No. 09-1036

In the Supreme Court of the United States

DAVID L. HENDERSON, PETITIONER

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 38 U.S.C. 7266(a), which establishes a 120-day time limit for filing a notice of appeal in the Court of Appeals for Veterans Claims in order to seek review of a decision of the Board of Veterans' Appeals, is subject to equitable tolling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-73a) is reported at 589 F.3d 1201. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 74a-92a) is reported at 22 Vet. App. 217. The opinion of the Board of Veterans' Appeals (Pet. App. 103a-117a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2009. The petition for a writ of certiorari was filed on February 24, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Veterans who wish to claim benefits must submit an application to the Department of Veterans Affairs (VA). See 38 U.S.C. 5100 *et seq.* The initial decision on a benefits claim is issued by a VA regional office. See *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1701 (2009). A claimant may appeal an adverse decision of the regional office to the Board of Veterans' Appeals (Board), which is a component of the VA. See 38 U.S.C. 301(c)(5), 7101 *et seq.*

A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court. See 38 U.S.C. 7252. A statutory provision entitled "[n]otice of appeal," 38 U.S.C. 7266, provides in pertinent part that, "[i]n order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed." 38 U.S.C. 7266(a). Decisions of the Veterans Court may in turn be appealed, subject to certain limitations on the scope of appellate review (see p. 9, *infra*), to the United States Court of Appeals for the Federal Circuit. See 38 U.S.C. 7292.

2. Petitioner is a veteran who applied for—and is currently receiving—100% disability benefits for paranoid schizophrenia connected to his military service. Pet. App. 3a. In August 2001, he applied for supplemental benefits for in-home care. *Ibid.* The regional office denied his claim, and petitioner sought Board review. *Ibid.* In a decision dated August 30, 2004, the Board denied petitioner's appeal. *Ibid.* Petitioner then sought review in the Veterans Court, but he did not file a notice

of appeal until January 12, 2005—15 days after the expiration of the 120-day period prescribed by Section 7266(a). *Ibid.*

3. The Veterans Court dismissed petitioner's appeal as untimely. Pet. App. 98a-102a. The court agreed with petitioner that the 120-day time limit for filing a notice of appeal is subject to equitable tolling "[i]n limited circumstances." *Id.* at 100a. The court concluded, however, that petitioner had failed to establish an entitlement to tolling because he had "not shown how a mental or physical illness caused his [notice of appeal] to be untimely." *Id.* at 102a.

Petitioner sought reconsideration of that ruling. The Veterans Court requested supplemental briefing on whether this Court's decision in *Bowles* v. *Russell*, 551 U.S. 205 (2007), which held that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement, precluded equitable tolling of the deadline for taking an appeal to the Veterans Court. Pet. App. 93a-95a. The Veterans Court ultimately concluded that the deadline in Section 7266(a) is not subject to tolling, and it again dismissed petitioner's appeal. *Id.* at 74a-92a.

4. Petitioner appealed, and the case was argued before a panel of the court of appeals. After argument, but before the case was decided, the court *sua sponte* granted rehearing en banc. The en banc court affirmed the dismissal order of the Veterans Court. Pet. App. 1a-43a.

a. The court of appeals began by noting this Court's holding in *Bowles* that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." Pet. App. 25a (quoting *Bowles*, 551 U.S. at 214). The court construed Section 7266(a) to be "a notice of appeal, or time of review, provision," and it concluded that the 120-day time limit "is jurisdictional" and therefore "not

subject to equitable tolling." *Ibid.* In reaching that conclusion, the court rejected petitioner's argument that Section 7266(a) is more analogous to a statute of limitations than to a time-of-review provision. The court observed that Section 7266 is entitled "Notice of appeal" and that Section 7266(a) refers to the "timely filing of a notice of appeal" "in order to obtain *review*" by the Veterans Court. *Id.* at 26a-27a. The court further noted that the review performed by the Veterans Court is on the agency record and is performed under standards "characteristic[] of appellate review, rather than of an assessment of claims in the first instance." *Id.* at 27a.

The court of appeals next examined the text and legislative history of Section 7266(a), discerning no "clear intent on the part of Congress to override the presumed jurisdictional treatment of time of review provisions." Pet. App. 29a. Nor, in the court's view, could *Bowles* persuasively be distinguished on the ground that it involved an appeal to an Article III court rather than to the Article I Veterans Court. *Id.* at 36a-37a. To the contrary, the court noted that jurisdictional limitations apply with "*added* force to Article I tribunals, . . . which owe their existence to Congress' authority to enact legislation pursuant to [Article I, Section 8] of the Constitution." *Id.* at 37a (quoting *United States* v. *Denedo*, 129 S. Ct. 2213, 2221 (2009)). Finally, the court of appeals rejected the contention of petitioner and his amici that the general pro-claimant orientation of the veterans benefit system alters the jurisdictional character of Section 7266(a). *Id.* at 40a-41a. The court explained that "although 'Congress has expressed special solicitude for the veterans' cause,' we do not have free rein to establish special procedural schemes governing

the veterans' system alone." *Id.* at 41a (quoting *Sanders*, 129 S. Ct. at 1707).

b. Judge Dyk concurred, joined by Judges Gajarsa and Moore. Pet. App. 44a-45a. While joining the opinion of the court, the concurring judges expressed the view that "the rigid deadline of the existing statute can and does lead to unfairness," *id.* at 44a, and they suggested "that Congress should amend the statute to provide a good cause exception," *id.* at 45a.

c. Judge Mayer dissented, joined by Judges Michel and Newman. Pet. App. 46a-73a. The dissenting judges characterized Section 7266(a) "as a statute of limitations rather than a rigid jurisdictional bar," *id.* at 53a, and they viewed this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), as establishing a presumption of equitable tolling that was undisturbed by *Bowles*. Pet. App. 47a-48a. The dissenting judges also concluded that the court of appeals had failed to give adequate weight to what they described as the "uniquely pro-claimant adjudicatory scheme" that governs veterans benefits determinations. *Id.* at 66a.

ARGUMENT

This Court's decision in *Bowles* v. *Russell*, 551 U.S. 205 (2007), reaffirmed the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 210. Strict enforcement of such time limits will undoubtedly produce painful results in particular cases. It is ultimately up to Congress, however, to strike what it views as the appropriate balance between the protection of deserving litigants' access to appellate review, on the one hand, and countervailing systemic interests in finality and efficient administration on the other. In striking that balance in the specific context of

veterans-benefit appeals, Congress may, for weighty reasons, take account of the fact that such appeals involve individuals to whom our Nation owes a great debt.

In this case, the court of appeals correctly held that 38 U.S.C. 7266(a), which prescribes the time limit for filing a notice of appeal in the Veterans Court to obtain review of a VA benefits determination, is jurisdictional and not subject to equitable tolling. That decision does not conflict with any decision of this Court or any other court of appeals. To the contrary, it accords with the general principles governing statutory time limits that this Court discussed in *Bowles*. Moreover, Congress has before it two legislative proposals—one of which the Executive Branch supports—that would permit the Veterans Court to extend the time for appeal upon a showing of good cause. If enacted, such legislation would greatly limit the prospective significance of the decision below. Further review is not warranted.

1. The court of appeals correctly held that the time limit prescribed in Section 7266(a) is a limitation on the jurisdiction of the Veterans Court. In *Bowles*, this Court reaffirmed the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210. Section 7266(a) is just such a time limit: it provides that, "[i]n order to obtain review" in the Veterans Court of a decision of the Board, a person aggrieved by the decision "shall file a notice of appeal with the Court within 120 days." Under *Bowles*, petitioner's failure to comply with that deadline precluded the Veterans Court from exercising jurisdiction over his appeal.

Petitioner contends (Pet. 19-22) that Section 7266(a) is a statute of limitations rather than a rule governing the time limits for taking an appeal, and that *Bowles* is therefore inapposite. Petitioner argues (Pet. 22-26) that

the deadline imposed by Section 7266(a) is instead subject to the principles of equitable tolling recognized in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), and *Bowen* v. *City of New York*, 476 U.S. 467 (1986). That argument is contrary to both the plain language of Section 7266(a) and the overall structure of the system for judicial review of veterans benefits claims.

a. Petitioner's theory rests on the premise that "Section 7266(a) establishes the time limit for a veteran to commence a civil action against the Secretary." Pet. 19 (emphasis omitted). The text of Section 7266(a) makes clear, however, that the provision establishes a notice-of-appeal deadline, not a statute of limitations for the "commence[ment]" of an action. The statutory deadline expressly pertains to the filing of a "notice of appeal." See 38 U.S.C. 7266(a) (stating that, "[i]n order to obtain review" in the Veterans Court of a Board decision, a veteran "adversely affected" by the decision "shall file a notice of appeal with the Court within 120 days"). And the title of Section 7266 is "Notice of appeal." See *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

The language of Section 7266(a) is significantly different from the wording of the provisions at issue in *Irwin* and *Bowen*. The Court in *Irwin* construed 42 U.S.C. 2000e-16(c) (1988), which permitted a federal employee to "file a civil action" based on a discrimination complaint "[w]ithin thirty days of receipt of notice of final action" by the Equal Employment Opportunity Commission. See 498 U.S. at 94-95. And the Court in *Bowen* construed 42 U.S.C. 405(g), which provides that an individual aggrieved by an administrative decision

concerning Social Security benefits "may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision." See 476 U.S. at 478; *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). In both cases, the Court held that the relevant provisions were statutes of limitations that were subject to equitable tolling. Unlike those statutes, however, Section 7266(a) does not refer to the "fil[ing]" or "commence[ment]" of a new civil action, but to the filing of a notice of appeal in an existing case. Because Section 7266(a) is a statutory deadline for taking appeals, *Bowles* indicates that it is jurisdictional in nature.

Petitioner notes (Pet. 20) that Section 7266(a) does not expressly refer to the "jurisdiction or power of the Veterans Court," and he points out (Pet. 20-21) that Section 7266(a) is separate from the provision creating the Veterans Court and defining its jurisdiction. But the provision at issue in *Bowles* (28 U.S.C. 2107) likewise does not use the word "jurisdiction," and it does not appear in the same chapter of Title 28 as 28 U.S.C. 1291, the section granting courts of appeals authority to review final judgments of district courts. Nevertheless, "[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003); see *Bowles*, 551 U.S. at 210.

b. The structure of the veterans judicial review system reinforces the conclusion that the role of the Veterans Court is not analogous to that of the district court under the statutory schemes at issue in *Irwin* or *Bowen*. The Veterans Court operates as an appeals court. Its sole statutory responsibility is to review the final decisions of a body—the Board of Veterans' Appeals—that

itself performs an adjudicative function. See 38 U.S.C. 7252. The Veterans Court cannot review findings of fact de novo but instead applies the typical appellate standard of clear error. 38 U.S.C. 7261(a)(4) and (c). It also must take account of the rule of prejudicial error, 38 U.S.C. 7261(b); see *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1700, 1704-1706 (2009), and it must perform its review exclusively on the record before the VA, 38 U.S.C. 7252(b).

Indeed, for certain aspects of a veteran's claim, the *only* available judicial appellate review is performed by the Veterans Court, since the Federal Circuit's jurisdiction is generally limited to reviewing questions of law. Except in constitutional cases, the Federal Circuit cannot review factual findings, even for clear error, and cannot review the application of law to fact. 38 U.S.C. 7292(d); *Forshey* v. *Principi*, 284 F.3d 1335, 1345-1347, 1351 (Fed. Cir.) (en banc), cert. denied, 537 U.S. 823 (2002). Those aspects of typical appellate review are performed only by the Veterans Court.

Thus, Section 7266(a) establishes a deadline for seeking *appellate* review of a final agency decision regarding veterans benefits. The Veterans Court is an appellate body exercising an appellate function, and a proceeding in that court is a civil appeal rather than a *de novo* civil action. Cf. *Joshi* v. *Ashcroft*, 389 F.3d 732, 734 (7th Cir. 2004) (observing, before *Bowles*, that "[t]he emergent distinction, so far as classification of deadlines as jurisdictional or not jurisdictional is concerned, is between those deadlines that govern the transition from one court (or other tribunal) to another, which are jurisdictional, and other deadlines, which are not.").

Petitioner points out (Pet. 28) that the appeal to the Veterans Court is the first time a case appears in a

court. That fact, however, does not control the jurisdictional analysis. In *Stone* v. *INS*, 514 U.S. 386 (1995), this Court held that the deadline for filing a petition for review of a decision of the Board of Immigration Appeals is jurisdictional, even though a petition for review provides the first opportunity to have a removal order considered by a court. See *id.* at 406. And in other cases governed by the Administrative Orders Review Act of 1950 (Hobbs Act), ch. 1189, 64 Stat. 1129, the courts of appeals have uniformly held that the 60-day time limit on petitions for review of agency orders is jurisdictional and may not be waived even by consent of the parties. See 28 U.S.C. 2344; *Cellular Telecomms. & Internet Ass'n* v. *FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003); *Florilli Corp.* v. *Pena*, 118 F.3d 1212, 1214 (8th Cir. 1997). In sum, neither the language of Section 7266(a) nor the nature of the review conducted by the Veterans Court provides any sound basis for distinguishing this case from *Bowles*.

c. Contrary to the suggestion of petitioner's amici, the Court's recent decision in *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010), does not cast doubt on the court of appeals' disposition of this case. See Paralyzed Veterans of America Br. 4-6; National Org. of Veterans' Advocates, et al. Br. 10-12. In *Reed Elsevier*, the Court held that the statutory requirement to register a copyright before suing for infringement is a claim-processing rule, not a jurisdictional prerequisite. 130 S. Ct. at 1241; see 17 U.S.C. 411(a). In reaching that conclusion, the Court emphasized that the determination whether a particular provision is jurisdictional turns not on the presence or absence of "a 'jurisdictional' label," but instead on "whether the type of limitation that [a statute] imposes is one that is properly ranked as juris-

dictional absent an express designation." 130 S. Ct. at 1248. And the Court reiterated that the "type[s] of limitation" at issue in *Bowles*—"statutory deadlines for filing appeals"—are properly regarded as jurisdictional. *Ibid.* Unlike the statute at issue in *Reed Elsevier*, Section 7266(a) falls squarely within that category.*

2. Petitioner identifies (Pet. 27-31) various ways in which the VA adjudication system differs from other administrative adjudication systems. Those observations, however, provide no basis for deviating from the general rule that statutory deadlines for the taking of appeals are jurisdictional. Last Term, this Court rejected the specialized framework devised by the Federal Circuit for resolving harmless-error questions in appeals to the Veterans Court. *Sanders*, 129 S. Ct. at 1700, 1704-1706. This Court held that the statutory command to "take due account of the rule of prejudicial error," 38 U.S.C. 7261(b)(2), directed the Veterans Court "to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." 129 S. Ct. at 1704. The

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* Amici National Organization of Veterans' Advocates, et al., also argue (Br. 13) that the decision below is at odds with the decisions of other circuits that have applied equitable tolling after this Court's decision in *Bowles*. Two of the three cases those amici cite, however, did not involve appeal periods at all. See *United States* v. *Dolan*, 571 F.3d 1022, 1025-1031 (10th Cir. 2009) (deadline for district court to impose restitution in a criminal case), cert. granted, No. 09-367 (argued Apr. 20, 2010); *Diaz* v. *Kelly*, 515 F.3d 149, 153-154 (2d Cir.) (statute of limitations for filing habeas petition), cert. denied, 129 U.S. 168 (2008). The third case did not involve an appeal filed after a statutory deadline had passed, and the decision held only that the appeal period did not start to run until after the district court denied a motion for reconsideration. See *United States* v. *Henderson*, 536 F.3d 776, 778-779 (7th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009). Those decisions are therefore inapposite here.

Court therefore "assess[ed] the lawfulness of the Federal Circuit's approach in light of [the Court's] general case law governing application of the harmless-error standard." *Ibid.* In other cases as well, this Court has disapproved the Federal Circuit's creation of special rules applicable to cases within its specialized subject-matter jurisdiction, and it has directed that court of appeals to apply rules of general applicability consistent with the precedents of this Court and the regional circuits. See *eBay, Inc.*, v. *MercExchange, L.L.C.*, 547 U.S. 388, 391-394 (2006); *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832-834 (2002).

In this case, the court of appeals appropriately took account of *Sanders* in reconsidering its pre-*Bowles* decisions permitting equitable tolling of statutory appeal periods. See Pet. App. 41a ("[W]e have recently been reminded by the Supreme Court that, although 'Congress has expressed special solicitude for the veterans' cause,' we do not have free rein to establish special procedural schemes governing the veterans' system alone.") (quoting *Sanders*, 129 S. Ct. at 1707). While recognizing that "the veterans' system is unique," the court was properly "wary of hinging different procedural frameworks solely on the special nature of that system." *Id.* at 42a. The court explained that "[j]urisdiction is in the province of Congress, and without any clear intent by Congress to provide for equitable relief from the Notice of Appeal filing deadline in 38 U.S.C. 7266(a), we cannot read in such relief based on the nature of the veterans system." *Ibid.* The court correctly recognized that it is up to "Congress to determine the subject-matter jurisdiction of federal courts," and that this "rule applies with *added* force to Article I tribunals" such as the Veterans Court, "which owe their existence to Congress'

authority to enact legislation pursuant to [Article I, Section 8] of the Constitution." *Id.* at 37a (quoting *United States* v. *Denedo*, 129 S. Ct. 2213, 2221 (2009)).

3. Petitioner suggests (Pet. 16-17) that review is warranted in this case because the Government petitioned for a writ of certiorari in *Kirkendall* v. *Department of the Army*, 479 F.3d 830 (Fed. Cir.) (en banc), cert. denied, 552 U.S. 948 (2007). But this Court *denied* the petition in *Kirkendall*, so that case hardly establishes that the Court should grant the petition here. In any event, the administrative proceedings before the Merit Systems Protection Board in *Kirkendall* were significantly different from the judicial proceeding to which Section 7266(a) applies. See *id.* at 834-835. This case, like *Bowles*, involves an untimely appeal filed to an appellate court. *Kirkendall* did not involve a court or a judicial proceeding at all; it concerned the appeal of a decision of the Secretary of Labor to another administrative body. The question whether equitable tolling is available in that context is distinct from the issue presented here.

4. As petitioner correctly explains (Pet. 13-16), the decision below creates some potential for unfair results in cases where circumstances beyond a veteran's control prevent him from filing a timely notice of appeal. In his concurring opinion, Judge Dyk called upon Congress to "amend the statute to provide a good cause exception." Pet. App. 45a. With the support of the Executive Branch, Congress is currently considering whether to enact such an amendment.

One bill already introduced in response to the decision below would allow veterans to reinstate appeals that were dismissed by the Veterans Court on or after July 24, 2008—the date on which petitioner's appeal was

dismissed—"upon a showing that the petitioner had good cause for filing the petition on the date it was filed." S. 3192, 111th Cong., 2d Sess. § 2(b) (2010). If enacted, that bill would overturn the decision below as it applies to petitioner's appeal and all subsequent appeals, and it would therefore moot this case.

The VA has expressed opposition to S. 3192 because it contains no limit on the length of time for which the appeal period can be extended. See *Hearing Before the S. Comm. on Veterans' Affairs*, 111th Cong. (May 19, 2010), http://veterans.senate.gov/hearings.cfm?action=release.display&release_id=ff37432e-ecdc-4d96-b6db-95481b4d00be (Statement of Thomas J. Pamperin, Associate Deputy Under Sec'y for Policy and Program Mgmt., Veterans Benefits Admin.). The VA has instead proposed that Congress amend Section 7266(a) to permit the Veterans Court, upon a showing of good cause, to extend the notice-of-appeal period for up to 120 days after the expiration of the original period. See Letter to Nancy Pelosi, Speaker of the House of Representatives, from Eric K. Shinseki, Secretary of Veterans Affairs (May 26, 2010) (transmitting the VA's proposed "Veterans Benefit Programs Improvement Act of 2010," including Section 209, "Good cause extension of the period for filing a notice of appeal with the Court of Appeals for Veterans Claims") (App., *infra*, 1a-6a). The VA's proposal would apply only to cases that are still pending before the Board or in which the 120-day period for seeking an extension has not yet expired, and it therefore would not alter the result in this case.

Congress thus has before it two proposals for statutory amendments that would soften the effect of Section 7266(a)'s 120-day filing deadline. The potential for a legislative resolution of the question presented is a fur-

ther reason that the Court's intervention is unnecessary at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

APPENDIX

THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON

May 26, 2010

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515

Dear Madam Speaker:

I am transmitting a draft bill, the "Veterans Benefit Programs Improvement Act of 2010." I request that this draft bill be referred to the appropriate committee for prompt consideration and enactment. The draft bill would make beneficial changes to enhance the efficiency and fairness of several Department of Veterans Affairs (VA) programs of benefits to Veterans and their families and to improve the procedures for the timely adjudication of claims and appeals for such benefits.

Title I of the draft bill would improve VA's compensation and pension programs by, among other things, eliminating a disparity arising under a judicial decision concerning payment of special monthly pension to disabled Veterans and by clarifying and simplifying the law governing month-of-death payments to surviving spouses. Title I of the draft bill would also improve VA's process for establishing presumptions of service connection for diseases associated with exposure to herbicides or hazards of Gulf War service in two ways. First, it would ensure that VA has sufficient time to give thorough consideration to the complex issues involved in such determinations. Second, it would provide that the effective

dates of awards based on a new presumption may be made commensurate with the date of the Secretary's determination that the presumption is needed rather than the date of final regulatory action. Title I would also extend existing authorities pertaining to contract compensation and pension examinations and pension payments to beneficiaries receiving Medicaid-covered nursing home care.

Title II of the draft bill would implement changes to improve the timeliness and efficiency of VA's adjudication of claims and appeals. In response to recent judicial decisions, the draft bill would reaffirm VA's authority to temporarily stay adjudications when necessary to avoid waste or delay, such as where a pending judicial precedent may significantly alter governing law in a way that would otherwise necessitate widespread remands of claims previously decided. The provisions in title II of the bill would also promote greater efficiency in appeals processing by providing for increased use of videoconferencing technology to conduct hearings before the Board of Veterans' Appeals (Board), by allowing the Board to consider in the first instance additional evidence submitted on appeal, and by modifying procedures relating to the timely filing of notices of disagreement and substantive appeals. Other provisions in titles II and VI of the draft bill would promote efficient administration of benefits by extending existing authorities for conducting data matching with other Federal entities and for maintaining a regional office in the Republic of the Philippines.

Improvements to VA's loan guaranty program under title III of the draft bill include a provision to ensure that a single-parent Veteran who returns to active duty may obtain a VA-guaranteed home loan if the Veteran's child occupies the home. The draft bill would also authorize the Secretary to allow superior liens created by public entities providing assistance in response to a major disaster, such as Hurricane Katrina, to ensure that Veterans may obtain such disaster relief, which may reduce the likelihood of foreclosures and claims against VA's loan guaranty.

Title IV of the draft bill would revise provisions relating to vocational rehabilitation and education benefits to increase the utility of incentives for employers to provide on-the-job training to veterans with service-connected disabilities, to promote greater efficiency in the approval of educational programs, and to permit extension of the delimiting date for education benefits for a beneficiary serving as the primary caregiver of a seriously injured Veteran.

The provisions of title V of the draft bill would provide Veterans Group Life Insurance participants who are insured for less than the maximum amount the opportunity to purchase additional coverage and would make permanent the current authority to extend Servicemembers' Group Life Insurance coverage for 2 years to Veterans who are totally disabled when they leave service.

Enclosed is a detailed section-by-section analysis of the provisions of this draft bill.

The Office of Management and Budget's preliminary estimate indicates that the bill would on net reduce direct spending by $1.23 billion over Fiscal Years (FY)

2010-2015 and $1.65 billion over FYs 2010-2020. The Statutory Pay-As-You-Go (PAYGO) Act of 2010 provides that revenue and direct spending legislation cannot, in the aggregate, increase the on-budget deficit. If such legislation increases the on-budget deficit and that increase is not offset by the end of the Congressional session, a sequestration must be ordered. This proposal would reduce direct spending and is therefore in compliance with the Statutory PAYGO Act.

The Office of Management and Budget advises that the transmittal of this draft bill is "in accord" with the President's program.

Sincerely,

/s/ ERIC K. SHINSEKI
ERIC K. SHINSEKI

Enclosure

111th Congress
2nd Session

A BILL

To amend title 38, United States Code, to improve and enhance the programs of compensation, pension, loan guaranty, education and vocational rehabilitation, and insurance for veterans, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Veterans Benefit Programs Improvement Act of 2010."

* * * * *

SEC. 209. GOOD CAUSE EXTENSION OF THE PERIOD FOR FILING A NOTICE OF APPEAL WITH THE COURT OF APPEALS FOR VETERANS CLAIMS.

(a) IN GENERAL.—Section 7266 of title 38, United States Code, is amended—

(1) in subsection (d), by striking "subsection (c)(2)" and inserting "subsection (d)(2)";

(2) by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively; and

(3) by inserting after subsection (a) the following new subsection (b):

"(b) The Court may, upon motion filed with the Court not later than 120 days after expiration of the original 120-day appeal period prescribed under subsection (a), extend the time to file a notice of appeal for a period not to exceed 120 days from the expiration of the original 120-day appeal period upon a showing of good cause. If a motion for extension is filed after expiration of the original 120-day appeal period, the notice of appeal must be filed concurrent with or prior to the filing of the motion. The Court's decision on the motion for extension or any issue concerning the motion shall be final and not subject to review by any other Court."

(b) EFFECTIVE AND APPLICABILITY DATES.—

(1) The amendments made by subsection (a) shall take effect on the date of the enactment of this Act.

(2) The amendments made by subsection (a) shall apply with respect to cases in which a final decision by the Board of Veterans' Appeals is issued on or after the date of the enactment of this Act and to any other cases in which the 120-day period for filing a motion for extension following the original 120-day appeal period has not expired on the date of the enactment of this Act.