Mr. Richard F. Weidman, Director of Government Relations, Vietnam Veterans of America

Statement of

VIETNAM VETERANS OF AMERICA

Submitted by

Richard F. Weidman
Executive Director
for Policy and Government Affairs

Before the

SENATE VETERANS' AFFAIRS COMMITTEE

Regarding

S2694, S2562, S.2121, S2659, S2416 and S.3363

June 8, 2006

Chairman Craig and distinguished members of the Senate Veterans' Affairs Committee, on behalf of Vietnam Veterans of America (VVA) and our National President John P. Rowan, I thank you for the opportunity to appear here today to offer our views on these important pieces of legislation. While I will comment on each of the bills being considered today, I will devote most of my time to the question of attorney representation, as it is perhaps the thorniest question the Committee is considering today.

S. 2694, VETERANS' CHOICE OF REPRESENTATION ACT OF 2006

American veterans essentially cannot obtain legal representation because of the current fee limitation in effect until after their case has gone past the Board of Veterans' Appeals. Legal counsel at the Court of Appeals for Veterans Claims (CAVC) is allowed to present no new evidence. Allowing veterans legal counsel at the initiation of their claim would give that claim a legal continuity. Legal counsel is the right of all Americans, except veterans. This is an injustice that must be redressed. VVA thanks you for bringing this issue to the fore, and starting the process that we hope will at long last be successful.

As you are aware, legislation of this nature is not unheard of, and in fact there have been several attempts over the past 20 years to pass similar bills. None of these previous attempts have been even remotely successful because of the vehement opposition of the Department of Veterans Affairs under several Presidents, and the opposition of some of our distinguished colleagues in other major veterans service organizations (VSOs). The VA bureaucracy itself has opposed opening the process to any form of meaningful reform. Today, however, Congress appears to be

ready to move to fix the broken, backlogged VA claims adjudication process. Significantly, unlike in previous efforts, the bi-partisan leadership of both the Senate and House Veterans' Affairs Committees appear to be the primary impetus behind the current legislation. For this reason, there is a very strong possibility that the current prohibition against veterans hiring attorneys before the VA will be repealed during the 109th Congress.

From our inception in 1978, VVA has been the foremost champion among the major VSOs of allowing veterans the right to choose to retain attorney representation in their claims for VA benefits, and of achieving full judicial review of all Compensation & Pension decisions of the VA. In 1988, VVA secured a partial victory in this effort with passage of the Veterans Judicial Review Act (VRJA), which among other provisions provided for attorney representation of veterans before the United States Court of Appeals for Veterans Claims (Veterans Court), and limited attorney representation in Veterans Court cases that were returned to the VA for re-adjudication. Under the proposed legislation, veterans would be allowed to retain an attorney to represent them before the VA regional offices (VAROs)??at the stage where their case has not yet been fully adjudicated or denied, and before an appeal to the VA's Board of Veterans' Appeals (BVA) is required.

Historical Background

The current restriction on attorney representation has its origin in the Civil War (1861-1865). At that time, Congress limited the fee charged by an attorney or ?claims agent? to $10 for assisting a veteran to complete and submit a claim to the Pension Bureau for a war pension. This statute was passed to protect veterans from unscrupulous lawyers and claims agents whose aim was to steal the veterans' pensions. In 1865 there was no regulation of law practice by government or licensing of attorneys by bar associations. Anyone could hold himself out as an attorney or claims agent and, for a fee, assist a veteran claim a pension. Nonetheless, in 1865 the value of $10 was many times greater than today, and at that time this amount was a fair fee and reasonable incentive for attorneys to assist veterans.

The statutory bar prohibiting a veteran from hiring an attorney evolved from this 1865 legislation because the $10 limit was never raised in the 123 years since then. With time, the $10 payment became meaningless. In the modern era, unless the attorney represented a veteran pro bono, the veteran could not legally hire an attorney for representation services before the VA. An attorney accepting a fee from a veteran greater than the authorized $10 would be committing a felony, and was subject to a fine and/or imprisonment. Over time, the primary proponents for not raising the $10 fee limit were the major VSOs, with the VA as their ally, the sole purpose of which was to prevent veterans from hiring attorneys.

With passage of the VJRA in 1988, which VVA vigorously supported, the first major change in 123 years loosened the prohibition against the veterans' right to hire an attorney. The VJRA created the Veterans Court, giving veterans the right for the first time to appeal an adverse BVA decision to a federal court of review. And, with the right to judicial review, Congress also allowed veterans the limited right to hire an attorney to represent them in the Veterans Court, as well as before the VA in cases the Veterans Court returned for re-adjudication. While an important step, the VJRA left in place the prohibition against veterans hiring an attorney for representation before the VARO and the BVA. Thus, although some veterans are currently free

to hire an attorney in limited circumstances (i.e., where the case has first been through the entire VARO and BVA appeals process), most veterans remain prohibited from hiring an attorney.

Because of their training in the law, attorneys generally can ensure that complicated claims are processed correctly and thoroughly from the outset. Having attorneys involved at the initial claims processing would help to ensure that the evidence is fully developed ?up front,? and that the VA is satisfying its legal duty to assist and complying with its own laws, regulations, and procedures. Also, attorneys are more likely to interpret, understand and apply new case law to veterans' claims. Just as important, attorneys also are well equipped to identify frivolous or non-meritorious issues, and would more likely ensure that these have been eliminated from a veteran's application for benefits. Attorneys are ethically bound to do so. Bringing a claim with little chance of success, only to be locked into a years-long battle with the VA does not serve the interests of the veteran.

If attorneys were allowed to represent veterans before the VARO, this also would have the effect of facilitating more successful administrative appeals before it would become necessary to appeal such cases to the BVA or the Veterans Court. For example, attorney participation in the claims adjudication process would ?raise the bar? on the part of VA adjudicators. Adjudicators would have to perform at higher levels of competency at the early stages of the process and would have to work a lot harder to justify denials of meritorious claims. Also, on average, an attorney would have a smaller caseload than most VSO service representatives. Therefore, the case of a claimant retaining an attorney to represent him or her during the entire claims process would likely receive significant individual attention, which would also free VSO service representatives to spend more time on their own veteran clients. All these effects will cause a reduction in the number of BVA and Veterans Court appeals and remands, leading in turn to a decrease in the backlog of claims. This outcome would be of great benefit to all veterans.

The Rehashed Arguments Against Allowing Veterans The Right To Choose Their Representative Have Long Been Discredited

The same arguments used to resist passage of the VJRA of 1988 are being asserted again to resist passage of the Veterans' Choice of Representation Act of 2006. Primarily, the rationale articulated by the major VSOs and the VA for their vehement support for perpetuating the bar to veterans choosing attorney representation is paternalistic, i.e., they argue that the veterans benefits system is non-adversarial and pro-claimant, and as such veterans and their benefits must be ?protected? from unscrupulous attorneys. Putting aside the merits of the argument that the VA benefits system is non-adversarial, the view that veterans need to be ?protected? from attorneys simply has no basis in fact, and discriminates against veterans in comparison to the unfettered right of all other socioeconomic groups in our nation to hire an attorney. There is no evidence that veterans have been abused by their attorneys (by charging exorbitant fees, for example) upon their being provided representation services before the Veterans Court and then on remand from the Court to the BVA.

Also cited by the VA and some others as to why attorney representation of veterans is harmful and should not be allowed is that, by introducing attorneys into the mix during the initial claims process, VA adjudicators will be forced to take a more adversarial position when adjudicating

claims. However, many veterans' advocates would argue that the VA adjudication process is already adversarial. Virtually any veteran who has been through this process will tell you that.

The fact that this process is adversarial not necessarily because of the animus of VA adjudicators, but because of their heavy workload and the massive backlog of cases. It is far faster and easier for a VA adjudicator to deny a claim and let the next level decision-maker fix any errors than it is to fully review the record, develop the evidence and make a thoroughly reasoned decision. With the assistance of an attorney at the start of a claim, the adjudicator's task can be streamlined to reviewing the evidence, developing the evidence as specified by the attorney, considering the attorney's legal and factual arguments and analysis, and rendering a decision. If the attorney fully develops the evidence as much as possible and writes a coherent argument, a favorable claims decision is essentially written for the adjudicator. Moreover, the adjudicator will have to work harder to find a justifiable basis to deny the claim.

Another discredited ?doomsday? argument is that allowing attorneys to represent veterans at the VARO level will result in undue competition with service representatives, perhaps even causing smaller VSOs to be driven out of the business of representing veterans. Such an outcome is highly unlikely. Allowing veterans the right to choose attorney representation will not diminish the critically important role of VA accredited VSO service representatives. As demonstrated by VVA's historical support for judicial review and the right to attorney representation, as well as its use of its own attorneys to represent veterans before the BVA and the Veterans Court, VVA has always viewed the roles of accredited service representatives and attorneys as complementary. Both groups train and learn from each other, and cooperate in the representation of VVA's veteran clients. The strength of accredited service representatives is in their front-line work in the field, developing claims and succeeding at the regional office level in most routine cases. The further up the appeal process a case must go, the more likely it presents complicated legal or factual issues, and is not routine. In such cases, especially at the appellate levels, the role of attorneys can be critical to providing veterans with quality representation.

Moreover, there will never be enough attorneys representing veterans to assist them all. Nor would attorneys have any incentive to take all veterans as clients. Because attorneys will be paid, economic considerations will determine the number of veterans who will choose legal representation. For the same reason, no small VSOs will be put out of the business of representing veterans because of attorneys. Only a small percentage of veteran's benefits claims involve amounts of past-due compensation sufficient to create incentives for attorney representation. Because the vast majority of cases do not involve large awards of past-due benefits, the vast majority of veterans will continue to have their cases represented by accredited VSO service representatives.

Yet another argument used in the past to resist attorney representation is that many attorneys have little or no training in VA laws, regulations and adjudication policies, which would result in inadequate representation or even legal malpractice. This is a ?red herring? because, since the VJRA was enacted in 1988, there already have been a number of attorneys throughout the country practicing in this area of the law. It is true that more attorneys new to this practice will become involved if the current bar to attorney representation is repealed. However, ethical and other professional responsibility rules require attorneys to be competent to adequately represent

their clients. Attorneys without direct experience with VA benefits laws and procedures should be at least familiar with how to obtain the information and learn what is necessary to provide adequate representation to veterans. This is not a new concept for attorneys. It is the method attorneys use with respect to every area of law in which they might practice.

Lastly, opponents of allowing veterans' freedom of choice also argue that only those veterans with financial means will be able to afford attorney representation. In other words, they argue that poorer veterans will be unable to afford attorneys and thus will be disadvantaged in terms of the quality of their representation, causing disparate classes of benefits claimants. It is highly unlikely, however, that some veterans will be denied the benefit of attorney representation based solely on their inability to pay the attorney's fee. Virtually no veteran will be required to pay an attorney in advance for representation. The vast majority of veterans' cases handled by attorneys will be done on a contingent basis (no fee unless an award of past-due compensation is won), which is the case with the limited attorney represented cases that occur today. This means that the merits of the veteran's case will most likely determine his or her access to an attorney, not the veteran's financial standing.

The overriding concern for VVA, as well as any other individual or group that cares about the rights of veterans, is that veterans get the most effective representation possible. If a veteran wants to hire an attorney as his or her representative at the VARO, is there a legitimate basis to deny them the right to do so? The position of VVA since its founding has been that no such basis exists. There should be no wavering from this same answer today.

The Changes Proposed in the New Legislation

Current law setting forth the limited circumstances and requirements for attorney representation for payment in veterans benefits claims is found at 38 U.S.C. § 5904(c) (2000). There currently are three basic requirements. First and foremost, there must be a final adverse BVA decision with respect to the claim. (This first requirement means that a veteran with a case in a position to finally hire a lawyer has gone through the entire VA claims adjudication and appeals process without the right to have hired one. On average, this process takes three to five years to complete.) Second, the veteran must hire the attorney within one year of the date of the BVA decision. Third, compensation can be paid to the attorney only for services rendered after the date of the final BVA decision in the claim that was the subject of the BVA's decision to deny benefits. See § 5904(c)(1).

The BVA has promulgated regulations requiring the attorney to file a copy of any attorney-fee agreement with a veteran with the VARO and BVA. When a fee becomes payable, the VARO first reviews the agreement to determine that all the requirements for payment of a fee have been met. Later, the BVA has the authority to entertain any allegation that the fee charged by the attorney is excessive or unreasonable. If so, the BVA may order a reduction in the fee called for in the agreement. See id. at § 5904(c)(2). The BVA's regulations provide that an attorney fee of 20 percent or less is presumed to be reasonable.

In addition, the attorney can choose to have the VARO withhold his or her fee and be paid directly by VA. If this payment procedure is used, the attorney-fee amount cannot exceed 20

percent of the amount of past-due benefits paid to the veteran on the basis of the claim. See id. at § 5904(d)(1).

In the proposed Veterans' Choice of Representation Act of 2006, the requirement that there be a final adverse BVA decision before the veteran may retain an attorney is eliminated in favor of allowing this at the point the veteran a claim for benefits before the VARO. All of the current provisions providing for VA oversight of the attorney-fee agreement with the veteran would be kept in place; that is, the requirements that the attorney-fee agreement be submitted to the VA and that the fee must not be excessive or unreasonable continue as before. The essential effect of the change is to allow veterans to hire an attorney while their claims are still in the early stages of adjudication at the VARO level of the claims process.

The Veterans' Right to Choose

By virtue of the title of the legislation itself?Veterans' Choice of Representation Act of 2006??the problem it seeks to redress is readily apparent. Unless the veteran decides to be his or her own representative, or is able to find a volunteer attorney, by law the only choice of representation currently available is a service representative from a VSO. Recently, a World War II veteran and long-time attorney representing other veterans as a volunteer has described the notion that veterans are not capable of competently deciding who will represent them in a VA matter as ? flabbergasting.?

Although veterans are considered mature and responsible enough to choose to serve their country, they are seen as lacking such capabilities with respect to choosing legal representation. This limitation, and the patronizing reasoning behind it, sets veterans off from every other discrete group of the American population. No other group ? including illegal aliens and felons in penal institutions-is barred from making a free choice about who will be their legal representative in matters personal to them that may be pending before the government.

If any group has earned the right to choose whether or not to hire an attorney, it is our nation's veterans. There simply is no justification for refusing veterans this basic right that is taken for granted by every other segment in our society.

Aside from the basic moral imperative of allowing veterans the choice to freely pick their representation, there are other very practical reasons veterans would desire this right. Primarily, the VA benefits system is rife with problems about which attorneys possess special skills to address. Even though intended to be ?non-adversarial,? the VA benefits system is nonetheless inherently complicated. There are numerous claim forms, confusing terminology, multiple deadlines for the submission of evidence and arguments, unpublished rules, numerous sources of military and medical records vital to a successful claim, and legal requirements that even VA adjudicators do not easily understand. Because of the complex nature of the veterans benefits system, and the lack of qualified VA adjudicators, there is a tremendous backlog of claims awaiting adjudication by VA. Because VA decision-making is so poor, adding to the backlog of cases are hundreds of cases each month returned to the VAROs from the BVA and the Veterans Court to correct errors. A veteran typically can be stuck in the VA claims process for years. In

the present system, however, a lawyer cannot become involved in the case until it is too late, i.e., after the initial evidence development and adjudication has already occurred.

Vietnam Veterans of America strongly and unreservedly supports S.2694 by convention resolution VB-14-95 ?Attorney Representation at VA? (copy attached). We urge its endorsement by this committee and passage by both houses of Congress. Our hope is that once this milestone is achieved we can move quickly to real judicial review by the federal courts.

S. 2562, VETERANS' COLA ADJUSTMENT ACT OF 2006

S.2562 would increase the current levels of disability compensation, additional compensation for dependents, the VA clothing allowance, and the various rates of Dependency and Indemnity Compensation (DIC) for disabled veterans and their families. The percentage increase would be equivalent to the percentage of the cost of living adjustment (COLA) for Social Security beneficiaries, and would become effective as of December 1, 2006. These COLA increases are absolutely necessary to prevent veterans and their dependents from falling through inflationary cracks.

VVA would also seek language in this legislation to include COLA increases for children receiving $250 DIC compensation. DIC payments are not affected by COLA increases.

S. 2121 VETERANS HOUSING FAIRNESS ACT

S. 2121 is a worthy piece of legislation. In some areas of the country, co-ops ? the two-syllable colloquialism for cooperative housing corporations ? have been off-limits to veterans seeking to secure a VA-guaranteed loan to purchase residential cooperative apartment units. Mr. Schumer's sensible bill would remedy this, providing thousands of veterans residing in urban areas with a housing option currently closed to them.

VVA endorses S. 2121.

S. 2659 ? Native American Veterans Cemetery Act of 2006

American Indians have served in every war fought by the United States of America. During World War I approximately 12,000 served with the American Expeditionary Force and many distinguished themselves in the fighting in France. In World War II, more than 44,000 fought against the Axis forces in both European and Pacific theaters. These Americans compiled a distinguished record of courage and sacrifice. More than 42,000 American Indians fought in Vietnam. American Indian contributions in United States military combat continued in the 1980s and 1990s as they saw duty in Grenada, Panama, Somalia, and the Persian Gulf.

Native Americans continue to play a major role in the armed services with nearly 11,000 on active duty today.

VVA believe it is time that Native American veterans who served our country so honorably are allowed to pursue a decent, dignified resting place on their tribal lands and fully supports S.2659.

S.2416, Veterans Employment and Training Act of 2006

The GI Bill is marketed toward youth. It is portrayed through mass advertising in such a skewed light that there is a common albeit mistaken, perception among the general public that the GI Bill will send a veteran through four years of college. The reality is far different. Today's GI Bill will pay on average a little more than one-fourth the amount of four years expenses at a state university at in-state costs. Long gone are the days of former infantrymen walking the halls of Yale and Stanford. The fact that qualified veterans are by and large excluded, due to their economic stations in life, from the top, prestigious institutions that churn out tomorrow's leaders, is not only detrimental to veterans, but is a real blow to this nation.

VVA believes that the time has come for a serious overhaul of the existing Montgomery GI Bill. A truly substantial GI Bill, one modeled on that accorded to World War II veterans that transformed America, built the middle class, and was an essential ingredient in building the greatest sustained economic engine in the history of the world, is what is needed today. Additionally, we need to restore the apprenticeship and explicitly directed vocational emphasis in the GI Bill to meet the needs of many of our newest veterans. This is one benefit that will, in turn, benefit this nation for generations to come, returning many times over the investment in dollars to the Treasury, as well as greatly aiding in growing our Gross Domestic Product.

S. 3363 ? VVA supports this amendment to Chapter 35 Subtitle IV of 38 U.S. Code that would extend an accelerated education payment program to dependents and survivors under the Montgomery GI bill. This benefit is extremely useful in non-degree education/training programs that will directly lead to meaningful employment.

Mr. Chairman, again all of us at VVA thank you for this opportunity to present our views on these improvements in vital veterans benefit.