STATEMENT OF

CARLOS FUENTES, SENIOR LEGISLATIVE ASSOCIATE
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

WITH RESPECT TO

Pending Legislation

WASHINGTON, D.C. MAY 24, 2016

Chairman Isakson, Ranking Member Blumenthal and members of the Committee, on behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and our Auxiliaries, I would like to thank you for the opportunity to testify on today's pending legislation.

S. 2896, Care Veterans Deserve Act of 2016

This legislation would expand the Veterans Choice Program, authorize independent reviews of Department of Veterans Affairs (VA) medical facilities and expand access to VA health care. The VFW supports sections 3, 4, 5 and 6. The VFW has concerns with section 2.

While the Veterans Choice Program has made significant progress since it was implemented in November 2014, it has yet to achieve what Congress envisioned when it passed the *Veterans Access, Choice, and Accountability Act of 2014*. The purpose for this landmark program was to address the national access crisis that has plagued the VA health care system, where veterans wait too long or travel too far for the care they need. The VFW has made a concerted effort to ensure the program works as intended by evaluating what aspects of the program are working and identifying common sense solutions to aspects that are not working as intended. We have done this because we agree that VA must leverage its community care partners in order to fulfil its obligation to our nation's veterans. However, we firmly believe that community care must complement, not supplant or compete with the high quality, comprehensive and veteran-centric care veterans receive from their health care system.

Section 1 would make any veteran enrolled in VA health care eligible for the Veterans Choice Program. The VFW is seriously concerned that such a significant expansion of eligibility would result in veterans receiving disparate and uncoordinated care. Medical research has determined that integrated and managed health care systems provide better health care outcomes than fee for service systems. That is why the majority of high performing health care systems, including VA,

have implemented the patient-centered medical home model of delivering health care, which ensures patients receive the care they need when they need it.

Additionally, the VFW has continued to receive complaints from veterans who face delays receiving care through the Veterans Choice Program and continue to receive erroneous bills for care that VA is required to provide. The VFW believes the current program must be fixed before considering whether to dramatically expand eligibility. The VFW urges the Committee to amend this legislation by ensuring veterans who are unable to receive a VA appointment by a clinically indicated date, or within a distance an enrolled veteran and such veteran's health care provider agree is reasonable, are offered community care options.

The VFW supports Section 3, which would require VA to provide veterans access to private sector urgent care clinics across the country. Urgent care is designed to meet the gap between emergency room care and ambulatory care. Urgent care has also been proven to reduce reliance on more costly emergency room care for non-life threatening care and alleviate demand on primary care providers. The VFW is also glad to see this section would waive copayment requirements for veterans who seek care through community urgent care clinics. This would ensure veterans are not financially impacted for receiving the urgent care they need. However, the VFW urges the Committee to ensure VA has the resources and authority it needs to expand urgent care capacity at VA medical facilities.

The VFW strongly supports section 4, which would authorize certain providers to practice telemedicine across state lines. This provision would go a long way towards helping veterans who do not live in the same state as the facility in which they are enrolled and for veterans who require home-based health care services.

With geographic distance remaining a significant barrier to care for veterans, the use of telemedicine technology has emerged as a highly effective method of providing veterans timely and convenient care. Current law, however, restricts VA health professionals from practicing telemedicine across state lines unless both the provider and the veteran are located in federally owned facilities. Consequently, veterans are required to travel significant distances to federal facilities just to access telehealth services. By allowing VA health care professionals to practice telemedicine across state borders, a veteran's physical location would no longer be a limiting factor in his or her ability to receive telehealth services.

Section 5 would extend operating hours for VA pharmacies and authorize VA to contract health care providers, including locum tenens to operate clinics on nights and weekends. The VFW fully supports extending operating hours for VA medical facilities. Veterans have continuously asked for VA medical facilities to increase operating hours. Doing so would ensure veterans who work during the day are not required to forgo wages to receive the health care they need. However, the VFW urges the Committee to amend this legislation to enable VA to use its health care providers during extended hours as well by removing the 80-hour biweekly restriction on VA employees. This would ensure veterans who receive care during extended hours can continue to receive their care from the VA medical professionals they know and trust.

S. 2888, Janey Ensminger Act of 2016

This legislation would require the Agency for Toxic Substances and Disease Registry (ATSDR) to conduct periodic literature reviews of the existing research regarding the relationship between exposure to toxic water at Camp Lejeune and adverse health conditions. The VFW supports the intent of this legislation, but has a serious concern with the threshold it sets for medical research, which we hope the Committee will address before advancing this legislation.

The approximately 650,000 veterans and family members who served on Camp Lejeune between 1953 and 1987 deserve to know if their health care conditions are related to water they drank that was contaminated with trichloroethylene, tetrachloroethylene, vinyl chloride, and other toxins. That is why the VFW fully supports periodic literature reviews of the existing body of research on the relationship between contaminated water at Camp Lejeune and the health conditions prevalent among veterans and family members exposed to such toxic substances.

However, this legislation would require the ATSDR to evaluate whether a health condition is caused by exposure to contaminated Camp Lejeune water, which is an unreasonably high bar for determining a relationship between adverse health conditions and toxic exposure. This legislation would require the ATSDR to categorize related health care conditions into three categories: sufficient with reasonable confidence that the exposure is a cause of the illness or condition; modest supporting causation; or no more than limited supporting causation. This would mean that the majority of the health conditions the ATSDR considers to be associated with exposure to trichloroethylene, tetrachloroethylene, vinyl chloride in drinking water would fail to meet this threshold.

Research regarding toxic exposures has traditionally used the Institute of Medicine's (IOM) six categories of associations: sufficient evidence of a causal relationship; sufficient evidence of an association; limited/suggestive evidence of an association; insufficient evidence to determine whether an association exists; inadequate/insufficient evidence; and limited/suggestive evidence of no association. These six categories are aligned with the nature of epidemiological research and can be used to guide future research. The VFW strongly urges the Committee to reduce the threshold from causation to IOM's six categories of association.

S. 2883, Appropriate Care for Disabled Veterans Act of 2016

The VFW supports this legislation, which would reinstate the requirement for VA to provide an annual report to Congress that details its capacity in selected specialized health care services.

This capacity report would provide information on utilization rates, staffing, and facility bed censuses needed to ensure more accountability within VA and would help ensure VA is a good steward to finite taxpayer resources. The VFW believes this report would improve staffing levels at local VA medical facilities and overall access to VA's specialized systems of care.

S. 2679, Helping Veterans Exposed to Burn Pits Act

This legislation would create a center of excellence for veterans exposed to burn pits and other toxic substances. The VFW supports the intent of this legislation and has recommendations to improve it.

The use of open air burn pits in combat zones has caused invisible, but grave health complications for many service members, past and present. Particulate matter, polycyclic aromatic hydrocarbons, volatile organic compounds and dioxins – the destructive compound found in Agent Orange – and other harmful materials are all present in burn pits, creating clouds of hazardous chemical compounds that are unavoidable to those in close proximity.

Unfortunately, the impact of exposure to such toxic substances on our Iraq and Afghanistan veterans is still not widely known or understood. What is clear, however, is that veterans exposed to burn pits continue to report debilitating pulmonary conditions which significantly affect their quality of life. That is why the VFW supports continued research on the impact of exposure to such burn pits on the health of Iraq and Afghanistan veterans. Furthermore, VA must ensure all its health care providers are aware of the symptoms experienced by exposed veterans and ensure these veterans receive appropriate medical treatments.

However, the VFW believes it would be more beneficial for veterans if the Committee were to expand VA's War Related Illness and Injury Study Centers (WRIISC) rather than establish a new center of excellence. The WRIISCs have been instrumental in conducting research on the health effects associated with exposure to burn pits, developing educational material for VA and community care providers, providing comprehensive exams for exposed veterans and providing high quality treatment specifically tailored to their needs. The VFW urges the Committee to increase funding for the WRIISCs and require VA to establish more centers throughout the country.

S. 2520, Newborn Care Improvement Act

The VFW supports this legislation, which would expand VA's authority to provide health care to a newborn child, whose delivery is furnished by VA, from seven to 14 days post-birth.

According to the Centers for Disease Control and Prevention, newborn screenings are vital to diagnosing and preventing certain health conditions that can affect a child's livelihood and long-term health. The VFW understands the importance of high quality newborn health care and its long term impact on the lives of veterans and their families. VA must ensure newborn children receive the proper post-natal health care they need.

S. 2487, Female Veteran Suicide Prevention Act

The VFW supports this legislation to improve VA mental health care and suicide prevention programs offered to women veterans.

As the population of female veterans continues to increase, it is important for VA and Congress to expand the availability of women-specific care at VA medical facilities. In a survey of 1,922 women veterans conducted by the VFW, 40 percent of respondents said they are either currently using mental health care services or they have in the past. This indicates that female veterans are high users of VA mental health care services.

With medical research consistently pointing to gender differences in effective treatment of mental health and prevention of suicide, it is vital for VA to ensure it provides the high quality and gender-specific care our female veterans deserve. Given the increase in the number of suicides across the country, the VFW strongly believes this legislation would help prevent female veteran suicide.

S. 2049, A bill to establish in the Department of Veterans Affairs a continuing medical education program for non-Department medical professionals who treat veterans and family members of veterans to increase knowledge and recognition of medical conditions common to veterans and family members of veterans.

The VFW supports this legislation, which would ensure community care providers who care for veterans and their families understand how to provide veteran-centric care. As the largest integrated health care system in the country and a worldwide leader in medical research, VA plays a significant role in training health care professionals. In fact, more than two thirds of all doctors in the country have received training in the VA health care system. This bill would rightfully ensure VA is able to train our current and future health care workforce.

Discussion draft to reform the rights and processes relating to appeals of decisions regarding claims for benefits under the laws administered by the Secretary of Veterans Affairs.

On January 22, 2015, the VFW testified before the Subcommittee on Disability Assistance and Memorial Affairs on the subject of the ever-growing appeals backlog[1]. We explored at length and in detail the reasons why the appeals backlog is the size it is today. We discussed the decades-long failure to request and receive appropriate levels of full time equivalent to deal with appeals. We pointed to deliberate choices made to ignore the growing problem by the Veterans Benefit Administration (VBA) managers at the local level as well as leaders in the Department of Veterans Affairs (VA) Central Office. Finally, we highlighted the fact that VBA leaders, with full knowledge of the consequences of their choices, decided to process disability claims, not for days, weeks or months, but for years, allowing appeals to wait.

Today, there are more than 450,000 appeals awaiting the years-long process to a final decision by the Board of Veterans' Appeals (BVA). Much of this backlog is due to the fact that eliminating the disability claims backlog was the focus of both VA and Congress. By focusing

[1] VFW testimony before the Veterans Affairs Subcommittee on Disability Assistance and Memorial Affairs, January 22, 2015, http://www.vfw.org/VFW-in-DC/Congressional-Testimony/Veterans%E2%80%99-Dilemma---Navigating-the-Appeals-System-for-Veterans-Claims/

on disability claims, VA stopped relatively simple appeals tasks. If VBA directed some resources to the Notice of Disagreement (NOD) certification process, nearly half of all appeals would be removed. How? History shows that once an NOD is filed, only half of all veterans continue their appeals after they receive their Statement of the Case (SOC).

Now VA, feeling the pressure of another growing backlog, has begun describing the current appeals process as too complicated and confusing to veterans in a bid to get Congress to create a new process it describes with the adjectives "simple" and "fast." What is being overlooked is that, despite the fact that the current appeals process is long, it works in providing veterans relief. Under the current system, BVA granted benefits to veterans in 29.2 percent of the cases it finally decided. With such a high appeals grant rate, the VFW insists any reforms to the process must protect the rights veterans enjoy in the current appeals process. Simple and fast is not better for veterans if it means veterans lose rights and VA rushes to deny appeals.

Let us be clear, we are not advocates of the status quo. We are not the old guard standing in the way of improvements to a process that does not serve veterans in a timely manner. However, we are advocates for veterans, and we will not support any change simply for the sake of change, nor changes that make the process easier for VA at the expense of veterans.

In short, we will not support a new appeals process which reduces the rights and protections found in existing law and regulations.

At the request of Secretary McDonald, the VFW has actively participated in a series of meetings with other Veteran Service Organization (VSO) representatives and officials of VA in an attempt to identify opportunities for improvement to the current appeals process. However, participation does not imply consent or approval of the any new process. We have worked with others to craft an alternative process which might provide speedier decisions without reducing rights and protections currently enjoyed by veterans.

The proposal outlined in the legislation under consideration today is, even if approved with the amendments we suggest, only one third of the solution. There are two elements missing from this proposal:

- A comprehensive plan by VA to competently and efficiently address the current backlog of pending appeals; and,
- An allocation of sufficient resources by Congress to allow VA to execute its plan.

The VFW will not endorse any change in the current appeals process until all three elements are in place.

Concern with the Proposal

While the VA's proposal is the combined work of a dozen VSO's and VA spanning hundreds of man hours of labor, much of it simply shifts work from an appeals lane, leaving it in a new center lane, labeling it a claim and not an appeal.

The proposal envisions several changes to current claims and appeals processing. Under the current claims process, a veteran submits a claim to a VA regional office. The claim goes through a stage of development and preparation for a decision. VA eventually decides the claim and notifies the claimant.

Under the current process, the claimant has the following options:

- Do nothing
- Submit new evidence within a year of the decision and ask for reconsideration
- Appeal

Under this proposal, the claimant has the following choices:

- Do nothing
- Submit new evidence (or new and relevant evidence) and receive a new decision
- Ask for a Difference of Opinion review and receive a new decision
- Appeal

As you can see, the proposed change to the appeals process shifts all of the regional office appeals processing, including the Decision Review Office (DRO) review, out of the current appeals lane and simply leaves it as another option available at the regional office[2], never calling it an appeal.

All appeals functions currently within the purview of the regional office are taken out of the appeals process and are renamed. With only a few exceptions, this process is not fundamentally different from the current process. The only possible advantage to the claimant is that these issues no longer linger in the shadows of the appeals process and must be worked as a claim by VBA.

Once this fundamental fact is recognized, it is easier to see what the new process is and what it might do for claims and appeals processing.

Staffing

The other fundamental fact which must be acknowledged is that despite substantial increases in VA staffing over the past decade, VA remains unable to adequately process all its work.

Allow us to explain by way of an illustration:

We are all familiar with the state of the armed forces. During the Cold War, it was a basic tenant of force structure that our military was large enough to deal with two major enemies at the same time. After the Cold War ended, Congress began reducing the size of the armed forces. In 2012, then Defense Secretary Leon Panetta acknowledged that the United States could no longer fight

[2] Under VA's proposal, the Decision Review Officer (DRO) position is eliminated. In its place, VA proposes to designate VBA employees to conduct Difference of Opinion reviews as an adjunct duty. The VFW opposes eliminating the highly skilled and experienced cadre of DRO's. It is our belief that the elimination of DRO's will result in a diminution of grants using the Difference of Opinion review authority.

two sustained ground wars simultaneously.[3] If Congress wanted the armed forces to have the ability to fight two ground wars at the same time it would have to approve additional personnel and equipment to do so.

So too it is with VA. VA has received funding to perform only some of the functions assigned to it. If Congress expects VA to fulfill all of its tasks in a timely manner, it must provide the personnel to do so. Without appropriate levels of staffing, VA will continue to fail and veterans will continue to wait for decisions on their claims.

Today, VA has sufficient personnel to process claims to completion in a reasonable time. It has sufficient staff to process appeals expeditiously. However, it does not have sufficient staff to do both functions simultaneously.

The resolution of this backlog requires Congress to adequately staff both VBA and BVA to process the work it has before it. Unfortunately, without a comprehensive plan from VA, Congress can only guess at the number of personnel required to maintain disability claims processing at current levels while processing and resolving the current appeals backlog.

VA must develop a comprehensive plan for maintaining its current claims workload while attacking the appeals backlog. This plan must include recommendations to Congress on what legislative changes are required and how many additional personnel are needed to eliminate the current appeals backlog in a reasonable period of time.

Examining VA's Proposal

Different lanes

The proposed change to the claims and appeals process creates what VA refers to as three lanes:

1. Center (claims) lane (The starting point for all claims)
   Under this lane all claims are processed much as they are today. A claimant submits a claim. VA develops the claim to completion and refers it for decision. VBA makes a decision and notifies the claimant.

2. Difference of Opinion review lane
   Once a decision is made, a claimant may elect to receive a higher level review from VBA. Under VA's proposal, this is not done by a Decision Review Officer but by someone who is at least one grade higher than the previous decision maker. VA apparently envisions this assignment as an adjunct duty and not a primary responsibility.

3. Appeals lane
   A claimant may elect to appeal once they receive a decision by VBA (either a center lane decision or a difference of opinion decision). Under this proposal, a claimant must then make a choice: submit no new evidence and receive an expedited decision

[3] http://www.thewire.com/global/2012/01/us-cant-fight-two-wars-same-time-anymore/46892/

(promised within 1 year of the appeal), or choose to submit new evidence and/or request a hearing. Under this scenario, a Veteran Law Judge will conduct a hearing at some undefined point in time and make a decision.

If the veteran elects the expedited lane, the BVA would conduct a de novo review of the evidence in the record at the time VBA made its original decision. If a hearing is held or new evidence is submitted, the BVA will make a decision based on the evidence in the record at the time the VBA decision was made and whatever new evidence is submitted during the appeal.

However, under this proposal remands are severely limited and are only allowed if it is determined that VBA did not fulfill its duty to assist a claimant as required by law prior to the VBA decision under appeal. What is not addressed is what action is required if evidence submitted during the appeal, either prior to the hearing or at a hearing, would trigger VA's duty to assist if it were submitted as a center lane claim. It appears that VA will not require the remand of the appeal for duty to assist development. This penalizes veterans who seek appellate review but later discover evidence. The only way they can obtain the assistance of VA is by withdrawing their appeal and submitting a supplemental claim in the center lane. This causes them to lose their place in the appeal process. Further, it may not even be a viable alternative since the one year period for submitting a supplemental claim may have lapsed while awaiting a hearing at the BVA.

Once the BVA makes a decision, the claimant may appeal to the Court of Appeals for Veterans Claims (CAVC) or may submit additional evidence within 1 year to have the issue reconsidered by VBA.

The premise of these changes is to provide virtually unlimited opportunity for the claimant to prove his/her claim by going through the center or claims lane. The other premise is that VBA will be able to adjudicate, or readjudicate, these claims in an expeditious manner (there is vague talk of the 125 day standard).

The BVA becomes the winner in this process. With remands limited to duty to assist errors, remands should be significantly reduced. While this is helpful to the BVA and appeals processing, it becomes problematic for veterans who have their appeals remanded for other reasons today.

This proposal is designed to address the frustration of claimants by reducing the length of time it takes them to obtain a decision from VA. However, what they lose is the ability to submit evidence critical to the favorable resolution of their claims. Further, we are certain that the percent of claims granted by the BVA will fall because of these changes.

Concerns

A number of areas of concern are not adequately addressed in this proposal. Leaving many of these issues to VA to refine by regulation creates an opportunity to do mischief.

Duty to Assist

The duty to assist claimants is well established by both regulation and case law. If a claimant at any point in the process identifies new evidence which is not of record, VA is obligated to assist the claimant in obtaining it. While we all want to see all the evidence submitted at the start of a claim, we understand that is not always possible. Newly discovered service or medical records may point to other evidence which must be obtained. New medical evidence may point to the need for an additional examination.

We have two concerns about limiting the duty to assist at the BVA. First, it is unclear what, if any, action is required if a claimant submits new evidence during the appeal process, either in documentary form or during a hearing. It is likely that additional development may be required. However, this proposal does not address how that is to be accomplished. Should the BVA remand the appeal to the VBA for development? Should the appeal be dismissed so the evidence can be developed? Or will the BVA make a decision based on the evidence in front of it, assuming that if the appeal is denied the newly submitted evidence will revert to VBA for additional development and decision? This last alternative suggests a legal problem: if the BVA receives evidence which in the center lane would trigger the duty to assist, and if the BVA makes a decision on that evidence without ordering additional development, would the veteran be precluded from bringing the claim back to the center lane for development because the issue was decided on that evidence?

Second, we are concerned that with a limited duty to assist requirement at the BVA, appeals may not be remanded because the BVA decides that the failures are “harmless error” and would not affect the outcome of the appeal. While we agree that there is danger in overdeveloping a record, there is also truth in the old adage, “you don’t know what you don’t know.”

Docket Flexibility

Currently the BVA is limited to only one docket. Under this proposal, BVA would have to maintain at least two dockets in order to have the flexibility to more efficiently work its cases. At the very least, the BVA would need a separate docket for the fast, no hearing/evidence lane so that those appeals are decided as rapidly as possible. In addition, BVA would need at least a second docket for those appeals requiring hearings. Finally, to achieve the greatest efficiencies, the BVA should have a separate docket for appeals wherein the claimant submitted additional evidence but did not request a hearing.

Therefore, we suggest a total of five dockets during transition. We believe the BVA needs the flexibility to use two dockets during the resolution of its current backlog: one docket for those wherein hearings are requested and a second docket for those appeals without hearings. It needs three additional dockets under this proposal: one docket for the fast appeals lane; one docket for the hearing lane and one docket where evidence is submitted but no hearing is requested.

Independent Medical Opinion/Independent Medical Expert

Under this proposal, VA would eliminate the ability of the BVA to ask for an Independent Medical Opinion (IMO). It argues that IMOs are available through the claims lane, so this authority is not necessary.

There are several reasons why the Independent Medical Opinion (IMO) authority should remain with the BVA. Under the current claims process, requesting and obtaining an IMO is difficult. While VA policy allows a veteran's representative to ask for an IMO, it must be approved by the regional office Veteran Service Center Manager (VSCM) before submission to the VA Compensation Service. Then it must be approved by the Compensation Service before the opinion is requested. This cumbersome procedure requires the approval of two individuals who may, or may not, have sufficient training and experience to understand the need for the IMO.

The BVA currently orders about 100 IMO's per year. A veteran's representative need only convince a Veterans Law Judge (VLJ) that an opinion is necessary. VLJ's have the training and experience necessary to make these decisions — training and experience which may be lacking in VSCM's and Compensation Service personnel.

New Evidence

Under current law, a claimant must submit new and material evidence in order to reopen a claim after a final disallowance. We have long believed that this creates an unnecessary burden on both VA and veterans. In practical terms, VA is required to make a decision as to whether evidence is both new and material. A VLJ recently estimated that between 10-20 percent of the appeals he reviews each year are on the issue of whether evidence is new and material.

It is our belief that eliminating the new and material standard would reduce non-substantive appeals by allowing regional office staff to make a merits decision on the evidence of record. With merits decisions, veterans have a better understanding of why the evidence they submitted was not adequate, and any appeal is on the substance of the decision, not on whether the evidence was new or material.

During our discussions with VA on an improved appeals process, we have argued that while a new and relevant evidence standard is potentially lower than the current new and material evidence requirement, it still imposes a bar to merits decisions, creating unnecessary work for regional office staff and unnecessary appeals to the BVA.

The VFW proposes that the only requirement to obtain reconsideration of a claim should be the submission of new evidence.

Higher Level Review

Under 38 CFR 3.2600, claimants may elect a review by a Decision Review Officer. This individual has the authority to conduct a de novo review of the evidence, order additional development as needed, and make a decision. No deference is given to the prior decision. Under this proposal, a difference of opinion review is provided. The reviewer need not be a DRO but can be anyone of a higher grade detailed to make the review. It is likely that this reviewer will not receive separate training and will have this assignment as an adjunct duty.

The VFW believes that while retention of a difference of opinion review is potentially beneficial to claimants, this change in authority will ensure that less well qualified individuals will conduct these reviews, decreasing quality and increasing the number of claimants denied.

Further, VA intends to make these reviews based solely on the evidence of record and preclude the authority to order additional development except for duty to assist errors. This presents the same problems for a claimant at a difference of opinion review as it does for evidence submitted at a BVA hearing described above. Any evidence submitted during a difference of opinion hearing would not be subject to the duty to assist. Once a decision is made, how might a claimant receive assistance by VA as required by the current duty to assist provisions of the law? This problem is not resolved by the language of this proposal. The VFW believes that the difference of opinion reviewers should be able to remand a claim for additional development based on evidence received during the difference of opinion review.

Claims in Different Lanes at the Same Time

One of the unresolved issues is whether claimants may have the same issue in more than one lane simultaneously. Under the proposed appeals process, it appears that the following scenario is not possible:

A veteran files an appeal in the BVA fast lane (no evidence, no hearing). Several months later, and before the BVA issues a decision, the veteran obtains new evidence which is pertinent to the claim. Since the veteran is precluded from submitting it to the BVA, he/she must submit it to the claims lane for consideration and adjudication. Depending on the nature of the evidence and the relative efficiency of the regional office staff, it is possible that the veteran could receive a favorable decision at the regional office prior to the issuance of the BVA decision.

It is for this reason that we urge Congress to address the permissibility of submitting evidence during the pendency of an appeal and to which entity it should be submitted. The VFW suggests that if the BVA cannot order a remand to properly develop evidence submitted during an appeal, than claimants should have the right to submit that evidence to the center lane while an appeal pends at the BVA.

Reports

The only way to know whether a process is working is by collecting and studying the data generated by it. Noticeably absent from the proposed legislation is any requirement that VA

collect data, analyze it and report to Congress and the public. At a minimum, Congress and the veteran community might want to know the following on a regular recurring basis:

- Current backlog
  - The total number of appeals pending
  - The subtotals of pending appeals at each stage of processing
  - The average days pending at each processing stage
  - What actions were taken during the reporting period to process and resolve pending appeals in each processing stage
  - The oldest pending appeals at each stage and what action VA has taken to process them.
- Similar questions could be asked of VA concerning the new claims and appeal process
  - How many claims are pending in each lane
  - Average timeliness for processing claims and supplemental claims, by regional office
  - Average timeliness for processing claims in the difference of opinion lane, by regional office
  - Average days pending of appeals in the fast lane at the BVA
  - Average days pending of appeals in the hearing lane at the BVA
  - Average days pending of appeals in the evidence only lane at the BVA
  - Total number of IMO requests made by the BVA
  - Total number of IMO requests approved by the Compensation Service
- And, of course,
  - Appeals granted, remanded and denied under the current appeals process
  - Appeals granted, remanded and denied under the proposed appeals process.

Plan to Reduce Current Backlog

VA must have a plan in place to process to completion the 440,000 pending appeals. It must be part of the proposed legislation for two reasons:

VA will need additional latitude to process its current backlog of appeals. Changes to claims and appeals processing which VA may wish to consider include:

a. Allow the BVA greater flexibility in managing its workload. Specifically, the BVA should be able to maintain a second docket to allow faster processing of non-hearing appeals.
b. There are many cases pending BVA review which have additional evidence submitted while the issue was on appeal but not considered by VBA. In order to facilitate efficiencies, VA should be allowed to screen and assign those appeals to regional office staff for the purpose of determining whether the benefit may be granted. We suggest that with the greater number of Rating Veterans Service Representatives available to review those appeals, many could be granted without further appellate review. In the case where a full grant of benefits is not possible, the case can be returned to the BVA for further consideration without loss of place in the docket.

c. In the alternative, VA could create a cadre of DRO's who are tasked with pre-screening and deciding cases on appeal. They would have the authority to grant any benefit allowed under the law. They could also identify deficiencies in the record and order a remand. This alternative would free up VLJ's and their staff attorneys to more efficiently process other appeals pending before the BVA.

Court of Appeals for Veterans Claims

Veterans could be adversely effected by these changes because they will be discouraged from seeking review by the Court of Appeals for Veterans Claims (CAVC). As this proposal is currently written, the only finality to the process occurs when one of three things happens:

1. The veteran becomes satisfied with a decision and stops seeking additional benefits;
2. The veteran fails to submit new (or new and relevant) evidence within the one year period following a VA decision; or
3. The veteran seeks review by the CAVC and is denied.

Under this proposal, the only possible time a veteran might seek review by the CAVC of a decision is when he/she has completely exhausted every possible piece of new evidence and has absolutely nothing left to submit to VA. One could argue that this is good for veterans and the BVA since it ensures that only those claimants who have no more evidence to submit go to the CAVC. Fewer appeals mean fewer remands.

It also means fewer precedent decisions instructing VA that their practices do not conform to regulations and their regulations do not conform to the law. The CAVC has provided a significant and useful function throughout its nearly 30 years of existence — it has told VA when it was doing things wrong.

This bill is intended to create a new claims and appeals process. VA must write regulations which fill in the gaps and provide additional guidance to both VA employees and veterans. Without judicial review, there exists no entity which can review VA's actions and determine whether they follow the law.

This proposal is designed to significantly reduce the impact of the CAVC on claims processing with VA by discouraging veterans from appealing to the Court. To ensure that veterans are not discouraged from appealing to the CAVC, we urge Congress to amend this proposal to allow claimants to submit new evidence within one year of a CAVC decision.

Recommendations:

Our recommendations for amending this proposal are summarized below:

1. Require VA to devise a detailed and comprehensive plan for processing its current work while also processing its current appeals workload. This plan should include an estimate of total staffing required and a projected completion date based on receipt of that additional staff.

2. Congress should provide the additional staffing as required. Failure to do so will ensure that appeals will continue to increase.
3. Congress should provide BVA with the flexibility to establish an additional docket to process its current workload.
4. Once a new claims and appeal process becomes effective, provide the BVA with the flexibility to establish up to three additional dockets to handle appeals.
5. Congress should allow VA twelve months or longer to publish and finalize regulations necessary to implement this proposal. If this proposal is passed in 2016, we suggest that the effective date of the changes be January 1, 2018.
6. Congress must resolve the issues surrounding the duty to assist. We believe that those conducting the difference of opinion review and the BVA should be required to remand to the center lane for additional development any evidence submitted during the difference of opinion or appeal process which triggers the duty to assist.
7. If Congress limits the duty to assist as shown in the current version of this bill, it should allow the submission of new evidence in the center claims lane while cases are pending in either the difference of opinion or appeals lane.
8. Congress should retain the BVA's current authority to request Independent Medical Expert Opinions under 38 USC 7109.
9. The DRO position should be retained.
10. Congress should eliminate the new and material evidence requirement found in 38 USC 5108 and require only new evidence in order to reopen a claim.
11. Evidence required to file a supplemental claim should be new evidence and not new and relevant evidence.
12. Congress should require VA to provide the reports outlined earlier in this testimony and any other reports it deems appropriate.
13. Considering the critical role of the CAVC in the oversight of VA's rules making and claims processing, we encourage Congress to provide claimants with the opportunity to submit new evidence within one year of a CAVC decision.

Discussion Draft Regarding Veterans Affairs Construction Reform

This draft legislation provides four provisions to improve the construction process and provide greater transparency related to costs and funding. While the VFW continues to call on Congress to provide VA greater authority to enter into public-private partnerships, sharing agreements and leases, VA will continue to need to build medical facilities.

The VFW fully supports the provision that mandates a forensic audit on any medical facility project that is projected to cost more than 25 percent of the appropriated amount. These audits will shine a light on what causes cost overruns, and provide both VA and Congress the information they need to correct inefficient construction practices.

Currently, the Secretary must report to Congress where bid savings come from and where they are going to be used. However, the Secretary is not compelled to report in detail the amounts that have already been obligated, how much of the project has already been completed and how bid savings has already been provided to that project. This provision will provide Congress with a

clearer picture of construction projects that are susceptible to cost overruns. The VFW fully supports this provision.
The legislation also calls for quarterly reports on the budgetary and scheduling status of each project, as well as a comparison between the planned and actual costs and scheduling status. This provision will provide Congress updates throughout the project life cycle, allowing it to detect cost overruns and construction delays early so corrective actions can be taken. The VFW fully supports this provision.
Lastly, this legislation calls on VA to use industry standards when constructing medical facilities. While the VFW agrees that VA should adopt private sector best practices, there are no clear industry standards to follow. That is why the VFW suggests codifying and putting in regulation many of the best practices, some of which VA has recently adopted, that will build in efficiencies and reduce cost overruns and building scheduling delays. The VFW believes that VA must always include a medical equipment planner as part of the architectural and engineering team; improve communications through a project management plan; subject all projects plans to peer review; develop change-order processes that increase the timeliness of the changes; and when practical, use a design-build process to reduce the number of change orders.

Draft bill to expand eligibility and medical services under section 101 of the Veterans Access, Choice, and Accountability Act of 2014.

This legislation would expand eligibility for the Veterans Choice Program to include veterans who have received care through the Project Access Receive Closer to Home (ARCH). The VFW supports this legislation and has a recommendation to improve it.

Project ARCH has been a very successful community care program that ensures veterans are not required to travel too far for the care they need. Veterans who receive care through Project ARCH inform the VFW that they want to continue to see their doctors. Given that Project ARCH is set to expire soon, the VFW has urged VA to ensure Project ARCH veterans are able to continue to receive the care they need without having to transfer to new providers or have their process for receiving such care changed. This legislation would rightfully expand community care eligibly to these veterans to ensure that occurs.

However, this legislation would make any veteran who has used Project ARCH eligible for the Veterans Choice Program, even if such veteran is no longer eligible for Project ARCH. That is why the VFW urges the Committee to amend this legislation to expand eligibility only to veterans who would otherwise continue to be eligible for Project ARCH.

State Outreach for Local Veterans Employment (SOLVE) Act of 2016

The VFW supports this legislation, which would provide states with greater flexibility in how they use funds provided under the Jobs for Veterans State Grants (JVSG) provided by the Department of Labor's Veterans Employment and Training Services (DOL-VETS).

This bill would prohibit DOL-VETS from rejecting a state's JVSG proposal based solely on which state agency would execute the plan. It would further prohibit DOL-VETS from rejecting a state's plan in its entirety because a portion of the plan is unacceptable, without providing an

explanation of why that portion was not approved. The VFW does not believe that DOL-VETS does either of these things now, so these provisions would simply codify current practice. We note that DOL-VETS would maintain full authority to reject all or part of a state's plan based upon its merits, and believe states should continue to be held to a high standard to ensure JVSG funds are being administered in a way that maximizes employment outcomes for veterans.

This bill would also allow states to identify additional significant barriers to employment (SBE) that would make veterans eligible for intensive services from Disabled Veterans Outreach Program (DVOP) specialists. Currently, only veterans with compensable disabilities are defined as having SBE. Under this legislation, states may include other veterans as SBE, such as homeless veterans, or those experiencing long term unemployment. While the VFW believes that DVOPs should provide services to disabled veterans first, they may have the ability to assist others as well. We believe states should be encouraged to develop innovative solutions to meet the unique needs of their unemployed and underemployed veterans.

Discussion draft of VA's proposal to modify requirements under which the Department is required to provide compensation and pension examinations to veterans seeking disability benefits.

The VFW opposes this legislation, which would relieve VA of its obligation to order medical exams for certain veterans who file claims for disability compensation by requiring "objective evidence" that the disability was incurred or aggravated in service; became manifest during a presumptive period; or the event in service was capable of causing the injury. The language of the bill leaves it up to VA to define "objective evidence" by regulation. This would raise the standard for duty to assist, which currently states that VA "will provide" an examination or opinion if necessary to decide the claim.

If this bill were to become law, it would have an indisputably negative impact on certain veterans. One category would be veterans who have disabilities that cannot be observed by others, such as fatigue, pain, or tinnitus. Another would be those whose service records may have been destroyed, damaged, or missing, including in the 1973 fire at the National Personnel Records Center.

To take one example, if a veteran's service records were not available, and attempts to locate them were unsuccessful, VA could just deny the claim. In certain circumstances, just receiving an exam will enable the veteran to show that the type of injury claimed would have onset during military service, given the severity and length of time between the injury and the exam.

Additionally, the word "objective" is not defined. It is unclear whether certified buddy statements, affidavits, and credible lay testimony would be considered "objective evidence" if the veteran did not fall into one of the "presumptions" where VA allows this evidence to be considered. VA currently accepts credible lay testimony from veterans in certain cases to prove an in-service event, even if it is a circumstance not controlled by 38 USC 501(a). Given these concerns, the VFW must oppose this bill.

Discussion Draft, Veterans Mobility Safety Act of 2016

The VFW supports this legislation, which would establish minimum safety standards for the Automobile Adaptive Equipment Program.

The Automobile Adaptive Equipment Program was established to enable severely disabled veterans to drive without the assistance of others by making modifications to their exiting vehicles or purchasing a new vehicle with the specific accommodations they need. Because the VA automobile grant is a one-time benefit, it is important that modifications made to vehicles are safe and function properly the first time.

Currently, VA prosthetic representatives are required to assist veterans in locating an approved vendor and inspecting the workmanship of vehicle modification. VA encourages veterans to verify that a vendor is registered with the National Highway Traffic Safety Administration (NHTSA), who is responsible for developing motor vehicle safety standards. However, NHTSA does not conduct thorough compliance evaluations to ensure registered adaptive equipment installers comply with the established standards. The VFW supports establishing a comprehensive policy regarding quality standards for providers. However, VA must also ensure that requiring certification of providers does not delay a veteran's ability to have his or her vehicle modified.

Mr. Chairman, this concludes my testimony. I will be happy to answer any questions you or the Committee members may have.