Testimony
Of
Vietnam Veterans of America

Presented by

John Rowan
National President
Vietnam Veterans of America

Before the
House Veterans Affairs Committee

REGARDING

Draft legislation to establish a permanent Veterans Choice Program
And
H.R. 5083, the VA Appeals Modernization Act of 2016

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Good morning, Chairman Miller, Chairwoman Brown and other distinguished members of the House Veterans Affairs Committee. Vietnam Veterans of America (VVA) is pleased to have the opportunity to present our testimony today regarding draft legislation to establish a permanent Veterans Choice Program and H.R. 5083, the VA Appeals Modernization Act of 2016.

**CHANGING “CHOICE”**

In the wake of the waiting-list scandal in 2014, Congress, in a spirit of bipartisanship, passed what has come to be known as the Choice Act.

Public Law 113-146 was designed to relieve much of the pressure in trying to schedule appointments for veterans to see medical specialists, as well as primary care clinicians, within reasonable wait times. The law allows veterans who cannot be seen within thirty days, or who live more than forty miles from a VA medical center or community-based outpatient clinic to seek medical care outside of the VA healthcare system. The law also permits the VA secretary to fire senior officials, albeit with an “expedited appeals process.” The law also funds the hiring of additional medical staff, the construction of new CBOCs, and some $10 billion to pay for care outside of the VA as per the above noted guidelines.

The Obama Administration really had no way of knowing just what the demand would be for non-VA health care, and because of the growing demands for more clinicians and equipment to help handle the anticipated influx of veterans of Iraq and Afghanistan, the administration wanted to divert some of the $10 billion set aside in the Veterans Choice Program to pay for non-VA health care for eligible veterans. VA wanted to use some portion of these funds to support “essential investments in VA system priorities.”

Many members of Congress have not applauded the VA’s stance. Those Members heralded what they thought they had done—to give veterans more choice in obtaining timely health care—and now, after all the hubbub, the initial demand for more choice may not have been all that it appeared to be. Or, perhaps, the expectation that anyone could set up a nationwide system as quickly as the law demanded was too optimistic.

VVA voiced its concern with VA administrators and HVAC staffers over several problems with the Choice Act. First, the 40 mile rule -- the 40 miles needed to be driving distance, and not “as the crow flies” distances. Secondly, the 40 miles
should be calculated as **40 miles from a VA facility that provides the type of services that the veteran needs**. (e.g. – if a CBOC does not provide dialysis and that is what the veteran needs, then the distance should then be calculated to the **nearest VA facility that provides dialysis**). Thirdly, mental health clinicians at non-VA facilities must meet the same professional standards/credentialing as those required of clinicians at VA facilities. We know that this last point is controversial in some quarters because the credentialed providers on a par with the VAMCs may be very hard if not impossible to locate in a given area.

While some additional flexibility may be needed initially, VVA believes that we have been talking about recruitment at military separation points for allied health care professions as well as clinicians of every sort for twenty years. Yet, VA still does not regularly and effectively do this most simple yet crucial task. At this point it is time to make such recruitment a legal requirement, since VA does not seem to be able to do the obvious to recruit the workforce needed by their veteran clientele.

In this same vein, whatever it takes to make it possible for veterans, particularly recently separated veterans to acquire the skills and credentials that are needed by VA in all disciplines, including mental health, is essential. This need is only going to become more acute in the out years, and VA should be doing everything possible to attract, help credential, and retain veterans in many specialties across the spectrum of care. Passage, funding, and implementation of programs like “Grow our Own” need to move forward exponentially.

Virtually all of the provisions for recruitment and hiring, as well as pay, make sense to us. The one area that causes us pause is Section 16. VA, like many other departments across the government, used so-called “outstanding scholar” authorities to get around veterans’ preference to hire non-veterans for more than thirty years. VVA would have to be convinced that this section 16 pertaining to “Employment of Students and recent graduates” is not just another iteration of the same ruse that prevented qualified veterans from employment at VA.

And lastly, VA needs to restore/build organizational capacity based on the increased number morbidity presentations of the veterans they now see. We all know that the number of veterans in every cohort group has increased. However, VA has not accounted for the increased resources needed to properly serve each veteran as the number of “presentations” or health problems that need to be addressed in each veteran has increased.
There is no excuse for the lying or the retribution against employees who told the truth, but the central fact is that VA did not have enough clinicians to meet the greatly increased number of clinical needs in 2014. The VA *still* does not have the organizational resources to meet the needs of the veterans it serves.

It is certainly true that the VA management of the resources it did have left much to be desired, and still does. However, for the first time in a very long time, we have the right Undersecretary of Health who is doing the right kind of things, at a determined pace, and building a team that will maximize the impact of resources VHA does have.

VVA with the exception of Section 16 can wholeheartedly support the reorganization of VHA. VVA also can support continuation of the CHOICE program, and perhaps some expansion of it, with the capacity to manage that care brought in-house, as well as working out a way to ensure that the medical records from non-VA care end up melded into the veterans’ VistA record.

Having said that, the organizational capacity of VHA must be expanded (as well as being better organized), and that will take significant resources over a number of years. We will look to the Congress to ensure that the resources are there to meet the needs of veterans of every generation.

**VA APPEALS MODERNIZATION: EXECUTIVE SUMMARY**

VVA has been an active participant in the workgroup convened by the VA Deputy Secretary to find common ground on solutions to the VA appeals process. While the appeals process is in need of reform, VVA’s position is that veterans ought not to be required to forgo their due process rights in order for VA to process their claims and appeals more quickly. VVA’s greatest concerns are that the H. R. 5083, VA Appeals Modernization Act of 2016 does not address the issue of a virtually total lack of precedent that has long plagued the claims and appeals process. Precedent is the crux of the issue. Ultimately this is a system of laws, and without precedent the American jurisprudence system could not operate. With precedent most of the claims can be automated, freeing staff for other work. Also, we believe if this legislation becomes black letter law, the role of the Court of Appeals for Veterans Claims (CAVC) will be significantly diminished to the detriment of veterans.
STATEMENT

I. H.R. 5083, VA APPEALS MODERNIZATION ACT OF 2016, IN ITS CURRENT FORM, DOES NOT ADDRESS THE LACK OF PRECEDENCE THAT HAS LONG PLAGUED THE VA CLAIMS AND APPEALS PROCESS

From its inception, the veterans claims and appeal process has lacked precedence, the legal principle by which judges are obligated to respect the precedent established by prior decisions. The never-ending churning of cases between the RO, BVA, and the CAVC, nicknamed, “The Hamster Wheel” by veterans and their advocates, has led to excessive wait times for too many veterans seeking final resolution of their appeals. The lack precedence at the BVA is the fundamental design flaw to the adjudication of veterans’ claims, as prescribed under Title 38. Regrettably, the legislation proposed by VA today does not address the precedence issue.

VVA offers three solutions to addressing the precedence issue:

a) Increase the number of VA OGC Precedent Opinions

In the early 1990s, after the CAVC’s inception, the VA OGC issued approximately 80-100 precedent opinions per year. Today, VA OGC issues less than 3 opinions per year. Clearly, precedent opinions are no longer a priority at VA OGC, and this needs to change. Veterans Service Organizations ought to be allowed to petition VA OGC to issue precedent opinions. If VA OGC declines doing so, then VA OGC need be required to issue a written denial that can be appealed to the CAVC.

b) Possibly Allow the BVA to issue 3 Judge Panel Precedent Opinions

Currently, the BVA is authorized 78 Veteran Law Judges (VLJs), but it currently lacks an effective precedence mechanism. BVA decisions are non-precedential and are not binding on future RO or BVA decisions. Consequently, the BVA is plagued by inconsistent decision-making by these 78 VLJs. In order to improve the consistency of RO and BVA decisions, VVA recommends that VA and this subcommittee look into the feasibility of BVA selectively issuing three-judge panel decisions to bind all future BVA decisions with the same legal issues and fact patterns, so other veterans with these same legal issues do not have to fight
the same battle repeatedly. If effectively implemented, this solution should reduce the number of appeals over time to the BVA.

c) Some believe that any precedential should only result from three judge panel of the CAVC.

The reasoning here is that the CAVC judges are both more qualified, and therefore this would be the proper venue for such arguments. The CAVC can meet in panels now, but they do not have to do so. That should change, because VA cannot follow the lead of the Social Security Administration to automate most of their processes if there are not clear precedents and settled law.

If one were a cynic, you could reasonably conclude that the VA is doing had stands and circus tricks to avoid having precedent set that then, of course, would be subject to judicial review.

**VA Must Adopt a Social Security Administration type of rules based system**

During the recent appeals summit, it was mentioned that the Social Security Administration (SSA) uses a rules-based system to improve the consistency of SSA decisions. This is clearly the direction that the VA must move, and move quickly.

Until the precedence issue is adequately resolved, the churning of cases will not end, continuing to waste scare agency resources and harming veterans. VVA strongly recommends the proposed legislation be amended to mandate an effective precedence setting mechanism in the veteran claims and appeals process. Otherwise, under the proposed framework as it is currently written, the “Hamster Wheel” remains, albeit with fewer cases at the CAVC.

**II. H.R. 5083, VA APPEALS MODERNIZATION ACT OF, IN ITS CURRENT FORM, HARM VETERANS BY DISINCENTIVIZING THEM FROM APPEALING TO THE CAVC, THEREBY MAKING THE CAVC IRRELEVANT**

VVA has been a longstanding and staunch advocate for judicial review of veterans’ appeals, having championed the passage of the Veterans' Judicial Review Act (Pub. L. No. 100-687), which established the United States Court of Veterans Appeals (now the Court of Appeals for Veterans Claims). VVA strongly believes that veterans have the right to judicial review of their claims for benefits under
Title 38, and we have significant concerns that the legislative framework proposed today by VA will undermine the CAVC by disincentivizing Veterans from appealing to the CAVC. Although, technically, the current framework does allow veterans to appeal to the CAVC, in practice, it will make the CAVC irrelevant.

Today, the CAVC receives approximately 4,000 appeals per year, of which, about 50 percent are remanded back to BVA via a Joint Motion for Remand (JMR). The rest of the appeals go to briefing and are decided by the Court. Currently, the VA loses 70-75 percent of its cases at the CAVC. Under the proposed legislation, very few veterans will elect to appeal to the CAVC after a Board of Veterans Appeals decision, because they would risk losing their claim’s effective date if they lose at the CAVC. Instead, it is much safer for them to keep the protections provided by this proposed legislation by filing a “supplemental” claim at the Regional Office (known as the ROJ in the legislation) and skip the appeal at the CAVC. VVA believes this will drastically reduce the number of cases appealed to the CAVC, with the consequence of reducing the pool of cases for the CAVC to choose from in order to render a three-judge panel merit decision. This drastic reduction of cases going to the CAVC will harm veterans by reducing the number of binding cases on the VA.

VVA suggests that the proposed legislation be amended by giving post-CAVC cases the same effective-date protection as post ROJ and post BVA decisions, thereby removing the disincentive to pursue judicial review.

In addition, Veterans must be given adequate notice about all their options for appeal under this new framework, including their ability to continue to appeal to the CAVC. This notice should be explained, not just when a final BVA decision is issued, but also earlier in the process, when a rating decision is issued by the RO. VVA is concerned the VA may not provide adequate notice to Veterans regarding their appeals option to the CAVC.
III.  H.R. 5083, VA APPEALS MODERNIZATION ACT OF, IN ITS CURRENT FORM, HARMS VETERANS BY ELIMINATING DECISION REVIEW OFFICERS (DROs) AND REPLACING THEM WITH “DIFFERENCE OF OPINION REVIEWS” (DOORS) WITH NO QUALIFICATION STANDARDS

It is in everyone’s best interest to have appeals decided at the lowest level possible in the appeals process, which is at the RO. The Decision Review Officer (DRO) is the backbone of the VA appeals process at the lowest level. DROs are GS-13s and come from the ranks of the most senior raters at VBA. The effectiveness of DRO reviews can vary from RO to RO, but generally, veterans represented by VVA have enjoyed successful outcomes by using the DRO process. Veterans benefit from this partnership. Unfortunately, today’s proposed legislation by VA threatens this successfully relationship.

This is classic “old VA” of taking something that is working and is good for vets and proceeds to try and break it. VVA had hoped that we were moving beyond that old destructive mindset toward real problem solving, in a way that puts the “veteran experience” at the center of all that is done.

Under the proposed legislation, the VA will eliminate the DRO position altogether and replace the DRO function with the Difference of Opinion Reviews (DOORs). Although senior VBA officials have stated VA will retain all existing DRO staff as senior raters, they have also indicated, in order to have a larger pool of staff to conduct DOORs, they will have to use VBA’s less experienced raters from lower pay scales to perform this function.

VVA has concerns that the only requirement identified by VA is that the rater conducting the DOOR must be one GS pay grade higher than the rater who issues the ROJ decision. The Duty to Assist (DTA) under current statute is no longer required once the rating decision is issued by the RO. VVA is concerned this will lead to less qualified decision-makers (GS-9s to GS-12s) making DRO-type decisions. DROs, especially experienced ones, have standing and political clout at ROs to overturn decisions. Reassigning this work to lower grade and less experienced raters, especially without the DTA mandated under current law, may lead to the rubber stamping of rating decisions. These may occur more frequently if the DOOR rater and the rater who issued the rating decision being reviewed are at the same RO.
VA has not explained how much work credit will be assigned for DOORs by VBA’s Work Credit System. Will DOORs be a primary or adjunct duty for raters? Will raters be given sufficient work credit for DOORs? If not, then DOORs will be undermined by the Work Credit System as raters will likely avoid them--or at least minimize the time spent on conducting a DOOR--as their primary job depends on making their rating production quota. What good is a DOOR if the rater is not provided sufficient work credit to properly review the entire record to ensure all evidence was properly weighed, and considered? VBA needs to ensure DOOR function is not undermined by the work-credit system.

VVA is also concerned about VA’s lack of detail regarding training of staff who will conduct DOORs. Will raters be given sufficient training to confidently review and overturn another rater’s decision? VVA strongly believes raters, as well as all VA staff involved in the process of adjudicating veterans claims and appeals—from clerks, all the way up to RO Directors and VLJs, ought to undergo recurring proficiency training.

Without adequate work credit and training provided to raters performing the DOOR function, this feature of the legislation will not achieve the desired goal of an effective, second-level review at the RO.

IV. H.R. 5083, VA APPEALS MODERNIZATION ACT OF 2016, IN ITS CURRENT FORM, HARMS VETERANS IF THE BVA IS ALLOWED TO UNDER-RESOURCE THE HEARING LANE DOCKET UNDER THIS NEW FRAMEWORK

Under the current legislation proposed by VA, there will be two dockets created at the BVA, one for expedited appeals (no new evidence added, and no hearings) and the other, where the claimant can add evidence and request a hearing. Depending on how BVA is allowed to allocate resources, VVA has concerns the “hearing” lane will be under-resourced, thereby, punishing those veterans who choose a hearing. Any final framework must ensure the hearing lane has adequate resources.
V.  H.R. 5083, VA APPEALS MODERNIZATION ACT OF 2016, IN ITS CURRENT FORM, HARMS VETERANS BY CLOSING OF THE RECORD BEFORE A BVA DECISION IS ISSUED

For claims being appealed to the Board of Veterans' Appeals, VA’s new plan allows new evidence to be submitted for only 90 days following the submission of the Notice of Disagreement and 90 days after the BVA hearing. There is no reason for VA to restrict the submission of evidence in appealed cases, however, especially when the plan states that evidence submitted after the issuance of a Rating Decision cannot trigger VA’s duty to assist.

This is especially important given VA’s history of backlogs. Although VA hopes BVA decisions will be issued less than a year after the filing of a Notice of Disagreement, under the proposed legislation, it is not outside the realm of possibility that BVA decisions end up being decided two to three years after the Notice of Disagreement is filed. If that is the case, not allowing a Veteran to submit evidence during that entire period completely defeats the idea that this system should revolve around what’s best for Veterans, as opposed to what makes life easier for VA administrators.

It is certainly worth noting that the overwhelming majority of evidence that comes is after the original claim is evidence that is being withheld or lost or just not provided in a timely manner by one entity or another of the government. Had the VA and the Federal government performed proper duty to assist in the first place, then the evidence would have been available at the start of the process.

Therefore, in our opinion, the record should be open until BVA issues a decision.

VI.  H.R. 5083, VA APPEALS MODERNIZATION ACT OF 2016, IN ITS CURRENT FORM, HARMS VETERANS BY CREATING A NEW “RELEVANT” EVIDENCE STANDARD

VA proposes to throw out entire area of case law on, “new and material” evidence by implanting a “new and relevant” evidence standard. In order to prevent the need for additional litigation to define what “relevant” evidence is, the words “and relevant” should be removed from the 38 U.S.C.A § 5108, and a supplemental claim should be deemed sufficient when any “new” evidence is submitted.
VA has argued VA resources would be wasted by allowing Veterans to reopen a denied claim with nothing more than a “picture of a horse.” This argument is without merit, however, as such a submission requires adjudication by VA either way, and it is hard to imagine that it would take VA too long to deny a claim on the merits when the only evidence added since the last denial is a picture of one or another end of a horse.

If VA adjudicated the merits of every supplemental claim for which “new” evidence was submitted, it would make the system vastly more efficient, as it would get rid of the entire class of appeals resulting from preliminary determinations finding new evidence not sufficiently “relevant” to reopen a claim, much as “new and material evidence” appeals clog the system now.

Under the proposed legislation VA’s “relevant evidence” definition is evidence, “that tends to prove or disprove a matter in issue.” This language is so general that it is meaningless, and will certainly lead to the need for litigation to further define it. Why did VA make this definition so vague? VVA has significant concern that VA is intending to make this definition more restrictive than what was promised to stakeholders in negotiations.

VII. H.R. 5083, VA APPEALS MODERNIZATION ACT OF 2016, IN ITS CURRENT FORM, HARMS VETERANS BY RASING THE STANDARD FOR WHAT IS ALLEGED ON THE NOTICE OF DISAGREEMENT

Under 7105(b)(4), BVA can “dismiss” an appeal if the Notice of Disagreement doesn’t allege specific errors of law or fact. This is yet another preliminary determination by VA that takes just as much time as a decision on the merits, and therefore it serves only to complicate the appeals system. It is also unclear what a Veteran's rights are after a claim is “dismissed” by BVA.

More importantly, the requirement that a Veteran would be forced to provide “specific allegations of error of fact or law” when submitting a Notice of Disagreement is a much higher standard than Veterans currently face. There is no good reason for VA to require sophisticated legal reasoning for a Veteran to be able to express disagreement with the denial of his claim. Most Veterans are not lawyers or medical experts. The fact that Veterans would also be forced to make irrevocable decisions about issues like hearings and the submission of evidence to BVA at the time they file a Notice of Disagreement is far too much to put on a
Veteran. This change appears to be yet another scheme to allow VA to easily dismiss appeals.

**H.R. 5083, VA APPEALS MODERNIZATION ACT OF 2016, IN ITS CURRENT FORM, HARMS VETERANS BY BEING DEPENDENT ON INCREASED FUNDING FOR VBA THAT WAS EITHER NOT ASKED FOR BY VA, OR ASKED FOR AND DENIED BY OMB**

Senior VA leadership proposed this legislation, but under the assumption VBA will receive adequate funding from the Congress to adequately staff up the ROs to meet the added demands that will be created by these legislative changes. The same VA senior leadership has the responsibility to request adequate funding from the Congress to ensure they have the adequate resources to carry out VA’s mission. It is unclear if VA senior leadership, knowing they were going to initiate the biggest and most radical change to the veterans’ appeals process since the creation of the Veterans Court nearly 30 years ago, requested sufficient resources for VBA to carry out these additional responsibilities. If not, why? Or, if they did, but their request was denied by OMB, then why is the administration at OMB setting the VA up for failure?

The success of this new appeals framework is dependent on VBA receiving adequate funding. Without adequate resources allocated to VBA, this proposed appeals framework is doomed for failure from the start. Is VA leadership planning on making Congress the scapegoat if these needed appropriations are denied?

**CONCLUSION**

In closing, on behalf of VVA and our National Board, I thank you for your leadership in holding this important hearing on these topics that are literally of vital interest to so many veterans, and should be of keen interest to all who care about our nation's veterans.

VVA supports modernizing the VA appeals process, so long as due process rights are not abridged, and the root causes are adequately addressed. The legislation proposed today is inadequate for the reasons stated above. As VVA has stated in before, Veterans' rights in the VA claims and appeals processes should not be abridged, curtailed or eliminated under the guise of "administrative efficiency."
Most importantly, this whole effort begs the crucial question of how best to establish precedent. Without precedent the chaos and “churn” will continue. Ninety percent of claims break out in 15 to 20 basically the same claim that VA is adjudicating by hand without precedent ten thousand to fifty thousand times each. And, of course, many of them will be wrong. VA would have you believe that veterans will appeal, appeal, appeal for no reason. The truth is that the majority of those who are denied justice just go away, and suffer in silence. That makes the life at the RO easier, but the point here is justice for each veteran – no more, no less.

General Omar Bradley had it right when he was head of the VA and said: “We are here to solve the veterans’ problems, not our own.”

Now if we had precedent on those above 15 to 20 basically the same claims, then it can be automated, and we stop wasting resources on that which can be best done by machine, and concentrate that staff power on the 9 or 10 percent which do not fall into the above referenced categories, and on really doing “duty to assist” veterans secure the information needed to advance their claim.

I thank you for the opportunity to speak to these issues on behalf of America's Vietnam Veterans. I will be happy to answer any questions you may have for me.
The national organization Vietnam Veterans of America (VVA) is a non-profit veterans' membership organization registered as a 501(c) (19) with the Internal Revenue Service. VVA is also appropriately registered with the Secretary of the Senate and the Clerk of the House of Representatives in compliance with the Lobbying Disclosure Act of 1995.

VVA is not currently in receipt of any federal grant or contract, other than the routine allocation of office space and associated resources in VA Regional Offices for outreach and direct services through its Veterans Benefits Program (Service Representatives). This is also true of the previous two fiscal years.

For Further Information, Contact:

    Executive Director of Policy and Government Affairs
    Vietnam Veterans of America
    (301) 585-4000, extension 127
John Rowan

John Rowan was reelected to a fifth term as National President of Vietnam Veterans of America at the organization’s 16th National Convention in Jacksonville, Florida. First elected to VVA’s highest office in 2005, Rowan has remained active with VVA since the organization’s inception in 1978.

A founding member and the first president of VVA Chapter 32 in Queens, New York, he has served as the chairman of VVA’s Conference of State Council Presidents, for three terms on the organization’s Board of Directors, and as president of VVA’s New York State Council. Rowan, who enlisted in the U.S. Air Force in 1965, went to language school, where he learned Indonesian and Vietnamese. He served as a linguist in the U.S. Air Force’s 6990 Security Squadron in Vietnam and at Kadena Air Base in Okinawa, providing the Strategic Air Command with intelligence on North Vietnam’s SAM sites to protect their bombing missions.

After his honorable discharge from the Air Force, Rowan received a B.A. in political science from Queens College and a master’s degree in urban affairs from Hunter College. Rowan retired from city service as an investigator with the City of New York’s Comptroller’s Office. Prior to his election as National President, Rowan served as a VVA veterans’ service representative in New York City. He lives in Middle Village, New York, with his wife, Mariann.