The Honorable Donald L. Ivers, Former Chief Judge of the United States Court of Appeals for Veterans Claims

Thank you for the invitation to testify before the Committee on June 8, 2006, and to address S. 2694, the ?Veterans' Choice of Representation Act of 2006.?

In his May 10, 2006, letter to you, Frank Nebeker, the first Chief Judge of the U.S. Court of Appeals for Veterans Claims, who was initially asked to testify, set forth his views regarding S. 2694. I have read that letter and I am in complete agreement with Judge Nebeker's views. In order to minimize redundancy, I ask that Judge Nebeker's letter be made available along with mine at the hearing.

The Committee is probably aware that the Court has long been on record as supporting the availability of attorney representation at the initial stages of the claims process. Freedom to seek counsel of one's choice has long been a hallmark of this nation's system of justice. That those who have given much in defense of that system are denied that freedom in pursuing claims arising out of their service is, at best, highly contradictory.

As Frank Nebeker points out in his letter, attorney discipline is powerful and active in every jurisdiction. That should relieve the Department of much of the burden of regulating the qualification and actions of those attorneys retained by veterans. Furthermore, attorneys are expected and required to follow appropriate ethical codes and to assure the effectiveness and viability of any system in which they provide representation, either adversarial or paternal.

My personal position on this issue is not one that I take lightly or without awareness that I have taken a different position in years past. My position, is, however, tempered by my service on the Court and the opportunity to observe the process from both within and without, so to speak. It is, if anything, stronger for that opportunity.

I join with Judge Nebeker in commending this effort to provide veterans the freedom to enter into a willing attorney-client relationship at the initial stages of the benefits claims process. I also join in his observation that a slow integration of attorney representation would give rise to invidious discrimination against those already in the system who might wish to retain counsel.

Sincerely,

Donald L. Ivers

May 10, 2006

The Honorable Larry E. Craig
Chairman, Veterans' Affairs Committee
520 Hart Senate Office Building
Washington, D.C. 20510-1205

Dear Mr. Chairman:

Thank you for the invitation to express my views on S. 2694. As you know, I was the first Chief Judge of the Veterans' Court. It soon became clear to me and my colleagues that the paternal approach of effectively preventing lawyer representation in the benefits process was severely outmoded. Thus, I compliment the sponsors of S. 2694 for recognizing that veterans, like everyone else, should be at liberty to seek counsel in the free market. Indeed, the fear that once existed that veterans needed protection from predatory lawyers no longer exists. Every jurisdiction in this country has very powerful and active disciplinary entities to police their bars under quite detailed and strong codes of professional conduct. I can speak from my experience on the District of Columbia Court of Appeals since 1969. Today the Court has a very substantial portion of its docket dealing with lawyer discipline ? much of it in reciprocal discipline from all state courts and many federal courts. Thus, burdening the Secretary with lawyer qualification, regulation, and discipline should, in my view, be kept at a minimum in light of extant bar disciplinary systems.

It may be anticipated that some resistance to this change from a once well intentioned limitation on the ability to retain counsel will develop. To the extent such resistance is motivated by a ? turf? interest in keeping lawyers from invading the province of non-lawyer veteran service officers, it should be paid no heed. The benefits process has become so complex and protracted that the need for counsel is manifest where it was not before. To the extent that that resistance is motivated by concern for maintaining the non-adversarial nature of veterans' benefits process, I suggest once a claim has been denied and the veteran wishes to appeal, the process inescapably becomes adversarial. The need for filing a ?notice of disagreement,? by its terms, connotes the commencement of an adversarial process from the veteran's perspective. The fact that the duty to assist and the evidentiary equipoise doctrine remain viable does not alter the reality of the veteran's situation and his or her perception that it is now ?Veteran v. VA.?

Moreover, the proceedings before the Court of Appeals for Veterans Claims have been recognized as adversarial from 1989, the inception of the Court. That fact has not negated the non-

adversarial nature of the process at VA. Indeed, with counsel representing the appellant veteran, it has always been possible to ensure that the duty to assist and the evidentiary equipoise doctrine remain the rule. The presence of counsel for the claimant does not alter the paternal nature of the process, nor would it from the initial claim level and beyond. In fact, counsel can assure the viability of that process from the very beginning.

Some might say that with counsel present the claimant is ?ready to fight,? but that view misperceives the role of counsel particularly in a non-adversarial process. Counsel is there to ensure the nature of the process is preserved as well as to ensure from the beginning that errors threatening that process do not occur.

I commend the effort to treat veterans as equals of all citizens in their right to seek a willing attorney and client relationship at the initial stage of the benefits process. But I have considerable doubt that slow integration of lawyer representation only in the initial application stage is necessary and reasonable since those already in the system would be invidiously discriminated against by being unable to retain counsel. There will hardly be a landslide of lawyers appearing at subsequent stages prior to a final BVA decision. At least there is no evidence to support a favorable reaction to such an in terrorem argument.

Sincerely,

Frank Q. Nebeker