UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 95-519

JOHN E. DONOVAN, APPELLANT,

V.

TOGO D. WEST, JR.
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appellant's and Appellee's Motions for Reconsideration

(Decided June 15, 1999)

John E. Donovan, pro se.

Leigh A. Bradley, General Counsel, and *Mary Ann Flynn*, Acting Deputy Assistant General, were on the pleading for the appellee.

Before KRAMER, HOLDAWAY, and STEINBERG, *Judges*.

STEINBERG, *Judge*, filed the opinion of the Court. HOLDAWAY, *Judge*, filed an opinion concurring in part and dissenting in part.

STEINBERG, *Judge*: On October 28, 1998, the pro se appellant timely filed a motion for reconsideration of the Court's October 8, 1998, opinion in this case, *see Donovan v. West*, 11 Vet.App. 481 (1998) (*Donovan I*). That motion, seeking greater relief, will be denied. On November 19, 1999, the Secretary also timely filed a motion for reconsideration (or, if reconsideration were denied, for "full Court review"), raising arguments against the Court's determination that the Board of Veterans' Appeals (Board or BVA) has jurisdiction to review a Department of Veterans Affairs (VA) regional office (RO) decision not to accept a deed in lieu of foreclosure (DILF). Those arguments -- although not raised upon initial briefing and therefore improperly presented piecemeal to the Court -- merit consideration because they suggest a need for clarification of certain portions of the Court's opinion in *Donovan I*. Accordingly, the Secretary's motion will be granted.

Upon consideration of the arguments raised by the Secretary, the Court holds that its original decision remains valid and controlling and will not be withdrawn. Hence, part I of this opinion incorporates the analysis from the original opinion, and part III of this opinion addresses additional arguments raised by the Secretary upon reconsideration.

I. Our Original Opinion

The relevant facts and law are addressed in the Court's prior opinion and will be summarized here only briefly. The appellant appealed to this Court a May 1995 BVA decision that the Board did not have jurisdiction to review a decision by a VARO not to accept a DILF from him. He also challenged the validity of the establishment of the debt by VA. In our original opinion, we held that the debt was validly established and that the Board does have jurisdiction over the RO decision declining to accept a DILF and remanded the matter for Board readjudication, including an adequate statement of reasons or bases pursuant to 38 U.S.C. § 7104(d)(1). Specifically, we asked the Board on remand to address the following two questions:

> First, did the RO err in not granting a DILF in this instance [describing with particularity the applicability, compliance with, and regulatory nature of any VA Manual provisions dealing with DILFs]? . . . Second, assuming that it were to be determined that the RO erred in denying a DILF, does the Secretary have the authority to release the indebtedness now, to declare that the indebtedness was wrongfully established, or to waive the debt . . . ?

Donovan I, 11 Vet.App. at 490. The Secretary now seeks reconsideration by the panel, and we will grant that motion, and, in so doing, reaffirm, and offer clarification as to, our holding in *Donovan I*.

II. Appellant's Motion

The appellant's motion for reconsideration asks the Court to reverse its decision that the debt was validly established. However, he has presented no new legal arguments and no new factual basis to persuade us to this course. For the reasons stated in part II.B.1. of *Donovan I*, 11 Vet.App. at 486-87, and in light of the clarifications provided below, the Court is satisfied that no further relief may be afforded by the Court at this time. Hence, the Court will deny the appellant's motion for reconsideration.

III. Secretary's Motion

A. Piecemeal Litigation

At the outset, the Court notes with disfavor -- notwithstanding the Secretary's request for "the Court's indulgence" (Motion (Mot.) at 2) -- that the Secretary did not present his added arguments to the Court in the first instance. This Court's pronouncements against such piecemeal litigation are well established. "This Court and, indeed, all courts do not countenance piecemeal or sequential litigation and under ordinary circumstances the Secretary's motion for reconsideration would have been denied". *Ashley v. Derwinski*, 2 Vet.App. 307, 310 (1992) (reconsidering upon correction by Secretary of factual error); *see also* U.S. VET. APP. R. 28(g) ("When pertinent and significant authorities come to the attention of a party after the party's brief has been filed or after oral argument but before the decision, a party shall promptly advise the Clerk, by letter, with a copy to all other parties, setting forth the citations."). However, *Donovan I* concerned particularly complex law, regulation, and factual circumstances and has apparently generated significant confusion on the part of the Secretary, evidenced in his motion for reconsideration, as to the extent of the Court's holding. Hence, "this panel determined that it would be more appropriate, at least in this case, to give due consideration to the positions belatedly raised by the Secretary." *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990) (granting reconsideration when new authority cited to Court). Nonetheless, such reconsideration remains the exception to the rule. "The Court continues to take a dim view of the practice of '[a]dvancing different arguments at successive stages of the appellate process'". *Tobler v. Derwinski*, 2 Vet.App. 8, 10 (1991) (reconsidering upon assertion of "significant error of law"); *see also Tubianosa v. Derwinski*, 3 Vet.App. 181, 184 (1992) (criticizing Secretary for engaging in piecemeal litigation); *Linville v. West*, 11 Vet.App. 172, 173 (1998) (per curiam order) (Steinberg, J., concurring in denial of motion for en banc reconsideration because appellant had presented arguments "in piecemeal fashion"); *cf. Boyer v. West*, 12 Vet.App. 142, 142 (1999) (*Boyer II*) (granting reconsideration when new arguments were presented by counsel for previously unrepresented appellant). In short, because of our concern that the Secretary has not clearly understood *Donovan I*, we issue this second opinion for the purpose of clarification.

B. Clarification of the Scope of **Donovan I.**

The Secretary argues the following:

> [D]ecisions regarding loan servicing, and whether or not to accept a DILF, are time-sensitive financial decisions. . . . As a practical matter, interjecting appellate rights

> into the foreclosure process is infeasible and could prove fatal to VA's home loan guaranty program. . . . Allowing the normal servicing of a loan in default to be delayed for several years while a veteran appeals one or more business decisions would be an untenable commercial burden on the lenders and could drive lenders out of the VA program.

Mot. at 7. The Court, for the following reasons, fails to see how our opinion in *Donovan I* would create any delay in the foreclosure process.

First, the Court was simply not presented in *Donovan I* with a situation where a foreclosure had been forestalled -- the foreclosure occurred in 1986 and VA subsequently sold the property in 1987. *Donovan I*, 11 Vet.App. at 484. We did not in *Donovan I* -- and do not now -- decide that a VA loan-guaranty recipient may undertake appellate review (to the Board or this Court) in order to forestall a valid foreclosure proceeding, or that by undertaking such review a recipient could ever forestall such proceeding, even inadvertently. That question was not briefed to this Court, and, based on the following discussion, the Court has trouble envisioning how such delay would occur. Nothing in *Donovan I* or this reconsideration opinion decides or implies that an appeal to the Board of an RO's refusal to accept a DILF could halt loan servicing or a foreclosure, or that this Court would have the power to do so in aid of its jurisdiction under the All Writs Act. *See* 28 U.S.C. § 1651(a) ("all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); *In the Matter of the Fee Agreement of Cox*, 10 Vet.App. 361, 370 (1997) (holding that this Court has authority, in appropriate circumstances, to issue writs under All Writs Act), *vacated in part on other grounds sub nom. Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998) (affirming all holdings; vacated only for consideration of asserted facts occurring after this Court's opinion).

What *Donovan I* did decide and what we reaffirm today is that applicable law and regulation provide for, indeed require, the availability of recourse to the Board -- for whatever postforeclosure financial or other relief might then be available -- when an RO declines to accept a DILF from a VA home-loan-guaranty recipient. *See Donovan I*, 11 Vet.App. at 487-91.

Second, the only instance in which delay in the foreclosure process that is particular to the VA home-loan-guaranty program appears to be envisioned in the statute is set forth in the provision requiring that the Secretary be given 30 days' notice by a lender prior to the institution of foreclosure proceedings. Specifically, 38 U.S.C. § 3732(a)(2) provides:

> Before suit or foreclosure the holder of the obligation shall notify the Secretary of the default, and within thirty days thereafter the Secretary may, at the Secretary's option, pay the holder of the obligation the unpaid balance of the obligation . . . . Nothing in this section shall preclude any forbearance for the benefit of the veteran as may be agreed upon by the parties to the loan and approved by the Secretary.

Section 3732(a)(2) thus grants the Secretary a 30-day period before foreclosure may commence during which the Secretary must, presumably, decide whether to accept a DILF. A decision by VA to refuse to accept a DILF could not stop or delay the foreclosure process, and only VA's refusal to accept a DILF, not the lender's decision to pursue foreclosure, is appealable to the BVA. Again, foreclosure had already occurred in *Donovan I* in 1986, almost ten years before the matter came to the BVA in 1995. *Donovan I*, 11 Vet.App. at 484. Thus, no delay to the foreclosure process follows from that or this opinion.

We reemphasize that *Donovan I* required the BVA to address on remand the two specific questions quoted in part I., above. *Id.* at 490. Hence, the Court has determined only that the Board has mandatory jurisdiction over the question whether a DILF has been properly refused by an RO, the amount of indebtedness of a home-loan-guaranty recipient to VA, and the nature of any postforeclosure relief as to the amount of the recipient's indebtedness to VA that VA may provide, particularly in the form of a waiver or release of indebtedness. The rights of lenders and the process of the actual foreclosure are not implicated.

Third, the Court notes that, although some language in *Donovan I* suggests that this Court may have jurisdiction over a Board decision that approved an RO's refusal to accept a DILF ("Because the Court holds that a veteran may appeal to the Board ***and thence to this Court*** a VA decision not to accept a DILF . . ." *Ibid*. (emphasis added)), that language was necessarily dictum because that situation in fact was not before the Court. *See also id.* at 491 (suggesting that Board decision upholding refusal to accept DILF would be reviewed by this Court under "arbitrary and capricious" standard of review). Hence, today we clarify that *Donovan I* was not intended to and did not decide that question. Rather, under *In re Fee Agreement of Cox*, 38 U.S.C. §§ 511(a) and 7104(a), and VA regulations (38 C.F.R. §§ 36.4283(e), 36.4320(e), 36.4323(a), (e)(1)(v), (e)(4), 36.4356(b)(8), and 36.4513 (1998)), we held only that the ***Board*** has mandatory jurisdiction over the decision not to accept a DILF and were not called upon to decide our jurisdiction over a possible subsequent appeal to this Court to review the Board's exercise of that jurisdiction in this or some

other case. That is an issue for another day. *Compare Marsh v. West, infra; Tulingan v. Brown*, 9 Vet.App. 484, 487 (1996) ("in view of the plenary grant of the right of judicial review of Board decisions adverse to veterans and other claimants to veterans benefits", Court has jurisdiction to review BVA decision that "orders or sustains a forfeiture"), *en banc review denied,* 10 Vet.App. 43 (1997) (per curiam order); *and Scott (Charles) v. Brown*, 7 Vet.App. 184, 189 (1994) (holding that exercise of discretionary authority to grant extension of time to file Notice of Disagreement "for good cause shown", 38 C.F.R. § 3.109(b) (1998), is decision committed "to the sole discretion of the Secretary", and, although there were no standards or guidelines prescribed for its exercise, "[t]he exercise of such a discretionary authority as to which regulations have been prescribed is subject to review by this Court to determine whether the exercise of discretion was made . . . 'in an arbitrary or capricious manner'"), *with Malone v. Gober*, 10 Vet.App. 539, 544-45 (1997) (indicating that this Court has no authority to review merits of BVA "decision [as to matter] . . . left to the discretion of the Secretary"); *Willis v. Brown*, 6 Vet.App. 433, 435-36 (1994) ("Court has no authority to review decisions made by the Secretary [under 38 U.S.C. § 503(a) equitable relief provision] which rest entirely within his discretion"); *and Tulingan*, 9 Vet.App. at 489-90 (Farley, J., concurring) (concluding that veteran is entitled to appeal to BVA an RO decision as to forfeiture, but not then to appeal to this Court, and concurring in decision that BVA has jurisdiction over RO decision as to forfeiture).

Fourth, the Court reiterates its recent holding in *Marsh v. West*, 11 Vet.App. 468 (1998), that "we have jurisdiction to review the Board's decision on its jurisdiction". That is all that *Donovan I* did.

C. Secretary's Remaining Arguments

Having so clarified the extent of *Donovan I*, we now turn to the Secretary's motion and address each of his remaining contentions in turn.

The Secretary essentially argues that this Court cannot require BVA review of an RO determination not to accept a DILF, and cites as support several decisions from other Federal courts. *See* Mot. at 5-6. However, we find these cases to be inapplicable here for several reasons.

First, the Court notes that the decisions cited by the Secretary share as their jurisdictional predicate the Administrative Procedure Act (APA), which authorizes judicial review "***except to the extent that*** . . . agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2)

(emphasis added). *See also Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (noting, under APA, that "even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion"). This Court's jurisdiction in *Donovan I*, however, did not rest upon the APA; rather, as we explained in *Donovan I,* "[t]his Court's appellate jurisdiction derives exclusively from statutory grants of authority provided by Congress . . . . [in the] Veterans' Judicial Review Act, Pub. L. No. 100-687 § 402, 102 Stat. 4105, 4122 (1988)", expressly 38 U.S.C. §§ 7252(a) and 7266. *Donovan I*, 11 Vet.App. at 482, 485 (citations omitted). Hence, the "committed to agency discretion" limitation set forth in the APA as to the jurisdiction of other Federal courts is inapposite to this case.

Further, none of those cases cited by the Secretary discuss the jurisdiction of the Board, specifically under 38 U.S.C. §§ 511(a) and 7104(a) and VA's own regulation, 38 C.F.R. § 36.4320(e)(i) and (ii), whereas *Donovan I*, again, decided ***only*** that question and, in so doing, held that because the Board had jurisdiction over an RO's decision not to accept a DILF, the veteran was legally entitled to "a written statement of the Board's finding[s] and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record" pursuant to 38 U.S.C. § 7104(d)(1). In this regard, the Court notes again the strong implication arising from VA's own regulation in 38 C.F.R. § 36.4323(e)(4) that the BVA has jurisdiction to review an RO refusal to accept a DILF in order to secure a full release of indebtedness. *See Boyer v. West*, 11 Vet.App. 477, 480 (1998) (*Boyer I*) (sustaining as reasonable Secretary's statutory interpretation of 38 U.S.C. § 1160(a) that, "by providing an exception explicitly based upon total deafness in both ears, Congress clearly considered and rejected the idea of providing a broader exception to the general policy of not providing compensation for conditions not related to service"), *aff'd on recons., Boyer II, supra.*

Moreover, to the extent that the Secretary seems to argue that the provisions of the VA Adjudication Procedure Manual M26-4 (Manual M26-4) are nonsubstantive and that, therefore, his exercise of discretion is unreviewable, and to the extent that he asserts that decisions of this Court and of other Federal courts as to the nonsubstantive nature of various VA Adjudication Procedure Manual provisions and VA circulars bear this out, the Court notes that the Secretary had ample opportunity to present these arguments to the Court earlier and did not do so. The Court is loath to

address such arguments at this late juncture, especially when the Secretary failed previously to give the Court notice of pertinent Manual M26-4 provisions and thereby failed to give the appellant the opportunity to respond. *See* U.S. VET. APP. R. 28(g); *see also Linville, Boyer II, Tubianosa, Ashley, Tobler,* and *Fugere,* all *supra*; *cf. Patton v. West*, 12 Vet.App. 272, 283 (1999) (holding that Court will address arguments based on VA Adjudication Procedure Manual M21-1, even when not raised by parties, if "substantial interests of justice dictate that the Court require the Secretary to adhere to his own regulatory provisions"). In fact, the Court in *Donovan I* struggled to find "any criteria or guidance for evaluating a request for a DILF", and ultimately noted only that "there is some reason to believe that such guidance does exist." *Donovan I*, 11 Vet.App. at 489; *see also id.* at 494 (Holdaway, J., concurring in part and dissenting in part) ("there are absolutely no standards for reviewing the Secretary's determination of whether a [DILF] would be warranted in a particular situation"). Insofar as the Secretary is now calling attention to the existence of such guidance as contained in the Manual M26-4 provisions, the Court notes only that the Board, as directed in *Donovan I*, 11 Vet.App. at 490, should address those provisions in its statement of reasons or bases on readjudication. We do not now nor did we in *Donovan I*, render a decision as to whether such provisions are binding on VA or create a substantive right in a veteran. *Cf. Parker (Don) v. Brown*, 9 Vet.App. 476, 480 (1996) (assuming, without deciding, that Manual M26-2 provisions relating to foreclosure appraisals are regulatory in nature). Again, the Court's jurisdiction in *Donovan I* was predicated on section 511(a) and not on any provision of the Manual M26-4.

The Court notes also that the Federal court decisions cited by the Secretary do not concern 38 U.S.C. § 3732(a)(4)(A), which requires VA to provide a veteran with information and, to the extent feasible, counseling regarding alternatives to foreclosure, including a DILF, or to have made a determination, which removes the need for such actions by VA, that the mortgagee in question "has a demonstrated record of consistently providing timely and accurate information to veterans". It would appear that review by the Board of an RO decision not to accept a DILF is necessary in order to ensure compliance with section 3732(a)(4)(A).

The Secretary also argues that 38 C.F.R. §§ 1.964 and 1.965 (1998) afford to the veteran "a meaningful remedy", by empowering VA to issue a full or partial waiver of a veteran's indebtedness to VA arising out of a VA home-loan guaranty. *See* Mot. at 7. As to this point, the Court notes that those regulations do not appear to ***require*** that a waiver be given when a DILF was

wrongfully declined. Rather, § 1.964 provides for a waiver only after a balancing of six factors as to "equity and good conscience" enumerated in § 1.965(a) and when "[t]here is no indication of fraud, misrepresentation, or bad faith on the part of the person . . . having an interest in obtaining the waiver", 38 C.F.R. §§ 1.964(a), 1.965. *See also* 38 U.S.C. § 5302(a); *Ridings v. Brown*, 6 Vet.App. 544, 546 (1994) (BVA decision must discuss all six factors in § 1.965(a) as to decision not to grant waiver). Further, it is unclear whether a waiver of a veteran's indebtedness and the acceptance of a DILF have equivalent effects with respect to restoration of a veteran's home-loan eligibility and with respect to a veteran's credit rating, and the Secretary has provided no information in this regard. *See generally* MANUAL M26-4, Ch. 2, para 2.17(f) (April 20, 1992) ("[t]he normal consideration for a [DILF] is a full and complete release of the mortgagors' personal liability"); 38 U.S.C. § 3702(b) (Secretary must consider amount of prior loans in computation of amount of future applications for guaranty or insurance entitlement unless such prior amounts have been paid in full or Secretary has been released from liability therefor); 38 C.F.R. § 36.4302 (1998) (implementing section 3702(b)); *Wells v. Brown*, 9 Vet.App. 293, 298 (1996) ("38 U.S.C. § 3702(b) precludes restoration and reuse of a veteran's expended guaranty entitlement" unless any loss by Secretary has been recovered or Secretary has been released from liability); *see also* 38 U.S.C. §§ 3713, 3714; MANUAL M26-3, App. 6a, "Bulletin -- Loan Guaranty Benefits" (Dec. 3, 1995) (form letter granting release to veteran pursuant to section 3713(b) and noting that "the entitlement you used in connection with the loan cannot be restored (until the Government has been reimbursed for the amount of the claim paid[])"); MANUAL M26-4, Ch. 2, para 2.06d(12) (April 20, 1992) (noting that loan-guaranty entitlement cannot be restored following preforeclosure release of VA's collection rights unless VA's claim is repaid). In any event, even if waiver were an equivalent remedy, that would not preclude the Board from having jurisdiction in this matter.

D. Response to the Dissent

The bulk of our dissenting colleague's opinion is devoted to erecting strawmen and then knocking them down. For example, the dissent starts out with the assertion that "[n]o statutory or regulatory provisions confer on a veteran a right to have the Secretary accept a DILF." *Infra* at __, slip op. at 13; *see also infra* at __, slip op. at 18-19. Nowhere have we held that such an entitlement exists -- either in this opinion or in *Donovan I.* What we ***did*** hold in *Donovan I*, and do hold today,

is that an appeal to the Board lies from an RO refusal to accept a DILF. So, there is no issue presented here or in *Donovan I* as to any entitlement to the acceptance by the Secretary of a DILF.

Most importantly, the dissent relies on cases in Article III courts and in this Court that found certain VA and other agency actions to be not subject to judicial review in federal court. This reconsideration opinion, however, expressly makes clear that we did not in *Donovan I* and we do not now decide whether "this Court . . . ha[s] jurisdiction over a Board decision that approved an RO's refusal to accept a DILF". *Ante* at __, slip op. at 5. What we did and do decide is only that "recourse to the Board" is available when there is such an RO refusal. *Ante* at __, slip op. at 4. None of the general Article III caselaw cited in the dissent relates to ***BVA*** jurisdiction, which is what this case is all about, and, of course, none of the Article III cases relied upon there and by the Secretary relate to the jurisdiction of ***this*** Court under title 38 -- namely, 38 U.S.C. § 511(a), 7104(a), 7252(a), 7261, 7266 -- over BVA decisions.

Furthermore, the dissent fails in its attempt to justify its (and the Secretary's) misplaced reliance on those cases in terms of their interpretation of the APA's implicit preclusion of judicial review ***under the APA*** in matters where "agency action is committed to agency discretion by law", 5 U.S.C. § 701(a)(2). *Infra* at __, slip op. at 15-16. The dissenting opinion manufactures the following conclusion, for which it cites absolutely no authority: "This Court must produce compelling reasons, in the context of veterans law jurisprudence, for why it will not follow the principles set forth in the APA and the Supreme Court's decisions interpreting it." *Infra* at __, slip op. at 16. The dissent then declares that Supreme Court cases construing the APA are "binding precedent in this Court" as to the construction of the judicial review provisions of the Veterans' Judicial Review Act, Pub. L. No. 100-687 § 402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C. § 7251 note) [hereinafter VJRA] and that "U.S. Court of Appeals decisions, holding that actions by VA in servicing loans are discretionary and not subject to judicial review, are very persuasive authority", *ibid*., despite the ***undeniable fact*** that such Supreme Court and U.S. Court of Appeals cases "were decided within the context of the APA", *ibid.* This assertion conveniently ignores what seems to us to be a most basic proposition -- that the Court's principle recourse must be to our own jurisdictional statute, enacted by the VJRA, in order to determine the extent of our jurisdiction. We would look to caselaw regarding another statute, such as the APA, only where the other statute contained somewhat comparable language to that in the VJRA.

Here, however, exactly the opposite is the case. Congress did ***not*** include in title 38 any provision even remotely resembling 5 U.S.C. 701(a)(2), which exempts from judicial review under the APA "agency action . . . committed to agency discretion by law". In contrast, Congress ***did*** use the APA as a model for certain provisions of the VJRA. *Compare* 38 U.S.C. § 7261(a) ("**Scope of Review**") *with* 5 U.S.C. § 706 ("**Scope of review**"); 38 U.S.C. § 501(d) (expressly making 5 U.S.C. § 553, *infra*, applicable to VA's adoption of rules and regulations pertaining to VA claimants) *with* 5 U.S.C. § 553 (regarding public notice and comment). Moreover, the VJRA also incorporated specifically into title 38 another provision drawn directly from the APA; section 223(c) (now section 502) was added to title 38 in order to permit a challenge to be brought directly in the U.S. Court of Appeals for the Federal Circuit to a VA action to which 5 U.S.C. §§ 552(a)(1) (regarding public information, agency rules, opinions, orders, records, and proceedings) or 553 (regarding rule making) refers (except for a challenge to the schedule for rating disabilities adopted under then-section 355 (now section 1155) of title 38). The legislative history of ***this particular provision*** provides that, in the event of ***such a suit***, the "[APA] standards, as set forth in chapter 7 of title 5, to review the challenge [to a VA rule or regulation] . . . . would be available in such cases." 134 CONG. REC. 31,470 (1988) (statement of Sen. Alan Cranston). This strongly suggests that Congress understood that the APA would not ***generally*** be applicable under the VJRA.

Against this background, the absence from title 38 of a provision analogous to 5 U.S.C. § 701(a)(2) counsels most strongly against this Court's giving ***any*** consideration to federal caselaw ***construing that APA provision*** when we are interpreting the VJRA's judicial-review provisions. In any event, these APA-based arguments all go to the jurisdiction of ***this Court*** to review an adverse decision of the BVA on a DILF request, a matter, as we stressed above, that is not resolved by this reconsideration opinion, which deals only with the mandatory jurisdiction of ***the BVA.***

Next, the dissenting opinion appears to suggest that our references to the Manual M26-4 provisions regarding DILFs are illegitimate because "[t]he appellant has never alleged that the manual provision were enforceable against VA." *Infra* at __, slip op. at 20. Judge Holdaway recently and unsuccessfully made a similar suggestion in a dissent regarding Manual M21-1 provisions relied on by the Court in *Patton v. West.* There, the Court rejected Judge Holdaway's limited view of its jurisdiction by stating:

> [T]he U.S. Supreme Court has made clear that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law". *Kamen v. Kemper Financial Services, Inc*., 500 U.S. 90, 99 (1991).
>
> The dissent cites *Carbino v. West*, 168 F.3d 32 (Fed. Cir. 1999). The question there, however, was whether under its rules this Court could properly deny consideration of an argument not raised until the reply brief, *id*. at __, slip op. at 2; not, as here, whether the Court has the authority to "decide all relevant questions of law", 38 U.S.C. § 7261(a)(1), whether raised by a party or not (a question the Federal Circuit did not address in *Carbino*).

Patton, 12 Vet.App. at 283. Moreover, the dissent seems to overlook the fact that the appellant has been proceeding pro se since his attorney withdrew in November 1997. For all of the above reasons, we must reject the thrust of the dissenting opinion.

Finally, the dissenting opinion concludes that the implication in 38 C.F.R. § 36.4323(e) that there is BVA jurisdiction to review a decision denying a complete release is somehow inapposite because the Secretary "did not authorize the lender to terminate the appellant's loan by means of a DILF". *Infra* at __, slip op. at 20. We fail to understand the distinction that the dissent attempts to make.

IV. Conclusion

The appellant's motion for reconsideration is denied. The Secretary's motion for reconsideration is granted; because it is granted, the Secretary's alternative motion for "full Court review" will not be considered. Upon consideration of the above, the Court holds that the piecemeal arguments of the Secretary presented upon reconsideration do not demonstrate that the Court erred in *Donovan I* in vacating the May 12, 1995, BVA decision in part and remanding for adjudication, with an adequate statement of reasons or bases, of the questions regarding the refusal to accept a DILF set forth above from that prior opinion. The holding and decision in *Donovan I* thus stands reaffirmed upon this reconsideration.

HOLDAWAY*, Judge*, concurring in part and dissenting in part: I concur in the majority's denial of the appellant's motion for reconsideration. I also agree that the Secretary's motion for reconsideration should be granted. However, as I stated in my dissent in *Donovan I*, the Court erred in reversing the Board's decision that it lacked jurisdiction to review the Secretary's decision not to accept the appellant's request for a DILF. Therefore, I dissent from the majority's "clarifying" opinion which again holds that the Board is statutorily compelled to review the Secretary's decision not to accept a DILF. The majority's opinion conflicts with general principles of appellate review of agency decisions adopted by this Court. The Secretary's decision whether to accept a DILF is a discretionary business decision to be made only when in the best interest of the government and is not reviewable by the Board.

No statutory or regulatory provisions confer on a veteran a right to have the Secretary accept a DILF. *Cf. Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir. 1982) ("It is clear that [chapter 37, of title 38, U.S. Code,] by its terms, imposes no legal duty upon . . . VA to undertake loan servicing of VA-guaranteed loans."). Pursuant to section 3732(a)(2), within thirty days of the date a lender notifies the Secretary of its intent to foreclose on the property, "the Secretary *may*, at the Secretary's *option*, pay the holder of the obligation the unpaid balance of the obligation plus accrued interest and receive an assignment of the loan and security." Therefore, the Secretary's power to accept an assignment of the loan and the deed to the property securing the loan is *completely* discretionary. *See First Family Mortg. Corp. of Florida v. Earnest*, 851 F.2d 843 (6th Cir. 1988) (holding that there was no right of action to review "VA's alleged failure to take foreclosure avoidance measures

or to take assignment of . . . an insured mortgage"); *Nimmo*, 677 F.2d at 699-700. Congress has also provided the Secretary with extremely broad discretionary powers to handle matters that arise relating to VA home-loan guarantees. *See* 38 U.S.C. § 3720. Several regulatory provisions mention that the Secretary has the legal *option* of accepting a DILF; however, those provisions do not outline any standards for when the Secretary should exercise his discretion and accept a DILF. *See e.g.,* 38 C.F.R. §§ 36.4283(e), 36.4320(e), 36.43232(e)(1)(v), 36.4356(b)(8), 36.4513 (1998). Because there are no criteria upon which the Board could judge the Secretary's discretionary decision to deny acceptance of a DILF, it is impossible for the Board to review such decision for abuse of discretion. It might be said, parenthetically, that the only standard for evaluating the Secretary's decision to accept a DILF is whether the decision was in the best interest of the government. *See discussion infra* at 20. An acceptance of a DILF that was not a sound business decision would place the Secretary in the position of violating his fiduciary responsibilities owed to the public fisc. If the Secretary wishes to grant, or a veteran seeks, equitable relief, there are separate regulatory provisions which outline the availability of such relief.

In *Willis v. Gober*, this Court found that the use of the term "may" in a statutory provision, which authorized the Secretary to select a court-appointed fiduciary, established that the decision rested entirely within the Secretary's discretion. 6 Vet.App. 433, 434-36 (1994). The Court concluded "that this Court has no jurisdiction to review the appointment, as that question was not for *Board* decision." *See id*. at 436 (citing 38 U.S.C. § 7252) (emphasis added). This Court recognized that a completely discretionary decision was not reviewable by the Board. Recently, in *Malone v. Gober*, 10 Vet.App. 539, 544-45 (1997), the Court held that because the Secretary's decision to provide nursing-home care to a veteran is left to the complete discretion of the Secretary, the decision was not reviewable by this Court. The Court pointed out that the Secretary had not promulgated any substantive or procedural regulations limiting his discretion, and because there was no standard for judging when a veteran was entitled to nursing-home care, the appellant had no legal basis for supporting an assertion of entitlement. *See id*. at 545. Therefore, as stated by the Supreme Court, "'if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is *impossible* to evaluate agency action for "abuse of discretion."'" *Id*. (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)) (emphasis added).

Accordingly, the Board's decision that it lacked power to review the Secretary's discretionary decision to not accept the DILF arrangement was correct and should have been affirmed.

It is important to note that prior to the formation of this Court, several federal circuit courts had determined that the decisions of the Secretary relating to servicing VA guaranteed home loans were a matter committed to agency discretion. *See First Family Mortg. Corp. of Florida* and *Nimmo*, both *supra* (and the cases cited therein). The majority points out that those decisions were based on the APA and then concludes that "the 'committed to agency discretion' limitation set forth in the APA as to the jurisdiction of other [f]ederal courts is inapposite to this case" because this Court derives its jurisdiction from the VJRA. The majority fails to understand the purpose and function of the APA with regard to federal courts. The APA does not provide an independent grant of subject matter jurisdiction for federal courts, whether Article I or Article III courts, to review agency action. *See Califano v. Sanders*, 430 U.S. 99, 107 (1977); *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1558 (Fed. Cir. 1988). For example, the United States Court of Federal Claims, an Article I court with exclusive jurisdiction defined by statute, has stated that "[w]hile the [APA] does not establish an independent basis for jurisdiction, it provides the framework for determining when and how this court may review agency action." *Pender Peanut Corp. v. U.S.*, 20 Cl. Ct. 447, 451 (1990); *see also Brahms v. U.S.*, 18 Cl. Ct. 471, 475-76 (1989) (applying the principles of the APA and determining that an Internal Revenue Service decision was not reviewable because Congress had drafted a law so broad that there was no law to apply); *accord Friedman v. Kantor*, 977 F.Supp. 1242, 1250 (Ct. Int'l Trade 1997) (stating that APA does not afford an independent basis for subject matter jurisdiction and applying the "committed to agency discretion" exception under 5 U.S.C. § 701(a)(2) and *Heckler, supra*, to preclude judicial review of an executive agency action). Likewise, this Court's jurisdiction is not based on the APA, but it should not ignore the principles outlined by Congress in the APA. In fact, the entire body of modern administrative law has been developed within the framework of the APA. The APA was basically an adoption of the federal common law developed to review the actions of federal agencies. *See Tulingan v. Brown*, 9 Vet.App. 484, 488 (1996) (Farley, *Judge*, concurring in the result) (citing 5 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 28:5 (2d ed. 1984)). Based on the majority's reasoning, because the Supreme Court's entire body of decisions relating to judicial review of agency decisions was created in relation to the APA, it is not applicable to this Court. This Court must produce

compelling reasons, in the context of veterans law jurisprudence, for why it will not follow the principles set forth in the APA and the Supreme Court's decisions interpreting it. Until that time, the Supreme Court's decisions, *see e.g., Heckler, supra*, and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), limiting judicial review where Congress has drafted laws that are so broad there is no law to apply are binding precedent in this Court. For that reason, this Court's decision in *Malone* that applies *Heckler* is the controlling precedent in this case. Furthermore, the U.S. Court of Appeals decisions, holding that actions by VA in servicing loans are discretionary and not subject to judicial review, are very persuasive authority that should not be merely brushed aside because they were decided within the context of the APA.

The case law relied on by the majority, today and in its earlier opinion, is a house of cards and cannot support its holding that the Board must review the Secretary's decision to deny acceptance of a DILF. First, the majority relies principally on the Federal Circuit's decision in *Cox, supra*. However, in *Cox*, the Federal Circuit was discussing the propriety of this Court's issuing a writ of mandamus compelling the Board to issue a final decision regarding payment of attorney fees from past-due benefits awarded to a veteran. *See id*. at 1362-65. The Federal Circuit agreed with this Court that the appellant had failed to exhaust his administrative remedies by appealing to the BVA the Secretary's denial of a direct payment of attorney fees, and, therefore, issuance of the writ of mandamus would not have been proper. The Federal Circuit stated that a decision by the Secretary about the attorney fee issue was mandatory under 38 U.S.C § 511(a) and that a claimant would then be entitled under section 7104(a) to review by the Board. *Id.* With respect to the Board's power to review agency decisions, the *Cox* decision does nothing more than reiterate the review power granted pursuant to section 7104(a). I can find no language in the *Cox* decision demonstrating any intent by the Federal Circuit to abrogate the established judicial doctrine accepted by this Court that an appellate authority will exercise judicial restraint where Congress, through the statutory language employed in creating the agency's power to make a determination, has committed the decision to the sole discretion of an agency decision maker.

Second, the majority cites case law from this Court that does not specifically address the reviewability of an agency decision where there are no criteria for judging the agency action. The majority relied on the Court's decision in *Tulingan, supra*, which is an anomaly and not applicable in this matter. In *Tulingan*, the Court was construing 38 U.S.C. § 6104(a), which provides: "Any

person shown by *evidence satisfactory to the Secretary* to be guilty of mutiny, treason, sabotage, or rendering assistance to the enemy . . . shall forfeit all accrued or future gratuitous [VA benefits]." The Court stated that because section 6104 was enacted at a time when judicial review of the Secretary's decisions was statutorily precluded, the purpose of the language "evidence satisfactory to the Secretary," could not have been intended to preclude judicial review. *Tulligan*, 9 Vet.App. at 487. The Court felt that the passage of the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), which provided a plenary grant of authority in this Court to review decisions of the Board, did not imbue the statutory provision with new meaning. The reasoning in *Tulingan* is not applicable in this case because determinations by VA regarding home loan guarantees were subject to judicial review prior to the enactment of the VJRA. Also, the Court did not discuss whether the pre-VJRA language was intended to limit the BVA's review of the Secretary's decisions.

Next, the majority relied on *Meakin v. West*, 11 Vet.App. 183, 186 (1998). However, in that case, the Court found that the Board had jurisdiction to review the Secretary's decision because there were *regulatory standards* that must be applied to determine whether a veteran was *eligible* for fee-basis outpatient treatment. *See id*. The Court specifically stated that it was not determining whether the discretionary decision to *authorize* the treatment was *committed to the sole discretion of the Secretary* or whether such decision would be *reviewable by the Board*. *See id*. Therefore, the *Meakin* decision is irrelevant to the issue before the Court. In *Scott v. Brown*, 7 Vet.App. 184 (1994), the Court held that the exercise of the Secretary's discretionary authority to determine whether "good cause" had been shown to extend the period for filing a Notice of Disagreement, is subject to review for compliance with the regulatory guidance and to determine whether the decision was arbitrary and capricious. *See id*. (relying on *Service v. Dulles*, 354 U.S. 36, 39 (1957) (holding that a decision committed to the absolute discretion of an agency is reviewable if the agency has promulgated regulations limiting its discretion)). The *Scott* decision is also not on point because the Court believed that "good cause" was a sufficiently manageable standard to permit appellate review. Likewise, in *Smith v. Derwinski*, 1 Vet.App. 267, 279 (1991), the Court held that "[w]aiver decisions, and the review of such decisions by the BVA, are subject to review by this Court to determine whether the statutory standard was applied in accordance with the *regulatory guidance* or whether the decision was made in an arbitrary or capricious manner." (Emphasis added.) Both

decisions in *Scott* and *Smith* dealt with review of a discretionary decision where there was at least some minimal standard promulgated in order to limit the Secretary's discretion.

In accordance, this Court has repeatedly held that where by statute or regulation there exists a manageable standard limiting the Secretary's discretionary authority, the Board and this Court must review the Secretary's discretionary decisions in order to insure that they were made within the statutory or regulatory confines. *See Meakin, supra*; *Stringham v. Brown*, 8 Vet.App. 445, 449 (1995) (holding that the Secretary had permissibly limited his discretion by regulation and his decision was reviewable); *Seals v. Brown*, 8 Vet.App. 291, 296 (1995) (holding that Secretary's discretionary decision about whether a veteran met the standards set out in 38 C.F.R. § 4.30(a) (1998) for a total disability rating for convalescence was reviewed under the "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" standard). However, no standards or guidance have been promulgated to limit the Secretary's discretion to approve or reject acceptance of a DILF. Therefore, the decision is committed absolutely to the Secretary's discretion and it is not reviewable by the Board. *See Heckler, Malone*, and *Willis*, all *supra*.

The majority also inexplicably continues to insist that 38 U.S.C. § 3732(a)(4)(A) "provides the Secretary with authority to accept a DILF as a means of the veteran's avoiding foreclosure and incurring indebtedness." *Donovan I*, 11 Vet.App. at 488; *see also ante* at __, slip op. at 8. Section 3732(a)(4)(A) provides:

> Upon receiving a notice [of default] pursuant to paragraph (1) of this section, the Secretary shall---
>
> > (i) provide the veteran with *information* and, to the extent feasible, *counseling* regarding---
> >
> > > (I) alternatives to foreclosure, as appropriate in light of the veteran's particular circumstances, including possible methods of curing the default, conveyance of the property to the Secretary by means of a [DILF], and the actions authorized by paragraph (2) of this subsection; and
> > >
> > > (II) what [VA's] and the veteran's liabilities would be with respect to the loan in the event of foreclosure; and
> > >
> > > . . . .

> except with respect to loans made by a lender which the Secretary has determined has a demonstrated record of consistently providing timely and accurate information to veterans with respect to such matters.

The majority states that the above provision grants the Secretary authority to accept a DILF from the veteran, "does not bestow broad discretion on the Secretary to accept or deny a request for a DILF, but rather simply fails to provide factors to be considered in processing such a request." *Donovan I*, 11 Vet.App. at 488. That is a misconstruction of the statute, pure and simple. Section 7232 provides a mandatory right to information and counseling, unless the Secretary finds that the lender consistently provides such matters, no more and no less.

The majority tries the same hat trick by citing to various regulatory provisions that merely make reference to the Secretary's ability to accept a conveyance of the secured property through a DILF, but that create no right to such action or set out any standards for when the Secretary is required to act. *See* 38 C.F.R. §§ 36.4283(e), 36.4320(e), 36.43232(e)(1)(v), 36.4356(b)(8), 36.4513. For example, section 38 C.F.R. § 36.4323(e)(1)(v) provides that the Secretary *may* approve a complete release of the Secretary's right to collect the indebtedness created by the Secretary's obligation to pay the home loan guarantee. Section 36.4323(e)(1)(v) states that a complete release of liability may be granted if:

> [i]n . . . consideration . . . the obligor completes, or VA is enabled to authorize, an action which reduces the Government's claim liability . . . ; *such actions would include* termination of the loan by means of a [DILF], private sale of the property for less than the indebtedness with a reduced claim paid by VA for the balance due the loan holder or enabling VA to authorize the holder to elect a more expeditious foreclosure procedure when such an election would result in the legal release of the obligor's liability.

(Emphasis added.) That regulation neither places an obligation on the Secretary to approve an acceptance, between the veteran and his lender, of a DILF, nor limits the Secretary's discretion. If the Secretary had authorized termination of the appellant's loan by acceptance of a DILF, and if that action would have reduced the Secretary's liability on the guarantee, then section 36.4323(e)(1)(v) would have become applicable. As pointed out by the majority, section 36.4323(e)(4) specifically excludes BVA review of partial releases under section 36.4323(e)(2)-(3). *See ante* at __, slip op. at 7. Therefore, by implication a decision under paragraph (e)(1) relating to a complete release may be reviewable. *See id*. However, in the present case, the Secretary did not authorize the lender to

terminate the appellant's loan by means of a DILF; therefore, paragraph (e)(1) is not applicable in this matter and cannot be used to bootstrap reviewability of the Secretary's decision to reject acceptance of a DILF merely because it mentions the availability of such action.

While the majority has conceded that there are no statutory or regulatory criteria governing when the Secretary should accept a DILF, the majority speculates that "there is some reason to believe that such guidance does exist." *See Donovan I*, 11 Vet.App. at 489 (citing BAXTER DUNAWAY, THE LAW OF DISTRESSED REAL ESTATE § 20.07 (1992)). For that reason, the majority has directed the Board to discuss the regulatory nature of the M26-4 MANUAL provisions relating to DILFs. Those manual provisions indicate that the primary considerations in determining whether the Secretary will approve acceptance of a DILF are (1) the likelihood of future collection of the debt created by paying the guarantee and (2) the *savings* that would accrue to the government by accepting the DILF. *See* MANUAL M26-4, para. 2.17 (1998). In other words, the decision is made in the best interest of the government. The majority takes the Secretary to task for not citing, in his original brief, the M26-4 provisions dealing with VA's acceptance of a DILF. However, the Secretary has long relied on federal case law that such provisions were not substantive rules with binding effect. *See Nimmo, supra; see also Buzinski v. Brown*, 6 Vet.App. 360, 369 (1994). The appellant, through counsel, did not allege the contrary. It was not until the Secretary received the majority's somewhat muddled decision--which conceded that the statute and regulations contained no guidance, but still remanded the case on the Court's suspicion that substantive guidance existed somewhere--that the Secretary found it necessary to point out that the manual provisions were not substantive law. The appellant has never alleged that the manual provisions were enforceable against VA. *See Carbino v. West*, __ F.3d __, No. 98-7035 (Fed. Cir. Feb. 12, 1999) (holding that, generally, pursuant to 38 U.S.C. § 7261(a) and Rule 28 of this Court's Rules of Practice and Procedure, only issues raised in an appellant's initial brief should be considered by this Court).

As pointed out by the Secretary, the veteran can apply for a waiver of the debt established under the home-loan-guarantee program. *See* 38 U.S.C. § 5302; 38 C.F.R. § 1.964, 1.965 (1998). Such decisions on waiver of indebtedness are expressly reviewable by the Board. *See* 38 C.F.R. § 1.958 (1998). The Secretary has set out detailed regulations for when based on "equity and good conscience" the debt should be waived. 38 C.F.R. § 1.965. In fact, any fault on the part of the government is expressly considered. *See id*.

With respect to the appropriate remedy, the majority speculates that "it is entirely unclear whether a waiver of a veteran's indebtedness and the acceptance of a DILF have equivalent effects with respect to restoration of a veteran's home-loan[-guarantee] eligibility and with respect to a veteran's credit rating." *Ante* at __, slip op. at 9. Once again, no specific remedy for the Secretary's failure to approve acceptance of the DILF exists because there is no statutory or regulatory right to such action on the part of the Secretary.

In this case, the veteran must accept responsibility for defaulting on his VA guaranteed loan and for moving to another state during the foreclosure proceedings without forwarding to VA his new address. The Secretary's decision denying acceptance of a DILF was a decision committed to his absolute discretion. That decision was to be made in the best interest of the government. The Secretary has no duty to assist the veteran in avoiding foreclosure. The appellant is now limited to any postforeclosure remedies available to him under the laws governed by the Secretary for forgiveness of the debt.