Mr. Barton F. Stichman, Co-Director, National Veterans Legal Services Program

NATIONAL VETERANS LEGAL SERVICES PROGRAM

STATEMENT OF BARTON F. STICHMAN

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BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES SENATE

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Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the views of the National Veterans Legal Services Program (NVLSP) on S. 2694, the "Veterans' Choice of Representation Act of 2006." NVLSP is a veterans service organization with a unique perspective on the merits of this legislation. Since NVLSP was established in 1980, we have trained thousands of veterans service officers and lawyers in veterans benefits law. We have also written educational publications that have been distributed to thousands of veterans advocates to assist them in their representation of VA claimants. This experience has helped us in formulating our position.

NVLSP strongly supports enactment of S. 2694. As I discuss in more detail below, we support S. 2694 for many of the reasons that Senators Craig and Graham identified when they introduced this legislation.

The Maior Reasons That S. 2694 Should Be Enacted

1. **Freedom of Choice.** In his press release of May 4, 2006, Senator Craig answered yes to the following question: "If American soldiers are mature and responsible enough to choose to risk their lives for their country, shouldn't they be considered competent to hire a lawyer?" NVLSP agrees entirely. Veterans deserve the right to choose to hire an attorney to represent them on a claim for VA benefits. It makes no rational sense to deny them this right when the right to choose to hire an attorney is enjoyed by criminal defendants, claimants for other federal government benefits including social security, and non-citizens opposing federal government efforts to deport

them. As one observer aptly put it, the current, 144 year-old statutory bar to hiring an attorney to help a disabled veteran on a VA claim is a "museum piece" that deserves to be repealed.

2. **The Overburdened Veterans Advocacy Network**. Another major reason that NVLSP supports S. 2694 is that the current network of veterans advocates available to our nation's disabled veterans is greatly overburdened. As I explain in more detail below, the time that veterans service officers can devote to an individual disabled veteran's case is greatly limited by the daunting caseload they must carry. Allowing disabled veterans to hire attorneys wi11 help alleviate this burden and promote justice.

The number of disabled veterans who need representation on their claims before the VA is staggering, and it is increasing over time. Thomas J. Pamperin, Assistant Director of the VA's Compensation and Pension Service, recently quantified for NVLSP the upsurge in VA claims.

He stated:

As reported in the President's budget submission for fiscal year 2007, disability claims from returning war veterans, as well as from veterans of earlier periods, have increased 36 percent between 2000 and 2005. VA projects that disability claims in 2006 will increase to an estimated 811,947, an increase of 23,649, based on the increasing claim rate. We project an additional 98,178 more claims as a result of specific legislation contained in VA's appropriation for 2006 mandating personal contact with veterans in six states (the "outreach effort"). Thus, we anticipate a total of 910,126 disability claims in 2006 compared to actual receipt in 2005 of 788,298, an increase of 121,828 claims . . . . Furthermore, VA is currently working on initiatives to conduct outreach to potential non-service¬connected, pension-eligible wartime veterans and survivors.

A recent article in the National Law Journal (a copy of which is attached hereto) gives a glimpse of the heavy load that is being carried by our nation's veterans service officers. The National Law Journal reports that as of 2003, the cases of 18,000 VA claimants pending before the VA regional office in St. Petersburg were being handled by 14 service officers employed by a major national veterans service organization. The cases of 9,000 VA claimants pending before the VA regional office in Los Angeles were being handled by nine service officers employed by the same organization.

This amounts to over 1,000 pending claims for each service officer. No service officer - no matter how well-trained - can devote a lot of time to an individual disabled veteran's case when he or she has to handle 1,000 or more clients at the same time.

Enactment of S. 2694 will have the important positive effect of increasing the pool of advocates available to represent the increasing number of disabled veterans who are seeking VA benefits. This, in turn, will help lighten the overwhelming caseload borne by many service officers. Most disabled veterans will undoubtedly choose to continue to be represented by a service officer who by law provides this service at no cost. But disabled veterans who are represented by a service officer will be benefited because the service officer will have more time to devote to their case.

3. **Improving Veterans' Access to the VA and Expediting Just Outcomes**. In Senator Craig's May 6th press release, he quoted Senator Graham as stating that "[t]his overdue change will significantly improve veterans' access to the VA and expedite just outcomes." Senator

Graham went on to state that "[i]n today's complicated world, legal assistance in navigating the system is more timely than ever." NVLSP strongly agrees with this assessment.

In the first place, NVLSP can vouch for the fact that the federal veterans benefits system has always been highly complex. To assist service officers and attorneys in representing veterans in this system, NVLSP has written the Veterans Benefits Manual ("VW), which has been published since 1999. The fact that the VBM is over 1,700 pages long reflects the complexity of the system. I should note that because important changes in veterans benefits law take place every year, a new edition of the VBM is published annually.

NVLSP also agrees with Senator Graham that enactment of S. 2694 would expedite just outcomes in this complex system. For example, in 11,833 of the 15,823 appeals (or 74.8%) that the U.S. Court of Appeals of Veterans Claims decided on the merits during the last 10 fiscal years, the Court was forced to remand the case back to the VA for further proceedings. Similarly, in 51,675 of the 121,174 cases (or 42.6%) heard by the Board of Veterans' Appeals during the last three fiscal years, the Board was forced to remand the case back to a VA regional offices for further proceedings.

A large percentage of these Court and Board remands are caused by the failure of the regional offices to comply with the nonadversarial VA procedures required by law in a way that prejudiced the veteran's case. For example, some claims have had to be remanded because the regional office failed to inform the disabled veteran of the evidence necessary to substantiate the veteran's claim as required by 38 U.S.C. § 5103. Some claims have had to be remanded because

the regional office failed to obtain the veteran's service department records, Social Security records, or private medical records, or to provide the veteran with a medical examination as required by 38 U.S.C. § 5103A. Some claims have had to be remanded because the regional office failed to obtain a medical opinion addressing whether the veteran's current disability is related to an event, injury, or disease that occurred during the veteran's military service as required by 38 U.S.C. § 5103A. These remands delay, sometimes for years, the ultimate resolution of a disabled veteran's claim that has already taken years to reach the Board of

Veterans' Appeals or the Court of Appeals for Veterans Claims.

But forcing the Board or the Court to make VA regional offices comply with these nonadversarial requirements is not the only way for a disabled veteran to have his claim fairly decided. If the obstacle to a fair decision is that the regional office failed to inform the disabled veteran of the evidence necessary to substantiate the veteran's claim, a service officer or lawyer can remove that obstacle early in the claims process by simply informing the disabled veteran about the evidence that is necessary. If the obstacle to a fair decision is that the regional office failed to obtain a medical nexus opinion or a veteran's service department records, Social Security records, or

private medical records, a service officer or lawyer can remove that obstacle early in the claims process by obtaining this evidence themselves and submitting it to the regional office.

Given the current heavy caseload borne by the nation's service officers, many of them simply do not have enough time in every case to analyze the claim and to obtain and submit the evidence that the VA regional office was obligated by law, but failed, to obtain. Enactment of S. 2694

should help alleviate this overload by making additional advocates available to our nation's veterans to assist them on their VA claims. This, in turn, will increase the amount of time these advocates have to devote to an individual case, thereby allowing them early in the claims process to remedy the regional office's failure to comply with the nonadversarial procedures required by law. The net result, as Senator Graham stated, will be to "expedite just outcomes."

I want to stress that in the experience of NVLSP, most service officers are well-trained, knowledgeable, and dedicated to helping veterans obtain the benefits they deserve. Adding attorneys to the mix of advocates who can represent veterans before the VA will ease the workload of many overburdened service officers and allow them to spend more time per case helping veterans. This legislation would add more advocates to the mix, and protect veterans from unreasonable fees. It is a "win - win" for both veterans and for service organization representatives.

An Argument Raised Against S. 2276: It Will Allegedly Make the VA System More Adversarial. Finally, I would also like to address an argument we have heard some make against allowing veterans freedom to choose to hire a lawyer on any VA claim. That argument is that the introduction of lawyers will make the VA claims adjudication system more adversarial.

The basic flaw in the argument is that there is no evidence to support this notion. Over the last five fiscal years, lawyers have represented VA claimants before the Board of Veterans' Appeals in 13,021 of the 152,731 cases (or 8.53%) decided by the Board. Thousands of VA claimants have been represented by lawyers before VA regional offices. If lawyers would make the VA

claims adjudication system more adversarial to the detriment of VA claimants, then there would already be evidence of this phenomenon. To NVLSP's knowledge, there is no such evidence.

In conclusion, NVLSP greatly appreciates the opportunity afforded to us by the Committee to address the merits of S. 2694. We believe that there are some technical amendments to S. 2694 that would further the objectives of the bill, and we intend to provide them to the Committee in writing in the near future. That concludes my prepared statement, and I would be happy to answer any questions.

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TURF WAR OVER VETS

LAWYERS GRIPE AT BEING KEPT AWAY FROM V.A. WORK.

Leonard Post Staff Reporter

Post's e-mail address is lpost@nlj.com.

A TURF BATTLE is under way over who should represent former military personnel in claims for injuries suffered when they were in uniform.

Should it be lawyers, who are now frozen out of business they would like to have, or nonlawyer veterans who want to keep the work in the "family"?

Veterans are not allowed to pay an attorney to request benefits until a case reaches the Court of Appeals for Veterans Claims.

By then the claim has already been denied twice--at the regional level and by the Board of Veterans' Appeals.

By contrast, anyone with legal problems involving such programs as Social Security Disability or workers' compensation can hire lawyers whenever they want. Only veterans, their spouses and dependents are denied the right to representation at an administrative level--where the record gets made--and only at the Department of Veterans Affairs (V.A.).

Lawyers say that if they were allowed to do the work for pay, they could make the system fairer to veterans. (Attorneys may work free at these early stages of the process, but few do.)

Opposing the lawyers is Disabled American Veterans (DAV), an organization that represents about one-third of all claimants for free. DAV is a true believer in the V.A.'s mission to protect its own. Its officials said they are not blind to problems with the V.A.'s adjudication of claims, but they don't want to see lawyers take advantage of veterans and complicate an already flawed system.

Ken Carpenter, a founder of the National Organization of Veterans' Advocates, a lawyers' group, suggests that DAV's motives may not be quite so noble: Its "concern is that we'll leave them to represent nickels and dimes," he said. "For them it's a turf war--the Alamo. If lawyers are allowed in, they'll lose their reason for being."

Veterans have 393,000 cases pending at the V.A.'s 58 regional offices, and 21,000 at the board, according to a V.A. spokesman. They seek compensation for service-connected injuries (even if they don't turn up for decades), as well as medical treatment, pensions, education benefits under various G.I. bills, life insurance, burial plots and other benefits. Veterans must prove entitlement.

The V.A. was established soon after World War I. Its regional officers have a duty to assist veterans in perfecting their claims. Carpenter asserts that in reality the process is not familial, but "antagonistic and adversarial."

"The way the law is written--it's a wonderful system," said Carpenter, a solo practitioner in Topeka, Kan., who is handling more than 1,000 veterans' cases. "The way it's administered is a national tragedy."

He said the process is often drawn out, full of remands due to incomplete records, mistaken regional hearing officers and spurious board decisions. Moreover, the veteran may die before benefits are paid.

In such a situation, if the case were in the court of appeals, it would be summarily dismissed. The spouse or other dependent would then have to start over by filing a survivor's claim at the regional level, where a lawyer would again be forbidden to charge a fee. And a survivor is entitled to only two years of past-due benefits, even if the veteran had been entitled to 20.

Carpenter's advocacy"organization "is attempting to educate members of Congress, particularly the veterans affairs committees, regarding the limitations of the current law," says Glenda Herl, its executive director. Despite success with some groups, she says, the DAV remains unconvinced.

No bill on the issue is currently before Congress, and a spokesman for New Jersey Republican Chris Smith, chairman of the House Committee on Veterans' Affairs, says the issue "is not presently on the Congressman's radar."

Rep. Lane Evans, D-I11., the ranking minority member of the House Veterans Affairs Committee, has weighed into the debate cautiously. "Veterans' service organizations do a good job in representing our nation's veterans," he said. "However, I support allowing veterans the opportunity to have a choice to hire an attorney when they are appealing a regional office decision."

That's not far enough for David Addlestone, a co-executive director of the Washington-based National Veterans Legal Services Program, a veterans' advocacy and educational organization and a nonprofit law firm. "We would like to see the law abolished entirely to give vets a free choice," he said. The law, 38 U.S.C. 5905, bars anyone from charging fees at the administrative level under threat of fine or up to a year in jail, or both.

The Maryland-based Vietnam Veterans of America also wants that law done away with.

The cost of lawyers

Joe Violante, DAV's national legislative director and a lawyer, argues that the choice would not be free. The cost to veterans would be at least 20% of their past-due benefits, he said.

"Basically our bottom-line position is that a vet should not have to pay to receive the benefits to which he or she is entitled," said Violante. "And, frankly, our concern is that if you ask vets to choose between a lawyer or one of our highly trained national service officers, they might be misled and assume that a lawyer knows more than we do. There are only a handful of lawyers out there with our experience."

Board of Veterans' Appeals data appear to support Violante's position. Veterans represented by lawyers and veterans' groups have almost identical success rates before the board, where they appeal regional-office denials of claims (see chart). The V.A. does not keep statistics on outcomes by representation at the regional level.

Only Vietnam Veterans of America has a substantially higher success rate before the appeals board than others, but it represents only 1.3% of claimants.

Richard Weidman, its director of government relations, explained: "We are so small and underfunded that we have to practice triage. If the vet is capable as a partner, and can help gather supporting material but they don't want to do it, we tend to direct them somewhere else. Without DAV there would be tens of thousands of vets who would not be represented at all." Veterans who dare to represent themselves are the least likely to win. But everyone need fear to tread--the overall success rate is 27.7%.

In 1988, Congress, recognizing that judicial scrutiny of the V.A. was sometimes necessary, established the specialized Court of Appeals for Veterans Claims. The veteran gets a de novo review of the legal standards upon which the board based its decision, but the court may reverse on factual grounds only if it finds a ruling was "clearly erroneous."

When cases reach this level, lawyers may charge fees. If a lawyer charges no more than a 20% contingency fee, the V.A. will withhold it from the award and pay the attorney directly.

The V.A. will not withhold any fees if an attorney charges more than 20% or has any other type of fee agreement. The Social Security Administration, by comparison, allows 25%. DAV uses attorneys at this level of the process, but it still charges no fee.

If a case is remanded to the board, as is most often the case, the continue on the case and still have the fee withheld. That's also board then remands the case to the regional office where it cases are not uncommon in this nonadversarial system, where lawyer opposing the veteran's claim.

In the last fiscal year, 58% of 2,150 appellants were not represented in initial filings in the Court of Appeals, according to Norman Herring, chief executive officer and clerk of the court. By the time the appeals were heard, half of those without lawyers had gotten representation.

Attorneys from the National Organization of Veterans' Advocates, who charge a 20% contingency fee, and the Veterans Consortium Pro Bono Program, were largely responsible for halving the number of those not represented.

Plagued by remands

The Court of Appeals throws out about a third of its cases for lack of jurisdiction, and remands many of the rest.

Remands occur because the record is not complete. Carpenter insists that if lawyers represented claimants from the start, it wouldn't happen. He serves his 1,000-plus clients from his Topeka office, Carpenter Chartered, with a staff of 15 and charges a 30% contingency fee.

"In general, [veterans' service organizations] rely too much on the V.A.'s duty to assist," said Bart Stichman, a joint executive director of the National Veterans Legal Services Program. "Although many of them are trained very well." Stichman, lead counsel in the ongoing Agent Orange litigation against the Veterans Administration, has 75 cases in the Court of Appeal.

Some veterans' service organizations have been "chartered" by Congress and given office space and telephones by the government. Each has its own training program. DAV's includes college courses and 16 months of on-the-job training.

"Our national service officers are all disabled veterans themselves--we've been through the process for our own claims," said Kevin Gregory, DAV's Washington regional supervising officer. "And our training never ends."

Then why doesn't DAV's do much better than other advocates? For one, it takes every case it is asked to, including those with little or no merit. But there is,

perhaps, another reason.

Veterans' service organizations "are often good, and DAV's is the biggest, but still they don't have the time per case a good lawyer has for obtaining evidence," said Stichman.

If Carpenter's mostly appellate caseload of 1,000-plus seems daunting, DAV's is staggering. In Los Angeles, nine officers and four support staff handle about 9,000 cases. In St. Petersburg, Fla., 18,000 claims are being handled by 14 service officers and six support staff.

Disability cases are often complex. Proof of an injury's connection to military service and the date the symptoms became debilitating are just two of many hurdles. A veteran with a medical malpractice claim against a V.A. physician or hospital will likely be represented by a nonlawyer generalist.

If a claimant doesn't start out totally disabled, the V.A.'s system of calculation makes it nearly impossible to reach a 100% disability. Despite that, persuasive advocacy can overcome the agency's finding and get a veteran adjudged totally disabled, both lawyers and nonlawyers have said. And that makes a big difference. A married veteran who is 90% disabled receives $1,429 a month; a married totally disabled veteran, $2,318.

Vietnam Veterans of America's Weidman said the system needs lawyers, not just veterans' groups. "Part of DAV's position is based on the fact that V.A., under its duty to assist, is supposed to do the work," he said. "It's a great theory, but it's nirvana, and it will never come."

He thinks attorneys, other advocates and all adjudicators should have to pass a tough competency test every three years, and take yearly continuing education. "Right now, people have lost faith in the system," Weidman said.

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