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Introduction

Serving the Veterans Who Have Served Us

By Daniel K. Akaka

Veterans law is complicated. The statutory and regulatory framework governing veterans benefits has matured over many years and can be confusing to the uninitiated. In 1988, the Veterans Judicial Review Act, Pub. L. No. 100-687, resulted in the creation of the U.S. Court of Appeals for Veterans Claims, which added yet another element to a complex process.

In December 2006, the U.S. Congress enacted legislation that afforded any veteran the right to hire an attorney to appeal a ruling on a claim for veterans benefits. This proposal was not without controversy. The bill passed after eleventh hour negotiations removed a roadblock to final passage and the president's signature.

Until passage of the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, an attorney could not charge a fee for assisting a veteran with a claim until the Board of Veterans Appeals, the body that reviews claims determinations made by local Department of Veterans Affairs (VA) offices, had made a final decision in the veteran's case. With passage of that law, a veteran now is permitted to hire an attorney after noticing his disagreement with a local VA office's decision. This change allows veterans to acquire legal assistance during the entire appellate process.

An attorney's training and experience can be valuable in navigating the difficult statutes, regulations, and court decisions that make up veterans law. A veteran also may seek assistance from a recognized representative of a veterans service organization.

Many in the veterans community believed that by allowing attorney representation, veterans and the claims process would be harmed. Some were concerned that attorneys would not be able to understand the intricate VA disability compensation system and that veterans would receive faulty assistance. I firmly believe that veterans should be given the right to hire attorneys. Some veterans, weighing all options, will decide to seek free assistance from a veterans service organization. Others will choose to engage the support of attorneys. It is a right that they must have.

An example of where an attorney's assistance might be helpful is deciphering the VA's Schedule for Rating Disabilities. Compensation is based on a disability rating that the VA assigns to service-connected conditions. The VA uses its rating schedule to determine which rating to assign to a veteran's particular condition.

Under current law, challenges to the VA rating schedule are permitted only for constitutional questions. To allow veterans to challenge the rating schedule for compliance with relevant statutory provisions, I introduced S. 2737, which would permit veterans to bring a VA rating challenge to the U.S. Court of Appeals for Veterans Claims. Without an attorney's assistance, a veteran might never know that the VA is not complying with Congress's direction.

Among the many challenges facing the nation as a consequence of the current conflicts in Afghanistan and Iraq is the increased number of veterans who have suffered traumatic brain injuries from improvised explosive devices and other weapons.

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Compromised Care The Limited Availability and Questionable Quality of Health Care for Recent Veterans

By Amy N. Fairweather

The assumption of an all-encompassing giveaway by the American government to military veterans is patently incorrect. Veterans are not all entitled to federal benefits, and those who are often find that securing the assistance that they are due is a daunting challenge, rife with bureaucratic pitfalls. If they qualify, veterans may be entitled to educational benefits, home loans, free medical care, pension and disability compensation, and free burial in nationally run cemeteries.

The Department of Veterans Affairs (VA) has been unable to keep up with its current caseload and has not responded well to the influx of wounded and ill service members returning from the wars in Iraq and Afghanistan. As of May 2008, over 830,000 Iraq and Afghanistan veterans have become eligible for VA services. Of those, 320,000 have sought VA health care and over 100,000 have been diagnosed with posttraumatic stress disorder (PTSD) or have other mental health needs. Compensation and disability claims for benefits are now backlogged by over 600,000 cases, with veterans waiting six to nine months for initial claims processing. This is due to the influx of new claims being processed by returning Iraq and Afghanistan veterans combined with an existing cohort of veterans who have yet to overcome the bureaucratic hurdles of processing their claim. Frankly, the system would simply collapse if the 1.7 million service members who have served in Iraq and Afghanistan were all to seek health care and benefits, given the present capacity shortfalls.

Primarily, veterans *may* be eligible for health care, pension and/or disability compensation, survivor, and educational benefits. In addition, a myriad of state-based benefits run the gamut from free fishing licenses to state university scholarships. For our purposes, this article concentrates on clarifying the nuts and bolts of federal health care and disability compensation. But before it does so, it must be noted that the Montgomery GI Bill education benefits are *not* free. Service members pay into the system and the maximum benefit amounts to approximately $1,200 per month. Even at a less expensive city or state college, because one pays for tuition, books, supplies, food, and lodging, obtaining a four-year college degree within the confines of the benefit is a nearly impossible task. Substantial improvements were signed into law in July 2008 that will become effective in August 2009. (See "The New GI Bill" on page 5.) The full impact of these changes has yet to be determined.

A Brief Historical Perspective

Our government has a history of steamrolling veterans even though they are among the most underserved citizens in our society. After World War I, veterans of the "Bonus Army"—a band of some 15,000 WWI veterans and their family members who protested during the spring and summer of 1932 in Washington, D.C.—fought long and hard for timely veterans aid. At the war's end, soldiers had been promised a bonus for services rendered in Europe, in the form of certificates that would mature in 1945, a full twenty years from the date of issue. Needless to say, the Bonus Army veterans wanted and needed immediate cash assistance during the Depression.

President Herbert Hoover ordered the protestors out of the District, and with General Douglas MacArthur in command, Major Dwight D. Eisenhower serving as his liaison, and Major George Patton leading the cavalry, the U.S. Army and the District police marched on the veterans and expelled them from the mall and surrounding areas by burning down their encampments. When the rout was over, the Army had shot and killed two veterans; two infants died from tear gas asphyxiation; and over 1,000 men, women, and children were exposed to tear gas. At the end of the day, the Bonus Army failed to secure the immediate aid its members needed, and the certificates were cashed out in 1945, as originally scheduled.

Nevertheless, the Bonus Army remained a force and succeeded in advocating for the GI Bill of Rights, which finally passed in July 1944. Thus World War II veterans received significant and well-deserved federal assistance transitioning to civilian life and stepping up the socioeconomic ladder. Indeed, those benefits are credited with helping to build the American middle class and the years of prosperity following that war.

Since that time, veterans benefits have eroded considerably, along with the broader social safety net. Indeed, veterans account for 23 percent of our nation's homeless and mentally ill. Swords to Plowshares and other attorneys are already providing services for homeless Iraq and Afghanistan veterans. Reports of divorce, family violence, drug abuse, unemployment, and suicide are on the rise. These attorneys hope to intervene early to prevent or mitigate the outcomes that Vietnam-era veterans still endure by providing legal representation and subsequent access to housing, employment and training assistance, mental health care, and peer support. Many of our newest veterans will fall through the

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cracks unless serious reforms are made in the provision of federal benefits.

The VA

The VA is an enormous bureaucracy with a quarter of a million employees. Chartered to "care for those who have borne the battle, their widows and orphans," its three branches are the Veterans Health Administration, the Veterans Benefits Administration, and the National Cemetery Administration (which is not discussed in this article). The first two of these are separate entities with separate eligibility requirements. Enrollment in health care and recognition of service-connected injury does not automatically result in payment of disability compensation. This provides ample opportunity for veterans to fall through the cracks, suffer inappropriate denial of care, give up fighting and forego benefits, or literally die before benefits are granted.

These issues were recently challenged in the landmark lawsuit, *Veterans for Common Sense v. Peake*, Case No. 07-03758 (N.D. Cal.). The suit challenged the lack of timely mental health care as well as constitutional defects in the closed system of VA disability claims adjudication. Most importantly, perhaps, it has provided an opportunity to shed light on a system that has operated in the dark with unchecked discretion over the care and assistance delivered to our nation's veterans. The trial judge's decision laid out shortcomings in VA mental health care delivery and claims adjudication. However, the judge found that it was not within his jurisdiction to fashion a remedy.

Generally, combat and noncombat veterans are eligible for the same breadth of health and disability benefits. Exceptions for new combat veterans include a five-year presumptive eligibility for health care and access to Vet Center services, which provide readjustment counseling for combat veterans and survivors of military sexual assault. This contrasts with veterans of other eras, who must establish service connection successfully through filing a VA claim in order to be eligible for free services.

Lack of capacity and chronic underfunding remain serious hurdles to the delivery of services. The conflicts in Iraq and Afghanistan have created a unique set of stresses for veterans and their families. The level and pace of repeated deployments to urban combat areas will have long-lasting effects beyond their terms of service. During Vietnam, all service members were called upon to typically serve a single one-year tour, and after that year-long obligation personnel were not redeployed again unless they volunteered. Today, *volunteer* members of our regular armed services, as well as National Guard and Reservists, are being called back for two, three, and four tours in extremely hostile conditions. These repeated deployments subject service members and their families to a constellation of issues affecting their social and economic well-being and physical and mental health. Recently, the RAND Corporation discovered that at least 18.5 percent of veterans returning from Iraq and Afghanistan have PTSD and 19.5 percent have traumatic brain injury (TBI). Forty-one percent of Iraq and Afghanistan veterans (133,633) who have sought VA care have been diagnosed with mental health disorders. This excludes those people who are actively serving or have yet to be diagnosed.

Not surprisingly these stresses are having an enormous impact on the federal government's ability to provide benefits and services. Sick and disabled veterans will languish until substantial changes are made in the adversarial process of filing claims and the federal government makes an investment in ensuring consistent, quality care.

Further, the VA provides no benefits or health services directly to families of veterans with the exception of survivor benefits and marginally higher disability benefits for veterans with dependants. Vet Centers and some VA facilities provide marriage and family counseling with the veteran as a conduit to care, but those centers are struggling with capacity and are decreasing the few services that are available. Thus, families themselves are at a loss when a veteran refuses to seek VA care or domestic abuse becomes an issue.

The Veterans Health Administration

The Veterans Health Administration is a national medical care system, split into twenty-two Veterans Integrated Service Networks comprised of hospitals, community-based outpatient clinics, and Vet Centers that provide peer-based transitional counseling. Generally, the VA's provision of physical health care is very good and is ranked among the nation's best. But access to timely care varies greatly from facility to facility, and access to quality mental health is extremely spotty. Iraq and Afghanistan veterans seeking treatment for PTSD or other mental health conditions report waiting months for professional care. When they receive it, the quality and continuity is dependent on whether they live near a VA facility that provides mental health care. These shortfalls have reached a crisis point; with substance abuse, homelessness, family dissolution, and suicide at unacceptable levels. Recent news of suicides, including that of Minnesota Marine Jonathan Schultze, who committed suicide days after being turned away for mental health care, has focused public and congressional scrutiny on the VA. In fact, the VA has acknowledged at least 1,000 suicide attempts every month by veterans of all eras. But for all of the proposals and investigations, real change is barely perceptible. To be fair, the many social work, mental health care, and Vet Center staffers are struggling mightily to meet the need, but resources and lack of consistent care leave life-and-death shortfalls.

Not all veterans are eligible for VA health care. Eligibility is based on discharge status; length of active duty (generally twenty-four months of continuous active service); financial need; and whether the veteran has "service-connected" status, that is, has a condition that occurred or began during active service. Service connection need not be related to combat duty or any official duty; it is sort of a 24/7 workers compensation for conditions connected to the term of the service members' contract.

Health care is then rationed among seven active priority groups, of which only Priority Group One veterans are

"guaranteed" a primary or specialized appointment within thirty days. That guarantee carries little weight as the Bush administration woefully underestimated the impact of the wars in Iraq and Afghanistan on our nation's veterans, and veterans commonly encounter waiting periods of substantially longer periods before care. The VA's own Inspector General has stated that 25 percent of patients must wait more than 30 days for a primary care appointment.

New combat veterans now have a presumption of service-connected eligibility and may enroll for five years after separation from the military and are placed in Priority Group Six unless otherwise qualified for a higher priority group. In February 2008, Congress extended the window of presumptive eligibility from two to five years in the Defense Authorization Act of 2008, 38 U.S.C. § 1707. This is a significant improvement but not sufficient enough, considering the fact that PTSD and some physical ailments associated with combat can take many years to manifest.

The Veterans Benefits Administration

Once again, not all veterans are eligible for monetary benefits that generally fall into pension (based on age and length of service) and disability compensation (based on a recognized level of service-connected disability). Levels of disability and corresponding monetary benefits are based on service-connected ratings, in increments of ten, from 0 to 100 percent. For those who cannot work, the difference can be a lifetime of bare economic stability (with benefits topping out at about $2,500 per month for a single veteran with no dependants) or abject poverty (a 50 percent disability will net a veteran about $725 a month).

The VA characterizes the claims process as nonadversarial, but this is clearly not the case. Veterans may not pay an attorney to assist them in filing an initial VA disability claim. The Veterans Benefits Administration acts as arbiter and opposing party in the process and may rely on its professional legal staff at any stage of the process. Veterans may seek pro bono assistance and receive assistance from congressionally chartered veteran services officers, such as county veteran service officers and agents of the Disabled American Veterans. These service agents are generally not attorneys, and the quality of services varies greatly.

The initial claims procedure is very complicated, beginning with a daunting sixteen-page form. Many disabled veterans, particularly those with PTSD and TBI, are ill-equipped to handle the process successfully. In addition, the veteran is denied basic due process, including meaningful discovery and the ability to challenge evidence. Other complications include strict technical requirements such as filing dates, which if missed may disqualify the claim regardless of its underlying merit. It takes an average of 183 days for a veteran to receive an initial decision, after which he or she may file a notice of disagreement and hire an attorney to assist with administrative appeals.

Consider the difficulty of this process for any layperson. Now add PTSD, TBI, or even the depression and difficulty concentrating associated with *normal* readjustment. Further, in PTSD cases, the veteran must prove they have PTSD, and they must present evidence that it is the result of trauma endured during service. This requires preparing a stressor statement describing the traumatic incident backed up either by military documentation of the incident or by two "buddy statements" attesting to the trauma. Telling the story and marshalling evidence related to what is often the most horrific experience in one's life is often a trigger for PTSD symptoms and a prime reason why veterans abandon claims.

Recently, the chair of the Senate Committee of Veterans' Affairs, Senator Daniel Akaka, requested that combat veterans with a military diagnosis of PTSD not bear the burden of further proving combat-related trauma. Secretary of Veterans Affairs James Peake agreed, but many service members are loath to seek mental health treatment within the military or those institutions they view affiliated with the military, such as the VA. Veterans participating in Swords to Plowshares Iraq Veteran Project focus groups repeatedly state that they would never seek military care for PTSD due to the rampant stigma. They would be ostracized and punished, accused of trying to get out of duty, and as officers, careers would be toast.

Not surprisingly, many of these first attempts result in denials or inappropriately low ratings. Too many deserving veterans walk away at that point and do not question or challenge the outcome. But the easiest and most effective way to ensure relatively timely and fair benefits is to have the assistance of a competent attorney from the initial stages. Repairing a poorly crafted claim is difficult and time consuming and can leave the veteran without proper compensation for years. The appeals process is overly complicated, with cases traveling back and forth between the appellate and administrative levels time and again, causing unacceptable delays. Swords to Plowshares legal staff have represented veterans in appeals lasting five years or more. If successful, these veterans are entitled to retroactive payment of benefits, but the damage wrought by years of limited income and denial cannot be redeemed.

Prior to 2007, veterans were barred from hiring attorneys at any stage in the claim until, and unless, the claim was heard in the U.S. Court of Appeals for Veterans Claims. While veterans may now hire attorneys to assist them in their administrative appeals, very few attorneys have any level of expertise in this area. In addition, the legislation authorizing paid legal services directed the VA to establish rules for representation that are daunting at best. The proposed rules would require attorneys who wish to represent veterans to take veteran-specific continuing legal education and include overwhelming reporting requirements. The final rules have yet to be published, but if many of the regulations proposed in the draft rules stand, few attorneys will seek to qualify. Further, even though attorneys may collect part

of the retroactive award in fees, no one is going to get rich in this area of practice.

Other Obstacles to Benefits

Other obstacles to veterans securing health care and benefits include the stigma associated with seeking help in the military culture, a general distrust of government, lack of knowledge regarding available benefits, and geographical barriers. Veterans who live in rural areas often have to travel for hours to reach the nearest VA facility. In some cases, services may be contracted out to local providers, but this is a process with no guarantees of success.

Enormous obstacles stem from the stigma associated with seeking help. In the military one is supposed to "suck it up." Seeking help, particularly mental health care, is anathema to military culture. In addition, many veterans think that the military and the VA are connected and fear health care or disability information appearing on military records. Many veterans who intend to stay in the Reserves, Guard, or go into police work fear that a mark of mental health need would be a career ender.

Far too many veterans have little idea of the benefits to which they are entitled. The VA is also barred from advertising, which would be the most obvious way to inform veterans of available resources. This is especially true of Guard and Reserve members who return to civilian life, far from the advice and support of the military or veterans communities. Far fewer Reserve and Guard personnel file for disability benefits, and they are two times more likely as their active duty peers to be denied disability benefits. The VA has established the Office of Seamless Transition to help ease the path from military to VA care, but this office is playing catch-up, rejiggering a hopelessly confusing process on the fly.

Veterans who are discharged from the military under other than honorable discharges have limited eligibility for federal benefits. In particular, bad conduct discharges are a bar to receiving disability benefits or health care. This is a particularly cruel outcome for many veterans of the current wars who suffer from PTSD and are kicked out of the military for behavior stemming from their combat injury. It is common for the performance of service members with TBI or PTSD to suffer, whether from diminished capacity, self-medicating substance issues, or reckless or reclusive behaviors symptomatic with these injuries. In other cases, veterans are precluded from care because they have been discharged with personality disorders that are considered a preexisting condition. Veterans have little recourse under these circumstances. They may pursue the difficult process of a discharge review by the military or a change in character of service claim with the VA.

Where to from Here?

Thankfully, VA services have witnessed some improvement. Congress mandated new programs, most recently in the Defense Authorization Act of 2008, 38 U.S.C. § 1707, including the extension of VA health care eligibility from two to five years. Other provi-

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The New GI Bill

On June 30, 2008, President George W. Bush signed into law the Post 9/11 Veterans Educational Assistance Act, 38 U.S.C. § 3301 et seq. This new GI bill is intended to provide veterans of the Iraq and Afghanistan conflicts with educational benefits similar to those received by World War II veterans.

These benefits include

- full tuition and fees for thirty-six months (four academic years) up to the value of the most expensive public university in the state of enrollment, paid at the beginning of each term;
- a monthly housing stipend, paid monthly, based upon local rates;
- an annual stipend for books, supplies, and equipment—up to $1,000;
- tutoring costs up to $100 per month for twelve months;
- costs for professional licensing or job certification exams up to $2,000; and
- additional, matching tuition funds for schools that offer scholarship funds to GI bill participants under a new Yellow Ribbon GI Education Enhancement Program.

The benefits are available to (1) active duty personnel, (2) activated National Guard and Reserve, and (3) veterans who served at least thirty-six cumulative months on active duty after September 11, 2001, or who were discharged for a service-related injury after at least thirty days of continuous service. Service members who have spent less than thirty-six months on active duty are eligible for a pro rata share of benefits, from 90 percent for those who served at least thirty cumulative months on active duty down to 40 percent for those who served at least ninety days on active duty after September 11, 2001. Months served in satisfaction of an already existing obligation—e.g., a military academy or Reserve Officers' Training Corps—do not count toward accumulation of the benefit.

The benefits can be used at

- four-year public or private colleges,
- two-year community colleges,
- business or technical schools,
- job training and apprenticeships,
- flight training, or
- online and correspondence courses approved by the VA.

Veterans who attend school part time will receive proportional benefits. All benefits expire fifteen years from the date of discharge.

The old Montgomery GI Bill provided up to $9,000 per year for up to four years and exhausted ten years after discharge. It also required service members to enroll in the program and to make contributions out of their military salaries while on active duty. Benefits were paid out as reimbursements rather than up front or during the course of the educational program. The new payment system will give service members far more flexibility and choice of educational programs.

Ensuring the Employment Rights of America's Citizen-Soldiers

By Mathew B. Tully and Ariel E. Solomon

Responding to the end of the Cold War and the restructuring of the U.S. military, in 1994 the U.S. Congress enacted a statute to encourage noncareer military service. It prohibited employment discrimination against people because of their military service and minimized potential harm to civilian careers and employment. Specifically, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) to protect members of the Reserve, and to "expand, codify, and clarify the employment rights and benefits available to veterans and employees." USERRA reflected a shift in the nation's defense policy, with its new reliance on the "citizen-soldier." The new force structure was later dubbed the Total Force Policy, which unequivocally recognized the Military Reserve and National Guard as integral components of the military and invaluable resources that could be called upon at any time. "The Total Force Policy called for an increased reliance on the reserves and was implemented in an effort to make training 'more meaningful' for these components and boost military manpower." Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859, 861 (2002). In 2001, at the start of the war on terror, the 1.3 million men and women serving in the Reserve and Guard made up nearly half of the U.S. Armed Forces. Department of Defense, *Partial Mobilization of National Guard, Reserve Authorized*, www.defenselink.mil/releases/release.aspx?releaseid=3040 (Sept. 14, 2001).

The government's dependence on the civilian workforce to fulfill national security initiatives has been more pronounced in the years following September 11, 2001. That attack resulted in the Department of Defense's mobilization of more than 518,000 members of the Guard and Reserve to sustain the U.S.-led war on terrorism. However, the reliance on members of the Reserve and Guard (collectively referred to herein as "service members") has created an unparalleled urgency to confront the unique challenges faced by noncareer soldiers returning home to civilian employment. In April 2008, the U.S. Department of Labor released unemployment rates for veterans who had served in Iraq and Afghanistan that showed a 6.1 percent jobless rate for veterans who have served since September 2001. That compares to a national unemployment rate of approximately 5 percent in April. The jobless rate for veterans ages 18 to 24 was substantially higher, totaling 12 percent, compared to 9.5 percent for nonveterans in the same age group. The federal government also reported that 16,000 formal and informal complaints were filed by service members who encountered problems getting rehired when they returned from military service to their jobs during the years of 2004 and 2005.

The challenges of reintegration are not novel. Veterans benefits statutes designed to assuage the strain of reintegration have a lengthy history, predating the culmination of World War II. USERRA likewise addresses reintegration, effectively rewriting the Vietnam-era Veterans Readjustment Assistance Act of 1974. Lofty in scope and breadth, its congressionally articulated purpose, as delineated in Title 38, Section 4301 of the U.S. Code, is (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment that can result from that service; (2) to minimize the disruption to the lives of people in the uniformed services, as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of these people upon their completion of service; and (3) to prohibit employment discrimination against people because of their service in the uniformed services.

Relief Under USERRA

USERRA expressly prohibits employment discrimination based on a person's service in the military. Its remedies include equitable relief, lost wages and benefits, and, in the event of a willful failure to comply with the act, liquidated damages in an amount equal to any award of lost wages and benefits. Courts also have the discretion to award reasonable attorney fees, expert witness fees, and other litigation expenses.

Reemployment rights under USERRA are governed by 38 U.S.C. §§ 4312 and 4313. The statutory paradigm dictates that an employer has an unequivocal obligation to reemploy a service member in the same position or a position of similar seniority, status, and pay in which the person was employed before his or her military service. The protection is tempered however, by Section 4312(d), which permits employers the right to deny service member reemployment requests when individual

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circumstances render reemployment impossible, unreasonable, or otherwise create an undue hardship to the employer. The burden of proof under Section 4312(d)(2)(c) rests on the employer to show impossibility or undue hardship; however, there remains an overt absence of judicial guidance that might otherwise indicate what constitutes an impossibility or undue hardship.

USERRA was drafted with the explicit intention of facilitating U.S. military service and minimizing the disruption to the lives of all "persons performing service in the uniformed services . . . by providing for the prompt reemployment of such persons upon their completion of [military service]." However, before reemployment rights attach under Section 4312, returning service members must provide advance written or verbal notice of military service to the employer. Further, service members are obligated to return to work on the first regularly scheduled workday following the conclusion of active duty service if the length of service has not exceeded thirty-one days. For military service exceeding thirty-one days but not exceeding 180 days, the reporting time is extended to fourteen days from the last day of active duty service. For lengthier periods of active duty, or tours of service in excess of 180 days, Section 4312 requires returning service members to submit an application for reemployment within ninety days of the completion date of their military service. The application deadline may, however, be extended for a two-year duration in the event illness or injury prevents timely application for reemployment.

The question however remains whether these protections are adequate; many argue that they are not. A recent Department of Labor report indicates that approximately 700,000 veterans have been unemployed in any given month, and the figure will likely increase as service members continue to return to civilian life.

Rights of Those Deployed for Long Periods

Reservists on prolonged or multiple tours are likely to encounter adverse employment actions that may result in unemployment. The most prominent reason for this is the overt lack of information provided to even the most well-intentioned employers. Poorly informed management, coupled with the strain of losing key members of the work force, often dictate undesirable employment decisions for service members.

Employment issues concerning multiple deployments are compounded by USERRA's statutory cap, which bars protection after a five-year period of active duty service performed under a single employer. Pursuant to Section 4312(a)(2), employers are not bound by the protections afforded under USERRA if a service member's cumulative absence from employment exceeds five years. There are limited exceptions to the cap, including Department of Labor Regulation 20 C.F.R. 1002.103, which applies to service members who are forced to mitigate economic losses suffered as a result of an employer's USERRA violation. In essence, the regulation provides that a service member who remains or returns to the armed services in an attempt to "mitigate economic losses caused by the employer's unlawful refusal to reemploy that person," shall be tolled "against the five-year limit."

Additional loopholes may bar reemployment rights for members of the Guard who are called to state active duty service by their governors, usually to protect, sustain, or rebuild American communities and their infrastructure. These emergency responders are an integral component of our homeland security strategy, as was demonstrated after the September 11 attack and in the wake of Hurricane Katrina. Nonetheless, members of the Guard who serve on active duty for state emergencies do not enjoy the same protections as their federal counterparts. Federal active duty in the Guard, including training commitments and time spent to support critical missions, are all exempt from consideration in calculating a person's Section 4312 time. However, service members ordered to active duty at the state level do not enjoy the same exemption, which strikes many observers and service members as purely arbitrary and patently wrong.

The government's dependence on the civilian workforce to fulfill national security initiatives has been more pronounced in the years following September 11, 2001.

A Flawed Enforcement Process

Perhaps the greatest problem with the rights afforded under USERRA is the gross inefficiency that characterizes the act's enforcement mechanism. Upon inception, USERRA obligated the Department of Labor Veterans' Employment and Training Service (DOL-VETS) to provide assistance to any person entitled to employment and reemployment rights and benefits under the act. Accordingly, the secretary of labor is granted wide authority to use existing federal and state agencies engaged in similarly related activities for this purpose.

Under Section 4322(a), a person claiming USERRA rights as a federal employee or applicant for federal employment is permitted to make a complaint in writing to the DOL-VETS; this is required to investigate the complaint. If the efforts of DOL-VETS do not resolve the complaint, the agency is required to notify the complainant of the results of the investigation and of his or her rights under Section 4324 to request that DOL-VETS refer the case to the Office of Special Counsel (OSC).

The OSC is charged with enforcing USERRA, with respect to federal ex-

Removing the Target Protecting Military Service Members and Veterans from Financial Predators

By Christopher L. Peterson

The nation's rallying cry in recent years has been "Support the troops!" While America's leaders unanimously embrace this sentiment, the depth of our actual commitment to the welfare of service members and veterans is less clear. Headlines proclaiming negligent medical care, never-ending overseas deployments, and inadequate body and vehicle armor provide a troubling analogue to a host of questionable financial products and outright scams marketed in military communities.

Service members and veterans face a variety of special challenges that can make them particularly vulnerable to financial predation. The great majority of service members are young, junior enlisted personnel who are frequently from economically challenged backgrounds. Moreover, most enlisted personnel have limited education experiences—indeed, the opportunity to save for an education is one of the primary benefits of military service. Military life takes service members to distant bases and outposts, far from family support networks that help most civilians in financial crises. Further, service members and veterans are tempting targets for financial predators because of their steady government paychecks. Unlike civilian employers, Uncle Sam rarely fires its service members, and many veterans can expect uninterrupted pension benefits. Military records make it easy to market to and track service members. And military culture and codes of conduct demand prompt repayment of even onerous and unfair debts.

Questionable Practices

Given these factors, perhaps we should not be surprised that journalists, academics, regulators, and military officers have documented a variety of questionable insurance polices, investments, and loans specifically designed to bilk unsuspecting service members and veterans. For example, a series of *New York Times* exposés found thousands of service members and veterans who had purchased overpriced and useless life insurance policies. Aggressive insurance salespersons had pushed the insurance as a way of saving money, even though the policies actually held little or no redemption value for the great majority of service veterans. Ironically, all of the service members qualified for cheaper, better life insurance offered by the military itself. Beyond insurance, similar patterns have emerged with respect to high transaction fee mutual funds and high interest rate loans requiring veterans to assign away their pension benefits. Moreover, military bases all around the country are often surrounded by car dealerships, rent-to-own home furnishers, and finance companies that specialize in misleading sales, quasi-legal practices, and bareknuckle collections.

Military records make it easy to market to and track service members.

Among the most aggressive and controversial lenders marketing their services to military personnel in recent years have been "payday" loan companies. Payday lenders hold a borrower's postdated personal check in exchange for a cash advance. While borrowers like the convenience, flexibility, and anonymity of payday loans, the obligations come at a steep price: average interest rates of around 450 percent. By way of comparison, the average interest rates on typical New York City mafia loan shark debts in the 1960s were a relatively modest 250 percent. Payday loans typically have short initial durations of about two weeks. But the average borrower cannot pay off the entire debt when the two weeks are up, creating what industry critics describe as a debt trap.

Potential Solutions?

In 2005 a geographic study published in the *Ohio State Law Journal* suggested that payday lenders disproportionately cluster around military bases. After the study was confirmed by an extensive Pentagon investigation, Congress adopted legislation limiting the price of most loans made to military service members to no more than 36 percent per annum. The statute also provided new protections against questionable insurance products. Further, it prohibited the use of mandatory binding arbitration agreements that some companies have used to prevent service members from asserting their legal rights in a court of law.

The new legislation attempting to prevent predatory lending to military service members went into effect in October 2007. While the new rules are a step in the right direction, regulations adopted by the Pentagon do not apply the new usury limit to either banks in general or credit cards in particular. It is unclear whether the thousands of payday lender locations doing business near the gates of military bases will close up shop, offer loans within the legal limit, or search for loopholes in the new regulations that would allow business as usual. For those who hope for civilized limits on commerce with service members and veterans, it remains to be seen whether Congress has succeeded in removing the target from the backs of our nation's military community.

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ecutive agencies, by initiating formal enforcement proceedings before the Merit Systems Protection Board, the quasi-judicial agency that retains original jurisdiction over all USERRA cases involving federal executive agencies as employers. Over a decade after USERRA was enacted, no USERRA enforcement action had ever been brought before the Merit Systems Protection Board.

In 2004, Congress created the Demonstration Project, which fundamentally altered the manner in which USERRA claims are processed by granting the OSC the authority to receive and investigate claims when the filing service member has a Social Security number ending with an odd integer or the matter relates to a violation of veterans' preference rights under 5 U.S.C. § 2302(b)(11). The project effectively divided USERRA review between DOL-VETS and the OSC. DOL-VETS was required to investigate all other claims and remained responsible for referring unresolved claimant matters to the OSC or the Department of Justice at the election of a filing claimant. The project went further to renew the requirement that the secretary of labor transmit an annual USERRA report to Congress detailing the number of claims reviewed by that department and including the number referred to the Department of Justice and the OSC. The purpose and intent of the project was to streamline the process and expedite the timely resolution of USERRA complaints, which oftentimes inexplicably endured for periods of approximately two years.

The Demonstration Project ended on December 31, 2007, and Congress has yet to pass legislation that prevents the law from reverting back to its pre-2004 construction. All USERRA complaints are now brought to DOL-VETS for investigation. Over the past two years, the Government Accountability Office has conducted multiple investigations into the efficiency of USSERA enforcement. These reports unanimously conclude that the Departments of Labor and Justice are failing our servicemen and -women in the administration of USERRA. The Government Accountability Office found deficiencies in the manner in which both departments advised claimants, processed claims, and enforced claimants' rights. In July 2007, it issued a report entitled *Improved Quality Controls Needed over Service Members' Employment Rights Claims at DOL* that criticized DOL-VETS processes and procedures used to enforce USERRA. However, it failed to indicate whether complaints brought directly to the OSC lead to faster and better results.

Congress enacted USERRA to protect veterans from unlawful discrimination in their employment because of their military service. An essential aspect of that protection is ensuring that aggrieved veterans have the ability to enforce those rights. The current enforcement scheme is inadequate and unduly places the onus on the returning veterans to ensure the timely resolution of their employment discrimination claims. The only efficient and effective method of redress under the current statutory scheme requires claimants to retain private counsel to effectively pursue their claims. This places access to affordable, skilled, and experienced legal counsel at a premium. It further begs the question of why USERRA, unlike other statutory employment discrimination schemes, denies successful claimants the mandatory award of attorney fees. Absent such a requirement, victims of a USERRA violation are liable to endure *two* harms: the initial denial of employment and the subsequent financial burden of enforcing their rights in the face of an unwieldy and inadequate statutory scheme.

Although veterans benefits statutes such as USERRA demonstrate a clear congressional commitment to reducing the detrimental effect realized by service members returning to civilian employment, the rapid onset of Reservists reentering the civilian work force is not without hardship. To date, the U.S. deployment in Afghanistan and Iraq has proven the greatest test of statutory protections afforded under the act. The unambiguous results have demonstrated that USERRA is simply incapable of adequately providing the protections necessary to guard employment rights for the increasingly large numbers of returning veterans.

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Child Custody and the SCRA

My Child or My Country?

By Nakia C. Davis

I am not an avid newspaper reader, preferring to be informed about the state of affairs by watching the CBS Evening News. However, I was recently drawn to a photograph in a newspaper of a teary-eyed American solider holding on to her child as if for dear life. The accompanying article told the story of a soldier, returning early from her deployment in Iraq, preparing to wage a "custody battle" stateside with her child's civilian father.

Before deployment, the soldier had done everything she thought necessary to protect her rights. She had obtained an order granting her primary physical custody, she had completed a family care plan, and she had arranged for temporary placement of the child with her mother during her deployment. What she had not anticipated was the civilian father waiting until her deployment to petition the court to modify the custody order, citing a "substantial change in circumstances." She wondered how this could this happen when her child's father had rarely even exercised the visitation rights he already had.

This soldier's predicament is not unique. Thousands face the heart-wrenching dilemma of involuntarily losing primary custody of their children as a result of their service to our country. This particular soldier was one of the very fortunate few who make it back to the States to present their cases to the courts. But her story raises larger questions. How can soldiers defend their rights from abroad? If soldiers lose primary custody while fighting for their country, what happens when they return home? Further, is it really right for us to expect our soldiers to fight two wars at the same time—one foreign, for their nation, and one domestic, for their children?

American civilians are surprised to learn what our soldiers face on the home front. Indeed, even many soldiers are surprised when they encounter such a situation. They often falsely believe that the stay of proceeding provisions of the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. §§ 521 and 522, will give them temporary, automatic protection from such legal proceedings while they are on active duty. Many soldiers think that if the other parent files such a petition while they are deployed, courts must put the matter on hold until the soldier returns from duty, thereby preventing custodial changes. Too often they face the consequences of this misconception, after they are already on foreign soil.

What Does the Law Really Say?

The drafters of the SCRA understood that it may be next to impossible for a solider to participate in a legal proceeding while defending our country. The stated purposes of the SCRA are "to provide for, strengthen, and expedite the national defense by enabling servicemembers to devote their entire energy to the defense needs of the United States of America as well as to provide for the temporary suspension of judicial and administrative proceedings that may adversely affect the civil rights of servicemembers during their military service."

What are Sections 521 and 522 supposed to do? As it relates to family law, one of the most important and most utilized provisions of the SCRA is the ability of the service member or the court, on its own motion, to stay any pending proceedings under Sections 521 or 522 until the service member is available to appear in court. For an attorney representing a service member under either provision, it is important to note that a stay request does not subject the service member to the court's jurisdiction nor does it constitute a waiver of any substantive or procedural defense. A service member must understand that neither Section 521 nor Section 522 provides a type of sovereign immunity as it relates to his or her legal obligation. The provisions that address the stay of a pending proceeding were enacted to keep legal proceedings "at bay" while a service member defends his or her country. A stay of a pending proceeding is equivalent to a delay or temporary suspension that may last for months or years, depending on the circumstances. The stay will normally be lifted once the court has determined that the material effect upon the service member—usually deployment—has been removed. Thus, additional stays may continue to be requested and will be granted so long as the service member can show that his or her ability to appear continues to be affected by his or her active duty status.

How does the stay of proceedings work? The statutory requirements differ depending upon whether the service member has actual notice of the proceeding. The service member has actual notice if he or she made an appearance at any time following the commencement of the proceeding. For example, an appearance has been made if at any time during the proceeding the service member filed a complaint, if he or she were the plaintiff, filed an answer, if he or she were the defendant, or served or responded to any motions, or appeared in person at any time. If the service member has *not* made such an appearance, Section 521 applies. Normally, the provision is applied in cases where the service member is the defendant, he or she has not made an appearance due to his or her active duty

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status, and the plaintiff is requesting "any judgment, decree, order or ruling, final or temporary" in his or her favor. In January 2008, Congress passed the 2008 National Defense Authorization Act, which emphasized that custody actions are deemed as default cases where the service member has not made an appearance in the case and in those cases involving a request for an initial stay.

Under Section 521, the court must first determine the military status of the absent party. Once that has been confirmed, a mandatory minimum ninety-day stay of the proceeding will be granted upon a motion by the absent service member's appointed attorney or on the court's own motion if the court determines that (1) there may be a defense to the action, and that defense cannot be presented without the presence of the service member; or (2) after due diligence, counsel for the defendant service member has been unable to contact the defendant or otherwise determine if any other meritorious defense exists. The requirements under Section 521 are significantly less stringent than if the service member has actual notice of the proceeding.

Conversely, Section 522 applies if the service member has actual notice and, as a result of that notice, has made an appearance in the case, is currently in the military or within ninety days after termination of military service, and has filed an application for a stay of proceedings. The court, upon its own motion, may enter the stay or shall enter the stay upon the motion of the service member if that motion includes (1) a written correspondence or other communication from the service member setting forth how the service member's current military duties materially affect his or her ability to appear, and that correspondence from the service member must state a date when the service member will be able to appear; and (2) additional correspondence or other communication from the service member's commanding officer stating that the current military duty does prevent the service member's appearance and military leave is not authorized for the service member at the time the commanding officer's correspondence was or will be presented to support the motion.

How would a stay affect the type of custody? Although a legal proceeding may be delayed due to a motion to stay proceedings being granted, the purported facts and circumstances at issue constantly evolve, especially in family law cases and specifically in custody cases, where matters commonly may take years before a permanent order is entered. The purported facts may work to a soldier's benefit or detriment. Why? Because the welfare of a child is established on a daily basis, by either a natural parent or a third party, and the welfare of the child is the court's *primary* focus, not the soldier's inability to appear due to his or her active duty status. Although active duty soldiers have the protections provided under a stay, a civilian parent is nonetheless afforded the services of the judicial system. Thus, that parent may file a complaint for custody or a motion to modify custody at any time, even during the soldier's deployment. Sadly, a large number of pleadings are filed strategically by civilians during the deployment of soldiers. Nothing can be done to prevent any such filing that addresses the best interest and welfare of a child, whether the action was brought in good faith or ill will. That intent question will only be addressed once the issue has been brought to the court's attention.

Because a custody action may be filed at any time, an active duty soldier who has primary physical custody of a child may return home only to find that he or she has lost that custody because the court has determined that since deployment the best interest and welfare of the child has been established with the other parent. Further, due partly to the protections afforded to natural parents under the Due Process Clause of the Fourteenth Amendment, many courts are entering temporary custody orders, finding that since the order is of a temporary nature, the service member's presence is not necessary—and hence that no fundamental right of that parent has been materially affected by entering it. The length of the soldier's deployment very often is a critical factor as to whether he or she will retain the primary physical custody of the child after the expiration of the assignment. If the child is thriving in his or her new environment, the court will be very reluctant to remove the child from the present living arrangement. Thus, it is not a good practice for a service member to request a stay instantaneously merely because it is available or specifically to delay dealing with the other parent and the court system because they represent inconveniences that the soldier would just like to put off as long as possible. If the soldier can return, it would be in his or her best interest to do so. Also, as pointed out by Mark Sullivan, an experienced family law practitioner who often works with military personnel and their spouses, counsel for the soldier should assume that opposing counsel has a working knowledge of the SCRA and may make several strong arguments against a stay being entered, such as (1) the elements of a valid ninety-day stay have not been met, (2) the service member's leave and earning statement indicates that he or she has accrued sufficient time to be present, (3) the service member's absence is one of convenience rather than military necessity (i.e., deployment to a foreign country versus mobilization out of state), or (4) the alleged unavailability may be cured by electronic means (i.e., via telephone, video teleconferencing, or the Internet). *See* Mark E. Sullivan, *Family Law and the Servicemembers Civil Relief Act: An Outline* 6, *at* www.abanet.org/legalservices/downloads/lamp/scrafamlaw.pdf; *see generally* MARK E. SULLIVAN, THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES (ABA Section of Family Law 2006).

Judicial Discretion Regarding the Child's Best Interests

As the natural parents of the child, both the soldier and the civilian are a protected class under the Due Process Clause of the Fourteenth Amendment,

which means that neither parent has a superior right to the custody of their child unless such a right has been established in a court of law. This constitutional right afforded to the natural parents of a child is superior to any third party acting as the physical and/or legal custodian. As it relates to child custody cases, the third party is normally a relative that has an established substantial relationship with the child, such as a grandparent. So a soldier must understand two things. First, his or her deployment will not serve as a justification for an effect on the protected rights of the other parent or what the court deems as the best interest of the child. Unless the court determines that the other parent is unfit or has neglected the welfare of the child in relation to state law, more likely than not the other parent will obtain more than visitation with the child during, and possibly after, deployment. Thus, a stay of a custody proceeding granted under Sections 521 and 522 may not automatically prevent an award of temporary custody to the other parent because judges and attorneys for both service members and civilians are troubled that a stay can be entered in cases involving domestic/family law issues when such issues are usually seen as urgent, requiring immediate judicial decisions. Second, a soldier's wishes or request that a third party retain primary physical custody of the child under a family care plan will not be deemed as superior to the rights of the other parent unless it can be proven that the other parent is unfit.

Although child custody actions are not exempt from the stay of proceedings under the SCRA, a trial judge must also balance the constitutional rights of both the soldier and civilian along with what is in the best interest of the child. While courts usually will take the desires of each parent under careful advisement, the opposing desires of parents will not take priority over what will actually promote the best interest and welfare of the child. Courts understand that each parent's view of what is in his or her child's best interest may vary greatly due to that parent's life experiences and other influences. Thus, a judge is given substantial discretion when making a determination as to the best interest of the child. Because of this judicial leeway, a decision is often difficult. Unfortunately, no provisions under the SCRA can balance the rights of the parents with the best interest of the child without making the soldier feel that he or she is being penalized because of deployment. However, instead of penalization, a court may view deployment as an unfortunate circumstance. And in an effort to acknowledge and accommodate the soldier's current involuntary position, the SCRA is applied liberally. Such a liberal application may result in the service member having more time to prepare a fuller exploration of the issues alleged in the pleading, providing more testimony and evidence before the court.

A judge is given substantial discretion when making a determination as to the best interest of the child.

Movement on the Legislative Front

Because there is not a legal scale that equally balances the interests of all involved, one may conclude that the SCRA does not work to the benefit of the service member as it relates to a proceeding on the issue of custody if a temporary custody order will supersede the authority given under the SCRA and a family care plan. Unfortunately, because the SCRA does not specifically address the domestic/family law context, lawmakers would likely be tip-toeing atop a slippery slope if specific family law amendments were attached to the provisions of the SCRA. If this area of the law were addressed via amendment, all others must likewise be handled with the same type of specificity, and frankly, that would be a nightmare.

Currently, limited discussion has taken place regarding how the SCRA might be amended in a way that would provide the soldier with additional protection as it relates to child custody and still pass constitutional muster. However, advocates for additional protection for soldiers in relation to child custody and visitation are fighting across this country through newly enacted state laws. For example, in July 2007 North Carolina, which has the country's fourth largest military population, enacted legislation that protects the soldier as well as their children from the disruptions that naturally occur when the soldier is deployed or assigned to temporary duty in a distant location. N.C. GEN. STAT. § 50-13.7A.

What Soldiers Should Do Before Deployment

A fair number of states are addressing these family law issues because of the long deployments of soldiers in Iraq and Afghanistan. Nonetheless, soldiers still must be extremely cautious in retaining counsel because their deployment or mobilization status puts them in a position to have more to lose. Thus, a soldier should make sure that his or her counsel is well versed in the benefits and detriments of the potential application of the SCRA to his or her specific situation. If the solider is not comfortable with the lawyer's knowledge of the SCRA, he or she should seek a second opinion. As a precautionary measure, if deployment is even a slight possibility, soldier parents should take the time to research the attorneys who are well versed in this area of the law. Likewise, any active duty service member should attempt to prepare wisely for deployment or mobilization by securing a temporary custody order that addresses the best interest and welfare of his or her child(ren). Parties should strive to negotiate a consent order rather than litigating the issue and deferring the decision to a judge. As mentioned

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After the Battles The Veterans' Battle with the VA

By Craig Kabatchnick

Imagine if our legal system were set up so that plaintiffs were forced to assemble, file, and argue their own lawsuits, and that attorneys could only be paid for their assistance after the initial case was lost (which, predictably, most would be). This unbelievable situation in reality is the state of veterans law today. Last year Congress granted the veterans half a loaf of relief by amending the original cap for attorney fees, which was $10. Due to this $10 limitation, few, if any, attorneys were registered with the North Carolina Bar Association's Lawyer Referral Service to handle veterans claims. During my years in private practice, and prior to my accepting a faculty position at North Carolina Central University School of Law, I participated in handling veterans claims as a public service because of the specialized knowledge and experience I had acquired in handling veterans claims while serving as a senior appellate attorney and associate special assistant in the Appellate Litigation Staff Group, Office of the General Counsel, U.S. Department of Veterans Affairs (VA), in which I personally represented the VA Office of the General Counsel in dozens of cases resulting in the denial of hundreds of veterans claims from 1990 to 1995.

The Expanding War on Terror

With the expanding War on Terror and its vast and extended military commitments abroad, many veterans returning from the Iraq and Afghanistan conflicts will have service-connected disability claims and many will need help in the initial filing of their claims.

It is anticipated that many Reserve, National Guard, and active duty personnel who have served in Iraq and Afghanistan on an extended basis will suffer from such disorders as post-traumatic stress disorder (PTSD) due to several factors: (1) the urban nature of the combat; (2) exposure to traumatic events in combat; (3) civilian casualties; and (4) exposure to the devastating effects of road-side bombs, commonly known as IEDs. Reserve and National Guard personnel who have served in Iraq and Afghanistan are especially vulnerable to the effects of the urban combat because their overall training and experience is usually less extensive than that provided to experienced soldiers already serving on active duty military service.

A massive number of American military personnel who are active in operations in Iraq and Afghanistan are returning home suffering from disabilities for which they deserve compensation. Claims can be of many types, including but are not limited to, (1) compensation and rating determinations; (2) reductions in VA benefits; (3) medical and mental health care, and the lack thereof; (4) vast reductions in benefits and medical support for victims of PTSD; (5) medical malpractice and negligence at VA medical centers; (6) delays in claims adjudication at the VA rating board level at all the VA Regional Offices (VAROs) nationwide, as well as the provision of VA benefits and care on a timely basis at the claims adjudication level, up to and including the Board of Veterans Appeals (BVA); (7) home loan guarantees; (8) widows' benefits; (9) hospital care/nursing home care; and (10) eligibility for vocational rehabilitation. However, because of limitations on fees for attorneys helping with veterans claims—limitations that date back to the Civil War—veterans are still finding great difficulty in obtaining the assistance of trained legal counsel in filing their initial VA claims.

The Act

The Veterans' Choice of Representation and Benefits Enhancement Act of 2006, (the Act), 38 U.S.C. §§ 5902-5905, effective June 20, 2007), allows attorneys to charge for services *after* the VA rating board at the VARO level has denied a veteran's initial or reopened claim for VA disability benefits. Prior to this, an attorney could only receive compensation after a BVA decision, which often occurs long after the filing of the veteran's initial claim for compensation and pension, during which time the veteran has often continued to suffer physically and economically. The BVA, which renders this decision, is staffed entirely by experienced attorneys, is appellate in nature and its scope of review, and oftentimes denials are based on defects in the processing of the initial VA claim at the VARO level. The Act only allows attorneys to charge for services after a notice of disagreement (NOD) has been filed with the VARO subsequent to a VA rating decision denying a veteran's initial or reopened claim for VA disability benefits. The NOD is a document filed by a veteran after there has been an adverse ruling by the VA rating board at the VARO level on his or her initial claim for compensation and pension benefits, indicating the veteran's disagreement with the original rating decision.

The attorney fee restrictions date back to an 1862 law that limited fees to $5 for handling veterans claims. Congress raised the cap to $10 total fees for which an attorney could be paid in 1924, and there it stood until the limit was repealed in 1988, when new legislation allowed attorneys to charge fees but only after the BVA made a final decision. This cap created a vast void in legal representation in the initial fact-finding stages of the VA claims adjudication process—representation that was greatly needed for the claim to become ripe for administrative and judicial review by the BVA and the U.S. Court of Appeals for Veterans Claims (CAVC). In order to process and develop these initial

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The NCCU Veterans Law Clinic

Students Learning to Help Veterans

By Craig Kabatchnick

The North Carolina Central University (NCCU) School of Law is part of a historically black college and was founded in 1940. Always committed to providing opportunity, the Law School has continued to grow over the decades. In 1944 it admitted its first women. In 1965 Caucasian students were enrolled. Nineteen eighty-one marked the first year for the Law School's evening program—the only evening law school program between Atlanta and Washington, D.C. As a result of the Law School's growth, the student body now includes over 550 students.

The Clinical Program at NCCU is formidable. It boasts ten different programs whose mission is to produce excellent attorneys who are sensitive to addressing the needs of people and communities that are traditionally underserved and underrepresented by the legal profession.

In 2006, I proposed that the NCCU School of Law establish a Veterans Law Clinic to assist veterans and their dependents in North Carolina and elsewhere. Given present world events, the continuous flow of related casualties, and the shortage of qualified legal assistance in this field, there is a significant need for a program that addresses these issues. Such a clinic would fit squarely within the mission of the Law School and its Clinical Program.

In January 2007, after considerable deliberation and the beginning of a continual search for funding, the NCCU School of Law opened the first major, active veterans law clinic in the country. Response nationwide has been outstanding. Cases have poured in from veterans of World War II, the Korean conflict, the Vietnam War, Iraq, and Afghanistan. In addition, claims resulting from the groundwater contamination that has arguably affected nearly one million veterans and their families at Camp Lejeune, North Carolina, will be the subject of many cases handled by the clinic.

The legal clinic enables law students to become skilled in the veterans claims adjudication process. Veterans will benefit greatly from the assistance of law students who help in sorting incoming claims and documents necessary for claims development, referring the claims to the proper offices or jurisdictions within the Department of Veterans Affairs (VA), helping claimants file all applicable forms, and ensuring that the initial development of a claim is completed within the time limits imposed by the VA.

Not only could the law students help veterans develop their initial claims for compensation and pension, but they could assist in ordering further medical examinations when needed and could ensure that the VA fulfills its broadened duty to assist veterans in the development of their claims. Before filing an appeal with the Board of Veterans Affairs, the students could assist with the filing of a notice of disagreement with an adverse VA rating decision, whereupon a statement of the case is issued by the VA explaining the rationale for the VA rating decision. Thereupon, an appeal to the Board of Veterans Affairs would be filed with the assistance of the law students under the guidance of the clinic's director. Under current court rules at the U.S. Court of Appeals for Veterans Claims (CAVC), law students can participate in claims in such a way that would grant relief at the initial stages of the VA claims adjudication process, this newly enacted legislation needs to be amended, in order to grant thorough and fitting relief and allow veterans the freedom to hire attorneys at the initial stages of the VA claims adjudication process, within the spirit and letter of the legislation as originally drafted. It is self-evident that many denials of veterans claims are often based on defects in the processing and development of the veteran's initial VA claim, either at the fact-finding stage by a rating board located at the VARO or subsequently at the appellate level by the BVA.

The Loophole

As originally drafted, the Act would have allowed all veterans to hire attorneys at any stage of the VA claims adjudication process, especially the initial filing stage. At this stage, a veteran has the rights to present arguments supported by case law and applicable statutes and regulations. However as it is currently drawn, the Act allows veterans to hire attorneys only after their initial claims are denied by the VA, thus deterring attorneys from getting involved in the initial stages. Because of opposition from several major veterans service organizations (VSOs), the new legislation did not pass in its original form. The amended version created a huge loophole in favor of the VA and against the best interests of veterans. At the initial filing stage a veteran has the right to present arguments supported by case law and applicable statutes and regulations. It is at the time of the initial filing of the claim that all the fact-finding occurs in support and development of the veteran's original claim for compensation and pension disability benefits. This includes the presentation of such evidence as: (1) statements from doctors who have provided treatment for the disability at issue over a prolonged period of time; (2) submission reports from board-certified medical doctors who specifically specialize in the field of medicine for which the claimed disability is at issue; and (3) articles and citations from recognized medical treatises, buddy statements, morning reports, evidence of citations, or other proof to help the veteran develop his or her claim for disability compensation or pension. Furthermore, the veteran has a right to appear at a hearing at the VARO.

It is also of utmost importance to note at this juncture in the VA claims adjudication process that the effective date is established from which any

any particular case under the direct supervision of a veterans law clinic supervising attorney or director.

NCCU's Veterans Law Clinic continues to be the largest active clinic of its type in the country. Currently more than thirty students are involved in the class. The response to this clinic has been outstanding statewide, and the purpose and benefits of a veterans law clinic located in a state with such a large veteran and military personnel population, and in close proximity to a major VA medical center, is obvious.

Students must complete one hundred hours of clinical work and twenty hours of live classroom training and lectures, with three credit hours awarded for the course. Many of the tools necessary for such duties are taught during the twenty-hour training, and written materials are provided. The students gain hands-on experience through case work during the one hundred clinical hours. Other students volunteer on a pro bono basis. Most pro bono students will complete forty-five hours in a semester. Graduating students who complete seventy-five pro bono hours in their law school careers are eligible to receive a certificate of recognition from the North Carolina Bar Association. The class studies the evolving spectrum of veterans law, especially as it relates to the present state of world events, the continuous flow of related casualties, and the significant need for such legal services. Law students are given the valuable opportunity to provide supervised claims adjudication assistance to veterans and their dependents. The class lectures primarily focus on the processing of veterans claims from the initial claims adjudication level all the way up to judicial review with the CAVC. Classes are completely interactive, with all students discussing the cases they are working on.

Third-year students may fully participate in many aspects of practice before the CAVC. Through hands-on experience and under extensive supervision, all participating law students will (1) screen files, (2) sort incoming claims and documents necessary for claims development, (3) interview veterans as to the validity of their claims, (4) assist veterans with the complexities and technical aspects of filing their claims, (5) perform legal research, (6) prepare supporting legal briefs, (7) refer the claims to the correct office of jurisdiction within the VA, (8) help a claimant file all applicable forms, (9) ensure that the initial development is completed within the time limits imposed by the VA, and (10) perform whatever other tasks are required to successfully work the veterans claims through the related adjudication process.

Veterans have been crying aloud for relief in the area of obtaining legal assistance in the processing of claims. Students are attracted to the clinic because they gain hands-on experience handling claims and because many of them are veterans or committed to serve in active duty military service upon graduation from law school.

Our hope is that the experience that law students gain from working with this clinic will not only assist veterans who otherwise would have meritorious claims denied but also will prepare these students for rendering service to veterans once they become practicing attorneys—and fill the void that has existed since 1862. Our society must be ready to assist our existing and returning veterans legally, medically, and socially, and this clinic is committed to doing its part.

Professor Craig Kabatchnick is the director and supervising attorney of the North Carolina Central University School of Law's Veterans Law Program.

award of benefits will be made payable.

Any new evidence presented by the veteran at either level of appellate review in favor of the veteran's original claim for disability benefits is considered new and material. Thus, if the claim is remanded and considered by the VARO de novo based on newly discovered evidence, it will require a reopening of the case and a review of the new evidence in the context of all evidence of record in order to determine whether a grant of service-connected benefits is appropriate. The crucial problem is that once a claim is reopened based solely on the submission of new and material evidence, the date that the reopened claim is filed with the VARO is considered the new effective date. This wipes out any past-due benefits the veteran might have received.

The amendment to Section 5904, eliminating the current prohibition on the charging of attorney fees after there has been a final VA rating decision at the initial stages of the claims adjudication process, provided a NOD has been filed, in fact created the loophole.

One contention raised by several VSOs in opposition to the original legislation was that providing incentives for attorneys to become involved in the initial stages would make the VA claims adjudication process adversarial rather than nonadversarial, as intended. In opposing the legislation, the VSOs argued that their local veterans service representatives were equally as capable as trained legal counsel to represent veterans at this initial claims stage and that utilizing trained legal counsel at the initial stages of the claims adjudication process would turn an alleged nonadversarial process into a adversarial one. My experience has proven just the opposite. The VA claims adjudication process is adversarial in nature, not only at the VARO level but also before the BVA and the CAVC. The burden of proof is always on the veteran to somehow prove that his or her claim for service-connected benefits is meritorious and worthy of a grant of service-connected benefits.

History has further shown, in strong numbers, that there is an unacceptable delay and backlog in the adjudication of VA claims, that many claims have been denied despite the existence of positive medical evidence in the veterans' claims folder, and there are failures on the part of the VARO rating boards to comply with the VA's statutorily mandated duty to assist.

The VA is statutorily bound by its affirmative duty to assist the veteran

in developing his claim, as set forth in the Veterans Claims Assistance Act of 2000, 38 U.S.C. §§ 5103A(b), 5103A(a)(g), 5103 A(a)(1)(2), 5103A(b), 5103A(b)(2), 5103A(d), and subsequent supporting case law. Under this duty to assist, the VA must address all issues presented by the veteran and even issues not specifically raised by the veteran that have come to light during the course of the adjudication of the initial claim and attempt to obtain any and all military service records, military medical records, public or private medical records, buddy statements, unit reports, and morning reports. In essence, the VA must assist the veteran in obtaining the pertinent evidence that will enable the veteran to prove his or her claim. It also must notify the veteran of what evidence is needed to help the veteran substantiate his or her initial claim for compensation and pension.

The affirmative duty to assist issue is also prevalent at the BVA, which is totally staffed by experienced VA lawyers. The issues stated above pertaining to the failures on the part of the VA to comply with its affirmative statutorily mandated duty issues alone, often result in the veteran having to appeal to the CAVC for relief. Therefore, this is further proof that this major flaw and loophole in the Act need to be amended to allow attorneys to be hired at the initial fact-finding stages of the VA claims adjudication process.

The argument behind the opposition by the VSOs to the law as it was originally enacted was to allegedly protect veterans from losing a chunk of their benefits to attorney fees. In reality, the Act had the effect of removing any incentive for skilled legal assistance at the most critical initial stage, which causes significant hardship for veterans who are forced to file pro se and then are condemned to the significant delays that then follow. Veterans have a saying about the way the VA handles veterans claims: "Delay, deny, and wait until they die." And dying they are, without benefits, due to lack of effective counsel in establishing their claims correctly from the beginning. Routinely, the VA fails to appropriately apply the benefit of the doubt standard in a fair and equitable fashion by rarely applying it in compliance with its abiding moral sanctions and obligations as set forth in statutes, regulations, and case law. The VA is obligated to consider all claims for compensation for pension utilizing a preponderance of the evidence standard. In reality, however, initial claims for compensation or pension brought by veterans acting pro se or with the assistance of veterans service officer who is not legally trained invariably are unjustly rejected by the VA. The VA often utilizes a standard not in compliance with the clear obligations set forth in the benefit of the doubt doctrine.

Legally, the claimant is *not* required to demonstrate that he or she should be granted benefits by even a preponderance of the evidence. Rather, the VA can deny the claim only if the preponderance of the evidence is against the claim. If there is an "approximate balance of positive and negative evidence regarding any issue material to the determination of a matter," the claimant wins and the claim is granted. *Gilbert* v. *Derwinski*, 1 Vet. App. 49, 54 (1990). This case construes the requirement in 38 U.S.C. § 5107(b) that where "there is an 'approximate balance of positive and negative evidence [regarding the merits of an issue material to the determination of the matter], the [claimant] prevails." In other words, the veteran is given the benefit of the doubt. That is the law. However, despite the obligation on the VA to consider all claims for compensation for pension utilizing a preponderance of the evidence standard, in reality, the VA utilizes a standard not in compliance with the clear obligations set forth in the benefit of the doubt doctrine at both the VARO and BVA levels.

Conclusion

Every aspect involved in the filing of the initial claim for compensation and pension involves interpreting statutes, regulations, and case law. It is best for lawyers to develop this evidence and present the arguments in support of those initial claims. The intent behind laws restricting or barring attorney fees has always been to protect veterans from lawyers claiming a chunk of their benefits. But instead, the laws have had the opposite effect by removing any incentive for skilled legal help to become involved with the cases at the most critical stage in the process.

Professor Craig Kabatchnick is the director and supervising attorney of the North Carolina Central University School of Law Veterans Law Program.

The New Suspect Class

Tragically, Our Veterans

By Gordon P. Erspamer

One of the most obscure discrimination issues existing today relates to our country's treatment of its veterans, a group that hardly qualifies under the legal definition of a "suspect class" as currently conceived. Nevertheless, it remains a fact that veterans are the most prominent remaining class of persons who suffer from invidious forms of institutionalized discrimination. It is veterans who are the subject of a judicially crafted exception to government tort liability under the Federal Torts Claims Act, as a result of the Supreme Court's Cold War–era decision in *Feres v. United States*, 340 U.S. 135 (1953), where the Supreme Court in effect legislated an exception to the waiver of sovereign immunity contained in that act. Our veterans (1) cannot pay a lawyer any sum whatsoever for legal assistance on any types of claims filed with the agency of original jurisdiction, the regional offices (ROs) of the Department of Veterans Affairs (VA); (2) have to face VA adjudicators who act as both the opposition and the trier of fact; (3) cannot subpoena VA doctors (or any other VA employees) to testify, e.g., to obtain testimony to support a diagnosis or challenge a misdiagnosis; or (4) cannot obtain any redress for denials of medical care or treatment, for there is no procedure available.

Even with respect to judicial review, each veteran, like Sisyphus, must climb a mountain to obtain relief even as to patently illegal policies or procedures of the VA, as there is no class action procedure, no ability to obtain injunctive relief, and the U.S. Court of Appeals for Veterans Claims (Veterans Court) lacks the ability to enforce any of its decisions at the RO level, as its former Chief Judge Frank Nebeker repeatedly decried in his "state of the court" speeches.

What We Learned from *VCS*

Veterans returning from Iraq and Afghanistan have served upon a stage where the effects of these legal niceties are played out every day, as chronicled in the recent trial of *Veterans for Common Sense v. Peake (VCS),* Case No. 07-03758 (N.D. Cal.). The court heard systemic evidence concerning the VA's programs for treating veterans, disputes arising out of medical care or treatment (administered by the Veterans Health Administration), and the adjudication system that processes claims for service-connected death and disability compensation (administered by the Veterans Benefits Administration). With respect to both the medical and adjudication systems, the plaintiffs in *VCS* emphasized the VA's handling of posttraumatic stress disorder (PTSD) and traumatic brain injuries (TBI), the signature injuries sustained in the Iraq and Afghanistan wars. The picture that emerged was not a pretty one, as an internal VA study, never previously released, found that veterans under VA care were attempting suicides at a rate of about 1,000 per month and succeeding an average of eighteen times every day. Thus the total number of veteran suicides in a single year eclipsed the number of combat deaths in the Iraq and Afghanistan wars combined. Our nation's newspapers and local television news reports are filled with poignant and tragic stories of the families of veterans torn apart by suicide and other events that they cannot control and often cannot really comprehend.

Other highlights from *VCS* included:

- A Washington state VA emergency room doctor testified to the unfolding "tsunami of medical need" among veterans returning from recent conflicts. Studies by the VA and other institutions point to highly elevated suicide rates among veterans, as much as 7.5 times the national average.
- A RAND Corporation study released in 2008 estimates that 300,000 U.S. soldiers who served in Iraq or Afghanistan suffer from PTSD or major depression, and nearly 320,000 report experiencing a TBI. "Roughly half of those who need treatment for these conditions seek it, but only slightly more than half who receive treatment get minimally adequate care," RAND reported. And the availability of that inadequate care for PTSD is dwindling. Despite the exponential increase in veterans diagnosed with it, a March 2008 report by the VA confirms that the average number of visits per veteran in PTSD mental health programs has actually rapidly decreased.
- Although the VA has a "sacred mission" to provide medical care for veterans—free for life in the case of those with PTSD or suicidal tendencies—there were 3,800 unfilled mental health positions at the VA as of October 31, 2007, despite the fact that the VA is currently operating under budget, according to one official at trial. Approximately 2,400 nursing and 1,400 doctor positions remain unfilled.
- Delay times preceding care is a critical problem. In 2006 the VA's former deputy undersecretary for Health and Health Policy Coordination said, "In some communities, VA clinics do not provide mental health or substance abuse care or waiting lists render that care virtually inaccessible." As of April

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2008, more than 85,000 U.S. veterans are waiting over thirty days for an appointment.

- Evidence produced at trial also showed that VA timeline statistics were "fudged," and that the true waiting times that veterans encounter for medical care or disability claim decisions are even longer than those the VA reports.

Much of the blame for the suicide epidemic lies with the VA, which had, somewhat belatedly in 2004, developed the Mental Health Care Strategic Plan (MHC Plan), to tackle the mental health care problems it expected to occur amongst the global war on terror veterans. Tragically, when James Nicholson replaced Anthony Principi as the Secretary for Veterans Affairs, the chief author and proponent of the MHC Plan, Dr. Francis Murphy, was fired, and critical elements of the MHC Plan were either scrapped or put on the back burner. Even today, most of the key elements of the MHC Plan are still only at the pilot stage. The outcome of the MHC Plan reflected a recurrent theme throughout the trial: the divergence between appearance and reality. Programs look good on paper but often are never implemented or enforced.

Major Problems in Handling Veterans Claims

At the same time, the VA's adjudication system for handling death and disability compensation claims is being choked by a huge influx of claims by veterans and their survivors, leading to unprecedented delays throughout the system. Currently, more than 600,000 veterans await decisions from VAROs, a number that is expected to increase to close to one million by 2008, as a recent study by Linda Bilmes of the John F. Kennedy School of Government at Harvard University predicted under the surge scenario.

The situation at the Board of Veterans Appeals (BVA), the body within the VA that handles internal appeals from RO decisions, is even more dire, as the backlog of initial appeals of denied claims has swelled to over 40,000, leading to delays averaging 1,419 days (3.89 years) for an appeal to be heard. The next level of appeal is to the Veterans Court, where Chief Judge William M. Greene, according to the paper record, faces a backlog of over 6,000 appeals—and veterans face an additional wait of almost four years.

Further delays are caused by the need to remand many claims, some of them multiple times, because the VAROs frequently make mistakes in developing the record, creating a recycling problem and extending the average claim decision time to 1,957 days. When multiple remands and appeals to the Veterans Court or Federal Circuit are factored in, we are at the point where the complete claim cycle exceeds ten years for most claims and as long as twelve to fifteen years in more complicated claims, such as those involving PTSD and TBI. The evidence shows that the VBA undersecretary made a policy decision to deemphasize the processing of appeals, and hence thousands of veterans die each year while they wait in line to have their appeals decided. In fact, there are currently no statutory or regulatory time limits imposed on the VA during any step of the adjudication process for benefits. However, the VA does impose time limits on veterans, and a veteran's failure to meet certain time limits within the appellate process results in a jurisdictional dismissal of the veteran's appeal.

One other startling revelation during *VCS* was that hearings "almost never" occur at the RO stage, despite the facts that veterans obtaining hearings had higher success rates, that it is more difficult to overturn an adverse decision than to obtain a favorable decision in the first instance, and that VA regulations guarantee claims a hearing "at any time on any issue." Was the absence of hearings a product of lack of access to counsel or veterans' frustrations with lengthy delays to obtain hearings (fifteen months or longer) or was it evidence of a more systematic and diabolical scheme to deprive veterans of their hearing rights? In an earlier case, *National Association of Radiation Survivors v. Turnage*, No. C-83-1861-MHP (N.D. Cal. 1983), discovery had disclosed a concerted effort to deprive veterans of the right to predecisional hearings that was based upon the VA's claim of lack of resources.

The total number of veteran suicides in a single year eclipsed the number of combat deaths in the Iraq and Afghanistan wars combined.

At the same time, VA error rates are unprecedented. The BVA reverses RO decisions 21 percent of the time and remands another 41 percent of the cases; the cumulative error rate on VARO decisions is over 90 percent. By the VA's own calculations, 44 percent of the reasons for remand by the BVA are "avoidable," meaning that had the RO fulfilled its duties to the veteran in the first place, the case would not have needed to be appealed. Seventy-five percent of the remanded cases return to the BVA a second time, and 27 percent of those cases are remanded once again. This creates a system where veterans claims essentially "churn" in the VA system, in some cases, for decades.

Perhaps the most disturbing revelation was that of the military's program to discharge thousands of soldiers exhibiting signs of PTSD and TBI, including combat soldiers and victims of sexual assault, as having preexisting personality disorders, a category of mental illness that develops in juveniles. The almost inevitable outcome is that the veterans are found ineligible

PTSD Doubly Disabling for Female Vets

By Penny Wakefield

Female veterans currently number more than 1.7 million, or 7 percent, of all veterans in the United States today. But with women comprising almost 15 percent of active duty personnel in today's military, the number of female veterans could double within the next five years.

Neither federal laws and regulations nor military and veterans programs and policies adequately address this dramatic shift in population and the current and future needs of women in today's service. One particular concern put into stark relief by the ongoing conflicts in Iraq and Afghanistan, where 11 percent of active duty forces are women, is the lack of appropriate health care available to many female service members and veterans who suffer from posttraumatic stress disorder (PTSD).

Like their male counterparts, more and more female service members are experiencing the kinds of incidents in and around war zones that trigger PTSD. But for many servicewomen, PTSD also has been triggered by a more personal threat: attacks by fellow soldiers. Almost a third of female veterans have reported having been sexually assaulted or raped while on active duty; many more experienced serious sexual harassment. Yet most programs established to help those with PTSD have been geared primarily to the symptoms and responses of men, not women. For example, women have been placed in group therapy sessions with men, even when assaults by men may have been an underlying cause of these women's PTSD.

U.S. military and Department of Veterans Affairs (VA) medical facilities are only beginning to grapple with the problem. The department promises more PTSD clinics, but currently only four—in Bay Pines, Florida; Boston, Massachusetts; Cincinnati, Ohio; and Palo Alto, California—focus on women, and most military facilities lack the trained personnel and specialized programs to treat women suffering from the mental and physical effects of personal assault along with combat.

One proposal to help address these concerns is the Women Veterans Health Care Improvement Act (H.R. 4107), introduced in November 2007 by Rep. Stephanie Herseth Sandlin (D-SD) and pending in the House Subcommittee on Military Personnel. The legislation would require the VA to

- assess barriers to comprehensive health care for servicewomen;
- assess all health care services and programs for servicewomen;
- provide training for mental health counselors to female veterans suffering from sexual trauma;
- identify, develop, and apply treatments for PTSD and other conditions attributable to combat or sexual trauma that have proven effective for women;
- assess the provision of readjustment counseling and related mental health services for female veterans at VA facilities; and
- conduct a long-term epidemiological study on female veterans who served in Iraq and Afghanistan.

On the Senate side, Sen. Patty Murray (D-WA) in April introduced the Women Veterans Health Care Improvement Act of 2008 (S. 2799), which similarly would require the VA to provide Congress a comprehensive assessment of VA services and programs for female veterans and a plan to address the full range of their health care needs, particularly the health consequences for women who have served in Iraq or Afghanistan. This bill, like the House legislation, also would require additional VA programs and services to address the effects of sexual trauma, the need for neonatal and child care, and the challenges of transitioning out of the service for female veterans.

Both bills also would require female veterans program managers at VA facilities.

Murray's bill was approved by the Senate Veterans' Affairs Committee on June 26 as part of the Veterans' Health Care Authorization Act of 2008 (S. 2969).

The VA historically has been understaffed and underfunded, and the huge influx of veterans of Iraq and Afghanistan who require VA care even while relatively young has strained available resources for all former service members. But, critics contend, the VA, established for and historically run by men, must change quickly to meet the dramatically different needs of a changed military.

According to Herseth Sandlin, more than 177,000 women have served in Iraq and Afghanistan since September 2001; more than 27,000 are there now. Such measures as enhanced PTSD treatment for women are "essential" to guarantee that female veterans "have access to services that they are entitled to when they return," Herseth Sandlin said in introducing the bill.

At the June 26 hearing on the Senate legislation, Murray noted that "[p]lanning for the wave of new women veterans is going to be a difficult and complex task." But, she said, with women increasingly serving and sacrificing on the front lines, we must "ensure that women have equal access to VA health care benefits and services, and that the VA health care system is tailored to meet the unique needs of women veterans."

Penny Wakefield is a human rights lawyer in Washington, D.C., who focuses particularly on legislative and policy issues affecting women. Director of the IRR Section from 1991 to 2004, she currently serves on the Human Rights *editorial board and in the leadership of the IRR and International Law Sections' International Human Rights Committees.*

for either medical care or disability compensation. The story of Jon Town, a combat veteran from Iraq injured by a rocket-propelled grenade, was compellingly told by Joshua Kors in a series of articles written earlier this year for *The Nation*. Just as tragically, these veterans' DD-214 discharge forms show the personality disorder discharge, making it extremely difficult for them to obtain employment.

Who Is to Blame?

What has led our nation to this national predicament? Many of the veterans' civil rights issues are vestigial ones associated with the history of veterans benefits dating back to the Civil War and these are now coupled with an entrenched bureaucracy that is very resistant to change. But more than ever it is now a cost that is dictating policy, a factor that a U.S. Department of Justice lawyer alluded to in arguing the VA's motion to dismiss the *VCS* case when he rationalized the VA's institutional shortcomings as inevitable in a system of "mass justice," by which he seemed to mean the truncated form of justice appropriate for large numbers of what we might call the "little people"—those without the means to assert their rights or defend themselves.

Nor can we really place the blame at the foot of Congress, which has consistently given the VA the money it said it needed—or even more—to do the job. Yet if you probe further, you will find that the VA budgets submitted by the Bush administration in FY2005 and FY2006 produced huge deficits just as large numbers of our troops assigned to the global war on terror began to return home and become veterans. This, we later learned, was primarily due to the VA's decision, apparently under pressure from the Bush administration, to use prewar assumptions regarding the number of veterans the VA would need to treat and the incidence of particular types of medical problems. These were coupled with assumptions about phantom cost savings, leading to deficits of over $1 billion, as found by the Government Accounting Office in a recent investigation. Relatively early in its tenure, the Bush administration had highlighted its policy direction to reduce personnel costs and increase funding for armaments, as reflected in the candid interview of David Chu, undersecretary of Defense for Personnel and Readiness. Greg Jaffe, *Balancing Act: As Benefits for Veterans Climb, Military Spending Feels Squeeze*, WALL ST. J. Jan. 25, 2005. Just recently, President Bush vetoed the VA budget passed by Congress. To honor the words of Abraham Lincoln, whose words form the motto of the VA—"For him that shall have borne the battle, and for his widow and his orphan"—would require both leadership from the president and Congress—and further increases in the VA budget. This is the elephant in the room that crowds out the voices of our disabled veterans.

There are currently no statutory or regulatory time limits imposed on the VA during any step of the adjudication process for benefits.

In the end, neither the repeating of platitudes, nor laying a wreath on Memorial Day, nor displaying a "Mission Accomplished" banner can constitute a true barometer of respect for the sacrifices made by our veterans in defense of our country. The only true measure of our devotion to those who have borne the battle is the degree to which we follow up with action to try to make whole their lives and those of their loved ones.

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Institutional Inequality Denying Benefits to Lesbian, Gay, and Bisexual Veterans

By Emily B. Hecht

Virtually all veterans of the U.S. Armed Forces are entitled to military benefits of some kind. What each service member receives varies based on a variety of factors: length of service, reason for discharge, and discharge characterization, for example. An estimated one million lesbian, gay, and bisexual (LGB) veterans currently live within the United States, each of whom is entitled to veterans benefits. There are three types of LGB veterans: (1) those who have been discharged after finishing their required time of service (including retirees); (2) those who have been discharged under the U.S. military's Homosexual Conduct Policy (colloquially referred to as "Don't ask, don't tell" and abbreviated herein as DADT); and (3) those who have been discharged before their service obligation was completed for some reason other than DADT. While each LGB veteran must satisfy all of the requirements he or she would otherwise have to meet to receive benefits, such veterans oftentimes are denied or disqualified from certain benefits as a result of their sexual orientation.

A DADT discharge has both immediate and lasting effects on LGB veterans. All veterans receive a form DD-214 upon discharge that lists the discharge characterization, the narrative reason for discharge, and the reenlistment code. A DD-214 issued in a DADT discharge will indicate (1) a negative nonwaivable reenlistment code, preventing LGB veterans from ever reenlisting in any branch of the service; and (2) "homosexual conduct," "homosexual act," "homosexual admission," or something similar, as the narrative reason for discharge, effectively "outing" LGB veterans to every future employer who requests to see their discharge paperwork.

The U.S. military is one of the largest funders of higher education in the country, and one of the most valuable and most utilized benefits afforded veterans of the Armed Forces is the Montgomery GI Bill. To be eligible for this benefit, the service member must (1) pay into the GI Bill fund (usually completed during the first year of service), (2) vest in those benefits (a service member must complete a specified portion of his or her service contract in order to vest), and (3) receive an honorable discharge. Discharge characterizations are supposed to be based on the service member's underlying service record. Generally speaking, unless there is some kind of aggravating factor, the majority of those discharged under DADT receive honorable discharges. However, if a service member is discharged from the military under DADT before they vest in their GI Bill benefits, they are not eligible for that educational assistance.

Some service members discharged under DADT may be subject to recoupment—a military demand for repayment of a prorated portion of scholarships, bonuses, or special pay from those who are discharged before they have completed their required service obligation. Whether the military can recoup from a service member depends on a number of factors, including whether the discharge is deemed to be "voluntary." Because the military views statements of homosexual orientation as "voluntary," in almost every instance when a service member tells the chain of command that he or she is gay, the military will require the service member to repay any scholarship, bonus, or special pay he or she has received. Once the service member is discharged, he or she will receive a bill from the military for the entire prorated portion of the money owed at the time of discharge.

For the most part, LGB veterans who are discharged either after completing their service obligation in full or before they have completed their time in service for a reason other than DADT will receive all of the benefits to which they would otherwise be entitled. However, all LGB veterans are denied access to a core group of benefits that similarly situated heterosexual veterans are entitled to: spousal benefits. DADT prohibits marriage or attempted marriage by service members to people of the same gender, and the Defense of Marriage Act prevents recognition of same sex marriages, civil unions, and domestic partnerships for all citizens, including active duty service members and veterans. Therefore, if a service member lives in a state where marriage (Massachusetts, California) or civil unions or domestic partnerships (New Jersey, Vermont, Washington, D.C., etc.) are available, they are prohibited by law from taking advantage of those legally recognized relationship statuses while still serving in the military (either on active duty or in the reserves) because of DADT. Once an LGB service member is discharged and becomes a veteran, he or she can marry, enter a civil union, or register as a domestic partner if the state so allows. However, because the Defense of Marriage Act prevents the federal government from recognizing these same sex relationships, spouses and partners of LGB veterans are denied access to death benefits, pension benefits, home loan assistance programs, medical benefits, the commissary, and any other benefits offered to heterosexual veterans. This is as blatant an act of discrimination as any that are perpetrated by the U.S. government against its own citizens.

Emily B. Hecht is a staff attorney with Servicemembers Legal Defense Network, a national, nonprofit legal services, watchdog, and policy organization dedicated to ending discrimination against and harassment of military personnel affected by "Don't ask, don't tell" and related forms of intolerance against lesbians, gays, and bisexual military personnel.

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A Conversation with Judge Nancy Gertner

Judge Nancy Gertner of the U.S. District Court for Massachusetts was recently interviewed by Steve Wermiel, co-chair of the *Human Rights* editorial board, after she had been selected to receive the 2008 Thurgood Marshall Award of the American Bar Association's Section of Individual Rights and Responsibilities (IRR). The award was presented to her at the Annual Meeting in August 2008 in New York City. The interview is intended to share the accomplishments of the Thurgood Marshall Award winner with a wider audience than those in attendance at the awards banquet.

Appointed by President Clinton in 1994, Judge Gertner was recognized for her tireless commitment to the preservation and expansion of civil rights and civil liberties for women, minorities, and the poor. As a criminal defense lawyer, she represented many high-profile defendants and focused much of her criminal practice on the protection of attorney-client privilege. Judge Gertner's civil rights practice was equally groundbreaking, with a caseload that included one of the first sex discrimination class actions involving an academic institution, one of the first sexual harassment cases in Massachusetts, and several cases involving discrimination against professional women. As a jurist, she has been a vocal critic of the federal sentencing guidelines and has written landmark decisions on racially balanced schools, housing discrimination, and racial disparities in federal juries.

Human Rights: **As a lawyer in practice, you developed a reputation as a fighter for civil rights. I have several questions about that commitment. First, what inspired your concern with and commitment to civil rights?**

Nancy Gertner: I was a child of the sixties. I graduated Barnard when the streets of New York were filled with antiwar demonstrations, when the civil rights movement and constitutional litigation showed us the promise of our Constitution, and when a burgeoning women's rights movement was beginning to be heard. These movements were impossible to ignore. And I believed passionately in what Rabbi Abraham Heschel said, that the opposite of good is not evil; it is indifference.

I went to graduate school and then law school in the midst of all of this. Yale Law School in particular was a cauldron, boiling over with demonstrations, cutting edge law reform litigation, causes and movements of all sorts. I planned to work as a lawyer for two or three years and then return to the academy. But I got caught up in an extraordinary practice—civil, criminal, appellate and trial, federal and state—mainly civil rights, civil liberties, and criminal defense. I vowed that I would use my skills to help people who seemed all but forgotten.

HR: **Did your own exposure to discrimination shape your views?**

NG: Interestingly enough, I was exposed to discrimination only after I graduated law school—in the courts of Massachusetts, where there were very few women lawyers, and among my colleagues at the bar. It didn't shape my views; it reinforced them.

HR: **Were there civil rights accomplishments of which you were particularly proud?**

NG: I assume that you are asking about my accomplishments as a lawyer.

My husband, John Reinstein of the American Civil Liberties Union, and I were responsible for *Moe v. Hanley*, the case that found a right to choose in the Massachusetts Constitution. I am also proud of the work I did with the Concerned Black Educators of Boston, a group of black teachers who participated in the Boston desegregation case.

But there is a longer list (in an unpublished memoir, by the way) of criminal cases dealing with the Fourth Amendment's exclusionary rule, the first case in Massachusetts using battered women syndrome as a defense, cases protecting the attorney-client privilege (against government subpoenas), civil cases dealing with race and gender discrimination of all kinds, including one of the first cases dealing with sexual and racial harassment, "glass ceiling" cases involving women who were denied tenure, civil actions for rape, psychiatric malpractice (namely, psychiatrists who slept with their patients), and a number of police misconduct/Section 1983 cases, etc. (In fact, John and I had an interesting partnership. I would try the criminal case, and he would do the subsequent Section 1983 action, if appropriate.)

I feel blessed to have been able to do what I wholly believed in as a lawyer and then have the privilege of becoming a judge.

HR: **When people think of the federal courts, compassion is not the**

Judge Nancy Gertner

College:	Barnard/Columbia, BA 1967
Law School:	Yale, JD 1971
Law Clerk:	Chief Judge Luther Swygert, 7th Circuit U.S. Court of Appeals, 1971–72
Career:	Private Practice, Boston, 1973–94, handling civil rights and civil liberties cases and criminal defense; Taught periodically at Harvard, Boston University, Boston College, and Northeastern Law Schools
Judiciary:	Judge, U.S. District Court, Boston, since April 1994
Writing:	Coauthored two books, wrote dozens of scholarly articles and essays

first word that comes to mind. Yet that is a term frequently used to describe your role as a judge. Can you provide some insight into how you make this happen?

NG: I will take your question in two parts: Where does the compassion come from, and how do I make it happen in court? I was born into very modest circumstances on the Lower East Side of Manhattan, circumstances that improved to a degree when my family moved to Queens. I knew about people struggling to make a living, dealing with seemingly heartless bureaucracies, feeling powerless and ignored. I had endless conversations with my parents, especially my father, about how the government and the laws affect ordinary human beings. They had an intuitive humanity that was not about grand theories or principles; it was about respect and integrity. (I call it the "Moishe factor"; Moishe was my father's name.)

What I loved about being a lawyer was the extent to which it enabled me to take my skills and status and speak for ordinary people. Don't get me wrong: I loved the grand law reform cases, as well, the intellectually stimulating appellate arguments, the high-profile civil rights and criminal defense cases. But I also loved helping individuals navigate the courts. The victories were sweet, but sometimes all I could do was to slow down the wheels of justice so that human beings would not be ground up in them.

The judicial role constrains me in different ways. There are obviously rules I have to follow, standards and laws I am obliged to implement. But I try not to forget what it was like to stand next to someone in court and feel that person trembling. Or what it was like to be stuck in the visitor's chamber at the maximum security prison in Massachusetts, when the doors jammed—both incoming and outgoing. Or visit a woman institutionalized at the Bridgewater State Hospital and hear people screaming in nearby rooms. I try not to forget what it was like to be a young lawyer, facing a judge who didn't much like the person you were representing or what you stand for and made that quite clear.

HR: **How has being a woman affected your time as a lawyer? Your tenure as a judge?**

NG: Justice Thurgood Marshall, for example, was often asked about the effect a given rule would have on ordinary people, how it would operate in real life. He asked those questions because he had felt acutely the impact of laws and rules that profoundly subordinated African Americans in his life and in his work. Obviously, my experiences of discrimination and denigration don't remotely compare with Justice Marshall's. But having had the experience of being an "outsider" and representing outsiders has shaped me. Lani Guinier once described this as becoming an "insider" without losing one's "outsider consciousness." Judging, after all, is about more than an abstract calculus of rule and principles. It involves using one's common sense and experiences in making credibility determinations, evaluating the context in which actions take place, trying to understand human behavior.

I was one of the first women trial lawyers—civil or criminal—in Massachusetts. I can't say I had an easy time of it. I had a file entitled "sexist tidbits," in which I recorded every derogatory comment, antiwoman "joke," and the snide/sarcastic/funny rejoinders I developed. (I still have the file, part of that unpublished memoir, in fact.)

And being a woman also energizes my commitment to other women lawyers. In every way I can, I try to use the status being a judge gives me to enhance women's progress in the legal profession. For example, I am active in the National Association of Women Judges and a group called the Equality Commission. Both organizations have been working to keep women's status from backsliding, to prevent the very real possibility that attrition and a contracting economy will reverse the gains women have made over the last several decades.

HR: **Do you have any reaction to the fact that you are only the second woman to receive the Thurgood Marshall Award, after Justice Ruth Bader Ginsburg?**

NG: I am extraordinary proud and humbled by the award.

HR: **Overall, do you think the federal courts do a better job now with civil rights cases than when you went on the bench in 1994?**

NG: No. I am on record criticizing the way federal courts respond to civil rights cases. Most civil rights plaintiffs who are alleging discrimination lose on summary judgment. This is so because of the rules—largely court-made—that have emerged over the past twenty years—mechanistic rules about statutes of limitations, or burdens of proof, or discovery. We have taken a complex phenomenon and, as Professor Elizabeth Schneider of Brooklyn Law School says, we have "sliced and diced" it so that it is not recognizable. Cases that should go to juries—because intent to discriminate is a quintessential jury question—are being tossed out for specious reasons, i.e., this or that racial epithet is considered a "stray remark" by a judge, when a jury might think otherwise; too often what we are really saying is that the plaintiff has not proved discrimination to the satisfaction of the federal judge, rather than his or her peers.

I have been at a seminar at which the teacher began his talk to judges on employment discrimination by saying: "Here's how you get rid of these cases." I was appalled.

For more conversation with Judge Nancy Gertner, visit *HR*'s website www.abanet.org/irr/hr/spring08/gertner08.html.

Serving the Veterans

continued from inside front cover

When veterans apply for service-connected benefits in connection with these injuries, they may face barriers to receiving VA compensation. Some veterans who received a Purple Heart or other combat medal for injuries sustained may already have proof of service connection. Veterans who are not awarded such medals, however, may face daunting challenges in proving that they served in combat.

To ease the burden placed on veterans who serve in combat, I introduced S. 2309 to provide for relaxed evidentiary requirements for veterans who received extra pay for duty in a combat zone while in service. Under this approach, a veteran who served in Iraq and who alleges injuries as the result of exposure to an improvised explosive device, for example, could receive benefits without the requirement that the veteran provide official military documents verifying that exposure. Again, this is an area where the assistance of an experienced attorney could be helpful to the claimant.

This issue of *Human Rights* investigates and explicates these and other important legal and policy concerns affecting veterans of the U.S. armed services, with a particular emphasis on those veterans returning from the wars in Iraq and Afghanistan. Articles discuss such matters as the long delays in processing veterans claims for compensation, the complications in receiving veterans medical care in rural America, the inequities that gay and lesbian veterans experience in the veterans compensation system, the problems encountered by National Guard and Reservist service members who return from deployment only to find that their jobs are no longer available to them, and even how military deployment may affect decisions as personal and profound as the granting of custody and child visitation rights. We owe those who have "borne the battle" no less than full and prompt consideration of these issues.

Daniel K. Akaka (D-HI) has served on the Senate Committee on Veterans' Affairs since becoming a U.S. senator in 1990 and has chaired the committee since 2006.

Compromised Care

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sions are generally directed to streamlining TBI care, the "seamless transition" of seriously wounded, guaranteeing a mental health appointment within thirty days of request, and increased outreach to the National Guard and Reserve.

As veterans advocates, Swords to Plowshares praise and rely on the VA for fine services for our clients. That said, we criticize structural shortfalls in the VA system that cause untenable delays and denials in disability compensation and access to timely care. For too long the VA has operated in a vacuum and has been largely ignored by those outside of the military and veterans communities. The Government Accountability Office, House Veterans' Affairs Committee staff, and the VA's own Inspector General have come out with report after report cataloguing shortfalls in the expenditure of funds and delivery of services. Each of these reports has been largely ignored.

Veterans should be enrolled in the VA when they enter the military. Disability claims should be presumptively approved then audited to ensure no veteran languishes or falls into poverty while waiting for financial assistance, the VA should be able to advertise, and attorney representation should be available from the earliest claims stage. The disability adjudication process should be scrutinized, ensuring due process and the timely disposal of claims, and ensuring that the VA is accountable to the veterans who have served our nation as well as the greater public who invest in their well-deserved care.

Amy N. Fairweather is an attorney with significant experience in public policy related to trauma and trauma survivors. She is the director of Swords to Plowshares Iraq Veteran Project—a project established in 2005 to survey the issues facing the newest generation of combat veterans, to identify gaps in services, and to promote programs and policies to better meet their needs.

SCRA

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above, a service member's desire for the primary physical custody of his or her child to be placed with a third party under a family care plan will not prevail over a natural, civilian parent's right to obtain the primary physical custody of the child so long as the natural parent was not deemed unfit by the court. In an ideal situation, the child custody order should be drafted in anticipation of deployment or mobilization and should address the service member reuniting with the child at the end of the military assignment. A very detailed finding of facts should address circumstances such as the home state of the child and the current custody arrangement with respect to, and without limitation, the education and housing of the child. Such findings would possibly prevent the civilian, noncustodial parent, who may not want to return the child at the expiration of the assignment, from asserting that such aspects are grounds for a substantial change of circumstances in a motion to modify. Further, a well-drafted temporary custody order will reiterate that the order is *temporary* and provide that no substantial change in circumstances is necessary to return the child to the status quo when the service member returns. Nevertheless, while the above-mentioned pointers can help alleviate many major custody issues facing service members, no one can predict the potential problems that may occur with negotiated temporary orders. Thus many states have drafted—or are currently drafting—legislation that will prevent service members from having to make a choice between their country and their children.

Nakia C. Davis is an assistant clinical professor of the Family Law Clinic and the General Externship Program at North Carolina Central University School of Law in Durham, North Carolina.

human**rights hero**

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Congress partially repealed the bar to paid attorney representation and created a new court—the U.S. Court of Appeals for Veterans Claims—with authority to review VA decisions denying benefits.

Because lawyers knew little about veterans law, veterans who initially appealed to this court had great difficulty finding lawyers to represent them. With Addlestone leading the way, NVLSP joined three other veterans service organizations to operate a program that over the last sixteen years has recruited, trained, and mentored thousands of attorneys to represent veterans before the court on a pro bono basis.

Addlestone also helped convince the judge who presided over the class action brought by Vietnam veterans against the chemical company manufacturers of Agent Orange to give the NVLSP a grant from the settlement funds. The NVLSP used these funds, in turn, to litigate a separate lawsuit challenging the VA regulation mandating denial of claims based on Agent Orange exposure. The court invalidated the VA regulation, and as a result the VA has paid out over the last seventeen years hundreds of millions of dollars in disability and death benefits to disabled Vietnam veterans and their survivors.

David Addlestone recently retired from the NVLSP, but only after earning his place as a true Human Rights Hero.

Barton F. Stichman has represented veterans for over thirty years and is the joint executive director of the National Veterans Legal Services Program.

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human**rights hero**

David Addlestone

By Barton F. Stichman

It is particularly appropriate to celebrate as a Human Rights Hero a person who dedicated his entire professional career to vindicating the rights of the often scorned warriors who fought the unpopular American war in Vietnam. David Addlestone began his service to these warriors while they were still in uniform. He took his wife and small child to live in Vietnam, where he represented military personnel in courts-martial and administrative discharge proceedings.

Upon returning to the States in the 1970s, Addlestone took up the cause of the more than 690,000 Vietnam veterans who had been issued less than honorable discharges, a stigma that sentenced them to a lifetime of underemployment and often deprived them of Department of Veterans Affairs (VA) benefits and medical care. Using funds he raised from private foundations, Addlestone led a nationwide effort to train attorneys to represent these vets on their applications to military discharge review agencies for upgrades in discharge. The lawyers he hired brought lawsuits resulting in the upgrades of thousands of less than honorable discharges and forcing the discharge review agencies to explain their decisions in writing and to make them publicly available.

Admittedly, Addlestone's work during this period did not always result in law reform. For example, Addlestone represented Tech. Sgt. Leonard Matlovich, who sued the U.S. Air Force for involuntarily discharging him on the sole ground that he was a homosexual. After Matlovich appeared on the September 8, 1975, cover of *Time*, the Air Force bought him off to save its homosexual discharge policy from court review.

In recent years, the U.S. policy to deny aliens imprisoned at Guantanamo Bay access to attorneys and federal civilian courts has been a controversial issue of public importance. But in 1980—when Addlestone helped found the National Veterans Legal Services Program (NVLSP) and refocused his efforts on veterans benefits—federal statutes imposed a similar policy on American citizens who had served their country in military uniform. Veterans could not legally hire attorneys to represent them on claims for VA benefits. And if a claim was ultimately denied, the veteran was barred by law from appealing the VA denial to federal court.

Addlestone spearheaded an effort to repeal these anachronistic laws. The repeal campaign was truly a David versus Goliath battle—no pun intended. Addlestone lobbied for repeal with the only veterans service organization that supported the change: the Vietnam Veterans of America, which had 50,000 members. Staunchly opposing repeal was the chairman of the House Veterans Affairs Committee and the traditional veterans service organizations, which had millions of members and a monopoly on the system for representing VA claimants. Finally, in 1988 Addlestone and his small band at the Vietnam Veterans of America prevailed.

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