JOHN WILSON, ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

STATEMENT OF
JOHN WILSON
ASSISTANT NATIONAL LEGISLATIVE DIRECTOR
OF THE
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
FEBRUARY 26, 2010

Mr. Chairman and Members of the Committee:

I am pleased to have this opportunity to appear before you on behalf of the Disabled American Veterans (DAV), one of four national veterans' organizations that create the annual Independent Budget (IB) for veterans programs, to summarize our recommendations for fiscal year (FY) 2011.

As you know Mr. Chairman, the IB is a budget and policy document that sets forth the collective views of DAV, AMVETS, Paralyzed Veterans of America (PVA), and Veterans of Foreign Wars of the United States (VFW). Each organization accepts principal responsibility for production of a major component of our IB—a budget and policy document on which we all agree. Reflecting that division of responsibility, my testimony focuses primarily on the variety of Department of Veterans Affairs (VA) benefits programs available to veterans.

In preparing this 24th IB, the IB Veterans Service Organizations (IBVSOs) draw upon our extensive experience with veterans' programs, our firsthand knowledge of the needs of America's veterans, and the information gained from continuous monitoring of workloads and demands upon, as well as the performance of, the veterans benefits and services system. This Committee has acted favorably on many of our recommendations to improve services to veterans and their families. We ask that you give our recommendations serious consideration again this year. My testimony today will focus on three areas: Benefits; General Operating Expenses; and Judicial Review.

Within the Benefits arena, the first area to address is concurrent receipt of compensation and military longevity retired pay. It has been and continues to be the perspective of the IBVSOs that all military retirees should be permitted to receive military longevity retired pay and VA disability compensation concurrently, regardless of the level of their disability rating.

Many veterans, retired from the armed forces based on longevity of service, must forfeit a portion of their retired pay earned through faithful performance of military service before they receive VA compensation for service-connected disabilities. This is inequitable. Military retired pay is earned by virtue of a veteran's career of service on behalf of the nation, careers of no less than 20 years.

Entitlement to disability compensation, on the other hand, is paid solely because of disabilities resulting from military service, regardless of the length of service. Most nondisabled military retirees pursue second careers after serving in order to supplement their income, thereby justly enjoying a full reward for completion of a military career with the added reward of full civilian employment income. In contrast, service-connected disabled military longevity retirees do not enjoy the same full earning potential. Instead, their earning potential is reduced commensurate with the degree of service-connected disability.

While Congress has made progress in recent years in correcting this injustice, current law still provides that service-connected veterans rated less than 50% who retire from the Armed Forces on length of service will not receive both their VA disability compensation and full military retired pay.

The IBVSOs recommend Congress enact legislation to repeal the inequitable requirement that veterans' military retired pay be offset by an amount equal to their rightfully earned VA disability compensation.

The next area to address is repeal of the current requirement that the amount of an annuity under the Survivor Benefit Plan (SBP) be reduced on account of and by an amount equal to Dependency and Indemnity Compensation (DIC).

Career members of the armed forces earn entitlement to retired pay after 20 or more years' service. Unlike many retirement plans in the private sector, survivors have no entitlement to any portion of the member's retired pay after his or her death. Under the SBP, deductions are made from the member's retired pay to purchase a survivors' annuity. Upon the veteran's death, the annuity is paid monthly to eligible beneficiaries under the plan. If the veteran died of other than service-connected causes or was not totally disabled by service-connected disability for the required time preceding death, beneficiaries receive full SBP payments. However, if the veteran's death was due to service or followed from the requisite period of total service-connected disability, the SBP annuity is reduced by an amount equal to the DIC payment. If the monthly DIC rate is equal to or greater than the monthly SBP annuity, then beneficiaries lose all entitlement to the SBP annuity.

This offset is inequitable because no duplication of benefits is involved. The offset penalizes survivors of military retired veterans whose deaths are under circumstances warranting indemnification from the government separate from the annuity funded by premiums paid by the veteran from his or her retired pay.

It is the recommendation of the IBVSOs that Congress repeal the offset between DIC and SBP.

The last area to address within the Benefits section of the IB is the topic of automobile grants and adaptive equipment. The automobile and adaptive equipment grants need to be increased and automatically adjusted annually to cover increases in costs.

The VA provides certain severely disabled veterans and service members' grants for the purchase of automobiles or other conveyances. VA also provides grants for adaptive equipment necessary for the safe operation of these vehicles. Veterans suffering from service-connected ankylosis of

one or both knees or hips are eligible for the adaptive equipment only. This program also authorizes replacement or repair of adaptive equipment.

Congress initially fixed the amount of the automobile grant to cover the full cost of the automobile. However, because sporadic adjustments have not kept pace with increasing costs, over the past 53 years the value of the automobile allowance has been substantially eroded. In 1946, the $1,600 allowance represented 85 percent of the average retail cost and was sufficient to pay the full cost of automobiles in the "low-price field."

The Federal Trade Commission cites National Automobile Dealers Association data that indicate that the average price of a new car in 2009 was $28,400. The current $11,000 automobile allowance represents 62 percent of the 1946 benefit when adjusted for inflation by the CPI; however, it is only 39 percent of the average cost of a new automobile. To restore equity between the cost of an automobile and the allowance, the allowance, based on 80 percent of the average new vehicle cost, would be $22,800.

It is the recommendation of the IBVSOs that Congress enact legislation to increase the automobile allowance to 80 percent of the average cost of a new automobile in 2009 and then provide for automatic annual adjustments based on the rise in the cost of living. Congress should also consider increasing the automobile allowance to cover 100 percent of the average cost of a new vehicle and provide for automatic annual adjustments based on the actual cost of a new vehicle, not the CPI.

Within the General Operating Expenses arena, the IBVSOs offer Congress and the Administration many opportunities for improvement. The first topic of consideration has to do with the Veterans Benefits Administration (VBA) disability claims process.

While simultaneously enhancing training and increasing individual and managerial accountability, Congress and the VA must take definitive steps to reduce delays in the disability claims process caused by policies and practices that were developed in a disjointed and haphazard manner.

The adjudication of compensation claims is complex and time consuming. Failure to develop evidence correctly requires serial redevelopment, which delays claims resolution and increases opportunities for mistakes. Further, inadequately trained employees may fail to recognize when claims development is inadequate for rating purposes. The lack of effective on-the-job training, as well as the failure to involve program expertise of senior Veterans Service Representatives (VSRs) and Rating Veterans Service Representatives (RVSRs) earlier in the process are critical failures. As a consequence, VA routinely continues to develop many claims rather than making timely rating decisions.

Processing policy should be changed to get claims into the hands of experienced technicians (Journey-level VSRs/RVSRs) earlier in the process. This way, issues with sufficient evidence can be evaluated, while development of other outstanding issues continues as directed by those more experienced technicians.

It is understandable that VA wants to be deliberative as it determines the next best course of action to address how to improve the claims process. After all, the VA estimates it will manage as many as 946,000 total claims this fiscal year and provide more than $30 billion in compensation and pension benefits. The IBVSOs recognize that VA has a responsibility to administer these programs according to the law.

There is virtually no in-process quality control that could detect errors before they create undue delays, and provide real-time feedback to technicians. The claims process is a series of steps VA goes through to identify necessary evidence, obtain that evidence, and then make decisions based on the law and the evidence gathered. What fails here is the execution. While the rules are fairly clear, it is the overwhelming quantity of the work, inadequate training, lack of adequate accountability, and pressure to cut corners to produce numbers that result in an 18 percent substantive error rate (by VA's own admission). It is difficult to maintain quality control when individual performance reviews are limited to 5 cases per month, and when there is virtually no oversight on the propriety of end product closures.

There is ample room to improve the law in a manner that would bring noticeable efficiency to VA's claims process, such as when VA issues a Veterans Claims Assistance Act (VCAA) notice letter. These notice letters, in their current form, do not inform the claimant of what elements render private medical opinions adequate for VA rating purposes.

In FY 2007, the Board of Veterans' Appeals (BVA) remanded more than 12,000 cases to obtain a medical opinion. In 2008, that number climbed to more than 16,000. In the view of the IBVSOs, many of these remands could have been avoided if VA had accepted sufficient medical opinions already provided by veterans. While recent court decisions have indicated that VA should accept private medical opinions that are credible and acceptable for rating purposes, we have seen no evident reduction in remands to obtain medical opinions.

To correct this deficiency, we recommend that when VA issues proposed regulations to implement the recent amendment of title 38, United States Code, § 5103, its proposed regulations contain a provision that will require it to inform a claimant, in a VCAA notice letter, of the basic elements that make medical opinions adequate for rating purposes.

Congress should also consider amending title 38, United States Code, § 5103A(d)(1), to provide that when a claimant submits private medical evidence, including a private medical opinion, that is competent, credible, probative, and otherwise adequate for rating purposes, the Secretary shall not request such evidence from a VA health care facility. The language we suggest adding to section 5103A(d)(1), would not, however, require VA to accept private medical evidence if, for example, VA finds that the evidence is not credible and therefore not adequate for VA rating purposes.

Modifying regional office jurisdiction regarding supplemental statements of the case (SSOCs) will improve the timeliness of the appeals process. This proposal is addressed in H.R. 4121, which seeks to amend title 38, United States Code, to improve the appeals process of the VA and was introduced by Representative John Hall on November 19, 2009.

In the current process, when an appeal is not resolved, the VA regional office will issue a statement of the case (SOC) along with a VA Form 9, to the claimant, who concludes, based on the title of the Form 9 (Appeal to the BVA) that the case is now going to the VA. Consequently, the veteran may feel compelled to submit additional or repetitive evidence in the mistaken belief that his or her appeal will be reviewed immediately by BVA. But the VARO issues another SSOC each time new evidence is submitted. This continues until VA finally issues a VAF-8, Certification of Appeal, which actually transfers the case to the BVA.

H.R. 4121 would amend this process so that evidence submitted after the appeal has been certified to the BVA will be forwarded directly to the BVA and not considered by the regional office unless the appellant or his or her representative elects to have additional evidence considered by the regional office. This opt-out clause merely reverses the standard process without removing any rights from an appellant. The IBVSOs believe this change should result in reduced appellant lengths, much less appellant confusion, and nearly 100,000 reduced VA work hours by eliminating in many cases the requirement to issue SSOCs.

It is the IBVSOs' recommendation that:

Congress should modify current "duty to assist" requirements that VA undertake independent development of the case, including gathering new medical evidence, when VA determines the claim already includes sufficient evidence to award all benefits sought by the veteran.

Congress should allow the BVA to directly hear new evidence in cases certified to it, rather than require VA's regional offices to hear the evidence and submit SSOCs.

Congress pass H.R. 4121 to amend the process so that evidence submitted after the appeal and certified to the BVA be forwarded directly to the BVA and not considered by the regional office unless the appellant or his or her representative elects to have additional evidence considered by the regional office.

The next area to address is VBA training. Although the VA has improved its training programs to some extent, more needs to be done to ensure decision makers and adjudicators are held accountable to training standards.

The IBVSOs have consistently maintained that VA must invest more in training adjudicators in order to hold them accountable for accuracy. VA has made improvements to its training programs in the past few years; nonetheless, much more improvement is required in order to meet quality standards that disabled veterans and their families deserve.

Training, informal instruction as well as on-the-job training, has not been a high enough priority in VA. The IBVSOs have consistently asserted that proper training leads to better quality decisions, and that quality is the key to timeliness of VA decision making. VA will achieve such quality only if it devotes adequate resources to perform comprehensive and ongoing training and imposes and enforces quality standards through effective quality assurance methods and accountability mechanisms. The Administration and Congress should require mandatory and comprehensive testing designed to hold trainees accountable. This requirement should be the

first priority in any plan to improve training. VA should not advance trainees to subsequent stages of training until they have successfully demonstrated that they have mastered the material.

One of the most essential resources is experienced and knowledgeable personnel devoted to training. More management devotion to training and quality requires a break from the status quo of production goals above all else. In a 2005 report from the VA Office of Inspector General, VBA employees were quoted as stating: "Although management wants to meet quality goals, they are much more concerned with quantity. An RVSR is much more likely to be disciplined for failure to meet production standards than for failing to meet quality standards," and "there is a lot of pressure to make your production standard. In fact, your performance standard centers around production and a lot of awards are based on it. Those who don't produce could miss out on individual bonuses, etc." Little if anything has changed since the Inspector General issued this report. VBA employees continue to report that they receive minimal time for training, whether it is self-study, training broadcasts, or classroom training. They report that management remains focused on production over quality.

The Veterans' Benefits Improvement Act of 2008 mandated some testing for claims processors and VBA managers, which is an improvement; however, it does not mandate the type of testing during the training process as explained herein. Measurable improvement in the quality of and accountability for training will not occur until such mandates exist.

Training will only be effective if the VBA training board, or a more robust oversight entity, can ensure communication and coordination between the Office of Employee Development and Training, Technical Training and Evaluation, Veterans Benefits Academy and the five business lines. Feedback should be collected from ROs to assess the effectiveness of their training, which can be incorporated into revised lesson plans as necessary. Communication and close, continued coordination by each of these offices is essential to the establishment of a comprehensive, responsive training program.

For a culture of quality to thrive in the VBA, VA leaders must be the change agents to achieve this important goal. Training is an essential component to transforming the organization from a production-at-all-costs focus to one of decisions based on quality products which are delivered in a timely manner.

It is the IBVSOs' recommendation that:

VA should undertake an extensive training program to educate its adjudicators on how to weigh and evaluate medical evidence and require mandatory and comprehensive testing of the claims process and appellate staff. To the extent that VA fails to provide adequate training and testing, Congress should require mandatory and comprehensive testing, under which VA will hold trainees accountable.

VA should hold managers accountable to ensure that the necessary training and time is provided to ensure all personnel are adequately trained. Feedback should be collected from ROs on the effectiveness of the training. The Office of Employee Development and Training, Technical Training and Evaluation, Veterans Benefits Academy and the five business lines should incorporate any emerging trends into revised training plans.

The next topic of consideration is VBA's current accountability and quality mechanisms. It is the IBVSOs' position that VBA must overhaul these outdated and ineffective mechanisms.

This can be accomplished through the development and deployment of a robust new electronic document management system, capable of converting all claims-related paperwork into secure, official electronic documentation that is easily accessible and searchable by all official personnel involved in the process and has built in accountability and quality management process management tools.

"60 Minutes" ran a story on January 3, 2010, entitled "Delay, Deny and Hope I Die," which addressed the issue of the VA's claims backlog and veterans' frustrations. The VA Deputy Under Secretary for Benefits, Michael Walcoff, was interviewed for the story. When asked if VA had a focus on quantity over quality, he stated, "I don't believe that they're being pressured to produce claims at the expense of quality. We stress over and over again to our employees that quality is our number one indicator, that that's absolutely a requirement for successful performance."

While he and others in leadership positions may stress quality, what employees are compensated for is quantity based on a work credit system.

In March 2009, the VA's Inspector General discovered that the VA was making more mistakes than it reported. The internal investigation found that nearly one out of four files had errors. That is 200,000 claims that "may be incorrect."

The need for improvement in quality is evident when reviewing the table depicting the VA Office of Inspector General's (VA OIG) results from their last six VA Regional Office visits at the end of my testimony.

Although quality may be emphasized and measured in limited ways, as it currently stands, almost everything in the VBA is production driven. Employees naturally will work towards those things that enhance compensation and currently that is production. Performance awards are based on production alone. They should also be based on demonstrated quality. However, in order for this to occur, the VBA must implement stronger accountability quality assurance measures.

What does VBA do to assess the quality of the product it delivers? The quality assurance tool used by the VA for compensation and pension claims is the Systematic Technical Accuracy Review (STAR) program. Under the STAR program, VA reviews a sampling of decisions from regional offices and bases its national accuracy measures on the percentage with errors that affect entitlement, benefit amount, and effective date. However, samples as small as 20 cases per month per office are inadequate to determine individual quality.

With STAR samples far too small to allow any conclusions concerning individual quality, rating team coaches who are charged with reviewing a sample of ratings for each RVSR each month. This review, if conducted properly, should identify those employees with the greatest success as well as those with problems. In practice, however, most rating team coaches have insufficient time to review what could be 100 or more cases each month. As a result, individual quality is often underevaluated and employees performing successfully may not receive the recognition

they deserve and those employees in need of extra training and individualized mentoring may not get the attention they need to become more effective.

The problems related to the quality of decisions, the timeliness of decisions, workload management, and safeguarding case files can be significantly improved by incorporating a robust IT solution. VA should establish systems that rapidly and securely convert paper documents into electronic formats, and establish new electronic information delivery systems that provide universal searchability and connectivity. This would increase the ability of veterans who have the means and familiarity with digital approaches to file electronic claims using VONAPP (Veterans On Line Application) or other future digital claims filing options. Lost or incorrectly destroyed records must become a problem of the past, as should the need to transfer thousands of case files from one location to the next.

The Veterans' Benefits Improvement Act of 2008 (section 226) required VA to conduct a study on the effectiveness of the current employee work-credit system and work-management system. In carrying out the study, VA is required to consider, among other things:

(1) Measures to improve the accountability, quality, and accuracy for processing claims for compensation and pension benefits;

(2) Accountability for claims adjudication outcomes; and

(3) The quality of claims adjudicated. The legislation requires VA to submit the report to Congress, which must include the components required to implement the updated system for evaluating VBA employees, no later than October 31, 2009. This report was not delivered on time.

This study is a historic opportunity for VA to implement a new methodology—a new philosophy—by developing a new system with a primary focus of quality through accountability. Properly undertaken, the outcome would result in a new institutional mind-set across the VBA—one that focuses on the achievement of excellence—and change a mind-set focused mostly on quantity-for-quantity's sake to a focus of quality and excellence. Those who produce quality work are rewarded and those who do not are finally held accountable.

It is the recommendation of the IBVSOs that:

The VA Secretary's upcoming report focus on how the Department will establish a quality assurance and accountability program that will detect, track, and hold responsible those VA employees who commit errors while simultaneously providing employee motivation for the achievement of excellence.

VA should generate the report in consultation with veterans service organizations most experienced in the claims process.

The performance management system for claims processors should be adjusted to allow managers greater flexibility and enhanced tools to acknowledge and reward staff for higher levels of performance.

The IBVSOs urge VA to identify new funding for the purposes enumerated in this section and to ensure that new VBA personnel are properly supported with necessary IT resources. With restored investments in these initiatives, the VBA could complement staffing adjustments for increased workloads with a supportive infrastructure to improve operational effectiveness. The VBA could resume an adequate pace in its development and deployment of IT solutions, as well as to upgrade and enhance training systems for staff to improve operations and service delivery to veterans. It is vital to the VBA that many of their unique needs are met in a timely manner, including the following: expansion of web-based technology and deliverables, such as a web portal and Training and Performance Support System (TPSS); "Virtual VA" paperless processing; enhanced veteran self-service access to benefit application, status, and delivery; data integration across business lines; use of the corporate database; information exchange; quality assurance programs and controls; and employee skills certification and training.

It is imperative that TEES and WINRS develop common architecture designs that maximize data sharing between the new GI Bill and the Vocational Rehabilitation programs. These programs share common information about programs of education, school approvals, tuition & fees, and other similar data which their processing systems should share more effectively. TEES provides for electronic transmission of applications and enrollment documentation along with automated expert processing.

Also, the IBVSOs believe the VBA should continue to develop and enhance data-centric benefits integration with "Virtual VA" and modification of The Imaging Management System (TIMS). All these systems serve to replace paper-based records with electronic files for acquiring, storing, and processing claims data.

Virtual VA supports pension maintenance activities at three VBA pension maintenance centers. Further enhancement would allow for the entire claims and award process to be accomplished electronically. TIMS is the Education Service system for electronic education claims files, storage of imaged documents, and workflow management. The current VBA initiative is to modify and enhance TIMS to make it fully interactive and allow for fully automated claims and award processing by the Education Service and VR&E nationwide.

VA's TPSS is a multimedia, multimethod training tool that applies the instructional systems development methodology to train and support employee performance of job tasks. These TPSS applications require technical updating to incorporate changes in laws, regulations, procedures, and benefit programs. In addition to regular software upgrades, a help desk for users is needed to make TPSS work effectively.

VBA initiated its skills certification instrument in 2004. This tool helps the VBA assess the knowledge base of veterans' service representatives. VBA intends to develop additional skills certification modules to test rating veteran service representatives, decision review officers, field examiners, pension maintenance center employees, and veterans' claims examiners in the Education Service.

By providing veterans regionalized telephone contact access from multiple offices within specified geographic locations, VA could achieve greater efficiency and improved customer

service. Accelerated deployment of virtual information centers will more timely accomplish this beneficial effect.

It is the IBVSOs' recommendation that:

VA complete the replacement of the antiquated and inadequate Benefits Delivery Network (BDN) with the Veterans Service Network (VETSNET), or a successor system, that creates a comprehensive nationwide information system for claims development, adjudication, and payment administration.

VA enhance the Education Expert System (TEES) for the Education Service to support the new GI Bill recently enacted by Congress in Public Law 110-181.

VA update the corporate WINRS (CWINRS) to support programs of the Vocational Rehabilitation and Employment (VR&E) Service. CWINRS is a case management and information system allowing for more efficient award processing and sharing of information nationwide.

Congress provide VBA adequate funding for its information technology initiatives to improve multiple information and information-processing systems and to advance ongoing, approved, and planned initiatives such as those enumerated in this section. These IT programs should be increased annually by a minimum of 5 percent or more.

VBA revise its training programs to stay abreast of IT program changes and modern business practices.

VA ensure that recent funding specifically designated by Congress to support the IT needs of the VBA, and of new VBA staff authorized in FY 2009, are provided to VBA as intended, and on an expedited basis.

The Chief Information Officer and Under Secretary for Benefits should give high priority to the review and report required by Public Law 110-389 and redouble their efforts to ensure these ongoing VBA initiatives are fully funded and accomplish their stated intentions.

The VA Secretary examine the impact of the current level of IT centralization under the chief information officer on these key VBA programs and, if warranted, shift appropriate responsibility for their management, planning, and budgeting from the chief information officer to the Under Secretary for Benefits.

Congress require the Secretary to establish a quality assurance and accountability program that will detect, track, correct and prevent future errors and, by creating a work environment that properly aligns incentives with goals, holds both VBA employees and management accountable for their performance.

The next topic to address in the area of General Operating Expenses is staffing. It is the IBVSOs' position that recent staffing increases in the VBA may now be sufficient to reduce the backlog of pending claims, once new hires complete training. However, any move by Congress

to reduce VBA staffing in the foreseeable future will guarantee a return to unacceptably high backlogs.

VA began making some progress in reducing pending rating claims in FY 2008. At the end of FY 2009, over 940,000 claims had been processed, well above the 940,000 that had been projected. Over 388,000 compensation claims were pending rating decisions, which is above the 386,000 of FY 2008.

During FY 2008, VA hired nearly 2,000 staff authorized by Congress. The total number of new hires since 2007 now stands at over 4,200. Historically, it takes at least two years for new nonrating claims processors to acquire sufficient knowledge and experience to be able to work independently with both speed and quality. Those selected to make rating decisions require a separate period of at least two years of training before they have the skills to accurately complete most rating claims.

It would be interesting to know the attrition rate of these 4,200 new hires. How many have successfully completed training? How many current employees have retired or terminated employment in comparison? Answers to these questions and other questions would be useful in discussions on the adequacy of the number of new hires and their current and future ability to substantially affect the claims backlog.

Once everyone is fully trained and reductions in the backlog are seriously under way, it would be a mistake of monumental proportions if Congress were to allow staffing levels to decline. The IBVSOs do not suggest that VBA staffing remain off limits to Congressional budget considerations. What we believe, however, is that staffing reductions should occur only after the VBA has demonstrated, through technological innovation and major management and leadership reforms, that it has the right people and the right tools in place to ensure that claims can be processed both timely and correctly. As with backlog reductions, these changes will also not occur overnight. Congressional oversight, therefore, is critical to buttress any real improvements in claims processing and quality decisions.

It is the recommendation of the IBVSOs that:

Congress require the VA to report the attrition rate the 4,200 new hires; how many successfully completed training; how many current employees have retired or terminated employment in comparison.

Congress continue to monitor current staffing levels and ensure that they remain in place until such time as the backlog is eliminated.

Once the backlog is eliminated, Congress consider staffing reductions in the VBA but only after ensuring that quality problems are fully and adequately addressed.

Congress ensure through oversight that management and leadership reforms in the VBA are completed and permanent.

The next topic of consideration is Vocational Rehabilitation and Employment, a program that continues to provide critical resources to service-connected disabled veterans despite inadequate staffing levels. To meet its ongoing workload demands and to implement new initiatives recommended by the Secretary's Vocational Rehabilitation and Employment (VR&E) Task Force, VR&E needs to increase its staffing.

The cornerstone among several new initiatives is VR&E's Five-Track Employment Process, which aims to advance employment opportunities for disabled veterans. Integral to attaining and maintaining employment through this process, the employment specialist position was changed to employment coordinator and was expanded to incorporate employment readiness, marketing, and placement responsibilities. In addition, increasing numbers of severely disabled veterans from Operations Enduring and Iraqi Freedom (OEF/OIF) benefit from VR&E's Independent Living Program, which empowers such veterans to live independently in the community to the maximum extent possible. Independent living specialists provide the services required for the success of severely disabled veterans participating in this program. VR&E needs approximately 200 additional full-time employees (FTEs) to offer these services nationally.

Given its increased reliance on contract services, VR&E needs approximately 50 additional FTEs dedicated to management and oversight of contract counselors and rehabilitation and employment service providers. As a part of its strategy to enhance accountability and efficiency, the VA VR&E Task Force recommended creation and training of new staff positions for this purpose. Other new initiatives recommended by the task force also require an investment of personnel resources.

Finally, VA has a pilot program at the University of Southern Florida entitled "Veteran Success on Campus" that places a qualified Vocational Rehabilitation Counselor on the campus to assist veterans in Vocational Rehabilitation as well as veterans enrolled in the Post 9/11 or other VA educational programs. The pilot has garnered high praise from the University, the American Council on Education, and the press. VA should be authorized to expand the program significantly in the next fiscal year.

In FY 2009, VR&E was authorized 1,105 FTEs. The IBVSOs have been informed that this number has been "frozen" due to the unknown impact the implementation of chapter 33 benefits will have on the VR&E program. Last year, we recommended that total staffing be increased to manage the current and anticipated workload as stated in the Secretary's VR&E Task Force. We believe that this increase is still warranted. VA currently has approximately 106,000 enrollees in Chapter 31. The IBVSOs believe that a ratio of 1:96 (which includes administrative support) is inadequate to provide the level of counseling and support that our wounded and disabled veterans need to achieve success in their employment goals.

It is the recommendation of the IBVSOs that Congress should authorize 1,375 total FTEs for the Vocational Rehabilitation and Employment Service for FY 2010.

The last area of the IB that I wish to address is Judicial Review. From its creation in 1930, decisions of the Veterans Administration, now the Department of Veterans Affairs, could not be appealed outside VA except on rare Constitutional grounds. This was thought to be in the best interests of veterans, in that their claims for benefits would be decided solely by an agency

established to administer veteran-friendly laws in a paternalistic and sympathetic manner. At the time, Congress also recognized that litigation could be very costly and sought to protect veterans from such expense.

For the most part, VA worked well. Over the course of the next 50 years, VA made benefit decisions in millions of claims, providing monetary benefits and medical care to millions of veterans. Most veterans received the benefits to which they were entitled.

Congress eventually came to realize that without judicial review, the only remedy available to correct VA's misinterpretation of laws, or the misapplication of laws to veterans claims, was through the unwieldy hammer of new legislation.

In 1988, Congress thus enacted legislation to authorize judicial review and created the United States Court of Appeals for Veterans Claims (CAVC) to hear appeals from BVA.

Today, the VA's decisions on claims are subject to judicial review in much the same way as a trial court's decisions are subject to review on appeal. This review process allows an individual to challenge not only the application of law and regulations to an individual claim, but more importantly, contest whether VA regulations accurately reflect the meaning and intent of the law. When Congress established the CAVC, it added another beneficial element to appellate review by creating oversight of VA decision making by an independent, impartial tribunal from a different branch of government. Veterans are no longer without a remedy for erroneous BVA decisions.

Judicial review of VA decisions has, in large part, lived up to the positive expectations of its proponents. Nevertheless, based on past recommendations in the IB, Congress has made some important adjustments to the judicial review process based on lessons learned over time. More precise adjustments are still needed to conform judicial review to Congressional intent. Accordingly, IBVSOs make the following recommendations to improve the processes of judicial review in veterans' benefits matters.

In the area of scope of review, the IBVSOs believe that to achieve the law's intent that the CAVC enforce the benefit-of-the-doubt rule on appellate review, Congress must enact more precise and effective amendments to the statute setting forth the Court's scope of review.

Title 38, United States Code, section 5107(b) grants VA claimants a statutory right to the "benefit of the doubt" with respect to any benefit under laws administered by the Secretary of Veterans Affairs when there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter. Yet, the CAVC has affirmed many BVA findings of fact when the record contains only minimal evidence necessary to show a "plausible basis" for such finding. The CAVC upholds VA findings of "material fact" unless they are clearly erroneous and has repeatedly held that when there is a "plausible basis" for the BVA factual finding, it is not clearly erroneous.

This makes a claimant's statutory right to the "benefit of the doubt" meaningless because claims can be denied and the denial upheld when supported by far less than a preponderance of evidence. These actions render Congressional intent under section 5107(b) meaningless.

To correct this situation, Congress amended the law with the enactment of the Veterans Benefits Improvement Act of 2008 to expressly require the CAVC to consider whether a finding of fact is consistent with the benefit-of-the doubt rule; however this intended effect of section 401 of the Veterans Benefits Act of 2008 has not been used in subsequent Court decisions.

Prior to the Veterans Benefits Act, the Court's case law provided (1) that the Court was authorized to reverse a BVA finding of fact when the only permissible view of the evidence of record was contrary to that found by the BVA and (2) that a BVA finding of fact must be affirmed where there was a plausible basis in the record for the Board's determination.

As a result of Veterans Benefits Act section 401 amendments to section 7261(a)(4), the CAVC is now directed to "hold unlawful and set aside or reverse" any "finding of material fact adverse to the claimant...if the finding is clearly erroneous." Furthermore, Congress added entirely new language to section 7261(b)(1) that mandates the CAVC to review the record of proceedings before the Secretary and the BVA pursuant to section 7252(b) of title 38 and "take due account of the Secretary's application of section 5107(b) of this title...."

The Secretary's obligation under section 5107(b), as referred to in section 7261(b)(1), is as follows:

(b) BENEFIT OF THE DOUBT - The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

Congress wanted for the Court to take a more proactive and less deferential role in its BVA fact-finding review, as detailed in a joint explanatory statement of the compromise agreement contained in the legislation:

[T]he Committees expect the Court to reverse clearly erroneous findings when appropriate, rather than remand the case. The new subsection (b) [of section 7261] would maintain language from the Senate bill that would require the Court to examine the record of proceedings before the Secretary and BVA and the special emphasis during the judicial process on the benefit-of-doubt provisions of section 5107(b) as it makes findings of fact in reviewing BVA decisions... The combination of these changes is intended to provide for more searching appellate review of BVA decisions, and thus give full force to the "benefit-of-doubt" provision.

With the foregoing statutory requirements, the Court should no longer uphold a factual finding by the Board solely because it has a plausible basis, inasmuch as that would clearly contradict the requirement that the CAVC's decision must take due account whether the factual finding adheres to the benefit-of-the-doubt rule. Yet such CAVC decisions upholding BVA denials because of the "plausible bases" standard continue as if Congress never acted.

It is the IBVSOs' recommendation that:

Congress clearly intended a less deferential standard of review of the Board's application of the benefit-of-the-doubt rule when it amended title 38, United States Code, section 7261 in 2002, yet there has been no substantive change in the Court's practices. Therefore, to clarify the less deferential level of review that the Court should employ, Congress should amend title 38, United States Code, section 7261(a) by adding a new section, (a)(5), that states: "(5) In conducting review of adverse findings under (a)(4), the Court must agree with adverse factual findings in order to affirm a decision."

Congress should also require the Court to consider and expressly state its determinations with respect to the application of the benefit-of-the-doubt doctrine under title 38, United States Code, section 7261(b)(1), when applicable.

The next topic to address is the appointment of judges to the CAVC. The CAVC received well over 4,000 cases during FY 2008. According to the Court's annual report, the average number of days it took to dispose of cases was nearly 450. This period has steadily increased each year over the past four years, despite the Court having recalled retired judges numerous times over the past two years specifically because of the backlog.

Veterans' law is an extremely specialized area of the law that currently has fewer than 500 attorneys nationwide whose practices are primarily in veterans law. Significant knowledge and experience in this practice area would reduce the amount of time necessary to acclimate a new judge to the Court's practice, procedures, and body of law.

A reduction in the time to acclimate would allow a new judge to begin a full caseload in a shorter period, thereby benefiting the veteran population. The Administration should therefore consider appointing new judges to the Court from the selection pool of current veterans law practitioners.

The IBVSOs urge the Administration to consider that any new judges appointed to the CAVC be selected from the knowledgeable pool of current veterans law practitioners.

The last topic to address in this area is in reference to Court facilities. During the 21 years since the CAVC was formed in accordance with legislation enacted in 1988, it has been housed in commercial office buildings. It is the only Article I court that does not have its own courthouse.

The "Veterans Court" should be accorded at least the same degree of respect enjoyed by other appellate courts of the United States. Congress has finally responded by allocating $7 million in FY 2008 for preliminary work on site acquisition, site evaluation, preplanning for construction, architectural work, and associated other studies and evaluations. The issue of providing the proper court facility is now moving forward.

It is the recommendation of the IBVSOs that Congress should provide all funding as necessary to construct a courthouse and justice center in a location befitting the CAVC.

We hope the Committee will review these recommendations and give them consideration for inclusion in your legislative plans for FY 2011. Mr. Chairman, thank you for inviting the DAV and other member organizations of the IB to testify before you today.