JOSEPH A. VIOLANTE, NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

STATEMENT OF
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OF THE
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
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Mr. Chairman and Members of the Committee:

On behalf of the 1.3 million members of the Disabled American Veterans (DAV), I am honored to appear before you today to discuss the legislative measures pending before this Committee.

S. 2938

Through Education Act," proposed by Senator Graham, would amend titles 10 and 38, United States Code, to improve educational assistance for members of the Armed Forces and veterans in order to enhance recruitment and retention for the Armed Forces. Under title 38, United States Code, chapter 30, this bill proposes to provide a veteran who served on active duty in the Armed Forces for 12 or more years, the following: A monthly rate of $1,650.00 for months occurring during fiscal year 2009, $1,800.00 for fiscal year 2010; and $2,000.00 for fiscal year 2011. Veterans who served less than 12 years would receive $1,500.00 beginning in fiscal year 2009. The bill also proposes an annual stipend of $500.00 for veterans pursuing an approved program of education at or above the half-time rate, and an annual stipend of $350.00 for less than the half time rate.

Currently, veterans with only two years of active service receive a reduced rate of educational benefits. However, those veterans with two years of service as well as those with three or more, receive a cost-of-living increase based on the consumer price index. This proposed legislation would eliminate the cost-of-living adjustment for veterans with less than three years of obligated service, which is effectively a reduction of benefits. The rate set by this bill regarding those with less than three years of service is $950.00 beginning in fiscal year 2009, which is approximately the level of benefits forecast for that fiscal year based on the current scale that takes into account a cost-of-living adjustment. Under this proposed legislation, educational benefits are capped at $950.00 beginning in fiscal year 2009 for those veterans with less than three years of service. The DAV questions the reasons for this reduction of benefits.

Further, the DAV believes this bill focus more on retention of service members than on educational benefits for those that have served. This places the legislation outside the mission scope of the DAV. We therefore take no position on this legislation.

S. 22

The "Post-9/11 Veterans Educational Assistance Act of 2008," S. 22, amends title 38, United States Code, to establish a program of educational assistance for members of the Armed Forces who serve in the Armed Forces after September 11, 2001. The provisions listed herein apply to former service members with three or more years of active service, but also include many veterans who served less than three years of active duty, to include those who served at least 30 consecutive days and then discharged for a service-connected disability.

Under the provisions of this bill, VA would pay an amount equal to the "established charges for the program of education, except that the amount payable . . . may not exceed the maximum amount of established charges regularly charged . . . for full-time pursuit of approved programs of education for undergraduates . . . ."this amount would be in accordance with the "public institution of higher education offering approved programs of education for undergraduates in the State in which the individual is enrolled . . . ." This would further be applicable to the "highest rate of regularly-charged established charges for such programs of education among all public institutions of higher education in such State offering such programs of education."

This legislation also provide a monthly stipend equal to the monthly housing allowance received by military service members holding a rank of E-5 and applicable to the zipcode area wherein the school is located. Under this bill, a qualified veteran would have 15 years to use his/her education benefits.

This bill is in accordance with the "GI Bill for the 21st Century" set forth in the Independent Budget for fiscal year 2009, published by the Independent Budget veterans' service organizations. Because of this, as well as the section of this bill entitling those veterans who serve at least thirty days of active duty and who were discharged because of a service-connected disability, the DAV supports this bill.

S. 161

S.161, introduced by Senator Thune (R-S.D.) on January 4, 2007, provides for annual cost-of-living adjustments (COLAs) to be made automatically each year in the rates of veterans' disability compensation and rates of dependency and indemnity compensation. This measure would index COLAs for veterans and survivor compensation programs to Social Security increases, thereby eliminating the need to introduce, and pass, and enact a veterans COLA bill each year. DAV supports this measure.

S. 961

S. 961, introduced by Senator Ben Nelson (D-Neb.) on March 22, 2007, amends title 45, United States Code, to provide benefits to certain individuals who served in the United States Merchant Marines during Word War II. DAV opposes this legislation, which would provide far greater

benefits to Merchant Marines who have no disabilities than many veterans receive for severe service-connected disabilities. Our opposition to this bill in no way indicates what we undervalue the contributions made by the brave individuals who served as Merchant Marines during World War II, and played a vital role in our ultimate victory in that war.

S. 1718

S. 1718, introduced by Senator Brown (D-Ohio) on June 27, 2008, amends the Service-Members Civil Relief Act to provide for reimbursement to service members of tuition for programs of education interrupted by military service, for deferment of students loans and reduced interest rates for service members during periods of military service, and for other purposes. This bill proposes to provide a 13-month transition period for service members to reenroll in a program of education and to begin paying back student loans undertaken for a program of education. The bill also institutes a six percent interest rate cap on student loans while a member is deployed on active duty, and requires education program providers to make reasonable accommodations to their students who are members of the Armed Forces and who discontinue a program of education because of a deployment.

Many veterans enrolled in education programs who are recalled to duty and deployed to Iraq or Afghanistan return with service-related disabilities. These veterans above all else, are affected by the restraints this bill intends to loosen. Because of the potential benefits this bill will provide, especially to those returning from deployment with service-related disabilities, the DAV does not oppose the favorable consideration of the bill.

S. 2090

S. 2090, introduced by Chairman Akaka (D-Hawaii) by request on September 25, 2007, would protect privacy and security concerns in records at the United States Court of Appeals for Veterans Claims (the Court).

If enacted, S. 2090 would initiate legislation that authorizes the Court to establish rules governing the privacy and security of certain information concerning the Court's electronic filing system. Many Federal Courts now operate under an electronic filing (e-filing) system. Congress has authorized appropriations for the Court to begin utilizing an e-filing system that is expected to be in progress by June 2008. Currently e-filing for applications for attorney fees and costs under the Equal Access to Justice Act is operational. However, there is currently no legislation authorizing the Court to promulgate rules regarding the privacy and security of electronic records.

Essentially, S. 2090 empowers the Court to prescribe rules as it determines necessary to carry out its pending functions under an e-filing system. The proposed legislation does not dictate to the Court any details requiring inclusion in such rules, but merely authorizes the Court to prescribe such rules "consistent to the extent practicable with rules addressing privacy and security issues throughout the Federals Courts." DAV has no opposition to S. 2090.

S. 2091

S. 2091, introduced by Chairman Akaka by request on September 25, 2007, would increase the number of the court's active judges.

If enacted, S. 2091 would increase the Court's number of active judges from seven to nine. While the DAV does not have a current resolution from its membership on this specific legislation, we question the need for more judges at this time.

Before DAV could support an increase of two more judges, we would request that this Committee require the Court include the items mentioned below in its annual report. Until this information is made available to Congress, it is, in our estimation, premature to expand the number of judges to nine full-time active judges.

DAV believes that Congress should require an annual report from the Court that requires the following information:

(1) The number of appeals filed.
(2) The number of petitions filed.
(3) The number of applications filed under section 2412 of title 28, United States Code.
(4) The number and type of dispositions, including settlements, cases affirmed, remanded, denied, vacated and appealed to the federal circuit.
(5) The median time from filing to disposition.
(6) The median time from the filing of briefs to disposition.
(7) The number of cases disposed by the Clerk of the Court, a single judge, multi-judge panels and the full Court.
(8) The number of oral arguments.
(9) The number and status of pending appeals and petitions of applications for Equal Access to Justice Act fees.
(10) A summary of any service performed by recalled retired judges during the fiscal year and an analysis of whether any of the caseload guidelines established under section 7257(b)(5) of title 38, United States Code, were met during the fiscal year.
(11) The number of cases pending longer than 18 months.

Until the Court reports on the above items, DAV cannot determine whether additional judges are needed and therefore, cannot support additional judges on the Court.

S. 2138

S. 2138, introduced by Chairman Akaka by request on October 4, 2007, would amend title 38, United States Code, to establish within the Department of Veterans Affairs (VA) the position of Assistant Secretary for Acquisition, Logistics, and Construction, and would increase the number of authorized Assistant Secretaries and Deputy Assistant Secretaries. DAV has no resolution on this matter and, therefore, we have no position.

S. 2139

S. 2139, introduced by Senator Klobuchar (D-Minn) on October 4, 2007, amends title 38, United States Code, to provide educational assistance under the Montgomery GI Bill for members of the National Guard and Reserve who serve extended periods of continuous active duty that include a prolonged period of service in certain theaters of operation. This bill provides that reservists or National Guard members who serve on active duty for at least 20 months on or after September 11, 2001, and who serve a period of not less than 12 months in a theater of operations designated by the Secretary of Defense will, under certain circumstances, be entitled to educational benefits under title 38, United States Code, chapter 30. This bill does not involve educational or vocational benefits specifically designed for veterans with disabilities, and is therefore outside the mission scope of the DAV. However, the bill does provide enhancement of educational service provided by VA. The DAV therefore does not oppose the bill

S. 2309

S.2309, introduced by Chairman Akaka on November 6, 2007, amends title 38, United States Code, section 1154, to clarify service treatable as that which a veteran engaged in combat with the enemy, and allowing for utilization of non-official evidence for proof of service connection for a combat-related disease or injury. The DAV supports this bill; however, we suggest amendments. This legislation establishes that a veteran who "during active service . . . served in a combat zone for purposes of section 112 of the Internal Revenue Code of 1986, or a predecessor provision of law, shall be treated as having engaged in combat with the enemy in active service for purposes of that paragraph during such service in that combat zone." The legislation as currently written would allow, for example, an Iraqi War veteran who only served in Bahrain and was consequently never in danger of being exposed to combat the same consideration as an Iraqi War veteran who served inside the combat theatre of operation.

We therefore suggest an amendment to this legislation that would still consider a class of veterans as having been exposed to combat, but suggest that those veterans with service inside the borders of the combat theatre of operation receive such consideration, such as those serving inside the borders of Iraq, Afghanistan, Vietnam, etc.

S. 2471

S. 2471, introduced by Senator Kennedy (D-Mass), improves the enforcement of the Uniformed Services Employment and Reemployment Rights Act of 1994. DAV has no opposition to the favorable consideration of this measure.

S. 2550

S. 2550, introduced by Senator Hutchinson (R-Texas) on January 23, 2008, would amend title 38, United States Code, to prohibit the Secretary of Veterans Affairs from collecting certain debts owed to the United States by members of the armed forces and veterans who die as a result of an injury incurred or aggravated on active duty in a combat zone. Although DAV does not have a resolution on this issue, we would not be opposed to its favorable consideration by this Committee.

S. 2617

S. 2617, introduced by Chairman Akaka on February 8, 2008, would increase effective as of December 1, 2008, the rates of compensation for veterans with service-connected disabilities and the rates of dependency and indemnity compensation for the survivors of certain disabled veterans. The Veterans' COLA Adjustment Act of 2007 would increase the rates of compensation for veterans with service-connected disabilities; however, within the bill is a provision that "[e]ach dollar amount increased under paragraph (1), if not a whole dollar amount, shall be rounded to the next lower whole dollar amount." While the DAV supports the overall intent of this bill, we have testified for the past several years that rounding down the adjusted rates to the next lower dollar amount will gradually erode the value of benefits and they will not keep pace with the rise in the cost of living. Rounding down veterans' cost-of-living adjustments unfairly targets veterans for convenient cost savings for the government. The DAV supports S. 2617, but we urge the Committee to strike the provision regarding the rounding down of the COLA. DAV has a long-standing resolution opposing the rounding down of our COLA. This resolution, Resolution 100, was passed again by the delegates at our last National Convention assembled in New Orleans, Louisiana, August 11-14, 2007.

S. 2674

S. 2674, introduced by Senator Burr on February 28, 2008, consist of two sections-title I and title II. The provisions of title I address "retirement of members of the armed forces for disability," and the provisions of title II address "compensation of veterans for service-connected disability. Each title consists of various sections that we will address independently.

Title I of the bill amends chapter 61 of title 10, United States Code, which currently governs retirement or separation from the military for physical disability. The bill proposes to divide chapter 61 into three subchapters. The first subchapter contains the provisions of the existing retirement system (the "old system"). The second subchapter contains the provisions of the new retirement system created by this bill, and the third subchapter would contain administrative provisions that apply to both retirement systems.

Members retired for disability after the effective date of this legislation would be subject to retire under the new system created by this bill, and members retired prior thereto would be subject to the old system. However, members retired after October 7, 2001, but prior to the effective date of this legislation could make an irrevocable choice between the two systems. Those eligible to convert to the new system after discharge must do so via the respective Board for Correction of Military Records (BCMR).

The bill, however, does not outline the details of the new military retirement system. Instead, the bill requires the Secretary of Defense to conduct a study to determine whom and under what circumstances a member retired under the new system will receive medical and dental care. Congress will then enact provisions of law with respect to who is entitled to such medical and dental care only after the report of the Secretary of Defense.

If Congress fails to enact any provisions of law specifying the category (ies) of retired service members eligible for healthcare by the date of implementation of the "enhanced Department of Veterans Affairs [VA] disability compensation system" provided for in title II of this bill, then the Secretary of Defense will have sole discretion to determine who is eligible for such care. The

DAV cannot blindly support any piece of legislation that allows for such carte blanche rulemaking, especially considering the Defense Department's historical propensity for abuse of both discretion and authority concerning this nation's sick and injured service members.

A more acceptable approach would be outlining which class of service retirees are eligible for medical and dental care within the legislative language. It would also be more acceptable to construct legislation wherein improvements in transition benefits are not dependent on the creation of a new VA disability compensation system.

Title II implements what the bill calls the "enhanced VA disability compensation system." Section 201 in title II of the bill requires the Secretary of Veterans Affairs (the Secretary) to examine a number of factors in conducting a study, including: The injuries for which disability compensation is paid under other programs; the extent to which quality of life and loss of earnings are separately taken into account in those other programs; the effect of injuries on earnings, quality of life, psychological state, physical integrity, and ability to adapt socially; and the extent to which disability compensation may be used as an incentive to undergo treatment or rehabilitation. Section 202 requires a similar study on transition benefits.
The bill requires those studies to reflect current concepts of medicine and loss of earning capacity from specific injuries. The Secretary would also be required to consider which injuries the new rating schedule would cover; the level of compensation for loss of quality of life as well as standards for determining loss of quality of life. Additionally, the VA is to study the level of compensation for loss of earning capacity that takes into account the age of a veteran, and the extent to which disability compensation may be used as an incentive to undergo treatment and vocational rehabilitation.

First, the foregoing studies are unnecessary because the Secretary has already contracted with Economic Systems, Inc. to conduct a study that takes into account most of the items listed in this section of the bill. A second study, apart from being redundant, would be an unwise use of departmental resources.

The substance of some of these studies are also quite concerning to us. For example, the "Secretary would be required to consider the appropriate injuries to be covered under the new disability rating schedule" of which Congress must later approve or disapprove. We feel this language is aimed at removing those disabilities that some feel should not be in the rating schedule. If that is the case, numerous scenarios exist that provide a valid basis for all disabilities currently in the rating schedule.

These studies also suggest using age as a determining factor when considering average loss of earnings capacity. This provision negates the practice that all disabled veterans are compensated based on the "average" loss of earning capacity. Ultimately, we feel this suggests compensating an older veteran at a lower rate than a younger veteran for the same disability. However, we also realize the intent behind this may be to compensate a younger veteran at a higher rate (temporarily) because of findings from the Veterans Disability Benefits Commission indicating younger veterans suffer increased rates of earnings' loss throughout their life when faced with disabilities earlier in life.

The inherent problem with such an approach would be determining at what age a veteran would no longer be entitled to a higher rate of compensation. Many individuals in today's society who are in relative good health choose to continue working well into their 80s, such as many senators and congressmen. This approach would inevitably create unfairness.

Therefore, age must ultimately be left out of any determination concerning the average loss of earning capacity. Compensating older veterans at lower payment rates than younger veterans, while at the same time boasting a new compensation system based on 21st century medicine and 21st century technology is self-contradicting. Access to 21st century medicine cures very few conditions; however, it does extend the lives of people that once would have lived much shorter lives because of disability, thereby allowing them to continue working beyond the average retirement age if they desire, or if they are capable.

While the DAV does not oppose innovative treatment plans with real health-related benefits, using compensation as an incentive to undergo treatment is discriminatory against veterans. Furthermore, the underlying assumption is that 21st century medicine is likely to cure veterans' disabling conditions. That is unfortunately not the case. For example, musculoskeletal disabilities such as gunshot wounds, joint replacements, degenerative disc disease, and arthritis; injuries to sensory organs such as hearing loss and blindness; injuries to the skin such as disfiguring and debilitating burn scars; systemic diseases such as diabetes; digestive system disabilities such as Crohn's disease, abdominal injuries such as gunshot wounds resulting in adhesions of the peritoneum, hepatitis, or bowel section removal; and diseases and injuries to the central and peripheral nervous systems such as multiple sclerosis, amyotrophic lateral sclerosis, or combat injuries resulting in paralysis of long nerves, are not curable.

The logistics required for such changes would be nearly impossible with VA's current workforce. Perhaps more important is the way such a law would be perceived by the veteran community. The disabled veteran community will view the current proposal as another way of saying that veterans are being less than honest or that by making it harder to qualify for disability payments, less will be entitled to such payments. The DAV is not insinuating that such a mindset exists behind this proposal. Nonetheless, the scars of the past do not heal quickly, or do not heal at all. Various sections of society have severely scrutinized disabled veterans for the benefits they receive, albeit more so in the past than the present. This provision, as well as others in this bill will open those old wounds.

Instead of using disability compensation as an "incentive" to undergo treatment or vocational rehabilitation, Congress should focus on removing the barriers to accessing treatment and vocational rehabilitation. Those barriers include obstacles such as access to childcare and ability to receive time off work, to mention a few examples.

Section 207 of the bill modifies title 38, United States Code, section 1155, by providing that ratings under the existing compensation system will continue to be based upon average impairment of earning capacity. For veterans receiving compensation under the "enhanced VA disability compensation system," the ratings must reflect average loss of earning capacity and quality of life.

The DAV realizes the intent of this bill is not to create two compensation systems, but rather to avoid it. We appreciate that mindset, and understand that once the new system under this bill goes into effect, there would be only one system under which any benefit is paid. Nonetheless, this bill still creates two "classes" of veteran. For example: veterans under the new system would receive a quality of life payment for an identical disability that does not warrant such a payment under the old system; veterans under the old system would receive compensation for disabilities which no longer exist in the new system.

This provision is inherently unfair. Only those veterans rated under the "new system" will receive a "quality of life payment." This appears to be an incentive for every veteran to choose entrance into the new system. If VA and Congress give quality of life payments serious consideration, then there is no justifiable reason to provide such payments only to those that fall under the new system or that otherwise choose to convert to the new system. If this provision is not meant to entice veterans into the new compensation system, then what justification is there for not providing such payments to all disabled veterans?

Section 207 of the bill also creates, amongst others, a new statute-title 38, United States Code, section 1207-which provides that, as frequently as the Secretary considers it appropriate, the Secretary must reevaluate and, if necessary, adjust the disability rating for any veteran receiving compensation under new chapter 12.

Under this section, not only will VA be forced to "adjust" a veteran's rating in accordance with repeat examinations, but will also be required to adjust the rating in accordance with changes made to the rating schedule incorporated since that veteran's last examination. This renders moot the first sentence in the new section 1155(e) that states: "an adjustment in the Rating Schedule will not result in a veteran's existing disability rating being reduced . . . ." This sentence creates a fallacy via section 1155(e) resulting in the potential that a veteran could get reduced based on perceived improvement then reduced further in the same rating based on a change in the rating schedule. In the alternative, a veteran with no improvement may nonetheless receive a reduced rating based solely on a change in the rating schedule. Worse yet, depending on changes in the rating schedule since a veteran's last examination, he/she could actually receive a reduced rate of compensation even though the veteran's disability increased in severity. The DAV cannot agree with this.

When VA chooses not to re-evaluate a particular disability, it is usually because that veteran has already undergone multiple examinations over the course of many years. Therefore, VA bases the determination not to re-evaluate a veteran's disabilities upon objective medical evidence. There is no conceivable harm to the interest of the veteran or the government in this practice. This provision attempts to fix what is not broken.

Likewise, this requirement would cause irreparable harm to the efficiency and management capability of the claims process, in part by causing the backlog of claims to increase exponentially. No claim (apart from disabilities such as amputation and the few wherein a medical examiner opines as stable) would ever be put to rest. Therefore, hundreds of thousands of self-perpetuating claims would be added to the backlog each year. The number of pending claims would climb into the millions very rapidly. There would be no cost-savings realized because of the logistics required. The VA does not, and will not, have the number of claims

adjudicators and compensation and pension examiners necessary to control the inevitable result of this provision.

Continual re-examinations are also unnecessary. Veterans Health Administration procedures already require VHA to notify the appropriate regional office whenever a service-connected disabled veteran receives medical care for a service-connected disability. The regional office concerned is then to consider to what extent, if at all, the medical report will affect that veteran's disability rating. These procedures are outlined in VA's Healthcare Adjudication Manual, M-1. Likewise, regulations requiring VBA to accept such reports as claims can be found at title 38, Code of Federal Regulations, section 3.157 (2007).
This and the following provision will also have severe unintended consequences that must be considered. One such consequence is a barrier to death benefits under title 38, United States Code, section 1318. This statute allows a surviving spouse to receive dependency and indemnity (DIC) benefits if the veteran spouse was rated permanent and totally disabled (P&T) for no less than 10 consecutive years prior to death. The effect of these provisions will ultimately result in many veterans evaluated as P&T receiving reduced rates of compensation, whether or not the propriety of such reductions are lawful, which will be up for debate in many cases. These reductions will interrupt the 10-year window of their P&T ratings resulting in VA denying surviving spouses DIC benefits under section 1318.

Two other consequences of equal if not greater severity is the termination of benefits under title 38, United States Code, chapter 35, Survivors and Dependents Educational Assistance (DEA), and the VA Civilian Health and Medical Program (CHAMPVA) under title 38, United States Code, Section 1781 and title 38, Code of Federal Regulations, Section 17.270. Each of these benefits are established when, inter alia, a veteran is rated by VA as P&T.

DEA provides educational opportunities to children whose education would otherwise be impeded or interrupted because their veteran-parent suffers from a severe service-connected disability. The objective is to provide educational assistance to aid children in attaining the educational status they might normally have aspired to and obtained but for the disability of such parent. Similarly, DEA provides educational assistance for veterans' spouses with a service-connected total disability, permanent in nature, to assist them in supporting themselves and their families at a standard of living to which the veteran, but for the veteran's service disability, could have expected to provide for the veteran's family.

Likewise, CHAMPVA benefits provide a totally disabled veteran with the means to ensure that his/her family has access to health care insurance. Many such veterans are not military retirees otherwise eligible for TRICARE benefits, and are unemployed; therefore, they usually do not have other private health care coverage. In these circumstances, these families are dependent solely on CHAMPVA for health insurance.

This and the following provision would prevent many families from ever establishing entitlement to such benefits because of the perpetual nature which the claims process will become. Worse yet, is that many families currently utilizing DEA and CHAMPVA benefits will have future entitlement to those benefits severed at the most critical times, during the course of attending school or obtaining potential life saving medical care.

A veteran rated totally disabled will not require an actual rating reduction in order to lose these benefits. There are two vital triggering mechanisms that determine entitlement to these benefits, at least pertaining to this discussion-a rating of permanent and total. Therefore, when a veteran enters the new system proposed by this bill, either voluntary or involuntary, that veteran will be re-evaluated thereby losing the permanent rating status required for entitlement to both DEA and CHAMPVA.

Nonetheless, many veterans will receive a rating reduction under this system, usually for no other reason than a misapplication of the law. The cumulative effect will result in a totally disabled veteran's family losing a large portion of their household income, potentially their only income, followed by a revocation of vital health insurance and education benefits. The veteran in this scenario will also lose entitlement to dental care at the VA.

Ultimately, through reduced compensation resulting in poverty for entire families, compounded by a revocation of health insurance, and further compounded by a veteran's inability to send his/her children to college, the scars left by the damaging effects of this legislation could last for generations. This scenario is not an exaggeration. This portion of the legislation, as well as section 207(b)(3) below, has unintended detrimental consequences. The DAV has long-standing resolutions objecting to such changes. Therefore, we must actively oppose this bill.

Section 207(b)(3) of the bill amends title 38, United States Code, section 110, which currently prohibits the reduction of a disability rating that has been in force for 20 or more years. This change will allow VA to continue to periodically reevaluate a veteran's disability. This change expressly severs veterans from protection from reductions in disability ratings that have been in effects for a long period of time-20 or more years.

Congress originally enacted the protections provided by title 38, United States Code, Section 110 in 1958. See 38 C.F.R. § 3.951(b) (2007). Congress further amended section 110, inter alia, in 1964. Apart from the general concern for the interests of disabled veterans, Congress realized the subsequent positive impact this enactment would have on the Administration. In addressing the administration's concerns, Congress, inter alia, stated: "It has in practice, however, worked extremely well, and has given no problem in the administration of the various veterans' laws. In fact, quite the contrary has been the case. It has eased administration and reduced administrative costs." 1964 Acts. House Report No. 1407, see 1964 U.S.Code Cong. And Adm.News, p. 2833.

To now revoke the 20year protection is highly precarious and unfair. We believe it will cause more unrest in the nearly 3 million veterans receiving compensation than for which anyone is prepared. Apart from all future veterans, this provision will affect more than any other those disabled veterans that have endured their disabling conditions the longest. This oldest group of veterans will suffer more unnecessary instability in their lives than any other group. Likewise, younger groups of veterans will never achieve such stability. Taking away this protection and still calling this an enhanced benefit plan is simply inconceivable.

Many VA adjudicators will inevitably see this change as the proverbial suggestion, if not a mandate, to reduce any protected rating that can be justified. The downstream result will be that those veterans and their families that have come to depend on VA compensation the most will

lose that compensation at critical times in their lives. Surely, this is not the way a grateful nation treats its disabled veterans.

S. 2683

S.2683, introduced by Chairman Akaka on March 3, 2008, would amend title 38, United States Code, to modify certain authorities relating to educational benefits for veterans. Section I of the bill, concerning accelerated educational assistance payments, clarifies that veterans seeking employment in a high technology industry are not required to seek an associate degree or higher in order to qualify for the accelerated payments. This bill does not involve educational or vocational benefits specifically designed for veterans with disabilities, and is therefore outside the mission scope of the DAV. However, the bill does provide enhancement of educational service provided by VA. The DAV therefore does not oppose the bill.

S. 2701

S. 2701, introduced by Senator Ben Nelson on March 4, 2008, would direct the secretary of Veterans Affairs to establish a national cemetery in the eastern Nebraska region to serve veterans in the eastern Nebraska and western Iowa regions. DAV has no mandate from its membership on this matter. However, we would not oppose its favorable disposition by this Committee.

S. 2737

S. 2737, introduced by Chairman Akaka on March 10, 2008, the ‘‘Veterans' Rating Schedule Review Act," amends title 38, United States Code, section 7252(b), by granting the Court jurisdiction to review "whether, and the extent to which, the schedule of ratings for disabilities complies with applicable requirements of [title 38, United States Code,] chapter 11." The DAV supports this legislation because, while continuing the Court's prohibition from reviewing the content of the VA's rating schedule, this amendment would clarify the Court's authority to review the rating schedule in so far as ensuring its agreement with chapter 11, and therefore its compliance with congressional intent.

S. 2768

S. 2768, introduced by Chairman Akaka on March 13, 2008, would provide a temporary increase in the maximum loan guaranty amount for certain housing loans guaranteed by the Secretary of Veterans Affairs. Although DAV has no mandate from its membership on this matter, we would not oppose its favorable disposition by this Committee.

S. 2825

S. 2825, introduced by Chairman Akaka on March 13, 2008, would amend title 38, United States Code, to provide a minimum disability rating for veterans receiving medical treatment for a service-connected disability. This bill provides a compensable rating for any veteran who requires continuous prescribed medication or the use of one or more prescribed adaptive devices

for treatment of a service-connected disability. Although DAV does not currently have a resolution on this issue, its purpose is beneficial to disabled veterans and DAV would encourage this Committee to favorably support its passage.

S 2864

S. 2864, introduced by Chairman Akaka on April 15, 2008, amends title 38, United States Code, to include improvement in quality of life in the objectives of training and rehabilitation for veterans with service-connected disabilities. This bill also repeals the limitations on the number of veterans enrolled in a program of independent living service and assistance. A disabled veteran's quality of life, as well as his/her independence in life is integral. Many who live without disability can easily take these issues for granted. However, a veteran facing a lifetime of disability does not have the luxury to do so. This bill would require the VA to focus on this important and ever challenging struggle in the lives of disabled veterans. The DAV supports this bill.

S. 2889

S. 2889, introduced by Chairman Akaka by request on April 17, 2008, would, in pertinent Section 7 and Section 8, make permanent the authority to carry out income verifications and increase the rate of disability compensation and DIC. DAV is opposed to making permanent the authority to carry out income verifications since there are recognized savings realized when Congress renews this provision. Those serving can be used to enhance other programs for disabled veterans. Under Section 8, DAV continues its opposition to the rounding down of our annual COLA.

S. 2951

S. 2951, introduced by Senator Baucus (D-Mont), on May 1, 2008, would require reports on the progress of the Secretary of Veterans Affairs in addressing causes for variances in compensation payments for veterans for service-connected disabilities.

In May 2005, the VA Office of Inspector General (VAIG) issued a report on the variances in VA disability compensation payments. It is interesting to note that the VAIG found some key distinctions in important areas of claims adjudications between those states with higher compensation rates (high cluster) and those states that had the lowest compensation rates (lower cluster).

In the higher cluster states, training was a priority; raters were more experienced; medical evaluations were better; there was a lower error rate; it took longer to render a decision (more thorough decision); fewer pending claims, despite more claims, more veterans on the role and more thorough decisions; fewer cases were sent (brokered) to other regional officers; and there was a higher percentage of represented cases. The converse was true in the lower cluster states.

It is also important to note that represented veterans in the lower cluster states did as well as veterans from higher cluster states. DAV supports this legislation to require the Secretary to report on the progress or the variances in compensation payments.

S. 2961

S. 2961, introduced by Chairman Akaka on May 1, 2008, would amend title 38, United States Code, to enhance refinancing of home loans by veterans. This measure would increase the maximum percentage of loan-to-value of refinancing loans subject to guaranty under title 38, United Stats Code, Section 3710(b)(8) from 90 percent to 95 percent. DAV has no opposition to this worthy bill.

Draft Legislation

Draft bill introduced by Senator Casey (D-Penn.) would help prevent the unnecessary foreclosures for Service-members. This measure proves that:
• Service-members who become seriously injured or ill during their military service will be given a one-year protection from foreclosure after their military service ends.

- Any service-member, including those above, who files a disability claim with the VA within one year of the end of their military service, will be protected from foreclosure until 30 days after the VA adjudicates their claim.
- The definition of "Serious Injury and Illness" is taken from the Service Members Civil Relief Act; DAV has no objection to this bill.

Draft Legislation

Draft bill introduced by Senator Menendez (D-NJ) would amend title 38, United States Code, to direct the Secretary of Veterans Affairs to provide a flat allowance for spouses and children of certain veterans who are buried in State cemeteries. DAV has no position on this matter.

Draft Legislation

Title I of the "Veterans' Benefits Enhancement Act of 2008" makes minor changes to title 38, United States Code , chapter 36, regarding education benefits under that chapter. The DAV has no opposition to such changes. Title II of the bill deals with provisions that would, amongst others: Permit VA to temporarily stay adjudication of claims while awaiting pending court decisions, thereby allowing the Board of Veterans' Appeals to decide certain cases out of docket number order. The DAV opposes this portion of the bill.

Section 201 of the bill states that, "[n]otwithstanding any other provision of this title, the Secretary may temporarily stay the adjudication of a claim or claims before the Board of Veterans' Appeals or an agency of original jurisdiction when the Secretary determines that the stay is necessary . . . ." A VA claimant's only remedy during such a stay would then be to petition for review of the action under regulation(s) yet to be promulgated by the Secretary. The claimant would be required to file such a petition with the United States Court of Appeals for the Federal Circuit (Federal Circuit), which could then set aside such action only if it determines that the action is arbitrary and capricious. The Secretary, in this by-request legislation, is essentially requesting unilateral authority to stay cases at will, thereby shifting the onerous burden of challenging such a stay to a VA claimant.

The Secretary and Chairman of the Board currently have authority to manage the activities of the Board that includes authority to stay classes of cases before it for well-articulated reasons of sound case management. However, that authority does not include the unilateral authority to stay cases pending an appeal to the Federal Circuit of a decision by the Court of Appeals for Veterans Claims. Where the Secretary or the Chairman of the Board desires to stay the effect of any decision of the Court of Appeals for Veterans Claims pending appeal to the Federal Circuit, the proper course is to file in the court that has jurisdiction over the particular case a motion to stay the effect of that case.

The Secretary's by-request legislation is a result of his disagreement with judicial precedent that decisions of the Court, unless or until overturned by the Court en banc, the Federal Circuit, or the Supreme Court, is a decision of the Court on the date issued. Any rulings, interpretations, or conclusions of law contained in such a decision are authoritative and binding as of the date the decision is issued and are to be considered and, when applicable, are to be followed by VA agencies of original jurisdiction, the Board, and the Secretary in adjudicating and resolving claims. Ramsey v. Nicholson, 20 Vet.App. 16, 23 (2006) (citing Tobler v. Derwenski, 2 Vet.App. 8, 14 (1991)).

The foregoing notwithstanding, the Ramsey Court concluded that it is reasonable for the Board to stay its proceedings in a case that arguably falls within the precedent of one pending appeal at a higher Court. However, the Court was clear in that the Board cannot choose to ignore a decision as if it had no force or effect. Absent reversal, a decision is law that the Board must follow. Nonetheless, where the Secretary desires a stay, the proper course is to file in the court that has jurisdiction over the particular case a motion to stay the effect of that case-to do so unilaterally is unlawful. Ramsey, 20 Vet.App. at 38-39.

The Ramsey Court also made clear, in light of explaining the proper pathway to lawfully request a stay of cases, that VA's consistent practice of refusing to follow the law of the circuit unless it coincides with the Board's views (meaning the issuance of unilateral stays) "is intolerable if the rule of law is to prevail." Ramsey, 20 Vet.App. at 24. The Secretary's by-request legislation seeks codification of that "intolerable" practice.

The Secretary's request further ignores the reality that VA employs a small army of attorneys, any of whom are qualified to file a motion for a stay of proceeding in the proper jurisdiction. The vast majority of VA claimants, however, do not have such expertise or resources. The system currently in place serves an important check and balance function. If the Courts issue a decision that VA sternly disagrees with, the Secretary has the resources and authority to appeal to a higher Court. If the Secretary wishes, he may file a motion with that Court for a stay of proceeding on all cases affected by the case on appeal. The higher Court may grant such a motion, thereby allowing the stay to continue. If the higher court finds the motion unreasonable, they may deny the motion and therefore deny the right to a stay. If the motion to stay is granted and a VA claimant wishes to challenge the stay, he/she may petition for a writ of mandamus, which the Court considers under the All Writs Act.

Despite the foregoing, in accordance with this legislation, the Secretary would have carte blanche ability to stay cases at will. Such ability would go unchecked until a stay affected a beneficiary with enough resources to challenge the stay in the Federal Circuit. Even then, the bill

contains no language that imposes a time limit on a stay. For instance, if VA chooses to appeal a case to the Court of Appeals for the Federal Circuit, and therefore stays like cases at the agency level and eventually loses the appealed case, there is nothing in the bill that would prevent the VA from continuing the stay nearly indefinitely while it decides whether to seek a legislative change to a judicial precedent of which it disagrees-such as it is expressly doing with this by-request legislation. Congress should refuse to award the VA such overreaching, and potentially abusive authority.

Draft Legislation

Senator Vitter (R-La.) has proposed a bill to amend title 38, United States Code, to make stillborn children insurable dependents for purposes of the Service members' Group Life Insurance program. The DAV has no resolution on this issue, which lies outside the mission scope of the organization. DAV has no opposition on this bill.

Draft Legislation

Senator Boxer (D-Calif.) has proposed a bill to require a report on the inclusion of severe and acute Post Traumatic Stress Disorder among the conditions covered by traumatic injury protection coverage under Service Members' Group Life Insurance. The VA has long considered an injury or disability one that can be either physical or mental. Severe cases of PTSD can be as debilitating and life altering as many physical disabilities. Therefore, DAV supports this proposed legislation.

Mr. Chairman, this concludes my testimony on behalf of DAV. We hope you will consider our recommendations. I will be pleased to address any questions you or other Members of the Committee may wish to ask.