STATEMENT OF
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BEFORE THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE & MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
ON
PENDING LEGISLATION

JULY 1, 2010

Mr. Chairman and Members of the Subcommittee.

Thank you for the opportunity to present the views of The American Legion on: H.R. 3407, Severely Injured Veterans Improvement Act of 2009; H.R. 3787, To deem certain service in the Reserve Components as active service for the purpose of laws administered by the Secretary of Veterans Affairs; H.R. 4541, Veterans Pensions Protection Act of 2010; and, H.R. 5064, Fair Access to Veterans Benefits Act of 2010; and H.R. 5549, the Rapid Claims Act.

H.R. 3407: Severely Injured Veterans Benefit Improvement Act of 2009

The American Legion has a proud history of advocacy for America's veterans. All veterans, particularly severely injured veterans and those who have been awarded the Purple Heart deserve the utmost respect and have truly deserved the thanks of a grateful nation. The American Legion recognizes the importance of caring for those injured through service as expressed through an organizational resolution titled: The American Legion Policy on VA Compensation. This resolution states that we, who are not forced on a daily basis, to contend with physical and psychological injuries received as a result of selfless service to this nation, can never fully repay these severely injured heroes.

H.R. 3407, the "Severely Injured Veterans Benefit Improvement Act of 2009," focuses on increased compensation for disabled veterans, and recipients of the Purple Heart. It further adds Traumatic Brain Injury (TBI) for eligibility for aid and attendance benefits, and severe burn injuries of both veterans and active duty members for adaptive equipment to automobiles, and extends the provisions of an existing pension for certain hospitalized veterans.

The American Legion has testified before Congress numerous times concerning the need for increased assistance to veterans who have been injured in service to this country. We are pleased that this bill increases the special monthly compensation rate for aid and attendance for severely injured veterans. While overall inflation is relatively low in today's economy, the costs of caring

for severely injured veterans at home to include personal health care services on a daily basis continue to increase.

Traumatic Brain Injury (TBI), "the signature wound for Iraq and Afghanistan," along with severe burns, is a legacy of the tactics being conducted by our enemies in Iraq and Afghanistan. The improvised explosive device (IED) is the weapon of choice for our enemy, and is insidious in its utilization and often even more devastating in its long-term effects than gunshots due to the multiple and terrible wounds and burns it produces. The American Legion has undertaken an effort to better understand TBI and Post Traumatic Stress Disorder (PTSD) in order to become more of a subject matter expert on the issues. On a regular basis new information is being developed both by military and civilian medical authorities which show how vulnerable the brain is to impacts, even those from sporting events such as professional football. It can be surmised that in the near future research will conclusively show that TBI is a debilitating and long lasting injury. Clearly, veterans who in many cases have been exposed to multiple severe explosions should be added to the need for aid and attendance.

Likewise, the terrible scars and the attending loss of appendages and range of motion due to the fire resulting in an IED explosion are a life-long sacrifice our veterans and military personnel must endure as a result of service to this nation.

H.R.3407 authorizes adaptive equipment for automobiles of veterans and service members with severe burns and other disabilities. The American Legion believes that these warriors have suffered and will continue to suffer for their entire lives and should not be forced to pay for the adaptive equipment necessary to bring some normalcy to their lives upon their return. The cost to adapt personal vehicles to improve mobility and to give some semblance of personal independence is not too great a cost for this nation to give these wounded warriors.

Finally, H.R. 3407 authorizes, subject to the availability of appropriations for the purpose, the VA Secretary to increase the monthly special pension by not more than $1,000. Once again The American Legion feels that a recipient of the Congressional Medal of Honor is of a special class of veteran. These recipients have given this nation "conspicuous gallantry above and beyond the call of duty." It is right that this nation give some token of esteem in the form of an increase to their special pension.

The American Legion supports H.R. 3407

H.R. 3787: To amend title 38, United States Code, to deem certain service in the reserve components as active service for purposes of laws administered by the Secretary of Veterans Affairs.

The American Legion has no position on this specific legislation at this time.

However, The American Legion does feel that there is a need for appropriate entitlements based on levels of sacrifice. In the case of H.R.3787 reserve component members must meet the

criteria of having completed a minimum of 20 "good" years for retirement. In those 20 years the service member is required to maintain physical fitness and professional standards to include military and civilian education, and weapons and equipment qualifications. In some cases these activities, in particular, maintaining physical fitness, and weapons qualification can have long term negative impact on hearing, and sensitive joints such as knees and shoulders.

The role of the Reserve Component servicemember has changed since the Gulf War that began in 1990. Prior to that war the reserve component was regarded as a strategic force to be called upon when greater mobilization of the armed forces was required for our national security. However, much of the combat power that comprises our warfighting efforts now resides in the reserve component. For this reason, the reserve component has changed from a strategic force to an operational force. Thus, in a wartime era, where we as a nation are relying more and more on the Guard and Reserve, it is imperative that earned benefits fairly reflect level of sacrifice. The American Legion will continue to review the issue of fair entitlements for Reserve and Guard members to develop a fair and complete organizational resolution that supports fair equity in benefits for all who have served.

H.R. 4541: Veterans Pensions Protection Act of 2010

This legislation would amend title 38, United States Code, to exempt reimbursements of expenses related to accident, theft, loss or casualty loss from determinations of annual income with respect to pensions for veterans and surviving spouses, and children of veterans.

The American Legion has no position on this legislation

H.R. 5064: Fair Access to Veteran's Benefits Act

H.R. 5064 reflects current procedures concerning equitable tolling. Equitable tolling is a doctrine or principle of tort law: a statute of limitations will not bar a claim if despite use of due diligence the plaintiff did not or could not discover the injury until after the expiration of the limitations period.

Under 38 U.S.C. § 7266(a), an appellant has 120 days from the date the notice of a final decision of the Board of Veterans' Appeals (BVA) is mailed to file a notice of appeal (NOA) to the United States Court of Appeals for Veterans Claims (CAVC). From 1998-2008, previous precedential decisions of the United States Court of Appeals for the Federal Circuit (***Bailey***) had permitted equitable tolling by the CAVC for the 120 day time period under § 7266(a). The Supreme Court, however, in ***Bowles v. Russell***, 551 U.S. 205 (2007), made it clear that the timely filing of a NOA in a civil case is a jurisdictional requirement and that courts have no authority to create exceptions. The Supreme Court further concluded that only Congress can make such exceptions.

In ***Henderson v. Shinseki***, the CAVC ultimately dismissed the veteran's appeal because he had missed the 120 day deadline by 15 days. The veteran argued that his service-connected mental disorder, rated 100 percent disabling, caused him to miss the deadline. While Mr. Henderson's appeal was pending at the CAVC, the Supreme Court rendered its decision in ***Bowles***, in which it stated that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," and thus cannot be waived. The Court also stated that it had no authority to create equitable exceptions to jurisdictional requirements.

On July 24, 2008, the CAVC ruled in a 2–1 decision that the holding in ***Bowles*** prohibited it from using equitable tolling to extend the 120-day appeal period set forth in § 7266(a). The CAVC determined that Congress had "specifically authorized" it to conduct "independent judicial appellate review" of the BVA, and that well-settled law established that its cases were "civil actions." Starting from that premise, the CAVC concluded that § 7266(a) was a notice of appeal provision in a civil case, and that it was jurisdictional and could not be equitably tolled. Accordingly, the court ruled that the Federal Circuit's precedent in ***Bailey*** was effectively overruled, and it dismissed Mr. Henderson's appeal for lack of jurisdiction.

Mr. Henderson subsequently filed a timely appeal of the CAVC decision with the United States Court of Appeals for the Federal Circuit. On December 17, 2009, the Federal Circuit affirmed the decision of the CAVC dismissing the veteran's appeal for lack of jurisdiction.

The Federal Circuit decision in ***Henderson***, citing the Supreme Court decision in ***Bowles***, has made it quite clear that equitable tolling in veterans' appeals at the Federal court level is prohibited. In April of this year, Senator Arlen Specter introduced S. 3192, the "Fair Access to Veterans Benefits Act," to require the CAVC to consider if a veteran's service-connected disability would have made it difficult or impossible for him or her to meet a deadline for filing an appeal.

The American Legion Resolution No. 32, adopted at the 2008 National Convention, supports proposed legislation that would extend the 120 day CAVC appeal deadline to one year following the BVA final denial of an appeal. It is in keeping with both the spirit and intent of Resolution No. 32 to support legislation, such as H.R.5064, that would allow the CAVC to apply equitable tolling in certain situations, especially in such instances where the veteran's service-connected disability hindered the filing of a timely appeal.

The American Legion supports H.R 5064.

H.R. 5549

The Rating and Processing Individual's Disability Claims Act (RAPID Claims Act)

This legislation would amend title 38, United States Code, to provide for expedited procedures for the consideration of certain veteran's claims, and for other purposes. H.R.5549 allows for the waiver of claim development by VA in those cases where a veteran certifies that he or she has

submitted a "fully developed claim." While this measure stands to potentially increase the speed with which a veteran may receive benefits, there are still concerns about this legislation. The American Legion supports efforts to streamline the claims process, and to fast track those claims where additional work is unnecessary. However, it is essential to ensure that veterans fully understand what is being asked of them when they submit to these waivers.

The intent is to relieve VA of certain required waiting periods so that they may move more swiftly to a decision provided the veteran certifies that no additional research is needed. While this is very beneficial in many cases, unrepresented veterans may not fully understand what is required to grant their claim, and therefore may place themselves in jeopardy by not submitting crucial evidence.

The American Legion believes that there must be further clarification on what mechanism is provided by H.R. 5549 to protect a veteran in situations where a veteran may erroneously believe, and therefore certify that all necessary development has been performed on a claim. It is critical that the veteran would be entitled to return to the traditional claims process at any point when it becomes clear that the claim is in fact, "not fully developed." In this way the rights of the veteran would be protected while allowing for more speed in processing.

It is understood that the veteran has the right to file a Notice of Disagreement (NOD) with a decision and enter into the appeals process. However, this would delay the claim as it moves through another bag logged system and thereby defeats the purpose of the original intent of H.R. 5549 to expedite accurate decisions of original claims.

In short, there are still concerns about the implementation of a measure such as this and how it will affect veterans. The American Legion would like to see more clarification and assurances of protections for veterans so that they are not put in a situation where they sacrifice their ability to receive thorough review of their claim in the hopes of having it processed more swiftly.

With the previous concerns noted, The American Legion American Legion supports H.R.5549

As always, The American Legion appreciates the opportunity, to testify and represent the position of the over 2.5 million veterans of this organization and their families. This concludes my testimony.