its deci-
10 sion and when presented, shall—

11 “(1) decide all relevant questions of law, interpret
12 constitutional, statutory, and regulatory provisions;

13 “(2) compel action of the Administrator unlaw-
14 fully withheld; and

15 “(3) hold unlawful and set aside decisions, find-
16 ings, and conclusions of the Administrator found to
17 be—

18 “(A) arbitrary, capricious, an abuse of discre-
19 tion, or otherwise not in accordance with law;

20 “(B) contrary to constitutional right, power,
21 privilege, or immunity;

22 “(C) in excess of statutory jurisdiction, au-
23 thority, or limitations, or in violation of a statu-
24 tory right; or

1 “(D) without observance of procedure re-
2 quired by law.

3 If the reviewing court finds the Administrator’s finding on an
4 issue or issues of fact to be arbitrary, capricious, or an abuse
5 of discretion, the court shall specify where it finds the record
6 to be deficient and shall, prior to entering any judgment re-
7 versing such decision, remand the case a single time to the
8 Administrator for further action not inconsistent with the
9 court’s order. In so remanding, the court shall specify a rea-
10 sonable period within which the Administrator shall complete
11 the required action and, if such action is not completed within
12 the time specified by the court, the matter shall be returned
13 to the court for its action.

14 “(b) In making the determinations under subsection (a)
15 of this section, the court shall review the whole record before
16 the court pursuant to section 4025(f) of this title or those
17 parts of such record cited by a party, and due account shall
18 be taken of the rule of prejudicial error.

19 “(c) In no event shall findings of fact made by the Ad-
20 ministrator be subject to trial de novo by the reviewing court.

21 “(d) When a final decision of the Administrator (as de-
22 fined in section 4025(c) of this title) is rendered in any case
23 and such decision is adverse to a party solely because of the
24 failure of such party to comply with any applicable regulation
25 of the Veterans’ Administration, the court shall review only

1 questions raised as to compliance with and the validity of the
2 regulation.

3 **“§ 4027. Remands**

4 “In any action brought under section 4025 of this title,
5 the reviewing court shall, on motion of the Administrator
6 made before the expiration of the time specified for the filing
7 of an answer to a complaint filed pursuant to subsection (a) of
8 such section, allow a single remand of a case to the Adminis-
9 trator for further review by the Administrator. If such review
10 is not completed within ninety days after the date of such
11 remand, the matter shall be returned to the court for its
12 action. At any time after the Administrator files an answer,
13 the court may, in the exercise of its discretion, remand the
14 case to the Administrator for further action by the Adminis-
15 trator and, if either party shall apply to the court for leave to
16 adduce additional evidence and shall show to the satisfaction
17 of the court that such additional evidence is material and that
18 there is good cause for granting such leave, the court shall
19 remand the case to the Administrator and order such addi-
20 tional evidence to be taken by the Administrator; in either
21 case, the court may specify a reasonable period of time
22 within which the Administrator shall complete the required
23 action. After a case is remanded to the Administrator, and
24 after further action by the Administrator, including consider-
25 ation of any additional evidence, the Administrator shall

1 modify, supplement, or affirm the findings of fact or decision,
 2 or both, and shall file with the court any such modification,
 3 supplementation, or affirmation of findings of fact or decision
 4 or both, as the case may be, and certified copies of any addi-
 5 tional records and evidence upon which such modification,
 6 supplementation, or affirmation was based. Any such modifi-
 7 cation, supplementation, or affirmation of the findings of fact
 8 or decision shall be reviewable by the court only to the extent
 9 provided in section 4026 of this title with respect to the
 10 review of the original findings of fact and decision.

11 **“§ 4028. Survival of actions**

12 “Any action brought under section 4025 of this title
 13 shall survive, notwithstanding any change in the person oc-
 14 cupying the Office of the Administrator or any vacancy in
 15 such office.

16 **“§ 4029. Appellate review**

17 “The decisions of a district court pursuant to this chap-
 18 ter shall be subject to appellate review by the courts of ap-
 19 peals and the Supreme Court of the United States in the
 20 same manner as judgments in other civil actions.”.

21 (b) The table of chapters at the beginning of title 38,
 22 United States Code, and the table of chapters at the begin-
 23 ning of part V are each amended by adding below the item
 24 relating to chapter 71 a new item as follows:

“72. Judicial Review..... 4025”.

1 SEC. 303. Subsection (d) of section 1346 of title 28,
2 United States Code, is amended by inserting before the
3 period at the end thereof "except as provided for in chapter
4 72 of title 38".

5 **TITLE IV—ATTORNEYS' FEES**

6 SEC. 401. Section 3404 is amended by—

7 (1) amending subsection (c) to read as follows:

8 “(c) The Administrator, pursuant to regulations which
9 the Administrator shall prescribe, may determine and ap-
10 prove payment of reasonable attorneys' fees to be paid by the
11 claimant, to attorneys recognized under this section, for serv-
12 ices rendered in representing an individual before the Veter-
13 ans' Administration in connection with claims for benefits
14 under laws administered by the Veterans' Administration. In
15 no event shall such attorneys' fee, determined and approved
16 by the Administrator, exceed—

17 “(1) for any claim resolved prior to the claimant's
18 receipt of a statement of the case pursuant to section
19 4005(d) of this title, \$10; or

20 “(2) for any claim resolved following the claim-
21 ant's receipt of such statement of the case, an amount
22 in excess of the lesser of—

23 “(A) the fee agreed upon by the claimant
24 and the attorney; or

1 “(B)(i) \$500, or a greater amount specified in
2 regulations prescribed by the Administrator based
3 on changed national economic conditions subse-
4 quent to the date of enactment of this subsection,
5 except that the Administrator may, in the Admin-
6 istrator’s discretion, determine and approve a fee
7 in excess of \$500, or such greater amount if so
8 specified, in an individual case involving extraor-
9 dinary circumstances warranting a higher fee; or

10 “(ii) if the claimant and an attorney have en-
11 tered into an agreement under which no fee is
12 payable to such attorney unless the claim is re-
13 solved in a manner favorable to the claimant, 25
14 per centum of the total amount of any past-due
15 benefits awarded on the basis of the claim.”; and

16 (2) adding at the end of such section the following
17 new subsections:

18 “(d) If, in an action brought under section 4025 of this
19 title, the matter is resolved in a manner favorable to a claim-
20 ant who was represented by an attorney, the court may de-
21 termine and approve as part of its judgment a reasonable fee
22 for the representation of such claimant in such action. When
23 the claimant and an attorney have entered into an agreement
24 under which no fee is payable to such attorney unless the
25 matter is resolved in a manner favorable to the claimant, the

1 fee so determined and approved shall not exceed 25 per
2 centum of the total amount of any past-due benefits awarded
3 on the basis of the claim. If, in such an action, the matter is
4 not resolved in a manner favorable to a claimant, the court
5 may determine and approve as part of its judgment a reason-
6 able fee, taking into consideration the extent to which there
7 could have appeared to have been a reasonable probability of
8 success for such an action at the time it was filed, for the
9 representation of such claimant not in excess of \$750.

10 “(e) To the extent that past-due benefits are awarded in
11 proceedings before the Administrator or by a court, the Ad-
12 ministrator shall direct payment of any attorney’s fee that
13 has been determined and approved under this section out of
14 such past-due benefits, but in no event shall the Administra-
15 tor withhold any portion of benefits payable for a period sub-
16 sequent to the date of the decision of the Administrator or
17 court making such award.

18 “(f) The determination and approval by the Administra-
19 tor regarding attorneys’ fees pursuant to subsection (c) of this
20 section may be reviewed by a court only to determine
21 whether the Administrator’s action constituted an abuse of
22 discretion. Review of the determination and approval by
23 either the Administrator or the court regarding an attorneys’
24 fee shall be obtained as follows:

1 “(1) For an award in conjunction with a claim
2 before the Administrator pursuant to subsection (c) of
3 this section, by an action brought, within thirty days
4 after the date of notice of such award, by either the
5 claimant or the attorney in the district court of the
6 United States in the judicial district in which the
7 claimant resides or the claimant’s principal place of
8 business is located.

9 “(2) For an award in conjunction with a claim ap-
10 proved by a United States court pursuant to subsection
11 (d) of this section, on a motion made, within thirty
12 days after the date of such award, by either the claim-
13 ant or the attorney in the district court of the United
14 States where the appeal was considered.

15 For actions brought under clause (1) of this subsection, the
16 Administrator shall be named as the defendant, but notice of
17 any such action shall also be given to all parties in interest
18 and all such parties shall be heard by the court reviewing the
19 award.

20 “(g) The provisions of this section shall apply only to
21 cases involving claims for benefits under the laws adminis-
22 tered by the Veterans’ Administration, and such provisions
23 shall not apply in cases in which the Veterans’ Administra-
24 tion is the plaintiff or in which other attorneys’ fee statutes
25 are otherwise controlling.

1 “(h) For the purposes of subsections (c) and (d) of this
2 section, claims shall be considered as resolved in a manner
3 favorable to the claimant when all or any part of the relief
4 sought is granted.

5 “(i) In an action brought under section 4025 of this title,
6 the court, in its discretion, may, as an extraordinary remedy,
7 allow the prevailing party, other than the Administrator, rea-
8 sonable attorneys’ fees as part of the costs.”.

9 SEC. 402. Section 3405 is amended by striking out “or”
10 after “title,” and striking out “him” and inserting in lieu
11 thereof “such claimant or beneficiary, or (3) with intent to
12 defraud, in any manner willfully and knowingly deceives,
13 misleads, or threatens a claimant or beneficiary or prospec-
14 tive claimant or beneficiary under this title with reference to
15 any matter covered by this title, by word, circular, letter, or
16 advertisement”.

17 TITLE V—EFFECTIVE DATES

18 SEC. 501. The provisions of this Act shall become effec-
19 tive on the first day of the first month beginning 180 days
20 after the date of enactment of this Act.

21 SEC. 502. A civil action authorized in chapter 72 of title
22 38, United States Code, as added by section 302 of this Act,
23 may be instituted to review decisions of the Board of Veter-
24 ans’ Appeals rendered on or after January 1, 1977, and prior
25 to the effective date of this Act: *Provided*, That such actions

1 are instituted not later than 180 days after the effective date
2 of this Act or after the mailing of notice by the Administrator
3 to the last known address of a claimant of the right to bring
4 such a civil action, whichever occurs later.

Passed the Senate September 17 (legislative day, June
21), 1979.

Attest:

J. S. KIMMITT,

Secretary.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTORJOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

June 19, 1979

Honorable Edward M. Kennedy
Chairman, Senate Judiciary Committee
2237 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Although views of the Judicial Conference on S. 330, the "Veterans' Administration Adjudication Procedure and Judicial Review Act", have not been formally requested by this Congress, a deputy counsel for the Subcommittee on Improvements in Judicial Machinery and the minority counsel for your Committee asked our office last week if we would like to comment upon the bill. We welcome this opportunity to do so.

On May 14, 1979, the Judicial Conference's Court Administration Committee's Subcommittee on Federal Jurisdiction reviewed S. 330. That Subcommittee focused its study upon Title III of the bill, which provides for the judicial review of "final decisions" of the Administrator of the Veterans' Administration.

That Subcommittee expressed its opinion that, although judicial review is a policy matter which must ultimately be resolved by Congress, if the Congress decides that judicial review is appropriate, then that authority should be conferred in a framework which realistically balances the interests, not only of claimants and the Veterans' Administration, but also those of the Federal courts. The Subcommittee therefore proposed that the Federal courts be authorized to review cases raising constitutional questions related to substantive and procedural due process issues and questions of statutory interpretation only. The Subcommittee believes that an administrative tribunal should be established to review findings of fact and, to the extent necessary, all questions of evidentiary sufficiency at law. That administrative tribunal, perhaps modeled after the Tax Court, as is the Court of Veterans' Appeals which would be created by H.R. 1813, 96th Congress, should review the primarily technical, and often complex, factual and evidentiary decisions made by the Administrator. The Subcommittee also believes that such a court should be fully authorized to render non-appealable orders in such factual and evidentiary cases [See H.R. 1813, Subchapter I, at Section 4053(b)]. The Judicial Conference's Subcommittee's concept

is not completely in conflict with provisions presently embodied in Title III of S. 330, because, under the existing language, reviewing courts would be required [under Section 4026(a)] to decide all significant questions of law.

Let me also emphasize that the Judicial Conference's Subcommittee endorses Section 4025(a) of the existing bill, which requires claimants to obtain a final decision from the Administrator before seeking judicial review, subject to certain modifications. While the Subcommittee does not endorse Section 4026(a), which authorizes courts to review findings of fact, the extent of disagreement between the Subcommittee's view and that of the Senate's Committee on Veterans' Affairs is not absolute. The Committee on Veterans' Affairs has approved amendments to Section 4026(a) which reflect a similar concern with problems inherent in judicial review of agency findings of fact. Significant problems have long been experienced with "the substantial evidence test". The Senate's Veterans' Affairs Committee, in recognition of those problems, attempted to establish a less troublesome evidentiary standard. Under S. 330, as now pending, the Administrator cannot be reversed unless his actions are "arbitrary, capricious or an abuse of discretion" [See Section 4026(a)]. Since that standard is not precise, the Veterans' Affairs Committee expressly provided [in Section 4026(c)] that courts cannot undertake *de novo* review of findings of fact. In addition, under the bill, if neither standard proves workable, judicial review is totally barred following the fifth fiscal year after the bill's enactment [See Section 4025(h)].

The Judicial Conference's Subcommittee on Federal Jurisdiction believes that resolution of the issue by such means overlooks many of the more serious problems created by judicial review of agency determinations. The most serious of those problems appear today in social security claims cases. Since 1974, Administrative Office statistics indicate that such social security filings have almost tripled in number. As a result, the executive branch has seriously considered terminating the judicial review of findings of fact in such cases. On February 5, 1979, the Office of Management and Budget formally requested the Administrative Office's views on one such problem. Copies of the Office of Management and Budget "Legislative Referral Memorandum", and our reply, are attached. Similar problems may well be experienced in relation to veterans' claims should S. 330 be enacted in the form in which it is now pending before your Committee. Certainly, our Federal courts will be required to devote extensive time to processing and adjudicating such claims. If the Administrator exercises a right [under Section 4027] to reevaluate a claim, our courts will be called upon to insure that the Administrator acts within the stipulated 90-day period. During trial, either party, under the same Section, could request that the case be remanded for further production of evidence upon a showing of "good cause". Good cause, however, as now embodied

in that Section, is a most broad and most imprecise standard. At the conclusion of trial, if a court rules on the claimant's behalf, that claim must then be remanded to the Administrator for action consistent with the court's order [See Section 4026(a)]. The Federal Jurisdiction Subcommittee believes that our courts should instead have clear authority to enter immediate binding judgments with which the Administrator must comply or appeal within a time certain.

Additional problems could rapidly develop from the lack of finality of a court's decision under S. 330 as now pending. Claimants would be entitled [under Section 106 of Title I] to a Board of Veterans' Appeals reconsideration of their claims *notwithstanding* previous judicial review of the matter. Not only is such an arrangement arguably in conflict with the long-established legal doctrine of *res judicata*; it may well require courts to reconsider claims more than once, as an individual veteran's physical condition changes.

One additional problem is presented by the Veterans' Affairs Committee's recent actions relating to the termination of judicial review. According to the Veterans' Affairs Committee's report, there is a clear intent to provide Congress with an opportunity to weigh the benefits and detriments of the proposed judicial review process. No criteria for such an evaluation are provided, however, nor is there an affirmative requirement that the federal judiciary be consulted.

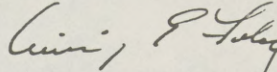
The Judicial Conference's Federal Jurisdiction Subcommittee believes it has suggested an alternative which resolves many of the problems noted above. The Subcommittee recommends the creation of "an Article I-type" administrative tribunal to review all findings of fact and evidentiary questions. The Subcommittee believes that such a tribunal would rapidly develop a necessary expertise concerning technical and complex questions raised by both claimants and the Administrator, and would therefore be capable of both promptly and accurately resolving such questions. The Federal Jurisdiction Subcommittee would also recommend that such a tribunal be specifically authorized to operate with processes which would preserve the element of informality, which now exists within the Veterans' Administration, to the extent that that element has been determined to be desirable; veterans' service organizations could then continue to represent their members in proceedings which would be less structured than those conducted in an Article III Federal court.

The views I have expressed above are, of course, only those of the Conference's Subcommittee on Federal Jurisdiction. While those views do reflect past policy statements by the Judicial Conference on this general matter [See *Reports of the Proceedings of the Judicial Conference of the United States*, March 11-12, 1963, at 18, and March 9-10, 1978, at 9.], the Subcommittee's opinion is subject to review

by the Court Administration Committee in late July and by the Judicial Conference in mid September.

On behalf of the Subcommittee on Federal Jurisdiction and the Judicial Conference, let me thank your Committee for this opportunity to have presented our views on S. 330.

Sincerely yours,



William E. Foley
Director

Enclosures

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
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OFFICE OF
THE CHAIRMAN

June 19, 1979

Honorable Strom Thurmond
United States Senate
Washington, D.C. 20510

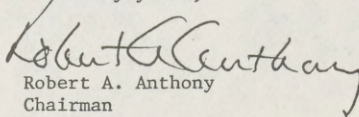
Dear Senator Thurmond:

I am happy to respond to your request for a description of the work that the Administrative Conference has done with regard to judicial review of benefits decisions of the Veterans Administration (VA).

In August of 1978, the Conference commissioned a study of the question as to whether benefits decisions of the VA should be made judicially reviewable. The study was undertaken by our consultant, Professor Frederick Davis of the University of Missouri School of Law. He concluded that VA benefits decisions should be made subject to judicial review. The Conference's Committee on Judicial Review, after meeting twice and receiving numerous comments from veterans groups and the affected agencies, proposed a recommendation in favor of judicial review. However, the Assembly of the Conference, in Plenary Session in December, did not reach a consensus on the issue and tabled the Committee's proposed recommendation.

I enclose, for your information, a copy of Professor Davis' report, the Judicial Review Committee's proposed recommendation, and a copy of the transcript of the Plenary Session debate on that recommendation.

Sincerely yours,


Robert A. Anthony
Chairman

Enclosures

ADDITIONAL PREPARED STATEMENT

PREPARED STATEMENT OF PAUL NEJELSKI, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE.

Mr. Chairman, I am Paul Nejelski, Deputy Assistant Attorney General in the Office for Improvements in the Administration of Justice. The Office was created by Attorney General Bell as one of his first official acts and is charged to examine a broad range of problems which may now delay or prevent citizens from obtaining justice, especially in the federal system. I am pleased to have this opportunity to convey to the Committee the views of the Department of Justice on the impact of the enactment of S. 364 on the workload of the federal court system. At this time, the Department neither supports nor opposes the passage of S. 364.

I. INTRODUCTION

Access to justice does not always mean that a court must be involved. In many cases, filing of a formal lawsuit only means unnecessary delay and expense while the parties maneuver for position or try to wear each other down. Non-judicial alternatives can often be both fairer and more efficient for all concerned. In an attempt to determine just what sort of non-court alternatives may be useful, the Department will make funds available for three Neighborhood Justice Centers in cities across the country to test the usefulness of local and informal dispute resolution means. In the federal system, we are also considering ways in which arbitration or mediation might be used in cases which now come before a judge.

Of course, many legal disputes will be heard in federal district courts. And one of the most serious difficulties they encounter is the sheer number of civil cases already there. The latest year for which complete figures are available is fiscal year 1976, which marks the 16th consecutive year during which the courts have seen an increase in the number of civil cases filed. Table 1, based on figures from the Administrative Office of U.S. Courts, demonstrates the dramatic increase in case filings during the last 16 years.

TABLE I.—CIVIL CASES FILED, TERMINATED, AND PENDING, FISCAL YEARS 1960-76

Fiscal year	Filed	Terminated	Pending, June 30
1960	59,284	61,829	61,251
1961	58,293	55,416	64,128
1962	61,836	57,996	67,968
1963	63,630	62,379	69,219
1964	66,950	63,954	72,195
1965	67,678	65,478	74,395
1966	70,906	66,184	79,117
1967	70,961	70,172	79,906
1968	71,449	68,873	82,482
1969	77,193	73,354	86,321
1970	87,321	80,435	93,207
1971	93,396	86,563	100,040
1972	96,173	95,181	101,032
1973	98,560	98,259	101,333
1974	103,530	97,633	107,230
1975	117,320	104,783	119,767
1976	130,597	110,175	140,189
Percent increase:			
1976 over 1960	120.3	78.2	128.9
1976 over 1975	11.3	5.1	17.1

Source: Table 14, 1976 Annual Report of the Director, Administrative Office of the U.S. Courts.

During the same period covered by the table, the number of authorized district court judgeships increased by almost 63 percent, from 245 to 399, but the increase in civil case filings exceeded 120 percent, rising from 59,284 in 1960 to a total of 130,597 in fiscal year 1976. Of that 1976 total, only 110,000 cases were terminated. As a result, the number of undecided cases still pending in the courts increased by over 20,000, and there were some 140,189 cases still pending at the end of the year.

These cases were divided among fewer than 400 district judges. Although the services of senior judges are very valuable in supplementing the active bench, they are largely counterbalanced by the substantial number of existing vacancies in the district courts. Nor can the number of federal judges be increased indefinitely, although the Senate has only recently recognized the clear need to provide a number of new judgeships by passing S.11, which would add 112 district and 36 appellate judges. The necessity to assure that the federal judiciary retains its high qualifications and the constitutional imperative affording life tenure during good behavior to judges, counsel against repeated or routine creation of new judgeships.

During fiscal year 1976, there were 327 civil cases filed for each authorized district judgeship, and 351 civil cases still pending for each judgeship at the end of the year. Compared with the average 218 civil cases filed and 232 still pending at the end of 1970, this represents a more than 50 percent rise in the pending caseload per judgeship during the past six years. Table 2 shows the number of civil cases per authorized judgeship from 1940 through 1976.

TABLE 2

Fiscal year	Authorized judgeships	Civil cases per authorized judgeship		
		Filed	Terminated	Pending on June 30
1940	183	190	204	161
1950	218	296	244	255
1960	245	242	252	250
1970	401	218	201	232
1974	400	259	244	268
1975	400	293	262	299
1976	399	327	276	351

Source: 1976 Annual Report of the Director, Administrative Office of the U.S. Courts, p. 76.

Over 9,000 of those cases had been in the federal courts for more than 3 years, and tens of thousands of others have spent years in the federal courthouse. Table 3 shows the age of civil cases pending in federal district courts over the last 16

years. I would like to draw the Committee's attention to the bottom line, showing percentage changes in pending cases between 1975 and 1976. All told, the number of cases still pending increased by 16.4 percent during that short period. One positive report, however, is that the number of cases which have been pending for more than 3 years has dropped since the high recorded in 1967. This decrease may be attributed to better judicial case management and the use of magistrates.

TABLE 3.—AGE OF CIVIL CASES¹ PENDING JUNE 30, FISCAL YEARS 1961 THROUGH 1976

Fiscal year	Total cases pending	Less than 1 yr	1 to 2 yr	2 to 3 yrs	3 yrs and over	
					Number	Percent
1961	61,085	33,703	14,910	6,401	6,071	9.9
1962	64,723	36,720	15,261	7,035	5,707	8.8
1963	66,130	36,903	16,791	6,890	5,546	8.4
1964	69,701	38,636	16,204	8,803	6,058	8.7
1965	71,941	40,113	16,861	8,341	6,626	9.2
1966	76,607	42,094	18,300	8,786	7,427	9.7
1967	77,575	41,430	18,893	9,122	8,130	10.5
1968	80,245	43,517	19,338	9,149	8,241	10.3
1969	83,957	46,436	20,006	9,268	8,247	9.8
1970	90,932	52,303	21,012	9,613	8,004	8.8
1971	97,799	55,261	23,141	10,375	9,022	9.2
1972	99,114	57,363	22,674	10,393	8,684	8.8
1973	99,437	58,957	23,036	9,842	7,602	7.6
1974	105,349	63,850	24,022	10,125	7,352	7.0
1975	117,491	73,692	25,999	10,237	7,563	6.4
1976	136,753	82,051	32,622	12,644	9,414	6.9
Percent change: 1976 over 1975	16.4	11.3	25.5	23.5	24.5	-----

¹ Excludes land condemnation cases.

Source: Table 20, 1976 Annual Report of the Director, Administrative Office of the U.S. Courts.

The result is that many persons with newer claims find that they have to take their place at the end of a very long waiting line, ranging from a median of 6 months in the District of Columbia and South Carolina to as much as 23 months average waiting time for federal cases filed in Massachusetts.

As I mentioned earlier, during the latest reporting year, a person filing suit in federal district court would typically have found an average of 351 civil cases ahead of him in line. But this is not the full story, because the courts are obliged to give priority to criminal cases under the Speedy Trial Act and to over 30 specialized kinds of civil cases ranging from suits under the Federal Election Campaign Act of 1971 to those under the Sugar Act of 1948, further delaying the time when a district judge can begin working on the normal run of case which is not given preferential treatment. The Attorney General is now considering a draft proposal on civil priorities which would afford equal treatment to all civil actions in district courts, instead of the present patchwork of special treatment.

As you know, the Department of Justice has already forwarded several proposals to the Congress which would, in our view, help to reduce these unnecessary delays. For example, we strongly support S. 1613, a bill which would allow civil actions to be tried before federal magistrates, with the consent of the parties, rather than waiting an indefinite time before a district judge. That bill was warmly endorsed by Senator Thurmond when it passed the Senate last month, and I would like to express our appreciation for his help at this time.

We also support the idea of reducing the number of diversity cases in which federal courts are required to try questions of State law when they are raised by citizens of different States. Especially when these cases are brought by plaintiffs in the federal courts located in their home States, there seems to be no good reason to prevent the State courts from trying these questions of State law.

II. S. 364

As you know, Mr. Chairman, S. 364 is a short bill with tall ambitions. Under present law, most final decisions of the Veterans' Administration concerning claims are not subject to judicial review under the Administrative Procedure Act. Section 2 of S. 364 would effectively repeal this exemption, now contained in 38 U.S.C. 211(a), and bring the V.A. fully within the judicial review provisions of that Act. If section 2 is enacted as written, persons who are aggrieved or injured by a final

adverse decision of the V.A., usually acting through the Board of Veterans Appeals, would be able to challenge such decisions in federal district court under 5 U.S.C. 702.

Section 3 of the bill seems designed to bring the V.A. within the other major subdivision of the Administrative Procedure Act, those provisions requiring public notice and comment opportunities for many kinds of agency actions. Enactment of section 3 would require the Veterans' Administration to provide public notice and opportunity for comment on most types of proposed or final agency rules and orders. Persons who were injured or aggrieved by a failure to meet those requirements would have a right to challenge the agency action in district court.

Finally, section 4 of S. 364 would repeal an existing statute, 38 U.S.C. 3404(c), which limits attorney's fees in veterans' claims to not more than \$10, paid by the Administration from the amount awarded to the claimant. Maximum-fee provisions of this sort were enacted as early as the Act of July 14, 1862, and have been a part of veterans' and pension statutes for over 115 years since that time. Enactment of section 4 would lift this statutory ceiling on attorneys' fees completely. It would also mean that the V.A. could no longer pay those fees, however large, and that recompense for attorneys and agents would have to come from the claimants themselves or other, non-V.A., sources. As a result, the cost to claimants of pressing a claim for benefits can be expected to rise rather substantially, wherever an agent or attorney is retained by the claimant.

III. IMPACT ON THE COURT SYSTEM

There are at least three ways in which enactment of S. 364 can be expected to affect the federal courts. First, section 2 would permit persons whose claims are denied in a final agency action to seek judicial review of actions which are not now reviewable. Second, section 3 may encourage an undetermined number of challenges to V.A. actions which do not involve a denial of individual claims. Third, by raising the recovery for lawyers from a \$10 limit to an unlimited amount, section 4 will undoubtedly attract additional claims into both the administrative and the judicial review process. We can also expect that cases involving lawyers will raise more issues and may be more time-consuming than has been the case until now.

We cannot easily assess the impact of allowing no-limit lawyers' fees under section 4, or of allowing challenges to V.A. actions not involving denials of claims under section 3, other than to suggest increases in the number and complexity of case filings in the district courts. However, the impact of allowing judicial review under section 2, reinforced by the incentive to lawyers which would be provided by section 4, is more visible. Using data supplied by the Administrative Office of the U.S. Courts, the Board of Veterans' Appeals, and the Social Security Administration, it can be estimated with fair accuracy. This assessment is only partial, since it excludes the expected impact of new cases generated by the availability of attorney's fees and by right to challenge agency action in nonclaim cases. Nonetheless, it may provide a measure of what the Judicial Conference of the United States called a "substantial impact on the workload of the federal courts" when the Conference disapproved S. 3392 and H.R. 14016, identical bills to provide for the sort of judicial review afforded by section 2 of S. 364, during the last Congress.

(a) *General approach*

This sort of assessment can be called a "court system impact settlement," a way to measure the added demand on federal judicial system resources which would be created by legislation including new or expanded causes of action, or altering existing ones. Our study of the methodology and format of these statements is just beginning, but we in the Office for Improvements in the Administration of Justice are working closely with the National Academy of Science which has just started an eighteen-month project in the field. In addition, we are working with the federal judiciary, the Federal Judicial Center, the Administrative Office of the U.S. Courts, and staff representatives of both Houses of Congress to provide Members with meaningful information on legislative proposals affecting the judicial system.

(b) *Cases subject to review*

The Veterans' Administration handles an enormous number of administrative actions each year, ranging from the operation of veterans' hospitals across the

country to decisions on individual claims and entitlements under scores of separate benefit programs. The highest administrative review body for most V.A. compensation and disability claims is the Board of Veterans Appeals, acting for the Administrator of Veterans Affairs as head of the agency. Over 75 percent of the Board's cases involve claims for awards or increases in service-connected disability entitlements, ranging from neuropsychiatric injuries through leukemia acquired by reason of exposure to military tests of atomic munitions to more common disorders resulting from wounds or injuries suffered during combat. The Board also considers a wide variety of pension, death benefit, educational, training, insurance, and loan guarantee claims. During fiscal year 1976, the Board decided a total of 28,482 cases, of which it denied 70 percent, or 19,927. Only 50 cases were filed in federal court that year involving the Board or its decisions, excluding eleven interpleader cases. In the following 12-month period ending June 30, 1977, the Board decided a total of 32,191 cases and denied 22,900 of these, or 71.1 percent. Table 4 shows the Board's caseload during prior years.

As you know, Mr. Chairman, the great majority of the Board's decisions are not now reviewable, because they do not fall within the judicial review provisions of the Administrative Procedure Act. Indeed, section 211(a) of title 38, United States Code, provides that such decisions "shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision * * *." Section 2 of S. 364 would amount to an implied repeal of 38 U.S.C. 211(a), and persons injured or aggrieved by the 22,900 denials entered by the Board last year (and all others similarly situated within the last 6 years) would be able to take their grievances to federal court.

Of course, not all such cases would be appealed by disappointed claimants, but those who wished to do so will nonetheless represent a sizable number of new cases compared to the 50 or so which now enter the courts each year. We expect that these new claims would be reviewed under the same "substantial evidence on record" test which applies in most judicial reviews under the Administrative Procedures Act, see 5 U.S.C. 702-705, and that the usual 6-year statute of limitations on claims against the United States will apply, 28 U.S.C. 2401.

TABLE 4.—VETERANS' ADMINISTRATION, BOARD OF VETERANS APPEALS

	Fiscal year—							
	1968	1969	1970	1971	1972	1973	1974	1975
CASES DECIDED BY THE BOARD								
Total decided.....	24, 857	22, 944	20, 809	25, 201	29, 692	29, 825	26, 209	25, 027
Allowed.....	3, 308	2, 954	2, 848	2, 976	3, 737	4, 143	3, 682	3, 698
Remanded.....	3, 481	3, 360	2, 975	3, 611	4, 328	4, 928	4, 187	3, 986
Withdrawn.....	114	203	252	274	268	274	266	424
Denied.....	17, 954	16, 427	14, 734	18, 340	21, 359	20, 480	18, 074	16, 919
BENEFITS INVOLVED								
Disability.....	19, 383	18, 171	16, 697	20, 560	24, 959	25, 247	21, 872	21, 095
Death.....	2, 412	2, 048	1, 933	2, 197	2, 361	2, 444	2, 206	2, 134
Insurance and indemnity.....	287	289	238	291	329	328	235	214
Education and training.....	306	326	329	706	789	808	803	677
Loan guarantee, waiver of indebtedness.....	1, 540	1, 214	774	578	336	114	155	114
Waivers and forfeitures.....	540	564	459	466	469	255	471	414
Medical.....	389	332	379	403	449	629	467	379

Venue would ordinarily be in the district where the plaintiff (the disappointed claimant) resides, 28 U.S.C. 1346 (a)(2), 1402(a). By comparing the expected percentage of appeals in similar kinds of cases under other statutes with the number of cases in which the Board denies a claim, we can establish a useful measure of the minimum expected number of new district court cases which would result from enactment of section 2 of S. 364.

(c) *Analogous kinds of cases*

Judicial review of social security administrative determinations is sufficiently close to the expected treatment of veterans' claims to provide a basis for comparison. In social security cases there are three levels of administrative review of claims, culminating in the final decisions of the Secretary of Health, Education and Welfare through the Board of Hearings and Appeals.

The administrative determination of the Secretary can be challenged by a civil action in federal district court. In recent years, approximately 20 percent of the administrative determinations have been challenged annually, although this rate seems to be dropping somewhat during the past few months as some cases are transferred to the Secretary of Labor, and as the first large rush of so-called "black lung" disability claims are resolved. The increase in challenges has been substantial during the past several years. As recently as fiscal year 1971, only 1,792 cases were commenced in the federal district courts under the social security laws. In contrast, during fiscal year 1976, that number has mushroomed to over 10,000 new cases annually. Almost half of the 1976 cases involved "black lung" disability benefits for coal miners and their dependents, and may represent the peak of a pent-up "bulge" of claims.

Social security cases involve issues of vital import to the claimants, as would claims by veterans for pensions or disability status. Nonetheless, at the close of fiscal year 1976 more than 10,000 social security cases were still pending in the courts, an increase of 81 percent over the previous year. Many of these pending cases are based on lengthy administrative records.

As noted above, social security cases are normally decided based on a review of the legal conclusions of the Secretary and a determination of whether there is substantial evidence on the administrative record to support any contested finding of fact. The Civil Division of the Department of Justice has estimated that as many as half of these cases, excluding those which present novel issues of statutory interpretation or constitutional rights, are now heard before federal magistrates rather than district judges. Of those cases not heard before magistrates, the great majority are decided by written motion. In only a very small number of cases are oral arguments heard by a district court judge on motions, and even fewer go through a full trial. But while most of these cases present no novel issues (as evidenced by the use of magistrates and motion practice), cases challenging interpretation of the governing statutes and the validity of regulations can be more time-consuming.

The complexity of issues and length of records increase in cases under the most recent additions to social security programs, such as "black lung" and Supplemental Security Income cases. In fact, the Civil Division estimates that the judicial workload of challenges to the latter program may currently outweigh the workload of the more numerous administrative-record cases. While this is probably only a temporary situation, it does indicate the disproportionate claims on judicial system time (and on claimants) of cases commenced at the beginning of a new program. The twin pressures of requiring the courts to interpret and construe a new and unfamiliar set of statutes and regulations on the one hand, and pent-up cases from the years immediately preceding enactment of the new legislation, can produce a temporary crest in filings which will eventually level off as leading decisions establish key precedents for future cases, and as the backlog in undecided cases is reduced.

Some thought has been given to allowing these social security reviews to be brought directly in the courts of appeal. A recent article by Professors Currie and Goodman¹ concludes that a transfer of original jurisdiction for court review of social security cases from the district courts to the circuit courts in fiscal year 1974 would have increased the total caseload of the appellate courts by 20 percent, compared to about 3.5 percent in the district courts. They also estimate that with the addition of "black lung" and SSI cases just entering the system during 1974, the total appellate caseload would increase as much as 30 percent. They concluded that while many claimants would prefer to continue their appeals to the circuits but are prevented by financial reasons from doing so, this consideration is decisively outweighed by the savings to the judicial system through avoidance of the projected overload on the appellate courts.

(d) *Estimates of veterans claims for review*

We have applied the experience gained with social security cases to estimate the prospective impact of section 2 of S. 364 on the district courts. As I noted earlier, the Board of Veterans Appeals denied 22,900 claims in the twelve months ending June 30, 1977. On the basis of experience with social security cases, approximately 20 percent, or some 4,600, of these denials would be appealed to the district courts if section 2 were enacted.

¹ D. P. Currie and F. I. Goodman, "Judicial Review of Federal Administrative Action," 75 Colum. L. Rev. 1, 21-24 (1975).

These 4,600 new cases would increase the total number of civil filings in the district courts by 3.4 percent, raising the average caseload for each sitting judge and adding to delays in those courts. With venue in plaintiffs' districts, we do not anticipate that there will be regional concentrations of these cases as has been the case with "black lung" benefit cases. On the basis of the average judicial workload in civil cases cited earlier, the increase in caseload would take the equivalent of up to 13 additional federal judges' time to handle veterans' claims alone. If the district courts' criminal dockets are also taken into account, the number of added judgeships would be reduced to around ten. Of course, the district judge represents only the most visible part of the requisite judicial machinery, including federal magistrates, clerks, administrative assistance, office and court facilities, and other support services. At the appellate level, the relatively low incidence of appeals in social security cases would suggest that perhaps only one additional court of appeals judgeship would be required.

A further impact on the federal judicial system may be an increase in the number of government attorneys and supporting staff needed to respond to these 4,600 added cases. Based on discussions with Department of Justice officials, we estimate that as many as 20 additional attorneys, and accompanying support services, may be needed within the offices of the United States Attorneys and the Civil Division of the Department alone, without taking into account any increase in V.A. offices required to prepare cases for litigation and presentation in court.

We recognize that these estimates depend upon broad averages of the judicial workload, and on analogy to similar but far from identical government benefit programs. Unfortunately, no current figures exist on the time which different types of cases take in terms of the time a judge or magistrate actually spends to decide a case, although the California Judicial Council has had considerable success in developing a set of weighted-caseload factors which can then be used to measure the relative "difficulty" or length of average cases within each weighted class. In the federal system, a 1971 study by the Federal Judicial Center, the "1969-1970 Federal District Court Time Study," found that social security cases then in the courts took—on the average—only 77 percent of the judicial time of the "average" federal civil case, such as those under the Labor Management Relations Act or involving trademark issues under federal law.

Despite these qualifications, which might reduce the estimate for needed additional judgeships by approximately 23 percent, to between 8 and 10 rather than 13, we do believe that the provisions of S. 364 would have the effect of significantly increasing the workload of the federal district courts. First, the estimate of 4,600 cases represents a 3.4-percent increase in the number of civil cases filed during 1976, and includes only the expected appeals from compensation cases; noncompensation appeals would add to this figure. Second, the increase would initially consist of relatively new case types, involving construction of unfamiliar statutes and regulations. Until the case law developed sufficiently to resolve the many undecided issues now open, this initial "bulge" in judge time would accentuate the accompanying bulge in caseload. Third, the number of cases potentially reviewable would be even larger, including all administrative denials in years prior to 1976 but still within the statute of limitations. Conceivably, the true addition could represent as many as six times the 4,600 cases we have been discussing until now. Finally, and perhaps most difficult to estimate, the true impact of judicial review of V.A. actions depend on the frequency of challenges brought about by sections 2 and 3 of S. 364. The Veterans' Administration makes nearly 11 million decisions each year relating to benefits, with almost 8 million involving compensation. The 22,900 denials by the Board of Veterans Appeals last year represent only a very small fraction of this total, and they are remarkable evidence of the apparent success of V.A. efforts to provide an administrative appellate process which serves the best interests of veterans and the general public alike.

IV. CONCLUSIONS

The impact of any proposed new legislation cannot be measured as part of a static system. In the case of S. 364, our estimates may be affected by the creation of new judgeships, establishment of a special "disability court" such as that proposed in H.R. 8076 for social security disability cases, temporary bulges in caseloads during the first few years of a program, or the differing number of veterans which can be expected due to variations in the strength of the armed forces. A

classic example of the unpredictability of judicial caseloads are the selective service cases which reached such high levels in the district courts during the late 1960's and have now all but disappeared with abolition of the draft.

Whatever may be the precise numbers of cases and appeals involved in the adoption of S. 364, we must recognize the continuing trend away from paternalism and towards due process in the conduct of government programs. For example, the separate juvenile court begun in the late 1890's was based in part on the paternalistic concept of protecting delinquent children from the adversary system in courts. That system is moving in the direction of affording adversary due process protections in juvenile courts.

While the introduction of lawyers into veterans' claims in some capacity may well be inevitable, there is also a need to examine alternative techniques to monitor the workings of government claims systems without depending on a disinterested paternalism on the one hand, or lengthy and costly judicial proceedings on the other. It may well prove to be mistaken to rely exclusively on the enlightened self-interest of lawyers to keep the system honest. Such alternatives as ombudsmen within the Veterans Administration, or deliberate sampling of Board decisions for further review by the Administrator, may prove a more effective means to assure full consideration of every veteran's legitimate claims.

Mr. Chairman, that concludes my written statement, and I would now be pleased to answer any questions which you or members of the Committee may have at this time.

ADDITIONAL SUBMISSIONS FOR THE RECORD

ADDITIONAL SUBMISSIONS OF STANFORD G. ROSS

Hearing Before the Senate Committee on the Judiciary

June 20, 1979

Senator Thurmond requested information on HEW's analysis of the social security cases that were decided by the Supreme Court in recent years. HEW found that its proposal on limiting judicial review to questions of constitutional or statutory interpretation would not have precluded judicial consideration in a single case. The analysis was conducted by the Office of the General Counsel (OGC) prior to HEW's decision to submit its proposal. Attached is the summary of Supreme Court cases considered by OGC.

Since this analysis was prepared, the Supreme Court has decided two cases under title II of the Social Security Act. In Califano v. Yamasaki, No. 77-1511, the Court held, on June 20, 1979, that an oral evidentiary hearing is required prior to recovery of an overpayment where the beneficiary requests waiver of recovery. On June 27, 1979, the Court in Califano v. Boles, No. 78-808, upheld the marriage requirement in section 202(g) of the act. Both cases would have reached the Court under the HEW proposal on judicial review.

Attachment

CASES PENDING IN U.S. SUPREME COURT
AND CASES DECIDED DURING OCTOBER TERMS, 1974-1978
INVOLVING TITLES II, XVI AND XVIII OF THE
SOCIAL SECURITY ACT

Cases Pending in Supreme Court During October Term, 1978

1. Califano v. Elliott; Califano v. Buffington - RSI - DI in Hawaii - Petition for Certiorari Granted October 2, 1978 - The issue is the constitutionality of SSA's overpayment procedures. The lower court required an oral hearing before the recoupment where the individual requests waiver or where the overpayment issue involves credibility. The availability of class actions under section 205(g) of the Social Security Act also is in issue. Companion case: Califano v. Mattem; Petition for Certiorari is pending before the Court.

2. Califano v. Boles - RSI - Probable Jurisdiction was noted on January 22, 1979 - The issue is the constitutionality of section 202(g) of the Social Security Act, providing mother's benefits, insofar as it requires the claimant to have been married to the wage earner.

Cases Decided by Supreme Court During October Term, 1978

1. Califano v. Aznavorian - SSI - On December 11, 1978, the Supreme Court reversed the district court decision and upheld the constitutionality of section 1611(f) of the Social Security Act. Section 1611(f) provides that an individual is ineligible for SSI benefits for any month during all of which he or she is outside the United States, and once outside the United States for 30 consecutive days, the individual is treated as remaining outside the United States until he or she has been in the United States for 30 consecutive days.

Cases Decided by Supreme Court During October Term, 1977

1. Califano v. Jobst - RSI - On November 8, 1977, the Court upheld the constitutionality of sections 202(d)(1)(D) and (d)(5) of the Act, which provide for termination of child's benefits where a disabled child beneficiary marries a disabled non-beneficiary.

2. Califano v. Torres; Califano v. Colon - SSI - On February 27, 1978 the Court upheld the constitutionality of sections 1611(f) and 1614(e) of the Act, which together deny benefits to individuals

traveling to Puerto Rico. Section 1611(f) provides that benefits are not payable to a beneficiary outside the United States, and "United States" is defined as the 50 States and the District of Columbia.

Cases Decided by Supreme Court During October Term, 1976.

1. Califano v. Goldfarb - RSI - On March 2, 1977, the Court found section 202(f) of the Act unconstitutional insofar as it required men to prove one-half support for widower's insurance benefits, while women did not for widow's insurance benefits.

2. Mathews v. Webster - RSI - In a per curiam decision on March 21, 1977, the Court reversed a lower court decision which had found unconstitutional section 215(b)(3) of the Act, which (until amendment) generally provided a more favorable benefit computation for women.

3. Mathews v. deCastro - RSI - On December 13, 1976, the Court upheld the constitutionality of section 202(b)(1) of the Act, which provides a wife's benefit to a currently married wife who is under age 62 with an entitled child of the wage earner in her care, but not to a divorced wife under age 62.

4. Califano v. Sanders - RSDI - On February 23, 1977, the Court held the denial of a request for reopening was not judicially reviewable under the Social Security Act or the Administrative Procedure Act.

Cases Decided by Supreme Court During October Term, 1975

1. Mathews v. Eldridge - DI - On February 24, 1976, the Court held that due process did not require an evidentiary hearing prior to termination of disability benefits due to medical cessation of disability.

2. Mathews v. Diaz - HI (Eligibility) - On June 1, 1976, the Court upheld the constitutionality of section 1836 of the Act, which provides that eligibility for Part B is limited to citizens or aliens lawfully admitted for permanent residence with five years of continuous residence.

3. Mathews v. Lucas; Norton v. Mathews - RSI - On June 29, 1976, the Court upheld the constitutionality of section 216(h)(3)(?) of the Act, which establishes an actual dependency requirement and appropriate times at which that requirement must be met in the case of certain illegitimate children.

4. Mathews v. Weber - RSDI - On January 14, 1976, the Court held that district courts may refer Social Security cases to U.S. Magistrates. [Note: I didn't include this as one of the twelve cases which involved challenges under the Social Security Act or to SSA's procedures.]

Cases Decided by Supreme Court During October Term, 1974

1. Weinberger v. Salfi - RSI - On June 26, 1975, the Court held sections 216(c)(5) and (e)(2) of the Act constitutional. These sections require a marriage for purposes of status under the Act to have lasted 9 months or more. The Court also held section 205(g) to be the exclusive route for judicial review and that that section required several steps, notably exhaustion of remedies, although not necessarily through the Appeals Council level.

2. Weinberger v. Wiesenfeld - RSI - On March 19, 1975, the Court found section 202(g) of the Act unconstitutional insofar as it provides a mother's benefit to a woman but no comparable benefit to a man.

Recommendation on Judicial Review of the Center for Administrative JusticeQuestion

Has the Social Security Administration in its proposal to limit judicial review taken into account the recommendations of the Center for Administrative Justice's study of the social security hearing system?

Answer

I think we have. The Center, in its report acknowledged that judicial review makes "... little, if any, contribution to accuracy and consistency ..." However, the Center was: "... dissuaded from a recommendation of outright abolition of judicial review by the contribution that review makes to political legitimization of the system."

Since the courts would continue to review cases which present issues related to constitutionality or statutory interpretation, the legitimization function would be maintained under our proposal.

The study did recommend that the judicial review process be modified to eliminate the open application system.

This problem would be corrected by H.R. 3236, now pending before the House. Section 10 of this bill would close the record to any new evidence in connection with a previous application once the decision is made at the administrative (ALJ) hearing. If a claimant's condition worsened (or if a new condition appeared) the claimant could at any time reapply for benefits.

STATEMENT BY
STANFORD G. ROSS
COMMISSIONER OF SOCIAL SECURITY
BEFORE THE
SENATE FINANCE COMMITTEE
SUBCOMMITTEE ON SOCIAL SECURITY
Monday, April 9, 1979

Mr. Chairman and Members of the Subcommittee, I am grateful for this opportunity to appear before you today to discuss the management and integrity of our social security programs. I welcome the scrutiny of your Subcommittee for it gives me a chance to clarify the standards of integrity to which I am holding the Social Security Administration (SSA), to report on the current state of SSA's management, and to discuss the actions I have taken to improve our performance.

I also welcome your help, Mr. Chairman, in the pursuit of a formidable challenge: the challenge to detect, understand, explain, and eradicate errors in our society's foremost social program. My own belief is that success in meeting this challenge is as important as any other I face as Commissioner.

I became Commissioner last October of an agency whose management has been the target of many critical reviews. Those reviews were seriously undermining the confidence of

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the American public in the social security program. Accordingly, I have spent much of my time during the first six months of my stewardship assessing the management of this vast agency. It is important that all Americans know what I have found. SSA basically gets its job done well, the fundamental integrity of our programs is not to be doubted, and the social security system itself is sound and reliable.

The true measure of the impressive achievements of SSA requires an appreciation of the enormous and complex tasks assigned to us.

- We routinely pay benefits every month to some 39 million aged and disabled persons and their survivors and dependents, most of whom need these amounts to pay for basic living expenses;
- We administer the trust fund financed Retirement, Survivor and Disability Insurance (RSDI) programs with expenditures totaling \$102 billion in 1979;
- We administer the general revenue financed Supplemental Security Income (SSI) program with expenditures totaling \$5.6 billion in 1979;

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- We share administration of the Aid to Families with Dependent Children (AFDC) program with the States, financed through a combination of general revenues and State funds with annual Federal expenditures totaling \$6.7 billion in 1979;
- We handle overall the expenditure of approximately one-quarter of the Federal budget, some \$130 billion in FY 1980;
- We handle over 58 million transactions every month to process beneficiary claims and post wages;
- We log 308 million wage items every year to workers' social security accounts in amounts totaling \$750 billion; and
- We stand prepared in emergencies to help our beneficiaries. Thus, if the recent events at the Three Mile Island nuclear power plant had developed into a situation requiring evacuation of the entire Harrisburg area, we had action plans ready that would have gotten displaced social security beneficiaries their monthly payments.

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To carry out these tasks, SSA has over 80,000 people located in almost 1,400 district offices in communities across the United States as well as 10 regional centers and our Baltimore headquarters. We are one of the largest Federal agencies. Our operating expenses in FY 1980 will be about \$2.3 billion, roughly 2 percent of the program amounts we handle. We believe this ratio of administrative costs to total expenditures compares favorably with any organization, public or private, in the financial area.

At the same time as we take credit for our achievements, let me be quick to add that SSA is moving to correct problems that we have and to become more efficient and effective in handling the taxpayer's dollars. We are not afraid to discuss our shortcomings openly. The American public should know about our weaknesses as well as our strengths. They should also know that we can and will do better. In fact, let me outline several steps we have taken already to improve our performance.

In January, Secretary Califano and I reorganized SSA. The new organization will allow us to pursue our mission much more effectively. Central elements of change are a consolidated Office of Systems which will overcome the

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serious fragmentation we found in that area of our operations, a centralized focus for operating policy to bring more coherence to our programs, a new assessment capability with SSA's own Inspector General-type operation, and an enhanced relationship with our field operations to improve staff services to the real heart of the SSA organization--the district offices.

As part of this reorganization, I charged the new Associate Commissioner for Assessment to construct a much more effective set of quality control systems designed to provide basic data on error rates. The major aspect of this effort is the full implementation of a quality assurance system for the Retirement, Survivor and Disability Insurance programs. This new system will give us the potential to pinpoint program errors and assist us in developing appropriate actions to correct them. Similar quality assurance systems were installed previously for the SSI and AFDC programs, and facilitated dramatic improvements in performance. In SSI, error rates have dropped from 11.5 percent in 1975 to the present 4.6 percent. In AFDC, the percentage has been sliced from 16.5 percent in 1973 to 8.1 percent. The first full results of this new system in the Retirement and

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Survivor Insurance (RSI) program will not be available until later this year. The data for the Disability Insurance (DI) program and the impact of the earnings test will become available during the following year.

The difficulty and time involved in constructing this type of system is not to my liking, but is inherent in this type of activity. To make this system reliable and useful we must move carefully to make certain it considers all of the complex nuances involved in the RSDI program. However, let me be clear that we are not sitting still pending final results. Our current, fragmented accounting systems give us a number of clues about the source of various errors in our programs. In addition, the General Accounting Office has assisted us in identifying sources of error and formulating actions that will reduce error. We are grateful for GAO assistance and fully expect to continue our cooperative relationship as we move toward improved management and reduction in errors.

We have been taking actions that should produce improvements. I have launched "Project Accuracy"--the purpose of which is to live up to Social Security's traditional goal: the right amount to the right person on time. This effort consists of a number of steps, both administrative and legislative. The thrust of this effort is threefold, to:

- Prevent payment errors where possible;
- Detect mistakes quickly; and
- Recover or settle payment errors swiftly.

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The major emphasis of Project Accuracy is to prevent erroneous payments from occurring at all. An emphasis on prevention is critical because most of our payments are to economically vulnerable people who have difficulty returning overpaid funds or face undue hardship if benefit amounts are erroneously low. We believe the most important actions we can take are to do everything possible to keep payment errors from happening in the first place. However, when they do occur, they must be detected as promptly as possible and corrected swiftly if we are to be responsible caretakers of public funds. With both hard work and your help with the legislative aspects of our efforts, I am confident we will make progress.

Another area where we have made inroads recently is in the student benefit program. This \$1.6 billion a year program, which makes cash payments to some 900,000 young people, has been marked by inadequate reporting and monitoring systems. Nearly complete results from our latest analysis show that there are as much as \$150 million in annual overpayments in the student benefit program. Recognizing the scope of this problem, Secretary Califano and I earlier this year instituted a systematic verification and computer matching process that we believe could lead to over \$50 million in savings within a short period of time.

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The above steps are a sample of the type of actions that we have taken already and will continue to pursue. I hope I am conveying to the Subcommittee a sense of the way I view my job as Commissioner. I intend to be ever vigilant in the identification of weaknesses in our management, systematic in developing action plans to address those problems, and aggressive in pushing our plans through to completion. I know that the American people are entitled to no less than a maximum effort.

Before being more specific about our corrective plans of action and the ways that you can assist us through legislative action, let me review what we do and do not know about the scope of errors in the RSDI program.

The basic fact is that at present we do not know with precision the extent of errors in the RSDI programs. This is an unacceptable situation and one of the reasons that we have put so much emphasis on the quality assurance system mentioned earlier in my testimony. Only when this basic data is available on a regular basis can we truly monitor our performance and fully identify those actions that will correct deficiencies.

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The current state of our knowledge is reflected in recent estimates by several different reports that show wide ranges in RSDI error rates.

- o The HEW Inspector General recently concluded in his second annual report on fraud, abuse and waste that the error in the RSDI programs could range anywhere from \$173 million to \$866 million annually;
- o The GAO has not projected a comprehensive RSDI error rate. GAO, using data provided by SSA, reported \$536 million in RSDI overpayments for the period between January to July 1978. Most of these overpayments resulted from the earnings test which are overpayments that appear in the first three months of the year. This condition indicates that the estimate cannot be doubled to get a reading on total identified overpayments in 1978. The data we supplied GAO for their half-year figure reflects identified overpayments of some \$685 million for the entire year.

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The inconsistency and wide variations in these reports illustrate the gaps in the information available about the extent of our errors.

While it will be next year before our RSDI Quality Assurance system is fully operating, I do want to share with the Subcommittee some preliminary data that we have gathered from a test of 3,000 cases in the RSI program, using the new quality assurance procedures.

I want to make clear that the numbers I am discussing here only measure a part of the RSDI system. The Disability Insurance program and the errors resulting from the annual earnings test were not part of this pilot study. Also, while this was a serious trial run, its main function was to test our quality review methods and procedures and therefore does not reflect proven measurement techniques or meet rigorous statistical standards. Nevertheless, the data is helpful in sketching a part of the problem that faces us, and gives us a basis for further corrective action -- steps that I have already initiated.

The pilot run in the RSI program identified a .5 percent rate of overpayment errors, and a .08 percent rate of underpayment errors. If, in fact, a .5 percent error

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were applied to the whole of RSI payments in 1979, it would represent \$445 million in overpayments and \$72 million in underpayments. While these numbers sound unacceptably high, one must keep in mind that the RSI program alone will pay some \$89 billion in benefits in 1979. And while we are making no claims to the statistical validity of the pilot at this time, I think it is fair to say that its results certainly should assure the public that the management of these programs is under control.

Let me stress again that these figures did not measure overpayments produced by the earnings test. And we do have clues from our accounting systems that the earnings test could be a very significant source of overpayments because the test requires beneficiaries to give us projected earnings for an entire year. If, after the year has elapsed, earnings exceeded estimates, benefits paid over that year will have been in erroneously high amounts. We can and do, however, adjust future benefits to recover overpayments that occurred.

The results of the pilot study also help us identify the major sources of error. The pilot revealed that a large portion of the excess payments were concentrated in cases where SSA received late notification of a beneficiary's death and where students receiving benefits were not in full-time school attendance.

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The major source of underpayments related to incorrect benefit computations. In addition, underpayments occurred in cases where wives and widows who claimed benefits before reaching age 65 were entitled to higher benefits upon reaching age 65. They either failed to file the appropriate claim or neglected at the time of their initial claim to supply the information that would automatically trigger the higher payment at age 65. Consequently, these beneficiaries were receiving payments in amounts lower than that to which they were actually entitled.

As mentioned earlier, we have already moved to tighten the management of the student benefit program. In light of the above results, we are now developing action plans that address all of the major causative factors identified thus far.

In the DI program, we know of course that we have some problem with errors, and we also know that present disability determination methods permit quite varied results. The major source of payment error occurs when beneficiaries fail to notify us of successful returns to work. But the problems in the DI program run much deeper and have led us to conclude that we need to restructure the entire administrative system in order to get higher quality initial determination decisions.

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One last important point must be made about our overpayments in the RSDI program. The numbers which I have cited today and any which are produced in the future can seriously distort the true story of SSA's performance. Data from our accounting systems gives us strong indications that well over half of our overpayments in the RSDI programs are collected. And, with the launching of "Project Accuracy," and the strengthening of our collection systems, we will do even better.

This important point about collection rates gives a much different perspective to our initial error rate figures -- all error ~~des~~ not involve dollar loss because it is in effect corrected. And this is only one of several critical variables that need to be understood in order to fully appreciate the meaning of any error figures we produce. My own belief is that the American public as a whole, as well as each of us individually, need to understand error rates in Government programs in a much more fundamental way. A simple citing of an error rate or the corresponding dollar figure can seriously misrepresent the state of affairs.

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A context is always necessary, as well as an appreciation of the various forces and objectives at play. Let me illustrate with the social security experience.

Total size of an agency should always be kept in mind when making judgments about the magnitude of a dollar error rate. This context has seldom been given in the stories I have seen about overpayments in SSA. A .5 percent error in a checking account with a \$100 balance translates into .50 cents. That is hardly an amount any of us would agonize over in an attempt to correct. Yet, that same error rate applied to the \$100 billion RSDI program leaves us with an unacceptable \$500 million.

When it comes to SSA, there is deep concern, which we share, with any notion that there may be half a billion dollars of errors. That concern is justified, but should be tempered as well, by an appreciation of the sheer size of the numbers that exist in SSA. And, as you all know, total program expenditures will only increase over time.

Program complexity is also a key factor. Complexity in legislative provisions inevitably predetermines administrative error, and SSA programs have become more and more complicated

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over time as Congress has seen fit to expand and elaborate these programs. Our programs require verification of a wide assortment of factors in the life of each beneficiary before we can determine correct payment amounts.

At one time, a retiree's basic benefit involved a simple computation applied to a worker's average monthly wage. Dependent and survivor beneficiaries were given a percentage of the basic benefit. A beneficiary might well in days gone by been able to understand enough to compute his or her own benefit. That simplicity has given way over the years to an extremely complex series of computation methods and interacting conditions that make benefit computations highly error prone. It is doubtful that any beneficiary today would have the knowledge and sophistication required to compute his or her own benefit amount. Thus, beneficiaries are even more dependent on the accuracy of our efforts and our responsibilities are enlarged.

This change over the years has come about primarily because the Congress added provisions requiring new computation methods or allowing beneficiaries more options which affect their benefits. Moreover, as the new provisions were added, the old ones were retained in the law to give the beneficiary the benefit of whichever method or option provided the higher payment.

In addition, each new beneficiary class added to the rolls (such as divorced mothers, remarried widows, and disabled widows, each with different eligibility requirements) has brought new complexity. As these new classes were added.

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grandfather clauses were included to maintain the level of benefits payable to beneficiaries on the rolls who might otherwise have been adversely affected -- most such clauses are still applicable. Further, with the additional classes of beneficiaries, the program was also liberalized to permit dual, triple, and even quadruple entitlements. In each of these situations, individual computations are necessary and then the interrelationships among them must be assessed to determine the proper benefits payable. We are reviewing from the standpoint of today's world whether the complexity produced by the layering of computation provisions over the years could not be reduced without unduly disadvantaging beneficiaries.

The simplest claims situation now requires a minimum of three computations to identify the one most beneficial to the claimant. A typical example would be a male wage earner retiring at age 65. We have to compute his potential benefits using all of his earnings since 1937, and again using all earnings since 1950. With the provision in the 1977 amendments for indexed earnings, we also must compute his potential benefit based on indexing his earnings since 1950.

At the risk of belaboring my point about complexity, I would like to take you through perhaps the most complex case, a widow's benefit computation. Certainly some widows'

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cases can be as simple as the retiree case outlined above. Many are far more complex. If a widow has earned social security coverage, we must make the three computations described above based on what she has earned in her own right, as well as perform similar computations on her deceased husband's account. Then, we will pay her own benefit plus the difference if the widow's benefit is higher.

If she is under age 65 we must consider reduction of her benefit amount on both accounts at different reduction rates. If there are applicable annual benefit rate increases, we must also determine the number of months before age 65 she will actually receive benefits in order to determine the reduction rate that applies just to the benefit increase. Since she can also be a widow more than once, other computations may be necessary for any other such accounts.

Is she disabled? If so, a different reduction rate for benefits payable at a lower age may be in order. Are delayed retirement credits in order? The widow's rate can be 100 percent of the deceased worker's rate including

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his delayed retirement credits but cannot exceed what he would have gotten had he lived. Had he drawn reduced benefits, for instance, her benefits would have to be reduced as well. There are a number of other complicating factors to consider but the foregoing fairly well outlines the exercise we go through to determine the right amount to the right person.

In addition to this overwhelming set of computations, changes in any of these factors require an adjustment in the benefit amount or may bring continued eligibility into question. Some of these factors we can monitor but for many of them we must rely on the beneficiary to notify us of changes in circumstances. This complex set of eligibility and reporting requirements results in three-fourths of the errors we identify stemming from failures of beneficiaries to report changes. We are taking action to recontact categories of beneficiaries most likely to change circumstances.

I am not saying that errors due to program complexity are tolerable. However, I raise the issue to illustrate that the complex nature of our programs makes the effort to prevent errors from occurring an enormous challenge. We consider an important element of our overall look at program management to be an assessment of where complexity can be reduced by legislation or administrative changes in the interest of both better public policy and reduced proneness to error.

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Making this challenge even more monumental is the pace and degree of change in the Social Security Act. For example, the Social Security Amendments of 1977 challenged us to quickly accommodate our operations to a number of major changes:

- indexing and decoupling radically revised our computation methods;
- changes affecting the retroactivity of benefits required alteration of benefit computations;
- enactment of two different earnings tests for young and old beneficiaries required additional computations;
- the change from a monthly to an annual earnings test required a major systems restructuring; and
- the change from quarterly to annual wage reporting required an additional major systems restructuring.

Further enriching this picture are the conflicting objectives that are often being balanced in SSA programs. Equity of treatment, adequacy of benefits, protection against abuse, program efficiency, due process, administrative convenience--all of these goals are at stake in the legislative and

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judicial process and the balancing can lead to situations where overpayments will definitely occur. Overpayments that result from conflicting objectives cannot fairly be termed payment "errors." The overpayment does not occur because of an error on the part of SSA or the beneficiary. One illustration of this phenomenon is the earnings test discussed earlier, which virtually guarantees the occurrence of erroneous payments by basing payment amounts on beneficiary estimates of earnings for an upcoming year.

An additional illustration of conflicting objectives leading to predetermined payment errors can be found in situations where a change in a beneficiary's circumstances requires suspension or termination of benefits. In the interest of due process we currently must give the beneficiary enough prior notice of the impending suspension or termination of benefits for the individual to appeal the action. In these situations, an overpayment will occur in at least one month. If the individual requests a redetermination or appears before an Administrative Law Judge or carries an appeal to the courts, additional months and, in some

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cases, years of overpayments will occur. The courts have ruled we must continue to pay benefits until a final decision has been rendered.

Another factor that complicates our functioning as an organization is the fact that we are a government agency operating within an executive branch in a governmental structure as a whole. We often do not control our own resources and are required to function under less than adequate conditions. For example, we presently have pending at GSA some 472 requests for action on space affecting our district offices. This means that over one-third of these community offices where we deal with the public are in less than satisfactory condition, some in horrible condition. This in turn affects the public's perception of the services we deliver as well as the morale of our own employees.

As part of the President's anti-inflation program personnel ceilings imposed on the government across the board impinge on us. Private organizations of our size and importance do not face this kind of extra constraint in performing their basic mission.

Let me be clear that we do not point out these matters to complain or to excuse any shortcomings we may have. From the standpoint of the

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public we serve, we are "government" whatever our position within the entire governmental structure. But we do mean to point out that there are resource limitations on our operations which do impinge directly on the quality of our service to the public.

Finally, we must all pursue the concept of an irreducible minimum. How close to perfection can all of us expect to reach? Beyond a certain point, the cost of preventing error may greatly exceed savings possible or may require intrusions into the personal lives of Americans which the public will find unacceptable. We certainly have not reached that point in SSA programs, but it is important that the American people not be misled into believing that zero error rates are attainable or always desirable. The point is we will always have some errors in these kinds of programs, but at a level acceptable to the public.

All these elements of context must be kept in mind. But, as I have indicated to you previously, we believe there are many ways that we can improve our performance. I touched on a few changes in the earlier portion of this statement. Let me discuss in more detail several of the administrative steps that we have taken to reduce our errors.

First, the Secretary and I have proposed significant changes in the disability determination process that will improve the accuracy of our decisions in the DI program. These changes do not require legislation and we are moving to implement them administratively.

- We will begin a Federal review of allowances at the initial State decision stage before those decisions are implemented and before benefits are paid.
- We will provide applicants whose claims are denied initially an opportunity for a face-to-face, informal conference with a decision-maker who will reconsider the case.
- At the hearing stage, we will use Social Security Administration personnel to present and defend the Government's case in a hearing before an Administrative Law Judge. This move to a more traditional adversary system will help protect the Government's interests and permit the ALJ to serve in a more purely judicial role.

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- ° We will establish an SSA Review Board to review appeals by claimants, as the present Appeals Council does, and to review ALJ allowances on its own motion. This will reduce the number of incorrect allowances at the hearings level.

- ° In addition we are now experimenting with an expansion of our procedures to reexamine DI beneficiaries for continuing disability. We currently schedule all DI claimants who fall into specified categories of disablement from which we believe there is potential for recovery, for periodic medical reexamination. This represents just over 20 percent of all new claims. We are conducting a pilot project to test the feasibility of expanding the categories of disablement for which we would schedule reexaminations.

Another aspect of our Project Accuracy involves a feature of the DI program which allows disability insurance beneficiaries trial work periods during which they can attempt to return to work without losing benefits. SSA notifies the beneficiary when the trial period has elapsed to see if the work effort was successful and benefits should be

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suspended. If the work effort has been successful but the beneficiary fails to respond to the notification, any benefit beyond the trial work period results in an overpayment. Beginning this month, SSA will suspend benefits if the beneficiary does not respond to the notification that the trial work period has elapsed, assuming it has been successful.

Third, to address overpayments in the student benefit program we have initiated a systematic certification process that will require students to provide semi-annual verification of full-time school attendance. Further, we have begun plans to check our student records against those kept by the Basic Education Opportunity Grant (BEOG) program for additional information that might alter a student's entitlement to social security benefits such as only part-time enrollment status or marriage.

Fourth, we will begin to contact young widows receiving benefits to determine if they have remarried. Perhaps as many as 3 percent of these beneficiaries, whose benefits by law should be terminated upon remarriage, neglect to inform SSA of changes in status. We believe that by periodically recontacting young widows and widowers, we

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will increase the likelihood of prompt reports of remarriage which will lead to a reduction in overpayments to these beneficiaries.

The fifth area involves cases when overpaid beneficiaries go off the rolls, receiving no further benefit checks from which the overpayments could be recovered. In these cases SSA generally arranges a payment plan with which the former beneficiary is expected to comply without billing or regular reminder. We are in the process of modifying our overpayment collection process to provide a centralized automated monthly billing system--in place of our current manual process controlled at the district office level--for situations which involve collection of overpayments by installments. We believe that by regularly billing former beneficiaries who have agreed to return overpayments in installments, we will improve recovery.

Sixth, since a majority of payment errors occur because recipients forget or are unaware of their responsibilities for reporting changes in circumstances, we believe we can prevent a large share of payment errors by better educating beneficiaries about reporting requirements. We are issuing new instructions to SSA employees who have personal contact

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with beneficiaries. These instructions emphasize the importance of informing beneficiaries about the requirements to report work activity and other circumstances that may change beneficiary status, particularly:

- disabled beneficiaries who return to work;
- student beneficiaries who lose student status;
- beneficiaries whose earnings may exceed the limitation;
- young widowed beneficiaries who remarry; and,
- wives and widows who may be entitled to higher benefits when they reach age 65.

In addition to these initiatives already underway, we will be proposing two legislative changes which would assist us in improving our record on payment accuracy in the RSDI programs. Our continuing review of the structure and operation of these programs will undoubtedly produce a number of other legislative recommendations in the future.

First, we are recommending improved integration between the social security disability insurance program and the SSI program to eliminate a problem that results when a

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retroactive social security payment is made for months in which SSI benefits have already been paid. Under present law, we cannot retroactively adjust the SSI payment except in the quarter during which the retroactive social security benefit is paid. A legislative change will make it possible to recover overpayments beyond the current quarter.

Second, we are proposing a modification in the earnings test that would decrease the incidence of overpayments in situations when beneficiaries are on the rolls for only a portion of the year. Under present law, properly paid benefits can become overpayments later in the year if a beneficiary is terminated and subsequently has substantial earnings. An example is the student who graduates and goes to work. The legislative change would apply a monthly earnings test only to that part of the year for which the person is eligible to receive benefits.

Secretary Califano and I recognize we have a major responsibility to taxpayers who finance our programs, and to program beneficiaries, most of whom rely on monthly payments from SSA as their principal source of income, to pay the appropriate person the right amount on

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time. We are committed to continuing review and improvement of SSA programs and the way they are administered. Inaccurate payments and management waste are intolerable and only serve to undermine public support for our programs and disrupt beneficiaries.

We believe it is absolutely vital to the future of income support in this country to demonstrate that social programs for the vulnerable of our society can be run efficiently. Compassion for the people served by our programs will be shown by efficient management that preserves the integrity of the programs and earns support from the American people as a whole. I am confident, Mr. Chairman, that we share the same goals for program integrity and that we can continue to work together to improve our programs and ensure their support from the American people.

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STATEMENT ON JUDICIAL REVIEW
OF VETERANS ADMINISTRATION DECISIONS

Submitted to the Administrative Conference on October 23, 1978

The National Veterans Law Center came into being in July of 1978 as a joint project of the American University Law School's clinical program and the Military Discharge Review Project of the American Civil Liberties Union Foundation. The Center provides legal services to veterans, largely involving claims before the Veterans Administration (VA), in the context of a clinical legal education program. There are currently twelve students learning the processes of lawyering under the tutelage of four attorneys. During the course of its familiarization with the procedures of the VA the staff of the program has become increasingly convinced that judicial review is essential to ensure that decisions of that agency are fairly arrived at. We are grateful, therefore, for the opportunity to comment upon the proposal that the Administrative Conference of the United States support judicial review and upon the report submitted to it by its consultant, Prof. Frederick Davis.

Were we to restrict our comments to the three alternatives that emerged from the October 5, 1978 meeting of the Advisory Committee we would clearly favor alternative 1. Prof. Davis' original recommendation (which was amended in §IV A(3) from "manifestly unsupported" to "manifestly contrary") is superior to any of the others because it allows a review of the factual determination by the VA in those cases in which the findings have little if any support in the record. The right of a veteran to judicial review of the denial of his claim for benefits would be an empty one were that right not to include at least a limited form of review of the factual finding upon which that decision is based.

Many of the claims adjudicated by the VA involve factual questions. While claimants are entitled to hearings at various stages of the adjudicatory process, they are not afforded rights which are considered basic throughout our justice system. For example, since there is no adversarial interaction at any such hearing the veteran often does not know which "facts" will be relied on by the hearing officers in making decisions and thus there is no opportunity to challenge the accuracy or relevance of the information which will be the actual basis of the determination. Furthermore, since no witnesses appear to oppose the claim there is no right to cross-examine and test the truthfulness or validity of the evidence which might provide the sole reason for the denial of the claim. The hearings consist mostly of the presentation of additional evidence by the claimant [including such things as documents and the testimony of the veteran] and argument on the issues in question. Because the hearing is so one-sided the opportunity for incorrect factual determinations is great. To the extent that a finding is not supported by the records and testimony available to the adjudicator the possibility exists that the decision is based upon irrelevant reasons. Allowing judicial review of factual determinations would provide an incentive for the VA to minimize the likelihood of erroneous decision-making and, in addition, provide claimants with a forum outside of the agency to take their complaints that a factual statement relied upon by the VA is unsupported by the evidence available.

One of the arguments advanced in opposition to providing a forum for even the most limited judicial review of VA fact finding is the claim that no one has demonstrated that the present system is inadequate. While it would be relatively easy to provide examples of cases in which the result seems unjust or inconsistent with the facts, we are aware of no systematic study which deals with the quality of the adjudication by the agency. Since the system is inherently a closed one, without public hearings, without any conveniently accessible written decisions, without the possibility of appeal outside of the agency, and without the regular participation of outside lawyers, reports of abuses tend to be anecdotal or otherwise difficult to verify. However, several known facts are extremely troubling and suggest that there is a strong probability that decision-making does not always comport with generally accepted notions of justice.

One principle which is basic to our jurisprudence is that, absent explicitly stated reasons for inconsistency, like cases will be decided in a like manner. In addition to the fact that the VA concedes inconsistencies among its regions, even at the level of the Board of Veterans Appeals the regulations do not bind the agency to its prior decisions. The relevant regulation states, "...Conclusions reached in individual cases are frequently influenced by peculiar facts or local statutes and, consequently, will not be followed as precedents...." 38 CFR §3.101. Also, see 38 CFR §19.103. Even were it possible to cite prior decisions of the BVA as precedent, it would be extremely difficult to find the relevant decisions since at this point they are not indexed or generally available (although we are advised that an index of BVA decisions is being prepared).

Another principle which seems basic is that access to all phases of the adjudication system will be provided to all claimants who are similarly situated. During the course of our familiarization with VA procedures we have heard about methods known to service organization representatives of obtaining reconsideration of decisions at the regional level which are not provided for in the regulations. (See Davis Report to Administrative Conference on September 21, 1978 at 21) Furthermore, there are cases which are apparently removed from the regular course of adjudication for administrative decision when a sufficient amount of political controversy is involved.

The extremely close relationship between the VA and the service organization representatives who provide nearly all of the representation of claimants before the agency can be antithetical to the concepts of independence of counsel and zealous advocacy. These representatives are provided offices in VA buildings and appear before the same officials day after day. While there are obvious advantages to such arrangements and, indeed, the representatives do well for their clients most of the time, there are also dangers inherent in such a system. The tendency of persons who work together in such proximity to "normalize" their relationship instead of meeting at arms length is well recognized. (See, Sudnow, "Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office" 12 Social Problems 255 (1965) which studies the phenomenon from the perspective of public defenders and prosecutors who appear against each other on a daily basis). While this may present advantages to most claimants, it can result in less-than-zealous advocacy in the unusual cases where preparation, fact-gathering and aggressive presentation are necessary in order for the client to receive fair consideration and an on-the-record and on-the-merits decision.

All of these factors lend credence to the claims that VA adjudications are sometimes less than perfect. But if the critics of this point of view are correct, the best way to establish that the agency is performing perfectly is to allow judicial review. Courts are extremely unlikely to upset an agency decision unless some serious error has been committed and therefore there ought be nothing to fear from allowing courts to review some of the actions. On the other hand, to deny a person a forum which is independent of the agency responsible for a decision and within which the person may prove that a claim denial was the result of arbitrary or capricious action or was unsupportable by the record, seems contrary to our basic jurisprudence and our system of checks and balances.

Another argument which is advanced against allowing judicial review of the factual determinations of the VA is the claim that the federal courts would be overloaded by the addition of this ~~type of~~ ^{type of} litigation. While we can share the concern of some people that the burden on the federal courts imposed by elimination of the preclusion from judicial review should be considered, we feel that it should not be given much weight and in any event is not a practical concern in this instance. It would seem that while denying access to the federal courts because of the impact on the administration of the courts might be appropriate in some situations, a heavy presumption should weigh against continuing it in the case of those who have served in the Armed Forces of the country. A realistic look at the potential cases reveals that the impact would be minimal.

The Department of Justice in its testimony ^{before} ~~for~~ the Senate Veterans Affairs Committee concluded that 4,600 cases a year could be anticipated. This was based on the 20% appeal rate of social security disability denials. This methodology overlooks the differences between the nature of VA and social security claims.

The vast majority of VA claims are routine claims awarded on the basis of a veteran's or a veteran's relative's status, e.g., educational benefits or pensions. Regulatory and statutory presumptions make the establishment of service-connection of a disease or injury also routine and in most cases standard percentages of disability are assigned to specific diseases or injuries, whereas in social security cases the claimant must prove the disability and the degree of inability to work. Twenty percent of the Board of Veterans Appeals cases are appeals from the denial of increased ratings and service connection is no longer an issue. These cases are unlikely to be taken to federal court. Furthermore, in 1977, of the 33,000 appeals disposed of by the BVA, only 5,500 involved requested hearings. It is only likely that those latter cases would be those from which a further appeal of a factual determination would be taken.

In sum, then, of the alternatives presented we favor Alternative 1 since it includes some review of administrative fact-finding. However, we believe that it would be preferable to adopt a standard of factual review which is more familiar and therefore more easily integrated into existing law. Some variation of the "substantial evidence test" would be superior and would meet the objective of providing some certainty both to litigants in evaluating whether or not to seek review and to courts in deciding how searching an inquiry ought be made.

Professor Davis proposes a standard of "manifestly contrary to the record" which is language that is heretofore unknown in Federal administrative law. There are apparently two justifications for the new language. It is suggested that it will clarify the intent that the review be a limited one and that to require the same standard as in the Administrative Procedure Act would require the "judicialization" of the VA. It should be noted that the "substantial evidence test" is in and of itself a limited form of judicial review and courts utilizing that standard are extremely reluctant to upset the factual determinations of administrative agencies and only do so when they are unreasonable. 4 Davis, Administrative Law Treatise §29.02 (1958). It is not at all clear that "manifestly contrary to the record" is, in fact, at all distinguishable in its application from the more traditional test. It is conceivable that a court would find them to be equivalents or that a court would find the new standard to be more similar to the "arbitrary and capricious" standard which would be most unsatisfactory as that is recognized as the narrowest formula for factual review. Davis, Administrative Law of the Seventies §29.00 647 (1976). The point is, though,

...Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

All that the substantial evidence test would require of the VA is that its decisions be reasonable. See, Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966). Surely no one would require of it anything less.

convenient way to apply the "substantial evidence test" to the VA would be to make it subject to §706 of the APA and require that its hearings be conducted in accordance with §§556 and 557 of the APA. It is our view that that or something similar would be desirable. We recognize, however, that the Administrative Conference is not prepared to go that far at this time. Thus, we urge the adoption of the "substantial evidence test" outside of the APA so that the committee's apparent objective of avoiding the judicialization of the VA could be met. That could be achieved by deleting §IV A(3) and substituting "Made a factual determination which is unsupported by substantial evidence." Applying this test outside of the APA would not require that the VA judicialize its internal procedures.

In its document entitled "Section-by-Section Analysis of Judicial Review Draft Bill" (April 21, 1978) the VA stated that this test would "...permit the retention of the practices now used by the Veterans Administration without substantial change."

Although the "substantial evidence test" is most commonly known in connection with the review provisions of the APA, this has long been the review formula for administrative findings. Davis, Administrative Law Treatise §29.02 at 118 (1958). The basic test was used by the courts prior to the APA in a quantitative manner, to determine if the evidence of record was in fact substantial in support of a decision. In administrative law today there is clear precedent for the use of a substantial evidence review standard in areas not subject to the APA judicial review or adjudication provisions. Two such areas are the review by the Court of Claims of decisions of certain military boards and of decisions of federal contract appeals boards.

The disposition of military pay cases by the United States Court of Claims is one example of the use of the substantial evidence standard to review broad discretionary decisions by the Boards for the Correction of Military or Naval Records (BCMR), 10 U.S.C. 1552. The body of case law developed there and the impact of such review on the exercise of discretion by these boards is relevant to our suggestion that a substantial evidence standard divorced from the Administrative Procedure Act can be successfully applied to the review of the Veterans Administration.

Congress created BCMRs by the passage of the Legislative Reorganization Act of 1946, ch. 753, §207, 60 Stat. 812. The Act authorized the armed service secretaries "to correct any military or naval record where in their judgment such action is necessary to correct an error or to remove an injustice." *Id.* This broad grant of authority included, for example, the power to correct a record to reflect a service related disability to entitle a servicemember to disability retired pay under the provisions of 10 U.S.C. §1201 (1970). See *Cosgriff v. United States*, 181 Ct. Cl. 730, 387 F. 2d 390 (1967).

The correction board process is fairly standardized among the services and has adjudicative procedures in practice remarkably similar to those of the Veterans Administration. An applicant files a written application for correction which triggers the administrative process. The application and supporting material, if submitted, are reviewed first by a board examiner who prepares a case summary for the consideration of the board members. The board decides, unlike the VA, whether to grant a hearing. The board has no discovery procedures or subpoena power. If a hearing is granted, the applicant is entitled to appear *pro se*, through counsel, or in person with counsel. The responsibility for notifying witnesses is the applicant's. The board hearing has a chairman presiding and evidence is introduced without the application of traditional rules of evidence. The applicant has no right to cross-examine witnesses advising the board, such as authors of advisory opinions that may be submitted. The board may request the applicant to submit additional information. Finally, the board makes findings of fact, conclusions and recommendations which are submitted with the record to the secretary who is not obligated to accept the recommendation of the board. Should the secretary approve the recommendation and the money claim be settled, the correction board process is completed.

The broad discretion accorded BCMR decision-making is in marked contrast with the narrow scope of judicial review of board decisions exercised by the Court of Claims. The basis for the Court of Claims review of corrections board action is found in the Tucker Act which allows for claims against the United States for money damages that are founded on the Constitution or a statute, regulation, or contract. See 28 U.S.C. §1491 (Supp. IV, 1974).

Judicial review of military pay cases is governed by traditional review criteria of administrative law, including the substantial evidence standard. See generally Abel v. United States, 191 Ct. Cl. 89, 423 F. 2d, 339 (1970) (crucial administrative findings supported by no evidence or no substantial evidence are subject to judicial review); Merson v. United States, 185 Ct. Cl. 48, 401 F. 2d 184 (1967) (decision of correction board relating to post discharge medical examination and Veterans Administration service connection rating not supported by substantial evidence.)

In BCMR cases, findings of fact are conclusive unless the plaintiff can demonstrate that such findings are not supported by substantial evidence. It should be noted, however, that the Court of Claims is unique in one sense in that it offers de novo review of administrative decisions. At trial new evidence can be introduced in support of an argument that a correction board decision is not supported by substantial evidence. As the parenthetical summaries of these above cases illustrate, the issues addressed in substantial evidence review of BCMR cases by the Court of Claims are quite similar to those that would be addressed by a federal district court on review of VA decisions.

The experience of the BCMRs with judicial review amply demonstrates that judicialization of administrative fact findings is not an inevitable result of substantial evidence review. The BCMRs have been subject to judicial review since their creation but have retained non-adversarial adjudicatory procedures. This has occurred despite the substantial number of cases handled by the boards and the complex factual issues decided. In fiscal years 1975, 1974, and 1973, for example, the Army BCMR considered approximately 7,324, 6,035, and 6,374 cases, respectively.*/ The Navy BCMR decided in fiscal years 1975, 1974, and 1973, approximately 4,034, 2,870, and 2,376 cases, respectively.**/ These figures certainly compare favorably to the caseload of the Board of Veterans Appeals which has been estimated recently at approximately 22,000 cases per year. Thus the notion that adopting substantial evidence review inherently requires more trial type VA hearings is neither accurate nor supported by the similar experience of the BCMRs.

*/ Exhibit 2 to Defendant's Motion for Summary Judgment at 3, Urban Law Institute of Antioch College, Inc. v. Defense, Civ. No. 76-0530 (D.D.C.).

**/ Exhibit 4 to Defendant's Motion for Summary Judgment at 5, Urban Law Institute of Antioch College, Inc. v. Defense, Civ. No. 76-0530 (D.D.C.).

Judicial review of government contract cases under the Wunderlich Act, 41 U.S.C. §§321-22 (1970), is another example of the use of the substantial evidence standard untied to the Administrative Procedure Act. Contract appeal boards are exempt from the review requirements of the Administrative Procedure Act. The Wunderlich Act regulates the judicial review of federal agency decisions made under federal contract "dispute" clauses which make administrative decisions on contractual matters final and conclusive. Under the Act, an administrative decision on a question of fact is entitled to finality only if supported by substantial evidence. See generally Discount Co., Inc. v. United States, Ct. Cl. ___, 554 F. 2d 1116 (1975). Judicial review is limited to the record made before the administrative agency. See generally United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963). And where there is insufficient evidence in the record, courts under the Act have stayed their own proceedings pending further administrative action. See generally Capobianco v. United States, Ct. Cl. ___, 394 F. 2d 515 (1968). Although the contract appeals boards have adversarial proceedings, and therefore the administrative processes are somewhat dissimilar from the VA, the presence of a substantial evidence standard independent of the APA in these cases suggests that courts will have a body of law to rely upon in VA decisions:

It must be stressed that there is strong approval for such a review standard outside the APA. When it considered the question of the standard of review by the Court of Claims in contract cases, the Supreme Court expressly approved the substantial evidence test. See United States v. Carlo Bianchi and Co., 373 U.S. 709, 715 (1963). The Court held that Court of Claims review is limited to the administrative record and that the "term 'substantial evidence' in particular has become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court." Id. The Court said that the standard has "consistently been associated with a review limited to the administrative record." Id.

These examples suggest that non-APA substantial evidence review is workable, has strong judicial support, and will not inevitably result in a major change in the internal procedures of the VA. Moreover, adopting an entirely new standard for review would likely result in unnecessary and protracted litigation simply over its meaning, a consequence in direct conflict with the rationale for the proposal.

In addition to the important question of the scope of the review of VA decisions, the sixty day limitation on filing a federal district court action contained in the proposal creates serious problems.

The peculiar nature of the internal VA claims procedures and other factors would seem to favor a period longer than sixty days within which a dissatisfied claimant could file an action in federal court.

The Legislative Analysis of the draft Judicial Review Bill submitted to the Senate Veterans Affairs Committee by the VA states in regard to their recommendation of a longer period:

There are two differences in the jurisdictional period in the new subsection 4025(a) and that found in the original security review statute. The first is that subsection 4025(a) provides that the claimant has one year to file his action for review instead of 60 days. It is believed that this greater period in which to file an action can be beneficial to the claimant in that he will have more time to decide whether to seek judicial review. A longer period in which to file may also serve to reduce the number of suits actually filed in the courts, since the claimant will have time to take advantage of the Veterans Administration's liberal policy of re-opening claims on the basis of new evidence without fear that he will lose his right to judicial review. Finally, the one-year period in which to file suit parallels the one-year period in which a claimant now has to appeal the regional office decision to the Board of Veterans Appeals and is more in keeping with the Veterans Administration's policy to give a claimant every opportunity to establish his entitlement to veterans' benefits.

Since most VA claimants will likely opt for free service organization counsel even if the \$10.00 fee limitation were removed, there will be an unusually long time lag between a switch in representation for federal court action. Rarely would there be continuity of counsel from the administrative to the federal court stage or a legal memorandum recommending review that the claimant could take to prospective counsel, so few of the service organization representatives are lawyers.

Sixty days is so short a period that a claimant may not, within that period be able to find an attorney to represent him, and the attorney who takes on the case is likely to have insufficient information to determine whether an appeal has merit. The result can be both filing of unwarranted appeals, so as to avoid the statute of limitations, and the barring of some meritorious claims, for lack of counsel to prepare a complaint during that period.

We fully support the VA's original suggestion that the time limit be extended to one year.

Respectfully submitted,

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