RICHARD PAUL COHEN,EXECUTIVE DIRECTOR, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

STATEMENT OF
RICHARD PAUL COHEN
EXECUTIVE DIRECTOR
NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
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MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates, Inc ("NOVA") on legislation pending before the Committee.

NOVA is a not-for-profit § 501(c)(6) educational organization incorporated in 1993 and dedicated to train and assist attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents before the Department of Veterans Affairs ("VA"), the United States Court of Appeals for Veterans Claims ("CAVC") and before the United States Court of Appeals for the Federal Circuit ("Federal Circuit").

NOVA has written many amicus briefs on behalf of claimants before the CAVC and Federal Circuit. The CAVC recognized NOVA's work on behalf of veterans when it awarded the Hart T. Mankin Distinguished Service Award to NOVA in 2000.

The positions stated in this testimony have been approved by NOVA's Board of Directors and represent the shared experiences of NOVA's members, as well as my own fifteen-year experience representing claimants at all stages of the veteran's benefits system from the VA Regional Offices to the Board of Veterans' Appeals to the CAVC and the Federal Circuit.

Because of space and time constraints, and in the interests of concentrating on those areas in which our members have the most expertise and the most information to add to the dialogue, NOVA will limit its comments to those bills which directly impact the operation of the Veterans Benefits Administration and the CAVC.

S. 2090, S.2091 and S.2737

In an effort to decrease the time required to prepare the record for appeals, the CAVC has implemented Miscellaneous Order No.03-08, adopting new Rules 10 and 28.1. Pursuant to these new rules, the VA will scan a veteran's entire VA claims file onto a disk to create the "Record Before the Agency". Thus, the veteran's confidential and sensitive information will be transformed into electronic data. Because the CAVC is preparing for the electronic filing of records (including personal data such as military service records, past and present medical treatment records, and veterans' personal statements, etc.), briefs and motions and for remote

access to these same electronically-filed documents, there is an increased risk of unauthorized disclosure of confidential information unless precautions are taken. NOVA supports S. 2090 because it seeks to protect and secure veterans' private information in these electronically-filed documents, a serious concern to NOVA members and veterans alike.

Consistent with our testimony before this Committee on November 7, 2007, NOVA continues to support S. 2091. As NOVA predicted, the number of notices of appeals filed with the CAVC continues to increase, with a record-setting high of 4,643 appeals filed during FY 2007. Because this trend of increased appellate filings will likely continue, NOVA support S. 2091, which would authorize adding two more judges to the CAVC. These two new judges will help shorten the time a veteran's appeal waits for a judge to render a decision. NOVA applauds Congress' proactive steps in this area to date and further suggests Congress consider implementing legislation that would add two judges for every two thousand additional appeals filed.

NOVA also supports S. 2737 because it seeks to amend 38 U.S.C. §7252 (b), which provides for limited review of the Schedule of Ratings for disabilities to determine whether it complies with the provisions of Chapter 11. Currently, the CAVC has no jurisdiction to review the Schedule of Ratings, which is utilized by the VA to determine the appropriate percentage of a veteran's disability and thus the amount of VA compensation to be paid. This legislation (S. 2737) would correct this problem, as highlighted by the case of Wanner v. Principi, 370 F.3d 1124,1129 (Fed. Cir. 2004), which held that the statutory scheme "excludes from judicial review all content of the ratings schedule as well as the Secretary's actions in adopting or revising that content"..

For example, because of the Court's limited jurisdiction, veterans are precluded from arguing that the "acoustic trauma" requirements contained in the diagnostic code for tinnitus is contrary to 38 U.S.C. § 1110. This principle also has been applied in later cases, such as Jones v. Principi, 18 Vet. App. 248 (2004) (rejecting challenge to failure to provide for separate ratings for multiple scars under diagnostic code 7804); and Byrd v. Nicholson, 19 Vet App. 388 (2005) (rejecting challenge to the Schedule of Rating regarding exclusion of periodontal disease). It is appropriate to open the CAVC's jurisdiction to include consideration of well-supported challenges to the VA's rating schedule.

S. 2309

NOVA supports the modification to 38 U.S.C. § 1154(b) which provides that a service member who served in a combat zone will be considered to have been in combat with the enemy. Establishing combat with the enemy can be a crucial first step in proving exposure to combat stressors, which is essential for receipt of VA service-connected benefits for medical conditions such as post-traumatic stress disorder (PTSD). This legislation would eliminate the incredible barriers facing veterans who were in combat, but whose service records do not include such designations (e.g., Combat Infantry Badge (CIB) or a purple heart) and who only knew their service buddies by nicknames. These barriers frustrate a veteran's later attempts to establish what occurred during his or her service in a combat zone.

To truly benefit service members who have difficulty proving that their PTSD is related to their military service, NOVA suggests a different modification of § 1154(b). If the intent is to significantly assist combat veterans in receiving the benefits they earned, the current proposal will not bring about its intended purpose because 38 U.S.C. § 1154(b) does not provide a presumption that a veteran is entitled to benefits for a service connected injury or disorder even for those veterans whom the VA concedes engaged in combat with the enemy. Rather, §1154(b) has been interpreted as providing only a presumption of service incurrence which still requires proof of medical nexus, Dalton v. Nicholson, 21 Vet. App. 23 (2006). In order to accomplish the intended result, § 1154 (b) needs the following addition:

'(3) In the case of a veteran who has been diagnosed with PTSD after military service and who engaged in combat with the enemy as defined in (2) above, a connection between PTSD and active military service shall be presumed and may be rebutted only by clear and convincing evidence to the contrary.'

S. 2573

Although NOVA recognizes Congress' benevolent intent to encourage veterans to agree to treatment and rehabilitation which may prove beneficial, NOVA opposes S.2573, "Veterans Mental Health Treatment First Act" primarily because of its likely unintended detrimental financial and treatment consequences. Section 1712C will impose upon veterans the "Hopson's choice"of treatment and a stipend or the standard VA treatment and compensation program. Veterans who have a diagnosis of service-connected PTSD and whose service-connected mental condition severely impairs their ability to earn a living will be forced to chose between the treatment first path or the path to receive adequate VA compensation.

Specifically, S. 2573 proposes that, a veteran who is married, and who has a disability which would be rated at 100% would forfeit the right to VA compensation of $ 2,699 per month in exchange for receiving only $2,000 at the beginning of the program and $3,000 at the conclusion and $ 500 per month during the program. Thus, over a year-long program, such a veteran would forfeit $21,388, (i.e., $32,388 less $11,000), and the veteran's family would be forced to live on $11,000 for that year. According to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV-TR") veterans with PTSD may habitually attempt to avoid thoughts or conversations associated with the trauma (DSM-IV-TR, C.(1)). They may also have markedly diminished interest or participation in significant activities (DSM-IV-TR, C.(4)) and irritability or outbursts or anger (DSM-IV-TR D.(2)). Thus, the medical community recognizes that such veterans may reject all treatment if treatment is compelled.

Furthermore, "[m]ost empirical studies or trials conducted to date show no relationship between compensation seeking, PTSD disability status, and treatment outcomes." IOM (Institute of Medicine) and NRC (National Research Council). 2007. PTSD Compensation and Military Service. Washington, DC: The National Academies Press, pages 183-184.

Finally, this bill would create two classes of veterans and two programs of treatment: (1) the treatment first veterans; and (2) the simultaneous benefits and treatment veterans. It follows that all veterans would not be in the same treatment plans for the same conditions and that care givers will come, however subconsciously, to stigmatize the non- treatment first veterans.

S.2617

NOVA supports the Cost of Living Adjustments provided in S.2617 but, additionally, supports the across the board immediate 25% increase for loss of quality of life which was recommended by the Veterans' Disability Benefits Commission ("VDBC") in its October 2007 report "Honoring The Call To Duty: Veterans' Disability Benefits In The 21ST Century."

S. 2674

NOVA generally supports Title II of America's Wounded Warrior Act, but with reservations concerning that portion of Sec. 201, i.e., (b)(6) and (c)(2)(F) and Sec. 203, which suggest a study of whether disability compensation may be used as an incentive to encourage veterans to undergo appropriate treatment and vocational rehabilitation. This is especially inappropriate if the veteran's disability compensation is contingent on the veteran getting treatment at a VA facility. Where and when a veteran seeks treatment is his/her personal choice. Veterans do not always seek treatment at a VA facility-especially if they have the means (i.e. disability compensation) to go to a private doctor. As explained above, with respect to S. 2573, NOVA is concerned that the implementation of such a program would have the unintended consequence of discouraging veterans from applying for benefits which they deserve.

NOVA also opposes (c)(2)(E) which would create different classes of veterans according to their age at the time they file their claim. Any attempt to revise the existing payment scale based on the veteran's age at the date of the initial claim conflicts with the VDBC's conclusion that it "does not concur with the recommendation" to investigate whether to including factors such as the veteran's age would improve the ability of the rating schedule to predict earnings losses. (VDBC 235.) A review of VDBC's tables 7.2, 7.3 (VDBC 226,227) reflects the conclusion that veterans who enter the VA disability system up to age 55 do not present a problem in terms of income parity. Moreover, 54.6% of veterans receiving initial VA disability awards are 55 years old or younger. (VDBC 101, Table 5.2.) Indeed, NOVA agrees with the VDBC's position that it "does not support a policy of considering age or other vocational factors in individual rating determinations" and does not believe that including factors such as age would improve the ability of the rating schedule to protect earnings losses because such determinations are unjustified and unfair to our WWII, Korean War and Vietnam veterans and to officers who are generally older than the enlisted troops under their supervision. (VDBC 235.)

Because Sec. 1205 appears to represent an unwarranted renunciation of the concepts of protected and permanent and total ratings (38 U.S.C. § 110; 38 U.S.C. § 1521; 38 C.F.R. § 3.951(b); 38 C.F. R. § 3.343(a)), NOVA opposes the broad discretion for periodic reevaluation and adjustment of disability evaluations contained in that section. Moreover, as found by the Institute of Medicine with respect to ratings for PTSD, "It is not appropriate to require across-the-board periodic reexaminations for veterans with PTSD service-connected disability." IOM and NRC 2007. "PTSD Compensation and Military Service". The National Academies Press, p. 195.

S. 2825

NOVA supports S. 2825 because it seeks to add language to 38 U.S.C. § 1155, which would establish a minimum rating of 10% for a veteran who requires continuous medication or the use

of an adaptive device is equitable. NOVA supports this proposed legislation because it is equitable and takes into account the real world limitations and restrictions imposed by chronic impairments which have previously slipped through the cracks and been non-compensatble.

The "Veterans' Benefits Enhancement Act of 2008"

The "Veterans' Benefits Enhancement Act of 2008", includes at Sec. 201 a modification of 38 U.S.C. by inserting §501A which would grant the VA the authority, in the exercise of its own unsupervised discretion, to stay the adjudication of claims whenever it determines the stay to be "necessary.". NOVA opposes S. 201 modifications as an unjustified intrusion into the jurisdiction of the CAVC by divesting the CAVC of its inherent jurisdiction to grant or deny such stays. Moreover, granting the VA the power to stay claims adjudication is dangerous because in actual terms, it would give the VA unfettered power to stall the development and consideration of hundreds of thousands of veterans' claims for benefits whenever the VA deems it necessary. Based on the vast experience of NOVA's members in assisting veterans with their appeals, it is NOVA's position that the VA cannot be trusted to exercise its use of this powerful tool in the best interest of our nation' s veterans.

NOVA's primary concern regarding this issue is highlighted by the VA's history of opposition to adjudicating the claims of critically-ill Navy veterans for benefits based upon illnesses caused by Agent Orange exposure. Thus, in the case of Ribaudo v. Nicholson, 21 Vet. App. 137 (2007), after the Court held unlawful and rescinded the unilateral stay instigated by the VA Secretary and imposed by the Chairman of the Board of Veterans' Appeals on the processing of appeals, the VA reluctantly resorted to the courts to obtain a stay of its obligation to continue adjudicating claims under the principles set forth in Hass v. Nicholson, 20 Vet. App. 257 (2006), appeal docketed, No. 07-7036 (Fed. Cir. Nov. 8, 2006). In Ribaudo, the VA asserted that the harm to the VA of continuing the adjudication of claims outweighed the harm to veterans ill with cancers resulting from their exposure to Agent Orange during Navy service off the coast of Vietnam. Another example of the VA utilizing procedural bureaucracy to the detriment of veterans was criticized by the United States Court of Appeals for the Ninth Circuit which observed that the performance of the VA regarding the administration of benefits for diseases caused by Agent Orange exposure has contributed substantially to our sense of national shame, because the VA continues to resist payment of benefits through obstructionist bureaucratic opposition, Nehmer v. U.S. Dep. Of V.A. 494 F.3d 846, 849, 865 (9th Cir. 2007).

Similarly, NOVA is concerned about the effect of Sec. 202 which would amend 38 U.S.C. § 7107(a)(1) to allow an earlier BVA docket number to be ignored if "the earlier case has been stayed" or if "the earlier case has been delayed for any reason".. There is no justification for departing from time-honored procedures of docket management to provide the BVA with complete discretion to juggle the docket and, without the possibility of challenge, to stay or delay a veteran's appeal and cause appeals to languish for many years longer than the usual 2 year waiting period until the veteran dies.