

LEGISLATIVE HEARING ON H.R. 356, H.R. 832,
H.R. 1994, H.R. 2133, H.R. 2275, H.R. 2344, H.R.
2360, H.R. 2361, AND A DRAFT BILL ENTITLED
“TO AMEND TITLE 38, UNITED STATES CODE,
TO MAKE CERTAIN MODIFICATIONS AND IM-
PROVEMENTS IN THE TRANSFER OF UNUSED
EDUCATIONAL ASSISTANCE BENEFITS UNDER
THE POST-9/11 EDUCATIONAL ASSISTANCE
PROGRAM OF THE DEPARTMENT OF VETERANS
AFFAIRS, AND FOR OTHER PURPOSES”

HEARING

BEFORE THE

SUBCOMMITTEE ON ECONOMIC
OPPORTUNITY

OF THE

COMMITTEE ON VETERANS' AFFAIRS

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

TUESDAY, JUNE 2, 2015

Serial No. 114-23

Printed for the use of the Committee on Veterans' Affairs



U.S. GOVERNMENT PUBLISHING OFFICE

98-640

WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

Available via the World Wide Web: <http://www.fdsys.gov>

COMMITTEE ON VETERANS' AFFAIRS

JEFF MILLER, Florida, *Chairman*

DOUG LAMBORN, Colorado	CORRINE BROWN, Florida, <i>Ranking</i>
GUS M. BILIRAKIS, Florida, <i>Vice-Chairman</i>	<i>Minority Member</i>
DAVID P. ROE, Tennessee	MARK TAKANO, California
DAN BENISHEK, Michigan	JULIA BROWNLEY, California
TIM HUELSKAMP, Kansas	DINA TITUS, Nevada
MIKE COFFMAN, Colorado	RAUL RUIZ, California
BRAD R. WENSTRUP, Ohio	ANN M. KUSTER, New Hampshire
JACKIE WALORSKI, Indiana	BETO O'ROURKE, Texas
RALPH ABRAHAM, Louisiana	KATHLEEN RICE, New York
LEE ZELDIN, New York	TIMOTHY J. WALZ, Minnesota
RYAN COSTELLO, Pennsylvania	JERRY MCNERNEY, California
AMATA RADEWAGEN, American Samoa	
MIKE BOST, Illinois	

JON TOWERS, *Staff Director*

DON PHILLIPS, *Democratic Staff Director*

SUBCOMMITTEE ON ECONOMIC OPPORTUNITY

BRAD WENSTRUP, Ohio, *Chairman*

LEE ZELDIN, New York	MARK TAKANO, California, <i>Ranking</i>
AMATA RADEWAGEN, American Samoa	<i>Member</i>
RYAN COSTELLO, Pennsylvania	DINA TITUS, Nevada
MIKE BOST, Illinois	KATHLEEN RICE, New York
	JERRY MCNERNEY, California

Pursuant to clause 2(e)(4) of rule XI of the Rules of the House, public hearing records of the Committee on Veterans' Affairs are also published in electronic form. **The printed hearing record remains the official version.** Because electronic submissions are used to prepare both printed and electronic versions of the hearing record, the process of converting between various electronic formats may introduce unintentional errors or omissions. Such occurrences are inherent in the current publication process and should diminish as the process is further refined.

CONTENTS

Tuesday, June 2, 2015

	Page
Legislative Hearing on H.R. 356, H.R. 832, H.R. 1994, H.R. 2133, H.R. 2275, H.R. 2344, H.R. 2360, H.R. 2361, and A Draft Bill Entitled "To Amend Title 38, United States Code, to Make Certain Modifications and Improvements in the Transfer of Unused Educational Assistance Benefits Under the Post-9/11 Educational Assistance Program of the Department Of Veterans Affairs, and for Other Purposes"	1
OPENING STATEMENTS	
Hon. Brad Wenstrup, Chairman	1
Hon. Mark Takano, Ranking Member	3
WITNESSES	
Hon. Paul Cook (CA-8)	7
Hon. Sean Patrick Maloney (NY-18)	8
Hon. Bill Flores (TX-17)	13
Mr. Paul R. Varela, Assistant National Legislative Director, DAV	10
Prepared Statement	41
Mr. Brendon Gehrke, Senior Legislative Associate, National Legislative Service, Veterans of Foreign Wars of the United States	12
Prepared Statement	47
Mr. Steve Gonzalez, Assistant Director, Veterans Employment and Education Division, The American Legion	15
Prepared Statement	54
Mr. David Borer, General Counsel, American Federation of Government Employees, AFL-CIO	16
Prepared Statement	61
Mr. Christopher Neiweem, Legislative Associate, Iraq and Afghanistan Veterans of America	18
Prepared Statement	72
Mr. Rick Weidman, Executive Director, Government Affairs, VVA	20
Prepared Statement	78
Mr. Curtis L. Coy, Deputy Under Secretary for Economic Opportunity, VBA, U.S. Department of Veterans Affairs	29
Prepared Statement	88
Accompanied by:	
Ms. Cathy Mitrano, Deputy Assistant Secretary for the Office of Resource Management, Human Resources and Administration, U.S. Department of Veterans Affairs	
Ms. Teresa W. Gerton, Acting Assistant Secretary, Veterans' Employment and Training Service, U.S. Department of Labor	31
Prepared Statement	107
Dr. Susan S. Kelly, Director Transition to Veterans Program Office, Office of the Under Secretary of Defense for Personnel and Readiness, U.S. Department of Defense	33
Prepared Statement	116

IV

STATEMENT FOR THE RECORD

Page

Statement of Rep. Markwayne Mullin	122
Veterans Education Success	123
U.S. Merit Systems Protection Board	148

**LEGISLATIVE HEARING ON H.R. 356, H.R. 832,
H.R. 1994, H.R. 2133, H.R. 2275, H.R. 2344, H.R.
2360, H.R. 2361, AND A DRAFT BILL ENTI-
TLED “TO AMEND TITLE 38, UNITED STATES
CODE, TO MAKE CERTAIN MODIFICATIONS
AND IMPROVEMENTS IN THE TRANSFER OF
UNUSED EDUCATIONAL ASSISTANCE BENE-
FITS UNDER THE POST-9/11 EDUCATIONAL
ASSISTANCE PROGRAM OF THE DEPART-
MENT OF VETERANS AFFAIRS, AND FOR
OTHER PURPOSES”**

Tuesday, June 2, 2015

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS’ AFFAIRS,
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:09 p.m., in Room 334, Cannon House Office Building, Hon. Brad Wenstrup [chairman of the subcommittee] presiding.

Present: Representatives Wenstrup, Costello, Bost, Takano, Titus, Rice, and McNerney.

Also Present: Representative Miller of Florida.

OPENING STATEMENT OF CHAIRMAN BRAD WENSTRUP

Dr. WENSTRUP. Good afternoon, everyone. The subcommittee will come to order.

Before we begin, I would like to ask unanimous consent that our colleague Chairman Miller be allowed to sit at the dais, to make opening statements, and ask questions.

Hearing no objection, so ordered.

I want to thank you all for joining us here today to discuss legislation pending before the subcommittee concerning education benefits, employment programs for our returning servicemembers and veterans, as well as accountability at the Department of Veterans Affairs.

This afternoon, we have nine important pieces of legislation before us.

I will focus my remarks on one of these bills, which I introduced earlier this year, H.R. 2344, the Veterans Vocational Rehabilitation

and Employment Improvement Act of 2015, as well as the draft bill that is on the agenda.

VA's Vocational Rehab and Employment, VR&E, program exists to help disabled veterans become employment-ready or to assist the most severely disabled reach a point of maximum independent daily living. For years, we have heard from veterans and VSOs that the time it takes to complete a rehabilitation plan from the time of application to full rehabilitation is too long. And they have also said that the caseload for counselors is too high, which then doesn't allow the counselor to appropriately help each client.

According to VA, on average, veterans spend anywhere between 5 to 10 years in the program—which, if that is how long it takes to rehabilitate some of these veterans, then that is understandable, but I fear that this extended length of time could also be due to an overworked system, a large caseload per counselor, and reliance on a primarily paper-based processing system.

H.R. 2344 is aimed at ensuring veterans are receiving thorough and diligent assistance from their counselors and that they are provided the best resources possible to get them back to an employment-ready status or to a position where they are able to live independently on their own. Our disabled veterans, who have sacrificed so much, deserve to have a fulfilling life following their service.

This bill would require that if a veteran is pursuing a course of education or training through VR&E that the program be approved for GI Bill benefits. Under current law, if a veteran is going to school through Voc Rehab, that school does not need to be approved by VA and the State approving agencies for GI Bill benefits.

Programs will have a year following enactment to come into compliance with these rules. But I hope that this will increase oversight, and ensure that there aren't any so-called fly-by-night schools taking advantage of our disabled veterans.

My bill would also change the law so that if a veteran is doing any adaptations to their home through VR&E that those changes be made under the rules already existing for specially adapted housing grants and by their employees, as opposed to the veteran's Voc Rehab counselor overseeing the changes. This accomplishes two things: gets these counselors out of the business of making home construction decisions and instead allows them to focus on their primary goal, to rehab the veteran; and ensures that experts who deal with home adaptations on a daily basis are now the ones handling oversight of these projects so we can ensure veterans are getting the best outcomes in their homes.

My bill would also encourage and authorize the Secretary to prioritize VR&E services based on need so that the VA can take into account things such as disability ratings, severity of employment handicaps, income, and other factors as the Department and its counselors are managing their ever-growing caseload. This provision is not to push any veterans out of the program but would be there to allow VA to prioritize the most disabled and employment-handicapped veterans as they seek VR&E services.

Lastly, H.R. 2344 would require the Secretary to reduce redundancies and process all VR&E claims and payments in a paperless system, and it authorizes \$10 million to upgrade their IT systems to make the change. VR&E has told us that they are cur-

rently in the process of updating their systems and that they have received authorization and funding for this upgrade. However, we have seen in the past that this money can easily be shifted elsewhere at any point. Shifting Voc Rehab to a paperless system will speed up the application process, increase efficiency, and assist in a quicker rehabilitation timeline for veterans in the program.

I do believe VR&E is constantly improving, and I appreciate the work the VR&E service director, Jack Kammerer, and his employees do on a daily basis. And the purpose of this bill is to assist them in their critical mission for disabled veterans.

Lastly, today, we will also be discussing a draft bill that deals with GI Bill transferability issues. The draft came from recommendations made by the Military Compensation and Retirement Modernization Commission earlier this year. The draft would change the service time requirement to be eligible to transfer GI Bill benefits to dependents to 10 years, with an additional 2-year commitment. Currently, the time requirement is 6 years, with an additional 4-year commitment.

The draft bill would also reduce the monthly living stipend that transferees receive by half of its current rate. The commission recommended cutting the living stipend completely for dependents. However, I do think that there should be some amount of a stipend to be given to transferees, as that is in many cases also a benefit to their spouse or parent who served and transferred them this benefit.

If we are to move this bill forward, I would commit to using the savings from these changes to improve GI Bill benefits or other programs for veterans, which I think we can all agree is important.

With that being said, I am eager to discuss each of the nine pieces of legislation before us today. And I am grateful to my colleagues who have introduced these bills and to our witnesses for being here to discuss them with us, and I look forward to a productive and meaningful discussion.

I will now yield to my colleague, Ranking Member Takano for any opening statement he may have.

OPENING STATEMENT OF RANKING MEMBER MARK TAKANO

Mr. TAKANO. Thank you, Mr. Chairman.

As we gather today, I just want to take a moment to thank you, Chairman Wenstrup, for conducting the Economic Opportunity Subcommittee in such a productive, positive, and bipartisan manner in this Congress. You have led the EO Subcommittee so that it has become the most productive of the four House Veterans' Affairs Committee subcommittees thus far in the 114th Congress. Under your leadership, we have conducted a legislative hearing and a markup under regular order, and we have forwarded 11 bills favorably to the full committee with unanimous bipartisan support. Five of our bills have actually passed the House.

I particularly want to also congratulate my colleague, who is not here, Miss Rice, on seeing her very first piece of legislation pass the House, H.R. 1382, the BRAVE Act.

So, on this high note, today we begin our second round of legislative hearings with nine bills before us. I have introduced two of these bills: H.R. 2360, the Career-Ready Student Veterans Act, and

H.R. 2361, the Work-Study for Student Veterans Act. I am very grateful that both enjoy bipartisan support.

The first, H.R. 2360, the Career-Ready Student Veterans Act, ensures that career education programs designed to prepare our student veterans for entry into the workforce are actually doing so. The bill would mandate that programs meet certain requirements in order to be eligible to receive GI Bill benefits.

Currently, education programs can be eligible for GI Bill benefits even if they lack proper accreditation or do not meet State licensure or certification requirements. This means that veterans can use their hard-earned education benefits to attend programs that do not prepare them for a career in their field of study. H.R. 2360 would change this policy so that student veterans could only use their GI Bill benefits at education programs that meet proper accreditation, licensure, and certification requirements.

Now, the Department of Defense already has this policy in place to protect servicemembers using tuition assistance benefits. It only makes sense that Congress should protect student veterans in the same way.

I am very proud to say that H.R. 2360 enjoys clear bipartisan support, and I urge my colleagues to consider supporting the bill as we listen to the testimony today.

My second bill, H.R. 2361, the Work-Study for Student Veterans Act, reinstates certain Department of Veterans Affairs student work-study activities that expired on June 30, 2013.

Through the VA's Student Work-Study Allowance Program, qualifying student veterans in college degree programs or vocational or professional programs are paid to work in a variety of capacities on campus at VA facilities or at other veterans-centered organizations to assist fellow veterans.

The work-study program achieves two important goals: offering student veterans a way to earn a little extra money, and providing transitioning veterans with the guidance and assistance of fellow veterans who know firsthand what the transition is like.

Unfortunately, the 113th Congress in the Senate failed to act on H.R. 1453, the Work-Study for Student Veterans Act, which passed the House and would have extended the authorization for several qualifying VA work-study activities.

I hope my colleagues will join me in support of this bill as we go forward. I hope we might hear from the VA today that they would like to see this program made permanent.

Now, there is a lot on the agenda, and I don't want to take up too much time here, but I do appreciate all of our witnesses for being here today, and I look forward to their testimony.

Thank you, Mr. Chairman. I yield back.

Dr. WENSTRUP. Thank you, Mr. Takano. I want to thank you for your kind words, and I appreciate the opportunity of working together with you on this subcommittee.

I will now yield to Chairman Miller of the full committee to discuss his bills, H.R. 1994 and H.R. 2275.

Chairman Miller, you now recognized.

Mr. MILLER. Thank you very much, Chairman Wenstrup, Ranking Member Takano. I appreciate the opportunity not only to sit at the dais today but also to present a couple of pieces of legislation

for your consideration today. I also appreciate the fact that you are allowing me to speak before Colonel Cook.

Sir.

I want to focus on the two bills that you talked about, H.R. 1994 and the VA Accountability Act of 2015. It provides the Secretary of the Department of Veterans Affairs with yet another tool to remove any VA employee for poor performance or misconduct. And the provision is simply an extension of the same authority that we passed last summer in the Choice Act to remove senior executives.

To prevent retaliation, the bill would protect whistleblowers by not allowing the Secretary to use this authority on employees who have filed a complaint with the Office of Special Counsel. This provision is critically important as we continue to uncover many instances of whistleblower retaliation, and the last thing I want is for this new provision that is meant to hold bad employees accountable to instead harm legitimate whistleblowers.

Now, additionally, this bill would require that all probationary periods for new VA employees last for at least 18 months instead of the current period of 1 year. It would also give the Secretary the authority to extend this probationary period as he or she would see fit. The provision was at the suggestion from Partnership for Public Service, a good government think tank, and will give VA supervisors more flexibility to determine new employees' performance before they actually become a permanent employee of the Department. I would also note that most medical professionals in VA are already required to complete a 2-year probationary period.

Finally, the bill would require that the Government Accountability Office would conduct a study of VA time, space, and resources devoted to labor union activities.

Some have said that this bill is nothing but a partisan attack against hardworking VA employees. This could be no further from that particular truth. As I have stated from day one, I believe that 99 percent of VA's more than 300,000 employees are dedicated and hardworking and are not part of the problem that exists at VA today.

The true problem is that, more than a year after enduring the biggest scandal in VA history, in which 110 VA facilities allegedly maintained secret lists to hide wait times, the Department has fired only one for wait-time manipulation—just one person. Even worse, rather than disciplining bad employees, VA often just transfers them to other VA facilities or puts them on paid administrative leave for months on end as they receive their full salary and waste taxpayer dollars.

Whether it is Philadelphia, Reno, Nashville, Phoenix, or a plethora of other facilities, VA's tradition of transferring problem workers, putting them on paid leave, or simply allowing them to go virtually unpunished continues because current civil service rules make it nearly impossible to hold bad employees accountable. One of the reasons I know this is because high-ranking officials at VA, people who work directly for the Secretary, have told me, in fact, that this is the case.

In a hearing last month, Deputy Secretary Gibson also said it was too hard to fire employees at VA. In one instance, the Office of Inspector General completed a well-documented report proving

one employee's blatant disregard for government regulations and rules. And, in this report, the IG recommended that the employee pay back tens of thousands of dollars in wasted time, wages, and travel fees which the employee had basically stolen during his time as a VA employee. Furthermore, the IG recommended that VA take administrative action against the employee.

So what did VA do with this report and the recommendations that were contained in it? Well, they reached a settlement agreement with the employee which only required the individual to pay back one-third of the amount of money the IG said the employee owed, allowed the employee to resign as opposed to being fired from VA, expunged all documentation from his official record regarding his misconduct during his time as a VA employee, and required VA to pay the employee several thousands of dollars to cover his attorney's fees he incurred during VA's investigation and their settlement.

We have asked the Department whether this employee has indeed paid back the amount he owed, and, although we are still awaiting a response, I have a sneaking suspicion that he has yet to pay back a single dime that was owed.

I am sure many people would be shocked to learn about the incident I just described and will wonder why VA just didn't do the right thing and fire this individual as well as collect the money that he owed the government. Well, the answer to that question lies in this chart that is going to be placed up on the screens that was part of a GAO report on the civil service from earlier this year. And you also have it in your binder.

Mr. MILLER. They found that it takes, on average, 6 months to a year and sometimes significantly longer to fire somebody at the VA. Once they are actually removed, the MSPB has cited that in 2013 it took an average of 243 days from start to finish to adjudicate an appeal.

The process illustrated by this chart is exactly the type of thing that makes the average citizen lose faith in their government and causes quality healthcare professionals and managers to think twice when considering whether or not they would work at VA. After all, why would anyone want to work for an organization where corrupt behavior that harms veterans and wastes taxpayer money is not only tolerated but often goes virtually unpunished because there is too much paperwork?

Is this what our citizens want? Is this what our veterans deserve? I don't think so, and neither do the more than 40 bipartisan cosponsors of my bill or the leading VSOs that support it. So it is time to bring commonsense measures to VA and give the Secretary the tools that he or she will need in the future to hold VA employees accountable.

Now, my second bill on the agenda is H.R. 2275, the Jobs for Veterans Act of 2015. This bill would realign all education and training programs for veterans into the new Economic Opportunity and Transition Administration at the VA. This means that VA's Education Service, Loan Guarantee Service, Vocational Rehabilitation and Employment Service, the Center for Veterans Enterprise, and VA's TAP program would transfer over from the Veterans Benefit Administration to this new administration.

The bill would also transfer the Veterans Employment and Training Service from the Department of Labor to this new administration within VA. The bill would require that VA and Department of Labor enter into a memorandum of understanding to ensure a smooth transition of these programs and employees. And it would require that VA create this new administration using already-existing resources.

I understand this is a major change in the way the Federal Government oversees job training and programs for training, but, as the old saying goes, the definition of “insanity” is doing the same thing over and over again but expecting different results. Decades of GAO reports and other reports have shown that the programs that Department of Labor’s VETS administers have continually been ignored by the Department of Labor regardless of the political party in the White House.

It is time to bring all employment and training programs under one roof, as this will eliminate duplication, it will streamline processes, and, most importantly, it will improve veteran opportunities for future employment.

And, Mr. Chairman, I appreciate the opportunity again, and I yield back my time.

Dr. WENSTRUP. Well, thank you, Chairman Miller. And I appreciate your deep dive into these issues. I think it is unfair not only to our veterans but to the thousands of good VA employees that there they are, devoted to the veteran, and we have those that take advantage of working in the system. I appreciate your testimony.

It is an honor today to be joined by our colleagues Colonel Paul Cook of California and Mr. Sean Maloney of New York at the witness table today. And I understand Mr. Flores will be here shortly.

Mr. Flores and Colonel Cook used to serve on this committee, and Mr. Flores used to be the chairman of this subcommittee last Congress. So I am sure it is a little bit of a different view for him when he gets here and sits at the witness table.

But I thank all three of you for being here.

Colonel Cook, you are now recognized.

STATEMENT OF THE HON. PAUL COOK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. COOK. Thank you, Mr. Chairman.

It was no problem yielding to Chairman Miller. It was a little bit disconcerting to see that when he was giving the definition of “insanity” he looked over at me. I don’t want to read into it.

Anyway, my bill, H.R. 832, ensures that veterans are receiving effective and successful employment training services.

This bipartisan bill authorizes an independent organization to collect and analyze data on the effectiveness of the Department of Labor’s Veterans’ Employment Training Service. The study will focus on veterans who have received intensive services from two programs under VETS: the Disabled Veterans Outreach Program and the Local Veterans Employment Representatives Program.

Disabled Veterans Outreach Program specialists provide job training for veterans, with special emphasis on veterans with service-connected disabilities. These specialists help veterans to be competitive in the labor market. They focus on veterans who are

economically or educationally disadvantaged, including homeless veterans and veterans with barriers to employment. Local veterans employment representatives conduct outreach to employers and focus on increasing and promoting the hiring of veterans.

The study will track the employment status of veterans who have received these services, determine if the program contributed toward their employment, monitor the employment retention rate, and determine if the services provided helped them increase their average earnings. A report on the findings will be presented to the Committee on Veterans Affairs in the House and Senate every year for the next 5 years.

Congress owes it to our veterans to provide them with the best employment services possible. Simply authorizing these programs isn't enough; we have to follow up and ensure they are working as intended. We saw at the VA what happens when the bureaucracy isn't subject to vigorous oversight. If we are going to authorize these programs to boost veteran employment, Congress has the duty to ensure that they are working.

You know, we have talked about this over and over again. Before I finish up, I do want to thank Congressman Costello and Congresswoman Titus for cosponsoring this bill.

The bottom line is that, with the military and veterans, we have a responsibility to take care of the troops. If a program is there to provide a certain function or mission, we have to make sure it is working; if not, get rid of it or change it. We owe that much to our veterans.

Thank you very much for letting me present this bill.

Dr. WENSTRUP. Well, thank you, Colonel Cook.

Mr. Maloney, you are now recognized.

STATEMENT OF THE HON. SEAN PATRICK MALONEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. MALONEY. Thank you, Mr. Chairman. It is an honor to be here with all of you and with my colleague Colonel Cook. He and I had the opportunity to lay a wreath at the Tomb of the Unknown Soldier just last week. I stood and watched while he performed that difficult duty in the rain.

Mr. COOK. I didn't drop it.

Mr. MALONEY. It was an honor to be there with him, and it is an honor to be here with all of you.

Mr. Chairman, Ranking Member Takano, members of the committee, thank you for holding this hearing and allowing me to testify in support of my bill, H.R. 356, the Wounded Warrior Employment Improvement Act. I know the committee has a lot of work to do, so I will be brief.

First off, I would like to thank Ranking Member Takano and Congressman Markwayne Mullin, who joined me as original cosponsors of this bill and worked to help move this legislation forward. I would also like to acknowledge the Wounded Warrior Project, which played a key role in crafting the legislation. And thank you to the staff of the Veterans' Affairs Committee for working with my office on this, as well.

My dad, Jim Maloney, was a World War II-era veteran who was fairly injured in the line of duty in 1946 aboard the USS Manchester. The guy next to him was killed. And my dad spent months in a naval hospital, about a year, trying to get back to his life. You know, his high school sweetheart, my mom, wrote him a letter every day that he was in that hospital, and he credits her and those letters with leading him back to a productive life.

But the truth is, when he finally got out of that hospital, his government was also there for him. It invested in him. He was able to go to school. He was able to get a job. He was able to start a family, have six kids, send us all to school, live his dream. And that, after all, is what it is all about.

But today too many members of the military return home only to struggle to reenter the workforce or to enter it for the first time. This problem is particularly prevalent among the roughly 3 million veterans who, like my dad, came home with a service-related disability. Our veterans deserve to know that when they come home their country will not forget their service. I know we all agree about that, and we have an obligation to safeguard that promise.

The VA's VR&E program is the critical tool for helping combat-disabled veterans find their place in the workforce, but, unfortunately, as a 2014 GAO report found, the program is badly in need of reform. The report highlighted problems with staff allocation and training, overwhelmed caseworkers, and flawed performance metrics that make it difficult to accurately gauge the program's effectiveness.

So my legislation is straightforward and simple. It would require the VA to develop a specific action plan to fix the problems identified in this GAO report. This bill would help reduce caseloads, increase enrollment in education programs, and implement a new training program to ensure that the staff are able to meet the needs of today's veterans, particularly those with traumatic brain injury and PTSD.

I am proud that this bill has the support of AFGCE, the IAVA, the Wounded Warrior Project, Vets First, and the American Legion.

I know that the VA has already taken steps to address some of these issues, and I appreciate that work, but, as the GAO report acknowledged, quote, "weaknesses remain." We cannot stop improving this program until it works and until it works well. We all know that, when given the opportunity, American veterans thrive in the workforce. They just need a government that is as good as they are and that is committed to investing in their success.

Thank you, and I look forward to working with all of you in support of this important goal. And I appreciate the opportunity to appear before you today.

Dr. WENSTRUP. Thank you, Mr. Maloney.

And I thank you both for bringing forth these bills and speaking on them at today's subcommittee hearing.

Unless there are any questions for our colleagues, you are now excused.

I now invite our second panel to the table: Mr. Paul Varela, the assistant national legislative director for Disabled American Veterans; Mr. Brendon Gehrke, senior legislative associate for the National Legislative Service at the Veterans of Foreign Wars of the

United States; Mr. Steve Gonzalez, assistant director for the Veterans Employment and Education Division at the American Legion; Mr. David Borer, general counsel for the American Federation of Government Employees and AFL-CIO; Mr. Christopher Neiweem, legislative associate at the Iraq and Afghanistan Veterans of America; and, finally, Mr. Rick Weidman, executive director for government affairs at the Vietnam Veterans of America.

I thank you all for being here, your service to our Nation in uniform, and for your hard work and advocacy for veterans.

Mr. Varela, we will begin with you, and you are now recognized for 5 minutes.

STATEMENT OF PAUL R. VARELA

Mr. VARELA. Good afternoon, Chairman Wenstrup, Ranking Member Takano, and members of the subcommittee. DAV appreciates the opportunity afforded to us today to testify at today's legislative hearing.

For the following bills—H.R. 832, 2360, 2361—and the draft bill regarding the transfer of unused educational assistance benefits under the Post-9/11 GI Bill, DAV has no resolution from our members pertaining to the issues identified within these bills but would not oppose passage of the legislation. For the remaining bills, we would like offer our views and, in some cases, our recommendations.

H.R. 356 contains several provisions, one of which would require the Secretary of VA to perform an analysis and make recommendations in a report to Congress to encourage Post-9/11 GI Bill-eligible veterans to use Vocational Rehabilitation and Employment, VR&E, benefits and services. We have no resolution from our membership regarding this issue.

DAV would not oppose the bill's passage; however, encouraging veterans with eligibility under Post-9/11 GI Bill to instead use VR&E benefits and services will require additional resources in VR&E to meet increased demand. VR&E's current counselor-to-client ratio remains high, which contributes directly to delays in delivering timely and effective services.

DAV and our independent budget partners have recommended a more practical counselor-to-client ratio of 1 to 125. To achieve this ratio in fiscal year 2016, VR&E would require an additional 382 full-time-employee equivalents, FTEE, 277 dedicated as VR&E counselors, and the remaining 105 employees dedicated towards support services, bringing VR&E's total FTE strength to 1,824.

DAV calls on Congress to increase staffing levels within VA's VR&E program in accordance with our National Resolution No. 052. If Congress intends to encourage increased use of VR&E by Post-9/11 GI Bill-eligible veterans, then adequate resources will be essential to strengthen this critical program to meet the demand.

H.R. 1994 would provide the VA Secretary with the authority to remove or demote employees based on performance or misconduct. We have no resolution from our membership on this topic and take no position on this bill.

H.R. 2133 would provide additional training options under the Transition Assistance Program, now TAP GPS, to members of the Armed Forces separating from Active Duty. The Secretary of De-

fense and Homeland Security would be required to provide additional training opportunities to these servicemembers. In accordance with DAV Resolution No. 053, we support this bill. Expanding training opportunities to these separating servicemembers will only help to better their chances of success when competing within the civilian job market.

H.R. 2275 would establish within VA a new Veterans Economic Opportunity and Transition Administration. It would improve employment and educational opportunities for veterans by consolidating various VA programs now managed by the Veterans Benefits Administration and also transfer veteran-focused programs from Department of Labor to VA.

Mr. Chairman, DAV previously testified before this subcommittee on February 12, 2015, regarding this very issue and encouraged Congress to introduce and enact this proposal. We are pleased to support this bill, consistent with DAV Resolution No. 227.

Consolidation has the potential to streamline and enhance economic and employment prospects for wounded, injured, and ill wartime veterans and provide them with meaningful and gainful opportunities. Ensuring these veterans and their families have optimal, seamless access to employment and economic prospects and services is a central concern of our organization. In the wake of war, we believe that we reflect the concerns of the entire Nation. DAV welcomes the opportunity to work with this subcommittee to see this justified reform enacted into law, and DAV thanks the sponsor for introducing this bill.

H.R. 2344 seeks to make improvements within VA's VR&E program that would affect the approval of courses pursued under VR&E, eligibility for special adapted housing, and new authority to prioritize VR&E services based on need for program participants, and a \$10 million authorization for related information technology enhancements.

DAV has no resolution from our membership on the particular issues identified within this bill but would not oppose passage of the legislation. However, we would recommend adding three additional reporting requirements: first, a report that captures information pertaining to the disapproval of courses under VR&E that fail to meet the approval standards set forth within the Montgomery GI Bill and Post-9/11 GI Bill programs; second, a report that collects information relative to the number of waivers seeking course approval and the disposition of any waiver requests; and, third, a report capturing information regarding need-based prioritizations.

Chairman Wenstrup, Ranking Member Takano, and members of the subcommittee, this concludes my testimony, and I am prepared to answer any questions you may have.

[THE PREPARED STATEMENT OF PAUL R. VARELA APPEARS IN THE APPENDIX]

Dr. WENSTRUP. Well, thank you very much.

Mr. Gehrke, you are now recognized for 5 minutes.

STATEMENT OF BRENDON GEHRKE

Mr. GEHRKE. Chairman Wenstrup, Ranking Member Takano, and members of the subcommittee, thank you for allowing me to present the VFW views on the pending legislation.

The VFW supports the intent of H.R. 356; however, we suggest that the Congress take a different approach. We share the concern that VR&E may not be able to serve the veterans who need it most if Congress does not make changes to the current system. However, we are doubtful that a VA action plan will remedy VR&E's access issues and may unnecessarily burden an already overworked agency. Instead, Congress should fund the longitudinal study that it authorized in the Veterans Benefits Improvement Act of 2008 so that VA can identify problems and modify VR&E to better serve veterans.

To better understand the veteran hiring experience, the VFW supports H.R. 832, and we urge the committee to appropriately fund the study.

The VFW strongly supports H.R. 1994, Chairman Miller's VA Accountability Act of 2015. We believe that VA and Congress must collaborate to identify and fix what is broken within VA, must hold employees accountable, and must do everything possible to restore veterans' faith in their VA.

In addition, we urge the committee to take a multidimensional approach to tackling issues with VA's human resource practices. The VFW is concerned with whistleblower retaliation, VA's hiring process, and the sinking morale of VA employees. A Federal survey shows that less than 50 percent of VA employees feel that arbitrary action, personal favoritism, and coercion for partisan political purposes is not tolerated. Also, VA employee satisfaction scores fell in 76 out of 84 measures within the last year.

With low morale comes a high price tag. The Gallup organization estimates that millions of disengaged employees cost the American economy as much as \$350 billion per year in lost revenue as a result of low employee morale. VA can't afford to lose time and money from poor hiring practices or low employee morale. We fear that VA's workforce productivity could further decline due to staffing shortages and low employee morale if VA cannot attract and keep high-achieving employees.

We believe that, in order to help foster a culture of accountability, Congress should include language in the bill to prevent whistleblower retaliation and provide VA with additional resources to recruit, train, and retain the best employees.

The VFW supports H.R. 2275. The VFW supports this bill because it can protect veterans job programs from sequestration, better ensure that veterans job programs receive proper congressional oversight, and improve veterans' access to job programs by streamlining government services. Also, Congress must ensure that Veterans' Employment Training Services is always properly funded no matter what agency has authorization over the program—or authority over the program.

The VFW supports H.R. 2344, except section 4. Section 4 requires VA to prioritize certain disabled veterans over other disabled veterans for access to VR&E programs. The VFW believes

that no veteran should have to wait or be denied the VA services that they have earned.

This provision calls for VA to manage to a budget instead of the need. As we have recently witnessed, this tactic leads to veterans being denied care and services they need to maintain a healthy life and provide for their families. We cannot allow this to happen again, and Congress must fully fund all of VA and expand VR&E resources so they can better provide employment services to disabled veterans.

The VFW supports H.R. 2360 to ensure schools who are eligible for the GI Bill are offering programs that award student veterans with proper programmatic accreditation that meets veterans' and employers' expectations.

Unfortunately, some schools offer degrees that do not provide graduates the needed credentials to qualify for the professions within their field of study. Worse yet, when asked, many of these schools offer prospective students unclear information about programmatic accreditation and their requirements for professional certification.

This is not a wise use of taxpayer dollars, it allows students to use money, whether it comes from military tuition assistance or the GI Bill, for degrees that will not result in more veterans being employed.

The VFW supports H.R. 2361.

Regarding the draft bill language, the VFW played an integral role in passing the Post-9/11 GI Bill, and we have a vested interest in ensuring the long-term viability of veterans education programs. The GI Bill's primary use should be to help veterans reintegrate into civilian life by providing the education and skills necessary to gain meaningful employment.

And the retention aspect should never provide a greater benefit to dependents than it does to wartime veterans. Therefore, any reduction of certain elements in the GI Bill must include increases for those who need it most. The committee should concentrate on closing gaps in the Fry Scholarship and improving the benefit to Guardsmen and Reservists who deployed overseas in defense of our country, especially those who are recovering from wounds or injuries incurred on Active Duty.

This concludes my remarks, and I look forward to answering any questions the committee may have.

[THE PREPARED STATEMENT OF BRENDON GEHRKE APPEARS IN THE APPENDIX]

Dr. WENSTRUP. Well, thank you, Mr. Gehrke.

And before we go to Mr. Gonzalez, I would like to pause for a second to recognize Mr. Flores of Texas and give him an opportunity to share his remarks on his bill, H.R. 2133.

**STATEMENT OF THE HON. BILL FLORES, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF TEXAS**

Mr. FLORES. Okay. Thank you, Chairman Wenstrup and Ranking Member Takano. It is great to be back in this esteemed committee today.

I am here today to testify in support of my bill, H.R. 2133, the Servicemembers' Choice in Transition Act. I introduced this legisla-

tion during the 113th Congress as the former chair of this subcommittee and was pleased to see it pass through the subcommittee last Congress.

The Servicemembers' Choice in Transition Act is meant to enhance the Transition Assistance Program, or TAP, that was required for all separating servicemembers in the VOW to Hire Heroes Act of 2011. TAP is a joint DoD, DoL, and VA program that provide training to servicemembers about veterans benefits, job search skills, pre-separation counseling, resume writing, interview preparation, and other transition training.

The bill would modify TAP to enable those leaving military service to attend the additional 2-day in-depth informational tracks that are currently optional. These three tracks cover career technical training, entrepreneurship opportunities, and access to higher education.

As I said before, the VOW to Hire Heroes Act required mandatory attendance at TAP for all but a few servicemembers. However, it is currently not mandatory for base commanders to allow servicemembers to attend these three tracks. Unfortunately, by not requiring these tracks, DoD's model for TAP falls short in providing sufficiently detailed information for transitioning servicemembers and preparing them for civilian life. The Post-9/11 GI Bill, for example, is a very generous benefit and could be worth well over \$250,000 to a veteran over 4 years. So it is important that the veteran is fully briefed on what that benefit can provide in the long run.

Furthermore, if a veteran was planning to go to college and use their Post-9/11 benefits, the education track would help them decide whether they are even ready for postsecondary education and/or what school best fits their needs. If they are not ready for school, then the education track gives a veteran an opportunity to be briefed on how to get ready, on how to set their education or training goals, on how to find out what schools would best meet their education or training goal, and on how to complete the admissions process, and, finally, how to finance their education or their training.

The importance of educating transitioning servicemembers before they use their GI Bill benefits was further highlighted and recommended to be mandatory for those who want to use their benefits in the recent 2015 Military Compensation and Retirement Modernization Commission report.

I believe that H.R. 2133, in making the optional tracks mandatory, would play an instrumental role in filling the gap as servicemembers transition from Active Duty to civilian life, while also giving the military services flexibility to meet those requirements. We owe it to our veterans to ensure that their transition into the workforce is as smooth as possible. By modifying the required contents of TAP, we are offering our servicemembers alternative training paths to better suit their intentions and to provide them with the tools for successful transition into civilian life.

Again, I want to thank the subcommittee for their time and support today. I also want to thank all the veterans service organizations that have shown support for this legislation in the past and today. And I urge passage of 2133.

And I yield back.

Dr. WENSTRUP. Well, thank you, Mr. Flores.

We will now continue on with the panel.

And, Mr. Gonzalez, you are recognized for 5 minutes.

STATEMENT OF STEVE GONZALEZ

Mr. GONZALEZ. Thank you, Mr. Chairman.

Good afternoon, Mr. Chairman and Ranking Member Takano, members of the subcommittee. Thank you for this opportunity to allow me to present the views of the American Legion, America's largest wartime veterans service organization, on several pieces of legislation being considered by the committee today.

Due to allotted time available, I will concentrate on three of the bills. First, I will address H.R. 832, the Veterans Employment and Training Service Longitudinal Study Act of 2015.

The American Legion would support a longitudinal study of the job counseling, training, and employment placement services, JVSG services, only if the bill were altered to direct the Secretary of Veterans Affairs to contract for this study as opposed to the Secretary of Labor.

In 2012, a similar proposal was made to study the Department of Labor employment services. At this time, Chairman Miller has stated more study was not needed and, quote, "We have already study after study over the years that say the program does not work." The American Legion agrees with the chairman's assessment. A longitudinal assessment of the Department of Labor VETS performance can already be read in the 16 GAO and OIG reports dating back to 1997. All reports reveal negative findings.

Therefore, such a detailed study would be better implemented after JVSG and the HVRP are moved to VA and set under the purview of the Secretary of Veterans Affairs. The American Legion supports this legislation.

Next, I will address H.R. 2275, Jobs for Veterans Act of 2015.

The American Legion has long supported the Department of Labor Veterans Employment and Training Services, or better known as DOL-VETS. Unfortunately, the good faith of the veterans in this program have been rewarded with ongoing program management problems, including a lack of accountability.

Department of Labor's budget request makes it painfully clear that the agency with the monumental task of helping Americans to be gainfully employed is unable to give the proper attention to veterans employment issues that our constituents deserve.

At this juncture, the American Legion believes that the best way to improve DOL-VETS is to transfer the Jobs for Veterans State Grants and the Homeless Veterans Reintegration Portion of the program to VA. Though there is a place for a veterans office within Department of Labor, the American Legion believes these two programs would be better served if they were located in a new administration consolidated under the VA.

Lastly, I will address H.R. 2360, the Career-Ready Student Veterans Act.

Institution accreditation is typically done by regional and national accreditation bodies. Programmatic accreditation is for specific programs offered within an educational institution. Programs

are typically accredited by specialized organizations. By not having the program accredited by the appropriate body, the individual does not make effective use of the GI Bill benefit if an individual uses the benefit to prepare for a license or certification occupation but the program does not meet the licensure requirements.

The American Legion will urge the Congress apply this requirement equally to all institutions of higher learning as well as non-accredited schools. We also urge Congress also include all deemed approved degree programs and assure that the State approving agencies can have adequate oversight of all institutions of higher learning if we are to implement this piece of legislation.

The American Legion does have two questions or concerns.

One, does the proposed legislation only cover meeting the licensure or certification standards in the respective State where the institution is located? If that is the case, it is troubling for those veterans who do not plan to practice in the State where the school is located or individuals taking distance learning courses. The legislation should make clear who would determine the requirements for these programs or approval in all the States.

And then the last, number two: If the intent of the Congress is to add to the existing workload of the State approving agencies, which are already spread thin, then the Congress should give great consideration and reevaluation of the existing budget of the SAAs, to include increasing such budgets to ensure that the SAAs are able to meet their current workload as well as the possibility of this new add-on.

Thank you, Mr. Chairman, Ranking Member Takano.

And I will yield my time, Mr. Chairman.

[THE PREPARED STATEMENT OF STEVE GONZALEZ APPEARS IN THE APPENDIX]

Dr. WENSTRUP. Thank you very much.

Mr. Borer, you are now recognized for 5 minutes.

STATEMENT OF DAVID BORER

Mr. BORER. Chairman Wenstrup, Ranking Member Takano, and members of the subcommittee, thank you for the opportunity to testify today.

AFGE's National VA Council represents more than 220,000 VA employees. We strongly oppose H.R. 1994 as currently drafted and urge lawmakers to reject these counterproductive measures in favor of AFGE recommendations, including expanded whistleblower protections that would truly hold VA managers accountable and protect our veterans.

Presented as accountability for SES and upper management, the greatest target in this extreme bill is the 350,000 nonmanagement employees of the VA, including service-connected disabled veterans who clean operating rooms, maintain VA cemeteries, and rate disability claims and their coworkers, who are PTSD therapists, surgeons, bedside nurses, and so on.

Stripping job protections from nonmanagement employees will increase the mismanagement in the form of retaliation, discrimination, patronage, and antiveteran animus. The result will be to chill disclosures, destroy employee morale, and undermine the retention of the VA's most experienced and valuable employees.

This bill proceeds from the false premise that it is too hard to remove a Federal employee under the current system. On the contrary, nothing in the current law prevents agencies from removing employees. Competent and responsible managers can and do remove poor performers and employees who engage in misconduct, and they do not unfairly target good employees. And, for the record, Federal employees stop getting paid as soon as they are terminated.

Under section 2, all VA employees, including even GS-4 housekeepers or cemetery caretakers, would lose fundamental rights to notice and to be heard, including 30-days advance notice of an adverse action, 7 days for an employee to respond, an employee representative, a written decision, and an opportunity to appeal.

These provisions would turn the clock back for employment rights over 100 years. It is worse than traditional at-will employment, and, if enacted, it will make the VA an even less competitive employer.

Unlike private-sector employees, Federal workers cannot bring most contract or tort claims to the courts, so the administrative due process eliminated by section 2 is often VA workers' only real protection. The requirement in H.R. 1994 to get the approval of the Office of Special Counsel will not protect whistleblowers. This proposal ignores the practical realities that not all individuals will file corrective actions, and OSC is not well-suited to essentially pre-approve the removal of every would-be whistleblower.

Employees facing discrimination and other prohibited personnel practices would be forced into filing OSC complaints in order to shield themselves from their new at-will status. This helps neither veterans nor whistleblowers, but it will precipitate a flood of OSC complaints that will paralyze the OSC and obscure the most valid cases of whistleblower retaliation.

Section 3 of the bill would extend the 1-year probationary period to 18 months or longer and gives the Secretary discretion to extend it even further. Probationary employees can be fired very easily under current law. Recently hired veterans working for VA managers who failed to train them know this all too well. OSC and MSPB already struggle to protect probationary employees from unjustified adverse actions because the burden of proof on the employer is extremely low. Extending the probationary period makes this even worse, and it will erode the chances a whistleblower with a legitimate concern will come forward.

Regarding section 4, we do not oppose a responsible study of official time, but such a study should be based on objective criteria, such as those used by the GAO and the OPM. The use of official time in the VA benefits taxpayers and veterans and Federal employees because it reduces costly employee turnover, it improves service, it creates a safer workplace, and it leads to quicker implementation of agency initiatives. Official time gives workers a voice to resolve disputes efficiently, protect whistleblowers from retaliation, and implement new technology and other innovations in collaboration with management.

If H.R. 1994 is not amended to strike provisions that reduce due process, lengthen probationary periods, and attack union official time, the AFGE will vigorously oppose the bill. Instead, Mr. Chair-

man, we strongly urge you to demonstrate our shared commitment to veterans through positive reform. My written testimony lists our reform proposals, and I will be happy to discuss those.

Thank you again for allowing me to testify.

[THE PREPARED STATEMENT OF DAVID BORER APPEARS IN THE APPENDIX]

Dr. WENSTRUP. Well, thank you.

Mr. Neiweem, you are now recognized for 5 minutes.

STATEMENT OF CHRISTOPHER NEIWEEM

Mr. NEIWEEM. Chairman Wenstrup, Ranking Member Takano, and distinguished members of the subcommittee, on behalf of Iraq and Afghanistan Veterans of America, our nearly 400,000 members and supporters, I would like to extend our gratitude for the opportunity to share our views and recommendations regarding these important pieces of legislation.

Starting with H.R. 356, disabled veteran unemployment has consistently been much higher than that of the greater veteran population, hovering at nearly 20 percent. Disabled veterans must be given the support necessary to overcome barriers to employment and achieve economic empowerment.

VR&E exists for that very purpose, and yet many disabled veterans don't know it exists, do not participate, or too often find the services it offers to be inadequate in securing a rewarding career. This legislation would improve the VR&E programs by creating an action plan to identify why the program is underutilized and put steps in place to improve its output.

The recommendations that would stem from its enactment would include an analysis and plan to increase disabled veteran participation. Additionally, a national staff training program would be installed for the counselors charged with implementing the program to ensure the variety of challenges their clients face are understood holistically. Without a fundamental understanding of the conditions a veteran is facing, a counselor will not be positioned to identify how to help the veteran secure a job and begin a rewarding career.

This legislation would improve a program that has been too often regarded as mediocre due to organizational factors that relates to the veteran-counselor relationship.

Turning to H.R. 832, veterans make use of services to assist them in transition for the sole purpose of improving their economic outcomes. Simply put, they want to succeed and secure a brighter financial tomorrow. This legislation would create a comprehensive longitudinal study to determine to what extent the job services veterans use aid them in securing careers.

Identifying which services veterans use and the amount of time they spent on Active Duty, whether or not they are collecting unemployment benefits, whether or not they secure work, and whether or not they stay with those jobs are all key pieces of information, the collection of which this bill would require. The report and data developed through this legislation is needed to ensure these programs are bringing back a return on investment for the veterans who are using them.

Turning to H.R. 1994, over 1 year after the Phoenix wait-list scandal shook the veterans community nationwide, the Department did not fire one employee for wrongdoing related to that incident. IAVA strongly supported the increased accountability provision of the Veterans Access, Choice, and Accountability Act last year, which gave the VA Secretary increased authority to remove the SES employees who did not serve our veterans to the standard that they earned. We now support in that same spirit expanding this removal authority to the greater VA workforce, notwithstanding whistleblowers, and publicly applaud Chairman Miller for refusing to give the Secretary any less authority than is fully necessary to get the Department back on the right track.

We have heard and agree with DepSec Gibson's testimony a few weeks back, which indicated it is currently too hard to hire and fire employees. This legislation would shorten the appeal period for VA employees engaged in misconduct or poor performance so, in those rare cases of wrongdoing, the Secretary is empowered to take corrective action more briskly. The process of personnel action should not languish in a sea of bureaucracy, as it has been.

I also want to make clear that the vast majority of the VA workforce does a fantastic job of serving our veterans every single day and too often does not receive enough praise. The sooner we get real reforms to stick, the sooner the headlines of misconduct will fade.

And in VA's testimony today you will read the false assumption that by enacting this piece of legislation it will result in disenheartment in the workforce and that employees could leave because of less protections. But the fact is, and VA states it, people serve at the VA because they want to serve veterans. And 90 percent, probably more, do a great job every day. And the idea of getting rid of those few folks the Department has proven they haven't been able to since last summer will improve morale, not reduce it.

H.R. 2133, we strongly support this legislation. It would allow a veteran transitioning away from Active Duty to receive additional education, career, and technical or entrepreneurial training. This would empower servicemembers to give them an early advantage in transitioning back to the workforce.

Turning to H.R. 2275, this legislation would create a fourth administration at VA that would align all veterans education, transition, and job placement programs under one agency entitled the Veterans Economic Opportunity and Transition Administration. This new administration would be led by the Under Secretary for Economic Opportunity.

Veterans we have spoken to have long reported overlapping services have clouded options rather than clarified them. GAO reports and feedback from our annual member survey have indicated the performance of LVERs and DVOPS under DOL-VETS has been stagnant at best and not shown the improvement needed to help veterans secure rewarding careers.

Ineffective oversight and incongruent placement of this service within a myriad of other programs over at DOL has not proven to be a positive fit, so we strongly support the legislation.

I will yield back and am happy to answer any other questions about any other bills.

[THE PREPARED STATEMENT OF CHRISTOPHER NEIWEEM APPEARS IN THE APPENDIX]

Dr. WENSTRUP. Well, thank you.

Mr. Weidman, you are now recognized for 5 minutes.

STATEMENT OF RICK WEIDMAN

Mr. WEIDMAN. Thank you, Mr. Chairman. VVA appreciates the opportunity to offer our thoughts on the bills under consideration today.

We very much favor 2361 and look forward to an early passage. We would urge you to take a hard look at this bill to expand the kinds of activities that work-study students would be eligible for, including helping with the preparation of veterans' claims and doing other research, such as looking at military documents at the Archives to be able to substantiate claims. That was used very effectively back in the 1970s and early 1980s and, unfortunately, is one of the things that went away, and it would be a good thing to bring back, and very productive.

Also, thank you for 2360. We think that that would also be a bill that would help significantly.

Mr. Flores' TAP bill is—the real problem there is not what the law says; the real problem is what the military does. The Marines solved this problem because the Commandant said, "You will," and put it in the commanders' OERs so if they didn't send all their people they would be relieved. It is real simple. And what is needed is the same kind of engagement from the other five services. And, while this legislation may help, without that strong commitment from the Secretary and from the Joint Chiefs, it ain't gonna happen, bluntly.

H.R. 356, the Employment Improvement Act, may help. I would say that VA in the last few years has made significant progress in cleaning up what was, in fact, a real mess in what is now known as the VR&E services, but this bill can help by simply codifying it and pushing it further.

The other thing in that regard and that touches on a number of things that people talked about today is there is no D-TAP. People talk about TAP and they say, well, we are taking care of veterans who are disabled. In fact, they are not. D-TAP is a myth. It never existed, not back after Vietnam, it did not exist in the 1990s with the big drawdown, and it really doesn't exist today as a program that makes any sense that gets people on track and feeds them right into the programs at VA, particularly Voc Rehab. And that needs to happen and needs to be very effective.

I would also point out that it needs to be a much more transparent process that involves the veterans organizations in a major way. The development of TAP thus far, the VSOs were flat ignored and snubbed in terms of making any input. We don't claim to have purchase on truth with a capital "T," but we know that folks in the bureaucracy don't either. And we do know a thing or two, those of us who have been around here for a year or two. My friends from IAVA think I started right after the Civil War, working in the Pension Building, but it is not true. It was a little bit later than that.

Mr. WEIDMAN. H.R. 832, introduced by Colonel Cook—who is, by the way, a life member of Vietnam Veterans of America—is moving

on the right track. The problem is the way in which the Department of Labor keeps score is the largest example of the post hoc ergo propter hoc logical fallacy I ever seen. In other words, because it happens after, it happens because of. They call it a reportable service that they counseled you if you went in and registered and they talked to you for 5 minutes or less.

And then if you go out and get your own job with no help from them, you show up on a UI tax report the next quarter, they cross match your Social Security number against that tax report, and if you are back to work they count it as a positive termination. That is absurd.

We need to have a scorecard that is meaningful before you can do any real performance evaluation. And Labor is clearly not going in that direction. They don't want to be, as an agency, don't want to be monitored. And so it is all the more reason, leading into why 2275, it is time to move and create the fourth division of VA, to move the DVOP/LVER program, and we would add the homeless program, the Homeless Veterans' Reintegration Program, and other functions, such as VEVRAA, to the VA portfolio.

In regards to H.R. 1994, VVA enthusiastically supports this with significant reservations, some of which were pointed out by our friends from AFGE. But we do think that there needs to be more power.

What we said in our written statement, I will come back to it, and it is shameful that the President and the Secretary have not acted to stop the retaliation, which is still going on as recently as the past 10 days, against people who stand up and tell the truth within the VA. And it is a disservice to them, it is a disservice to the people who exhibit that kind of courage and that kind of commitment to vets that they would put themselves and their families in jeopardy, and it needs to be solved, and it needs to be solved now.

Thank you, Mr. Chairman. I see I am over time, and I appreciate your indulgence.

[THE PREPARED STATEMENT OF MR. WEIDMAN APPEARS IN THE APPENDIX]

Dr. WENSTRUP. Well, I want to thank you all for your testimony today. I will now yield myself 5 minutes for questions.

Mr. Varela and Mr. Weidman, one argument I have heard from some critics of H.R. 2275 is that this bill would create more duplication and not less. And I would like to get your response to that criticism.

Mr. VARELA. Thank you, Mr. Chairman.

In our previous testimony back in February we mentioned that this is a win-win for VA and for veterans seeking employment and economic opportunities. Again, having to navigate between two Federal entities to try to arrive at a job can be very discouraging to those seeking employment.

Also, within VBA they are responsible for those activities. They are responsible for vocational rehabilitation in employment, they are responsible for the home loan program, they are responsible for the administration of education benefits as well provided through VA. So if we take that out and we put that in a new administration

and we allow the VBA to focus on claims and appeals, they will be able to concentrate more on those activities.

And then taking those veteran-centric functions from Department of Labor and transferring them over to the VA, again, it narrows that focus, it narrows that concentration to really drive all those services and benefits in one location. And veterans want to go to one place to get everything that they want to get, and the VA is the logical choice.

Dr. WENSTRUP. Thank you.

Mr. WEIDMAN. The Department of Labor has had 70-plus years to get it right when it comes to veterans. In the creation of unemployment insurance, subsequent to the Social Security Act in the beginning of the Depression, the employer said: Hey, if you are going to tax us for this, we want something to get these people back to work. So the job service was created.

From the outset, largely because the vets came to the Mall in 1931, they had veterans preference of that new job service. And it didn't work as well as it should, but it worked sort of for a while.

In 1944, when the series of laws that we know as the beginning, original GI Bill were passed, they created LVERs, the local veterans' employment representatives. Why? Because in the midst of the war, for those people coming back, those disabled vets who no longer could fight, it wasn't happening for them. And once again, after Vietnam in 1977, the Employment and Training Administration and the state workforce development agency says they weren't placing any Vietnam and disabled Vietnam vets into jobs because they couldn't find them. And, hence, the DVOP program was created.

So they have had chance after chance after chance after chance. And I will tell you with sadness that the state workforce development agency relationship to the VETS flat doesn't work. And I lost my mind and moved my family to Albany, New York, when I had the opportunity to run what was at the time the second biggest LVER/DVOP program in the country in New York and discovered that even with the support of the executive chamber, the support of both the state senate and the state assembly and all the VSOs, and of the Business Roundtable, we still couldn't overcome the reluctance of the office managers to let the DVOPs and LVERs do their job properly.

My point is this, it is never going to work. It is a structural problem. And it needs to be moved to VA, and with no hesitation that if the workforce development agency doesn't do their job, they contract with somebody who will get it done. Our veterans deserve better than this dissembling that continues to go on, particularly with employment. The best doggone readjustment program we can offer any veteran of OIF/OEF or future conflicts is meaningful work at a living wage. And if we don't do that, all the rest is eyewash, because that would help them reestablish a sense of worth within our society.

Thank you, Mr. Chairman.

Dr. WENSTRUP. Thank you.

Mr. Borer, how do you respond to those that say that good employees want to work with good employees and watching someone

you work with skirt the rules and not be held accountable damages morale and hurts retention?

Mr. BORER. Well, we are all for accountability, Mr. Chairman, and our concern with this bill is that it doesn't actually improve accountability. Accountability to us means it is not mutually exclusive with the idea of due process, so that removing due process rights doesn't mean that managers are going to be held more accountable. We think the opposite is true. We think the unintended consequence here is if you reduce the rights of the frontline employees, fewer of them are going to speak up and hold their coworkers or their bosses accountable.

We talked to whistleblowers at AFGE. We have dealt with, I believe, four dozen who have been threatened with retaliation since the wait list scandal has started. The very first thing they ask is: Can I get fired if I speak up? They don't ask: Is there a streamlined process for firing me if I get in trouble here?

Due process is a fundamental piece of that picture, and if you pull out that fundamental piece you are going to get less whistleblowing and less accountability.

Dr. WENSTRUP. I think I now recognize Ranking Member Takano for any questions he may have.

Mr. TAKANO. Thank you, Mr. Chairman.

I spoke to a student veteran yesterday who was fortunate to have received excellent education counseling at the community college he first attended using his GI benefits. He has now transferred to a well-known and, some would say prestigious, 4-year university here in Washington, DC.

However, not all veterans share his story. He told me he knows many young veterans who were not lucky enough to receive such good advice and chose to use their GI Bill benefits to attend programs that they later learned were not properly accredited. They were faced with the infuriating choice of either completing a worthless degree or starting over at a new program after having wasted both their valuable benefits and time.

Given that current law places many veterans in this untenable situation, I would like Mr. Gehrke of the VFW to expand upon your support, your comments on H.R. 2360, the Career-Ready Student Veterans Act.

Mr. GEHRKE. As I mentioned, I know a couple examples of legal degrees, either a paralegal degree or a law school degree, where there are schools who offer these degrees. However, when the veteran graduates with those degrees, they don't have their accreditation or their certificate requirements to go and actually practice paralegal or their legal practice. So you have to wonder if that is the greatest benefit to the veteran as well as to the taxpayer who just paid out thousands of dollars for this veteran to get a degree that he now cannot use or at least has to go get additional certification requirements.

So I think it is the best interest to ensure that degrees are meeting the expectation of the veterans and the employers, and that is the most important thing.

Mr. TAKANO. I thank you for those comments.

Before I ask my next question, and it is going to be on Chairman Miller's VA Accountability Act, H.R. 1994, I am concerned about

the effect that the VA Accountability Act would have on VA employees' due process rights. As we consider this matter, I think it is important for members to understand the background of the Merit System Protection Board and the necessary protections to prevent civil servants, especially whistleblowers, from being unfairly targeted.

So I ask unanimous consent to include a May 2015 report to Congress from the MSPB on due process in Federal civil service employment into the record.

Dr. WENSTRUP. Without objection.

[THE PREPARED STATEMENT OF MR. RICK WEIDMAN APPEARS IN THE APPENDIX]

Mr. TAKANO. Continuing my question. There is a disagreement about how H.R. 1994 would affect whistleblowers, and I am concerned that the bill would deter employees from reporting the misconduct of their supervisors because they could be easily fired out of retaliation.

Can you talk about how H.R. 1994 will affect whistleblowers? Again, Mr. Gehrke.

Mr. GEHRKE. So, I mean, further context, I think last year it was established that there are senior leaders within VA who are not doing a good job and who are at times neglectful. My fear is that those very people who should be getting fired who are not getting fired will then be in charge of firing their subordinates.

So are you really going to give that authority to a senior manager, who subordinates may not trust, who may not be doing a good job themselves, and then might use his subordinates as a scapegoat, especially if they are blowing the whistle on him and saying, "This is a bad senior leader who is doing bad things"? Will he have the ability to punish that subordinate and have the ability to initiate that type of firing process for a subordinate who may otherwise be doing a good job or just might not be getting the training and supervision he needs from a senior leader to do a good job? So that is the fear.

However, I think, to be clear, it is the VFW's position that both the hiring and the firing process is far too arduous to complete. But you have to do everything at once and you have to be careful with who you are giving the authority to fire these employees to.

Mr. TAKANO. Mr. Gehrke, thank you for your testimony and the views of the VFW.

Dr. WENSTRUP. Mr. Bost, you are recognized for 5 minutes.

Mr. BOST. Yeah, I would like to continue down, if I could, with the question on 1994.

First off, let me tell you that, one, in my former life I was a union firefighter. Two, I always worked very hard when I worked in a state for AFSCME and those that were under that union. But I have a question, because since having this job, a certain case came up. Let me ask this, because I don't know. I am new at this.

Could you please tell me the doctors that are hired for the VA, do they also fall under your protection on the unions?

Mr. BORER. Yes. AFGE represents thousands, probably, of doctors.

Mr. BOST. I wanted to confirm that before I ask the next question. When working on the problems that we have with our VA, I

asked specifically for constituents to come forward. I have a situation where I couldn't believe it when the veteran said it, but I know him well. And he said that he would have liked to have found out about his hernia, but because of the religious beliefs of the doctor he saw, she was not able to examine him. They cannot fire her.

Now, I would like to hear, if we don't move forward with this, what do we do with those situations? Because I stand for my workers and employees, and I want them to have a way to make sure that they aren't improperly treated. But I want my veterans to be treated correctly. And I don't know, whenever I went to the VA, my local VA, and asked specifically, the administrator, he says, yeah, he knows about it. Well, no. No, there needs to be a way to let them go or make them ear, nose, and throat specialists, but good heavens.

So this is the type of things we are trying to do. And I want to protect the employee. I understand that. But do you have an answer on how the language can be put together, other than saying, "Okay, we think this goes too far"? Because my final job, I feel like, is to protect our veterans.

Mr. BORER. Sure. And we share that commitment. We have, again, 100,000 members in the VA who are there, as someone said earlier, primarily because they believe in serving our veterans.

In the doctor's situation, she has a bona fide religious belief that interferes with that particular duty, that is an EEO matter. And so, as you said, maybe somebody else could do that exam, I would think. There are certainly other doctors available. I would think that is more of a management problem where they have to have the right people doing the right exams.

Mr. BOST. And my question—of course, that is a specific issue—but I don't know if it was a change of religion, because somehow you had to get through medical school. And I don't know at what point do we give the power to the administrators to administrate and how we would do that. So, I mean, it is something I am going to watch very, very closely. There are the cases out there, and we have got to make sure we are very wise with what we do.

I yield back.

Dr. WENSTRUP. Ms. Titus, you are recognized for 5 minutes.

Ms. TITUS. Thank you, Mr. Chairman. And thank you and the ranking member for having the hearing today, and also for including the legislation that I introduced, along with a former member of our committee, you heard from him earlier, Colonel Paul Cook of California. We worked together on this, and I was very pleased to do it.

Our bill, the Veterans Employment and Training Service Longitudinal Study Act, would require a longitudinal study for job counseling, training, placement services, so that we can better monitor the effectiveness of these programs.

And I heard several of you mention that you supported this, and I appreciate you offering some comments about how to make the bill work better. And I look forward to working with you on that and hoping that we can move it through this committee.

I would also like to go back and discuss H.R. 1994, VA Employee Accountable Act. We all are in agreement that those serving our veterans as well as public servants in every department need to be

held at the highest level. But I have got some concerns about this legislation, like some of you do, that it is going to affect the VA's efforts to recruit and retain the most qualified employees.

Now, I know that the Secretary has prioritized recruiting the best and brightest to join the VA, and I think that is important. We don't want to do anything that ties his hands.

In Nevada, we have a hard time recruiting. We don't have a permanent director of the Reno RO. We have a hospital, brand new hospital without a permanent director. We have a hard time getting doctors to come to that hospital. So we just don't want to do anything that stops that process.

Mr. Gehrke, you mentioned in your testimony that the VA—you highlighted it, several of you mentioned it, but you highlighted it—that the VA needs to be able to quickly fill vacancies within the workforce. And you referred to the report that the VFW issued in September, "Hurry Up and Wait." In this report you suggest that Congress examine ways to streamline the hiring process so that we can hire the best employees.

I wonder if you would share some of the details of that and maybe give us some concrete proposals of how we could do that, because I would like to work with you and the other VSOs on improving that process, and then I would ask them if they have any particular suggestions as well.

Mr. GEHRKE. Absolutely. Thank you for the question.

I think that needs to be extremely focused on. Just out of curiosity, I was looking today, and there are 2,500 vacant VA jobs currently posted on USAJobs. Now, I was looking at out of curiosity, I am not interested in leaving the VFW, just in case my boss is watching. But 1,600 of those positions have been pending for over 60 days. There are 81 positions open in Ohio with 69 of them being pending longer than 60 days, 268 in California with 178 been pending for longer than 60 days, and 40 in Nevada with 15 open for 60 days or greater. And as you indicated, some of those are pretty high-level positions that should be filled.

Now, you have to wonder, if you fired all the employees today, if you had a magic wand and you did that, you would think that there would be an instant gap in services, because there would be nobody there. However, if you are able to hire all those 2,600 employees you would think that services would increase immediately. So I think that needs to be in the frame of thought.

Now, there are multiple recruitment training and retention reforms that should probably take place throughout the VA and the Federal Government as a whole. I think three recommendations that could happen immediately. One is review recruitment patterns, as well as quit rates for positions, especially like schedulers, and take steps to maintain a constant applicant pool, like recruiting at 110 percent rather than at 100 percent or as they open.

Establish automatic recruitment procedures and avoid repeated approval delays and remove requirements to backfill actions. I think hiring managers really feel like it takes too long to get their new hires approved through the process. As well as develop standard operating procedures throughout VA on hire, training, and retention practices.

Right now, each VA medical center has their own hiring practices, their own training practices. Some work better than others, however. So if you are able to take the best practices and then implement them VA-wide, as well as share that information and how that is working, you would think that you would be able to come up with some better solutions that are happening right now. So we strongly recommend VA take the following actions.

But I am definitely eager to work with you and your staff to come out with some concrete details and suggestions on a way to move on forward on that, that we can hopefully couple with the chairman's legislation.

Ms. TITUS. That would be great. Thank you.

Thank you, Mr. Chairman.

Dr. WENSTRUP. In followup to that just for a second, Mr. Gehrke, if I could intervene here, you brought up recruiting at 110 percent, which I think is an interesting concept. Are there any other Federal agencies right now that are doing that that you are aware of and what kind of success rate are they having in making sure that their vacancies are filled quickly?

Mr. GEHRKE. Not that I am aware of. And like I mentioned, I think VA is one example. I mean, we hear of horror stories all the time in Washington, DC, of the Federal hiring process and the firing process, and I think they are symptomatic of the whole Federal Government.

I would love to see VA become a model employer both in their firing and hiring practices and then be able to disseminate that to other Federal Government agencies. So we would be willing to work with the committee to make that happen.

I do have to say, though, if we are going to create unique standards for VA, we should make sure that those employees are recognized appropriately.

Dr. WENSTRUP. Thank you very much.

Ms. RICE. you are recognized for 5 minutes.

Ms. RICE. Thank you, Mr. Chairman.

I just want to follow up on a question that Mr. Takano actually asked Mr. Gehrke. I want to ask it of Mr. Borer.

What are your concerns about how H.R. 1994 would affect VA whistleblowers?

Mr. BORER. Well, as I said, whistleblowers that come to us, the very first question they ask is: Am I going to get in trouble if I stand up and tell what I know? And so when you start subtracting their due process rights and you go to a system that essentially makes them at-will employees, our advice is going to change. We are going to have to begin to tell them: No, you really don't have much protection anymore if this bill passes. And I can guarantee you that whistleblowers will then stand up and leave my office and never mention it again to anybody because they will be afraid to lose their job. So it is really that simple.

And as I said before, it is not that it is impossible to fire Federal employee. I believe the VA fired 2,000 people in 2014. It is just a matter of doing the paperwork. I think managers, if you surveyed the managers, they don't like doing reports either, but they do reports. You just have to go through a process, and it can be done.

Ms. RICE. Mr. Borer, I am going to direct this question to you, but also would like everyone on the panel to answer it if you do have an answer.

One of the things that in the short time that I have been here that I have recognized is that without a profound culture shift within the VA we are going to continue to have panels of people that are going to talk about problems over and over and over again. And whenever I have put that question to higher-ups in the VA there really has been no sufficient answer as to how you really implement a culture shift. Because that has to take place, and I think that comes from the top down.

You gentlemen all seem to me to be qualified enough to maybe give some suggestions. And I will just start with you, Mr. Borer, then anyone else who wants to add.

Mr. BORER. That is a concern that we have. And the culture at the VA until now, in years past, has been anybody that sticks their hand up, we chop it off. And so we have seen a lot of whistleblowers retaliated against. And that was part of the management culture at the VA.

I have to say, we have met with the Secretary repeatedly about this. We get very good signals from the Secretary, but it is a huge organization, as you know. It does have to start at the top, but there is great difficulty in pushing cultural change down through an organization this size.

We have partnered with the Secretary on this. We are working very hard to make that happen. But that great middle management inside the VA is what we need to push in a new direction, and that is going to take some time.

Mr. WEIDMAN. It is precisely because of that that, I think, we need 1994. In our statement we said that the lower the grade, the more the due process protection should be. And earlier SES was put on the line, but nobody has been let go. And it is those below them who are still grade levels, grade 16 or whatever is comparable, aren't covered by the earlier act. So something needs to be done at that level.

I will tell you also that the culture change of creating a fourth division, you have got a chance to build a corporate culture from the ground up. And that corporate culture of that division should be totally different than compensation and pension. It is a, what am I going to do, how can I do for myself? And within the VA at large, it needs to stop patronizing veterans.

Let me give you an example. In a discussion, I will make it sound more polite than it actually turned out to be, over doing chest x-rays with freestanding CAT scans, which is now approved for Medicare and Medicaid payments, VA is still refusing to do it. And the woman who is in charge of preventive health says: Oh, well, there will be false positives, and we don't want to upset the veterans. And I said, what? Are we cattle? You think we are going to stampede and that you will get hurt? Is that what it is?

I mean, it is that the attitude towards veterans of not respecting us as individuals and collectively that makes us wild on our feet. And in a discussion following up on that with Sloan Gibson and with the Secretary, they said: Well, it is really not that easy, Rick. I said: What you guys need is the archangel of death. I am 70 years

old. I have no wish for a VA career. Hire me for a year. I will fire the suckers.

And change the attitude. You cannot change the attitude if you don't have line authority. This crazy five-area thing, this is nothing that we haven't said in detail to them. They don't have any line authority. And we said that is ridiculous. They are all going to come together, said, yeah, we are all with you for our new MyVA, and they are going to come back and do the same damn thing. Why? Because you don't do their officer evaluation reports.

You have got to connect and from the top down, say: This is going to happen. This is happening on your watch. If you don't fix it, you are down the road. And if they don't fix it, then they are down the road, and you bring in somebody else. They are good people, but nothing ever happens to the bad guys now, ever. And that is what makes us crazy. It has made us crazy for 30 years.

Ms. RICE. I think you have hit the nail on the head, because if you can't show accountability there can be no culture shift.

Mr. WEIDMAN. Precisely.

Ms. RICE. Thank you, gentlemen.

Mr. WEIDMAN. And you have to enough good people that you can start over, but you have to start at the top and send the right cues.

Ms. RICE. Thank you, gentlemen.

I yield back. Thank you, Mr. Chairman.

Dr. WENSTRUP. Well, if there are no further questions from our panel, you are now excused. And I thank you again for your testimony here today.

Dr. WENSTRUP. I want to now recognize our final panel of witnesses today. First, I want to welcome back Mr. Curt Coy, Deputy Under Secretary for Economic Opportunity at the U.S. Department of Veterans Affairs. And he is accompanied by Ms. Cathy Mitrano, Deputy Assistant Secretary for the Office of Resource Management at the U.S. Department of Veterans Affairs.

We also have Ms. Teresa Gerton, who is now the Acting Assistant Secretary for the Veterans' Employment and Training Service at the U.S. Department of Labor. And finally, we have Dr. Susan Kelly, Director of the Transition to Veterans Program Office in the Office of the Under Secretary of Defense for Personnel and Readiness at the U.S. Department of Defense.

I want to thank you all for being with us today.

Mr. Coy, if you are ready, then we will begin with you. And you will be recognized for 5 minutes as soon as you get settled.

STATEMENT OF CURTIS L. COY

Mr. COY. Thank you, Mr. Chairman. And good afternoon, Mr. Chairman, Ranking Member Takano, and other members of this subcommittee. Thank you for the opportunity to be here today to discuss legislation pertaining to VA economic opportunity programs. Accompanying me today is Cathy Mitrano, Deputy Assistant Secretary for the Office of Research Management.

We are here to discuss several impactful bills. We will defer to our colleagues at Labor and Defense on those that pertain to their programs.

With respect to H.R. 2275, Jobs for Veterans Act, while we appreciate the committee's focus on improving employment and eco-

conomic opportunity for veterans by consolidating various programs, VA does not support the bill. VA believes there is currently an appropriate management structure in place to oversee veteran programs in a collaborative environment.

VA is pleased, however, to see several bills that seek to improve our vocational rehabilitation and employment services to our wounded warriors and disabled veterans. We support the intent and purpose of most of the provisions of these bills and would like to work with the committee to ensure the bill language meets that intent. For example, a requirement to ensure voc rehab courses of education meet the same requirements as those for the GI Bill. We are currently doing so.

Less than 1 percent of voc rehab plans have courses that are not GI Bill approved, but there are occasional instances where veterans' requirements cannot be met with GI Bill courses. We agree that voc rehab housing modifications are best managed by our Specially Adaptive Housing grant experts in our Loan Guarantee Service, but the bill as written may not meet the intent or have unintended consequences.

VA supports the intent to prioritizing VRE services and currently tries to do just that through our IDES program and ensuring seriously and very seriously injured veterans receive VRE appointments within 10 days and have established plans within 30 days. Conducting a complete study, likely with contractor support and to include input from our various stakeholders, would certainly take time and resources.

VA supports and appreciates the intent of reducing redundancy and inefficiencies in the IT process for VRE claims. We are currently working with our Office of Information Technology for a new case management system. This effort would complement that effort subject to availability of appropriated funds.

Another bill would require VA to develop and publish an action plan for improving and in training and rehabilitation services for our VRE clients. While we support this effort, we believe we are currently focusing on these issues, and we would be happy to discuss some of those efforts.

With respect to the VA Accountability Act of 2015, VA will continue to work with the committee and VSOs on how the Secretary can best hold employees accountable while preserving the ability to recruit and retain highly skilled workforce that VA needs to best serve veterans.

VA supports the intent behind the Career-Ready Veterans Act; however, we do not support the bill as currently drafted and would be happy to work with the committee to ensure the language meets that intent. We agree that courses or programs of instruction should ensure students can meet the licensure and certification requirements of a state's particular vocation. If a veteran is using their well-earned GI Bill benefits to become a barber or a nurse, the program should prepare them to be obtain a barber certificate or a nursing license. We are ready to work with the committee to address any inconsistencies in that bill.

VA fully supports the workstudy program for a student veterans act that expands the program to those efforts previously expired in 2013 and extending the current expiration date.

Mr. Chairman, this concludes my statement. Thank you for the opportunity to appear before you today. We would be pleased to respond to any questions you or other members of the subcommittee may have. Thank you, sir.

[THE PREPARED STATEMENT OF MR. COY APPEARS IN THE APPENDIX]

Dr. WENSTRUP. Well, thank you, Mr. Coy.

Assistant Secretary Gerton, you are now recognized for 5 minutes.

STATEMENT OF TERESA W. GERTON

Ms. GERTON. Good afternoon, Chairman Wenstrup, Ranking Member Takano, and members of the subcommittee. Thank you very much for the opportunity to participate in today's hearing. As Acting Assistant Secretary of the Veterans' Employment and Training Service at the Department of Labor, I appreciate the opportunity to discuss the Department's views on pending legislation and proposals impacting veterans.

While this hearing is reviewing several bills under consideration by the subcommittee, I will limit my remarks to the Job for Veterans Act and the Veterans Employment and Training Service Longitudinal Study Act.

The Jobs for Veterans Act of 2015 seeks to establish the Veterans Economic Opportunity and Transition Administration within the Department of Veterans Affairs and to transfer DOL's veterans programs to the VA. The administration does not support moving the Veterans' Employment and Training Service or its programs to VA.

The veterans employment services DOL provides are well integrated into the public workforce system that is overseen and funded by DOL and shifting these services to VA would weaken this connection. VETS is able to accomplish its mission by working closely with other parts of the Department, including the Employment and Training Administration, which administers numerous core employment and training formula programs.

Together, these DOL programs provide a unified and complementary approach to serving and protecting the reemployment rights of veterans and have operated together within the states for decades. We believe that moving vets to another agency will diminish the synergy gained through alignment of these programs with other Department of Labor employment and training programs, as well as those that protect the rights of servicemembers, veterans, and their families.

Further, DOL's connection with governor-appointed state or local workforce boards and state workforce agencies that oversee the nearly 2,500 American Job Centers across the Nation facilitates veterans' employment with large national employers, as well as those small and medium-sized businesses that do most of the hiring. Our long-established relationship with the state workforce agencies is a partnership that delivers proven and positive results.

The movement of veterans' employment programs and services from DOL to the VA would generate inefficiencies by removing existing employment programs and services for veterans from the na-

tional employment services network that already exists for all America's job seekers and workers.

Other significant changes are currently underway in the public workforce system as it affects education, training, and employment services for veterans and their families. The Workforce Innovation and Opportunity Act, signed into law last year, was the first legislative reform of the public workforce system in over 15 years. This transformational legislation, which passed by a wide bipartisan majority, reaffirmed the roles of the American Job Center system that served over 1.1 million veterans last year and brought together and enhanced several key employment, education, and training programs.

The Opportunity Act modernized the public workforce system to help job seekers and workers access the services they need to succeed in the labor market and match employers with the skilled workers they need to compete in the global economy.

The Opportunity Act also requires a new data reporting structure. Currently, reporting requirements are met through the state workforce agencies which are funded by DOL's Employment and Training Administration. The reporting system for veterans' employment outcomes is part of the Department's reporting regime for the workforce system. Any requirements to adjust or change collection of veterans' data under H.R. 2275 would require extensive coordination between two departments instead of two agencies in the same department. Further, requiring VA systems to integrate with the new labor reporting system is likely to generate tens of millions of dollars in additional costs.

The administration wants to ensure that we build on the established relationships and the improvements called for in the Workforce Innovation and Opportunity Act to modernize the public workforce system and American Job Centers to better help our transitioning servicemembers and veterans obtain family sustaining jobs. For this reason, the administration does not support any legislation that would undermine its progress or ability to help veterans and transitioning servicemembers achieve positive employment outcomes.

The Department does support the enactment of the Veterans Employment and Training Service Longitudinal Study Act, which would direct the Secretary to enter into a contract with a non-government entity to conduct a statistically valid longitudinal study of veterans and the job counseling, training, and placement services for veterans provided by the Department. However, we do have technical concerns enumerated in our written statement and look forward to working with the committee to address those issues.

Chairman Wenstrup, Ranking Member Takano, distinguished members of the subcommittee, this concludes my statement. Thank you for the opportunity to be part of this hearing, and I welcome any questions you may have.

[THE PREPARED STATEMENT OF MS. GERTON APPEARS IN THE APPENDIX]

Dr. WENSTRUP. Thank you, Ms. Gerton.

Dr. Kelly, you are now recognized for 5 minutes.

STATEMENT OF SUSAN S. KELLY

Ms. KELLY. Chairman Wenstrup, Ranking Member Takano, and members of the subcommittee, I am pleased to appear before you today to discuss and share the Department of Defense's views relating to several pieces of proposed legislation.

Regarding H.R. 2133, which would amend section 1144 of Title 10, United States Code, the Department does not believe it is necessary. The current DoD policy provides servicemembers the opportunity to participate in all training tracks in addition to the core transition GPS curriculum. These training tracks are now offered at 206 military sites worldwide. The Department believes that further legislation to permit servicemembers to receive these specific training tracks would limit our flexibility to modify the training and education needed by transitioning servicemembers as the program evolves.

Regarding H.R. 2275, section 4, the Department believes that the best way to maintain an all-volunteer force is to demonstrate to potential recruits that servicemembers thrive when they return to the civilian workforce. One way to improve the likelihood of this is to ensure our servicemembers receive the best training possible on employment opportunities, resources, rights, and practices.

Since the passage of the Vow to Hire Heroes Act of 2011 and the redesign of the Transition Assistance Program, the Department has gained a greater appreciation for the value that the Department of Labor Employment Workshop provides our servicemembers. The Department of Labor's familiarity with the modern labor market, expertise in assisting with credentialing, licensing, and finding registered apprenticeships, and its connection to state labor offices makes it the single best organization in our Federal Government to provide labor-related services not only to our servicemembers, but to all American citizens.

The success of the DOL's Employment Workshop proves its value. On average, 91 percent of transitioning servicemembers who participate in a 3-day employment workshop say the training enhanced their confidence in transition planning, 93 percent said they will use what they learned, and 96 percent said the facilitators were knowledgeable about the material.

The Employment Workshop's emphasis on providing servicemembers early access to state-run American Job Centers is a critical factor in assisting our servicemembers in finding employment. Segregating veteran services and staff from the employment services available to the rest of the Nation is inefficient and potentially puts veteran reintegration into civilian life at risk.

Since the revised workshop began in 2012, the outlook for servicemembers transitioning to the civilian workforce has brightened every year. This is good news. But to best ensure continued progress, as well as to discover innovative ways to build what Secretary Carter has called the force of the future, DoD and DOL must continue to work together.

We would hope not to have diversions from that close work with DOL, as we strongly believe that it is the single-best organization in our Federal Government to provide labor-related services.

Regarding the draft bill that would amend Title 38, U.S. Code, the DoD believes that this draft bill appears to mirror several of

the education proposals from the Military Compensation and Retirement Modernization Commission final report from January of 2015.

In response to that report, the DoD deferred comment until it has more data on the impacts of transferability on educational benefits on retention. Similarly, the Department stated on May 13 in testimony to the Senate Committee on Veterans' Affairs that without data enabling the Department to understand the potential effects on retention the Department cannot support a bill that changes the Post-9/11 GI Bill housing stipend for dependents or the proposed language to increase the eligibility requirements for transferring Post-9/11 GI Bill benefits.

To this end, the Department has sponsored a study with Rand to review educational benefits for servicemembers to include the benefits of the Post-9/11 GI Bill and the impacts on retention with a focus on impacts of transferability. We anticipate the study to be completed in the summer of 2016.

Regardless of the outcomes of the study, the Department strongly believes that those servicemembers who have already committed to additional service obligations should be grandfathered and their dependents should not be subject to any reduction in transferability that may be imposed by further legislation. The Department defers to the VA regarding any costs to this bill.

Mr. Chairman, I thank you and the members of this subcommittee for your outstanding and continuing support for the men and women who proudly wear the uniform in defense of our great Nation.

[THE PREPARED STATEMENT OF MS. KELLY APPEARS IN THE APPENDIX]

Dr. WENSTRUP. I thank you all for your remarks. And I now yield myself 5 minutes for questions.

And I will start with Ms. Gerton. We are all trying to get the best opportunities for our veterans to succeed. So I would like to get your response to the comments from the veterans groups that we heard earlier on the previous panel that believe that vets and programs for veterans in general are lost in a myriad of other missions within the DOL. You have many, many missions within the DOL, and they believe, as they testified, that transferring these programs to VA is the best option. So I am curious your response to their thoughts on that process.

Ms. GERTON. Mr. Chairman, thank you for the question.

I think there are a number of critical points about how DOL delivers services for veterans that we have to keep in mind. Across all of its services, in all of the Job Centers in the country last year, the Department of Labor, through its state workforce agency activities, served over 1.1 million veterans. The JVSG program that VETS administers as part of that served only 330,000 out of that 1.1 million.

First of all, moving the VETS programs to the VA only moves the support for those 330,000, and that is a counseling and case management type of support. It separates then the support for those veterans who need the greatest amount of additional services to prepare them for employment, those who have significant barriers to employment, those young veterans, and those who were sepa-

rated because of involuntary force downsizing decisions. It separates the counseling support for those folks from the embedded services that DOL delivers in employment and training and education opportunities and employment readiness that are delivered by the broader Job Center services.

So in the first point, we think that separating the services actually would diminish the outcomes for the veterans who need the greatest amount of support because it moves the counseling and case management away from the embedded services.

The second point I would make is that VETS serves within DOL as the voice of the veteran and the advocate for the veteran across all of DOL's program. So removing VETS from the Department of Labor would remove that voice of the veteran from all of the policy decisions that DOL is making.

And I include in that recent efforts that improve and streamline the accreditation of apprenticeships so that veterans can serve in them, take greater advantage of them, and use their GI Bill housing stipend to augment apprentice salaries. Additionally, our work with the Office of Federal Contract and Compliance Programs on behalf of veterans to make sure that Federal contractors are meeting their veteran hiring obligations, and our work on USERRA that the GAO documented in a study last year that clearly demonstrated that VETS is doing a better job in protecting veterans' reemployment rates.

So those points, and a number of the arguments that we enumerated in our written testimony, demonstrate that we clearly believe, and the administration supports, that the retention of VETS inside DOL because it delivers a better outcome for veterans, not worse.

Dr. WENSTRUP. So you would say then that the conclusions drawn by the VSOs are incorrect?

Ms. GERTON. Sir, I cannot dispute that in the past VETS has had some difficulty in administering those programs. I would point to recent reports over the last 2 to 3 years that demonstrate a significant improvement in those outcomes. We have a number of externally delivered reports, including from the GAO, from the Center for Naval Analysis, from the Summit Institution that demonstrate the value of the Veterans' Employment and Training Service's services to veterans. We have data over the past 10 years that demonstrate a significant improvement in veteran outcomes.

We would believe that the most recent history would tend to overwrite a long past history and say that we have got the organization on the right track.

Dr. WENSTRUP. Well, thank you.

Mr. Coy, at the bill signing for the Veterans Access Choice and Accountability Act, President Obama made the following statement in support of accountability measures that are essentially the same authority provided in section 2 of H.R. 1994. And I will quote the President here. He said: "Now, finally, we are giving the VA Secretary more authority to hold people accountable. We have got to give Bob"—McDonald—"the authority so that he can move quickly to remove senior executives who fail to meet the standards of conduct and competence that the American people demand. If you engage in an unethical practice, if you cover up a serious problem, you should be fired, period. It should be that difficult." End quote.

So what has changed since that time that the President and the administration have now changed their mind?

Mr. COY. If I may, Mr. Chairman, I would like to ask Ms. Mitrano to address that specific question.

Ms. MITRANO. Thank you.

Well, first of all, I don't think that we differ with the President's statement or this committee's stated desire for accountability within VA. Certainly, we are all about trying to hold people accountable for those unethical and those egregious-type conduct actions that we have seen displayed. However, this piece of legislation extends to all of the GS employees throughout VA, and it is targeted at VA only, it is not a government-wide reform of course. And we believe it simply is going a bit too far when it comes to the due process deprivations to that broad a group of employees.

Dr. WENSTRUP. So let me ask you. So you would prefer it be extended to every agency, not just VA?

Ms. MITRANO. Well, at least it would not then have the disparate effect of targeting VA employees only in this time. I think that certainly some studies should be done to improve the government-wide adverse action or—

Dr. WENSTRUP. Well, I am just curious what has changed since the time of the statement, because at the time of the statement—the problem lies within the VA. And so we are addressing the problem that is very, very clear and in front of the American people. So I don't understand what has changed since the President made that comment.

Ms. MITRANO. Well, I think the scope of the legislation is what is changing here in this piece of legislation. It is not just the most senior leaders and VA who have the responsibility, higher level of responsibility of ensuring these types of actions don't occur, but it is the wage grade employees, it is all the way down, as my colleague from AFGE mentioned, to the folks that are cleaning the hospitals out and providing service to our employees.

And this legislation certainly does deprive them, basically, of every due process right to their livelihood. And so I think that the scope is significantly different when you look at the 350,000 or more employees that VA has, a third of which are veterans themselves, who have put their own lives on the line fighting for the very constitutional protections, such as due process and the preservation of property right or the right to preserve your livelihood.

Dr. WENSTRUP. Well, I just don't see what has changed since the time that statement was made. But I appreciate your comments here today.

And, with that, I yield back my time.

And, Mr. Takano, you are recognized for 5 minutes.

Mr. TAKANO. Thank you, Mr. Chairman.

Dr. Kelly, you said there is no data on the effect of the change in transferability. But can you tell me just how important the educational benefits are to the military's ability to recruit people into the voluntary force? I mean, where does that rank in terms of an incentive for people to join the military?

Ms. KELLY. I can tell you that 50 percent of recruits identify education benefits as one of the reasons, one of the compelling reasons, that they want to join the Armed Forces.

Mr. TAKANO. It is a compelling reason, it is one of the number-one reasons or top three reasons why people—you don't know about that?

Ms. KELLY. I don't have that data, no. But I will—

Mr. TAKANO. But at least 50% identify this as a reason they join.

Ms. KELLY. I will check that out when I go back too.

Mr. TAKANO. I would like to know that. If we knew that, it would help me make some inferences, even in advance of the data, on specifically how transferability should work.

It is my own sense that it is a very important recruiting tool for our voluntary forces. And, as a ranking member of this committee, I want to make sure that we make good on that promise, that that promise is not hollow, that, indeed, people are able to use these benefits positive effect.

There are three levels of, protections. And, seems to me that political appointees that are at will. Is that correct? In any one of the Federal departments, but there are appointees that are very much close to the top who can be fired "at will." Is that true?

Ms. MITRANO. Yes. My understanding is that the political appointees serve at the pleasure of the President, and they are subject to at-will employment.

Mr. TAKANO. And in this quest for accountability for some of the egregious things that have happened within the Department, we saw that there was a firing—not a firing, of course, but Secretary Shinseki resigned his position. So, at the very top, there was an at-will sort of act. But, in this case, he wasn't fired, but circumstances came together that he actually left under those conditions. But there is a level below the political appointees. And, for the public, can you tell me what is that level generally known as?

Ms. MITRANO. Well, below the political appointees are the Senior Executive Service employees.

Mr. TAKANO. The SES.

Ms. MITRANO. The SES, exactly. And the SES are covered by the legislation that was already passed, dealing with the expedited removal authority.

And then the level below the SES are what we typically refer to as the GS ranks, the General Schedule ranks, of Federal civilian employees that are currently subject to the pending legislation.

Mr. TAKANO. And H.R. 1994 extends—so we have legislation that affected the SES—

Ms. MITRANO. Yes.

Mr. TAKANO [continuing]. That was passed. And that was the statement that President Obama was addressing—

Ms. MITRANO. Yes.

Mr. TAKANO [continuing]. That we should be able to hold the SES, the senior management that are typically in the civil service—

Ms. MITRANO. Yes.

Mr. TAKANO. We streamlined the ability of, say, Secretary McDonald to be able to discipline and dismiss this level of employee.

Ms. MITRANO. Yes. Yes, sir.

Mr. TAKANO. And now we are talking about, in this new legislation that is pending before us, an extension of this streamlining or to make it much more easy to fire people that are below the SES.

Ms. MITRANO. Yes. Exactly, sir.

Mr. TAKANO. And that is the scope that we have that you hesitate to say is a good idea, that we may be subjecting people that are below the SES, the Senior Executive Service, to far less job protections than are necessary so that they may report bad actions to superiors.

Ms. MITRANO. Yes. Absolutely, sir.

Mr. TAKANO. Don't you also believe there is also a problem of politicization of the Department, that we, in effect, turn the entire department over to political patronage? That people who can be fired at will up and down the chain put us in the position of an administration coming in and firing everybody, and then there is a huge number of jobs that can be filled.

Ms. MITRANO. Absolutely.

Mr. TAKANO. If they can be fired at will, you know—I mean, this is something that existed, sort of, in the mid-19th century. And that is the whole reason why we had civil service reform acts, was to protect—so we need to find the sweet spot.

Ms. MITRANO. Yes.

Mr. Takano.

Ms. MITRANO. Absolutely.

Mr. TAKANO [continuing]. Enough protections. But we also want to prevent rent-seeking, as well.

Ms. MITRANO. Yes.

Mr. TAKANO. Mr. Chairman, my time is up. I yield back.

Dr. WENSTRUP. Miss Rice, you are recognized for 5 minutes.

Ms. RICE. Thank you, Mr. Chairman.

I would like to focus on two of the bills, 356 and 1994. They are opposed by the VA.

And, Mr. Coy, I would like to ask you, as to Congressman Maloney's bill, H.R. 356, can you explain why an analysis of workload management challenges at the VA's regional offices is unnecessary?

Mr. COY. When we looked at this particular bill, we indicated that we supported, you know, the intent to improve and expand, but we think we are doing much of this. And so we are not necessarily opposed to the intent of this bill.

We are looking at the entire VRE organization over the past several years, as has been noted by a few folks. We are streamlining a number of our business processes. We have developed new performance metrics, both on a regional level and on a national level. We developed a staffing model for each of our regional offices to ensure that we are putting assets where we need to do that.

We put together a national training curriculum that includes things like TBI and PTSD, job-seeking skills, but also working with other key agencies like the Veterans Health Administration and their mental health services to ensure that we are serving those veterans with PTSD and TBI in the right way.

We have worked with DOL. We just recently, only a short time ago, back in February, signed a memorandum of understanding that took a number of months for us to put together so we can

work more collaboratively. We have worked with DoD on IDES and improved TAP programs. We have looked at our VetSuccess on Campus program. We have developed telecounseling.

So when we look at the wide swath of the things that we are doing in VRE, we are not suggesting that we are doing it all and we have all the right answers; what we are suggesting is that we are going down a path that is doing all of those kinds of things.

Ms. RICE. Why can't you just take a recommendation like this and say, you know what, maybe someone else has a good idea too? And maybe all of the things that you just mentioned have nothing to do with the outcome of an analysis of workload management challenges.

Mr. COY. And I think we have indicated that, you know, a study like this would be timely and somewhat costly. But, in fact, we are not necessarily opposed to the intent of wanting to take an inward look at all of our programs.

Ms. RICE. Then why not just do it?

Mr. COY. Well, we think, when we look at the GAO studies, we have looked at all the previous studies, we are, in fact, following many of those recommendations that we are doing right now.

Ms. RICE. I just was specifically asking about this one. I wasn't sure I understood the reason for the opposition.

So, going to the VA's opposition to H.R. 1994, I guess I am going to ask you two things: What is the basis of your opposition to 1994? And can you tell this committee what the VA is doing in the absence of 1994 and what it would allow for to hold negligent employees accountable to their actions? Because we know that there is no accountability, at this point.

Mr. COY. I would like to, if I may, defer that to Ms. Mitrano, who is here to answer for VA's—

Ms. RICE. Oh, okay.

Ms. MITRANO. Thank you for the opportunity.

Our concerns with 1994 really drive around the due process deprivations for employees. I mean, the Supreme Court has held that a Federal job, or a job, is a property right, and the Fifth Amendment to the Constitution certainly says that you shall not be deprived of your property without due process of the law.

This legislation actually would allow the Secretary to fire a Federal employee, remove them from their livelihood, with no notice, with no written reasons proffered, pretty much on the spot.

That employee would then have 7 days to appeal to the Merit Systems Protection Board, but that would be a post-deprivation, it would be after they have already been fired they will have some right to appeal the action while they are unemployed. They have to file within 7 days, which is a fairly abbreviated timeframe that, you know, some employees might not be able to make.

If they do get an appeal within 7 days, the Merit Systems Protection Board's judge is required to issue a decision within 45 days, which is also a very abbreviated time for a judge to convene a hearing and gather enough information to have a hearing. If the 45 days is not met by the administrative judge for whatever reason beyond the employee's control, or beyond VA's control certainly, the VA's decision becomes final at that time.

So, really, if taken in the worst-case scenario, an employee at the VA could be deprived of their livelihood on the spot and never have an opportunity to present reasons why that decision was mistaken or, perhaps, given some ability to defend him- or herself. So that is a significant concern.

Ms. RICE. And I understand that. That makes sense. But you are putting that concern over the concern of whistleblowers, who are actually suffering probably more than someone who could be fired on the spot. And that really is at the heart of this, that retaliators are being protected more than whistleblowers are.

And this is the optic issue that I have with the VA: that you don't seem to understand how bad what you just say sounds, that you defend bad actors over whistleblowers.

Ms. MITRANO. Ma'am—

Ms. RICE. My time is up. And I appreciate your answer. My point is the culture is not going to change—

Ms. MITRANO. I understand.

Ms. RICE [continuing]. And there will never be effective administration, holding people accountable, until people are actually held accountable.

Thank you—

Ms. MITRANO. No, I understand—

Ms. RICE. Thank you so much.

And I appreciate the time, Mr. Chairman.

Dr. WENSTRUP. Well, thank you.

Ms. Mitrano, do you consider the right to appeal part of due process or not?

Ms. MITRANO. Yes, it is part of due process. But it—

Dr. WENSTRUP. Okay. Well, you have been stating here today that people would have no due process if this bill became law. And I think that is a misleading statement, considering that people have the right to appeal and, if they win their appeal, they are given their back pay. So I am afraid that I think you have skewed things a little bit in the process. But we will end with that.

And I just want to say that, if there is no further questions, the panel is now excused.

And I do want to thank everyone here today for taking the time to come and share your views on these nine bills because your input and your testimonies are very important to the legislative process, and we appreciate your insight and feedback.

I would also like to announce that the subcommittee will be holding a markup on some or all of these bills on June 25.

I ask unanimous consent that the written statement of Paralyzed Veterans of America be placed in the hearing record.

Without objection, so ordered.

Dr. WENSTRUP. Finally, I ask unanimous consent that all members have 5 legislative days to revise and extend their remarks and include extraneous material on any of the bills under consideration this afternoon.

Without objection, so ordered.

Dr. WENSTRUP. This hearing is now adjourned.

[Whereupon, at 4:14 p.m., the subcommittee was adjourned.]

APPENDIX



National Service & Legislative Headquarters
 807 Maine Avenue, S.W.
 Washington, D.C. 20024-2410
 Phone (202) 554-3501
 Fax (202) 554-3581
 www.dav.org

**STATEMENT OF
 PAUL R. VARELA
 DAV ASSISTANT NATIONAL LEGISLATIVE DIRECTOR
 COMMITTEE ON VETERANS' AFFAIRS
 SUBCOMMITTEE ON ECONOMIC OPPORTUNITY
 UNITED STATES HOUSE OF REPRESENTATIVES
 JUNE 2, 2015**

Chairman Wenstrup, Ranking Member Takano and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to testify at this legislative hearing, and to present our views on the bills under consideration. As you know, DAV is a non-profit veterans service organization comprised of 1.2 million wartime service-disabled veterans that is dedicated to a single purpose: empowering veterans to lead high-quality lives with respect and dignity.

H.R. 356, the Wounded Warrior Employment Improvement Act

This bill would require the Secretary of the Department of Veterans Affairs (VA) to perform an analysis and make recommendations in a report to Congress to encourage certain veterans to use the benefits of chapter 31, title 38, United States Code, Vocational Rehabilitation and Employment (VR&E) services by chapter 33-eligible veterans. The bill would require an action plan designed to improve the services and assistance provided under chapter 31. The required report would include a plan to remedy certain workload management challenges at VA regional offices (VARO), including reducing counselor caseloads for veterans participating in rehabilitation, particularly counselors assisting veterans with traumatic brain injury and post-traumatic stress disorder, and counselors with dual educational and vocational counseling workloads.

The bill also would require VA to perform an analysis to assess the percentage of veterans with service-connected disabilities who served on or after September 11, 2001 who choose not to participate in a rehabilitation program under chapter 31 but instead use their entitlement to educational assistance under chapter 33. The analysis required by this bill would examine barriers to timely enrollment in rehabilitation programs under chapter 31 and any additional barriers to a veteran's enrollment.

The bill would require VA to report within 270 days of the date of its enactment, and to develop and publish the action plan to improve the services and assistance provided.

DAV has no resolution from our membership on the particular issue within this bill. While we would not oppose passage, we have identified some concerns that we recommend be addressed prior to passage of this bill.

DAV recognizes the intrinsic value of chapter 31 service for wounded, ill and injured veterans. However, encouraging those veterans with eligibility under chapter 33 to instead use chapter 31 authority will require additional resources in VR&E to meet the increase in demand.

Today, VR&E's counselor-to-client ratio is far too high, at 1:135. This ratio has been disproportionate for quite some time and contributes to the delays in the administration of timely and effective services. However, the average ratio can be misleading. For example, the Cleveland VARO's counselor-to-client ratio is 1:206, but in the Fargo VARO it is 1:64.

Ideally, an effective counselor-to-client ratio would be 1:125, as has been advocated by the *Independent Budget* for the past several years. In order to achieve the 1:125 counselor-to-client ratio in FY 2016, VR&E would require an additional 382 full-time employee equivalents (FTEE), of whom 277 would be dedicated as VR&E counselors and the remaining 105 employees would be in support services, bringing VR&E's total FTEE strength to 1,824. While increased staffing levels are required to provide efficient and timely services, it would also be essential that these increases be properly distributed throughout VR&E to ensure that counselors' caseloads are equitably balanced among VAROs.

DAV calls on Congress to increase staffing levels within VA's VR&E program in accordance with our National Resolution No. 052, approved by our membership at our most recent National Convention. As contemplated by this bill, if Congress intends to encourage increased use of chapter 31 services, versus services afforded under chapter 33, then adequate resources would be essential to strengthen this critical program to meet the increased demands inherent in servicing more eligible service-disabled veterans.

H.R. 832, the Veterans Employment and Training Service Longitudinal Study Act of 2015

This bill would amend title 38, United States Code, chapter 41, to direct the Department of Labor (DOL) to enter into a contract with a non-governmental entity to conduct a longitudinal study of job counseling, training, and placement services for veterans provided by DOL.

The study would be required to obtain specific information for each participant. The information collected would capture the average number of months served on active duty; disability ratings; unemployment benefits received; the average number of months employed and average individual and household annual income; employment status; whether the individual believes that any services received helped the individual to become employed; use of educational assistance; participation in a vocational rehabilitation program; conditions of discharge or release from the armed forces and demographic information.

Under the bill DOL would be required to submit an annual report to Congress not later than July 1 of each year during the authorized study period.

DAV has no resolution from our membership on this particular issue, but would not oppose passage of this legislation.

H.R. 1994, the VA Accountability Act of 2015

This bill would provide VA the authority to remove or demote employees based on performance or misconduct.

DAV has no resolution from our membership on this topic and DAV takes no position on this bill.

H.R. 2133, the Servicemembers' Choice in Transition Act

Enactment of this bill would provide additional training options under the Transition Assistance Program to members of the armed forces separating from active duty.

Under this bill, the Secretary of Defense and the Secretary of Homeland Security would be required to provide additional training opportunities to separating service members, including preparation for higher education or training, for career or technical training, for entrepreneurship, and for other training options as determined by the respective Secretaries. The Secretary of Defense and the Secretary of Homeland Security would be required to ensure that a member of the armed forces who elects to receive the additional training proposed in this bill would be afforded the opportunity to obtain it.

DAV supports this bill in accordance with DAV Resolution No.053, adopted at our most recent national convention.

H.R. 2275, the Jobs for Veterans Act of 2015

This bill would establish in VA a new Veterans Economic Opportunity and Transition Administration. Establishment of the new administration would improve employment and educational opportunities for veterans by consolidating various VA programs now managed by the Veterans Benefits Administration, and also would transfer veteran-focused programs from DOL to VA.

Mr. Chairman, DAV previously offered testimony before this Subcommittee on February 12, 2015, regarding this very issue and encouraged Congress to introduce and enact this proposal. We are pleased to support this bill consistent with DAV Resolution No. 227, adopted by our membership at our most recent National Convention.

H.R. 2275 would create a fourth administration within VA. Under the bill, certain DOL programs would be transferred to VA not later than October 1, 2016. All personnel, assets, and liabilities pertaining to these programs would be transferred by that date.

This transfer to the VA would include administration of all functions and programs now performed by the DOL under title 38, United States Code. On enactment, VA would administer the homeless veterans' reintegration programs under chapter 20, employment and employment rights of members of the uniformed services under chapter 43, employment and training of

veterans under chapter 42, and job counseling, training, and placement services for veterans under chapter 41. The bill would establish a new Under Secretary position and two Deputy Under Secretaries with various responsibilities.

The creation of a new VA administration that would manage all these programs is a logical, responsible step for Congress to take through this legislative mandate. Plus, important to DAV, we believe consolidation offers the potential to streamline and enhance the prospects and training possibilities for wounded, injured and ill wartime veterans, for them to overcome employment obstacles, and open up opportunity for them in their post-service lives. It could also both reduce current costs while revealing the availability of new or alternative services and programs to those receiving employment and educational assistance in a unified program.

Ensuring that our nation's wounded, injured and ill wartime veterans and their families receive opportunities for meaningful and gainful economic and employment is a central concern of our organization; in the wake of war, DAV believes that we reflect the concerns of the entire nation. Veterans who truly sacrifice themselves in war need a hand up, not a handout. Reforming this important function of government that leads them to rewarding private employment would provide them that hand.

DAV welcomes the opportunity to work with the Subcommittee to see this justified reform enacted into law, and DAV thanks the sponsor for introducing this bill.

H.R. 2344, Veterans Vocational Rehabilitation and Employment Improvement Act of 2015

H.R. 2344 would make improvements to VA's VR&E Program. The bill contains four sections that would make changes affecting the approval of courses pursued under chapter 31; eligibility for Specially Adapted Housing (SAH); would provide new authority for VA to prioritize VR&E services for program participants; and, would authorize \$10 million for related information technology (IT) enhancements.

Section 2 stipulates to the maximum extent practicable that a course of education or training may be pursued by a veteran as part of a rehabilitation program only if the course is also approved under chapter 30 or 33 of this title, but would provide VA a waiver authority when warranted. This restriction would apply to a course of education or training pursued by a veteran who first begins a program of rehabilitation on or after the date that is one year after the date of enactment.

DAV has no resolution from our membership on this particular issue proposed by section 2 of H.R. 2344, and therefore takes no position.

DAV recommends the Subcommittee consider adding a report to captures information regarding disapproval of courses when they fail to meet the approval requirements of chapter 30 and 33, the number of waivers received seeking to approve courses, and the disposition of any waiver requests.

Section 3 of the bill would extend SAH benefits to certain veterans enrolled in chapter 31 rehabilitation, and would bar the use of dual SAH benefits from other authorities. This section would affect the aggregate amount of assistance (now generally capped at \$63,780). The bill would authorize VA to waive the limitations in individual cases when warranted.

This section would require VA to submit a biennial report to Congress on the use of the waiver authority described above.

DAV has no resolution from our membership on this particular issue proposed within section 3, but would not oppose passage of this section.

Section 4 of this bill would provide the Secretary with new authority to prioritize Chapter 31 services for program participants using criteria specified in the bill. VA would be required to submit a plan to Congress outlining proposed changes in processing Chapter 31 services not later than 90 days before making such changes.

DAV has no resolution from our membership on this particular topic, but would not oppose passage of this section of the bill. We would recommend that VA's reporting responsibility include information to categorize need-based prioritizations. It should document veterans determined to have the greatest need compared to those in lesser need, and specify the processing timelines for each group.

Section 5 would require VA's payments for and on behalf of veterans participating in a rehabilitation program be processed and paid from one corporate VA IT system, rather than making payments through multiple systems.

DAV has no resolution from our membership on this particular issue, but would not oppose passage of this section.

H.R. 2360, the Career-Ready Student Veterans Act

This bill would ensure that VA education benefits are paid for duly recognized educational and employment programs and courses.

VA and state approving agencies are authorized to approve applications of institutions providing veterans non-accredited courses. Approval is authorized when institutions and their non-accredited curricula are found to meet criteria specified in subsection (c) of section 3676 of title 38, United States Code.

This bill would add two new standards for such approvals. First, approval could be afforded in cases of programs designed to prepare individuals for licensure or certification in a State when programs meet any instructional curriculum, licensure or certification requirements of such State. Second, approval could be given in cases of certain programs within a State when they are designed to prepare individuals for employment. The bill would also provide the Secretary with waiver authority when warranted.

DAV has no resolution from our membership on this particular issue, but would not oppose passage of this bill.

H.R. 2361, the Work-Study for Student Veterans Act

This bill would extend for seven years the existing authority of VA to provide work-study allowances for certain activities by individuals receiving educational assistance.

DAV has no resolution from our membership on this particular issue, but would not oppose passage of this bill.

Draft Bill, to amend title 38, United States Code, to make certain modifications and improvements in the transfer of unused educational assistance benefits under the Post 9/11 Educational Assistance Program of the VA

This bill would modify eligibility requirements to transfer chapter 33 educational benefits from members of the military to their eligible dependents.

Under the bill, as a condition to transfer unused educational benefits to family members, a service member would be required to complete ten years of service, rather than six and would have to agree to perform two more years, rather than four, bringing the total active service commitment to 12 years of active service.

The bill would also amend the rates of stipend payments made to eligible spouses and children. The monthly rate would be limited to an amount equal to 50 percent of the stipend that would have otherwise been payable to the service member.

DAV has no resolution from our membership on this topic; thus, DAV takes no position on this bill.

Mr. Chairman, this concludes my testimony. DAV appreciates your request for this statement. I would be pleased to answer any questions from you or members of the Subcommittee dealing with this testimony.

STATEMENT OF

BRENDON GEHRKE, SENIOR LEGISLATIVE ASSOCIATE
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

VETERANS' AFFAIRS SUBCOMMITTEE
ON ECONOMIC OPPORTUNITY
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

**H.R. 356, H.R. 832, H.R. 1994, H.R. 2133, H.R. 2275, H.R. 2344, H.R. 2360,
H.R. 2361, AND DRAFT LEGISLATION**

WASHINGTON, D.C.

June 2, 2015

Chairman Wenstrup, Ranking Member Takano and members of the Subcommittee, on behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and our Auxiliaries, I want to thank you for the opportunity to present the VFW's views on today's pending legislation.

H.R. 356, Wounded Warrior Employment Improvement Act

This legislation directs the Department of Veterans Affairs (VA) to develop and publish an action plan for improving the Vocational Rehabilitation and Employment (VR&E). We share Representative Sean Patrick Maloney's concerns that VR&E may not be able to serve the veterans who need it the most if Congress does not make changes to the current system. However, we are doubtful that a VA developed action plan will remedy VR&E's access issues and may unnecessarily burden an already overworked agency.

In place of an action plan, the VFW urges Congress to fund the longitudinal study that was authorized in the Veterans Benefits Improvement Act of 2008, so that VA can identify problems and modify VR&E to better serve veterans. The Government Accountability Office (GAO) and the Independent Budget Veterans Service Organizations (IBVSO) recommend that Congress fund this longitudinal study, to be conducted by an outside organization, to measure VR&E's effects on the long term employment outcomes of its participants. It is difficult for VA to put forth an effective action plan to improve VR&E without good quantitative and qualitative data provided by a longitudinal study.

The VFW believes that VA is willing to improve VR&E when issues are properly identified and they have the resources to make improvements. For example, VA instituted 100 of 110 of the Congressional Commission on Service Members and Veterans Transition Assistance recommendations to improve VR&E. However, due to a lack of resources, VA is unable to implement the Commission's recommendations to expand VR&E eligibility, create a monthly stipend for those participating in VR&E's employment track, or create incentives to encourage disabled veterans to complete their rehabilitation plans. We strongly urge Congress to provide VR&E sufficient funding so VR&E can implement all of the Commission's recommendations.

H.R. 832, Veterans Employment and Training Service Longitudinal Study Act of 2015

This legislation requires the Department of Labor (DOL) to contract with a non-government entity to conduct a longitudinal survey of veterans who have used or are using DOL'S Veterans Employment Training Services (VETS) job counseling, training, and placement services to better understand the veteran hiring experience. The VFW supports H.R. 832.

The services delivered by DOL-VETS provide veterans with an important gateway to meaningful civilian employment after their military service. Unfortunately, there is not enough quantitative or qualitative evidence to determine which elements of DOL-VETS' programs do or do not help veterans find meaningful employment. Therefore, it is difficult to implement best practices and cut ineffective ones. A longitudinal study will allow DOL-VETS to detect developments or changes in the characteristics of the unemployed veteran population at both the national and the local level; thereby, helping Congress and DOL make clear connections between which employment programs work and which do not work.

H.R. 1994, VA Accountability Act of 2015

The VFW believes that VA and Congress must collaborate to identify and fix what is broken within VA, must hold employees appropriately accountable to the maximum extent of the law, and must do everything possible to restore veterans' faith in their VA. We support Chairman Miller's VA Accountability Act of 2015. However, we also believe that in order to help foster a culture of accountability, Congress must include language within the bill to prevent whistleblower retaliation, and while expediting the firing process will help rid VA of bad actors, it is equally as important to ensure VA can quickly fill vacancies within its workforce.

The VFW believes that Congress should not make it easier for VA's senior leaders to target low level employees and mid-level managers, without including legislation to prevent retaliation against whistleblowers. A federal survey shows that less than 50 percent of VA employees feel that arbitrary action, personal favoritism and coercion for partisan political purposes are not tolerated. More so, only 43 percent felt senior leaders maintain high standards of honesty and integrity; only 37 percent are satisfied with

policies and practices of senior leaders; and only 36 percent feel senior leaders generate high levels of motivation and commitment in the workforce. These statistics are alarming and suggest that for a culture of accountability to be established, change must start from the top, not the bottom.

We believe that if Congress focuses on firing bad employees without also focusing on hiring good employees, VA will not have the staff needed to care for veterans. In our report, "*Hurry Up and Wait*," we highlight deficiencies in VA human resources practices, outlining several recommendations to improve the hiring process and customer service training. Section 203 of the *Veterans Access, Choice and Accountability Act* called for a Technology Task Force to perform a review of the Department of Veterans Affairs' scheduling system and software development. In their review, the Northern Virginia Technology Council (NUTC) reinforced our concerns that VA's hiring process moves too slowly. NUTC suggested that for VA to be successful, it should aggressively redesign its human resources processes by prioritizing efforts to recruit, train, and retain clerical and support staff. In today's economy, hiring the best people is extremely critical. In many cases, it is more effective to coach a current employee, even a poor performing one, than it is to find, interview, engage and train new employees. We fear that VA's workforce productivity could decline due to staffing shortages and low employee morale if VA does not reform its hiring processes.

The VFW looks forward to working with Congress to expedite passage of this legislation and find workable solutions to VA human resources' issues to ensure VA can move quickly to fire employees who put veterans at risk, and at the same time move quickly to hire the best applicants to set VA on a path to restore trust in the system.

H.R. 2133, Servicemembers' Choice in Transition Act

This legislation will provide transitioning service members with additional training opportunities under the Transition Assistance Program (TAP). The VFW supports H.R. 2133, which ensures transitioning service members have access to the full suite of transitional training.

A persistent issue with the delivery of TAP to transitioning service members is ensuring consistent and timely access to the newly established track curricula and relevant training. While the VFW's internal surveys show that the revised TAP curriculum is a useful improvement over past iterations, we continue to receive complaints from service members who feel they are being denied the opportunity to take advantage of the optional track curricula, and that the current components of TAP covered under the participation mandate do not necessarily provide them with all of the information they need to pursue their career aspirations. While we recognize the progress that the services have made with TAP design and implementation, TAP has not yet reached its full potential. By mandating service members' access to any of the track curricula, if they choose to attend the briefings, it will go a long way in providing access to specific information and training service members need to more seamlessly transition.

H.R. 2275, Jobs for Veterans Act of 2015

This legislation establishes the Veterans Economic Opportunity and Transition Administration within the Department of Veterans Affairs (VA), and moves the authority for the Veterans Employment and Training Services (VETS) from Department of Labor (DOL) to VA. By establishing a fourth administration within VA, funding for VETS programs will not be in competition with other DOL priorities during an era of funding restraints; Congress will have stronger oversight of all the veterans economic opportunity and employment programs; and the Veterans Benefits Administration (VBA) will be able to focus on its primary responsibility – disability and pension claims.

By removing VETS from DOL, Congress protects the program from budget caps and Department priorities. This idea is reflected in the fact that from FY 2011 to FY 2015 the VETS program saw a 5.6 percent increase in funding, while VA saw a 13.3 percent increase over the same period of time.

We believe that placing all veterans' employment programs under a single authority will improve congressional oversight and government efficiency. Since 1997, there have been 16 federal reports on the continuing and consistent inefficiencies with the VETS' state grant program and poor interagency coordination between DOL and VA economic opportunity programs. As a result of fragmented programs, veterans have a hard time deciphering where they should go to receive employment services. Divided responsibility for federal economic opportunity programs leaves neither DOL nor VA completely accountable for veterans' economic success or failure. By aligning VETS programs with the veteran-centric mission of VA, veterans will have easier access to employment services.

By creating the Veterans Economic Opportunity Administration and dividing these responsibilities between two Under Secretaries, executive oversight of all these programs will improve. The VFW looks forward to working with this Committee to pass this much needed piece of legislation.

H.R. 2344, Veterans Vocational Rehabilitation and Employment Act of 2015

The VFW supports every section of H.R. 2344 with the exception of section 4. Section 4 calls on the Secretary to prioritize access to the program based on levels of need. No veteran should have to wait or be denied this critical service because his or her disability is not as severe or their economic situation is better than other veterans. This provision calls on VA to manage to a budget instead of managing to need. This practice has led to veterans being denied care. We cannot allow this to happen again. Congress must fully fund the VR&E program so every eligible veteran has timely access to the full suite of services.

H.R. 2360, Career-Ready Student Veterans Act

This legislation will mandate that education programs provide accreditation when such accreditation is necessary for employment. The VFW supports H.R. 2360 to ensure schools that are approved for the Post-9/11 GI Bill are offering programs that award student veterans with proper programmatic accreditation to meet both veterans' and employers' needs.

Some schools offer degrees that do not provide graduates the needed credentials to qualify for certain professions. Worse yet, when asked, many of these schools offer prospective students unclear information about programmatic accreditation and the requirements for professional certification. Some schools use terms like "fully accredited," which in theory may be true, but in reality do not offer the program accreditation needed to gain employment. Unfortunately, student veterans often fall prey to misleading recruiting sales tactics. We believe that student veterans need to be given the resources to be informed shoppers with federal education dollars. Also, it is not a wise investment of taxpayer dollars to allow students to use money, whether it comes from military tuition assistance or the Post-9/11 GI Bill, for degrees that will not yield any significant return.

Furthermore, the fact that the education requirements vary from state to state and that the professional associations do a poor job of communicating with potential job candidates, only adds to the problem. Therefore, the VFW supports this legislation to ensure that schools provide student veterans with licensure and certification through their programs when the credential is needed to gain employment.

H.R. 2361, Work Study for Student Veterans Act

This bill is a simple extension of VA's authority to offer work-study allowances for student veterans. The VFW has long supported the VA work-study program, and we would proudly support this initiative to extend the program to 2018.

DRAFT LANGUAGE

This legislation will consolidate all education benefits into a single program, extend the time commitment required to obtain the transferability benefit, and decrease the Basic Housing Allowance for dependents. The VFW played an integral role in passing the Post-9/11 GI Bill and we have a vested interest in ensuring that the veterans who utilize this robust benefit receive quality educational and vocational training outcomes. Military and veterans' education benefits provide a critical tool to ensure that those who have defended our nation can compete for the best jobs when they leave service. We believe the country has a vested interest in ensuring that federal education dollars for our military men and women provide the greatest value. Therefore, any reductions of certain elements in the Post-9/11 GI Bill must not be seen as savings, but must be reinvested for those who need it most.

The Post-9/11 GI Bill should primarily be used to help veterans reintegrate into civilian life by providing the education and skills necessary to gain meaningful employment. The Post-9/11 GI Bill must be a transition benefit first, and the retention and transferability aspect should never provide a greater benefit to dependents than it does to war time veterans.

We also recommend that duplicative education assistance programs should sunset to reduce administrative costs and to simplify the education benefits system. To do so, Congress would have to choose between two options. First, extend full Post-9/11 GI Bill benefits to all service members and veterans, including all reserve component members. The second option would be to create a scaled system in which certain categories of veterans will receive different percentages of the Post-9/11 GI Bill, depending on whether they served on active duty, reserve status or during a time of war, similar to how VA awards a certain percentage of the Post-9/11 GI Bill to reserve component service members today. If these programs are set to expire, Congress needs to ensure that war veterans, including guardsmen and reservists, do not receive less of a benefit than other veterans and dependents.

Chairman Wenstrup, Ranking Member Takano, this concludes my testimony and I am happy to answer any questions you or the Committee members may have.

Information Required by Rule XI2(g)(4) of the House of Representatives

Pursuant to Rule XI2(g)(4) of the House of Representatives, VFW has not received any federal grants in Fiscal Year 2014, nor has it received any federal grants in the two previous Fiscal Years.

The VFW has not received payments or contracts from any foreign governments in the current year or preceding two calendar years.

STATEMENT OF
STEVE GONZALEZ, ASSISTANT DIRECTOR
VETERANS EMPLOYMENT AND EDUCATION DIVISION
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
ON
PENDING LEGISLATION

JUNE 2, 2015

Chairman Wenstrup, Ranking Member Takano, and distinguished members of the subcommittee, on behalf of our National Commander, Michael Helm, and the 2.3 million members of The American Legion, America's largest wartime veteran's service organization, thank you for this opportunity to testify regarding our position on pending legislation before this subcommittee.

H.R. 356: Wounded Warrior Employment Improvement Act

To direct the Secretary of Veterans Affairs to develop and publish an action plan for improving the vocational rehabilitation services and assistance provided by the Department of Veterans Affairs.

Through the years the Department of Veterans Affairs (VA) Vocational Rehabilitation and Employment Program (VR&E) has assisted thousands of disabled veterans in obtaining their college education and improving their employment potential. However, in order for the VR&E Program to better serve veterans and become more efficient in assisting disabled veterans in obtaining gainful employment, there need to be specific changes to the program. The American Legion believes H.R. 356 will provide necessary improvements to the VR&E Program that will allow disabled veterans to receive more intensive counseling and better results with employment placement. Please note that the success of the rehabilitation of this nation's disabled veterans is determined by the coordinated efforts of every federal agency (Departments of Defense, Housing and Urban Development, Labor, Office of Personnel Management, and VA) involved in the seamless transition from the battlefield to the civilian workplace. This is a team effort.

The success of the VR&E Program will be measured by these veterans' ability to obtain meaningful employment and achieve a high quality of life. To meet America's obligation to these service-connected veterans, VA leadership must continue to focus on marked improvements in case management, vocational counseling, and most importantly, job placement. The American Legion strongly supports VR&E Programs and is committed to working with VA and other federal agencies to ensure America's wounded veterans are provided with the highest level of service and employment assistance.¹

¹ Resolution No. 326: Support Legislation that would Change the 12-year Delimiting Date for Eligibility to Chapter 31 Benefits (VA's Vocational Rehabilitation and Employment Program) – AUG 2014

The American Legion supports this legislation**H.R. 382**

Designates the facility of the United States Postal Service located at 8585 Criterion Drive in Colorado Springs, Colorado, as the "Chaplain (Capt.) Dale Goetz Memorial Post Office Building."

The American Legion has no position on this legislation**H.R. 832: Veterans Employment and Training Service Longitudinal Study Act of 2015**

To amend title 38, United States Code, to direct the Secretary of Labor to enter into a contract for the conduct of a longitudinal study of the job counseling, training, and placement services for veterans provided by the Secretary, and for other purposes.

The American Legion would support a longitudinal study of the job counseling, training, and employment placement services (JVSG) services only if the bill were altered to direct the Secretary of Veterans Affairs to contract for this study as opposed to the Secretary of Labor. The American Legion wants to be clear in our message that the best way to improve DOL-VETS is to transfer the JVSG and HVRP portions of the program to VA, as noted below in our statement on H.R. 2275: *Jobs for Veterans Act of 2015*. Back in 2012, a similar proposal was made to study the DOL employment services further. At the time, Chairman Miller had said more study was not needed, stating, "We have had study after study over the years that say the program does not work."² The American Legion agrees with the Chairman's assessment. A longitudinal assessment of DOL-VETS performance can already be read in the 16 GAO and OIG reports dating back to 1997. All reports revealed negative findings. Therefore, such a detailed study would be better implemented after JVSG and HVRP are moved to VA and set under the purview of the Secretary of Veteran Affairs.³

The American Legion cannot support the legislation as written, but could with the revision suggested**H.R. 1994: VA Accountability Act of 2015**

To amend title 38, United States Code, to provide for the removal or demotion of employees of the Department of Veterans Affairs based on performance or misconduct, and for other purposes.

This bill would provide for the removal or demotion of employees of the Department of Veterans Affairs based on performance or misconduct, and for other purposes. The American Legion urges Congress to enact legislation that provides the Secretary of Veterans Affairs (VA) the

² <<http://archive.armytimes.com/article/20120427/NEWS/204270309/Lawmakers-Take-vets-programs-from-Labor-Dept->> . Accessed May 28, 2015.

³ Resolution No. 13: *Expanding Veterans Employment and Homeless Services within the Department of Veterans Affairs* – OCT 2014

authority to remove any individual from the Senior Executive Service (SES) if the Secretary determines the performance of the individual warrants such removal, or transfer the offending individual to a General Schedule position without any increased monetary benefit.⁴

Prior to the passage of the H.R. 3230: *Veterans Access, Choice, and Accountability Act*, The American Legion also supported H.R. 4031: *Department of Veterans Affairs Management Accountability Act of 2014*. The American Legion supported the *Veterans Access, Choice, and Accountability Act of 2014* due to the systematic failures in the VA including, but not limited to, preventable deaths, delays in providing timely and quality health care, and VA's failure to adjudicate claims in a timely manner. H.R. 4031 provided for the removal of SES employees of the Department of Veterans Affairs for performance.⁵

The American Legion is gravely concerned with the lack of accountability within VA. H.R. 1994 is a step to further provide the tools to the Secretary of Veterans Affairs to better manage employees, and hold them accountable when they fail to perform their duties in a manner that is befitting of a public servant; especially when veterans entrust their care to VA.

The American Legion supports this legislation

H.R. 2133

To amend title 10, United States Code, to provide additional training opportunities under the Transition Assistance Program to members of the Armed Forces who are being separated from active duty.

The American Legion has long advocated for the Transition Assistance Program (TAP) to be made mandatory for all transitioning service members and to include those in National Guard and Reserve components. The American Legion has always believed that the capstone courses developed as part of the TAP revamp mandated by the Veterans Opportunity to Work Act should be made mandatory. This bill allows for these courses to be taken by service members on an elective basis and does not restrict the number of time or classes that can be taken.⁶

The American Legion supports this legislation

H.R. 2275: Jobs for Veterans Act of 2015

To amend title 38, United States Code, to establish in the Department of Veterans Affairs the Veterans Economic Opportunity and Transition Administration and to improve employment services for veterans by consolidating various programs in the Department of Veterans Affairs, and for other purposes.

⁴ Resolution No. 30: *Department of Veterans Affairs Accountability* – MAY 2015

⁵ <http://www.legion.org/legislative/testimony/220553/pending-legislation>

⁶ Resolution No. 345: *Transition Assistance Program Employment Workshops for National Guard and Reserve Members* – AUG 2014

The American Legion has long supported the Department of Labor Veterans Employment and Training Service (DOL-VETS). Unfortunately, the good faith of veterans in this program has been rewarded with ongoing program management problems including a lack of accountability and an agency truculent to sensible policy changes. DOL's budget request makes it painfully clear that the agency with the monumental task of helping Americans to be gainfully employed is unable to give the requisite attention to veterans' employment issues that our constituents deserve.

At this juncture, The American Legion believes that the best way to improve DOL-VETS is to transfer the Jobs for Veterans State Grants (JVSG) and the Homeless Veterans Reintegration Portions (HVRP) of the program to VA. Though there is a place for a veterans office within DOL, The American Legion believes these two programs would be better served if they were located in a new administration consolidated under VA.⁷

The American Legion supports this legislation

H.R. 2344

To amend title 38, United States Code, to make certain improvements in the vocational rehabilitation programs of the Department of Veterans Affairs.

Since the 1940's, VA has provided vocational rehabilitation assistance to veterans with disabilities incurred during military service. The Veterans Rehabilitation and Education Amendments of 1980, Public Law (PL) 96-466, changed the emphasis of services from training, aimed at improving the employability of disabled veterans, to helping veterans obtain and maintain suitable employment and achieve maximum independence in daily living. In that same spirit/intent, The American Legion believes H.R. 2344 would provide essential improvements to the VR&E program such as strengthening the ability for the Secretary to approve education/training courses that are helpful for disabled veterans, along with prioritizing veterans based upon need; having VR&E counselors focusing more on employment services than home adaptations issues; and streamlining payment methods through new information technology. If H.R. 2344 is enacted, these changes would ultimately help achieve the goal for those completing the program: gainful employment.

Recent reports show that Post-9/11 veterans still have a higher unemployment rate than their non-veteran peers. As a nation at war, there continues to be an increasing need for VR&E services to assist returning veterans in reintegrating into independent living, achieving the highest possible quality of life, and securing meaningful employment. The American Legion strongly supports VR&E programs and is committed to collaborate with VA and other federal agencies to ensure that all veterans are able to reintegrate into their communities and remain valued, contributing members of society.⁸

⁷ Resolution No. 13: *Expanding Veterans Employment and Homeless Services within the Department of Veterans Affairs* – OCT 2014

⁸ Resolution No. 326: *Support Legislation that would Change the 12-year Delimiting Date for Eligibility to Chapter 31 Benefits (VA's Vocational Rehabilitation and Employment Program)* – AUG 2014

The American Legion supports this legislation.

H.R. 2360

To amend title 38, United States Code, to improve the approval of certain programs of education for purposes of educational assistance provided by the Department of Veterans Affairs.

It is important to keep in mind that there are different types of accreditation, including institutional accreditation and program accreditation. Institutional accreditation is typically done by regional and national accreditation bodies. Programmatic accreditation is for specific programs offered within an educational institution. Programs are typically accredited by specialty organizations. The examples provided in H.R. 2360, the American Psychological Association and the American Bar Association are the programmatic accreditation bodies, respectively.

It is common for licensing and certification agencies to require institutional accreditation and/or program accreditation. In Virginia, for example, to be licensed as a clinical psychologist:

The applicant shall hold a doctorate from a professional psychology program in a regionally accredited university, which was accredited by the APA within four years after the applicant graduated from the program, or shall meet the requirements of subsection B of this section.⁹

This does not make effective use of GI Bill benefits if an individual uses the benefit to prepare for a licensed or certification occupation, but the program does not meet licensure requirements. This would include the requirement that a program be accredited by a programmatic accrediting agency.

The American Legion urges the requirement apply equally to institutions of higher education, as well as non-accredited schools. This always means the Congress should not exclude deemed approved degree programs, and ensure that State Approving Agencies (SAAs) can have adequate oversight of all institutions of higher learning.

The American Legion also believes if this task should fall as a responsibility of the SAA, the proposed legislation should incorporate how the Department of Defense determines program approval for usage of Tuition Assistance (TA). Questions remain as to if the legislation would only cover meeting the licensure or certification standards in the respective state where the institution is located. If that is the case, it is troubling for those veterans who do not plan to practice in the state where the school is located or individuals taking distance learning courses. The legislation should make clearer who will determine the requirements for these programs in all states.

If the intent of the Congress is to add to the existing workload of the SAAs, which are already spread thin, then Congress should give great consideration and reevaluation of the existing budget of the SAAs, to include increasing such budgets to ensure the SAA's are able to take on their

⁹ <http://law.lis.virginia.gov/admincode/title18/agency125/chapter20/section54/>

current workload, as well as the possibility of this new add-on. The American Legion believes there is validity in the underlying reason for the proposed legislation and supports HR 2360. However, we also believe there are a few items that need to be fleshed out.¹⁰

The American Legion supports this legislation, with some revisions.

H.R. 2361: Work Study for Student Veterans Act of 2015

To amend title 38, United States Code, to extend the authority to provide work-study allowance for certain activities by individuals receiving educational assistance by the Secretary of Veterans Affairs.

This bill would extend the Department of Veteran Affairs authority to offer certain work-study allowances for student-veterans due to expire mid-year. The American Legion has long supported the VA work study program and supports this initiative to maintain as many of these work-study opportunities as possible.

This program provides a valuable benefit to student-veterans and that benefit is often multiplied many times over when, for example, veterans are allowed to perform outreach services to service members and veterans furnished under the supervision of a State approving agency employee. This is just one instance of the important work that is accomplished by these student-veterans. Extending the deadline to 2020 would be an important message to our student-veterans, along with continuing to provide a valuable benefit to this important, and motivated, group of Americans.¹¹

The American Legion supports this legislation

Draft Bill

To amend title 38, United States Code, to make certain modification and improvements in the transfer of unused educational assistance benefits under the Post 9/11 Educational Assistance Program of the Department of Veterans Affairs, and for other purposes.

The American Legion sees the Post 9/11 GI Bill primarily as a transition tool, but is cognizant of its use as a retention tool. It is well known that the ten year mark is an important decision point in a military career, the halfway mark so to speak. Too many members are exiting service at this point and if transferability would be more advantageous as a retention tool at the ten year mark rather than the six year mark, we see the reason in that. The American Legion supports extending the time commitment required to obtain the transferability benefit.

¹⁰ Resolution No. 312: *Ensuring the Quality of Servicemember and Veteran Student's Education at Institutions of Higher Learning* – AUG 2014

¹¹ Resolution No. 312: *Ensuring the Quality of Servicemember and Veteran Student's Education at Institutions of Higher Learning* – AUG 2014

The American Legion also supports the idea of decreasing monthly stipend allowance to children who use transferred education benefits. However, decreasing the monthly stipend benefit to spouses can create unintended consequences. This denial of benefit can grossly have a negative impact on spouse caregivers who have sacrificed greatly to care for their loved one in uniform.

Military spouses face the challenges of health, employment difficulties, depression, deteriorating family relationships, and financial challenges. They are often unprepared for new responsibilities that few Americans can relate to. These spouses, who may have been unemployed or underemployed previously, may one day be required to become the primary source of income for the family. By decreasing the monthly stipend to spouses, the Congress runs a serious risk of creating an unintentional consequence that will harm those spouses who have already sacrificed so much.

Lastly, The American Legion recommends grandfathering all those individuals that have been awarded the benefit prior to the enactment of this proposed legislation.¹²

The American Legion supports the draft legislation, with some reservations

Conclusion

As always, The American Legion thanks this subcommittee for the opportunity to explain the position of the 2.3 million veteran members of America's largest wartime veteran's service organization.

For additional information regarding this testimony, please contact Mr. Larry Provost at The American Legion's Legislative Division at (202) 861-2700 or lprovost@legion.org.

¹² Resolution No. 312: *Ensuring the Quality of Servicemember and Veteran Student's Education at Institutions of Higher Learning* -- AUG 2014

STATEMENT OF
DAVID BORER, GENERAL COUNSEL
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
BEFORE THE
VETERANS' AFFAIRS SUBCOMMITTEE
ON ECONOMIC OPPORTUNITY
UNITED STATES HOUSE OF REPRESENTATIVES
WITH RESPECT TO
H.R. 356, H.R. 1994 and H.R. 2344
JUNE 2, 2015

Chairman Wenstrup, Ranking Member Takano and members of the Subcommittee, thank you for the opportunity to testify today on behalf of the American Federation of Government Employees, AFL-CIO (AFGE) and the AFGE National Veterans Affairs Council, representing over 670,000 federal employees, including more than 220,000 employees of the Department of Veterans Affairs (VA).

H.R. 356, The Wounded Warrior Employment Improvement Act

As the exclusive representative of VA employees working in Vocational Rehabilitation and Employment (VR&E) in the Veterans Benefits Administration (VBA), AFGE strongly supports H.R. 356. Based on feedback from our membership, AFGE shares the concerns addressed in H.R. 356 regarding the performance measures for VR&E employees and believes that the metrics should be more nuanced and focus on the long term progress of veterans. One year, an employee may perform well and resolve a lot of cases. The following year, the same employee may perform well but struggle to resolve cases due to circumstances beyond the employee's control. Basing performance standards primarily on the number of rehabilitation successes must always be considered along with mitigating circumstances, since the changing circumstances of the veterans themselves have a significant impact on this metric.

One of the other issues with the current performance measures is that employees are required to have a specific success rate for Serious Employment Handicap (SEH) cases. This number is arbitrary and the SEH designation is non-specific as well. Counselors may feel pressured to mark veterans' claims as SEH cases in order to achieve their performance standards when they may not be SEH cases.

It is our experience that newly hired veterans turn over at VBA at a significantly higher rate than non-veteran new hires. VA must set the standard as the exemplary employer of veterans in the federal government and find additional methods for retaining veterans. To that end, AFGE strongly supports the analysis, recommendation, and implementation requirements in Section 3(1) of the bill that would remedy difficulties faced by employee veterans who are participating in a VR&E program themselves.

AFGE also encourages Congress to examine performance metrics for all VR&E employees and address the issues outlined above.

H.R. 1994, VA Accountability Act of 2015

AFGE and the National VA Council strongly oppose H.R. 1994 as currently drafted. We urge lawmakers to reject these counterproductive and dangerous proposals in favor of amendments that will bring about meaningful reform, including expanded whistleblower protections, revolving door restrictions, limits on administrative leave and other AFGE recommendations discussed below that would truly hold VA managers accountable and protect veterans. If H.R. 1994 is not amended so that the provisions that reduce due process, lengthen probationary periods and attack union official time are eliminated, AFGE will work to defeat the bill.

H.R. 1994 in its current form is dangerous because it destroys the civil service protections of the very non-management employees who can hold management accountable to uphold the interests of veterans. The bill is dangerous because longer probationary periods will subject more veterans in the VA workforce to unfounded or discriminatory terminations. And the bill is dangerous because it diverts the

resources of the Office of Special Counsel and Merit Systems Protection Board away from appropriate claims of retaliation and discrimination. The bill is dangerous because it puts at risk the union's ability to represent non-management employees facing retaliation, discrimination and other prohibited personnel practices.

Finally, this bill is dangerous because it will cause significant numbers of health care professionals in critical shortage occupations to leave the VA or reject a future VA career, undermining veterans' access to the high quality of health care they rely on from the VA.

H.R. 1994 targets front line, non-management VA employees including thousands of service-connected disabled veterans.

Section 2 of H.R. 1994 extends the SES due process cuts enacted in the Choice Act to non-SES managers as well as to **every non-management front-line employee**. Despite the fact that the bill is presented as a tool to enhance accountability for SES and upper management, its greatest target is the 350,000 plus non-management employees who work on the front lines, including service-connected disabled veterans who clean operating rooms, police emergency rooms, maintain VA cemeteries and rate disability claims, and their coworkers who are PTSD therapists, surgeons, bedside nurses, electronic health record technicians, among so many other essential positions. Stripping job protections from non-management employees will result in **more** mismanagement in the form of retaliation, discrimination, patronage and anti-veteran animus. And veterans' health care will suffer, along with the employees who have pledged their careers to care for veterans.

AFGE has worked with more than 40 rank-and-file whistleblowers in the VA who have been threatened or retaliated against by VA managers precisely because they blew the whistle on waste, fraud and abuse that was, like the wait list scandal, caused by VA managers. If H.R. 1994 is enacted as drafted, there will be no recourse for these employees, and the derelictions of VA managers will likely

be swept under the rug. VA employees will be left with the choice of keeping quiet about mistreatment of veterans or losing their jobs.

The VA already has -- and uses -- existing tools to fire poor performers and front line employees engaged in misconduct.

This bill proceeds from the false premise that it is "too hard" to remove federal employees under the current system. It is not. Poorly trained supervisors and inadequate use of the existing probationary period are what are at issue here. Employees should only be removed for legitimate causes. Yes, this is harder than "at will" employment, but maintaining an apolitical, merit-based civil service requires that termination be for demonstrable causes. This is not "too hard" for a competent and responsible manager.

According to the Merit Systems Protection Board's 2015 Report, *What is Due Process in Federal Civil Service Employment?*, over 77,000 full-time, permanent, federal employees were discharged as a result of performance and/or conduct issues from FY 2000 to FY 2014. In FY 2014, 2,572 VA employees were terminated or removed for disciplinary or performance reasons, according to the Office of Personnel Management. Also, contrary to some of the rhetoric behind calls to eliminate federal employee job rights, **federal employees do not continue to receive their salaries after they are terminated.**

Eliminating the due process rights of VA front line employees will undermine the agency's mission and hurt the veterans it serves.

H.R. 1994 is poised to set the clock of workers' rights back more than 100 years. It makes the employment of VA employees subject to the whims of the VA Secretary, a political appointee. We learned in the Progressive Era that it is a great public good to have a civil service insulated from politics. Anyone who doubts that this bill creates a full-fledged patronage system should take a look at the history of government employment prior to the passage of the Pendleton Act of 1883.

By tearing down the due process protections granted to the covered employees, this bill would have the overall effect of chilling disclosures, destroying employee morale, and undermining the retention of many of VA's most experienced and valuable employees.

We have a ready example of the impact of eliminating or severely limiting due process rights for employees. The Transportation Security Administration (TSA) has established a system that is, in many ways, an analog of the system proposed in H.R. 1994. TSA front line employees have few rights and little due process, while managers have full due process rights. Quite understandably, the unfairness inherent in TSA's system is reflected in some of the lowest morale scores in the government, and a reluctance on the part of the frontline workforce to come forward with evidence of mismanagement that threatens public safety.

Analysis of Section 2. Removal or Demotion of Employees Based on Performance or Misconduct

H.R. 1994 entirely eliminates the procedural protections of 5 U.S.C. § 7513(b) and 5 U.S.C. § 4303. Section 7513(b) is the adverse action section of the Civil Service Reform Act (CSRA). That section currently:

- Requires 30 days' advance notice before an adverse action may be imposed;
- Requires not less than 7 days for the employee to respond;
- Allows an employee representative; and
- Requires a written decision.

Section 4303 serves much the same function for unacceptable performance actions, although the specifics are different.

By eliminating these two sections, H.R. 1994 eliminates the "notice and opportunity to be heard" that have been a hallmark of federal sector due process since before the CSRA was adopted in

1978. These provisions form the very foundation for due process in the civil service system. To be clear, **nothing in section 7513 or in section 4303 currently prevents agencies from removing employees or requires the MSPB or any other reviewing body to reach a particular result.**

H.R. 1994 eliminates 7513(b), the core notice and opportunity to be heard section of the CSRA's adverse action protections. This sets up a fundamental denial of due process, which might never be heard because the bill also provides that notwithstanding any other provision of law, including 5 U.S.C. § 7703 (the CSRA's judicial review section for adverse actions), the decision of the MSPB's administrative judge shall be final and shall not be subject to any further appeal.

Put another way, while the bill provides a nominal right to appeal a removal or demotion action by the Secretary to the MSPB, if it is appealed before a harsh 7-day deadline that itself has no textual support, the bill substantively precludes both full MSPB review and judicial review.

This creates a situation that is arguably worse than traditional notions of at-will employment. In the private sector, for example, at-will employees may have access to the courts under a contract or tort theory even if they do not have due process rights. Because of the comprehensive nature of the CSRA, and numerous cases interpreting the CSRA, federal employees are prohibited from bringing even these same types of contract and tort claims to court. **VA employees covered by this bill would thus become "at-will plus" or, perhaps more accurately, "at-will minus."**

Blocking access to the objective review provided by the courts, or even blocking full review by the MSPB, would invite VA managers (who have already shown themselves willing to abuse the rights of whistleblowers) to engage in arbitrary or capricious conduct vis-à-vis the front line VA workers. This is compounded by the fact that bill contains a provision mandating that if the MSPB's Administrative Judge cannot issue a decision within 45 days, then "the removal or demotion is final." Given that the MSPB

already has an active and heavy caseload, this provision is an additional and intentional elimination of fundamental employee rights.

With respect to whistleblowers, the bill ignores the practical reality that not all individuals will file for corrective action and that OSC is not well-suited to essentially pre-approving the removal of every putative whistleblower. The bill would nonetheless force employees facing discrimination and other forms of prohibited personnel practices into OSC complaints in order to shield themselves from their new at-will employment status. This helps neither veterans nor whistleblowers. It only precipitates a flood of OSC complaints that are likely to paralyze OSC and obscure the most valid cases of whistleblower retaliation at the same time.

Section 3 of the bill would extend the one-year probationary period to 18 months, and the employee's ability to secure permanent status after that would be subject to the complete discretion of the Secretary to extend that probation even longer. Under current law, some VA employees have two-year probationary periods ("pure Title 38" clinicians including physicians, dentists, registered nurses (RN) and physician assistants (PA) (38 USC 7403(b)). VA employees in other positions have one-year probationary periods, including "hybrid Title 38" health care professionals.

What every probationary employee in the VA has in common is the ability to be fired very easily. The large numbers of veterans recently hired into the VA workforce know firsthand how powerless they are when a manager who has failed to train them properly or resents having to hire a veteran decides to fire them. This Committee has heard testimony about claims processors and health care professionals, among others, who were summarily fired during probation without recourse, even though their terminations were motivated by retaliation, or what would otherwise be prohibited personnel practices.

It is already extremely difficult for agencies such as the OSC and MSPB to protect probationary employees from unjustified adverse actions, because the burden of proof on employers is extremely

low. Subjecting more employees to longer probations and the whim of managers who wish to harass them with even longer periods of at-will employment will further devastate the VA's efforts to hire veterans and Hybrid Title 38 mental health professionals in VA "mission critical" occupations in short supply such as psychologists, pharmacists and physical therapists. (See the Veterans Health Administration's 2014 report, *Interim Workforce and Succession Strategic Plan*, Table 3.)

Section 4 of H.R. 1994 mandates a study of Department time and space for labor organization activity. We are concerned that this provision may be used to weaken the rights of non-management employees and limit the ability of taxpayers to hold VA management accountable.

Under current law, union official time allows federal employees who are volunteer union representatives to represent all their coworkers (those who pay dues and those who don't) while in an official duty status. Union representatives are prohibited from using official time to conduct union-specific business, solicit members, hold internal union meetings, elect union officers, or engage in partisan political activities.

The use of official time in the VA benefits taxpayers, veterans, and federal employees because it reduces costly employee turnover, improves service, creates a safer workplace, and leads to quicker implementation of agency initiatives. Official time gives workers a voice to resolve disputes efficiently so they can get back to work, protect whistleblowers from retaliation, and implement new technology and other innovations to solve workplace problems in collaboration with management.

In its 2014 report, *Labor Relations Activities: Actions Needed to Improve Tracking and Reporting of the Use and Cost of Official Time* (GAO-15-9), GAO studied union official time and recommended that the Office of Personnel Management consider alternative approaches to developing cost estimate and new opportunities to increase efficiency of data collection and reporting.

A study that assesses the use of official time in VA according to objective criteria, such as those identified and used in the GAO study, is never problematic. But we are concerned that the study of official time mandated in H.R. 1994 may be used as a means to legitimize the elimination of this important function, given the overall animus toward front line VA employees that infuses the remainder of the bill. We urge the committee to amend the language in the bill to require that the study use a template resembling the GAO study referenced above, or OPM's annual studies of official time. The study must not be yet another highly politicized means of eliminating frontline workers' ability to hold VA management accountable.

AFGE Recommendations for Amending H.R. 1994

AFGE is deeply committed to the same goals as lawmakers: Serving veterans through increased health care access, reduction of the claims backlog and other improvements. AFGE understands that lawmakers are facing intense rhetoric about mismanagement that attempts to place blame on non-management, front line employees (over one-third of whom are veterans themselves). But, a bill that reduces management accountability by undermining the rights and protections of front line employees is not the answer.

AFGE strongly urges you to demonstrate your commitments to veterans through positive reform, not through proposals to eliminate civil service protections -- proposals that Chairman Miller intends to use as a "test case" for the rest of government. (See <http://www.govexec.com/feature/firing-line/e>.)

Therefore, AFGE urges the Subcommittee to amend H.R. 1994 as follows:

Section 2:

1. Strike subsections (a) and (b).

2. Insert language that definitively states that the whistleblower protections in of 5 U.S.C.2302 (b)(8) and (9) apply to all VA employees, regardless of job classification, including any right or remedy available to an employee or applicant for employment in the civil service and any rule or regulation prescribed by law.
3. Provide OSC and MSPB with sufficient resources to handle additional claims.

Section 3:

1. Strike subsections (a) through (c).
2. Apply a uniform, one-year probationary period to all VA non-management employees.
3. Establish programs to support newly-hired veterans facing transition challenges, including training, mentoring, and protection from unsupportive managers.

Section 4:

1. Strike subsections (a) and (b).
2. Implement recommendations in GAO report discussed above (GAO-15-9)

Other AFGE Recommendations:

1. Limit amount of time that VA employees can be placed on paid administrative leave; mandate study of VA management abuse of paid administrative leave and restricted work duty as a form of retaliation;
2. Impose stronger "revolving door" restrictions on post-VA contractor employment and contract awards;
3. Improve management training and performance measures relating to personnel practices;

4. Impose stricter limits on the number and duration of non-permanent VA appointments; mandate a study on the impact of VA's growing use of temporary, term and part-time appointments on the cost and quality of patient care and other VA functions;
5. Improve effectiveness of VA administrative investigation boards (see GAO-12-483);
6. Assess the impact of VA police reporting structure on VA accountability.

As the Merit Systems Protection Board stated in its May 2015 report to the President

and Congress, *What is Due Process in Federal Civil Service Employment?*:

Due process is available for the whistleblower, the employee who belongs to the "wrong" political party, the reservist whose periods of military service are inconvenient to the boss, the scapegoat, and the person who has been misjudged based on faulty information. Due process is a constitutional requirement and a small price to pay to ensure the American people receive a merit based civil service rather than a corrupt spoils system.

H.R. 2344, Veterans Vocational Rehabilitation and Employment Improvement Act

AFGE supports H.R. 2344. AFGE member reports confirm the need for the changes proposed Section 5 of the bill, which would require VA to use one payment system when making payments to veterans in a rehabilitation program. AFGE members reported issues with the Benefits Delivery Network (BDN) system, which has needed an upgrade for years. AFGE members also agreed that there were redundancies with inputting information into both BDN and the other payment system, the Subsistence Allowance Module. AFGE believes that this change would be beneficial for both veterans receiving benefits and employees working at the VA.

Thank you for the opportunity to testify on these important legislative issues.



Statement of Christopher Neiweem
 Iraq & Afghanistan Veterans of America
before the House Committee on Veterans Affairs
 Subcommittee on Economic Opportunity
 Tuesday, June 2, 2015

Statement of Christopher Neiweem
 of
Iraq & Afghanistan Veterans Of America
before the
House Committee on Veterans' Affairs
Subcommittee on Economic Opportunity
for the hearing on
Pending Legislation

June 2, 2015

Bill #	Bill Name	Sponsor	IAVA Position
H.R. 356	Wounded Warrior Employment Act	Rep. Maloney	Support
H.R. 2360	Career-Ready Student Veterans Act	Rep. Takano	Support
H.R. 2361	Work-Study for Student Veterans Act	Rep. Takano	Support
H.R. 832	Veterans Employment and Training Service Longitudinal Study Act of 2015	Rep. Cook	Support
H.R. 2275	The Jobs for Veterans Act of 2015	Rep. Miller	Support
H.R. 1994	The VA Accountability Act of 2015	Rep. Miller	Support
H.R. 2133	Servicemembers Choice in Transition Act	Rep. Flores	Support
H.R. 2344	Veterans Vocational Rehabilitation and Employment Improvement Act of 2015	Rep. Wenstrup	Support
Draft Bill	To Amend Title 38 U.S. Code to make modifications and improvements in the transfer of unused educational assistance benefits under the P/911 GI Bill Program at VA		Oppose



Statement of Christopher Neiweem
Iraq & Afghanistan Veterans of America
before the House Committee on Veterans Affairs
Subcommittee on Economic Opportunity
Tuesday, June 2, 2015

Chairman Wenstrup, Ranking Member Takano, and Distinguished Members of the Subcommittee:

On behalf of Iraq and Afghanistan Veterans of America (IAVA) and our nearly 400,000 members and supporters, we would like to extend our gratitude for the opportunity to share our views and recommendations regarding these important pieces of legislation.

H.R. 356, Wounded Warrior Employment Act

Disabled veteran unemployment has consistently been much higher than that of the greater veteran population, hovering at nearly 20%. Disabled veterans must be given the support necessary to overcome barriers to employment and achieve economic empowerment. VRE exists for that very purpose and yet, many disabled veterans don't know it exists, do not participate, or too often find the services it offers to be inadequate in securing a rewarding career.

This legislation would improve the VRE program by creating an action plan designed to identify why the program is underutilized and put steps in place to improve its output. The recommendations that would stem from its enactment would include an analysis and plan to increase disabled veteran participation. Additionally, a national staff training program would be installed for the counselors charged with implementing the program to ensure the variety of challenges their clients face are understood holistically. Without a fundamental understanding of the conditions a veteran is facing, a counselor will not be positioned to identify how to help the veteran secure a job and begin a rewarding career. This legislation would improve a program that has been too often regarded as mediocre due to organizational factors as it relates to the veteran-counselor relationship.

H.R. 832, Veterans Employment and Training Service Longitudinal Study Act of 2015

Veterans make use of services to assist them in transition for the sole purpose of improving their economic outcomes. Simply put, they want to succeed and secure a brighter financial tomorrow.

This legislation would create a comprehensive longitudinal study to determine to what extent the job services veterans use aide them in securing careers. Identifying which services veterans used, the amount of time they spent on active



Statement of Christopher Neiveem
 Iraq & Afghanistan Veterans of America
before the House Committee on Veterans Affairs
 Subcommittee on Economic Opportunity
 Tuesday, June 2, 2015

duty, whether or not they are collecting unemployment benefits, whether or not they secure work, and whether or not they stay with those jobs are all key pieces of information, the collection of which this bill would require. The report and data developed through this legislation is needed to ensure these programs are bringing back a return on investment for the veterans using them.

H.R. 1994, The VA Accountability Act of 2015

Over one year after the Phoenix wait-list scandal shook the veterans community nationwide, the Department did not fire one employee for wrong-doing related to that incident. IAVA strongly supported the increased accountability provision of the Veterans Access, Choice, and Accountability Act (VACAA) last year which gave the VA Secretary increased authority to remove SES employees who do not serve our veterans to the standards they earned.

We now support--in that same spirit--expanding this removal authority to the greater VA workforce, notwithstanding whistleblowers, and publicly applaud Chairman Miller for refusing to give the Secretary any less authority than is fully necessary to get the Department back on the right track. We have heard-- and agree with--DepSec Gibson's testimony a few weeks back, which indicated it is currently too hard to hire and fire employees.

This legislation would shorten the appeal period for VA employees engaged in misconduct or poor performance so in those rare cases of wrongdoing, the Secretary is empowered to take corrective action more briskly. The process of personnel action should not languish in a sea of bureaucracy as it has been. I also want to make clear that the vast majority of the VA workforce does a fantastic job of serving our veterans every day and too often does not receive enough praise.

The sooner we get real reforms to stick, the sooner the headlines of misconduct will fade.

H.R. 2133, Servicemembers Choice in Transition Act

This legislation would allow a veteran transitioning away from active duty to receive additional education, career, technical, or entrepreneurial training. This would empower service members and give them an early advantage in transitioning back to the workforce.

H.R. 2275, The Jobs for Veterans Act of 2015



Statement of Christopher Neiveem
 Iraq & Afghanistan Veterans of America
before the House Committee on Veterans Affairs
 Subcommittee on Economic Opportunity
 Tuesday, June 2, 2015

This legislation would create a fourth administration at VA that would align all veterans' education, transition, and job placement programs under one agency entitled the Veterans Economic Opportunity and Transition Administration. This new administration would be led by the Under Secretary for Economic Opportunity.

Veterans we speak to have long reported overlapping services have clouded options rather than clarified them. GAO reports and feedback from our annual member survey have indicated the performance of LVERs and DVOPS under DoL VETS has been stagnant at best and not shown the improvement needed to help veterans begin careers. Ineffective oversight and the incongruent placement of this service within a myriad of other programs over at DoL has not proven to be a positive fit.

IAVA has previously likened this to having a Member of the U.S. House of Representatives posted in an office in the U.S. Senate, while still being responsible for legislative outcomes in the House—it doesn't make much sense. The time to change the status quo and put veterans first is now.

H.R. 2344, Veterans Vocational Rehabilitation and Employment Improvement Act of 2015

This legislation would provide Secretary McDonald the needed flexibility to prioritize the provision of services under VRE. Disability ratings, the degree to which veterans face employment barriers, and other factors can assist in executing the program in a more equitable manner. Additionally, IT upgrades under this legislation would streamline and improve the manner in which claims are processed within the program.

VRE is a program specifically purposed to support veterans with disabilities. By making sure appropriate modifications are made, the likelihood of veterans being employed increases, which is paramount for those using the program.

H.R. 2360, Career Ready Student Veterans Act

This legislation would restrict the VA from approving courses, for the purpose of distributing GI Bill funds, to programs that are unaccredited or do not meet the licensure or certification requirements of the state in which the program is provided.

We have already seen many examples of for-profit colleges, with much higher



Statement of Christopher Neiweem
Iraq & Afghanistan Veterans of America
before the House Committee on Veterans Affairs
Subcommittee on Economic Opportunity
Tuesday, June 2, 2015

tuition costs than most public universities, providing education programs to veterans that often leave them ill-prepared to be competitive in today's workforce, which then leads to unemployment. There still continues to be debate on these topics both within that sector and in Congress.

However, this is a piece of legislation everyone should support because after completing these programs, the veteran is still unfit for employment. These programs are not recognized by the accreditation boards and too often the veteran was unaware when they enrolled because of poor counseling from the school's staff-- often sales professionals incentivized to sign them up.

This legislation would provide obvious quality control and encourage veterans to pursue programs that will provide value long-term.

H.R. 2361, Work-Study for Student Veterans Act

This legislation would assist student veterans by extending the work-study program until 2020.

Draft Bill

This legislation would increase the years of service obligation required of a service member in order to maintain the option of transferring their benefit to a dependent. We testified this year in both congressional hearings and have spoken at informal roundtable discussions on this topic. Again, IAVA is strongly opposed to this change without a more substantive discussion that involves our members' support. The GI Bill and the benefits associated with it were a tough fight on the Hill and diminishing the value of veterans benefits must involve stakeholder support before a major change is made.

Thank you for your time and attention. I am happy to answer any questions you may have.



Statement of Christopher Neiweem
Iraq & Afghanistan Veterans of America
before the House Committee on Veterans Affairs
Subcommittee on Economic Opportunity
Tuesday, June 2, 2015

**Biography of Christopher Neiweem
Legislative Associate, Iraq and Afghanistan Veterans of America**

As Legislative Associate, Christopher maintains Congressional relationships and supports advocacy programs and routinely comments on policy matters in the national media. He provides editorial support for IAVA priorities in print regularly. Chris spent 6 years in the U.S. Army Reserves as a military police NCO and served a tour of duty in 2003 during Operation Iraqi Freedom detaining Enemy Prisoners of War (EPWs), and performing base security and customs during the Iraq war.

Statement on Receipt of Grants or Contract Funds

Neither Mr. Neiweem, nor the organization he represents, Iraq and Afghanistan Veterans of America, has received federal grants or contract funds relevant to the subject matter of this testimony during the current or past two fiscal years.

TESTIMONY OF



Presented By

Richard Weidman
Executive Director for Policy and Government Affairs

Before the

House Veterans Affairs Committee
Subcommittee on Economic Opportunity

Regarding

**H.R. 356; H.R. 832; H.R. 1994; H.R. 2133; H.R. 2275; H.R. 2344;
H.R. 2360; H.R. 2361; and a draft bill entitled, "To amend title 38,
United States Code, to make certain modifications and improvements
in the transfer of unused educational assistance benefits under the
Post 9/11 Educational Assistance Program of the Department of
Veterans Affairs, and for other purposes."**

June 2, 2015

Vietnam Veterans of America

*House Committee on Veterans Affairs
Subcommittee On Economic Opportunity
June 2, 2015*

Chairman Wenstrup, Ranking Member Takano and distinguished Members of the Subcommittee, on behalf of the Board of Directors, and members, I thank you for giving Vietnam Veterans of America (VVA) the opportunity to testify today regarding pending legislation before the subcommittee.

H.R.356 Wounded Warrior Employment Improvement Act introduced by Representative Sean Patrick Maloney (NY-18), this legislation directs the Secretary of Veterans Affairs to develop and publish an action plan for improving the training and rehabilitation services and assistance provided by the Department of Veterans Affairs (VA) for veterans with service-connected disabilities.

Requires such plan to include:

- *a comprehensive analysis of, and recommendations and a proposed implementation plan for remedying, workload management challenges at VA regional offices, including steps to reduce counselor case loads of veterans participating in a rehabilitation program;*
- *a comprehensive analysis of the reasons for the disproportionately low percentage of veterans with service-connected disabilities who served in the Armed Forces after September 11, 2001, who opt to participate in a VA rehabilitation program relative to the percentage of such veterans who use their entitlement to VA educational assistance;*
- *recommendations and a proposed implementation plan for encouraging more veterans with service-connected disabilities who served in the Armed Forces after September 11, 2001, to participate in VA rehabilitation programs; and*
- *a national staff training program for vocational rehabilitation counselors, that includes the provision of training to assist counselors in understanding the very profound disorientation experienced by warriors because of their injury, training to assist counselors in working in partnership with veterans on individual rehabilitation plans, and training on post-traumatic stress disorder and other mental health conditions and on moderate to severe traumatic brain injury that is designed to improve the ability of such counselors to assist veterans with such conditions.*

Vietnam Veterans of America

*House Committee on Veterans Affairs
Subcommittee On Economic Opportunity
June 2, 2015*

Vietnam Veterans of America (VVA) strongly supports this bill that would help ensure that disabled veterans get the assistance they need to succeed in the job market. We owe our veterans more than “blood money” in the form of compensation for service connected wounds, injuries, illness, or other adverse medical condition or malady. We owe all veterans, particularly disabled and veterans of combat theater deployments, the help needed to be able to obtain and sustain meaningful work at a living wage. In fact, the very best readjustment program for disabled veterans is now and always has been a decent job.

HR 356 will provide that all the services needed to help the disabled veteran reach the point of being “job ready” will henceforth be organized in a more comprehensive and integrated manner. VVA would note that part of this continuum of care must begin by implementing a real “Disabled Transition Assistance Program” or DTAP. Various Federal entities have claimed that we have such a program for more than 25 years, yet there still is no such meaningful program that consistently reaches separating military personnel who have been in some way disabled.

VVA looks forward to working with this area of VA in a much more transparent way than has been the case in the last decade or so, and in a collegial manner to ensure that a real continuum of assistance is actually available to every veteran or survivor who is eligible.

H.R.832 Veterans Employment and Training Service Longitudinal Study Act of 2015, introduced by Representative Paul Cook (CA-8), this legislation directs the Secretary of Labor to enter into a contract with a non-governmental entity to conduct a longitudinal study of a statistically valid sample of each of the following groups of individuals over a period of at least five years: (1) veterans who have received intensive job counseling, training, and placement services; (2) veterans who did not receive intensive services but who otherwise received services; and (3) veterans who did not seek or receive services.

Requires the study to include the collection of specified information for each individual who participates in the study, including:

- *the average number of months served on active duty,*
- *the distribution of disability ratings,*

Vietnam Veterans of America

*House Committee on Veterans Affairs
Subcommittee On Economic Opportunity
June 2, 2015*

- *unemployment benefits received,*
- *the average number of months employed and average individual and household annual income,*
- *employment status,*
- *whether the individual believes that any service received helped the individual to become employed,*
- *use of educational assistance,*
- *participation in a vocational rehabilitation program,*
- *conditions of discharge or release from the Armed Forces, and*
- *demographic information.*

Directs the Secretary to submit annual reports on the outcomes of the study that include any information the Secretary determines is necessary to determine long-term outcomes of the individuals in such groups.

VVA favors enactment of HR 832. Anything that will provide useful information about what is actually happening in regard to assisting veterans to find work is helpful, whether that function is based at the Department of Labor or at the VA. I would suggest that there be an oversight group to look at how they are doing data collection, which includes outside experts and knowledgeable veterans' advocates as equal partners, to ensure that the longitudinal study is more informative and meaningful than the current reports from the Department of Labor. VVA would point out that the reports from VETS at Labor have in the last decade at times been more than three years late.

H.R.1994, VA Accountability Act of 2015, introduced by Representative Jeff Miller, (FL-1) *this legislation would amend title 38, United States Code, to provide for the removal or demotion of employees of the Department of Veterans Affairs based on performance or misconduct, and for other purposes.*

VVA supports 1994, there is no excuse for the dissembling and lack of accountability in so much of what happens at the VA. It is certainly better than it was a year ago, but there is a long way to go in regard to cleaning up that corporate culture to make it the kind of system it should become. VA must change so that it can be trusted to get the "biggest bang for the taxpayer's buck," **and** (most importantly) get the individual veteran the best care or service due, in a timely way. It can be cleaned up and the job done

Vietnam Veterans of America

*House Committee on Veterans Affairs
Subcommittee On Economic Opportunity
June 2, 2015*

right the first time, if there is the political will to hold people accountable for doing their job properly.

VVA does believe that more safeguards should be built in for “workers” due process as opposed to managers. That does not mean that a lower level worker can escape accountability for the quality and/or quantity of their work.

Furthermore, it is clear to VVA that those VA employees who voice unwelcome truths, and who have the courage to stand up for what is right and for the veterans served are still being harassed, punished, and their livelihoods, and general well being subjected to extreme duress. The President and the Secretary simply must take immediate and effective action to address this ongoing problem.

H.R.2133 - Servicemembers' Choice in Transition Act, introduced by Representative Bill Flores (TX-17), *this legislation would amend title 10, United States Code, to provide additional training opportunities under the Transition Assistance Program (TAP) to members of the Armed Forces who are being separated from active duty.*

This legislation may well be of help, but all of this effort will not mean anything unless and until the other services emulate the Commandant of the Marine Corps, and put the requirement that personnel who will be separating must be allowed to attend TAP in the Officer Evaluation Report requirements. (When the Commandant says “You will” it gets done.)

H.R. 2275 - Jobs for Veterans Act of 2015 introduced by Congressman Jeff Miller (FL-1), *this legislation would amend title 38, United States Code, to establish in the Department of Veterans Affairs the Veterans Economic Opportunity and Transition Administration and to improve employment services for veterans by consolidating various programs in the Department of Veterans Affairs, and for other purposes. VVA strongly H.R. 2275 moving this function to VA in a new fourth division of VA that deals solely with helping veterans become as independent as possible. For those of working age, this means helping them successfully enter the civilian workforce. While we will address this in greater detail next week, this is a crucial aspect of the budget and planning process.*

Vietnam Veterans of America

*House Committee on Veterans Affairs
Subcommittee On Economic Opportunity
June 2, 2015*

VVA has always held that the ability to obtain and sustain meaningful employment at a living wage is the absolute central event of the readjustment process. Adding additional resources and much greater accountability to the VA Vocational Rehabilitation process is essential if we as a nation are to meet our obligation to these Americans who have served their country so well, and have already sacrificed so much.

The creation of the Veterans Economic Opportunities Administration (VEOA) will be a significant in the right direction. Additionally, the Department of Veterans Affairs must renew and embrace a corporate culture that measures its vocational rehabilitation and educational programs and initiatives to determine whether and how much they contribute to the ability of veterans to obtain and sustain gainful employment at a living wage.

The VA moved in the right direction by creating the Office of Economic Opportunity. This administrative change, we believe, does not go far enough. Hence, VVA advocates the creation of a fourth entity within the VA.

The VEOA should be headed by an under secretary nominated by the President and confirmed by the Senate. This VEOA would consolidate within the VA various separate yet what should be coordinated and interrelated programs whose mission, in essence, is to enable veterans to achieve their piece of the American Dream.

The VEOA would consolidate the Vocational Rehabilitation Service, the Veterans Education Service, and an enhanced Center for Veterans Enterprise. It would grant functional control, if not the outright transfer the Veterans Employment and Training Service (VETS) from the Department of Labor, as well as the DVOP (Disabled Veteran Outreach Program) and the LVER (Local Veterans Employment Representative) positions, which currently reside in state departments of labor.

The VEOA goes beyond an administrative action, and we will work with leadership on both sides of aisle and the Administration to achieve early enactment of HR 2275. VVA will also reach out to our colleagues to assist the Executive branch in correctly implementing the VEOA, and assist in creating a different corporate culture where the workforce does what is right by the veteran, but also where the expectation is that the veteran will

Vietnam Veterans of America

*House Committee on Veterans Affairs
Subcommittee On Economic Opportunity
June 2, 2015*

concentrate on his or her abilities, not their disabilities. The whole focus of VEOA should be, and must be, to help veterans focus on and achieve the highest degree of independence and autonomy possible.

H.R.2360 Career-Ready Student Veterans Act introduced by Representative Mark Takano (CA-41), *this legislation would amend title 38, United States Code, to improve the approval of certain programs of education for purposes of educational assistance provided by the Department of Veterans Affairs.*

VVA generally favors enactment of this legislation insofar as it really leads to helping veterans acquire skills that can be of immediate use in securing a decent job. We do point out that VBA revoked authority for a veterans' Community Based Organization that has been in operation for 11 years to be eligible to receive GI Bill monies, as had been the case over the more than past two years. When pressed, VBA officials said that it did not matter that this program over that period had a 90% job placement rate for course graduates, VBA had to do what the VA Office of General Counsel said they must do. VVA notes that this is the very same office of General Counsel who has stood idly by while predatory institutions were stealing not only billions of tax payer dollars, but were also stealing the future of the young veterans who were being bilked and left with no credentials of any value nor any marketable skills.

We have heard a great deal in past years about "transformation." Unless that transformation starts with the Office of General Counsel and its long term career employees, all the rest will wind up being merely froth.

H.R.2361 Work-Study for Student Veterans Act introduced by Representative Mark Takano (CA-41), *this legislation would Reauthorize through June 30, 2020 (under current law, the authorization expires as of June 30, 2013) certain qualifying work-study activities for individuals receiving educational assistance through the Department of Veterans Affairs.*

"To amend title 38, United States Code, to make certain modifications and

Vietnam Veterans of America

*House Committee on Veterans Affairs
Subcommittee On Economic Opportunity
June 2, 2015*

improvements in the transfer of unused educational assistance benefits under the Post 9/11 Educational Assistance Program of the Department of Veterans Affairs, and for other purposes.”

VVA strongly favors enactment of HR 2361. The VA work study program not only helps student veterans with needed additional income, but, if properly implemented, can assist in accomplishing many tasks in the veterans’ community that are particularly suited for student veterans to perform. We have in mind activities like tutoring, assisting with basic communication skills, outreach to others in their cohort group, and the like.

Mr. Chairman, Ranking Member Takano, I thank you for this opportunity for Vietnam Veterans of America (VVA) to share our thoughts regarding this vital legislation being considered here today.

I will be happy to answer any questions you and your colleagues may have.

Vietnam Veterans of America

*House Committee on Veterans Affairs
Subcommittee On Economic Opportunity
June 2, 2015*

**VIETNAM VETERANS OF AMERICA
Funding Statement
June 2, 2015**

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 for Policy and Government Affairs
Vietnam Veterans of America
(301) 585-4000, extension 127

Richard F. Weidman

Richard F. “Rick” Weidman is Executive Director for Policy and Government Affairs on the National Staff of Vietnam Veterans of America. As such, he is the primary spokesperson for VVA in Washington. He served as a 1-A-O Army Medical Corpsman during the Vietnam War, including service with Company C, 23rd Med, AMERICAL Division, located in I Corps of Vietnam in 1969.

Mr. Weidman was part of the staff of VVA from 1979 to 1987, serving variously as Membership Service Director, Agency Liaison, and Director of Government Relations. He left VVA to serve in the Administration of Governor Mario M. Cuomo as statewide director of veterans’ employment & training (State Veterans Programs Administrator) for the New York State Department of Labor.

He has served as Consultant on Legislative Affairs to the National Coalition for Homeless Veterans (NCHV), and served at various times on the VA Readjustment Advisory Committee, the Secretary of Labor’s Advisory Committee on Veterans Employment & Training, the President’s Committee on Employment of Persons with Disabilities - Subcommittee on Disabled Veterans, Advisory Committee on Veterans’ Entrepreneurship at the Small Business Administration, and numerous other advocacy posts. He currently serves as Chairman of the Task Force for Veterans’ Entrepreneurship, which has become the principal collective voice for veteran and disabled veteran small-business owners.

Mr. Weidman was an instructor and administrator at Johnson State College (Vermont) in the 1970s, where he was also active in community and veterans affairs. He attended Colgate University (B.A., 1967), and did graduate study at the University of Vermont.

He is married and has four children.

88

STATEMENT OF

CURTIS L. COY

DEPUTY UNDER SECRETARY FOR ECONOMIC OPPORTUNITY

VETERANS BENEFITS ADMINISTRATION

DEPARTMENT OF VETERANS AFFAIRS

BEFORE THE

SUBCOMMITTEE ON ECONOMIC OPPORTUNITY

HOUSE COMMITTEE ON VETERANS' AFFAIRS

JUNE 2, 2015

Good afternoon, Mr. Chairman, Ranking Member Takano, and other Members of the Subcommittee. Thank you for the opportunity to be here today to discuss legislation pertaining to the Department of Veterans Affairs' (VA) programs, including the following: H.R. 356, H.R. 1994, H.R. 2133, H.R. 2275, H.R. 2344, H.R. 2360, and H.R. 2361, as well as a draft bill to make certain modifications and improvements in the transfer of unused educational assistance benefits under VA's Post 9/11 Educational Assistance Program. Another bill under discussion today would affect programs or laws administered by the Department of Labor (DOL). Respectfully, we defer to that Department's views on H.R. 832, the "Veterans Employment and Training Service Longitudinal Study Act of 2015," a bill to direct the Secretary of Labor to enter into a contract for the conduct of a longitudinal study of the job counseling, training, and placement services for Veterans provided by the Secretary of Labor.

Accompanying me this afternoon are Cathy Mitrano, Deputy Assistant Secretary for Office of Resource Management, Human Resources and Administration and John Brizzi, Deputy Assistant General Counsel, Office of General Counsel

H.R. 356

H.R. 356, the "Wounded Warrior Employment Improvement Act," would require the Secretary of Veterans Affairs to develop and publish an action plan for improving the vocational rehabilitation services and assistance VA provides to Veterans. Section 2 of the bill states that the unemployment rate for Veterans with service-connected disabilities who served in the military after September 11, 2001, (Wounded Warriors) is nearly 17.8 percent. The section also asserts that only 20 percent of Wounded Warriors pursuing an education in 2013 chose to pursue vocational rehabilitation, while 54 percent chose to pursue educational assistance under chapter 33 of title 38, United States Code, and forego counseling and other supports because of the educational assistance program's easier application process and greater freedom. Other findings contained in the bill are that VA faces challenges with the Vocational Rehabilitation & Employment (VR&E) program's workload management, which affects the delivery and quality of services to Veterans, and that the VR&E program should be the premier program assisting Wounded Warriors to realize their economic goals.

Section 3 of H.R. 356 would require the action plan to include a comprehensive analysis of, and recommendations and a proposed implementation plan for, remedying workload management challenges at VA regional offices, including steps to reduce counselor caseloads, as well as an implementation plan for encouraging more Wounded Warriors to participate in a rehabilitation program under chapter 31 of title 38,

United States Code. Section 3 would also require the plan to include an analysis of the reasons for the low percentage of Wounded Warriors who choose chapter 31 services and assistance compared to the higher percentage who choose chapter 33 educational benefits, and an analysis of the barriers to enrollment in a chapter 31 program. In addition, section 3 would require the plan to include a national staff training program for VR&E counselors, with an emphasis on training on post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI).

While VA supports the effort to continue to improve and expand methods to provide timely and comprehensive vocational rehabilitation services and assistance to transitioning Servicemembers and Veterans, VA does not support this bill because VA does not believe there is a need for a new action plan to improve the services and assistance provided under chapter 31. VR&E Service's business process re-engineering initiative examined workload issues, training, roles, responsibilities, and outreach from FY 2011 to FY 2014, and consequently streamlined workload management strategies and developed a new staffing model, which informed the FY 2015 Resource Allocation Model. In addition, VA has a national training curriculum for VR&E staff that covers a variety of topics related to job duties, and includes information on working with individuals with PTSD and TBI, and other mental health issues. VR&E Service partners with the Veterans Health Administration (VHA) on many specialized trainings. VA also has an outreach campaign to increase awareness of and access to chapter 31 services. VR&E is an integral part of the Transitional Assistance Program (TAP) and vocational rehabilitation counselors (VRCs) are involved in supporting transitioning Servicemembers participating in the Integrated Disability Evaluation System (IDES). VRCs have been placed on military installations for early outreach and

the delivery of vocational rehabilitation services to transitioning Servicemembers. Because of these initiatives, training, and outreach programs, Servicemembers and Veterans have the information necessary to make an informed choice on available VA programs. In addition, there are fewer barriers to accessing rehabilitation services; VR&E staff better understand the specialized needs of Wounded Warriors and are therefore prepared to provide appropriate and timely rehabilitation services to meet those needs.

VA is currently developing a number of new initiatives. First, VR&E is developing new performance measures that will ensure the daily activities of employees who provide direct services to Veterans are linked to program measures that define successful outcomes. Second, VR&E is developing a new case management system, which will streamline responsibilities, produce a paperless environment, and improve data integrity. The funding included in the two-year IT budget cycle for the VR&E case management system project for FY 2015 and FY 2016 is \$9.72 million. Third, VR&E has implemented TeleCounseling as an optional method of coordinating case management and supportive services for Veterans participating in a chapter 31 program.

VA does not believe that comparing the services and assistance offered under chapters 31 and 33 demonstrates that there are problems with the delivery and quality of chapter 31 services and assistance. Because eligibility for chapter 31 services and assistance is more restrictive than eligibility for chapter 33 assistance, fewer Veterans are eligible for chapter 31 services, and therefore fewer Veterans necessarily have the choice to pursue a chapter 31 program.

VA cannot confirm that the unemployment rate for Wounded Warriors is nearly 17.8 percent. The most recent data from DOL on this specific population, "Employment Situation of Veterans - 2014", published on March 18, 2015, indicates the unemployment rate for Veterans with a service-connected disability who have served since September 11, 2001 is 9.1percent.

VA estimates that it would cost \$2 million to procure a contract to conduct a new analysis and develop an action plan as outlined in this bill. There would be no mandatory costs associated with enactment of this bill.

H.R. 1994

Section 2 of H.R. 1994 would give the Secretary of Veterans Affairs the same authority for VA non-Senior Executive employees granted to him for VA Senior Executives under 38 U.S.C. § 713. Under section 2, the Secretary could remove a VA non-Senior Executive employee from the civil service or demote the employee, either through a reduction in grade or annual rate of pay. If the individual being removed or demoted is seeking corrective action from the Office of Special Counsel (OSC) the Secretary could not take an action under this section without approval from OSC. Individuals removed or demoted under section 2 could appeal that action to a Merit Systems Protection Board administrative judge (AJ), who would be required to issue a decision on the appeal within 45 days. Decisions issued by an AJ would be final and not subject to further appeal.

Section 3 of this bill would require all new VA employees who are competitively appointed or appointed to the Senior Executive Service at VA to serve a probationary

period of at least 18 months. The probationary period could be extended past 18 months by the Secretary.

H.R. 1994 is the latest in a series of legislative proposals targeting VA employees by providing extraordinary authority to sanction them, not available in other Federal agencies. Last summer, section 707 of the Veterans Access, Choice, and Accountability Act of 2014, added 38 U.S.C. § 713, establishing an expedited removal authority that strictly limits VA Senior Executives' post-termination appeal rights. While that provision gave the Secretary additional flexibility in terms of holding VA Senior Executives accountable for misconduct or poor performance, it constrained the Secretary's ability to retain gifted senior leaders by singling out VA Senior Executives for disparate treatment from their peers at other agencies.

It is likely that H.R. 1994 would also result in unintended consequences for VA, such as a loss of qualified and capable staff to other government agencies or the private sector. Section 2 of this bill, which is based on 38 U.S.C. § 713, would apply to all VA employees regardless of their grade or position. VA's workforce consists of a diverse array of employees, including employees with advanced degrees in business, law, and medicine. Many of these employees accept lower pay to serve at VA, and a large number of these employees are Veterans. While VA's employees are motivated first and foremost by a desire to serve Veterans, another motivation to accept lower pay shared by many federal employees is the job security afforded by protections such as appeal rights that attach at the end of a probationary period. Diminishing those appeal rights or expanding the probationary period will reduce the motivation to pursue public service at VA.

Section 2 of the bill poses due process concerns, due to its failure to provide the employee with a chance to be heard prior to losing the benefits of employment.

Section 3 of this bill would also adversely impact recruitment at VA, by extending the probationary period for employees from what is usually 12 months to 18 months and authorizing the Secretary of Veterans Affairs to extend the probationary period beyond that time at his discretion. In general, the probationary period serves as a way of examining whether an employee is suitable for his or her position. The 12-month cap of probationary periods serves a dual role: it gives management a finite amount of time within which to gauge an employee's performance, and it gives the employee a reasonable period of time within which he or she would be made a permanent federal employee. By expanding that time to 18 months and allowing the Secretary to extend the probationary period past 18 months, section 3 of this bill may impact VA's ability to recruit employees. Like the diminishment of due process and appeal rights, the longer probationary period simply makes VA less competitive for the candidates seeking job security. In effect, H.R. 1994 would create a new class of employees in the government, a "VA class." These "VA class" employees could be removed or demoted at the discretion of the Secretary, would receive fewer due process rights and abbreviated MSPB appeal rights in actions taken under section 2 of the bill and would serve longer probationary periods than their peers at other government agencies. This will hinder VA efforts to make the "VA class" of employee the very finest employees to serve our Veterans and ensure that they timely receive the benefits and care to which they are entitled.

By singling out VA employees, the legislation would dishearten a workforce dedicated to serving Veterans and hurt VA's efforts to recruit and retain high performing employees.

VA will continue to work with the Committee and VSO's on how the Secretary can best hold employees accountable while preserving the ability to recruit and retain the highly skilled workforce VA needs to best serve Veterans.

H.R. 2133

H.R. 2133, the "Servicemembers' Choice in Transition Act," would amend section 1144 of title 10, United States Code, concerning TAP, which provides employment and job training assistance and related services for members of the Armed Forces being separated from active duty, and for their spouses, to add a new subsection to require the Secretaries of Defense and Homeland Security to permit a member of the Armed Forces who is eligible for assistance to elect to receive additional training.

VA defers to the Department of Defense (DoD) and the Department of Homeland Security (DHS) for views on the bill. There would be no mandatory or administrative costs associated with enactment of this bill.

H.R. 2275

H.R. 2275, the "Jobs for Veterans Act of 2015," would amend title 38, United States Code, to establish in VA a new "Veterans Economic Opportunity and Transition Administration."

Section 2 of the bill would establish the "Veterans Economic Opportunity Administration" to administer programs that provide assistance to Veterans and their dependents and survivors related to economic opportunity, such as VA's VR&E, Education, Loan Guaranty, Transition Assistance, and Homeless Veterans Reintegration programs, and certain programs related to Veteran-owned small

businesses. The new Administration would be led by an Under Secretary for Veterans Economic Opportunity, who would be directly responsible to the Secretary of Veterans Affairs. Section 3 of the bill would make the new Under Secretary position subject to appointment by the President with the advice and consent of the Senate.

While VA appreciates the Committee's focus on improving employment services for Veterans by consolidating various programs, we do not support this bill. The current Veterans Benefits Administration (VBA) structure reflects the Under Secretary for Benefits' overall responsibility for Veterans benefit programs, including compensation, pension, survivors' benefits, VR&E, educational assistance, home loan guaranty, and insurance. A separate Administration for economic opportunity programs would negatively impact Veterans and would result in a redundancy of management support services. VA understands that the Committee may have used both VA and DOL FY 2016 budget requests to develop the 22,118 FTE ceiling. If this is the case, then the legislation does not provide for the additional staff required to support the administrative and management functions for the new administration. This increase in staffing would be at the expense of direct FTE associated with the delivery of benefits, which would reduce support to Veterans. In 2011, the Office of Economic Opportunity (OEO) was established in VBA under the authority of the Under Secretary of Benefits to directly oversee Education Service, VR&E Service, Loan Guaranty Service, and the Office of Transition, Employment, and Economic Impact. We believe there is currently an appropriate management structure in which there is internal collaboration among these program offices to oversee Veteran programs related to economic opportunities. We are concerned that dividing the benefit programs between two Administrations will result in a redundancy of management support services and add an administrative burden.

The Office of Small and Disadvantaged Business Utilization (OSDBU) reports directly to the Secretary or Deputy Secretary. OSDBU's mission is to advocate for the maximum practicable participation of small, small-disadvantaged, Veteran-owned, women-owned, and empowerment-zone businesses in contracts awarded by VA and in subcontracts awarded by VA's prime contractors. This bill would move only OSDBU's Center for Verification and Evaluation (CVE) program to the new Administration. CVE administers the verification program required for Service-Disabled Veteran-Owned Small Business and Veteran-Owned Small Business and maintains the vendor information page database. VA is concerned that moving this major program from OSDBU to a new Administration will result in a redundancy of efforts when dealing with small and disadvantaged business activities.

VA is also concerned that there will be extensive issues related to human resources and logistics with transitioning two principal staff positions that would be transferred under section 2: Disabled Veterans' Outreach Program Specialists and Local Veterans Employment Representatives. DOL's Veterans' Employment and Training Service programs provide employment and training services to eligible Veterans through State grant programs. Funds are allocated to State Workforce Agencies that support the two principal staff positions. Maintaining the presence of these positions in state-owned job centers while transferring DOL's grant authority/appropriation to VA would be problematic.

Section 4 of the bill would transfer all functions currently performed under chapters 20, 41, 42, 43 by DOL to VA to be administered by the newly established Veterans Economic Opportunity Administration. It would also require DOL and VA to

enter into a memorandum of understanding to accomplish the transfer and to ensure effective coordination and avoid duplication of activities.

Like DOL, VA does not support the transfer of these Veterans employment programs and services from DOL to VA. VA has significant concerns regarding a transfer, considering the current integration of these services throughout DOL's nationwide network of employment services and VA's lack of existing infrastructure and subject matter expertise to support the delivery of some of the functions that would be transferred to VA.

Without more specific information on the number of employees authorized for the new administration and an in-depth understanding of the DOL functions and operations that would be transferred if this bill were enacted, VA is unable to provide a cost estimate for the proposed new administration.

H.R. 2344

Section 2 of H.R. 2344 would amend section 3104(b) of title 38, United States Code, to add a requirement that a course of education or training may be pursued as part of a vocational rehabilitation program under chapter 31, United States Code, only if it is approved for purposes of chapter 30 or 33 of title 38. The Secretary would have discretion to waive this requirement, if determined appropriate. This requirement would apply to Veterans who first begin a chapter 31 program of rehabilitation on or after the date that is one year after the date of enactment.

VA does not oppose this section because it is essentially in line with current practice. There would be no costs associated with enactment of this section.

Section 3 of this bill would amend chapters 21 and 31 of title 38, United States Code, so that housing modifications required under a rehabilitation program may be provided under the Specially Adapted Housing program. VA supports the purpose of section 3, as VA believes that it would help Veterans continue to achieve maximum independence in daily living, increase Veterans' freedom of choice, and create additional administrative efficiencies.

VA cannot support the section as drafted, however, because it is not clear whether it would accomplish its purpose, and VA believes it would have unintended consequences. For example, it is not clear how VA would coordinate the benefits. Despite the section 3 bar against duplication of benefits, the provision could be interpreted to allow housing modifications under either chapter 21 or chapter 31, or both, depending on the Veteran's situation and preferences. Due to the structure of chapter 21, section 3 would result in expanded eligibility for Veterans' Mortgage Life Insurance. It would also make the provision of housing modifications under rehabilitation programs available outside the United States. VA would be pleased to work with the Committee to address these and other technical concerns.

Without technical amendments to clarify the impacts of this section, VA cannot estimate benefits costs.

Section 4 of this bill would amend section 3104 of title 38, United States Code, to allow the Secretary to prioritize chapter 31 services based on need. The Secretary would be required to consider disability ratings, the severity of employment handicaps, qualification for a program of independent living, income, and other factors the Secretary determines to be appropriate when evaluating need. The Secretary would

also be required to submit a plan describing any changes in priority of chapter 31 services to Congress within 90 days of making any changes.

VA supports the intent behind this section; however, VA would need to develop a study to determine how to prioritize the provision of chapter 31 services based on need, because of the complexity of the matter. It would take VA approximately one year to submit a plan to the Congress. VA currently has authority to provide vocational rehabilitation services based on the rehabilitation needs of individuals and believes services should continue to be provided in that manner. Additionally, under section 3120 of title 38, United States Code, VA is required to provide independent living programs first to Veterans for whom the reasonable feasibility of achieving a vocational goal is precluded solely as a result of a service-connected disability. Income is not a factor currently used to determine vocational rehabilitation services to be provided to Veterans that qualify based on service-connected disability and the existence of an employment handicap. VA would need to identify policy and procedures to implement this additional criterion.

There would be no costs associated with enactment of this section.

Section 5 of this bill would require VA to reduce redundancy and inefficiencies in the use of information technology to process claims for chapter 31 rehabilitation programs by ensuring that all payments for and on behalf of Veterans participating in a chapter 31 rehabilitation program are only processed and paid out of one corporate information technology system, and by enhancing the information technology system supporting Veterans participating in a chapter 31 rehabilitation program to support more accurate accounting of services and outcomes. This section would authorize appropriations of \$10 million for FY 2016 to carry out the section. It would also require

the Secretary to submit a report to Congress not later than 180 days after the date of enactment on the changes made.

VA supports the intent behind this section. VA's Office of Information and Technology is currently working to begin development of a new case management system for VR&E Service. The funding included in the two-year IT budget cycle for the VR&E case management system project for FY 2015 and FY 2016 is \$9.72 million. VA plans to move all subsistence allowance award payments for chapter 31 off of the Benefits Delivery Network and into the Subsistence Allowance Module, with payment through the Finance and Accounting System, by August 2015. This move will allow VR&E Service to monitor the improvement in payment timeliness, the level of administrative burden on staff, and the fiscal accuracy and integrity of completed claims. The scope of the current VR&E Case Management System (CMS) contract does not include full integration to existing financial payment systems – including contracts, vendor, and school payments. Subject to the availability of appropriations to support this authorization of funds, this section would allow VA to build upon the VR&E CMS by developing a single user interface for all chapter 31 payments.

H.R. 2360

H.R. 2360, the "Career-Ready Student Veterans Act," would amend title 38, United States Code, to improve the approval of certain VA programs of education for purposes of educational assistance.

This bill would amend 38 U.S.C. § 3676(c), pertaining to the approval of non-accredited courses, by adding new requirements to the criteria that must be met for State approving agencies to approve institutions' written applications for approval of

non-accredited courses. First, in the case of a program designed to prepare an individual for licensure or certification in a State, the program would need to meet any instructional curriculum licensure or certification requirements of that State. Second, in the case of a program designed to prepare an individual for employment pursuant to standards developed by a board or agency of a State in an occupation that would require approval or licensure, the program would need to be approved or licensed by such board or agency of the State.

H.R. 2360 also would add subsection (f) to section 3676 to permit VA to waive the aforementioned requirements in the case of a program of education offered by an educational institution if VA determined:

- The educational institution was accredited by an agency or association recognized by the Department of Education;
- The program did not meet the requirements at any time during the two-year period preceding the date of the waiver;
- The waiver furthers the purposes of the educational assistance programs administered by VA or would further the education interests of individuals eligible for assistance under such programs;
- The educational institution does not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance, except for the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal student assistance.

H.R. 2360 would also amend 38 U.S.C. § 3675, pertaining to the approval of accredited courses at for-profit educational institutions, to include the new requirements in section 3676(c), above, as part of the approval conditions for accredited courses offered by private for-profit institutions.

VA supports the intent behind H.R. 2360. However, we do not support the bill as currently drafted for a number of reasons.

If enacted, H.R. 2360 would ensure that non-accredited courses pursued by GI Bill beneficiaries meet all of the State requirements for licensure or certification in a given occupation or career field and would be approved by the State board or agency that developed the standards. VA does not oppose the concept of additional criteria for the approval of non-accredited courses. However, we note that, as written, the bill would not allow the Secretary to waive the requirement for non-accredited courses, as the institution must be accredited in order to meet the criteria for a waiver. VA is unclear as to the reason why an accreditation requirement is being inserted in the approval criteria for non-accredited programs. In general, an institution's accreditation applies to all of the courses offered by the institution, and accredited courses have different approval requirements.

Additionally, H.R. 2360 would ensure that accredited courses at private, for-profit institutions meet all State requirements for certification and licensure. VA supports efforts to ensure that Veterans and other GI Bill beneficiaries are well-trained and adequately equipped to obtain employment and achieve economic success. However, we note that the proposed licensure and certification requirements would not be applied to similar programs at public and private, not-for-profit institutions. Consequently, the

bill does not ensure that all Veterans and beneficiaries would receive all of the training required for licensure or certification in their chosen occupational fields.

VA estimates that there would be no additional discretionary cost requirements associated with the enactment of H.R. 2360. Mandatory costs associated with this bill are still under consideration.

H.R. 2361

H.R. 2361, the "Work-Study for Student Veterans Act," would amend section 3485(a)(4) of title 38, United States Code, extending for five years (through June 30, 2020) VA's authority to provide work-study allowances for certain already-specified activities. Under current law, the authority expired on June 30, 2013.

Public Law 107-103, the "Veterans Education and Benefits Expansion Act of 2001," established a five-year pilot program under section 3485(a)(4) of title 38 that expanded qualifying work-study activities to include outreach programs with State Approving Agencies, an activity relating to the administration of a National Cemetery or a State Veterans' Cemetery, and assisting with the provision of care to Veterans in State homes. Subsequent public laws extended the period of the pilot program and, most recently, section 101 of Public Law 111-275, the "Veterans' Benefits Act of 2010," extended the sunset date from June 30, 2010 to June 30, 2013. Prior to the expiration of this legislation, there were approximately 300 individuals who participated in the work-study program under these activities.

VA does not oppose legislation that would extend the current expiration date of the work-study provisions to June 30, 2020, subject to the identification of appropriate offsets. VA does not have the benefit costs associated with this proposal at thistime.

Draft Legislation Concerning Transfer of Chapter 33 Benefits

This draft legislation would make certain modifications and improvements in the transfer of unused educational assistance benefits under the Post- 9/11 Educational Assistance Program (chapter 33 of title 38, United States Code). Specifically, section 1(a) of the legislation would amend 38 U.S.C. § 3319(b)(1) to allow members of the uniformed services to transfer unused education benefits to a family member after the Servicemember has completed 10 years of service and agrees to serve for 2 more years. The current provision requires 6 years of service and an agreement to serve for 4 more years. Although dependent children are not eligible to receive transferred benefits until the Servicemember has completed a minimum of 10 years in the Armed Forces, spouses can currently begin using transferred benefits once the Servicemember has completed 6 years of service.

In addition, section 1(b) of the proposed legislation would amend 38 U.S.C. § 3319(h)(3) to change the rate of payment for dependents who receive transferred entitlement under chapter 33. The monthly amount of the basic allowance for housing stipend payable to a spouse or a child who receives the transferred education benefit would be payable in an amount equal to 50 percent of the amount of such stipend that would otherwise be payable to the transferor under chapter 33, and that is currently payable to the transferee.

Finally, section 1(c) of the draft legislation would change the term "armed forces" to "Armed Forces" each place it appears in 38 U.S.C. § 3319.

Since transferability is a Department of Defense (DOD) benefit that aids in retention, VA defers to DOD regarding these provisions.

VA estimates that there would be no additional discretionary costs associated with the enactment of this legislation. Mandatory costs, administrative costs, and IT costs are still under consideration.

Mr. Chairman, this concludes my statement. Thank you for the opportunity to appear before you today. I would be pleased to respond to questions you or the other Members of the Subcommittee may have.

STATEMENT
OF
TERESA W. GERTON
ACTING ASSISTANT SECRETARY FOR
VETERANS' EMPLOYMENT AND TRAINING
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

June 2, 2015

Introduction

Good afternoon, Chairman Wenstrup, Ranking Member Takano, and distinguished Members of the Subcommittee. Thank you for the opportunity to participate in today's hearing. As Acting Assistant Secretary at the Veterans' Employment and Training Service (VETS) at the Department of Labor (DOL or Department), I appreciate the opportunity to discuss the Department's views on pending legislation and proposals impacting veterans.

While this hearing is focused on several bills under consideration by the Subcommittee, I will limit my remarks to the proposed legislation that has a direct impact on the programs administered by DOL, specifically H.R. 832, "Veterans Employment and Training Service Longitudinal Study Act of 2015," H.R. 2275, "Jobs for Veterans Act of 2015," and H.R. 2133, "Servicemembers' Choice in Transition Act."

The Department is the Federal government's leader on training and employment services. It has the expertise and a nationwide network to best provide skills training and employment opportunities for anyone who needs them, including veterans. In addition, DOL is well positioned to cater to the specific employment and training needs of our Reserve Component forces that make up 51% of the total force, particularly those Reserve members who have not deployed to a combat zone and therefore do not qualify as a "veteran" and are ineligible for veterans' services. Reservists also maintain parallel careers throughout their military service, and require continuous career support in geographically dispersed areas, which DOL can provide. The Administration strongly believes that the Department's integrated network and programs are best suited to positive employment outcomes for the men and women who serve our country.

H.R. 832 – "Veterans Employment and Training Service Longitudinal Study Act of 2015"

H.R. 832, the "Veterans Employment and Training Service Longitudinal Study Act of 2015," would direct the Secretary to enter into a contract with a non-government entity to conduct a statistically valid longitudinal study of veterans and the job counseling, training, and placement services for veterans provided by the Department.

The Department supports the enactment of this bill and looks forward to conducting the type of longitudinal study called for in the legislation. We welcome the opportunity to have a survey to better understand the impact of our services on the employment outcomes of veterans. The bill calls for a survey of the following groups: (1) veterans who received intensive services through the Department's programs; (2) veterans who received services but did not get an intensive service; and (3) veterans who did not seek or receive services from the Department's programs.

The Department believes that this type of study could offer a tremendous opportunity to learn about the impact of the Department's services for veterans. Studying the three groups of veterans over time, the Department could provide more complete data on the long-term outcomes of veterans who receive services from the Department and the key factors influencing those outcomes. In addition, the study would allow the Department to examine trends in program satisfaction and long-term employment and standard of living outcomes. The results would allow better tailored services to assist veterans with their immediate and long-term employment needs. The estimated cost of the study is \$10 million. The Department does have some concerns over levels of access with the third cohort above, and is happy to provide technical assistance on this bill to help maximize the value this study could provide to both the Department and Congress.

Further, to enable delivery of meaningful results, the Department requests access to the National Directory of New Hires (see Section 453A(h) of the Social Security Act, 42 U.S.C. 653) for the purposes of this study. At this time, DOL does not have authority to readily access earnings data nationally, which would be essential to conducting a meaningful and effective evaluation of outcomes outlined in the bill, such as employment status and income. Without such access, the process of obtaining earnings data involves timely and costly negotiation with States and generates significant delays in studies.

H.R. 2275 – "Jobs for Veterans Act of 2015"

H.R. 2275, the "Jobs for Veterans Act of 2015," seeks to establish under title 38 of the U.S. Code the "Veterans Economic Opportunity and Transition Administration," within the Department of Veterans Affairs (VA), with the primary function of administering the programs of the Department which provide assistance related to economic opportunity of veterans and their dependents and survivors. It also seeks to transfer the DOL's veterans' programs to VA, beginning October 1, 2016.

The Administration does not support moving the Veterans' Employment and Training Service or its programs to VA. The veterans' employment services DOL provides are well integrated into the public workforce system that is overseen and funded by DOL; shifting these services to VA would weaken this connection. The Department works with our partners at other agencies to meet the employment and training needs of veterans and help them successfully transition into the civilian workforce, on behalf of over one million veterans each year.

As described below, VETS' mission is focused on four key program areas: (1) preparing veterans for meaningful careers; (2) providing them with employment resources and expertise; (3) protecting their employment rights; and, (4) promoting the employment of veterans and related training opportunities to employers across the country. VETS is able to accomplish its mission by working closely with other parts of the Department--including the Employment and Training Administration (ETA), which administers numerous core employment and training State formula programs. Together, these DOL programs provide a unified and complementary approach to serving and protecting the reemployment rights of veterans, and have operated together within the States for decades.

VETS also has strong, established relationships with our Federal partners like DoD and VA; State and local governments; private sector employers and trade associations; institutions of higher learning; non-profit organizations; and Veteran Service Organizations to establish and develop a network that enables service members, veterans, and families to successfully integrate into their communities. This focus on coordination is reflected in our Directors for Veterans' Employment and Training (DVET) standards of performance, which specify that each DVET must coordinate with state Departments of Labor and Veterans Affairs. As discussed later, the Workforce Innovation and Opportunity Act (WIOA) supports even greater inter-agency coordination. This legislation would undercut, not improve, the coordination that exists today. The public workforce system is designed to be a decentralized network of strong partnerships at the Federal, state, local, and regional levels. Extracting VETS from the Department will make these interactions more expensive and less efficient.

The movement of veterans' employment programs and services from DOL to the VA would generate inefficiencies by removing existing employment programs and services for veterans from the national employment services network that already exists for all America's job seekers and workers. As the Federal government's leader on veteran employment, VETS ensures that the full resources of the Department are readily available for veterans and service members seeking to transition into the civilian labor force. We believe that moving VETS to another agency will diminish the synergy gained through alignment of these programs with other Department of Labor employment and training programs, as well as those that protect the rights of service members, veterans, and their families.

Transition GPS and the DOL Employment Workshop (DOL EW)

VETS provides its three-day DOL Employment Workshop as part of the mandatory "Transition GPS" curriculum to prepare service members to seek civilian employment. Since its inception, DOL has provided training and services to over 2.6 million separating or retiring service members and their spouses. Funded at \$14 million in FY 2015, DOL conducted more than 6,600 EWs for over 207,000 participants at 206 military installations worldwide. Since the EW's redesign in 2013, it has been highly rated by its participants and received strong levels of support from members of the Veterans Service Organizations: 89 percent of over 11,000 service members who participated in a survey about the DOL EW in the fourth quarter of FY 2014 reported that it enhanced their confidence in transition planning. The American Legion, which testified before this Subcommittee earlier this year, "was highly impressed both by the amount and the quality of information that was conveyed....by instructors who were contracted by the

Department of Labor.” The data suggest that the Department’s revised EW meets the high expectations of its audience, and an independent study is evaluating the effectiveness of the new curriculum.

Jobs for Veterans’ State Grant (JVSG) and AJC Services for Veterans

The Department provided employment and training services in Program Year (PY) 2013 to well over 1.1 million veterans through DOL’s programs at nearly 2,500 American Job Centers (AJC) throughout the country. VETS’ programs (Jobs for Veterans State Grant (JVSG), and Homeless Veterans Reintegration Program (HVRP)) are specifically designed to provide services to veterans who have significant barriers to employment.

DOL awards JVSG as a formula grant to each state and territory to support two types of staff positions in the AJC network: Disabled Veterans’ Outreach Program (DVOP) specialists and Local Veterans’ Employment Representatives (LVER). Funded at \$175 million, the JVSG program provided intensive employment services to over 330,000 veterans, and other eligible persons. As shown in Table 1, average six-month earnings, employment entry, and retention for all veterans served by the combined services in key states delivered through the AJCs improved from PY 2012 to PY 2013.

Table 1. Common Measure Results, PYs 2012-2013, Combined Outcomes of Wagner-Peysor Employment Service and Jobs for Veterans State Grants*

Measure	PY 2012 Result	PY 2013 Result
Percent of Veterans employed in the first quarter after exit (Entered Employment Rate (EER))	50.2%	52.9%
Percent of Veterans employed in the first quarter after exit still employed in 2nd & 3rd quarters after exit (Employment Retention Rate (ERR))	79.6%	81.0%
Average six month earnings of Veterans in the second and third quarter after exit (Average Earnings (AE))	\$16,870	\$17,243

*Table 1: As reported in the Labor Exchange Reporting System, ETA-9002D and forms 9132 for the states of Texas, Utah and Pennsylvania.

Homeless Veterans Reintegration Program (HVRP)

While homelessness among veterans has declined, much work remains to be done. For the PY 2013 award cycle, Congress appropriated approximately \$38.1 million to DOL for HVRP. Funds were awarded to 147 grantees. These included awards for two targeted programs designed to address the employment barriers of specific veteran populations, as follows:

- under the HVRP Homeless Female Veterans and Veterans With Families (HFVWF) program, 22 grants, in 16 States and the District of Columbia, totaling over \$4.96 million, were awarded; and
- to support the Incarcerated Veterans Transition Program (IVTP) for 1 quarter of performance and 3 quarters of retention services, 14 grants, in 13 States, totaling \$824,630, were awarded for one quarter of performance and three quarters of retention services.

Table 2 provides performance information from the HVRP program for the previous two program years. From PY 12 to PY 13, fewer participants were enrolled in the program and the average cost per placement dipped slightly for standard HVRP participants. The participant decline is linked to the decreasing numbers of homeless veterans nationwide. With fewer to serve, the remaining homeless veteran population consists of the chronically homeless or those with the most significant barriers to employment. Nonetheless, VETS was able to provide the appropriate levels of support to prepare these veterans for employment with only minor cost increases.

Table 2. HVRP Participant Statistics, PY 2012 and PY 2013

Grant	Participants Enrolled		Average Cost per Participant		Average Cost Per Placement		Average Hourly Wage at Placement	
	PY 2012	PY 2013	PY 2012	PY 2013	PY 2012	PY 2013	PY 2012	PY 2013
HVRP	17,480	16,133	\$1,964	\$1,903	\$3,034	\$3,003	\$11.22	\$11.51
HVRP Subset: HFVWF	1,433	1,213	\$2,424	\$2,585	\$3,656	\$4,869	\$12.24	\$12.32
HVRP Subset: IVTP*	1,408	275	\$2,546	\$2,709	\$4,014	\$4,656	\$10.69	\$10.81

*In PY 2013, IVTP grantees performed for only one quarter (July 1, 2013-September 30, 2014), due to availability of funding.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

The Department protects veterans’ employment and reemployment rights by enforcing USERRA (38 U.S. Code 4301-4335). The Act prohibits discrimination in employment based on prior service in the uniformed services, an individual’s current service in the uniformed services, or intent to join the uniformed services. USERRA also provides reemployment rights with the pre-service employer following qualifying service in the uniformed services. VETS receives and investigates, as well as resolves, claims arising under USERRA. VETS also provides its USERRA Annual Report to Congress each year, which includes more detailed information regarding program and enforcement outcomes. In FY 2014, VETS and the Office of Special Counsel (OSC) concluded a three-year demonstration project (from August 2011 to August 2014) to assess each agency’s performance in reviewing and resolving Federal-sector USERRA cases. The Government Accountability Office (GAO) evaluated the agencies’ performances using metrics, including case outcomes, customer satisfaction, timeliness, cost, and capacity. As reflected in GAO’s final report, GAO-15-77, released on November 25, 2014, VETS scored higher than OSC in each measured category.

The Workforce Innovation and Opportunity Act (WIOA)/JVSG Refocusing

There are two significant changes currently underway in the public workforce system as it affects education, training, and employment services for veterans and their families. President Obama signed the Workforce Innovation and Opportunity Act (WIOA) into law on July 22, 2014 -- the first legislative reform of the public workforce system in over 15 years. This transformational legislation, which Congress passed by a wide bipartisan majority, reaffirmed the role of the AJC system, a cornerstone of the public workforce system, and brought together and enhanced several key employment, education and training programs. WIOA modernized the public workforce system to help job seekers and workers access the services they need to succeed in the labor market and match employers with the skilled workers they need to compete in the global economy.

Congress established an extremely aggressive schedule for implementing WIOA, which generally goes into effect in July 2015. WIOA implementation will affect nearly every aspect of the public workforce system, and a successful outcome will require significant attention at the State, local, regional, and Federal levels. Implementing WIOA, along with the Administration's other job-driven training reforms, will strengthen the network of nearly 2,500 AJCs, provide greater accountability and transparency for consumers, and establish an effective blend of job training and postsecondary education known as career pathways that can help veterans advance in their careers while earning industry-recognized credentials. VETS continues to work closely with ETA to help states and local workforce areas implement WIOA. During PY 2016, states and local areas will implement performance management systems to collect the outcome metrics defined in WIOA and other data on services provided to veterans served through AJCs. These dramatic changes to the public workforce system make uprooting VETS and its programs by October 2016 particularly ill-timed.

In addition, consistent with the VOW to Hire Heroes Act of 2011, the Department released a JVSG refocusing strategy in April 2014, updated in February 2015, which refines and clarifies the roles of DVOP and LVER staff. These changes are intended to improve workforce programs' service delivery strategies for veterans and eligible spouses, meet anticipated demand for services from an increase in transitioning service members, and ensure that JVSG-funded state staff members are performing their functions consistent with Congressional intent. As part of the implementation plan for this refocusing strategy, VETS and ETA issued joint guidance documents and conducted extensive technical assistance for state JVSG and AJC staff members. Audits for compliance with these requirements began this year.

Both WIOA and JVSG refocusing are significant programmatic changes that require the time and attention of state and local workforce staff for their successful implementation. We are concerned that having the organizational realignment proposed in this legislation occurring at the same time that significant additional changes to both the JVSG program and the workforce system are underway would be disruptive and counterproductive.

The Department also notes that this proposed legislation may be seen to conflict with the WIOA provisions which provide States the opportunity to develop and submit to the Secretary of Labor a single Combined Plan and to build performance management systems that make available

performance information on WIOA programs for job seekers and the public, including data on training providers' performance outcomes. DOL is planning to align as appropriate other DOL-administered program performance goals, including JVSG, with WIOA performance indicators.

Modernization of the public workforce system under WIOA and making it more job-driven, combined with JVSG refocusing, ultimately will deliver higher quality employment services for veterans and better connect employers to veterans seeking new or next jobs. The proposed move of VETS and its programs to VA would make transition more complex and unnecessarily complicated, and it could have the unintended consequence of adversely affecting employment services for veterans.

Data Reporting Systems

WIOA requires a new data reporting structure. The AJC is the cornerstone of the Nation's workforce investment system and is administered by the Department, which not only has the mission focus but the necessary infrastructure in place to meet current and expected demand for employment-related services, including training. VETS' services and other veterans' programs within the Department are fully integrated with other DOL employment and enforcement programs in order to serve veterans with a broad array of coordinated services. Currently, reporting requirements under title 38, U.S. Code, chapter 41 are met through the State Workforce Agencies which are funded by DOL's Employment and Training Administration. The reporting system for veterans' employment outcomes is part of the Department's reporting regime for the workforce system. Any requirements to adjust or change collection of Veterans' data would require extensive coordination between two Departments, as opposed to two agencies within a single Department. Further, requiring VA systems to integrate with the new labor reporting system is likely to generate tens of millions of dollars in additional costs.

Military-Civilian Integration

The Department believes that reintegration is most successful when it assists veterans to bridge the civil-military divide in the workforce. In fact, recent studies report that relegating veterans to a veterans-only service can perpetuate stigmas and myths further. As stated in the *Volunteers of America's* 2015 report titled, *Exploring the Economic and Employment Challenges Facing U.S. Veterans*, veteran clients described their inability to relate to civilians, discomfort around civilians, and difficulty adapting to civilian employment culture as significant obstacles to their effective transition to civilian employment. Our interactions with veterans and transitioning service members reinforce these observations.

Additionally, RAND recently released its report, *Veteran Employment: Lessons from the 100,000 Jobs Mission*. In this report, RAND notes that, "the transition from uniformed service member to veteran employee involved challenges for individuals and for employers. Perhaps the most significant challenge is the ability of both veterans and employers to match military skills to civilian job requirements." As the report details, veterans and employers made statements in reference to how difficult it can be to connect with one another. As one participant stated, "It's really just a lot of noise in the veterans' employment landscape, with so many different job boards and veteran employment sites that it's confusing for the employer and the veteran." DOL

has been providing employment and training services for all Americans for over 100 years and the AJC network is best suited to meet the needs of both veterans and employers. AJCs have business services teams that often include LVERS who work with employers to help them recruit and hire talented individuals and veterans. Also, AJCs are well positioned to provide individuals who are seeking employment with referrals to employment opportunities in their area through the National Labor Exchange.

Veterans can best be supported through their transition to meaningful civilian employment by being fully integrated into the civilian support structure, as represented by the integration of the JVSG and HVRP grant programs within the delivery of employment services provided by the national network of AJCs and managed by DOL.

H.R. 2133 – “Servicemembers’ Choice in Transition Act”

H.R. 2133, the “Servicemembers’ Choice in Transition Act,” would amend section 1144 of title 10 of the U.S. Code, by adding the new subsection titled, Additional Training Opportunities. Under this subsection, the Secretaries of Defense and Homeland Security must permit a member of the armed forces eligible for assistance under the program to elect to receive additional training in any of the following subjects:

- (A) Preparation for higher education or training,
- (B) Preparation for career or technical training,
- (C) Preparation for entrepreneurship, and
- (D) Other training options determined by the Secretary of Defense and the Secretary of Homeland Security.

Additionally, the proposed bill would require the Secretaries of Defense and Homeland Security ensure that a member of the armed forces who elects to receive additional training is able to do so.

The Department believes that service members and their spouses should be provided every opportunity to better prepare them for the civilian workforce through every available means possible. Additional employment and educational training opportunities can only enhance their chances of success by increasing their employability. If enacted, the costs to facilitate the expected increase in service member participation in the aforementioned curriculum would be negligible for the Department, since DOL does not deliver these pieces of the Transition GPS curriculum. However, the Department defers to the Departments of Defense and Homeland Security to provide remarks on this legislation.

Conclusion

DOL’s focus on employment is part of our core mission and competency. Creating opportunities for our veterans to thrive in the civilian economy through meaningful employment is a priority for DOL leaders and for every agency within the Department, and we work closely with our partners at the Departments of Veterans Affairs and Defense to do so. DOL’s connection with Governor-appointed State workforce boards and State workforce agencies, and local workforce boards that oversee the nearly 2,500 AJCs across the nation facilitates veterans’ employment

with large national employers, as well as those small and medium-sized businesses that do most of the hiring. DOL's long-established relationship with State Workforce Agencies is a partnership that delivers proven and positive results. The Administration wants to ensure that we build on these established relationships and the improvements called for in WIOA to modernize the public workforce system and AJCs to better help our transitioning service members and veterans obtain family-sustaining jobs. For this reason, the Administration has strong concerns about any legislation that would undermine its progress or ability to help veterans and transitioning service members achieve positive employment outcomes.

VETS recently submitted its annual report to Congress for FY 2014. VETS welcomes the opportunity to discuss the contents of its report with members of this Subcommittee. The Department looks forward to working with the Subcommittee to ensure that our transitioning service members and veterans, and their families, have the resources and training they need to successfully transition to the civilian workforce. Chairman Wenstrup, Ranking Member Takano, distinguished Members of the Subcommittee, this concludes my written statement. Thank you for the opportunity to be a part of this hearing. I welcome any questions you may have.

116

STATEMENT
OF
DR. SUSAN S. KELLY
DIRECTOR
TRANSITION TO VETERANS PROGRAM OFFICE
OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND
READINESS
DEPARTMENT OF DEFENSE
BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE
ON ECONOMIC OPPORTUNITY
HEARING
ON
PROPOSED LEGISLATION
JUNE 2, 2015

Chairman Wenstrup, Ranking Member Takano, and Members of the Subcommittee, I am pleased to appear before you today to discuss and share the Department of Defense's views relating to several pieces of proposed legislation. I will focus my comments only on those proposals that will affect the Department of Defense (DoD). I will generally defer to the Department of Veterans Affairs (VA) to provide responses on those proposals that we perceive do not have significant DoD impacts. My testimony will address H.R. 2133, Section 4 of H.R. 2275, and the draft bill, "Modification and Improvement of Transfer of Unused Education Benefits to Family Members Under Department of Veterans Affairs Post-9/11 Educational Assistance Program."

H.R. 2133, "Servicemembers' Choice in Transition Act"

This proposed bill would permit members of the Armed Forces eligible for assistance under section 1144 of title 10, United States Code (employment assistance, job training assistance and other transitional services), who elect to receive additional training in preparation for higher education or training, preparation for career or technical training, preparation for entrepreneurship, or any other training options determined by the Secretary of Defense, to receive the additional training in subjects available.

While the Department appreciates the intent of this bill, we do not believe it is necessary. The current Transition GPS (Goals, Plans, Success) curriculum offers three separate tracks in addition to our Transition GPS Core curriculum. The tracks consist of the "Accessing Higher Education" Track, the "Career Technical Training" Track, and the "Entrepreneurship" Track, all designed to assist Servicemembers to meet Career Readiness Standards (CRS). These

additional tracks are offered at 206 military sites worldwide; further legislation to permit Servicemembers to receive this training would be duplicative.

H.R. 2275, “Jobs for Veterans Act of 2015”

H.R. 2275, “Jobs for Veterans Act of 2015” section 4, “Transfer of Department of Labor Veterans Programs to Department of Veterans Affairs.” This section would transfer key veteran employment-related functions, currently residing in the Department of Labor (DOL), to VA.

Veterans strengthen our nation's workforce. They enter the job market with essential skills learned and honed in the military; they help American businesses stay competitive in the global marketplace, and they even create their own small businesses to compete in this marketplace.

Since 1981, the responsibility of providing our veterans, Servicemembers, and their spouses with employment resources and expertise, employment rights protection, and employment opportunities to help them strengthen our nation's workforce has rested with the Department of Labor's Veterans Employment and Training Service (DOL VETS). Although the DoD has always worked closely with DOL VETS, since the passage of the VOW To Hire Heroes Act of 2011 and the redesign of the Transition Assistance Program, the Department has gained an even greater appreciation for the value that the DOL provides our Servicemembers.

In this digital age, there are ever-changing mechanics involved in exploring career interests, searching the labor market, building resumes, preparing for interviews, and ultimately securing a job offer. DOL's familiarity with the modern labor market and its connection to state labor offices, make it the single best organization in our federal government to provide labor-related services, not only to our Servicemembers, but to all American citizens.

The success of the Transition Assistance Program's DOL Employment Workshop (DOLEW) further proves its value. The latest feedback data shows that, on average, 91 percent of transitioning Servicemembers who participate in the Employment workshop said the training enhanced their confidence in transition planning, 93 percent said they will use what they learned, and 96 percent said the facilitators were knowledgeable about the material.

Embedded in the DOLEW and throughout the Transition GPS curriculum, are direct connections to DOL's American Job Centers (AJCs). This deliberate bridging between DoD and DOL facilitates early access for our Transitioning Servicemembers and their spouses to the entire swath of employment and training services provided at AJCs, not only those targeted for Veterans but for all services available to every citizen. Employment is core to a successful transition and segregating Veteran services from the employment services provided to the rest of the nation is inefficient and puts Veteran reintegration into civilian life at risk.

Since the revised workshop began in 2012, the outlook for Servicemembers transitioning to the civilian workforce has brightened every year. This is good news, but we must look to the future. DoD and DOL have joined hands to build a renewed focus on apprenticeships for the talent pipeline flowing through the Armed Forces. Congress provided DoD with the Skillbridge authority and we are working hand-in-glove with DOL to enable installation commanders to capitalize on growing opportunities for training and apprenticeships. We are encouraging communities to shape new grants available from DOL to re-tool their state workforces and tap into the talent pool of transitioning Servicemembers at local installations as a highly trainable asset. We would hope that our close work with DOL can continue without diversion as it harbors tremendous potential. To best ensure continued progress in this vein, as well as discover innovative ways to build what Secretary Ashton Carter has called the Force of the Future, DoD strongly believes that the mission and functions of job counseling, training and placement

services, as well as the administration of employment and employment rights of our Veterans, should remain with the DOL. It is the best way to ensure that those who served continue to strengthen our nation's workforce.

Draft bill entitled, "To amend title 38, United States Code, to make certain modifications and improvements in the transfer of unused educational assistance benefits under the Post 9/11 Educational Assistance Program of the Department of Veterans Affairs, and for other purposes."

The Department of Defense (DoD) appreciates the opportunity to discuss potential modifications and improvements to the Post-9/11 Educational Assistance Program of VA, as proposed in this draft legislation. This draft bill appears to mirror several of the education proposals from the Military Compensation and Retirement Modernization Commission Final Report (January 29, 2015). In response to that Report, DoD deferred comment until we have more data on the impacts of transferability of educational benefits on retention. Similarly, as the Department stated May 13, 2015, in testimony to the Senate Committee on Veterans Affairs, without data enabling the Department to understand the potential effects on retention, the Department--and the Joint Chiefs are particularly concerned on this point--cannot support a bill that changes the Post-9/11 G.I. Bill housing stipend for dependents, or the proposed language to increase the eligibility requirements for transferring Post-9/11 G.I. Bill benefits.

To this end, the Department has sponsored a study with RAND National Defense Research Institute to review education benefits for Servicemembers, including the Post-9/11 G.I. Bill and its impacts on retention (with a focus on impacts of transferability). We anticipate the study to be completed in the summer of 2016, allowing the Department to evaluate the potential

effects of altering eligibility requirements for, or the transfer of, G.I. Bill benefits, as well as the reduction of the housing stipend for dependents.

Because the impacts of proposed reductions to benefits on retention are still unknown, and a study is still in progress, we would like to defer comment until the study is complete.

Further, regardless of the outcomes of the study, the Department strongly believes that those Servicemembers who have already committed to additional service obligations should be “grandfathered” and that their dependents should not be subject to any reduction in transferability that may be imposed by future legislation.

The Department defers to VA regarding any costs of this bill.

Mr. Chairman this concludes my statement. I thank you and the members of this Subcommittee for your outstanding and continuing support for the men and women who proudly wear the uniform in defense of our great Nation. They are most deserving of our best efforts to make them career-ready and to enable them to achieve their aspirations. The Department and I look forward to working closely with you to strengthen the All-Volunteer force through a balanced program of recruiting, retention, and transition, and to recognize the service of our veterans.

Statement from U.S. Rep. Markwayne Mullin (OK-02) on H.R. 356, the Wounded Warrior Employment Improvement Act

There are no words to describe the sacrifices that our disabled service members have made—sacrifices that lead to challenges for these individuals and their families when they come home. We must do everything we can to help our Wounded Warriors get back into the workforce, and the bipartisan Wounded Warrior Employment Improvement Act (H.R. 356) increases access to important veterans' assistance programs.



VETERANS EDUCATION SUCCESS

STATEMENT FOR THE RECORD
LEGISLATIVE HEARING ON THE
CAREER-READY STUDENT VETERANS ACT (H.R. 2360)
BEFORE THE
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY
COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
JUNE 2, 2015

Chairman Wenstrup, Ranking Member Takano, and Members of the Subcommittee:

Veterans Education Success (VES) appreciates the opportunity to share its perspective on the Career-Ready Student Veterans Act (H.R. 2360). VES is a non-profit organization focused on protecting the integrity and promise of the GI Bill and other federal educational programs for veterans and servicemembers.

Career-Ready Student Veterans Act (H.R. 2360)

H.R. 2360 adopts the same commonsense, bipartisan protections for GI Bill educational benefits that Congress put in place, through the bipartisan 2014 National Defense Authorization Act, for servicemembers who use DOD's Tuition Assistance Program.¹ We believe that it is critical for Congress to extend these same bipartisan protections to veterans using GI Bill benefits.

The goal of this important legislation is simple—to protect the integrity of GI Bill educational benefits and taxpayer expenditures. Earning a certificate or degree does not automatically lead to a job in a veteran's field of study. Some professions, including law, nursing, teaching, and certain healthcare professions, must also meet state licensure and certification requirements as well as employer expectations.

The Department of Veterans Affairs (VA) and its partner, State Approving Agencies (SAAs) approve programs for veterans to attend using their GI Bill benefits. Unfortunately, the Department of Veterans Affairs allows veterans to use their GI Bill

¹P.L. 113-66.

benefits for degrees that do not lead to the necessary licensure or certification. Frankly, this is a waste of both veterans' hard-earned educational benefits and taxpayer dollars.

Appropriate Accreditation Is Often the Pathway to a Job

In approving degree programs, VA and SAAs generally rely on standards established by the Department of Education. The Education Department recognizes two types of accrediting agencies—both institutional and programmatic. According to the Education Department, accreditation is the recognition that an institution maintains standards requisite for its graduates to gain admission to other reputable institutions of higher learning or to achieve credentials for professional practice.

In general, institutional accreditation, not programmatic accreditation, is a prerequisite for a school to participate in the federal student aid program.²

- *Institutional accrediting organizations* are either regionally based (accrediting schools in their geographic region) or national in scope (accrediting schools that have multiple campuses across the country).³ In some cases, the type of institutional accreditation can limit the ability of schools' graduates to find a job in their field of study. For example, all states require teachers to graduate from a regionally accredited school and some police agencies do as well.
- *Specialized accrediting agencies* focus on specific degrees offered by schools or by a department or college within a larger university.⁴ Some of these specialized agencies accredit distance education programs and accreditation by one of these agencies allows schools to participate in federal student aid.⁵ For some careers, however, institutional accreditation is not sufficient: Proper accreditation at the programmatic level by a specialized accrediting organization is necessary. For example, lawyers must graduate from a law school accredited by the American Bar Association to sit for Bar Exam, which is required in all but a few states to practice law. Similarly, you simply cannot become a licensed clinical psychologist unless the PhD program you attend is accredited by the American Psychological Association.

State Boards and Employers Also Play a Role in Determining Who Gets Hired

At the state level, various boards and entities determine licensing and certification requirements, including Boards of Nursing and Dentistry, state bar admission associations, and state Departments of Education. For law enforcement officers, state

²Although the Department's College Navigator website provides information on institutional accreditation, it has very spotty data on schools' programmatic accreditation.

³http://www2.ed.gov/admins/finaid/accred/accreditation_pg6.html

⁴See <http://ope.ed.gov/accreditation/FAQAccr.aspx>. See this link for a list of some of the specialized accrediting agencies: http://www2.ed.gov/admins/finaid/accred/accreditation_pg7.html. Other approved agencies can be found at the Council for Higher Education Accreditation, <http://www.chea.org/>.

⁵http://www2.ed.gov/admins/finaid/accred/accreditation_pg10.html

legislatures may set minimum standards but state and local police agencies may adopt more stringent requirements.

While some professions do not require licensure, states and employers may strongly prefer schools to be programmatically accredited. For example, state nursing boards may take programmatic accreditation into consideration when determining which schools' nursing programs are approved for graduates to become licensed RNs. And, some employers insist that graduates pass a national certification exam offered by a recognized organization. Particularly in the healthcare field, employers view such certification as a protection against lawsuits alleging that they employ unqualified health personnel.

GI Bill Approval of a School Program Doesn't Mean the Degree Leads to a Job

Numerous GI Bill approved degrees in programs such as law, psychology, teaching, criminal justice, and numerous healthcare fields, including nursing, medical assistant, and dental assistant do not lead to jobs because they lack the appropriate accreditation or fail to meet state-specific criteria required for certification or license. Moreover, veterans graduating from some programs are unable to obtain the professional certifications that employers strongly prefer.

From our pool of veterans complaints and law enforcement actions, we identified at least 8 fields of study offered by 15 different schools that failed to meet state or employer requirements for graduates to find a job in their field of study (see table below). Yet, the Department of Veterans Affairs authorizes GI Bill benefits for these programs at about 60 campuses across the country. Overall, GI Bill approved programs at about 20 percent of the 300 campuses that we examined did not qualify graduates for state licensure or certification. An attachment to this statement contains a detailed description of these findings.

These programs—offered both online and at brick and mortar campuses—represent the tip of the iceberg of unaccredited programs because this analysis focused only on some of the degree programs that were the subject of veteran complaints or state Attorneys General lawsuits. Certainly, degree programs in other fields pose similar accreditation problems for graduates. For example, on May 26, 2015, the U.S. Federal Trade Commission announced an action against Ashworth College for misleading students about programs that "failed to meet the basic educational requirements set by state licensing boards for careers or jobs" in numerous states. The action noted that Ashworth's programs were eligible for GI Bill dollars, but not for federal student loans, and that Ashworth targeted veterans and service members for recruiting, including through recruiters posing as "military advisors."⁶

⁶<https://www.ftc.gov/system/files/documents/cases/150526ashworthcollegecmpt.pdf>

Sample of Degree Programs Approved for GI Bill Benefits that Don't Lead to Jobs in Those Fields

Degree	Sample of GI Bill-approved campuses identified through veteran complaints or lawsuits with degree programs that don't satisfy job requirements	Why degree doesn't lead to a job	Related Lawsuit
Law	7 (online (3), CA (4)) ^a	not ABA accredited ^b	
Clinical Psychology (PhD)	2 (WA, FL)	not APA accredited ^c	CO AG
	MN	not APA accredited	CT
Teaching (early childhood)	IA, online	not state board of education approved	IA AG
Nursing	4 (AL, FL (2), NC)	not state board of nursing approved	NM AG
Criminal Justice	Boise	police dept. requires regional accreditation	
	4 (Tampa, St. Petersburg, IL (2))	police dept. requires regional accreditation	
	4 (IL)	police dept. requires regional accreditation	IL AG
Dental Assisting	18 (TX (9), CA (9))	not state dentistry board approved ^d	
Medical Assisting	3 (CA)	lacks the program accreditation required to attain the certification employers prefer	
	4 (NE, OH (2), WI)	lacks the program accreditation required to attain the certification employers prefer	MN AG
	8 (CO, MO, NE, OK, TX (4))	lacks the program accreditation required to attain the certification employers prefer	
Surgical Technology	KS, MO	lacks the program accreditation/approval required to attain the certification employers prefer ^e	NY AG

Source: Research by Veterans Education Success.

Note: This table has been revised to reflect the fact that the Phoenix BA nursing program offered at 19 campuses in various states does not require state Board of Nursing approval because the Phoenix program only enrolls RNs who are seeking a Bachelor's degree in nursing and already have a state license to practice. The VA database of GI Bill approved programs does not distinguish between such "post-licensure" programs and the 3 "pre-licensure" programs we examined that Phoenix offers in California, Colorado, and Hawaii. Those 3 programs are approved programs in those states and qualify graduates to become licensed RNs.

^aThere are a total of 6 law schools but 7 online/campus-based programs because one law school offers both online and campus-based degrees.

^bAmerican Bar Association. ABA accreditation is not required to sit for the bar in California and several other states. However, graduates are required to undergo several years of mentoring by a licensed lawyer in order to take the bar exam.

^cAmerican Psychological Association.

^dTexas requires dental assistants who perform x-rays to be state registered but none of Kaplan's 9 Texas campuses are approved by the state dentistry board. California's dentistry board requires dental assistants to

attend a state approved school to perform four different procedures but Kaplan is only approved for one of the four procedures.

⁶Two organizations offer a certification exam for surgical technology—the National Board of Surgical Technology and Surgical Assisting and the National Center for Certification Testing. The former requires schools to have programmatic accreditation to sit for the exam while the latter requires graduation from an “authorized” school.

Accreditation and licensure requirements bring harsh, real-life implications for the young men and women who learn, too late, that their degree lacked the proper accreditation and they are not eligible to even sit for a licensing exam in their field of study. Once their GI Bill benefits are wasted on an unaccredited program, there is no recourse for them. Many such veterans understandably express anger that VA did not properly protect their hard-earned benefit.

Veterans justifiably expect that if VA has approved a program for GI Bill benefits, then that program is a good use of those hard-earned benefits. Veterans believe that VA approval means the program is worthy of their sacrifice. Veterans should not be expected to navigate different state-specific licensing requirements and employer preferences to try to uncover that a program is, in fact, unlikely to leave them eligible for work. Nor should they be expected to rely on school disclosures, which may not be forthcoming or helpful.⁷ In short, determining whether a school’s program meets career requirements is not a task that veterans should be burdened with.

Already operating under a similar provision, the Defense Department reports that it requires schools to self-certify that they are in compliance in order to relieve the administrative burden of enforcing the requirement

Conclusion

H.R. 2360, the Career-Ready Student Veterans Act would extend to veterans the same commonsense, bipartisan protections that Congress already put in place in 2013 for servicemembers who use DOD’s Tuition Assistance Program.

The examples cited in this testimony underscore the need to protect veterans’ hard-earned educational benefits by ensuring that only degree programs leading to the jobs they actually studied for are approved to receive GI Bill funds. These degree programs at both brick and mortar campuses and online are only the tip of the iceberg. Because this analysis only examined some of the programs that were the subject of veteran complaints or state Attorneys General lawsuits, additional programs may also leave veterans ineligible to work in their field of study.

It would be a disservice both to veterans’ military service and to taxpayers’ investment in the post-military careers of our nation’s veterans not to extend these basic protections.

⁷Inadequate disclosures about programs’ lack of proper accreditation has been the subject of many law enforcement law suits against certain programs.

Thank you for considering the views of Veterans Education Success on this important topic.

Walter Ochinko
Policy Director
Walter@VeteransEducationSuccess.org

THE GI BILL PAYS FOR DEGREES THAT DO NOT LEAD TO A JOB

Issue

Unfortunately, some programs approved for GI Bill benefits leave graduates *de facto* ineligible to obtain a job in their field of study because the school (1) lacks the appropriate accreditation or (2) fails to meet state-specific criteria required for certification or license. In addition, some graduates may be technically eligible to obtain a job in the field of study, but are not hired because they are unable to obtain the professional certifications that employers strongly prefer. The programs at issue range from law to teaching, criminal justice, and numerous healthcare fields, including nursing, psychology, medical assisting, dental assisting, and surgical technology.

The fiscal year 2014 National Defense Authorization Act requires schools that participate in DOD's Tuition Assistance program to meet the instructional curriculum licensure and certification requirement of each state if the schools program is designed to prepare individuals for state licensure or certification.¹ To relieve the administrative burden of enforcing this requirement, DOD officials told us that it requires schools to certify that they are in compliance. We believe that it is critical for Congress to extend these same bipartisan protections to veterans using GI Bill benefits.

Findings

Based on a limited sample of veterans' complaints and lawsuits by state law enforcement agencies, our research identified 8 degree-programs offered by 15 different schools at both brick and mortar campuses and online that failed to meet state or employer requirements, leaving graduates ineligible to work in their field of study. Yet, veterans are able to enroll in these programs at about 60 campuses across the country. Overall, GI Bill approved programs at about 20 percent of the 300 campuses that we examined did not qualify graduates for state licensure or certification. A description of our methodology may be found at the end of this document.

These degree programs represent only the tip of the iceberg because we examined only some of the programs that were the subject of veteran complaints or state Attorneys General lawsuits; additional programs may also leave veterans ineligible to work in their field of study. For example, at the end of May, the U.S. Federal Trade Commission (FTC) announced a settlement with Ashworth College for misleading students about programs that "failed to meet the basic educational requirements set by state licensing boards for careers or jobs" in numerous states because they lacked the proper accreditation.² FTC noted that Ashworth's programs were eligible for GI Bill dollars, but

¹P.L. 113-66.

²<https://www.ftc.gov/system/files/documents/cases/150526ashworthcollegemcpt.pdf>

not for federal student loans, and that Ashworth targeted veterans and service members for recruiting, including through recruiters posing as "military advisors."

Sample of Degree Programs Approved for GI Bill Benefits that Don't Lead to Jobs in Those Fields

Degree	Sample of GI Bill-approved campuses identified through veteran complaints or lawsuits with degree programs that don't satisfy job requirements	Why degree doesn't lead to a job	Related Lawsuit
Law	7 (online (3), CA (4)) ^a	not ABA accredited ^b	
Clinical Psychology (PhD)	2 (WA, FL) MN	not APA accredited ^c	CO AG CT
Teaching (early childhood)	IA, online	not state board of education approved	IA AG
Nursing	4 (AL, FL (2), NC)	not state board of nursing approved	NM AG
Criminal Justice	Boise 4 (Tampa, St. Petersburg, IL (2))	police dept. requires regional accreditation	
	4 (IL)	police dept. requires regional accreditation	IL AG
Dental Assisting	18 (TX (9), CA (9))	not state dentistry board approved ^d	
Medical Assisting	3 (CA) 4 (NE, OH (2), WI)	lacks the program accreditation required to attain the certification employers prefer	MN AG
	8 (CO, MO, NE, OK, TX (4))	lacks the program accreditation required to attain the certification employers prefer	
Surgical Technology	KS, MO	lacks the program accreditation/approval required to attain the certification employers prefer ^e	NY AG

Source: Research by Veterans Education Success.

Note: This table has been revised to reflect the fact that the Phoenix BA nursing program offered at 19 campuses in various states does not require state Board of Nursing approval because the Phoenix program only enrolls RNs who are seeking a Bachelor's degree in nursing and already have a state license to practice. The VA database of GI Bill approved programs does not distinguish between such "post-licensure" programs and the 3 "pre-licensure" programs we examined that Phoenix offers at campuses in California, Colorado, and Hawaii. Those 3 programs are approved programs in those states and qualify graduates to become licensed RNs.

^aThere are a total of 6 law schools but 7 online/campus-based programs because one law school offers both online and campus-based degrees.

^bAmerican Bar Association. ABA accreditation is not required to sit for the bar in California and several other states. However, graduates are required to undergo several years of mentoring by a licensed lawyer in order to take the bar exam.

^cAmerican Psychological Association.

^dTexas requires dental assistants who perform x-rays to be state registered but none of Kaplan's 9 Texas campuses are approved by the state dentistry board. California's dentistry board requires dental assistants to attend a state approved school to perform four different procedures but Kaplan is only approved for one of the four procedures.

^eTwo organizations offer a certification exam for surgical technology—the National Board of Surgical Technology and Surgical Assisting and the National Center for Certification Testing. The former requires schools to have programmatic accreditation to sit for the exam while the latter requires graduation from an "authorized" school.

Background on Accreditation

The Department of Veterans Affairs and its partner, State Approving Agencies, approve programs for GI Bill benefits, relying in part on accreditation. The Education Department recognizes accrediting agencies. Accreditation signifies that an institution maintains standards requisite for its graduates to gain admission to other reputable institutions of higher learning or to achieve credentials for professional practice.

There are two types of accrediting bodies—institutional and "specialized," programmatic accrediting agencies. In general, institutional accreditation, not programmatic accreditation, is a prerequisite for a school to participate in the federal student aid program.³

- *Institutional accrediting organizations* are either regionally based (accrediting schools in their geographic region) or national in scope (accrediting schools that have multiple campuses across the country).⁴
- *Specialized accrediting agencies* focus on specific degrees offered by schools or by a department or college within a larger university.⁵ Some of these specialized agencies accredit distance education programs.⁶

For example, Harvard University is accredited as an institution, while its law school is accredited by the American Bar Association, which is the specialized accrediting body with sole jurisdiction over accreditation of U.S. law schools.

How Institutional Accreditation Affects Veterans. In some cases the type of institutional accreditation can affect the ability of a school's graduates to obtain a job in their field of study. For example:

- Police departments increasingly require an Associates degree from an accredited school. For some jobs, students must graduate from a *regionally* accredited school in order to obtain the required state certification or licensure.
- In order to be licensed to teach in any other states, individuals must graduate from a *regionally* accredited school with a state-approved teacher preparation

³Although the Education Department's College Navigator website provides information on institutional accreditation, it has very spotty data on schools' programmatic accreditation.

⁴http://www2.ed.gov/admins/finaid/accred/accreditation_pg6.html

⁵See <http://ope.ed.gov/accreditation/FAQAccr.aspx>. See this link for a list of the specialized accrediting agencies: http://www2.ed.gov/admins/finaid/accred/accreditation_pg7.html

⁶http://www2.ed.gov/admins/finaid/accred/accreditation_pg10.html

program.⁷ In addition, states have additional requirements. For example, in New Jersey graduates must then pass a certification exam in order to receive a provisional teaching certificate. With this certificate, graduates can be hired by a school district where they receive mentoring, supervision, and evaluation before earning a permanent teaching certificate.

How Specialized Accrediting Agencies Affect Veterans. For some jobs, institutional accreditation may be insufficient; programmatic accreditation by a specialized accrediting organization may be necessary to gain employment. For example:

- Law school graduates must have matriculated at a school accredited by the American Bar Association in order to sit for the Bar Examination in nearly every state, and passing the Bar Exam is required in most states to practice law.
- Accreditation by the American Psychological Association is required to become a licensed clinical psychologist.

State/Employer Preference. Some states and employers may not require, but strongly prefer, schools to be programmatically accredited.⁸ For example:

- State nursing boards may take programmatic accreditation into consideration when determining which schools' nursing programs are approved. Only graduates of approved nursing programs can sit for a state's licensing exam.
- Employers may also prefer to hire graduates from programmatically accredited schools and offer such graduates higher salaries.

DEGREES THAT REQUIRE PROGRAMMATIC ACCREDITATION

Law

Passing the bar exam allows graduates to be licensed to practice law in that state. The vast majority of U.S. bar admission associations rely on accreditation by the American Bar Association (ABA) to determine whether their legal education requirement for admission to the bar is satisfied. Education at an ABA-approved law school meets the requirements in every jurisdiction in the United States.⁹ California, Washington, Vermont, and Virginia provide an alternative route to legal practice in addition to attending a traditional, ABA-approved, law school. This alternate route, referred to as "law office reading," allows individuals to skip law school and instead apprentice for several years with a licensed lawyer. Veterans pursuing this alternate route do not need to attend law school or use up their GI Bill and incur debt. Their bar-exam pass rates are significantly lower than for law school graduates.¹⁰

⁷Interview with the Director of Accreditation, CAEP.

⁸Employers' human resources departments caution students to make sure they are enrolling in programs with the proper accreditation, a seal of approval that many bosses look for. See <https://sites.google.com/site/commonsensedemocracyfoundation/recent-articles/idahoansareflockingtoexpensivefor-profitschools>

⁹http://www.americanbar.org/groups/legal_education/resources/distance_education.html

¹⁰http://www.slate.com/blogs/business_insider/2014/08/02/states_that_allow_bar_exams_without_law_degrees_require_apprenticeships.html

The following sample of law schools are not accredited by the American Bar Association but are approved to receive GI Bill educational benefits.¹¹ All six schools are located in California which does not require ABA accreditation for graduates to take the bar exam, but does require additional steps.¹²

There may be additional law schools that do not meet accreditation requirements, as this limited sample arose from veteran complaints or lawsuits.

- Abraham Lincoln University's Juris Doctor law degree program.¹³
 - 25 veterans enrolled during CY 2014. VA paid tuition and fees for 17 veterans in FY 2014 totaling \$71,488.
- California Southern University's Juris Doctor law degree program.¹⁴
 - 10 veterans enrolled during CY 2014. VA paid tuition and fees for 6 veterans in FY 2014 totaling \$37,965.
- Concord Law School's Juris Doctor law degree program.¹⁵
 - 48 veterans enrolled during CY 2014. VA paid tuition and fees for 25 veterans in FY 2014 totaling \$225,000.
- Irvine University's Juris Doctor law degree program.¹⁶
 - 4 veterans enrolled as of April 2015. VA paid tuition and fees paid for 3 veterans in FY 2014 totaling \$15,045.
- Pacific West College of Law's Juris Doctor law degree program.¹⁷
 - 2 veterans enrolled as of April 2015. FY 14 tuition and fees paid for 1 veteran totaled \$7,476.

¹¹http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/official-guide-to-aba-approved-law-schools.html

¹²The State Bar of California recognizes three different categories of law schools: ABA-accredited schools, state-accredited schools, and unaccredited schools. In most states, a degree from an ABA-accredited law school is a prerequisite for eligibility to take the bar examination, but California has its own system for accrediting law schools and allows graduates of these state-accredited schools (also called Committee-accredited schools, since the body accrediting them is the Committee of Bar Examiners) to sit the bar upon completion of their degrees alongside graduates of ABA-accredited schools. The Committee also allows graduates of unaccredited law schools to sit the bar, but students at these schools are required to take the First-Year Law Students' Examination, also called the Baby Bar, in order to proceed past their 1st year in law school. See <http://www.top-law-schools.com/californias-law-school-baby-bar.html>

¹³This law school only offers online classes. It's website states that it is accredited by the Distance Education and Training Council but does not acknowledge that the school lacks ABA accreditation. During a live chat, VES asked if a graduate could sit for the bar exam in Iowa and the response was to contact the bar admission authorities in that state. "I cannot advise you about other state bars, unfortunately."

¹⁴This school offers both campus-based and online degrees.

¹⁵Concord law school is an online program.

¹⁶Irvine's law program is campus based.

¹⁷Pacific West's law program is campus based.

- University of San Luis Obispo Juris Doctor law degree program.¹⁸
 - 1 veteran enrolled as of April 2015. FY 14 tuition and fees paid for 1 veteran totaled \$3,240.

Law School Student Testimonial

"I could have tried to transfer, but I had heard from many sources that [Concord] credits rarely transferred. The most important bit of knowledge I gained during this time was from a one-term adjunct instructor, who, when I told her of my plan to continue my education through Concord Law School, informed me that the school was not recognized in Iowa for taking the Bar exam. That information was eye opening. The Dean apparently didn't know or forgot to mention this little problem with Concord."
 Student Eric Schmitt, U.S. Senate Testimony: <http://www.help.senate.gov/imo/media/doc/Schmitt.pdf>

Psychology

To be licensed as a clinical psychologist, students must graduate from a doctoral program accredited by the American Psychological Association (APA).

The following programs do not meet accreditation requirements. There may be additional programs that also do not meet accreditation requirements, as this limited sample arose from veteran complaints or lawsuits.

- Argosy University PhD in clinical psychology is GI Bill approved for 11 campuses (including its online program). The online and 8 of the campus-based doctoral programs are APA accredited (CA, GA, HI, IL, MN, and VA). Its doctoral programs in Washington state and Florida lack APA accreditation.
 - GI Bill approved, but **not** APA accredited at campuses in WA and FL.
- Walden's PhD in Psychology is not accredited by the APA.
 - GI Bill approved, but **not** APA accredited for its MN campus

Colorado Attorney General's Lawsuit

Argosy's lack of proper accreditation for its PhD in psychology left its graduates ineligible to become licensed Psychologists. This was the topic of a successful lawsuit by the Colorado Attorney General, which reached a \$3.3 million settlement with the school. The AG's office said Argosy admitted it planned to apply for APA accreditation for the PsyD program but never did. The company also said it never intended to apply for APA accreditation because the APA doesn't accredit programs that meet only on the weekends.

<http://www.bizjournals.com/denver/news/2013/12/05/argosy-university-pays-colorado-33m.html>

Private Connecticut Lawsuit

The U.S. District Court refused to dismiss a lawsuit against Walden brought by a graduate of the school's PhD psychology program. Although the plaintiff was told he could become a licensed psychologist, he learned that Walden did not have the appropriate accreditation when he applied to take Connecticut's licensing exam.

<http://law.justia.com/cases/federal/district-courts/connecticut/ctdce/3:2008cv00045/80151/36/>

¹⁸San Luis Obispo's law program is campus based. The school's website clearly states that it is unaccredited and spells out the steps students must take to sit for the bar in California.

DEGREE PROGRAMS THAT REQUIRE STATE-LEVEL APPROVAL

Teaching

States, not specialized accrediting agencies, are responsible for approving teacher education programs. Programmatic accreditation by the Teachers Education Accreditation Council (TEAC) or the National Council on Accreditation of Teacher Education (NCATE) is only one of a number of factors that states may take into consideration when approving teacher education programs.¹⁹

The following programs do not meet accreditation requirements. There may be additional programs that also do not meet accreditation requirements, as this limited sample arose from veteran complaints or lawsuits.

Ashford University is not TEAC or NCATE accredited but has institutional accreditation from the Western Accreditation of Schools and Colleges, a regional accrediting agency. All states, including Iowa, require teachers to graduate from regionally accredited schools; Iowa has approved Ashford's elementary and secondary teacher education programs up to the Bachelor's degree level.²⁰ However, Iowa has not approved Ashford's early childhood education program.

- Ashford University's online early childhood education program does not allow graduates to become classroom teachers without additional classroom time.
 - Ashford's early childhood online degree is approved for GI Bill benefits at its Iowa campus and online but graduation **does not** result in licensure.

Iowa Attorney General's Lawsuit

In May 2014, the Iowa Attorney General reached a \$7.25 million settlement with Ashford over allegations that the school's marketers told prospective students that an online Ashford education degree would allow them to become classroom teachers when, in fact, many Ashford graduates are subject to additional requirements that may require additional time, more coursework, or additional money.

After the settlement, Ashford acknowledged that its early education degree did not lead to licensure or certification in any state.

http://qctimes.com/news/local/government-and-politics/ashford-agrees-to-million-iowa-settlement/article_87739f8e-8445-51d6-b32f-1fa741874faf.html

Nursing

As with teacher education, states (not specialized accrediting agencies) are responsible for approving nursing education programs.²¹ In general, states review and approve "pre-

¹⁹TEAC and NCATE are merging to create the Council on Accreditation of Education Programs (CAEP).

²⁰See <http://www.boee.iowa.gov/require.html>

²¹See <https://www.ncsbn.org/665.htm>

licensure” nursing programs—not programs where existing RNs enroll to earn more advanced credentials such as Bachelors or Masters degrees. The graduate of a state Board of Nursing (BON) approved program may be able to obtain a nursing license in a different state through endorsement (reciprocity) or because it is a compact state that recognizes licenses obtained in other compact states.²² Endorsement is not automatic. According to the Texas BON, every state has different practice regulations based on the needs of its population, which the state takes into consideration in approving endorsements. In addition, applicants must meet the same standards as those required of Texas nurses.²³ Although applicants can’t sit for the licensing exam in Texas if they graduated from an approved nursing program in different state, California permits this route to licensure.²⁴

National nursing accreditation is a voluntary process intended to strengthen education quality by measuring schools’ performance against nationally recognized standards. The Accreditation Commission for Education in Nursing (ACEN) accredits diploma programs, practical nurse programs, associate programs, bachelors, and masters programs. Another national nursing accrediting agency, the Commission on Collegiate Nursing Education (CCNE), focuses on baccalaureate, graduate, and residency programs in nursing.²⁵ Accreditation in nursing is important, as it generally requires a certain level of licensure exam pass rates, thereby ensuring the nation’s nurses bring a level of quality.

Although national accreditation by a specialized accrediting agency is not required to obtain a nursing license, there is a potential downside in attending a non-accredited nursing program. While you may receive a quality education and be eligible to sit for and pass the NCLEX licensing examination, it generally does imply that you will not be qualified to attend an accredited nursing school in pursuit of additional education (for example, an RN-to-BSN or a master’s degree program). That, in turn, might limit your progression in your professional nursing career.²⁶

The following programs do not meet accreditation requirements. There may be additional programs that also do not meet accreditation requirements, as this limited sample arose from veteran complaints or lawsuits.

ITT Tech offers Associates degrees in nursing at 40 campuses and Phoenix offers Bachelor’s and Master’s degrees at 26 campuses, all of which are approved for GI Bill benefits.²⁷ None of ITT’s nursing programs are accredited by the national nursing accrediting agency, CCNE; all of Phoenix’s programs are accredited by CCNE.

²²<https://www.ncsbn.org/nurse-licensure-compact.htm>

²³https://www.bon.texas.gov/licensure_endorsement.asp

²⁴<http://www.rn.ca.gov/applicants/lic-end.shtml>

²⁵See http://nmbon.sks.com/Approval_and_Accreditation.aspx.

²⁶ <http://www.allnursingschools.com/nursing-careers/article/nursing-school-accreditation/>

²⁷We did not examine GI Bill approved nursing programs at all Phoenix campuses.

- ITT Tech’s Associates degree in nursing has state Board of Nursing approval or initial approval at 22 of its 40 campuses.²⁸ Of the remaining campuses, however, 4 lack state Board of Nursing approval and their graduates cannot sit for the state licensure exam; 14 campuses are subject to increased scrutiny (consent agreements), conditional approval (enrollment suspended), or probationary status (low licensure pass rates). Again, all 40 ITT campuses are approved for GI Bill benefits.
 - Four ITT campuses are GI Bill approved but graduates cannot obtain a license in those states: AL, FL, NC
- Of the GI Bill approved programs we examined, Phoenix’s Bachelor of Science in nursing has state Board of Nursing approval for 3 of 22 campuses—California, Hawaii and one of its Colorado campuses. Although the Phoenix programs in these 3 states are listed generically as Bachelor’s degree programs in VA’s database of GI Bill approved programs and on state Board of Nursing websites, they are actually “pre-licensure” programs intended for individuals with a nursing certificate who aspire to become RNs, that is, they do not enroll individuals who already have an Associate’s degree in nursing because they are already RNs. Unlike many other schools, Phoenix does not offer an Associate’s degree because, according to Phoenix officials, employers prefer to hire RNs with Bachelor’s degrees.

At the 19 other campuses we examined, Phoenix also offers Bachelor’s programs in nursing. However, these programs only enroll individuals with Associate degrees in nursing who are licensed RNs. Initially, we erroneously reported that these programs were not state Board of Nursing approved in a number of states, an error attributable to the fact that all 22 Phoenix programs we examined were described generically in both VA and state websites as “Bachelor’s programs.” In fact, these 19 programs do not require state approval because they only enroll licensed RNs seeking a Bachelor’s degree. For the same reason, Phoenix’s Masters of Science in nursing does not require state Board of Nursing approval.

New Mexico Attorney General’s Lawsuit

The New Mexico 2014 lawsuit alleges that ITT’s nursing program has never been accredited by the Accreditation Commission for Education in Nursing, the organization that accredits associate degree nursing programs. In addition, it alleges ITT misled its New Mexico students into believing that the Nursing program was accredited.

<http://www.bizjournals.com/albuquerque/news/2014/02/27/ags-office-sues-itt-educational.html>

Veteran Student Testimonial

“I feel I was misled in my education path. I wanted to be a registered nurse. University of Phoenix stated they could get me there, but most of my credits did not transfer and did not bring me much closer to my ultimate goal.”

Eric L., who served in Iraq (March 2015 complaint received by Veterans Education Success)

Criminal Justice

²⁸Initial approval allows graduates to sit for state licensure.

State legislature or boards may set the minimum educational standards for police officers, but local police agencies are free to set higher educational standards. As a result, determining whether applicants meet a police agency's educational standards requires considerable research and ultimately may require applicants to contact police agencies directly.²⁹ In addition to state and local education standards, it may be considered a plus if a school's program is acknowledged by the Academy of Criminal Justice Sciences, an international body for certifying criminal justice education programs.³⁰

Some police agencies only require a high school degree, but often look favorably upon candidates with college experience.³¹ Police agencies increasingly require some college credits, but allow exceptions to college requirements for those with military service or prior law enforcement experience.³² In general, police agencies that require applicants to have college credits specify that credits be from an "accredited" school. Some police agencies, however, require degrees or credits from *regionally accredited* schools, such as the Illinois State Police; the DuPage and Will County, Illinois sheriffs offices; the Schaumburg, Illinois, police department; the Tampa, Florida, police department; the Boise, Idaho police department; Texas state troopers and highway patrol officers; and many other county and local police departments.³³

The Chicago police department required regional accreditation until about 2010 but subsequently limited the requirement to "accredited" schools. According to one state Attorney General's office, college accreditation requirements may be generally stated, but hiring preferences may favor local community college degree programs because their graduation requirements are more rigorous and include courses in writing and math, in addition to criminal justice courses.

The following programs do not meet accreditation requirements. There may be additional programs that also do not meet accreditation requirements, as this limited sample arose from veteran complaints or lawsuits.

²⁹See <http://www.how-to-become-a-police-officer.com/states/texas/> For example, in Florida and Washington state minimum educational requirements are laid out in statute. See <http://www.how-to-become-a-police-officer.com/states/florida/> and <http://apps.leg.wa.gov/WAC/default.aspx?cite=139-07-020> In Illinois, the Illinois State Police Merit Board establishes the basic standards (<http://www.how-to-become-a-police-officer.com/states/illinois/>)

³⁰<http://www.excite.com/education/states/ohio/criminal-justice-schools-in-ohio>

³¹Although police departments may only require candidates to have a high school diploma or GED, college graduates may receive special consideration during the hiring process, as well as higher starting salaries. See <http://www.lawenforcementedu.net/ohio/ohio-schools/#context/api/listings/prefilter> and <http://www.how-to-become-a-police-officer.com/states/florida/>

³²<http://www.how-to-become-a-police-officer.com/#cities> See also http://www.acjs.org/pubs/167_667_3517.cfm

³³See <https://www.illinoisstrooper.com/recruitment/pre-employment-requirements/> ; <http://www.cfpbmonitor.com/files/2014/11/IL-AG-second-amended-complaint.pdf> ; <http://www.ci.schaumburg.il.us/emp/employ1/Documents/Recruiting%20Brochure-12.2013.pdf> ; <http://www.how-to-become-a-police-officer.com/states/florida/> ; <http://police.cityofboise.org/home/join-bpd/>

Brown Mackie, ITT Tech, and Westwood College offer criminal justice degrees at numerous campuses across the U.S. that are approved for GI Bill benefits. All three schools have national rather than regional accreditation, which would satisfy the educational requirements of some police departments but not others. For example, the following police departments require degrees from regionally accredited schools:

- A graduate of ITT's criminal justice program in Tampa could not obtain a job with the Tampa police department because it requires degrees from regionally accredited schools. (Graduates would likely meet the requirements in several other Florida cities.³⁴)
- A graduate of ITT's criminal justice program in St. Petersburg, Florida, must contact that police department to determine if ITT is an "approved accredited college or university."³⁵
- A graduate of Brown Mackie's criminal justice program in Boise, Idaho could not obtain a job with that city's police department.³⁶
- A graduate of ITT's or Westwood's criminal justice programs would meet the educational requirements for employment by the Chicago police department but not for employment by the Illinois State Police; the DuPage and Will County, Illinois, sheriffs offices; or the Schaumburg, Illinois, police department.

Illinois Attorney General's Lawsuit

The Illinois Attorney General alleged in its 2014 lawsuit that Westwood misled students by falsely claiming that its criminal justice program (1) was regionally accredited; (2) graduates are eligible to be hired as federal, state or local police officers in Illinois; (3) most graduates obtain law enforcement jobs, (4) graduates earn about \$20,000.00 more per year than people with just a high school diploma, (5) graduates can obtain employment in law enforcement even if possessing a criminal record; and (6) degrees lead to employment with the FBI and State Police. None of these claims are true.
<http://www.cfpbmonitor.com/files/2014/11/IL-AG-second-amended-complaint.pdf>

Veteran Student Testimonials

- *"When I attempted to transfer my units (in private and public sector security) from Brown Mackie to Pasadena City College in California, I found out that none of my units transferred because they didn't have the right level of accreditation. Not only did Brown Mackie lie about their accreditation level but they lied about (the) level of education they offer... I have a debt with nothing to show for it and am struggling to stay afloat."* Marine Corporal Anselm Caddell, Veterans Student Loan Relief Fund Fact Sheet
- *"I specifically asked ITT Tech before signing up whether their degree was the same as any other public 4-year university and was told YES. I found out while applying at NYPD, LAPD, Seattle PD and 23 other police departments that NONE of them accepted ITT Tech credits. Once I found out that my time and money spent at ITT Tech was worthless, I tried to transfer my credits to a community college. I was told I have to start completely over as a freshman."* Marine Specialist Bryan Babcock, Veterans Student Loan Relief Fund Fact Sheet³⁷

³⁴<http://www.how-to-become-a-police-officer.com/states/florida/>

³⁵<http://old.stpete.org/police/employment/police/police-selection-standards.html>

³⁶<http://police.cityofboise.org/home/join-bpd/>

³⁷Specialist Babcock attended ITT prior to 2010. Since then, some police departments, such as Chicago's, have relaxed their requirements and now require graduation from an "accredited" school.

- *"I went to ITT tech because I wanted to be a Drug Enforcement Agent and was told my credits would count and transfer. Well after I graduated with a two year degree, I was told the schooling I looked into after did not take their credits and I am stuck with a \$46,000 school loan when the GI bill should have paid for all of it."* Roland P. of Pennsylvania, who attended from 2012-2014 (May 2015 complaint received by Veterans Education Success)

Veteran complaints suggest that other criminal justice programs may also not lead to the jobs that veterans have studied for.

Additional Veteran Student Testimonials

- *"I was told when I attended [Colorado Tech U in 2013] that any [police] department would accept their degree. Upon asking someone I knew that worked for the Georgia Department of Corrections, I was informed they do not and that they only accepted degrees from traditionally accredited universities."* Anthony B. of Georgia (May 2015 complaint received by Veterans Education Success)
- *"I was enrolled at Colorado Tech U for 4 years. No post graduation job opportunities happened. I have a BA in Criminal Justice and an Associates Degree in Accounting. Have not been able to utilize either one."* Debbie L. of Tennessee (May 2015 complaint received by Veterans Education Success)
- *"I was initially recruited at a job fair and was told that University of Phoenix was fully accredited and all law enforcement agencies accept this is a viable degree. I have applied for over 100 probation officer jobs and rarely ever get a call back. I spoke with a recruiter once that told me I would have a very difficult time finding a job in probation with that degree and he was right. I owe over \$40K in student loans and can't get a job in the career field I trained so long to do."* Bryan H. of Texas (May 2015 complaint received by Veterans Education Success)
- *"I was told that there were many opportunities for a veteran in private security and law enforcement by the University of Phoenix with a degree in criminal justice. I was unable to find any willing to accept my level or training or background. So I had to change degrees [but] none of the credits were transferable. The quality of the classes was terrible, teachers "participation requirements" making no sense and off of very limited information with little actual teaching. I wasted time and money for a school who couldn't make good on their educational promises."* Michael F. of Ohio (May 2015 complaint received by Veterans Education Success)

Dental Assistant

Programs for dental assistants are regulated by state dentistry boards. Kaplan offers a dental assistant certificate at campuses in California, Indiana, Tennessee, and Texas, which are approved for the GI Bill.³⁸ The Dentistry Boards in these four states require dental assistants to be state registered and to have graduated from a state approved dental assistant program or one accredited by the Commission on Dental Accreditation (CODA). As described below, a Kaplan graduate cannot perform the full range of duties of a dental assistant in Texas, California, Indiana, and Tennessee.

³⁸One of Kaplan's programs in Indiana offers an AAS dental assistant degree.

The following programs do not meet accreditation requirements. There may be additional programs that also do not meet accreditation requirements, as this limited sample arose from veteran complaints or lawsuits.

- 9 Kaplan campuses in Texas are GI Bill approved but lack state approval to perform x-rays. In Texas, dental assistants who perform x-rays must attend a state-approved program to obtain the required registration. None of Kaplan's 9 Texas campuses have state approval.³⁹
- 9 Kaplan campuses in California are GI Bill approved but lack state approval for some procedures. California requires dental assistants to attend state-approved schools for 4 different procedures. Nine Kaplan California campuses are approved for application of "pitt and fissure sealants" but none are approved for coronal polishing, x-rays, or ultrasound scaling.⁴⁰
- 1 Kaplan campus in Indiana is GI Bill approved and the program is accredited by CODA. However, the procedures that graduates may perform are limited to applying sealants and coronal polishing.⁴¹
- 1 Kaplan campus in Tennessee is GI Bill approved and approved by the state dental board. However, the procedures Kaplan graduates can perform may be limited because the state requires that they have taken specific classes and then complete state approved training.⁴²

Eyewitness News: WSOC TV

Students at for-profit Kaplan College say they were misled for months about the school's dental assistant program. Eyewitness News reporter Jim Bradley has been investigating their claims, taking them to state regulators and questioning college leaders.

The students admitted they signed a disclosure form in which Kaplan makes clear its program is not approved by CODA, the National Commission on Dental Accreditation. But the students all said Kaplan counselors assured them it soon would be.

"They told me they were in the process of becoming CODA accredited, that it was already in the making, that they would be accredited by the next month," Nesbitt said.

That was last March. But it wasn't until a month ago, as many of the students approached the end of their training, that they were told the program wasn't accredited at all.

The impact of that news was huge for students. Going through an accredited program is one of the ways to become eligible to be nationally certified -- and employable -- at the higher level, and better-paid position, called Dental Assistant 2.

Since Kaplan's dental assistant program is not accredited, current Kaplan students would have to work in a dentist office as a DA 1 for 3,000 hours -- essentially two years -- to become qualified as Dental Assistant 2s.

³⁹http://www.tsbde.state.tx.us/index.php?option=com_content&task=view&id=32&Itemid=26#Career%20School%20Graduates

⁴⁰http://www.dbc.ca.gov/licensees/rda/certificates_pfs.shtml

⁴¹<http://www.in.gov/pla/3162.htm>

⁴²See <http://www.dalefoundation.org/resources-and-state-requirements/State-Dental-Assistant-Requirements/Tennessee> and <http://health.state.tn.us/boards/dentistry/education.htm#Registration>

But since the dental assistant program at Kaplan's Charlotte location isn't accredited, students are now being told they'll graduate as entry level dental assistants -- or DA1s -- who earn lower salaries, making the whistleblowers worried about being able to repay the loans they took out to cover a portion of their \$18,000 tuition.

But Whistleblower 9's investigation uncovered a startling revelation. Not only is Kaplan's dental assisting program not about to complete the year-long accreditation process -- Kaplan has yet to even apply for accreditation for that program.

...after Eyewitness News began asking Kaplan questions about its dental assistant program, the company emailed this offer to students: To fully refund the cost of their tuition, books, fees and supplies. Waive all costs for the remainder of their dental assisting classes. Provide a stipend after graduation.

<http://www.wsoctv.com/news/news/whistleblower-9-students-say-they-were-misled-by-1/nGSy3/>

DEGREES FOR WHICH CERTIFICATION MAY BE PREFERRED BY EMPLOYERS

Medical Assistant

Medical assistants work alongside physicians, mainly in outpatient or ambulatory care facilities, such as medical offices and clinics.⁴³ Graduates of medical assisting programs accredited by the Commission on Accreditation of Allied Health Education Programs (CAAHEP) or the Accrediting Bureau of Health Education Schools (ABHES) are eligible to take a certification exam offered by the American Association of Medical Assistants (AAMA).⁴⁴ According to the AAMA, many employers of allied health personnel require, or at least prefer, that their medical assistants be certified, as a protection against lawsuits alleging that they employ unqualified allied health personnel.⁴⁵ Although some states require education and/or credentialing as a legal prerequisite for the performance of certain duties, medical assistants are currently not licensed in most states.⁴⁶

The following programs do not meet accreditation requirements. There may be additional programs that also do not meet accreditation requirements, as this limited sample arose from veteran complaints or lawsuits.

American Career College, Herzing University, and National American University offer numerous medical assistant programs that are approved for the GI Bill.

- 3 American Career College campuses in California are GI Bill approved but graduates are unlikely to be employed because they lack the programmatic accreditation required by the organization that offers the certification exam that employers require or prefer.
- Herzing. Herzing offers both certificates and Associates degrees in medical assisting. Seven Herzing medical assistant programs in Ohio, Wisconsin, and Nebraska are unaccredited.⁴⁷ Four programs in various states are accredited.⁴⁸
 - Herzing's medical assistant programs in Ohio, Wisconsin, and Nebraska are GI Bill approved but graduates are unlikely to be employed because they lack programmatic accreditation by the organization that offers the certification exam that employers require or prefer.
- National American University (NAU). Eight NAU medical assistant programs in Colorado, Missouri, Nebraska, Oklahoma, and Texas, are unaccredited. Sixteen other programs are accredited.

⁴³http://www.aama-ntl.org/medical-assisting/what-is-a-medical-assistant#.VWM5_lnBzGc

⁴⁴<http://www.aama-ntl.org/cma-aama-exam/application-steps/eligibility>

⁴⁵<http://www.aama-ntl.org/medical-assisting/what-is-a-medical-assistant#.VWM7GFnBzGc>

⁴⁶<http://www.aama-ntl.org/docs/default-source/employers/more-emps-hire-cma.pdf?sfvrsn=4>

⁴⁷Herzing's website states that its Akron, Ohio, program is CAAEP accredited but CAAEP does not list the school's program as accredited. See <https://www.herzing.edu/about/accreditation>

⁴⁸<https://www.herzing.edu/about/accreditation>

- 8 National American University campuses are GI Bill approved in Colorado, Missouri, Nebraska, Oklahoma, and Texas, but graduates are unlikely to be employed because they lack programmatic accreditation by the organization that offers the certification exam that employers require or prefer.

Minnesota Attorney General's Lawsuit

Herzing has offered an accredited medical assistant diploma program at its Crystal, Minnesota campus for many years. In 2011, Herzing began to offer a two-year associate degree in clinical medical assisting at its Crystal campus. To be eligible to sit for the Certified Medical Assistant ("CMA") exam and obtain the certification preferred by many employers, a student must graduate from a medical assistant program that is programmatically accredited by either the Commission on Accreditation of Allied Health Education Programs ("CAAHEP") or the Accrediting Bureau of Health Education Schools ("ABHES"). Herzing's two-year degree program was not accredited by either organization.

<http://blogs.mprnews.org/oncampus/2013/11/mn-attorney-general-settles-with-herzing-u-over-lack-of-ma-accreditation/>

Student Testimonials

- *"I attended the [American Career College] Medical Assistants program, which promised a career in the medical field. Unfortunately, with all my hard work, this did not happen. I was Valedictorian of my class and received honor roll and perfect attendance on graduation. A month prior to graduation, the instructor informs me they had become unaccredited and Kaiser or any other hospital will not hire anyone from American Career College."* Student who wrote to the Senate HELP Committee quoted in *For Profit Higher Education: the Failure to Safeguard the Federal Investment and Ensure Student Success*, http://www.help.senate.gov/imo/media/for_profit_report/PartII/ACC.pdf, pp. 235
- A National American University recruiter touted the school's Medical Assisting Program but the student found himself taking an accounting course. He complained and was then told that the campus did not yet have approval for the Medical Assisting Program and that the school had enrolled him in a healthcare management program. 2012 Senate HELP Committee Report, *For Profit Higher Education: the Failure to Safeguard the Federal Investment and Ensure Student Success*, http://www.help.senate.gov/imo/media/for_profit_report/PartII/NAU.pdf, p. 624

Surgical Technology

According to the U.S. Department of Labor, the majority of employers want surgical technologists who have passed a national certification exam. Certification exams are administered by the National Board of Surgical Technology and Surgical Assisting (NBSTA) and the National Center for Certification Testing (NCCT). To become NBSTA certified, you must have graduated from a school with programmatic accreditation from either ABHES or CAAHEP.⁴⁹ To become NCCT certified, you must have graduated from an "authorized" school.

The following programs do not meet accreditation requirements. There may be additional programs that also do not meet accreditation requirements, as this limited sampling arose from veteran complaints or lawsuits.

⁴⁹<http://www.alliedhealthschools.com/health-careers/medical-technician/surgical-technologist-certification/>

- 1 Brown Mackie campus in Kansas City, Kansas is GI Bill approved but graduates are unlikely to be hired because the Kansas City campus is neither ABHES nor CAAHEP approved. As a result, graduates of the Kansas City campus cannot become NBSTA certified. Brown Mackie's Kansas City campus is not NCCT authorized.⁵⁰
- 1 Sanford Brown campus in St. Peters, Missouri is GI Bill approved but graduates are unlikely to be hired because the Kansas City campus is neither ABHES nor CAAHEP approved. As a result, graduates of this campus cannot become NBSTA certified. It's unclear whether Sanford Brown's program is NCCT approved.⁵¹

Veteran complaints suggest that a wide variety of other surgical technology programs may also not lead to the jobs that veterans have studied for.

Veteran Student Testimonial

"I was unable to get a job in the private sector because Everest's Surgical Technical program was not accredited upon my graduation. Everest University stole the government's money and burdened me with tens of thousands of dollars of debt in return for a useless and meaningless degree."
Ehren N. of Florida (May 2015 complaint received by Veterans Education Success)

New York Attorney General's Lawsuit

"Certain health services programs, including the Diagnostic Medical Ultrasound, the Cardiovascular Technology, and the Surgical Technology programs at Sanford Brown Institute.... were not programmatically accredited; that graduates of these unaccredited programs could not sit for certain qualifying exams typically necessary for employment upon graduation; and that graduates' inability to sit for these exams could negatively affect their employment opportunities."
Attorney General of the State of New York v. Career Education Corporation, AOD No. 13-379, available at: <http://nylag.org/wp-content/uploads/2013/05/Executed-CEC-AOD.pdf>

ADDITIONAL DEGREE PROGRAMS THAT SHOULD BE INVESTIGATED

Veteran complaints suggest that a wide variety of additional degree programs may also not lead to the jobs that veterans have studied for.

There may be additional programs that also do not meet accreditation requirements, as this limited sample arose from veteran complaints or lawsuits.

Medical Billing & Coding

Medical Billing & Coding is a field similar to Medical Assistant—graduates of schools that lack the proper accreditation or recognition in the field may find it difficult to find a job.

⁵⁰VES phone call with NCCT on May 26, 2015.

⁵¹Phone call with NCCT on May 28, 15.

Veteran Student Testimonials

- *"I was told [by Colorado Technical University] there were plenty of job opportunities in the Medical Billing and Coding field. But they won't hire you unless you have least two years experience. But how am going to get the experience if they won't hire me? They also told us before we graduated get hired and then worry about getting certified. Well that's not right either. They are looking for you to be certified first."* Richard D. of Wisconsin (May 2015 complaint received by Veterans Education Success)
- *"I was assured [by Colorado Technical University] that everything was correct and I'd get my degree. They said they are accredited which is how the GI Bill is paying for it. During my LAST class for my associates degree, I found out that we can't get certified in a few different levels including the highest level which is actually required by most major medical facilities. It's a useless degree."* Cheryl M. of Illinois (April 2015 complaint received by Veterans Education Success)
- *"Sanford Brown lied, told me upon registration that my credits were transferable. This was incorrect. I was told I could get a job in that field. This was incorrect. Everything told to me was incorrect and now I owe money for a program that I took and aced however cannot get A job in medical billing and coding. They also said they were accredited. They are not."* Donna N. of South Carolina (May 2015 complaint received by Veterans Education Success)
- *[At Sanford Brown,] they didn't know how to teach. If we didn't understand we were told to 'learn it on our own.' One professor told us her way is the right way and to ignore the [Standard Operating Procedure] on the test. We had to ask the President of the school for soap and paper towels in the lab because nothing was done when we asked professors for the supplies. We are handling bodily fluid without being able to wash our hands before or after handling them. We used donated expired reagents, test and tubes."* Millie Q of Texas (May 2015 complaint received by Veterans Education Success)

Engineering and Technology

Engineering and Technology are additional fields in which industry standards require accreditation. In engineering, the recognized accrediting body (since 1932) is the Accreditation Board for Engineering and Technology, formerly known as the Engineers' Council for Professional Development. Lack of appropriate accreditation may make it difficult for graduates to obtain a job in their field of study.

Veteran Student Testimonials

- *"When I was speaking with the [ITT] recruiter, he told me they were accredited. After 9 months, I found out yes they are accredited, just not ABET [Accreditation Board for Engineering and Technology, which is expected in the industry] accredited. Then I got deployed again. Now my student loans are almost \$7,000."* Heith I. of Oregon (May 2015 complaint received by Veterans Education Success)
- *"The quality of education [at Heald] was poor. I work in the telecom field and one would think that coming from a school that advertised hands on learning, that I would have known how to terminate telephone, data, and video jacks, right? Not the case. I had a 2-year degree with barely any hands on experience, never touched a relevant meter that professionals use in the field. I felt very let down and cheated that I invested so much time and energy, not getting the hands on experience, and career support as intended."* Ryan B. of Hawaii (May 2015 complaint received by

CONCLUSION

In conclusion, veteran complaints and state law enforcement lawsuits enabled us to identify a number of programs that lacked the proper accreditation needed to meet state licensing requirements or employer expectations. As a result, veterans graduating from these programs, which were GI Bill approved, would be unable to obtain a job in their field of study. Our research likely uncovered only the tip of the iceberg with respect to programs that lacked the proper accreditation.

There are likely additional programs that also do not meet accreditation requirements, as this limited sampling arose from veteran complaints or lawsuits.

METHODOLOGY

Veterans Education Success identified degrees that do not lead to certification or licensure by reviewing state Attorney General lawsuits and student complaints. We then used several databases to determine the necessary certification or licensure requirements for various degree programs.

- *College Navigator*. This Department of Education website indicates whether a school participating in federal student aid is regionally or nationally accredited.
- *Specialized Accrediting Agencies*. We identified the specialized accrediting agencies approved by the Department of Education and then used those agencies' websites or the website of the Council on Higher Education Accreditation (CHEA) to identify the schools whose degrees have received programmatic accreditation (www.chea.org).
- *State Certification and Licensure Requirements*. For certain degrees such as nursing and teaching, we reviewed state websites to determine if schools' degree programs were approved, enabling graduates to set for certification or licensure exams.
- *Employer Preferences*. We reviewed the website of organizations that provide certifications for graduates of programs such as dental assistant, medical assisting, and medical ultrasound sonography to determine industry hiring standards for individuals who graduate with certificates or degrees in such fields.
- *WEEMS Database*. This Department of Veterans Affairs (VA) database identifies the programs at each school campus that are approved to receive GI Bill funds (<http://inquiry.vba.va.gov/weampub/buildSearchInstitutionCriteria.do>).

What is Due Process in Federal Civil Service Employment?

A Report to the President and the Congress of the United States
by the U.S. Merit Systems Protection Board

May 2015





U.S. MERIT SYSTEMS PROTECTION BOARD
1615 M Street, NW
Washington, DC 20419-0001

The President
President of the Senate
Speaker of the House of Representatives

Dear Sirs:

In accordance with the requirements of 5 U.S.C. § 1204(a)(3), it is my honor to submit this U.S. Merit Systems Protection Board (MSPB) report, *What is Due Process in Federal Civil Service Employment?* This report explains the interactions between the U.S. Constitution and adverse personnel actions in a merit-based civil service.

In the Civil Service Reform Act of 1978 (CSRA), Congress sought to ensure that agencies could remove poor performers and employees who engage in misconduct, while protecting the civil service from the harmful effects of management acting for improper reasons such as discrimination or retaliation for whistleblowing. Recently, Congress has expressed an increased interest in amending the CSRA, including those provisions that apply to adverse actions.

To assist Congress in these endeavors, this report explains the current civil service laws for adverse actions and the history behind their formation. It also explains why the Constitution requires that any system to remove a public employee for cause must include: (1) an opportunity – before removal – for the individual to know the charges and present a defense; and (2) the ability to appeal a removal decision before an impartial adjudicator. The report discusses why the circumstances of the case can determine whether the individual has been given the process that is “due” and how this enables the employing agency to act even more swiftly when there is reason to believe that a serious crime has been committed. The report also contains an appendix that clarifies any confusion about how the current civil service operates.

Due process is available for the whistleblower, the employee who belongs to the “wrong” political party, the reservist whose periods of military service are inconvenient to the boss, the scapegoat, and the person who has been misjudged based on faulty information. Due process is a constitutional requirement and a small price to pay to ensure the American people receive a merit-based civil service rather than a corrupt spoils system.

I believe that you will find this report useful as you consider issues affecting the Federal Government’s ability to maintain a high-quality workforce in a merit-based civil service.

Respectfully,

Susan Tsui Grundmann

U.S. Merit Systems Protection Board

Susan Tsui Grundmann, Chairman

Mark A. Robbins, Member

Office of Policy and Evaluation

Director

James M. Read

Deputy Director

James Tsugawa

Project Manager

Sharon Roth

Table of Contents

Executive Summary	i
Introduction.....	1
Chapter One: Development of Federal Employee Rights.....	3
The Spoils System	3
The Pendleton Act of 1883	5
The Lloyd-La Follette Act of 1912	5
The Veterans' Preference Act of 1944.....	7
President Kennedy's Executive Order in 1962.....	9
The Civil Service Reform Act of 1978	9
Chapter Two: <i>Loudermill</i> and Progeny	13
The <i>Loudermill</i> Case	13
<i>Loudermill</i> Applies to Federal Government	18
<i>Loudermill</i> and Suspensions	23
Chapter Three: The Statutory Procedures	27
Suspensions of 14 Days or Less	27
Suspensions of More than 14 Days, Demotions, and Removals	27
Chapter Four: Efforts to Modify the System	33
Government-Wide Modifications	33
Agency-Specific Modifications	36
Conclusion	39
Appendix A: Clearing up the Confusion	41
Appendix B: The Statutory Process Flowcharts	45

Recently, there has been extensive public discourse comparing the Federal civil service and employment in the private sector, particularly pertaining to adverse actions such as removals. The truth is that the adverse action laws are not entirely different. As with private sector employers, the Government may be sued for discrimination, violation of the rights of veterans to return to duty after military service, retaliation for protected whistleblowing activities, and for ignoring other laws applicable to the private sector that Congress has deemed necessary for the public good. However, it is also true that there are some rules about the process for removing employees that apply only to the Federal Government. As this report will explain in greater depth, the requirements of the U.S. Constitution have shaped the rules under which civil service agencies may take adverse actions, and the Constitution therefore must play a role in any responsible discourse regarding modifications to those rules.

More than a century ago, the Government operated under a “spoils system” in which employees could be removed for any reason, including membership in a different political party than the President or publicly disclosing agency wrongdoing. The result of such a system was appointment and retention decisions based on political favoritism and not qualifications or performance. In response, Congress determined that there was a need for a career civil service, comprised of individuals who were qualified for their positions and appointed and retained (or separated) based on their competency and suitability. As a part of this system, Congress enacted a law stating that any adverse action must be taken for cause – meaning that the action must advance the efficiency of the service.

Today, that law, as amended, is codified in chapter 75 of title 5. Under chapter 75, an agency may implement an adverse action – up to and including removal – for such cause as will promote the efficiency of the service. Before an agency imposes a suspension for 14 days or less, an employee is entitled to: (1) an advance written notice stating the specific reasons for the proposed action; (2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in

Executive Summary

support of the answer; (3) be represented by an attorney or other representative; and (4) a written decision and the specific reasons therefor at the earliest practicable date.

Before an agency imposes a suspension for more than 14 days, a change to lower grade, reduction in pay, or a removal action, an employee is entitled to: (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; (3) be represented by an attorney or other representative; and (4) a written decision and the specific reasons therefor at the earliest practicable date. The law also provides that for these more serious adverse actions, once the action has taken effect, the employee is entitled to file an appeal with the Merit Systems Protection Board.

While a legislature can decide whether to grant property, the Constitution determines the degree of legal process and safeguards that must be provided before the Government may take away that property. The U.S. Supreme Court has repeatedly held that, when a cause is required to remove a public employee, due process is necessary to determine if that cause has been met. Neither Congress nor the President has the power to ignore or waive due process.

Due process "couples" the pre- and post-deprivation processes, meaning that the more robust the post-deprivation process (*i.e.*, a hearing before an impartial adjudicator), the less robust the process must be before the action occurs. However, at a minimum, due process includes the right to: (1) be notified of the Government's intentions; and (2) receive a meaningful opportunity to respond before the action takes place.

Congress has enacted the procedural rules described above to help ensure that adverse actions are taken in accordance with the Constitution and for proper cause. Due process – and the rules that implement it – are in place for everyone, not only for the few problem employees who will inevitably appear in any workforce of more than a

million individuals. Due process is there for the whistleblower, the employee who belongs to the “wrong” political party, the reservist whose periods of military service are inconvenient to the boss, the scapegoat, and the person who has been misjudged based on faulty information. Due process is a constitutional requirement and a small price to pay to ensure the American people receive a merit-based civil service rather than a corrupt spoils system.

When considering any changes to the current statutes for adverse actions, it will be important for those involved in the debates to consider: (1) how best to achieve the goal of a merit-based civil service that has the respect of the American people, including those citizens that the Government hopes will answer the call to public service; and (2) the extent to which the new language of the statutes will comport with the Constitution as interpreted by the U.S. Supreme Court.

The issue of due process¹ in Federal employment has received attention in recent years in the decisions of both the U.S. Merit Systems Protection Board (“MSPB” or “the Board”) and its reviewing court, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”).² The roots of due process are older than the Republic and are enshrined in the Constitution.³ In 1912, when Congress established by statute that civil service employees could not be removed except for just cause, it included a list of processes due to employees.⁴ Congress also was concerned about due process when it enacted the Civil Service Reform Act of 1978 (CSRA), which created the Board as a successor agency to the Civil Service Commission (CSC) and codified the procedures many agencies still use today to remove or discipline Federal employees.⁵ Due process’s deep roots in American jurisprudence, the Constitution, and more than a century of Federal civil service laws ensure that it is an issue that is fundamental to the question of Federal employee rights. The purpose of this report is to describe, in plain English, the

¹ Due process refers to the steps that the Government must take to ensure fairness before depriving a citizen of life, liberty, or property. As Chapter Two will explain in greater depth, due process is guaranteed by the U.S. Constitution and applies to public employment in which the Government has established that there must be a cause to remove or suspend an individual. See *Gilbert v. Homar*, 520 U.S. 924, 935-36 (1997) (suspension); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (removal). Due process “is flexible and calls for such procedural protections as the particular situation demands.” *Gilbert*, 520 U.S. at 930 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

² See, e.g., *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (Fed. Cir. 2011) (holding that if a deciding official is given new and material information relevant to the charges or the penalty without providing the employee with an opportunity to respond, then the employee’s due process rights are violated); *Gajdos v. Department of the Army*, 121 M.S.P.R. 361, ¶¶ 18-25 (2014) (arguing that *Mathews v. Eldridge*, 424 U.S. 319 (1976) established the standard to be used to determine due process rights); but see *id.*, dissenting opinion of Vice Chairman Wagner, at ¶ 3 (asserting that the Board’s examination of an employee’s entitlement to due process should be governed by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), not *Mathews*).

³ *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956) (explaining that our constitutional guarantee of due process follows the tradition set forth in the Magna Carta). See *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 28-34 (1991) (Scalia, J., concurring) (describing the history of due process from the Magna Carta in 1215, to an English statute from 1354, to the American colonists’ understanding of the term in the late 18th century as expressed in their laws and state constitutions, to Supreme Court decisions reached thereafter).

⁴ Lloyd-La Follette Act, 37 Stat. 555, Aug. 24, 1912.

⁵ S. Rep. 95-969, at 40 (1978 U.S.C.C.A.N. 2723, 2762) (explaining that the CSRA’s “new procedures [were expected to] make it possible to act against ineffective employees with reasonable dispatch, while still providing the employee his due process rights”).

Introduction

history of due process and the sources of due process rights in Federal employment to explain the past and provide a foundation to explore issues that may arise in the future. Appendix A contains a list of some perceptions about the civil service, accompanied by facts to clear up confusion about the system along with citations to allow further research and discovery for those who may be interested in correcting the record. Appendix B contains flowcharts showing how the adverse action system works. The materials contained in the appendixes are repeated in the back of the report on perforated sheets so that they can be removed and shared with others.

Chapter One: Development of Federal Employee Rights

Due process is the means by which the Government may lawfully deprive an individual of his or her life, liberty, or property.⁶ To explain why due process applies to Federal employment we begin with a discussion of why Federal employees have a property interest in their employment.

The right to be removed only for just cause (and not arbitrarily or for a reason that is contrary to the public good) is distinct from due process. However, it is that right to just cause that gives the employee a property interest in the job, which triggers the constitutional requirement that the Government follow due process in the removal of that property interest.

To many people, it may seem odd for the law to give a person a “right” to continue in a Federal job, the thinking being that the job belongs to the Government on behalf of the American people and the incumbent is merely the temporary holder of the position. The job exists to serve the public, not the particular person who happens to be filling it. Why, then, protect the individual’s right to keep the job?

The right to be removed only for cause did not come about purely out of concern for the individual who desires to avoid unemployment. Rather, it was the result of thorough debate over how best to ensure that the individuals responsible for effectuating Federal laws – employees of the executive branch – were the right people for the jobs at hand. The requirement that there be just cause to remove an employee is the opposite side of the coin from the requirement that the appointment of the individual be justified by his or her fitness for service. Both ensure a merit-based system.

The Spoils System

Prior to 1883, incompetence and corruption flourished throughout the Federal Government, as individuals were appointed and retained (or separated) based upon

⁶ U.S. Const. Amend. V.

political contributions rather than capabilities or competence.⁷ This was known as the “spoils system” because Federal positions were considered the spoils of war (elections being the war) available for distribution to supporters as payment for that support.⁸ In the words of Theodore Roosevelt (who served as a Civil Service Commissioner before becoming the 26th President), “[t]he spoils system was more fruitful of degradation in our political life than any other that could possibly have been invented. The spoils-monger, the man who peddled patronage, inevitably bred the vote-buyer, the vote-seller, and the man guilty of misfeasance in office.”⁹

Aside from the ethical standards of an individual who was likely to engage in the behaviors necessary to be selected in a spoils system, holding the position itself also did not encourage ethical behavior. In order to keep the appointment, an employee might use his office to grant favors to the leadership of the party in power. “Not only incompetence, but also graft, corruption, and outright theft were common.”¹⁰ George William Curtis, a proponent of a merit-based civil service, said that under the spoils system, “[t]he country seethe[d] with intrigue and corruption. Economy, patriotism, honesty, honor, seem[ed] to have become words of no meaning.”¹¹ The system was so deeply corrupt that ultimately, a President was assassinated by a disappointed office

⁷ *Elrod v. Burns*, 427 U.S. 347, 354 (1976) (explaining that “strong discontent with the corruption and inefficiency of the patronage system of public employment eventuated in the Pendleton Act”). President Andrew Jackson is famously credited with saying, “If you have a job in your department that can’t be done by a Democrat, abolish the job[.]” *The Independent*, “Andrew Jackson,” available at <http://www.independent.co.uk/news/presidents/andrew-jackson-1391112.html>. See also U.S. Office of Personnel Management, *Biography of an Ideal* (2003), at 175-200.

⁸ U.S. Office of Personnel Management, *Biography of an Ideal* (2003), at 184.

⁹ *Id.* at 182-83.

¹⁰ *Id.* at 183-84.

¹¹ *Id.* at 182. In 1871, George William Curtis was appointed by President Ulysses S. Grant to serve as chairman of the first Federal Civil Service Commission. The commission was unable to stop the use of patronage to fill positions and Curtis resigned. Ultimately, the commission’s funding was terminated and reform would not come until the Pendleton Act of 1883. *New York Times*, “On This Day,” available at <https://www.nytimes.com/learning/general/onthisday/harp/1207.html>.

seeker who believed that he was entitled to a Federal job based on the work he had done for his political party and had been denied this entitlement.¹²

The Pendleton Act of 1883

In 1883, Congress passed the Pendleton Act, which required that the classified civil service (meaning the Federal positions subject to the rules for merit that Congress had established) hire employees based on the “relative capacity and fitness of the persons examined to discharge the duties” in question, following “open, competitive examinations” of candidates.¹³

However, retention of these capable individuals proved to be a different question. In the decades following the Pendleton Act, protections against removals varied based on the whims of the President in office. In 1896, President Grover Cleveland ordered that removals of Federal employees could not be made based on “political or religious opinions or affiliations” and penalties for “delinquency or misconduct” must be “like in character” for “like offenses[.]”¹⁴ In 1897, President William McKinley amended that rule to include that, “No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.”¹⁵

The Lloyd-La Follette Act of 1912

Despite these rules, abuses remained. In 1912, when discussing the need to enact legislation to ensure that removals were consistent with merit, Senator Robert La Follette entered into the *Congressional Record* stories of myriad abuses, including that a “particularly efficient” employee who was recently promoted was fired a few weeks

¹² *Biography of an Ideal* at 199-201.

¹³ Pendleton Act of 1883, § 2.

¹⁴ Grover Cleveland, “Executive Order - Civil Service Rules,” Rule II, §§ 3, 6 (May 6, 1896), available at <http://www.presidency.ucsb.edu/ws/?pid=70805>.

¹⁵ *United States v. Wickersham*, 201 U.S. 390, 398 (1906) (quoting the Executive Order of July 27, 1897).

later for notifying the press of dangerous working conditions that had already caused the deaths of four people.¹⁶ One letter entered into the record alleged that reductions in grade and summary removals for reasons unrelated to job performance had caused the civil service to become “a laughing farce and a cruel mockery.”¹⁷

In 1912, Congress enacted section 6 of the Lloyd-La Follette Act, which stated in part,

That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred [sic] against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof[.]¹⁸

The Lloyd-La Follette Act included the right of the CSC to review a copy of the records related to the above, but expressly did not provide for the right to a hearing or examination of witnesses unless the management official effectuating the removal chose to provide them.¹⁹

¹⁶ 48 Cong. Rec. 10731 (Aug. 12, 1912). The passage of more than a century has not eliminated the need to ensure that removals are for cause and not for an improper reason such as retaliation for whistleblowing. *See, e.g., Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35 (2014). In *Aquino*, the appellant, a screener for the Transportation Security Administration (TSA), informed his fourth-level supervisor of actions by his first-level supervisor that he reasonably believed posed a substantial and specific danger to public safety in aviation. The supervisor then alleged that the appellant was inattentive to his duties and the appellant was removed on this basis. The appellant exhausted his remedies with the Office of Special Counsel and filed an individual right of action appeal with MSPB. Following a hearing, MSPB determined that the appellant’s supervisor learned of the appellant’s disclosure on the same day the appellant made his disclosure and that it was only a few days later that the appellant’s supervisor reported the appellant’s alleged misconduct to upper-level management. Additionally, MSPB determined that other employees, who committed offenses similar to the allegations against the appellant, but who were not whistleblowers, were not removed. MSPB therefore found that the appellant’s protected whistleblowing activity was a contributing factor in his removal and ordered the agency to cancel the removal action. *Id.* at ¶¶ 2-4, 14-31, 33.

¹⁷ 48 Cong. Rec. 10729 (Aug. 12, 1912). Senator La Follette alleged that following his inquiries into the state of the civil service, the Postal Service violated postal laws and subjected his mail to “an espionage that was almost Russian in its character[.]” opening and examining mail addressed to the senator sent by Postal Service employees. *Id.*

¹⁸ 37 Stat. 555 (Aug. 24, 1912).

¹⁹ *Id.*

By the time World War II approached, the CSC had carved out a role for itself overseeing the removal process, but it was very limited. Agencies would give the CSC copies of a removal file only upon request by the CSC and only for the purpose of investigating *procedural* compliance with the statute. The CSC made it clear that neither it nor the courts would review whether there was *sufficient cause* for removal or any other “exercise of discretion by the appointing power[.]”²⁰

The Veterans’ Preference Act of 1944

For veterans, this situation – in which the CSC would not look at whether the agency had cause for implementing a removal action – changed in 1944 with the enactment of the Veterans’ Preference Act (VPA). Under the VPA, preference-eligible veterans were allowed to file an appeal with the CSC for discharges, suspensions of more than 30 days, furloughs without pay, reductions in rank or compensation, or debarment.²¹ This right included furnishing affidavits in support of the individual and an entitlement to appear before the CSC, which would then issue its findings and recommendations.²² However, there was an important piece missing from the VPA of 1944 as originally enacted; agencies were not specifically required to abide by the CSC’s decisions.²³ A House Report explaining the need to add a legal requirement for agencies

²⁰ “The power of removal for unfitness remains in the appointing officer unimpaired by the restrictions of the civil-service law and rules. He is the judge of the qualifications of his subordinates, and the question whether such cause exists as requires a removal in the interests of the efficiency of the service is for him to determine. The judgment of the appointing officer as to whether or not the causes for removal are sufficient is not reviewable by the courts or by the Civil Service Commission, but the civil-service rules provide that the Commission shall have authority to investigate any alleged failure to follow the procedure required by statute or rule. Courts will not restrain or review the exercise of discretion by the appointing power, except to enforce statutory restrictions, and will not interfere in or review cases of alleged violation of executive rules and regulations relating to removals. An employee’s fitness, capacity, and attention to his duties are questions of discretion and judgment to be determined by his superior officers.” U.S. Civil Service Commission, *Removal, Reduction, Suspension, and Furlough*, Form 505 (Mar. 1937), at 1, 6-7.

²¹ 58 Stat. 387 (Veterans’ Preference Act of 1944) § 14.

²² *Id.*

²³ See generally 58 Stat. 387 (Veterans’ Preference Act of 1944). The CSC was given the authority to “make and enforce appropriate rules and regulations” to effectuate the purpose of the VPA. *Id.* at § 19. However, the CSC’s decisions concerning the appeals process under the VPA were often “disregarded” by the employing agencies and departments. H. Rep. 80-1817 (Committee on Post Office and Civil Service) (Apr. 16, 1948).

to comply with recommendations from the CSC stated, “It is obvious that the Veterans’ Preference Act is a nullity unless provision is made to make effective the decisions of the Civil Service Commission with respect to appeals processed by veterans and other employees under the provisions of the Veterans’ Preference Act.”²⁴ The VPA was amended in 1948 to state that agencies were required to comply with CSC recommendations in appeals brought under the VPA.²⁵

While the VPA provided protections for preference eligibles, the system for those without preference remained in a state of disorder. A 1953 study conducted by a subcommittee of the Senate Committee on [the] Post Office and Civil Service described the adverse action review process afforded by the Lloyd-La Follette Act as “comparatively feeble[.]”²⁶ The report stated that, “[e]veryone interviewed during the study has agreed that appeals and grievances policies and practices in the Federal Government as a whole are in a state of confusion. The legislative basis for the disposition of these matters is a patchwork of laws enacted at different times and for different purposes.”²⁷ The subcommittee found that a lack of central direction from the CSC, varying levels of protection in different agencies based on individual agency policies, and the inability of employees in some agencies to get a hearing on matters as serious as removal actions, “tend[ed] to breed confusion and misunderstanding and to cause resentment, distrust, and exasperation on the part of employees and management alike.”²⁸

²⁴ H. Rep. 80-1817 (Committee on Post Office and Civil Service) (Apr. 16, 1948).

²⁵ 62 Stat. 575, Pub. L. No. 80-741 (Jun. 22, 1948).

²⁶ Senate Committee on Post Office and Civil Service, *Appeals and Grievance Procedures in the Federal Government*, 83 S. Doc. 33 (Mar. 20, 1953), at 7-8.

²⁷ *Id.* at 3-4. The laws and executive orders mentioned by the report included protections against discrimination and appeal rights for performance ratings and classification decisions. *Id.* at 8.

²⁸ *Id.* at 4-5. When it was left up to agencies to decide what protections to grant, the pattern was quite interesting – particularly given that the study occurred during the height of the Cold War. The greater the national security implications of an agency’s mission, the more inclined the agency seemed to be to protect employees from improper actions. Agencies with responsibilities for national defense and veterans, such as the Department of the Army, Mutual Security Agency, and the Veterans’ Administration, opted to “go beyond the letter of the law in establishing hearing procedures.” These agencies chose to give both hearing and appeal rights to non-veterans as well as veterans for adverse actions involving misconduct, poor

The House Committee on [the] Post Office and Civil Service reached similar conclusions regarding the inadequacies of the system in place in the 1950s, concluding that,

In light of all of the circumstances, and recognizing that an increase in appeals before the Commission would result, there seems to be no sound ground for denying equal appeals rights to all Federal employees or for continuance of the present situation which in effect relegates the nonpreference Federal employee to the status of a second-class citizen, in comparison to preference employees, in certain classes of appeals from adverse personnel actions.²⁹

President Kennedy's Executive Order in 1962

On January 17, 1962, President John Kennedy addressed these problems by issuing an executive order to “extend to all employees in the competitive civil service rights identical in adverse action cases to those provided preference eligibles.”³⁰ This included the right to appeal adverse agency decisions to the CSC.³¹

The Civil Service Reform Act of 1978

In 1978, Congress enacted the CSRA. “A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action[s], part of the outdated patchwork of statutes and rules built up over almost a

performance, and malfeasance. *Id.* at 8. The Central Intelligence Agency and Atomic Energy Commission also would always grant a hearing before taking an adverse personnel action. *Id.* at 4. In contrast, the Department of Agriculture chose to deny hearings before removing an employee. *Id.* at 8. Still other agencies, such as the Department of Justice, chose to have no formal policy, so that procedures may have varied in similar cases within the same agency. *Id.*

²⁹ House Committee on Post Office and Civil Service, *United States Civil Service Commission Report*, 84 H. R. Rept. No. 1844 (Mar. 1, 1956), at 46. “Preference” employees are individuals entitled to preferential treatment in certain hiring and separation situations because of past military service. Levels of preference can vary, and the individual may be a veteran, spouse, widow, or mother, depending on the circumstances. For more information about veterans’ preference and how it operates, see U.S. Merit Systems Protection Board, *Veteran Hiring in the Civil Service: Practices and Perceptions* (2014), available at www.mspb.gov/studies.

³⁰ Executive Order 10988, *Employee-Management Cooperation in the Federal Service*, Jan. 17, 1962, § 14.

³¹ *Id.*

century that was the civil service system.”³² In the CSRA, Congress recognized the importance of due process and an outside review procedure to ensure that adverse actions were merit-based and comported with constitutional requirements as established by Supreme Court decisions issued as of 1978.³³ It codified the employee’s right to: (1) notice of the charges; (2) a reasonable opportunity to respond to the deciding official; and (3) an appeal to a neutral body after the adverse action takes effect.³⁴ Congress also made it clear that agency actions would not be permitted to stand if they were the result of prohibited personnel actions, such as discrimination or retaliation for whistleblowing.³⁵

As discussed later in this report, some provisions of the CSRA have been modified over the years. But, the core protections (notice of the proposed action, a meaningful opportunity to respond, and a right to be heard by a neutral adjudicator) remain for most employees and have been expanded to encompass additional employees not originally covered by the CSRA.³⁶ These core protections and the standards of proof to take an adverse action are discussed in greater depth in Chapter Three.

Unfortunately, misunderstandings have occurred about how the adverse action laws operate. Appendix A contains a list of some perceptions that people may have about the ability of agencies to implement adverse actions and provides information to clear up the confusion.

³² *United States v. Fausto*, 484 U.S. 439, 444 (1988) (internal punctuations and citations omitted).

³³ S. Rep. 95-969, at 19, 24, 51-52 (1978 U.S.C.C.A.N. 2723, 2741, 2746, 2773-74).

³⁴ 5 U.S.C. §§ 7503, 7513, 7701-7703. The Lloyd-La Follette Act included the right to notice and an opportunity to respond, but was missing the important post-action review process by a neutral body to ensure that the action was in the interest of the efficiency of the service and had not been taken for an improper reason. See 37 Stat. 555 (Aug. 24, 1912).

³⁵ 5 U.S.C. § 7701(c)(2). See, e.g., *Sowers v. Department of Agriculture*, 24 M.S.P.R. 492, 494, 496 (1984) (ordering the cancellation of a removal action after the Board found that the record showed the agency manipulated circumstances to remove a whistleblower who was excellent in his post).

³⁶ See, e.g., Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376, 104 Stat. 461.

As this chapter has explained, the protections currently provided to Federal employees were the result of a slow evolution involving both congressional action and independent action by various Presidents through executive orders. These protections were provided because it became clear over time that a consistent review process for adverse actions was necessary for an effective merit-based system.

However, as the next chapter explains, in 1985, the third branch of the Government – the judiciary – became involved in the matter and via its interpretation of the U.S. Constitution, it changed the ground rules under which the executive and legislative branches are permitted to operate the civil service. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court held that Congress (through statutes) or the President (through executive orders) can still grant **protections** to employees, but Congress and the President lack the authority to decide whether they will grant **due process rights** for those protections. Rather, according to the Supreme Court, the Constitution guarantees that if there must be a cause to remove the individual from his or her job, then there is automatically a due process requirement to establish that the cause has been met.³⁷

³⁷ See *Loudermill*, 470 U.S. at 541. See also Eric Katz, “Lawmakers Threaten New Secret Service Chief’s Job, Tell Him to Fire More Agents,” Govexec.com (Mar. 24, 2015), available at, http://www.govexec.com/defense/2015/03/lawmakers-threaten-new-secret-service-chiefs-job-tell-him-fire-more-agents/108298/?oref=govexec_today_nl, in which the Director of the Secret Service explained, “I am resolved to holding people accountable for their actions. . . . But I want to make clear that I do not have the ability to simply terminate employees based solely on allegations of misconduct. This is not because I am being lenient, but because tenured federal government employees have certain constitutional due process rights which are implemented through statutory procedures.”

Cleveland Board of Education v. Loudermill (“*Loudermill*”) is a landmark case that serves as the foundation for nearly any recent case involving the due process rights of public employees, including Federal employees.³⁸ However, *Loudermill* did not happen in a vacuum and does not stand alone. It is consistent with the Supreme Court decisions about public employment that preceded it.³⁹ *Loudermill* and its progeny uniformly provide that while governments decide whether employment with them will be at-will, once a government institutes the requirement that it must have a cause to take adverse actions, constitutional requirements will determine a minimum threshold for how those actions can occur.

The *Loudermill* Case

James Loudermill was employed by the Cleveland Board of Education in 1979-1980. He was classified as a civil servant. Under Ohio state law in effect at the time, “[s]uch employees [could] be terminated only for cause, and [could] obtain administrative review if discharged.”⁴⁰

Prior to his appointment, Loudermill claimed that he had never been convicted of a felony, despite having been convicted of grand larceny more than a decade earlier. He was removed for dishonesty regarding his criminal history without being provided an

³⁸ While *Loudermill* originated as a challenge to a state law, the U.S. Supreme Court and the Federal Circuit have clearly and unequivocally held that the decision in *Loudermill* applies to actions taken against Federal employees. The issue is *public* employment, regardless of the level of government. See, e.g., *Lachance v. Erickson*, 522 U.S. 262, 266 (1998) (explaining that while the *Loudermill* holding of due process, particularly the right to notice and a meaningful opportunity to respond, applies to the Federal civil service, there is no right to lie in that response); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1375 (1999) (quoting and citing *Loudermill* extensively to explain a Federal employee’s due process right to present his or her side of the case).

³⁹ See, e.g., *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 192 (1988) (citing *Loudermill* and holding that when a state university acts to “impose a serious disciplinary sanction” on a tenured employee, it must comply with due process); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-77 (1972) (describing three earlier decisions in which the Court held that due process rights applied to public employment).

⁴⁰ *Loudermill*, 470 U.S. at 535.

opportunity to respond to the charge or to challenge the decision to remove him.⁴¹ He appealed the removal decision to Ohio's civil service commission. When the Ohio commission upheld the removal, Loudermill had the right to appeal that decision through the state courts. He opted to file a claim in Federal court instead, asserting that the Ohio statute under which he was removed was unconstitutional because it did not entitle him to respond to the charge against him before the removal took place.⁴²

The Federal district court determined that Loudermill had a property right in the position but "held that because the very statute that created the property right in continued employment also specified the procedures for discharge, and because those procedures were followed, Loudermill was, by definition, afforded all the process due."⁴³

At about the same time, another Ohioan, Richard Donnelly, was removed from his position by the Parma Board of Education. While Donnelly was reinstated by the Ohio civil service commission (without back pay for the period in which he had been terminated), he also challenged the constitutionality of the same law "[i]n a complaint essentially identical to Loudermill's[.]" Because of the similarities, the two cases were consolidated for appeal.⁴⁴ They are jointly known as *Loudermill*.

On appeal, the U.S. Court of Appeals for the Sixth Circuit found that both individuals had a property right to their positions. However, unlike the district court below, the Sixth Circuit found that "the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pre-termination hearing" and that Loudermill and Donnelly had therefore been "deprived of due process."⁴⁵

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 536.

⁴⁴ *Id.* at 536-37.

⁴⁵ *Id.* at 537 (punctuation added).

The Supreme Court granted certiorari for both cases.⁴⁶ The question of whether the appellants had a property interest in their jobs was disposed of quickly. The court noted that the individuals, by statute, were “entitled to retain their positions during good behavior and efficient service, [and] could not be dismissed except for misfeasance, malfeasance, or nonfeasance in office[.]”⁴⁷ The Court agreed with the district and appellate courts below that *by limiting the circumstances under which the positions could be taken away, the statute gave the employees property rights in their positions.*⁴⁸

While not disputing the existence of the property right, the Parma Board of Education argued that the same law that granted the property right also provided the conditions under which the property in question (the job) could be taken away. This was known as the “bitter with the sweet” approach because the law simultaneously gave the property in question and enabled the state to take it away on its own terms.⁴⁹

In response to this claim, the Court determined that, “[t]he point is straightforward: the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.” In other words, a statute can give the substance – namely the property right – but the fact that it has done so does not necessarily mean that it can freely limit the procedures by which that right can be taken away.⁵⁰

⁴⁶ Certiorari refers to an order from an appellate court to a lower court instructing it to deliver a case so that it may be reviewed. Most cases heard by the Supreme Court are the results of it granting requests that it issue such orders, causing it to be referred to as “granting certiorari” – meaning that the court has indicated it will agree to review a case. *Black’s Law Dictionary* (10th ed. 2014).

⁴⁷ *Loudermill*, 470 U.S. at 538-39 (internal punctuation omitted).

⁴⁸ *Id.*

⁴⁹ *Id.* at 539-40.

⁵⁰ *Id.* at 541. Property rights in continued employment may come from statutes or from other commitments made by the governmental entity. See, e.g., *Roth*, 408 U.S. at 576-77 (describing a case, *Connell v. Higginbotham*, 403 U.S. 207, 208 (1970), which held that an employment contract with a clearly implied promise of continued employment was sufficient to establish the property right); *Leary v. Daeschner*, 228 F.3d 729, 741-42 (6th Cir. 2000)

The Court held that,

Property cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.⁵¹

The Court explained that, “once it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the Ohio statute.”⁵² Rather, it comes from the Federal Constitution.⁵³

The *Loudermill* Court explained that the “root requirement” of the Due Process Clause is that “an individual be given an opportunity for a hearing before he is deprived of any significant property interest. This principle requires some kind of a hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment.”⁵⁴

One reason for this due process right is the possibility that “[e]ven where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.”⁵⁵ The Court was emphatic that “the right to a hearing does not depend on a demonstration of certain success.”⁵⁶

The Court recognized that public employers might not want to keep an employee on the job during the pre-termination process. However, its recommended solution was

(holding that a contract, such as a collective bargaining agreement, may create a property interest).

⁵¹ *Loudermill*, 470 U.S. at 541 (internal punctuation omitted).

⁵² *Id.* (internal punctuation and citation omitted).

⁵³ *Id.*

⁵⁴ *Id.* at 542 (internal punctuation and citations omitted). The Court also stated that, “this rule has been settled for some time now.” *Id.*

⁵⁵ *Id.* at 543.

⁵⁶ *Id.* at 544.

that, “in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.” Removal without a pre-termination process is not an option.⁵⁷ Rather, an employee with a property right in the position *must* be given “notice and an opportunity to respond.”⁵⁸

While the decision in *Loudermill* explained that pre-termination procedures are required, it also made it clear that the constitutionality of termination procedures does not depend solely on the pre-termination process. The Court stated that its holding was heavily dependent on “the provisions in Ohio law for a full post-termination hearing.”⁵⁹ The two issues (pre- and post-termination procedures) are “coupled” when looking at the question of whether due process has been given.⁶⁰

The “nature of the subsequent proceedings” can determine whether the pre-termination proceedings were adequate.⁶¹ When applying this rule, courts have emphasized the need to look at the “totality” of the procedures.⁶² For example, in *Farhat v. Jopke*, 370 F.3d 580, 597 (6th Cir. 2004), the court held that *Loudermill* does not demand that the pre-termination opportunity to respond take place before a neutral and impartial decision-maker when impartiality is provided by a “post-termination proceeding where bias and corruption are ferreted out.”⁶³ However, while “the nature of subsequent proceedings may lessen the amount of process that the state must provide

⁵⁷ *Id.* at 544-45.

⁵⁸ *Id.* at 546.

⁵⁹ *Id.* at 545-48.

⁶⁰ *Id.* at 547-48.

⁶¹ *Id.* at 545. Because of this coupling, the constitutionality of the process as a whole may depend on the constitutionality of various stages of the process, including which party bears the burden of proof. The Supreme Court has held that for a deprivation of life, liberty, or property, a statute that presumes guilt without “a fair opportunity to repel” that presumption violates the due process clause. *Manley v. State of Georgia*, 279 U.S. 1, 6 (1929). See also *Speiser v. Randall*, 357 U.S. 513, 524 (1958) (explaining that in both criminal and civil cases, the burden of proof cannot be “unfairly” shifted to the defendant).

⁶² *West v. Grand County*, 967 F.2d 362, 368 (10th Cir. 1992).

⁶³ *Farhat*, 370 F.3d at 597. See *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 332-33 (9th Cir. 1995) (holding that if post-termination proceedings are overseen by individuals who harbor malice for the employee’s whistleblowing activities, the process will fail to meet the due process requirements).

pre-termination, subsequent proceedings cannot serve to eliminate the essential requirement of a pre-termination notice and opportunity to respond.”⁶⁴

Loudermill Applies to the Federal Government

Public employers – whether state or Federal – are covered by the due process guarantees of the U.S. Constitution.⁶⁵ For this reason, a decision by a Federal court pertaining to due process in state employment can be instructive when the holding is reached as a result of the Federal Constitution. However, a decision reached by the U.S. Supreme Court is more than instructive – it is an instruction.⁶⁶ When the Supreme Court reaches a conclusion based on the requirements of the Federal Constitution, that holding should be considered when setting laws, regardless of whether the legislature in question is state or Federal. While *Loudermill* was a decision involving a state employer, ***both the Supreme Court and the Federal Circuit have explicitly recognized that the Constitutional due process rights described in Loudermill apply to the Federal civil service.***⁶⁷

The two most well-settled (and well-known) issues in all of American jurisprudence are quite simple: “An act of congress repugnant to the constitution cannot become a law” and it is “emphatically the province and duty” of the judiciary to interpret laws and the Constitution.⁶⁸ As a result, any decisions by the Supreme Court

⁶⁴ *Clements*, 69 F.3d at 332.

⁶⁵ While the Federal Government is covered by the Fifth Amendment and the states by the Fourteenth Amendment, the effect is the same. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) (explaining that, “when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause”); *Block v. Hirsh*, 256 U.S. 135, 159 (1921) (explaining that, “[t]he national government by the Fifth Amendment to the Constitution, and the states by the Fourteenth Amendment, are forbidden to deprive any person of ‘life, liberty, or property, without due process of law’”).

⁶⁶ The Supreme Court is the highest court for cases involving claims brought under the Federal Constitution and for claims arising under Federal civil service laws. See 28 U.S.C. § 1254 (granting the Supreme Court jurisdiction to review cases from the courts of appeals); 28 U.S.C. § 1295(a)(9) (granting jurisdiction over MSPB decisions to the Federal Circuit).

⁶⁷ *Erickson*, 522 U.S. at 266 (citing *Loudermill* when explaining the due process rights of a Federal civil servant in his employment); *Stone*, 179 F.3d at 1375-76 (holding in the context of Federal employment that the “process due a public employee prior to removal from office has been explained in *Loudermill*”).

⁶⁸ *Marbury v. Madison*, 5 U.S. 137, 138, 177 (1803). See *Richmond Medical Center for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (holding based on *Marbury* that, “where

involving constitutional interpretations – including decisions regarding public employment – are binding on Congress and the President. While a Supreme Court decision based on its interpretation of a law may be overruled by the enactment of a new law, a decision based on the Constitution cannot.⁶⁹ A decision based on an interpretation of the Constitution can only be altered through a new decision by the Supreme Court or a constitutional amendment.⁷⁰

There are two significant cases relying on *Loudermill* that have highlighted the extent to which the Constitution requires an opportunity to respond before an adverse action can be effectuated: (1) *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011); and (2) *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999). They are sometimes referred to jointly by the label “*Ward/Stone*” because of the extent to which they share a common legal concept – namely, that if a deciding official is exposed to information affecting the outcome of his decision-making process without the employee being told of the information and given the opportunity to present a defense against it, then any opportunity to respond is fundamentally flawed and will fail to meet the constitutional requirements of *Loudermill*.⁷¹

In *Stone*, a removal case, the deciding official received two *ex parte* communications: one from the proposing official and one from a second official who

a legislature oversteps its bounds and issues a law repugnant to the constitution, it is void and must be struck down by the courts”) (internal punctuation omitted); *Berkowitz v. United States*, 340 F.2d 168, 173 (1st Cir. 1965) (holding that a court may find that “Congress could not have intended what its words appear to say” if the alternative is to hold that the court “cannot give effect to what was said because it is repugnant to the Constitution”). See also U.S. Supreme Court at www.supremecourt.gov/about/constitutional.aspx (explaining that, “[w]hen the Supreme Court rules on a constitutional issue, that judgment is virtually final; its decisions can be altered only by the rarely used procedure of constitutional amendment or by a new ruling of the Court”).

⁶⁹ Compare *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (explaining that “a constitutional decision of this Court may not be in effect overruled by an Act of Congress”) (punctuation omitted) with *Mansell v. Mansell*, 490 U.S. 581, 588 (1989) (explaining that Congress could “overcome” an earlier decision by the Court involving statutory interpretation by enacting new legislation).

⁷⁰ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996).

⁷¹ *Ward*, 634 F.3d at 1280; *Stone*, 179 F.3d at 1377.

also advocated for Stone's removal.⁷² Stone was not informed of the communications or their content prior to the effectuation of his removal.⁷³ He appealed his removal to MSPB, asserting that these communications harmed his due process rights.⁷⁴ The administrative judge assigned to the case held that there was no statute or regulation prohibiting such communications, and the Board denied the appellant's petition for review.⁷⁵ Stone then filed an appeal to the Federal Circuit.⁷⁶

On appeal, citing *Loudermill*, the court stated:

We begin by noting that [Stone's] property interest is not defined by, or conditioned on, Congress' choice of procedures for its deprivation. In other words, [title 5] § 7513 and § 4303 do not provide the final limit on the procedures the agency must follow in removing Mr. Stone. Procedural due process requires "that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures."⁷⁷

The court held that "[i]t is constitutionally impermissible to allow a deciding official to receive additional material information that may undermine the objectivity required to protect the fairness of the process. *Our system is premised on the procedural fairness at each stage of the removal proceedings.*"⁷⁸ Accordingly, the case was remanded to the Board with instructions that if the Board found that the communications involved new and material information, the action would have to be reversed and the employee provided with a constitutionally correct removal procedure.⁷⁹

The factors that the Board was instructed to consider when determining if information was new and material included:

⁷² *Stone*, 179 F.3d at 1372-73. An *ex parte* communication is a communication between one party and the decision-maker where the other party is not present and not given the opportunity to present his or her side of the argument.

⁷³ *Id.*

⁷⁴ *Id.* at 1373.

⁷⁵ *Id.* at 1371.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1375 (internal citation to *Loudermill* omitted).

⁷⁸ *Id.* at 1376 (emphasis added).

⁷⁹ *Id.* at 1377.

whether the *ex parte* communication merely introduces ‘cumulative’ information or new information; whether the employee knew of the error and had a chance to respond to it; and whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. Ultimately, the inquiry of the Board is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances.⁸⁰

These are commonly referred to as the *Stone* factors or the *Stone* test.

In *Ward*, the appellant was removed for improper conduct arising out of a conflict with his supervisor in which she perceived the appellant’s behavior as threatening and disobedient.⁸¹ Before reaching a decision on the penalty, the deciding official spoke with three supervisors and one manager who discussed other alleged incidents involving similar behavior by Ward.⁸² Ward was not informed of these conversations.⁸³ The deciding official later admitted that the repeated pattern of belligerent conduct described in the conversations led him to conclude that Ward could not be rehabilitated by a lesser penalty and that removal was therefore necessary.⁸⁴

On appeal, the Board held that the deciding official’s use of this *ex parte* information was improper but concluded that, because the *ex parte* communication involved the penalty and not the charges, it could remedy the error by doing its own penalty analysis.⁸⁵ The Board then held removal was appropriate.⁸⁶

Ward appealed this decision to the Federal Circuit, which held that the Board erred in its conclusion that an impropriety involving the penalty did not raise the same constitutional issues as an impropriety involving charges.⁸⁷ The court held that the distinction was “arbitrary and unsupportable” because “[t]here is no constitutionally

⁸⁰ *Id.*

⁸¹ *Ward*, 634 F.3d at 1276.

⁸² *Id.* at 1277.

⁸³ *Id.* at 1278.

⁸⁴ *Id.* at 1277.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1280.

relevant distinction between *ex parte* communications relating to the underlying charge and those relating to the penalty.”⁸⁸ The Board was instructed that it could not excuse a constitutional violation as a harmless error.⁸⁹

The court remanded the case to the Board with the instruction to apply the *Stone* factors to determine whether new and material information had been introduced to the process without the appellant being granted the opportunity to respond.⁹⁰ If this had occurred, then, as with *Stone*, the appellant would be entitled to a new, constitutionally correct procedure.⁹¹

The court also reminded the Board that, “[a]s *Stone* recognized, the Due Process Clause only provides the minimum process to which a public employee is entitled prior to removal. Public employees are, of course, entitled to other procedural protections afforded them by statute, regulation, or agency procedure.”⁹² The Board was instructed that, *if it found the constitutional requirements had been met*, then it was to examine any procedural errors involving statutes or regulations and conduct a “proper” analysis to determine if such errors were harmful.⁹³ A harmful error is one in which the outcome was affected by the agency’s failure to follow required procedures.⁹⁴ The court reminded the Board that, by statute, if there were harmful errors in the agency’s process, the agency could not prevail.⁹⁵ Thus, even if the Board concluded that the removal itself was reasonable, it did not have the authority to cure an agency’s procedural errors.⁹⁶

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1281 (internal citations and punctuation omitted).

⁹³ *Id.* at 1282.

⁹⁴ *Id.* at 1281-82.

⁹⁵ *Id.*

⁹⁶ *Id.*

Loudermill and Suspensions

In the Federal context, there has not been extensive discussion of the types of actions to which the property right extends because the statute pertaining to the procedures for removing civil service employees, 5 U.S.C. chapter 75, also applies those same procedures to lengthy suspensions and demotions. However, the Supreme Court has addressed the interaction between its *Loudermill* decision and situations in which the penalty is a suspension rather than a removal.

In *Gilbert v. Homar*, 520 U.S. 924 (1997), a policeman employed by the State of Pennsylvania was suspended without pay without first receiving notice and a period to reply. The suspension was triggered by his arrest and the filing of charges for a drug felony.⁹⁷

When deciding whether there would be a due process right to advanced notice and an opportunity to reply in such cases, the Court noted that it had previously held that due process “is flexible and calls for such procedural protections as the particular situation demands.”⁹⁸ When “a State must act quickly, or where it would be impractical to provide [a] predeprivation process, [a] postdeprivation process satisfies the requirements of the Due Process Clause.”⁹⁹ The Court held that “[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in *limited* cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.”¹⁰⁰

The Court applied its test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (a benefits case), to explain the factors to consider in determining whether sufficient due

⁹⁷ *Gilbert*, 520 U.S. at 926-27. For purposes of this case, the Court assumed the individual had a property right without actually deciding that the property right existed. *Id.* at 929. *Cf. Tarkanian*, 488 U.S. at 192 (holding in the context of a case involving a suspension that acted as a demotion that, when a state actor “decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution”).

⁹⁸ *Gilbert*, 520 U.S. at 930 (quoting *Morrissey*, 408 U.S. at 481).

⁹⁹ *Id.* at 930.

¹⁰⁰ *Id.* at 930-31 (quoting *Federal Deposit Insurance Corporation v. Mallen*, 486 U.S. 230, 240 (1988) (emphasis added)).

process has been granted in the employment context. The three factors are: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest.”¹⁰¹

For the private interest factor, the Court reiterated its holdings from other cases that the length and finality of the property deprivation should be considered when assessing the process that an individual is due and concluded that a suspension may be a relatively minor deprivation compared to a removal “[s]o long as the suspended employee receives a sufficiently prompt postsuspension hearing[.]”¹⁰²

For the state interest factor, the Court noted that a police officer holds a position of “great public trust and high public visibility” and that felony charges are serious. Therefore, the state had a strong interest in the matter.¹⁰³

For the last *Mathews* factor, the risk of an erroneous action, the Court noted that the purpose of a pre-suspension hearing would be to determine if there was adequate evidence of the misconduct and found that the arrest and filing of charges against the individual provided an adequate safeguard. Therefore, the Court concluded that the individual’s constitutional right to due process was not violated when he was suspended without advanced notice.¹⁰⁴

However, in *Gilbert*, the Court noted that the charges against the individual were dropped on September 1st, yet the suspension continued without a hearing until September 18th. The Court held that, “[o]nce the charges were dropped, the risk of erroneous deprivation increased substantially[.]”¹⁰⁵ Accordingly, it remanded the case

¹⁰¹ *Gilbert*, 520 U.S. at 931-32 (quoting *Mathews*, 424 U.S. at 335).

¹⁰² *Gilbert*, 520 U.S. at 932.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 933-34.

¹⁰⁵ *Id.* at 935.

to the court of appeals to determine whether, under the facts of the case, the hearing was sufficiently prompt to satisfy the requirements of due process.¹⁰⁶

In other words, because due process is situationally dependent, as situations evolve, the *minimum* level of process that the Constitution requires can change. One of the dangers of skirting too closely to the minimum amount may be the employer finding itself on the wrong side of that line. The situationally dependent nature of due process may also pose a challenge for the establishment of rigid rules. For example, what constitutes a “meaningful” opportunity to reply may be different in a simple case as opposed to one with highly complex issues or difficult to access evidence. Chapter Three will discuss in greater depth the opportunity to reply.

¹⁰⁶ *Id.* at 935-36.

Suspensions of 14 Days or Less

By statute, before an agency imposes a suspension for 14 days or less, an employee is entitled to:

- (1) an advance written notice stating the specific reasons for the proposed action;
- (2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- (3) e represented by an attorney or other representative; and
- (4) written decision and the specific reasons therefor at the earliest practicable date.¹⁰⁷

Appendix B contains a flow chart illustrating this process. The law does not give appellate jurisdiction to MSPB for such actions unless another statute applies, such as MSPB's jurisdiction over cases alleging whistleblower retaliation or discrimination based on military service or obligations.¹⁰⁸

Suspensions of More than 14 Days, Demotions, and Removals

Before an agency imposes a suspension for more than 14 days, a change to lower grade, reduction in pay, or a removal action, an employee is entitled to:

- (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
- (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- (3) e represented by an attorney or other representative; and

¹⁰⁷ 5 U.S.C. § 7503. The U.S. Office of Personnel Management has issued regulations stating that the employee's period to reply to a proposed suspension of 14 days or less cannot be less than 24 hours. 5 C.F.R. § 752.203(c).

¹⁰⁸ See, e.g., *Johnson v. U.S. Postal Service*, 85 M.S.P.R. 1, ¶ 11 (1999) (finding MSPB had jurisdiction under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) for a 7-day suspension when the appellant alleged that he was denied leave and instead was charged with absence without leave (AWOL) for periods during which he served on military reserve duty, leading to him being suspended for AWOL); *Hupka v. Department of Defense*, 74 M.S.P.R. 406, 411 (1997) (finding MSPB had jurisdiction over an appeal of a 5-day and a 4-day suspension where the appellant alleged retaliation for whistleblowing and exhausted his administrative remedies).

(4) written decision and the specific reasons therefor at the earliest practicable date.¹⁰⁹

Additionally, “[a]n agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer” and “[a]n employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.”¹¹⁰ Appendix B contains a flow chart illustrating this process.

While a conduct-based adverse action must comport with the rules set forth in chapter 75 of title 5, agencies may take a performance-based demotion or removal action under: (1) the rules specific to performance-based actions set forth in chapter 43 of title 5; or (2) the rules for general demotions and removals set forth in chapter 75.¹¹¹

Both chapters have similar requirements for providing an employee with notice of a proposed action and a meaningful opportunity to respond.¹¹² However, the standard of proof differs.¹¹³ If MSPB is asked to adjudicate an appeal, “the decision of the agency shall be sustained” if the agency’s case is supported by a preponderance of the evidence, unless the agency opts to use the procedures set forth in 5 U.S.C. § 4303, in which case it must be supported by substantial evidence.¹¹⁴ Substantial evidence means that a reasonable person could have reached the agency’s conclusion, while a

¹⁰⁹ 5 U.S.C. § 7513(b).

¹¹⁰ 5 U.S.C. § 7513(c)-(d).

¹¹¹ See *Lovshin v. Department of the Navy*, 767 F.2d 826, 834 (Fed. Cir. 1985) (explaining that either chapter may be used for performance-based actions); U.S. Merit Systems Protection Board, *Addressing Poor Performers and the Law* (2009), available at www.mspb.gov/studies (discussing performance-based actions under the two different sets of rules).

¹¹² Under 5 U.S.C. § 4303, an employee “is entitled to: (1) 30 days’ advance written notice of the proposed action which identifies the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical elements of the employee’s position involved in each instance of unacceptable performance; (2) be represented by an attorney or other representative; (3) a reasonable time to answer orally and in writing; and (4) a written decision” that specifies the instances of unacceptable performance and that has been “concurrented in” by an official at a higher level than that of the proposing official. 5 U.S.C. § 4303(b)(1) (punctuation and numbering modified).

¹¹³ 5 U.S.C. § 7701(c)(1).

¹¹⁴ *Id.*

preponderance of the evidence means that the evidence shows a charge is more likely to be true than not.¹¹⁵

If an action is taken under chapter 75 of title 5, then the agency must also prove that managerial judgment has been properly exercised within “tolerable limits of reasonableness.”¹¹⁶ This means that the penalty was not clearly excessive; disproportionate to the sustained charges; or arbitrary, capricious, or unreasonable.¹¹⁷ A penalty will be found unreasonable if it is “so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion[.]”¹¹⁸

The tolerable limits of reasonableness standard applies to an agency’s chapter 75 action. For actions taken under chapter 43, the Federal Circuit has held that an agency has “discretion to select one of only two penalties, demotion or removal, for unacceptable employee performance. That discretion is not unfettered. It is measured by the mandated performance appraisal system.”¹¹⁹ Accordingly, MSPB does not review chapter 43 penalties.¹²⁰

However, under either chapter 43 or chapter 75, the agency’s decision will not be sustained if: (1) there was a harmful error in the application of the agency’s procedures; (2) the action was based on a prohibited personnel practice (such as discrimination or retaliation for whistleblowing); or (3) the decision was otherwise not in accordance with

¹¹⁵ A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence. 5 C.F.R. § 1201.56(c)(1). For an in-depth discussion of the rules for agencies to take performance-based adverse actions, see U.S. Merit Systems Protection Board, *Addressing Poor Performers and the Law* (2009), available at www.mspb.gov/studies_

¹¹⁶ *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981); see *Norris v. Securities and Exchange Commission*, 695 F.3d 1261, 1266 (Fed. Cir. 2012).

¹¹⁷ *Douglas*, 5 M.S.P.R. at 284.

¹¹⁸ *Villela v. Department of the Air Force*, 727 F.2d 1574, 1576 (Fed. Cir. 1984) (quoting *Power v. United States*, 531 F.2d 505, 507 (1980)).

¹¹⁹ *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1564 (Fed. Cir. 1985).

¹²⁰ *Id.*

the law.¹²¹ These are known as “affirmative defenses.” To prevail on an affirmative defense, the appellant must prove it by a preponderance of the evidence.¹²²

As explained above, for performance- and conduct-based adverse actions, the law permits an agency to effectuate an action 30 days after it proposes the action. If the agency has reasonable cause to believe the employee has committed a serious crime, the action can take effect in as little as 7 days. The employee must be told the charges and proposed penalty and have a reasonable opportunity to respond. If the employee wants an attorney, he or she is entitled to have one at his or her own expense.¹²³ When a decision has been reached, the employee is entitled to be told in writing the reason for that decision. ***This is all that the law requires.***¹²⁴

Responsible agencies may take the time to conduct investigations before proposing actions in order to feel confident that they can prove their charges and that the penalty does not constitute an abuse of discretion. They may determine that it is reasonable to offer an employee more than the statutory bare minimum of time to submit a response to the charges. These are ***choices*** that agencies make – and often for good reasons. Agencies should want to ensure that their charges are true and that information that may prove otherwise comes to their attention before they remove an employee. As the Secretary of the Department of Veterans’ Affairs, Robert McDonald, stated in an interview on *60 Minutes*, when asked whether employees who lie and put themselves before veterans should be fired: “Absolutely. Absolutely. But we’ve got to make it stick.”¹²⁵

The statute, as currently constructed, was designed to comport with the Constitution so that agencies could make their actions “stick.” It balances the importance of speedy action with the constitutional right of an employee to respond and

¹²¹ 5 U.S.C. § 7701(c)(2); see 5 U.S.C. § 2302(b) (listing the prohibited personnel practices).

¹²² 5 C.F.R. § 1201.56.

¹²³ *Marsheck v. Department of Transportation*, 15 M.S.P.R. 423, 425 (1983).

¹²⁴ 5 U.S.C. § 7513.

¹²⁵ CBS News, “Cleaning up the VA,” Nov. 9, 2014, transcript available at <http://www.cbsnews.com/news/robert-mcdonald-cleaning-up-the-veterans-affairs-hospitals/>.

show the agency that it has wrongly charged or will wrongly penalize him or her. Any amendments to the statute should do the same. It would not serve the public interest for agencies to take actions that violate the Constitution or that fail to advance the efficiency of the service.

Chapter Four: Efforts to Modify the System

While MSPB is a successor agency to the CSC and was given adjudicatory responsibilities that had belonged to the CSC, the law that established MSPB also provided a new statutory framework to protect employee rights and the merit systems. This chapter describes some of the changes that have taken place in the adverse action system following its initial establishment in the CSRA and the role of due process in those changes.

When reviewing case law, it is important to recognize that the rules have been subjected to some modifications since the CSRA and that many changes applied only to specific agencies, while others were Government-wide.¹²⁶ Additionally, some (but not all) of the agency-unique changes were later repealed in part or whole. Therefore, individuals with an interest in this area should be careful when reviewing older cases and cases involving agency-specific rules.

Government-Wide Modifications

There have been a number of modifications to the civil service adverse action processes since 1978; however, many of these changes were unique to a single agency. Some modifications were by statute and others by case law. The modifications that had an effect on the entire civil service include: (1) the Civil Service Due Process Amendments of 1990 (DPA), Pub. L. No. 101-376, 104 Stat. 461 (which changed important rules for excepted service (“ES”) employees); (2) *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002) (overruling previous holdings regarding competitive service (“CS”) probationary period employees and the legal definition of

¹²⁶ The definition of “employee” in the competitive excepted services has evolved since the CSRA as a result of both new statutes and case law. The history is complex, as we explained in our 2006 report, *Navigating the Probationary Period After Van Wersch and McCormick*, available at www.mspb.gov/studies. Today, the answer as to whether a CS or ES individual is an employee often – but not always – revolves around whether the individual has completed a trial or probationary period. As explained in our earlier discussion of the Pendleton Act, Congress desired that there be a period in which an individual must prove himself or herself on the job before an appointment is finalized. Until that has occurred, generally, the individual is not yet an employee with a property right in such employment. *Navigating the Probationary Period After Van Wersch and McCormick* discusses some exceptions to this general rule.

“employee”); and (3) *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144 (Fed. Cir. 1999) (discussing the legal definition of “employee” in the ES).

The DPA, which granted appeal rights to most ES employees, is particularly instructive because of the deliberateness with which it was enacted. In *United States v. Fausto*, 484 U.S. 439 (1988), the question before the Court was what remedies were available to an ES employee who had been suspended wrongly.¹²⁷ The Court held that the CSRA had created “a comprehensive system for reviewing personnel action[s] taken against federal employees. Its deliberate exclusion of [ES employees] from the provisions establishing administrative and judicial review for [a 30-day suspension] prevents [a] respondent [in Fausto’s situation] from seeking review in the Claims Court under the Back Pay Act.”¹²⁸

Congress objected to this result, which would have left ES employees without adequate protection from improper adverse actions, and passed the DPA, which was explicitly intended to provide ES employees with the right to challenge adverse actions.¹²⁹ The House Post Office and Civil Service Committee described the need for the bill as “urgent” in light of the *Fausto* decision.¹³⁰ It also noted that ES veterans had appeal rights to MSPB under the VPA of 1944 (discussed in Chapter One) and that:

Permitting veterans in excepted service positions to appeal to the Merit Systems Protection Board when they face adverse actions has not crippled the ability of agencies excepted from the competitive service to function.

¹²⁷ Fausto was removed by his agency. He appealed that action to MSPB, which concluded it lacked jurisdiction over his appeal because he was in the excepted service. He then filed a grievance with his agency, which determined he should not have been removed and mitigated the action to a 30-day suspension. He then filed an appeal of that suspension with the U.S. Court of Claims, which concluded it lacked jurisdiction. He appealed that decision to the Federal Circuit, which held that while MSPB lacked jurisdiction over the case under the CSRA, the Claims Court did have jurisdiction under the Tucker Act. (The Tucker Act grants the Claims Court “jurisdiction to render judgment upon any claim against the United States founded upon the Constitution.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (punctuation modified)). The Claims Court then reached the merits of the case, found the suspension should not have occurred, and ordered back pay. The Government petitioned the Supreme Court for certiorari on the question of the Claims Court’s jurisdiction over an excepted service employee’s Tucker Act claim. *Fausto*, 484 U.S. at 442-43.

¹²⁸ *Fausto*, 484 U.S. at 455.

¹²⁹ Pub. L. No. 101-376; H.R. Rep. 101-328, at 4 (1990 U.S.C.C.A.N. 695, 698).

¹³⁰ H.R. Rep. 101-328, at 4 (1990 U.S.C.C.A.N. 695, 698).

Therefore, the committee see[s] no problem with extending these procedural protections to certain other employees in the excepted service.¹³¹

Congress determined that ES employees “should have the same right to be free from arbitrary removal as do competitive service employees.”¹³² After discussions with the Office of Personnel Management (OPM), the law was crafted to require a longer waiting (trial) period for ES employees to obtain appeal rights in recognition of differences in how they are appointed.¹³³ President George H.W. Bush, who as a former Director of Central Intelligence was in a unique position to understand the need to balance security concerns and management prerogatives with fair treatment of employees, signed the bill into law on August 17, 1990.¹³⁴

The DPA was intended to reverse the effect of *Fausto* and put ES employees under MSPB’s protection to the same extent as CS employees.¹³⁵ However, there are some adverse actions, such as suspensions of 14 days or less, which cannot be appealed to MSPB under ordinary circumstances.¹³⁶ The DPA did not address these actions.¹³⁷

¹³¹ H.R. Rep. 101-328, at 3 (1990 U.S.C.C.A.N. 695, 697).

¹³² H.R. Rep. 101-328, at 4 (1990 U.S.C.C.A.N. 695, 698).

¹³³ *Van Wersch*, 197 F.3d at 1149 (quoting 136 Cong. Rec. 20365, 20366 (1990)). Certain agencies also were explicitly excepted from the provisions of the bill, primarily either because a different law already addressed their specific workforces (*e.g.*, Foreign Service, Central Intelligence Agency, General Accounting Office, and Veterans Health Services and Research Administration); or because their missions were deemed too sensitive to permit a broadening of employees’ appeal rights (*e.g.*, Federal Bureau of Investigation and National Security Agency). See H.R. Rep. 101-328, at 5 (1990 U.S.C.C.A.N. 695, 699) for a more complete list of agencies excepted from the DPA and the reasons for those exceptions.

¹³⁴ 136 Cong. Rec. H11769-04 (message from the President), 1990 WL 275299.

¹³⁵ H.R. Rep. 101-328, at 3-4 (1990 U.S.C.C.A.N. 695, 697-98).

¹³⁶ MSPB may have jurisdiction over whistleblower retaliation claims even if it would not otherwise have jurisdiction over the employee or adverse action in question. See, *e.g.*, *Hupka*, 74 M.S.P.R. at 411 (holding that MSPB has jurisdiction over an appeal of a 5-day and a 4-day suspension where the appellant alleged retaliation for whistleblowing and exhausted his administrative remedies); *O’Brien v. Office of Independent Counsel*, 74 M.S.P.R. 192, 195, 197, 208 (1997) (holding that MSPB has jurisdiction over an appeal from a temporary employee in the excepted service if the individual is a whistleblower who experienced retaliation and has exhausted his administrative remedies). Similarly, USERRA can provide MSPB jurisdiction over suspensions that are too brief to otherwise meet the requirements for MSPB’s adverse action jurisdiction. See, *e.g.*, *Johnson*, 85 M.S.P.R. 1, ¶ 11 (finding USERRA jurisdiction over a 7-day suspension when the appellant alleged that he was denied leave and instead was charged with absence without leave (AWOL) for periods during which he served on military reserve duty, leading to him being suspended for AWOL).

As a result, chapter 75's subchapter I sets forth rules involving the necessary cause and procedures for short suspensions in the competitive service without discussing any such rules for the excepted service.

Unlike the DPA, the changes to the civil service brought about by the Federal Circuit's decisions in *Van Wersch* and *McCormick* appear to be the result of poor statutory construction rather than congressional intent. In both *Van Wersch* and *McCormick*, the Federal Circuit determined that there was a "compelling case" to be made that Congress intended that individuals on new appointments who had previous Federal service would be treated as probationers who do not have finalized appointments and are therefore not entitled to the full panoply of rights given to employees. However, the court concluded that, because of the way in which the law was structured, CS and ES individuals in a probationary or trial period could be entitled to the procedural rights set forth in title 5 chapter 75 if the individuals met certain conditions regarding length of service.¹³⁸ In other words, through its possibly unintentional word choices, Congress gave due process rights to individuals whose right to the property – the appointment – had not yet been finalized.¹³⁹

Agency-Specific Modifications

Post-CSRA agency-specific changes to the civil service rules tend to be most noteworthy for their short duration. Some (but not all) have been enacted only to be repealed by a later Congress. Such actions can have their own complications. An example of this is the 1996 Department of Transportation and Related Agencies

¹³⁷ See Pub. L. No. 101-376.

¹³⁸ See *McCormick*, 307 F.3d at 1341-42; *Van Wersch*, 197 F.3d at 1152. Section 7511(a)(1)(A) of title 5 lists who may be considered an employee for purposes of appeal rights and uses the word "or" to separately list two different qualifying criteria. This use of "or" can be found in the original text of the CSRA and is likely a result of an attempt to mimic the regulations of the CSC. However, moving the words out of the surrounding context from the Code of Federal Regulations caused a change in their meaning. The criteria was originally structured as a list of individuals who could not be considered employees with procedural and appeal rights, but the CSRA structured the law as a list of individuals who were covered. In this way, what had once been criteria for excluding an individual from coverage ceased to have that effect. Compare CSRA, Pub.L. No. 95-454, 92 Stat. 1111 with 5 C.F.R. § 752.103 (1978).

¹³⁹ Congress has not chosen to enact legislation to overrule the decisions in *Van Wersch* or *McCormick*.

Appropriations Act (“DOT Act”), Pub. L. No. 104–50, 109 Stat. 436 (1995) and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“Ford Act”), Pub. L. No. 106–181, 114 Stat. 61 (2000).¹⁴⁰

The DOT Act removed the Federal Aviation Administration (FAA) from MSPB jurisdiction and the relevant statutes and rules, and the Ford Act *mostly* put it back. MSPB jurisdiction was restored to what it had been before the DOT Act, but the Ford Act did not address any changes to MSPB’s Government-wide jurisdiction that occurred after the DOT Act and did not specify the rules that the Board was to apply when exercising its reinstated jurisdiction.¹⁴¹ According to the Federal Circuit, Congress enacted the Ford Act because it was “[d]issatisfied with the DOT Act’s foreclosure of appeal rights to the Board[.]”¹⁴² Employees of the Transportation Security Administration (TSA) also fall under the FAA system.¹⁴³ These systems can have some

¹⁴⁰ Another example of an agency-specific law that was later repealed is the National Security Personnel System (NSPS). NSPS was authorized by Congress for the Department of Defense (DoD) in the National Defense Authorization Act (NDAA) for FY 2004 and repealed in the NDAA for FY 2010. See U.S. Government Accountability Office, *DOD Is Terminating the National Security Personnel System, but Needs a Strategic Plan to Guide Its Design of a New System*, GAO-11-524R, Apr. 28, 2011, at 1-2. This imposition and repeal of a personnel system also created some adverse action issues. See, e.g., *Ellis v. Department of the Navy*, 117 M.S.P.R. 511, ¶¶ 6-8 (2012) (explaining why a cumulative effect of personnel actions gave some employees adverse action appeal rights over the manner in which they were moved from an NSPS pay system back to the GS pay system, while others did not have appeal rights).

¹⁴¹ See *Roche v. Merit Systems Protection Board*, 596 F.3d 1375, 1378-82 (Fed. Cir. 2010) (explaining the history of the two Acts and the extent to which Board jurisdiction was restored without specifying the rules that the Board was to apply when exercising that jurisdiction); *Belhumeur v. Department of Transportation*, 104 M.S.P.R. 408, ¶¶ 5-12 (2007) (explaining that because the Veterans Employment Opportunity Act (VEOA) was enacted in 1998 and the Ford Act of 2000 reinstated the jurisdiction that the Board had in 1996, the Board lacked VEOA jurisdiction for the FAA). See also *Gonzalez v. Department of Transportation*, 568 F.3d 1369, 1370 (Fed. Cir. 2009) (explaining that the Ford Act did not restore the Back Pay Act for FAA employees).

¹⁴² *Roche*, 596 F.3d at 1378.

¹⁴³ *Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1332 (Fed. Cir. 2006). Because the FAA is within the Department of Transportation and the TSA is within the Department of Homeland Security, some cases that list either of those departments as a party to a case may follow a different set of rules than other cases within those same departments. TSA screeners are particularly in their own category, with the Board unable to hear appeals from TSA screeners alleging violations of laws such as USERRA, the Whistleblower Protection Act (WPA), VEOA, suitability determinations under 5 C.F.R. part 731, employment practices appeals under 5 C.F.R. part 300, and the Board’s review of agency regulations under 5 C.F.R. part 1203. *Spain v. Department of Homeland Security*, 99 M.S.P.R. 529 (2005), *aff’d sub nom.*, *Spain v. Merit Systems Protection Board*, 177 F. App’x 88 (Fed. Cir. 2006).

seemingly odd quirks when compared to the rest of the civil service because some laws interact with each other, and the Ford Act did not fully return the FAA system to all of the laws related to the civil service. As a result, the employment laws pertaining to FAA and the TSA have some missing bits and pieces.¹⁴⁴

As noted earlier, one of the main reasons for the enactment “of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action[s], part of the outdated patchwork of statutes and rules built up over almost a century that was the civil service system.”¹⁴⁵ In the 40 years since the CSRA was enacted, the addition of various pieces has made the civil service increasingly complex to manage, as once again, a patchwork of statutes and rules must find a way to work together in concert.¹⁴⁶

¹⁴⁴ See *Gonzalez*, 568 F.3d at 1370 (explaining that the Ford Act did not restore the Back Pay Act for FAA employees); *Mitchell v. Department of Homeland Security*, 104 M.S.P.R. 682, ¶ 5 (2007) (explaining that because the TSA Administrator had not modified the FAA personnel system, the Board could not order back pay or interest for the employee); *Belhumeur*, 104 M.S.P.R. 408, ¶¶ 5-12 (explaining that because VEOA was enacted in 1998 and the Ford Act of 2000 put back the jurisdiction that the Board had in 1996, the Board lacked VEOA jurisdiction for the FAA).

¹⁴⁵ *Fausto*, 484 U.S. at 444 (internal punctuations and citations omitted).

¹⁴⁶ See U.S. Merit Systems Protection Board, *Veteran Hiring in the Civil Service: Practices and Perceptions* (2014), available at www.mspb.gov/studies (discussing the variety of laws enacted to support the hiring of veterans and how complicated a situation can become when they interact with other hiring laws and regulations).

There are good reasons why public employers must ensure that actions are taken to advance the efficiency of the service and not for improper motives. These requirements mean that certain procedural rules must be followed. But, in the words of Supreme Court Justice William Douglas, “[i]t is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.”¹⁴⁷

Prior to the 1960s, the Federal Government obtained a wealth of experience showing what can happen in the absence of such rules and with the supremacy of capriciousness. As the chapter titled *Development of Federal Employee Rights* illustrated, Congress found the results both unpleasant and unproductive.

It has been said that: “No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.”¹⁴⁸ However, providing an individual with the opportunity to respond does not always prevent improper actions from occurring. Agencies have taken adverse actions that are unsupported by the evidence.¹⁴⁹ Adverse actions for prohibited reasons, such as discrimination or retaliation for whistleblowing activities, still occur.¹⁵⁰

¹⁴⁷ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). In that same decision, Justice Felix Frankfurter wrote: “Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one’s private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.” *Id.* at 171 (Frankfurter, J., concurring).

¹⁴⁸ *Id.* at 171-72 (Frankfurter, J., concurring).

¹⁴⁹ See, e.g., *Prouty v. General Services Administration*, 122 M.S.P.R. 117, ¶¶ 35-38 (2014) (explaining that under the current statute, supervisors and executives can be held to high standards for proven charges, but the removal actions at issue could not be sustained because the agency had abandoned its duty to produce evidence in support of its charges); *Kenyon v. Department of the Navy*, 57 M.S.P.R. 258, 261-62 (1993) (holding that the appellant was

Conclusion

The system remains imperfect, but the current statutes, containing a pre-termination opportunity to respond, coupled with a post-termination review of agency decisions, have enabled the Government to provide the public with a merit-based civil service with due process under the law. Merit-based actions are required for an effective and efficient civil service. Due process is required to ensure that: (1) merit is truly the basis of the system; and (2) the system comports with the requirements of the U.S. Constitution. As with any set of laws, there is likely room for improvement. But, as long as merit is part of the system, due process will remain a required element.

entitled to attorney fees because the agency deliberately chose not to produce any evidence or argument supporting its removal action or its subsequent decision to cancel the removal after the employee filed an appeal).

¹⁵⁰ See, e.g., *Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197, ¶¶ 8-23, 41-42 (2011) (finding that the employee's protected disclosures to members of Congress and an Office of the Inspector General were contributing factors in his removal and ordering that the removal be cancelled); *Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶¶ 40, 42(2003) (finding that, where misconduct was proven but the penalty was a result of sex-based discrimination, the penalty imposed must be the same as that given to similarly-situated members of the other sex); *Creer v. U.S. Postal Service*, 62 M.S.P.R. 656, 663-64 (1994) (ordering the cancellation of a removal action that was the result of sex-based discrimination); *Johnson v. Defense Logistics Agency*, 61 M.S.P.R. 601, 607-10 (1994) (ordering the cancellation of a removal action where the un rebutted testimony, including that of the agency's deciding official, showed a pattern of racial discrimination). See also U.S. Office of Special Counsel, Annual Report to Congress for Fiscal Year 2013, at 19, available at www.osc.gov (discussing cases in which OSC obtained corrective action for whistleblowers who experienced retaliation).

Appendix A: Clearing up the Confusion

Perception	Reality
It is impossible to fire a Federal employee.	From FY 2000-2014, over 77,000 full-time, permanent, Federal employees were discharged as a result of performance and/or conduct issues. ¹⁵¹
There are no legal barriers to firing an employee in the private sector.	Many of the laws that apply to removing employees in the Federal civil service also apply to private sector employment or have a similar counterpart, such as the Civil Rights Act of 1964 (Title VII – Equal Employment Opportunity), and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), both of which permit private sector employees to pursue litigation. ¹⁵²
An agency must pay a salary to an employee who has been removed until any appeal has been resolved.	An employee does not continue to receive a salary once removed. If the action is found to have been unwarranted, then reinstatement and back pay may be awarded. But, there is no pay while removed. ¹⁵³

¹⁵¹ Analysis of data from U.S. Office of Personnel Management, Central Personnel Data File (CPDF), FY 2000-FY 2014. Discharge data includes the removal of probationers and those in a trial period for reasons involving conduct and/or performance. It does not include discharges from some agencies that use unique coding, such as the more than 10,000 separation actions that occurred within the TSA in this period, because the coding system does not permit us to determine the reasons for those separations.

¹⁵² See 38 U.S.C. §§ 4301-4333 (USERRA); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, § 706(e)-(g) (authorizing discrimination litigation in Federal courts). Congress has also enacted other laws to protect private sector employees. See, e.g., Family Medical Leave Act of 1993 (FMLA), Pub. L. No. 103-3, 107 Stat. 6, § 107 (authorizing civil actions and damages); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 748 (authorizing a cause of action for discrimination against whistleblowers); <http://www.whistleblowers.gov/> (explaining that Congress has enacted 22 laws to protect employees from retaliation for reporting occupational safety hazards).

¹⁵³ See 5 U.S.C. § 5596 (b)(1)(A). But see 5 U.S.C. § 1214(b)(1) (authorizing the Office of the Special Counsel (OSC) to request that the Board order a stay of a personnel action if there are reasonable grounds to believe the action is the result of a prohibited personnel practice). MSPB records indicate that OSC requests for such stays are very rare. From FY 2004-2014, OSC filed 65 requests for a stay, 86% of which were granted. Appellants also may request a stay under more limited circumstances. See 5 U.S.C. § 1221(c).

Appendix A: Clearing up the Confusion

Perception	Reality
Agency leaders have no authority to serve as proposing or deciding officials in title 5 adverse actions.	Title 5 empowers the agency to take an adverse action. If agency leadership chooses to delegate the proposal or decision authority to lower levels, then it cannot interfere with the decision-making process of those delegates. But, prior to the assigned decision-maker's involvement in a particular case, current statutes permit delegations to be abandoned or modified by the agency at will. ¹⁵⁴
If an employee is suspected of a crime, the agency cannot fire the employee for the same underlying conduct until the criminal matter is resolved.	The agency is permitted to remove the employee without waiting for criminal charges to be filed. If the removal is appealed to MSPB and criminal charges are filed, then MSPB may stay its proceedings until the criminal matter is resolved if, under the facts of the particular case, it is necessary in the interest of justice. However, the individual remains removed without pay during that period. ¹⁵⁵

¹⁵⁴ *Goeke v. Department of Justice*, 122 M.S.P.R. 69, ¶ 23 (2015) (explaining that the agency opted to delegate to a non-supervisory career official the authority to propose adverse actions, even though no external law, rule, or regulation required any delegation of the agency's disciplinary power. Such a delegation can be abandoned or modified prospectively by the agency at will; but, once adopted and until modified, it must be enforced); see *Boddie v. Department of the Navy*, 827 F.2d 1578, 1580 (Fed. Cir. 1987) (explaining that a new official can be substituted only if the substitution occurs before the assigned official considers the charges); *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (2011) (prohibiting *ex parte* communications); 5 U.S.C. § 7513 (authorizing an "agency" to impose an adverse action).

¹⁵⁵ *Wallington v. Department of the Treasury*, 42 M.S.P.R. 462, 465 (1989). See, e.g., *Raymond v. Department of Army*, 34 M.S.P.R. 476, 478 (1987) (appellant removed and MSPB appeal dismissed without prejudice to refiling because of investigation by U.S. Attorney); *Green v. U.S. Postal Service*, 16 M.S.P.R. 203, 206 (1983) (staying a removal appeal at MSPB pending completion of the ongoing criminal investigation by the U.S. Attorney's Office). Civil proceedings may be frozen pending the resolution of a criminal prosecution. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1204 (Fed. Cir. 1987). However, the law has specific provisions to make it possible to fire an employee reasonably suspected of a crime for which imprisonment may be imposed *even faster* than an employee whose actions are not likely to result in imprisonment. 5 U.S.C. § 7513(b)(1). Additionally, the Board has held that an employee is not entitled to back pay for any period of an indefinite suspension based on an indictment, regardless of the outcome of the criminal charges, if the indictment was proper when effected. *Jarvis v. Department of Justice*, 45 M.S.P.R. 104, 108 (1990); see *Wiemers v. Merit Systems Protection Board*, 792 F.2d 1113, 1116 (Fed. Cir. 1986) (holding that a reversal of a conviction did not entitle an employee to back pay for a suspension based on alleged criminal activity).

Perception	Reality
<p>The removal of a Senior Executive Service (SES) employee is delayed by the appeals process.</p>	<p>If a career¹⁵⁶ SES employee is removed for “misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function[.]” then the individual may appeal the action to MSPB, but the appeal can be filed only <i>after</i> the removal has taken effect.¹⁵⁷</p> <p>If the individual is removed for “less than fully successful executive performance[.]” then the individual is entitled to an informal hearing by MSPB. The request for the hearing may be filed before the removal action, but, the law specifically states that the <i>removal need not be delayed</i> pending a hearing.¹⁵⁸</p> <p>Thus, whether an action is taken for performance or conduct, the appeals process before the Board does not require any delay in the removal of the individual or in the termination of pay and benefits to that individual.</p>
<p>If an agency proposes an action such as a suspension and then learns the situation is more serious than it knew, it cannot propose a more serious action instead.</p>	<p>While an employee cannot be punished twice for the same event,¹⁵⁹ an agency may withdraw a notice of proposed suspension and replace it with a notice of proposed removal.¹⁶⁰</p>

¹⁵⁶ The MSPB appeals process only applies to non-probationary career appointees and those who met the definition of employee prior to placement in the SES. See 5 U.S.C. §§ 7541, 7543.

¹⁵⁷ 5 U.S.C. § 7543. Section 707 of the Veterans Access, Choice, and Accountability Act (VACAA), Pub. L. No. 113-146, 128 Stat 1754, which established a different process for the removal of SES members in the Department of Veterans Affairs (DVA), provided that, “the Secretary determines the performance or misconduct of the individual warrants such removal.” See 38 U.S.C. § 713. However, under both the traditional SES system and the VACCA system, there is no requirement to delay the effective date of the termination and cessation of pay and benefits pending appeal. Rather, under the traditional system, any appeal of an action for “misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function” cannot take place until after the action takes effect, as it is the taking of the action which provides MSPB with its jurisdiction.

¹⁵⁸ 5 U.S.C. § 3592(a). *But see* 5 U.S.C. §§ 3592(b)(2), 4314(b)(3) (the right to request a hearing under section 3592(a) does not apply to any senior executive removed for receiving unsatisfactory annual appraisals).

¹⁵⁹ *Wigen v. U.S. Postal Service*, 58 M.S.P.R. 381, 383 (1993) (an agency cannot impose disciplinary or adverse action more than once for the same instance of misconduct).

¹⁶⁰ *Brough v. Department of Commerce*, 119 M.S.P.R. 118, ¶¶ 10, 13 (2013). The agency must comply with its own internal rules for issuing notices of proposed action. See *Canary v. U.S. Postal Service*, 119 M.S.P.R. 310, ¶¶ 11-12 (2013) (holding that the substitution of a new deciding official violated the agency’s procedures under the circumstances of the case).

Appendix A: Clearing up the Confusion

Perception	Reality
<p>If, during the adverse action process, the agency accidentally fails to provide the employee with all of his or her constitutional rights, the agency loses the ability to take an adverse action.</p>	<p>An agency can correct the procedural problem and still take the action. For example, if the deciding official learns <i>ex parte</i> information, then the agency can issue a new notice of proposed action that includes the new information.¹⁶¹ If an action takes effect before the procedural issue is identified, and the action is reversed by MSPB on constitutional grounds, then the agency is free to take the action again, this time properly following all the rules.¹⁶²</p>
<p>Supervisors are rarely punished compared to non-supervisors.</p>	<p>In order to be promoted to higher-level grades – including supervisory positions – employees often must show successful performance and conduct over time. Because past conduct and performance are among the best predictors of future conduct and performance, length of service and grade-level tend to have a relationship to the rate at which individuals experience adverse actions. However, an analysis of appealable adverse action data shows that a supervisor is no less likely to experience an adverse action than a non-supervisor of similar age, seniority and grade.¹⁶³ Case law explicitly states that agencies are permitted to hold supervisors to a higher standard than non-supervisory employees.¹⁶⁴</p>

¹⁶¹ See *Dejoy v. Department of Health & Human Services*, 2 M.S.P.R. 577, 580 (1980) (holding that an agency may cancel a proposed removal and substitute a new notice of proposed removal).

¹⁶² See *Ward*, 634 F.3d 1274, 1279 (2011) (explaining that if there is a due process violation, the appellant “is automatically entitled to an ‘entirely new’ and ‘constitutionally correct’ removal proceeding”); *Solis v. Department of Justice*, 117 M.S.P.R. 458, ¶ 8 (2012) (explaining that the appellant is entitled to a new proceeding).

¹⁶³ Analysis of data from CPDF, FY 2005-2013, full-time, permanent employees experiencing a suspension of more than 14 days, change to lower grade, or removal for cause.

¹⁶⁴ See, e.g., *Gebhardt v. Department of the Air Force*, 99 M.S.P.R. 49, ¶ 21 (2005), *aff’d*, 180 F. App’x 951 (Fed. Cir. 2006) (holding that “[s]upervisors may be held to a higher standard of conduct than non-supervisors because they hold positions of trust and responsibility”); *Myers v. Department of Agriculture*, 88 M.S.P.R. 565, ¶ 34 (2001), *aff’d*, 50 F. App’x 443 (Fed. Cir. 2002) (holding that an “agency has a right to expect a higher standard of conduct from supervisors than from nonsupervisory employees”).

Appendix B: The Statutory Process Flowcharts

Suspensions of 14 Days or Less (5 U.S.C. § 7503, 5 C.F.R. § 752)

Step One: Analysis

- ✓ Identify issues.
- ✓ Investigate to ascertain facts and collect evidence.

Step Two: Action

- ✓ Agency: Propose the personnel action in writing including what action is proposed and why (charges and penalty). Inform the employee of any information that may be considered by the deciding official.
- ✓ Agency: Provide the employee with a reasonable opportunity to respond to proposed action (no less than 24 hours).
- ✓ Optional for Employee: Respond to the notice of proposed action.
- ✓ Agency: Consider the evidence and employee response (if any) before reaching a decision on the charges and penalty.
- ✓ Agency: Notify the employee in writing of the decision, effective date, and any complaint or grievance rights.

Step Three: Review

- ✓ Optional for Employee: File a discrimination complaint (EEOC procedures) or grievance (collective bargaining agreement or administrative grievance procedures).
- ✓ Agency: Respond to the complaint or grievance. For example, in an arbitration proceeding, establish that the evidence supports the charges and the penalty was reasonable.
- ✓ Employee: If asserting an affirmative defense, provide evidence to support that defense.

Removals, Demotions, Suspensions of Over 14 Days and Furloughs for 30 Days or Less (5 U.S.C. § 7513)

Step One: Analysis

- ✓ Identify issues.
- ✓ Investigate to ascertain facts and collect evidence.

Step Two: Action

- ✓ Agency: Propose the personnel action in writing including what action is proposed and why (charges and penalty). Inform the employee of any information that may be considered by the deciding official.
- ✓ Agency: Provide the employee with a reasonable opportunity to respond to proposed action (no less than 7 days).
- ✓ Optional for Employee: Respond to the notice of proposed action.
- ✓ Agency: Consider the evidence and employee response (if any) before reaching a decision on the charges and penalty.
- ✓ Agency: Notify the employee in writing of the decision, effective date, and any appeal, grievance, or complaint rights. Action may not take place less than 30 days from proposal date unless there is cause to believe the employee committed a crime for which imprisonment may be imposed.

Step Three: Review

- ✓ Optional for Employee: File an appeal (MSPB), discrimination complaint (EEOC procedures), or grievance (collective bargaining agreement procedures).
- ✓ Agency: Respond to the appeal, complaint or grievance. For example, in an MSPB proceeding, establish that the evidence supports the charges and the penalty was reasonable.
- ✓ Employee: If asserting an affirmative defense, provide evidence to support that defense.

Adverse Employment Actions in the Federal Civil Service: The Facts

Perception	Reality
It is impossible to fire a Federal employee.	From FY 2000-2014, over 77,000 full-time, permanent, Federal employees were discharged as a result of performance and/or conduct issues. ¹
There are no legal barriers to firing an employee in the private sector.	Many of the laws that apply to removing employees in the Federal civil service also apply to private sector employment or have a similar counterpart, such as the Civil Rights Act of 1964 (Title VII – Equal Employment Opportunity), and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), both of which permit private sector employees to pursue litigation. ²
An agency must pay a salary to an employee who has been removed until any appeal has been resolved.	An employee does not continue to receive a salary once removed. If the action is found to have been unwarranted, then reinstatement and back pay may be awarded. But, there is no pay while removed. ³
Agency leaders have no authority to serve as proposing or deciding officials in title 5 adverse actions.	Title 5 empowers the <i>agency</i> to take an adverse action. If agency leadership chooses to delegate the proposal or decision authority to lower levels, then it cannot interfere with the decision-making process of those delegates. But, prior to the assigned decision-maker's involvement in a particular case, current statutes permit delegations to be abandoned or modified by the agency at will. ⁴
If an employee is suspected of a crime, the agency cannot fire the employee for the same underlying conduct until the criminal matter is resolved.	The agency is permitted to remove the employee without waiting for criminal charges to be filed. If the removal is appealed to MSPB and criminal charges are filed, then MSPB may stay its proceedings until the criminal matter is resolved if, under the facts of the particular case, it is necessary in the interest of justice. However, the individual remains removed without pay during that period. ⁵
Supervisors are rarely punished compared to non-supervisors.	In order to be promoted to higher-level grades – including supervisory positions – employees often must show successful performance and conduct over time. Because past conduct and performance are among the best predictors of future conduct and performance, length of service and grade-level tend to have a relationship to the rate at which individuals experience adverse actions. However, an analysis of appealable adverse action data shows that a supervisor is no less likely to experience an adverse action than a non-supervisor of similar age, seniority and grade. ⁶ Case law explicitly states that agencies are permitted to hold supervisors to a higher standard than non-supervisory employees. ⁷
If an agency proposes an action such as a suspension and then learns the situation is more serious than it knew, it cannot propose a more serious action instead.	While an employee cannot be punished twice for the same event, ⁸ an agency may withdraw a notice of proposed suspension and replace it with a notice of proposed removal. ⁹
If, during the adverse action process, the agency accidentally fails to provide the employee with all of his or her constitutional rights, the agency loses the ability to take an adverse action.	An agency can correct the procedural problem and still take the action. For example, if the deciding official learns <i>ex parte</i> information, then the agency can issue a new notice of proposed action that includes the new information. ¹⁰ If an action takes effect before the procedural issue is identified, and the action is reversed by MSPB on constitutional grounds, then the agency is free to take the action again, this time properly following all the rules. ¹¹
The removal of a Senior Executive Service (SES) employee is delayed by the appeals process.	If a career ¹² SES employee is removed for “misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function[.]” then the individual may appeal the action to MSPB, but the appeal can be filed only after the removal has taken effect. ¹³ If the individual is removed for “less than fully successful executive performance[.]” then the individual is entitled to an informal hearing by MSPB. The request for the hearing may be filed before the removal action, but, the law specifically states that the removal need not be delayed pending a hearing. ¹⁴ Thus, whether an action is taken for performance or conduct, the appeals process before the Board does not require any delay in the removal of the individual or in the termination of pay and benefits to that individual.

¹ Analysis of data from U.S. Office of Personnel Management, Central Personnel Data File (CPDF), FY 2000-FY 2014. Discharge data includes the removal of probationers and those in a trial period for reasons involving conduct and/or performance. It does not include discharges from some agencies that use unique coding, such as the more than 10,000 separation actions that occurred within the Transportation Security Administration (TSA) in this period, because the coding system does not permit us to determine the reasons for those separations.

² See 38 U.S.C. §§ 4301-4333 (USERRA); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, § 706(e)-(g) (authorizing discrimination litigation in Federal courts). Congress has also enacted other laws to protect private sector employees. See, e.g., Family Medical Leave Act of 1993 (FMLA), Pub. L. No. 103-3, 107 Stat. 6, § 107 (authorizing civil actions and damages); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 748 (authorizing a cause of action for discrimination against whistleblowers); <http://www.whistleblowers.gov/> (explaining that Congress has enacted 22 laws to protect employees from retaliation for reporting occupational safety hazards).

³ See 5 U.S.C. § 5596 (b)(1)(A). But see 5 U.S.C. § 1214(b)(1) (authorizing the Office of the Special Counsel (OSC) to request that the Board order a stay of a personnel action if there are reasonable grounds to believe the action is the result of a prohibited personnel practice). MSPB records indicate that OSC requests for such stays are very rare. From FY 2004-2014, OSC filed 65 requests for a stay, 86% of which were granted. Appellants also may request a stay under more limited circumstances. See 5 U.S.C. § 1221(c).

⁴ *Goeke v. Department of Justice*, 122 M.S.P.R. 69, ¶ 23 (2015) (explaining that the agency opted to delegate to a non-supervisory career official the authority to propose adverse actions, even though no external law, rule, or regulation required any delegation of the agency's disciplinary power. Such a delegation can be abandoned or modified prospectively by the agency at will; but, once adopted and until modified, it must be enforced); see *Boddie v. Department of the Navy*, 827 F.2d 1578, 1580 (Fed. Cir. 1987) (explaining that a new official can be substituted only if the substitution occurs before the assigned official considers the charges); *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (2011) (prohibiting *ex parte* communications); 5 U.S.C. § 7513 (authorizing an "agency" to impose an adverse action).

⁵ *Wallington v. Department of Treasury*, 42 M.S.P.R. 462, 465 (1989). See, e.g., *Raymond v. Department of Army*, 34 M.S.P.R. 476, 478 (1987) (appellant removed and MSPB appeal dismissed without prejudice to refiling because of investigation by U.S. Attorney); *Green v. U.S. Postal Service*, 16 M.S.P.R. 203, 206 (1983) (staying a removal appeal at MSPB pending completion of the ongoing criminal investigation by the U.S. Attorney's Office). Civil proceedings may be frozen pending the resolution of a criminal prosecution. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1204 (Fed. Cir. 1987). However, the law has specific provisions to make it possible to fire an employee reasonably suspected of a crime for which imprisonment may be imposed *even faster* than an employee whose actions are not likely to result in imprisonment. 5 U.S.C. § 7513(b)(1). Additionally, the Board has held that an employee is not entitled to back pay for any period of an indefinite suspension based on an indictment, regardless of the outcome of the criminal charges, if the indictment was proper when effected. *Jarvis v. Department of Justice*, 45 M.S.P.R. 104, 108 (1990); see *Wiemers v. Merit Systems Protection Board*, 792 F.2d 1113, 1116 (Fed. Cir. 1986) (holding that a reversal of a conviction did not entitle an employee to back pay for a suspension based on alleged criminal activity).

⁶ Analysis of data from CPDF, FY 2005-2013, full-time, permanent employees experiencing a suspension of more than 14 days, change to lower grade, or removal for cause.

⁷ See, e.g., *Gebhardt v. Department of the Air Force*, 99 M.S.P.R. 49, ¶ 21 (2005), *aff'd*, 180 F. App'x 951 (Fed. Cir. 2006) (holding that "[s]upervisors may be held to a higher standard of conduct than non-supervisors because they hold positions of trust and responsibility"); *Myers v. Department of Agriculture*, 88 M.S.P.R. 565, ¶ 34 (2001), *aff'd*, 50 F. App'x 443 (Fed. Cir. 2002) (holding that an "agency has a right to expect a higher standard of conduct from supervisors than from nonsupervisory employees").

⁸ *Wigen v. U.S. Postal Service*, 58 M.S.P.R. 381, 383 (1993) (an agency cannot impose disciplinary or adverse action more than once for the same instance of misconduct).

⁹ *Brough v. Department of Commerce*, 119 M.S.P.R. 118, ¶¶ 10, 13 (2013). The agency must comply with its own internal rules for issuing notices of proposed action. See *Canary v. U.S. Postal Service*, 119 M.S.P.R. 310, ¶¶ 11-12 (2013) (holding that the substitution of a new deciding official violated the agency's procedures under the circumstances of the case).

¹⁰ See *DeJoy v. Department of Health & Human Services*, 2 M.S.P.R. 577, 580 (1980) (holding that an agency may cancel a proposed removal and substitute a new notice of proposed removal).

¹¹ See *Ward*, 634 F.3d at 1279 (explaining that if there is a due process violation, the appellant "is automatically entitled to an 'entirely new' and 'constitutionally correct' removal proceeding"); *Solis v. Department of Justice*, 117 M.S.P.R. 458, ¶ 8 (2012) (explaining that the appellant is entitled to a new proceeding).

¹² The MSPB appeals process only applies to non-probationary career appointees and those who met the definition of employee prior to placement in the SES. See 5 U.S.C. §§ 7541, 7543.

¹³ 5 U.S.C. § 7543. Section 707 of the Veterans Access, Choice, and Accountability Act (VACAA), Pub. L. No. 113-146, 128 Stat. 1754, which established a different process for the removal of SES members in the Department of Veterans Affairs (DVA), provided that, "the Secretary determines the performance or misconduct of the individual warrants such removal." See 38 U.S.C. § 713. However, under both the traditional SES system and the VACCA system, there is no requirement to delay the effective date of the termination and cessation of pay and benefits pending appeal. Rather, under the traditional system, any appeal of an action for "misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function" cannot take place until after the action takes effect, as it is the taking of the action which provides MSPB with its jurisdiction.

¹⁴ 5 U.S.C. § 3592(a). But see 5 U.S.C. §§ 3592(b)(2), 4314(b)(3) (the right to request a hearing under section 3592(a) does not apply to any senior executive removed for receiving unsatisfactory annual appraisals).

Suspensions of 14 Days or Less (5 U.S.C. §7503, 5 C.F.R. §752)

Step One: Analysis

- Identify issues.
- Investigate to ascertain facts and collect evidence.

Step Two: Action

- Agency: Propose the personnel action in writing including what action is proposed and why (charges and penalty). Inform employee of any information that may be considered by the deciding official.
- Agency: Provide the employee with a reasonable opportunity to respond to proposed action (no less than 24 hours).
- Optional for Employee: Respond to notice of proposed action.
- Agency: Consider the evidence and employee response (if any) before reaching a decision on the charges and penalty.
- Agency: Notify the employee in writing of the decision, effective date, and any complaint or grievance rights.

Step Three: Review

- Optional for Employee: File a discrimination complaint (EEOC procedures) or grievance (collective bargaining agreement or administrative grievance procedures).
- Agency: Respond to the complaint or grievance. For example, in an arbitration proceeding, establish that the evidence supports the charges and the penalty was reasonable.
- Employee: If asserting an affirmative defense, provide evidence to support that defense.

Removals, Demotions, Suspensions of Over 14 Days and Furloughs for 30 Days or Less (5 U.S.C. §7513)

Step One: Analysis

- Identify issues.
- Investigate to ascertain facts and collect evidence.

Step Two: Action

- Agency: Propose the personnel action in writing including what action is proposed and why (charges and penalty). Inform employee of any information that may be considered by the deciding official.
- Agency: Provide the employee with a reasonable opportunity to respond to proposed action (no less than 7 days).
- Optional for Employee: Respond to notice of proposed action.
- Agency: Consider the evidence and employee response (if any) before reaching a decision on the charges and penalty.
- Agency: Notify employee in writing of the decision, effective date, and any appeal, grievance, or complaint rights. Action may not take place less than 30 days from proposal date unless there is cause to believe the employee committed a crime for which imprisonment may be imposed.

Step Three: Review

- Optional for Employee: File an appeal (MSPB), discrimination complaint (EEOC procedures), or grievance (collective bargaining agreement procedures).
- Agency: Respond to the appeal, complaint or grievance. For example, in an MSPB proceeding, establish that the evidence supports the charges and the penalty was reasonable.
- Employee: If asserting an affirmative defense, provide evidence to support that defense.

