HEARING ON PENDING LEGISLATIVE PROPOSALS: H.R. 109, 368, 1482, 1483, 1609, 1809, 2155, 2156 AND 2157

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMPENSATION, PENSION, INSURANCE AND
MEMORIAL AFFAIRS

OF THE

COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

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HEARING ON PENDING LEGISLATIVE PROPOSALS: H.R. 109, 368, 1482, 1483, 1609, 1809, 2155, 2156 AND 2157

THURSDAY, OCTOBER 12, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMPENSATION, PENSION,
INSURANCE AND MEMORIAL AFFAIRS,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to call, at 10:02 a.m., in room 334, Cannon House Office Building, Hon. Terry Everett (chairman of the subcommittee) presiding.

Present: Representatives Everett, Evans, and Montgomery.

Also present: Smith of New Jersey and Bilirakis.

OPENING STATEMENT OF CHAIRMAN EVERETT

Mr. EVERETT. Good morning. We have a pretty lengthy meeting, so we are going to get started. This legislative hearing of the Subcommittee on Compensation, Pension, Insurance and Memorial Affairs will come to order.

Before we proceed, I think it is in order to note the recent retirement announcement of Sonny Montgomery, the former Chairman of this Committee. Sonny has earned lots of titles during his congressional service; "The General," and "Mr. National Guard" are just a couple.

I am convinced the title he cherishes most is simply "Mr. Veteran." As a veteran of two wars, Sonny knows why we have title 38. He knows those who put on the uniform earn something special. He understands balancing the individual rights against the group. And he understands the need to preserve the integrity of the benefits system. As in all political life, there is genuine and honest debate over policy issues. Nobody agrees on anything, not even in our own families. But of this I am sure: Everyone agrees that G.V. "Sonny" Montgomery has been a man of integrity in pursuing and defending the veterans' cause. I want to personally thank him for his leadership, his friendship and the model he has set for the rest of us. We will miss him as will our Nation's veterans.

But one thing we will always remember and we will always know is that this committee is a better committee because Sonny Montgomery served here. The veterans are better off because Sonny Montgomery served here. And this is a better Congress because Sonny Montgomery served here.

Today, we are here to receive testimony on several bills covering a wide array of veteran's benefits. I would like to welcome the witnesses, and I look forward to hearing their views on the bills. We have several panels, so I ask each of the witnesses to summarize their testimony and limit their remarks to no more than 5 minutes. Without objection, the witnesses' entire statements will be included in the hearing record.

We have received draft CBO cost estimates for some of the bills. CBO estimates that H.R. 109 would have a pay-go cost of $10 million in its first year. H.R. 368 has no pay-go implications. H.R. 1482 is undetermined. H.R. 1483 has no expected cost. H.R. 1609 would simply be an asterisk. H.R. 1809 has no pay-go cost. H.R. 2155 would save under $1 million. H.R. 2156 is undetermined. And H.R. 2157 would have no cost impact.

Often, on this committee, we must balance what in some cases are two competing goods. For instance, while I have not made up my mind on the issue, what would be the benefit of authorizing the Court of Veterans Appeals to review nearly any case appealed from the Board of Veterans Appeals on the grounds of clear and unmistakable error? On the plus side, the individual veteran would get yet another opportunity for appeal of an unfavorable decision at the Board. On the other hand, the possible avalanche of appeals noted in the Department's views on H.R. 1483 would make an already difficult situation at the Board and Court nearly untenable.

In its letter commenting on H.R. 1483, which I will include in the record without objection, the Secretary notes that appealing just 5 percent of the 518,000-plus BVA decisions made between 1977 and 1994 would add nearly 26,000 to the Board's workload, an amount nearly equivalent to the Board's output this year.

The Secretary estimates that the Board's average response time would be increased to 1,083 days from the current, already excessive 745 days. The ripple effect of such an increase means that all veterans with a claim in the system would feel the effect. So we must again balance what is right for the individual against what is right for the veterans as a whole.

I am looking forward to a positive and informative discussion on the pros and cons.

Finally, before I recognize the Ranking Member, Mr. Evans, who I am sure will join us in a minute, I would like to digress just a little. As you know, VA is trying to modernize the operations at BVA. It would seem to me that the larger issue before this subcommittee is how VA is organized to adjudicate and deliver benefits and the tools it uses to facilitate that process. As you know, the subcommittee has asked GAO to look into the issue as well as the computer modernization issue. This subcommittee will hold further hearings on that larger process, and I sincerely hope that everyone will come to the table with an open mind.

Today's consideration of H.R. 1483 is a good case in point. The VSOs continue to request yet another right of appeal. I think the real problem is a continuing lack of quality decisions throughout the system and at least some of that lack of quality is structural, as pointed out in the recent GAO study, titled "Effective Interaction Needed Within VA to Address Appeals Backlog."

A major conclusion was that VA's structure does not lend well to producing consistently good decisions. The report states:

"GAO found instances in which BVA officials were unaware of Board interpretations; guidance and practice were inconsistent with Board interpretation; and questions about interpretations had been raised but not yet resolved. Unless consistent interpretations are developed, VARO decisions will continue to be remanded, delaying benefits for some veterans and increasing the workload for the Board, VBA and VHA.

In addition, unless VA clearly defines its adjudication responsibilities, it will not be able to determine whether it has the resources to meet these responsibilities or whether some new solutions are needed, including amending laws defining VA's responsibilities or reconfiguring the agency, end quote.

I think that goes to the core of the challenge facing VA in the way it operates its adjudication system. We cannot expect quality and volume production in a system that is fundamentally flawed in its design, and I want to work with the Department to help fix the system.

One final thing. This is not about cutting VA's budget. It is about making a government agency responsive to the people who pay the bills. The taxpayers have a right to expect excellence from the VA and from this committee in our oversight role. I am concerned not only about the future of VA programs, but also how today's programs operate because if today's operation is not effective, tomorrow's programs will be ineffective.

We don't have Mr. Evans with us. I was ready to recognize him. He will be late. I will say to all Members that your statements will be included in the record without objection, and does anybody have any opening remarks? Mr. Montgomery.

OPENING STATEMENT OF HON. G.V (SONNY) MONTGOMERY

Mr. MONTGOMERY. Mr. Chairman, I would like to comment.

I appreciate very much what you said earlier in your first remarks about my retirement. I still will be around for about 14½ months more. I plan on spending part of my time in Mississippi and part of my time up here in retirement, and I hope I will be active in trying to work and protect veterans' programs after I have retired.

As you know, one of my first loves is working for veterans; I have served on this committee over 28 years, and the first chairmanship I received as subcommittee chairman was your subcommittee, Compensation, Pension and Insurance. I enjoyed very much working in that area, and I appreciate these hearings this morning.

Thank you again for your very generous remarks.

Mr. EVERETT. I can assure you they were well earned.

If we can have the first panel. The panel is composed of Congressman Chris Smith, the Vice Chairman of the full committee, and Congressman Mike Bilirakis, a former Ranking Member of this subcommittee. They have asked to address us concerning their bills.

Gentlemen, welcome, and please proceed.

STATEMENT OF HON. CHRISTOPHER H. SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. SMITH. I want to thank you very much, Mr. Chairman, for this opportunity to appear before your panel and to testify on behalf of H.R. 368. This important legislation would add bronchiolo-aveolar pulmonary carcinoma to the list of cancers that are presumed to be service-connected for veterans who were exposed to radiation in accordance with the provisions of Public Law 100–321. While the number of people who would be affected by this measure is small, I believe that simple justice and compassion oblige us to provide relief for the victims and for their survivors.

Mr. Chairman, in 1986, almost 10 years ago, I became involved with the case of Joan McCarthy, a constituent from New Jersey. Joan has for many years worked to locate other atomic veterans and their widows and she founded the New Jersey Association of Atomic Veterans. Joan's husband Tom was a participant in Operation Wigwam, a nuclear test in May of 1955, which involved an underwater detonation of a 30-kiloton plutonium bomb in the Pacific Ocean about 500 miles southwest of San Diego.

Tom served as a navigator on board the *U.S.S. McKinley*, one of the ships assigned to observe the Operation Wigwam test. The detonation of the nuclear weapon broke the surface of the water, creating a giant wave and bathing the area with a radioactive mist. Government reports indicate that the entire test area was awash with the airborne products from the detonation. The spray from the explosion was described in an official government report as a, quote, "insidious hazard which turned into an invisible radioactive aerosol," close quote.

Tom McCarthy spent 4 days in this environment while serving aboard the *U.S.S. McKinley*. In April of 1991—1981, at the age of 44, Tom McCarthy died and the cause of death was a very rare form of lung cancer, bronchiolo-aveolar pulmonary carcinoma. This illness is a nonsmoking-related cancer, a pulmonary cancer, which is noteworthy given the estimate that about 97 percent of all lung cancers are caused by smoking.

On his deathbed, Tom informed his wife about his involvement in Operation Wigwam and wondered about the fate of other men who were present on board that ship.

Mr. Chairman, smoking is not considered a cause for this ailment, but it is a well-documented fact that exposure to ionizing radiation can cause this lethal cancer. The National Research Council cited Department of Energy studies in their BEIR V reports, stating that "Bronchiolo-Aveolar Carcinoma is the most common cause of delayed death from inhaled plutonium 238." The BEIR V report notes that this cancer is caused by the inhalation and deposition of alpha-emitting plutonium particles.

Mr. Chairman, the Department of Veterans Affairs has also acknowledged the clear linkage between this ailment and radiation exposure. In May of last year, Secretary Brown wrote Chairman Montgomery of the Veterans' Affairs Committee, our former Chairman, regarding this issue; and Secretary Brown stated as follows and I quote: The Veterans' Advisory Committee on Environmental Hazards considered the issue of radiogenicity of bronchiolo-alveolar carcinoma and advised me that, in their opinion, this form of lung

cancer may be associated with exposure to ionizing radiation. They commented that the association of exposure to ionizing radiation and lung cancer has been strengthened by such recent evidence as a 1988 report of the United Nations Scientific Committee on the Effects of Atomic Radiation, the 1990 report of the National Academy of Sciences Committee on the Biological Effects of Ionizing Radiation, the BEIR V report, and the 1991—1991 report of the International Committee on Radiation Protection. The Advisory Committee went on to state that when it had recommended that lung cancer be accepted as a radiogenic cancer, it was intended to include most forms of lung cancer, including bronchiolo-alveolar carcinoma.

I met with Secretary Brown, Mr. Chairman, last year and he assured me that the VA would not oppose Congress taking action to add this disease to the presumptive list. Notwithstanding this fact, however, the VA has repeatedly denied Joan McCarthy's claims for survivor's benefits. Unfortunately, Joan is not alone in being denied the survivor's benefits that she deserves. Consider the case of Gwen Poitras, who lives in Pasco County, Florida. Gwen's husband Robert Poitras was in command of the *U.S. Takelma*, one of the ships that observed the nuclear test in Operation Hardtack in the South Pacific.

Just like Thomas McCarthy, Robert died of bronciolo-aveolar pulmonary carcinoma. And just like Joan McCarthy, Robert's widow is denied the dependency and indemnity compensation which she applied for after her husband's death.

The VA claimed in the past—they claimed that adjudication on a case-by-case basis in the appropriate means—is the appropriate means of resolving these claims. Unfortunately, the practical experiences of claimants revealed deep flaws in the process that has been used by the VA.

Mr. Chairman, I hope that this legislation can be acted upon by this Congress, by this subcommittee. I have pushed this many, many years and we thought that we could get an administration fix, but we have been precluded in that; but again, the VA has indicated that they would like to see this included, and I hope that they will so testify.

The estimates by the CBO are that this is a very, very modest amount, that only approximately 12 people would be affected by this as it stands now, so I do think it certainly would not break the budget, but it would be a matter of justice and compassion for the widows and for those who have suffered from this radiation poisoning.

Thank you, Mr. Chairman.

[The prepared statement of Congressman Smith of New Jersey appears on p. 33.]

Mr. EVERETT. Thank you for your excellent presentation.

The chair now recognizes the former Ranking Member of this Committee and the gentleman from Florida.

STATEMENT OF HON. MICHAEL BILIRAKIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. BILIRAKIS. Thank you, Mr. Chairman. Good morning to you and to Mr. Montgomery and, of course, the members of the staff.

I appreciate the opportunity to testify about this practice which I like to think all of us would consider to be very unfair.

But first I would like to say I have been so buried in Medicaid and Medicare that I really wasn't aware that our dear Sonny was retiring and I always called him "Mr. Chairman." I still call him "Mr. Chairman." I think he will always be Mr. Chairman of the Veterans' Committee.

It has been an honor to work with you. I know other things will be taking place over the next year or so, but still I wanted to say that here this morning.

Well, gentlemen, under current law, as we know, if a veteran dies before the end of the month, even if it is only by a few hours, a surviving spouse will have that month's disability compensation revoked, the entire month's disability compensation revoked, so this creates a huge financial burden for a recent widow, especially if she is not eligible for dependency and indemnity compensation. I think we all would agree that it is really appalling that during her time of grief she is forced to return her husband's monthly compensation, the money that she spent—the money that she spent on his living expenses when he was alive. So I have introduced 109, which would prorate a veteran's last compensation check, providing compensation earned for each day that the veteran lived in that final month; and of course, if a veteran lived, let's say, until the 15th of the month, he would get his compensation—or she would get his compensation from the 1st to the 15th. Still there would be a return of part of that check that has been received, but not, at least, the entire amount.

A new widow certainly should not have to return a check already issued, or at least the entire check already issued because her husband died before the end of the month. I know that that exists in some other retirement area, social security and whatnot; I have always wondered about the unfairness of something like that.

I first became aware of this problem, Mr. Chairman, when, as you indicated, I served as the Ranking Minority Member of this subcommittee. A good friend of mine and former colleague of ours, Tom Lewis from Florida, introduced similar legislation on this issue in the previous Congress.

Tom worked very closely with our committee, and we did approve a modified version of this legislation as part of H.R. 4088, the Veterans Benefits Act. The provision agreed upon in H.R. 4088 grants a full month's benefit to spouses of totally disabled veterans who are not eligible, who are not eligible for DIC, for Dependency and Indemnity Compensation. The Congressional Budget Office estimated that the measure at that point in time would only cost $2 million per year and so we retained that here. However, ultimately it was dropped in conference with the Senate. Tom retired at the end of the last Congress, and I feel it is important to continue his efforts on the issue.

This bill, as you may know, has widespread bipartisan support, and even in these times when the National Taxpayers Union basically penalizes us for even cosponsoring pieces of legislation, we still have 100 cosponsors of this legislation, including six members of the Veterans' Affairs Committee.

You have already indicated that CBO costed this, the entire amount, not the modified version, at approximately $10 million per year. We had received an interim amount, an unofficial amount, $11 a year. I like your figure better than ours and I realize that regardless of what the figure is that in these times of fiscal austerity this is not a small amount of money. It is certainly small compared to the amount of money we spend around here, but certainly not a small amount of money.

But I am certainly willing to work with the committee, as I always have been, to find affordable alternatives, if any are necessary, and I would hope that not too many would be necessary. At the very least, we have a responsibility to assist those widows of totally disabled veterans who do not qualify for Dependency and Indemnity Compensation. What our bill basically does is, for those that do qualify for DIC, rather than kick in at the beginning of the month when the person passes away, it would kick in the day after the person has passed on so that there is no overlap.

So I would hope that the committee, maybe you should always come in with your best plan, but I would hope that at least it would consider something similar to what we did in H.R. 4088. It is really a small sacrifice for the spouse of a veteran who might be without income for a month because her husband died just a few hours, a 31-day month, if that person died on the 30th, she loses it all. If it were a 29-day month, a February and leap year, and he died the 29th, she would get it for the full month. There is something unfair with all that.

So, Mr. Chairman, as the subcommittee reviews legislation affecting veterans benefit programs—and I commend you for doing that—I urge you to seriously consider how grateful our veterans will be, knowing their spouses will receive some sort of fair treatment, at least in the difficult months following their death.

I pledge to work with you and the entire committee on this issue and all of the others and thank you again for your serious consideration.

[The prepared statement of Congressman Bilirakis appears on p. 35.]

Mr. EVERETT. Thank you very much. I think it is unfortunate that the first communication to the spouses received from our government is the fact that they owe the government money after the veterans are dead.

Mr. BILIRAKIS. It is, isn't it, when you stop to think about it?

Mr. EVERETT. Mr. Montgomery, do you have any questions?

Mr. MONTGOMERY. I will be brief.

I want to welcome my colleagues. I enjoyed working with both of you over the years and want to continue to be around, as I said earlier.

Both of these are interesting bills. I think on your bill, Chris, I am not sure whether the Veterans Department endorsed it or not. I don't think they took a stand against it, I am not sure.

Mr. Bilirakis' bill, I believe the Veterans' Department will testify in favor of it. On the Bilirakis bill, we did pass that last year.

Mr. BILIRAKIS. The modified version.

Mr. MONTGOMERY. It was a modified, that is correct. As I understand it, you would accept a modification, but you would prefer this one.

Mr. BILIRAKIS. I hate to admit that because unfortunately we would probably come right down to that. I think $10 million against $2 million—again we are talking about, you know, a large amount of money; and yet in the scheme of things, whatever, I would hope it would not be that. But certainly——

Mr. MONTGOMERY. That probably was not a fair question, but you prefer your bill as introduced?

Mr. BILIRAKIS. Yes, sir.

Mr. MONTGOMERY. And how much does your bill cost, Chris?

Mr. SMITH. When CBO scored it, it didn't even make a cut that they considered to be significant.

What—we are talking about approximately 10 to 12 people, 10,000 per year, so you know, you just factor that out; it is less than $100,000. It is a universe of people that have suffered greatly and were excluded.

You are right, I am not sure if the VA is for or against, but my conversation with Secretary Brown indicates that he would not object to it. I don't know why they don't just do it administratively, which is what we asked them to do. When Chairman Applegate looked at this some years ago, that was the hope, that it would be done by the VA itself, and they didn't do it.

But I don't think they would object to it, and I want to add my voice to what my good friend Mike Bilirakis said about you, Sonny. This is my first opportunity, since hearing the sad news, to say how indebted we all are for your leadership on behalf of veterans.

This has always been a bipartisan committee. Bob Stump continues that; Terry Everett and the other chairmen of the subcommittees continue it, but you laid down the markers early on. I have been on this committee for 15 years, and you have always been an outstanding leader on behalf of all veterans and all Americans, and I am grateful for that.

Mr. MONTGOMERY. Thank you, Chris. This committee has got to stay bipartisan. If it doesn't, the veterans will be the ones that suffer; and both of you gentlemen have been very active. When you were a minority, there was no problem; I really didn't know what party you were in. That is the way we worked it and that is the way it should be continued, and I think Bob Stump will do that. Thank you.

Thank you, Mr. Chairman.

Mr. EVERETT. Thank you, Mr. Montgomery.

Chris, my appreciation.

Mr. SMITH. Thank you, Mr. Chairman. I appreciate it.

Mr. EVERETT. Will the second panel, please come forward. The second panel is composed of representatives from the Department of Defense, Lieutenant General Samuel Ebbesen and Deputy Assistant Secretary of Defense Al Bemis. Please be seated.

STATEMENTS OF LT. GEN. SAMUEL E. EBBESEN, U.S. ARMY, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR MILITARY PERSONNEL POLICY, OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR FORCE MANAGEMENT POLICY; AND AL BEMIS, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND PERSONNEL, OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR RESERVE AFFAIRS

Mr. EVERETT. I will let you all determine the order. Go right ahead.

STATEMENT OF LT. GEN. SAMUEL E. EBBESEN

General EBBESEN. Mr. Chairman, thank you for the opportunity to appear before this distinguished committee today to discuss the Servicemen's Group Life Insurance, a remarkable program with over 30 years of distinction. The Department of Defense is greatly indebted to this committee for its contribution to the success of this program. We are also most appreciative of the excellent management and administration which has kept this program extremely simple and highly effective.

The Department supports the two bills on which we have been asked to comment today. These proposals will help make the program stronger, particularly for Reservists while retaining the program's simplicity and effectiveness. In effect, H.R. 2156 will bring the Reserves in line with the insurance programs for those separating from active duty. Both forces will then have the SGLI program while they are serving, with the continuously renewable convertible VGLI thereafter.

Mr. Al Bemis, in a moment, will address the specifics of the two bills, H.R. 2156 and H.R. 2157. I want to focus on the matter of automatic coverage under SGLI for $100,000 with the option to elect any $10,000 increment up to $200,000. As you know, we would prefer to automatically enroll a member for the maximum insurance level of $200,000 with the option of reduced coverage by completing the appropriate election. We believe this approach would further enhance the program's simplicity and effectiveness in two ways.

First, any death before completion of the required paperwork would pay the maximum benefit to the surviving beneficiary, such as death in transit to active duty or during the initial day or two of service. Such deaths, of course, are a tragedy and that tragedy need not be compounded by paying less than maximum SGLI.

Secondly, automatic maximum gives the best protection to survivors and they are important. They will receive the maximum benefit unless the member has made a clear and determined election for reduced coverage.

Now, while some junior members might not need this much insurance, those who really want less, we believe, will continue to elect less. Those who are not so inclined won't change the election, and should they die, the survivor will be appreciative of the resulting benefit.

The current program, although workable, would be more effective, we believe, in the long run with an automatic maximum provi-

sion; especially, I think the survivors will certainly be most appreciative of that process.

You also asked that we testify about the services' counseling program for SGLI. I will tell you that each service determines how best to inform their members of the options available. I assure you that we in the Department and the Services, are not involved with hard-sell for members to elect a given level of coverage. Each individual elects the level of coverage appropriate for his or her particular circumstance.

Insurance, as you are aware, is a very personal decision. There is no specific counseling requirement, but the services do try to ensure a member understands the implications of declining coverage altogether, underscoring the emphasis of the election form which requires that the declination of coverage be made with the member's own handwriting in the words, and I quote, "I want no insurance," end quote.

Our goal in the Department is to inform members of their options. Nevertheless, the Department requested OSGLI to develop a video to help members in making their election. That product will soon be available for counseling, helping members consider the factors that influence the decision and how much insurance is appropriate. I have recently seen the video, and it is an informative and educational product which I believe will facilitate each member in making the right choice for his or her circumstance.

Mr. Chairman, I thank you for the opportunity to appear before the subcommittee today and for your consideration. Again, we are most appreciative of this committee and those who manage the SGLI and VGLI programs. After Mr. Bemis' remarks, we will be happy to respond to your specific questions.

Mr. EVERETT. Mr. Bemis, go ahead.

STATEMENT OF AL H. BEMIS

Mr. BEMIS. Mr. Chairman, I also thank you for the opportunity to appear before this distinguished committee, and offer my strong support on behalf of all National Guard and Reserve members for the significant improvements to the Servicemen's Group Life Insurance and the Veteran's Group Life Insurance programs as proposed in both H.R. 2156 and H.R. 2157. I fully concur with the remarks made by General Ebbesen, but want to further address the Reserves' specific changes proposed in those two bills that would favorably impact the Reserve Force.

H.R. 2156 would merge the Retired Reserve SGLI program with the recently improved Veteran's Group Life Insurance, VGLI, which has a lifetime renewable provision. This would be a significant improvement by allowing Retired Reservists to retain insurance past age 60 where the Retired Reserve SGLI now ends.

Another plus is that under a combined program, broader participation could result in a more favorable rate structure than we have for either of the current programs.

Secondly, this bill would, for the first time, provide an insurance program for the Reservists who separate short of retirement. We believe that this is appropriate as it will extend to these veterans the same insurance options that are extended to those separated from Active service.

The second bill, H.R. 2157, pertains to persons who are eligible for SGLI coverage as drilling Reservists, but who are in a nonpay status and who, therefore, must remit their SGLI premiums directly to the service concerned. The service is obligated to make a timely payment of this premium to the VA, regardless of the member's timeliness in making the payment to the service. Some members have abused the situation by ignoring their premium obligation for extended periods. Our DOD Inspector General cited this as a management problem. H.R. 2157 would allow us to limit this premium debt problem by terminating the member's insurance.

The proposals before you can make the program strong in that they provide equal treatment for Active Duty and Reserve Forces, which is particularly important from a total force perspective.

Concerning the counseling programs for the Reserve Forces, we believe that the Reserve components do try to ensure that each member understands the importance of this program and the implications of declining coverage altogether. For example, our nonprior servicemembers of the Reserves normally receive their counseling and an enrollment opportunity during their basic training period. Upon return to their unit, members are again counseled and the counseling continues on a periodic basis, usually during the annual records review process which occurs every year.

In closing, I also agree that it is important to raise the automatic coverage level to a 200,000 maximum, as discussed by General Ebbesen. This change is in keeping with the simplicity and effectiveness of the SGLI and VGLI programs. We prefer the maximum to apply, and I think most survivors would also.

I thank you for the opportunity to testify on behalf of our 1.1 million National Guard and Reserve members; and again, we are most appreciative of this committee and those who manage both the SGLI and VGLI programs.

Thank you, Mr. Chairman.

[The prepared joint statement of General Ebbesen and Mr. Bemis appears on p. 39.]

Mr. EVERETT. Thank you both for your testimony. I served in the military, as I think most folks on this panel did, but I have to tell you, I generally oppose reverse checkoffs. I have not found them—I have been in private industry a lot of years—to be a very effective tool for determining what somebody really likes to do.

I appreciate your remarks about counseling and so forth, but I can recall my first few days in basic training. If somebody had handed me a form to have my throat cut, I probably would have signed the thing.

I would have to ask you a couple of things. Some would raise the GI bill contribution, something which we oppose. Is the automatic $200,000 SGLI coverage a good idea and why do you think it is a good idea? Can't the private sector provide that coverage? And I understand that they feel like they could even do it at a cheaper rate.

General EBBESEN. Well, Mr. Chairman, I will tell you it is not a must-have, but we certainly believe in the Department, that it is a better way to go. We have managed under the present construct of the law, but we believe the differences that will result from an automatic maximum would be absolutely positive.

I think payments for those who die before electing is one of them; also payments where the member is indifferent to his insurance level and is willing to go along with the government default option, whatever it may be. I think those who are not indifferent and desire less than the maximum would make certain that their preferred coverage is established.

And I go back to the basic process again, which says we believe that the survivor is important in all of this, and having that option available to them and to elect down rather than electing up, we don't believe is too difficult a process and would accomplish that same objective.

Again, I say that the current process is working.

Mr. BEMIS. Mr. Chairman, if I might add, if you hark back to your early days in the military, yes, the commercial insurance industry can provide the coverage and they probably can do it at a little cheaper rate. But if you are moving from Camp Swampy to somewhere else to go from basic training to your next duty station, then going from your permanent assignment, going overseas, are you really going to—do we really expect these young troops to go and find an insurance agent that they are comfortable with, that they rely on, they trust, and that provides them an opportunity to make a solid decision?

In the meantime, we believe that you ought to have this coverage to provide the protection for him until he can get to that point where he can make that rational decision of what he wants to do with his life insurance program.

Mr. EVERETT. Point well made. But I don't understand why a reverse checkoff is needed. I have to tell you that I am quite fundamentally opposed to reverse checkoffs. Why can't we just leave it at $100,000, and if they want to go up to $200,000, as they currently have the option to do, just leave it that way? I frankly don't see the case for going to reverse checkoffs.

Do we know how much it would cost to do this?

Mr. BEMIS. I don't think there is any cost involved.

Mr. EVERETT. $5 a year or $10 a year?

General EBBESEN. Mr. Chairman, I have no cost available. We could provide to the committee what the cost would be. I would assume the cost would be negligible, if any at all.

Mr. EVERETT. To the individual?

General EBBESEN. Well, to the individual, of course, it will have a cost to him because he will now be paying the cost up to $200,000.

Mr. BEMIS. It will cost him $18 for $200,000 rather than $9 for $100,000.

Mr. EVERETT. $9.

Mr. BEMIS. Per month. And of course that is taken out of his pay. Administrative cost, there is no difference because he has to fill the form out anyway no matter what level of insurance he has.

Mr. EVERETT. Mr. Montgomery.

Mr. MONTGOMERY. Thank you, Mr. Chairman.

General, welcome. And I especially want to welcome Al Bemis, Secretary Bemis. He served on our staff for a number of years. He served partially on the Veterans' Committee, and congratulations—

he is a very capable person, and I congratulate him, being here testifying before us today.

Mr. Chairman, on these other bills, I will have to take a look at them, but Mr. Stump and I introduced H.R. 2157, termination of SGLI when premiums are not paid by Reservists, and I think Mr. Bemis supported this legislation. That makes sense: If they don't pay the premium, they should be dropped from the rolls and like you, I will have to take a look at these other bills.

Just for the record—and I am kind of getting away from the scope today, but we probably need it on the record on the Montgomery GI Bill, where the Senate Veterans' Affairs Committee, in reconciliation, recommended a monthly payroll deduction of—going up 33 percent, moving it to $133 a month and reducing—reducing the COLA. But I just ask the military to comment on the 33 percent so we would have it in the record.

General EBBESEN. Mr. Montgomery, as you are well aware, we do not support the raising of that rate. We believe the current process works. The youngster, when he comes in today, we think, will end up with a pay cut when you take the $33 out, so we don't think that is a good idea.

Secondly, and probably more importantly, it is going to be tough for someone when he looks at his paycheck and says, gee, I have got to make a decision to add about a third more into a pot for that process and he is going to think twice about signing up for it; and we think that is a bad idea.

We think that over the long term, it is a good program. It contributes to the country as a whole. It contributes to the services in particular, and it contributes to the individual in the long term.

Mr. MONTGOMERY. Thank you.

We must realize, too, that these are our youngest veterans. After 3 months under the law, they become veterans after they have served on Active Duty time, so they don't really have any groups out there helping them. They are coming in just trying to survive for the first year that they are in the service.

And I want to thank the veterans' organizations. They haven't overobjected that we have found other ways to cover the GI bill by the copayment for non-service connected veterans, on their medicines that they get, so we have found a way to pay for this without charging the soldier an extra $33 a month.

My last comment, Mr. Chairman, on the Armed Services Committee authorization bill, the Senate has added the $200,000 for SGLI; and actually, Mr. Stump and I have been looking at that. Under the House rules, this comes under your subcommittee, and we should take a look at it and see what we want to do on it; and I guess this hearing is pretty timely that we are talking about raising from $100,000 to $200,000 and then how do you pay for it?

Of course, the soldier pays for it. Do we get this committee involved? What do we do? Do we get permission from the Armed Services Committee, National Security Committee, to move ahead? So that is pending in the conference report of whether we take that back under jurisdiction of this committee or what we do on the $200,000 SGLI.

Mr. EVERETT. Thank you Mr. Montgomery.

Mr. Evans.

Mr. EVANS. No questions, Mr. Chairman.

Mr. EVERETT. Alright, Gentlemen, thank you very much. Your points are well made, and I appreciate your appearance here today.

General EBBESEN. Thank you Mr. Chairman.

Mr. EVERETT. I would like to call the next panel, please. The third panel is Larry Rhea, Deputy Director of National Legislative Affairs, Non Commissioned Officers Association; Russell Mank, National Legislation Director, Paralyzed Veterans of America; James Magill, Director of National Legislative Service, Veterans of Foreign Wars; Lieutenant General (Ret.) John Conaway, President, Conaway Group.

STATEMENTS OF LARRY D. RHEA, DEPUTY DIRECTOR OF LEGISLATIVE AFFAIRS, NON COMMISSIONED OFFICERS ASSOCIATION; RUSSELL W. MANK, NATIONAL LEGISLATIVE DIRECTOR, PARALYZED VETERANS OF AMERICA; JAMES N. MAGILL, DIRECTOR OF NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS; AND LT. GEN. (RET.) JOHN CONAWAY, PRESIDENT, CONAWAY GROUP

Mr. EVERETT. Gentlemen, if you will all please take your places at the table, and let's go ahead and proceed.

Mr. Rhea.

STATEMENT OF LARRY D. RHEA

Mr. RHEA. Thank you, Mr. Chairman. The Non Commissioned Officers Association is pleased to be here this morning to offer our comments on the various legislation being considered. The Association also thanks you for including our entire prepared statement in the hearing record. Therefore, in my oral comments, I will address only those bills on which the Association has concerns or on which we have offered suggestions for their improvement. For those bills not specifically mentioned in these brief oral comments, NCOA either supports or has no objections to those measures.

So let me begin then with H.R. 1482, the Veterans Programs Amendments of 1995. NCOA supports these amendments with two exceptions.

First, Mr. Chairman, NCOA prefers the provisions of H.R. 109, which logically provides compensation to the day the veteran dies and survivors' benefits from that day forward. If the subcommittee decides not to advance H.R. 109, then NCOA would prefer the language of 1482 that would allow surviving beneficiaries to retain the veteran's last compensation check since survivor benefit payments are not effective during that same month.

And, second, the provision in H.R. 1482 that would take from 1 year to 2 years the limit on the payment of accrued benefits continues to ignore, in NCOA's opinion, the realities confronting veterans. Plainly and simply stated, NCOA believes that accrued benefits should be paid in full. We do not believe that veterans should be punished or limited for the failure of a claims and appeals system.

In regard to H.R. 1609, NCOA is not necessarily opposed to Representative Waters' proposal, although it is only fair to say, Mr. Chairman, that the Association is not overly excited about it, either. We are concerned about the potential dilution of VA service-

connected standards and, unarguably, the standards of VA and social security are different.

And my final comment, Mr. Chairman, deals with H.R. 2157. Again, we are not opposed to the bill, but we do believe that the language in the bill which requires the veteran to justify late payments to the satisfaction of the Secretary prior to reinstatement is overly subjective, and we believe it is unnecessary. Requiring the veteran to justify late payment and then engaging someone else in a review process to determine if reinstatement is warranted is, in NCOA's view, a needless administrative burden on all parties.

That concludes my oral comments, Mr. Chairman. I will be happy to answer any questions, and on behalf of NCOA, I thank you.

Mr. EVERETT. We thank you.

[The prepared statement of Mr. Rhea appears on p. 44.]

Mr. EVERETT. Mr. Magill.

STATEMENT OF JAMES N. MAGILL

Mr. MAGILL. Thank you, sir. What I would like to do before my statement, if I may, is add to your opening remarks in that we also appreciate the great contributions that the former Chairman of this committee has made. We have called on his counsel many times over the years, and I was glad to hear that you will be staying at least part-time in the area; and we look forward to working—continuing to work with you in the future.

As far as—with respect to the bills before us today, I too would just like to comment on one concern we have. We certainly do support enactment of all the bills. However, with respect to H.R. 1609, we do support the exchange of medical information between Social Security and VA. However, we do have concerns with the provision in the bill which allows the Commissioner to make determinations of veterans' eligibility for benefits under laws administered by the Secretary of Veterans' Affairs.

Again, we do support the bills that are before us and I will be happy to respond to any questions you have.

Mr. EVERETT. Thank you Mr. Magill.

[The prepared statement of Mr. Magill appears on p. 51.]

Mr. EVERETT. General Conaway, we are going to skip over you and go straight to Mr. Mank.

STATEMENT OF RUSSELL W. MANK

Mr. MANK. Mr. Chairman, I appreciate the opportunity to testify on behalf of the Paralyzed Veterans of America.

I can only echo what Jim Magill just said. Congressman Montgomery, Paralyzed Veterans of America have enjoyed working with you over the years; you certainly have been a strong supporter of our organization. We look forward to working with you in the next 14 months and the years thereafter.

Mr. Chairman, PVA, in its statement, has indicated that we have no objection to the bills—to the nine bills before us. We have offered some suggestions how they could be made stronger, and those are so indicated in my statement.

What I would like to do is take a few moments to address a particular issue in H.R. 1482 that directly affects our members. It is

section 5; it is the proposed increase to the automobile grant. It contains only three or four lines in the bill, but it directly affects the service-connected members of our organization. PVA is a very small organization. Those service-connected members who jumped out of an airplane in 1950 when this program was just getting under way—the program started in 1946—would have received an automobile grant of $1,600. That amount would have covered approximately 78 percent of the cost of an automobile. In 1994, based upon the National Automobile Dealers Association statistics, the average cost of an automobile in the United States was $19,200. If Congress increased the amount to $6,000 today, that will pay for approximately 31 percent of the automobile.

The GI who jumped out of an airplane in 1950 and sustained a spinal cord injury, and the GI who jumped out of an airplane in 1995, and sustained a spinal cord injury, both have received a devastating injury while serving in their Nation's armed forces. Yet what has been done over the years is to reduce the person's benefit by almost two-thirds. I would ask that Congress readdress this issue and increase the grant to $11,000.

That concludes my remarks. Thank you, sir.

Mr. EVERETT. Thank you very much.

[The prepared statement of Mr. Mank appears on p. 53.]

Mr. EVERETT. General Conaway.

STATEMENT OF GENERAL (RET.) JOHN B. CONAWAY

General CONAWAY. Thank you, Mr. Chairman. I appreciate the opportunity to be here.

I retired about a year and a half ago as Chief of the National Guard of the United States, the National Guard Bureau, and had almost 550,000 soldiers and airmen under me and 4,600 units in 3,200 communities. So the benefits that they get and receive obviously are as important in our total force as they are for the Active Duty personnel.

I appreciate these issues that you all are considering. I want to say before I make just a couple of brief verbal remarks that my good, dear friend Chairman/Congressman/General Sonny Montgomery, I have appreciated his service and working with him in my 18 years as a general officer in the National Guard Bureau.

From the time I came in in 1977, we called him our "legend." He is actually a legend in his own time, and Congressman Montgomery has done so much and the Montgomery GI Bill has done wonders for the Guard and Reserve as well as for the Active Duty forces.

I personally got my Master's degree, which helped me to move up and get assigned to the Pentagon, because of the GI bill. So maybe I shouldn't have used the GI bill, Sonny, and I would have got to stay in beautiful Kentucky. But I enjoyed my tour up here.

The only issue that I want to comment on is the issue on SGLI, raising the automatic from $100,000 to $200,000. General Ebbesen brought up a couple of good points, as did Secretary Bemis. I think administratively or in some other way that the young troops that are enlisting and coming into the military, on their way to their initial basic training site, or wherever they go, probably administratively should be covered for the $200,000 until they have been

sat down and gone through the administrative records that they have to go through to sign up for what they have to sign up for, and then they can declare what insurance they want.

You get into a little bit of a privatization versus "government take care of us" in this issue, as you alluded to. There are private associations, military associations that offer great coverage to all of the servicemembers. They do it at a lesser rate in many cases. I served for 5 years on the board of the Armed Forces Benefit Association while I was Chief of the National Guard. I still do some nonpay advising to them.

I am a life member of the National Guard Association, U.S. I am a member of the Enlisted National Guard Association of the U.S. I am a member of the Reserve Officers Association. I am a member of the Retired Officers Association, as well as AFBA, and I have a lot of insurance with United Services Automobile Association, too.

All of them have life insurance, as well as other forms of insurance. All of them do great support for the military and to this committee, as well as the National Security Committee, in representing the personnel that are out there.

When you look at the comparison with the civil service program, FEGLI, Federal Employees Group Life Insurance, FEGLI is purely a voluntary program. There is nothing mandatory in FEGLI. You sit down with the new employees, 18, 19, 20-year-olds, GS–2s, GS–3s, GS–4s, GS–5s, GS–6s, and you offer them increments of insurance, and this is how much is going to be taken out of your pay, and they can elect what they want and they can go back annually, and they maybe have a better briefing program than we have in the military.

Even that, as it may, that is purely voluntary. They also are aware of what association and other insurance costs are.

I think that the current program works. I don't think it is broken. I think half of the members of the Guard and Reserve take the maximum $200,000, with $100,000 basically automatic and another $100,000 they can opt for. Active Duty, I understand it is well over 60 percent, so they are getting briefed. I think the associations would like to have their chance for their programs to be available and accessible, the military associations would. They can offer it for as low as $7.80 per $100,000 per month.

Now, that is to 82 percent of the military, to be fair about this. The smokers, there is a smoker/nonsmoker rate; within most all of the associations they have a differentiation. SGLI and VGLI do not, and that is a big difference there.

So I don't know whether you need to look at a difference there or the fact that it does cost more for most military association insurance than it does—if you are a smoker, than it does for SGLI. But I think the fact that we have a free enterprise system, we get into fairness and competition, that the military associations and industries should have their fair chance to offer this insurance as well. They do fairly well.

But I think the program is good the way it is, and I would cover the new members before they have a chance to earmark what they want, cover them for their maximum until they fill out that form.

Thank you, sir.

Mr. EVERETT. Thank you very much.

We will begin with you, Mr. Rhea. Do you think they ought to have $200,000 SGLI coverage; is that a good idea, or how does your organization feel?

Mr. RHEA. Mr. Chairman, in our testimony this spring before the joint session of both the House and the Senate Veterans' Affairs Committees, Non Commissioned Officers Association advocated the automatic enrollment; we believe it is a good thing and should be done.

As far as costs, I think—as General Conaway was speaking there, the thought occurred to me, while the increase goes from $9 to $18 per month for that young individual, we would better serve that individual by taking the additional $9 at that point when they first enlist rather than giving him 2 or 3 months to go down to the MCX, the Navy Exchange or the post exchange with his easily accessible Master Charge and run up a bill there, and then not be able to at some later point take the higher enrollment. So I think we would be doing a service.

As far as administrative cost in relation to the earlier panel, I don't know what additional administrative cost would be incurred in doing that. We would be using the same counseling process.

Mr. MAGILL. The VFW has no official position on that, but I certainly know that we would have not object to it as long as the option was available to a member at a later date if he wanted to retain it or elect to reduce cost—of the insurance.

Mr. EVERETT. Mr. Mank.

Mr. MANK. PVA has no official position on this topic, but it is a reasonable proposal.

Mr. EVERETT. Let me switch directions and ask our veterans' service organizations if something does well for the individual, but harms the group in the process, is that something you advocate? I am specifically talking about the thing I addressed in my opening statement about the clear and unmistakable error.

We have testimony from VA that they feel like that would increase the adjudication up to even 1,000 days.

Mr. MAGILL. The Veterans of Foreign Wars, in our statement, support that bill.

I would like—the increasing for 1,000 days, I would like more information on that before I commented. It seems like an exceptionally long time.

Mr. MANK. Mr. Chairman, as we indicated in our statement also, we support the bill with just some minor modifications.

We have to fix the system, but to say that the veteran can't file another appeal on something that may be clear and unmistakeable error flies in the face of common sense, so we think the bill is good with minor modifications.

Mr. RHEA. Mr. Chairman, NCOA has indicated our support for the bill in our testimony here this morning, and in previous hearings we have also signaled that same support for this. I would also like to defer a little bit to what Jim Magill said here. I would like to look at that thousand days a little more to see where we would come down on VA's estimates on that, if we think they might be correct. But even then, I think we would have to realize that what we are talking about here is that a clear and unmistakable error

was made, and we have had one abiding thing in the 2 or 2½ years that I have been working these veterans issues now.

You know, we talk about the element of doubt or the benefit of doubt to the veteran, so I don't think I would jump right in immediately with VA's argument. We support the legislation and think it was the right thing to do, sir.

Mr. EVERETT. Well, thank you very much.

The current 700-plus days we find unacceptable as it is, and I know VA finds that unacceptable as well as the VSOs.

Mr. Montgomery.

Mr. MONTGOMERY. Thank you very much, Mr. Chairman.

I would like to again say thank you to the witnesses for their remarks and their time. Thank you very much.

On the 1482, Mr. Evans and I introduced, I don't think we totally are locked into no changes. I mean, that is why we introduced the bill.

If there are some changes that the gentleman from PVA and others would like to make, certainly, Mr. Chairman, we would consider that. These bills need amending when you bring them up. That is why you have witnesses. Certainly, we would have no problems with that.

On General Conaway's testimony, some of these associations, and as I understand it, the NCOA is not affected that much by raising the insurance, the life insurance, on funding that doesn't run your organization of selling life insurance or group life insurance.

Mr. RHEA. Of course, NCOA is like all other associations, we offer different products and that sort of thing. Quite frankly, Mr. Montgomery, we haven't assessed it in that particular manner, the effect it would have on our association. The basis on which we have come down in supporting the $200,000 and the automatic enrollment feature is what we think is good and right for the young Soldier, Sailor, Airman, Marine, Coast Guardsman or whatever.

Mr. MONTGOMERY. I think, then, General Conaway, I think for the record, if you could maybe submit for the record some of the associations that depend totally on the life insurance program, and then we could work from there.

Mr. Chairman, maybe it doesn't affect but a few, but I appreciate what we are trying to do, and I know the military has testified today that they support it, $200,000, but I still think we need to maybe have some input about what associations that are selling insurance also and the cost differential.

Thank you.

Mr. EVERETT. Thank you, Mr. Montgomery.

Panel, thank you very much.

General CONAWAY. May I make one comment?

What Mr. Montgomery said we will check, I don't know that it would totally bankrupt any of the associations, Mr. Montgomery. They all have supported the 100 and the 100 automatic and the 100 optional. I think it gets to be a fairness issue, what is better for the troops and what is better for the taxpayer.

You know, the troops need to be educated on what NCOA has and AFSA has, AFBA and all of these so they can shop around more. We do this with our civilian employees, with FEGLI insur-

ance. Nothing is automatic, they have to go sit down and pick which option they want.

Now we are going to increase this. If we have a war—in Vietnam alone, the government paid an additional $500 million over and above what the insurance companies paid to subsidize wartime claims. That was the insurance at that time. Today, that would cost 5 to 10 billion for the government.

When you get private industry involved, there is no subsidization of that. Private industry covers all of that, including these associations, and if the troops can save hundreds and hundreds of dollars over their lifetime with this insurance, they should be offered this or it should be available to them versus just automatically putting them into government program. That is where we come down on this, is what is better for the troops and better for the taxpayer, and I think the system is working.

Mr. MONTGOMERY. Mr. Chairman, our military witnesses are still here. I was told by staff that sometimes when a person has just the $100,000, that some way the military could pay a little higher premium, or not premium, but the insurance policy than was indicated.

Could Mr. Bemis tell us, is that correct, can you go over the 100,000 or the 50,000, or whatever?

Mr. BEMIS. There have been cases where after the deaths have occurred, the survivors have made the claims that the individual intent was to take the higher amount. And I think that by and large what the Department and the services have done is leaned to the benefit of the survivors rather than the letter of the law that says, you signed for 100,000, that is all you get. So we have had several cases where that has occurred, and I think that is what you are alluding to.

Mr. MONTGOMERY. That is exactly what I am alluding to.

How much did you pay?

Mr. BEMIS. The maximum amount.

Mr. MONTGOMERY. Okay.

Mr. EVERETT. Panel, thank you.

As usual, you made your—yes, Mr. Rhea.

Mr. RHEA. Mr. Chairman, I thank your indulgence here for just a moment. I couldn't go back to my office and be the only member of this panel that didn't acknowledge the former Chairman. And I would hope, though, that he knows from our heart and the expressions of our gratitude and the enduring respect that we have for him, not only as a friend of veterans, of the military, and include in that the marvelous work you have done for the National Guard and Reserve, and to publicly state once again, and I am sure, Mr. Montgomery, we will have an occasion in the next 14, 14½ months to again publicly state it, but our everlasting thanks to you, sir.

Mr. MONTGOMERY. I appreciate that.

And, Mr. Chairman, I have gotten all the noncommissioned officers awards. One I didn't get, and I told them about it, they gave me.

Mr. EVERETT. Mr. Montgomery, I can assure you they were all well earned.

Thank you, panel. As usual, your testimony has been precise, clear, good reasoning. You made your points well.

Mr. EVERETT. Let me call the next panel so we can move on, Mary Schoelen, Veterans' Benefits Program, Vietnam Veterans of America; Joe Violante, Legislative Counsel, Disabled American Veterans; Carroll Williams, Director of Veterans Affairs and Rehabilitation, the American Legion.

If the panel would please step up.

Ms. Schoelen, if you don't mind, we will begin with you.

STATEMENTS OF MARY J. SCHOELEN, ESQ., VETERANS' BENEFITS PROGRAM, VIETNAM VETERANS OF AMERICA, INC.; JOE VIOLANTE, LEGISLATIVE COUNSEL, DISABLED AMERICAN VETERANS; AND CARROLL WILLIAMS, DIRECTOR FOR VETERANS' AFFAIRS AND REHABILITATION, THE AMERICAN LEGION

STATEMENT OF MARY J. SCHOELEN, ESQ.

Mr. SCHOELEN. Thank you, Mr. Chairman.

I would like to thank the Members of the Subcommittee on Compensation Insurance and Memorial Affairs for the opportunity to present VVA's views on the several bills before the subcommittee. We would also like to join in thanking the exiting Mr. Montgomery on his long-time service to veterans.

Due to time constraints, I will limit my remarks to the measures that VVA feels are most important, but I will be happy to answer questions on any of the other bills.

VVA supports H.R. 1483's efforts to reintroduce clear and unmistakable error as an avenue for final veterans' benefits decisions to be reviewed by the Department of Veterans Affairs. Historically, veterans and their dependents have been able to assert that the final decision on their claims by either the agency of original jurisdiction or the Board of Veterans' Appeals contained clear and unmistakable error, allowing them to have their claims readjudicated.

If the prior decision was reversed, the effective date for the award of benefits would be the date of the underlying claim. This is important because it allowed erroneous decisions at any level of VA to be corrected upon discovery of the error.

If an error is made by any VA decision-maker that injures the claimant, it shouldn't matter who made the error, just that the claimant be allowed to receive the benefits to which he or she is entitled to.

However, as you know, two recent decisions by the Court of Veterans Appeals and the Court of Appeals for the Federal Circuit have essentially foreclosed review of any decision that had previously been appealed to the Board of Veterans' Appeals. Currently, the only appellate review available for a clearly and unmistakably erroneous decision that has been reviewed by the board before is a request for reconsideration by the board. However, reconsideration is strictly at the discretion of the Chairman and cannot be reviewed by the court or denial cannot be reviewed by the court.

VVA also strongly supports H.R. 1483's provision that specifically allows for judicial review of clear and unmistakable error. Without this specific provision, many claimants would still not be entitled to judicial review of their erroneous claims if the Notice of Disagreement was filed prior to November 18, 1988.

VVA has always fought for broad access to judicial review of VA determinations. That fight leads us to strongly advocate for measures that would restore judicial review to veterans seeking review of their erroneous decisions.

Now, I would like to turn to H.R. 1609. VVA strongly supports the provisions that provide for increased access and sharing of information between VA and the Social Security Administration. Information gathered during the course of an SSA determination is frequently very important to VA disability determinations for eligibility to compensation and pension.

It has often been difficult for individual claimants, their representatives, and even VA to acquire copies of SSA records. Repeated requests have gone unanswered. VA then proceeds to make a determination without these records, and that very case may be remanded by BVA to require the same records.

While we support this provision, we propose that the language in Section 1 be changed to require the shared information to contain the Commissioner's determination of the veteran's eligibility for Supplemental Social Security Income and the basis for that determination, when such a determination has been made.

VVA strongly supports the provisions proposed in H.R. 1482 to increase benefits and access to benefits for veterans. We specifically support the increase in the period for which accrued benefits are payable from 1 year to 2 years, but we reassert our general opposition to the limitation on awarding retroactive benefits, adjudicated after the death of the veteran. The families of the veterans should not be denied benefits that the veterans would have otherwise been entitled to.

VVA also favors H.R. 368. We have supported the "atomic veterans" in their efforts to gain care and compensation for conditions caused by military exposure to ionizing radiation. We now support the addition of bronchiolo-alveolar carcinoma to the list of presumptively service-connected conditions.

Finally, VVA supports H.R. 2155, restricting the clothing allowance of incarcerated veterans who are otherwise adequately clothed, does not, in our view, contradict VVA's long support for these veterans.

We also support the establishment of a presumption of permanent and total disability for veterans over 65 who are nursing home patients. This will save these veterans and their families a great deal of time and effort to prove such a level of disability to VA and save VA resources to develop these claims.

Mr. Chairman, VVA thanks you again for the opportunity to comment on these bills, and this concludes our testimony.

Mr. EVERETT. Thank you.

[The prepared statement of Ms. Schoelen appears on p. 57.]

STATEMENT OF JOE VIOLANTE

Mr. EVERETT. Mr. Violante.

Mr. VIOLANTE. Mr. Chairman and Members of the subcommittee, on behalf of the Disabled American Veterans and its auxiliary, I wish to thank you for this opportunity to present our views on legislative proposals affecting our Nation's service-connected disabled veterans and their families.

Before I continue, I also would like to express DAV's deep appreciation to Chairman Montgomery. He is going to be sorely missed both in the House and on this committee. We have certainly appreciated his tireless and dedicated effort on behalf of veterans.

At the outset, Mr. Chairman, I would like to note that DAV's position on these legislative proposals has been set forth in our written testimony. I would be happy to respond to any questions. However, this morning I would like to concentrate our focus on H.R. 1483.

As you will recall, the House, with bipartisan support, passed similar legislation on clear and unmistakable error last year in the 103rd Congress, and that was H.R. 4088. There is no reason whatsoever why H.R. 1483 should not receive this body's full support.

In the past, the VA has testified that the passage of clear and unmistakable error legislation would increase their workload. Again, I note in their written testimony today they have said the same thing.

However, I do not believe that the facts bear out these statistics. It has been our experience, and we have represented a large number of veterans before the regional office and the BVA, that the correction of clear and unmistakable error in rating board decisions has always been available to claimants, and the VA has not been inundated with claims at the regional office level for clear and unmistakable error.

For the most part, clear and unmistakable error claims are brought by the veterans' representatives and not by individual claimants, because this issue is a technical issue and many veterans don't understand it and therefore these issues are mostly picked up by the representatives. The vast majority of these claims for clear and unmistakable error are meritorious. For years, until the U.S. Court of Appeals for the Federal Circuit overturned the Court of Veterans Appeals decision in Smith, everyone believed that they could obtain a review of prior board decisions on the basis of clear and unmistakable error.

Mr. Chairman, I also would like to note that in the past, we, the DAV, and most of the other veterans' service organizations have supported pay increases for board members at the BVA, the elimination of term limits. We have supported the single-member decisions, and an increase in the Board's FTE in an effort to turn around the backlogs.

I would also like to note that 2 years ago, the VA, and particularly the Board, was predicting that the processing time was going to reach 1,700 days. That has turned around. There has been a decrease in the processing time.

I believe that if this law was passed and even if their predictions were right on the numbers, that we could work with them to turn the processing time around again. I don't think that at this point in time that that should be an obstacle for the passage of this bill. We certainly will do everything that we can to ensure that the processing time doesn't increase to the level predicted by BVA.

Mr. Chairman, there is no legitimate reason not to give favorable consideration to H.R. 1483. There is no reason to prohibit a claimant from establishing that his or her benefits have been wrongfully

denied and that but for clear or unmistakable error, he would be in receipt of that benefit.

I thank you again for the opportunity to present our views.

Mr. EVERETT. Thank you again for appearing here.

[The prepared statement of Mr. Violante appears on p. 62.]

STATEMENT OF CARROLL WILLIAMS

Mr. WILLIAMS. Thank you, Mr. Chairman and Members of the subcommittee. On behalf of the 3 million members and 1 million auxiliary members of the American Legion, we appreciate the opportunity afforded this morning to present our views on several bills scheduled for consideration by this subcommittee which impact on veteran benefits and programs.

Our written testimony has been submitted, and our perspective on the various legislative measures to amend the statutes to title 38 are now a matter of record. Nonetheless, we would like to take this occasion to verbally comment on a few of these proposed changes to the title.

H.R. 109, which proposes to make certain changes in the effective date of discontinuance of benefit payments of compensation, dependency, indemnity compensation and pension benefits, specifically amending United States Code, title 38, Section 5110 and 5112, based on marriage or remarriage of a payee or death of a payee, we ask that during your period of deliberation you consider the importance of ensuring the economic impact to veterans, to the veteran families represented by monthly compensation and pension payments. This is made available to survivors to help meet expenses in time of the veteran's death.

As you know, claims for survivor benefits to the Department of Veterans Affairs, Social Security Administration or to the military can take months to adjudicate, which can cause extreme financial hardship for the surviving spouse during this period.

H.R. 368 proposes to amend Section 1112 to add bronchiolo-avleolar carcinoma to the presumptive list of diseases related to exposure to ionizing radiation for establishing service connection.

As you know, the American Legion has been at the forefront for a number of years in support of legislation to ensure that the veterans exposed to ionizing radiation during atmospheric nuclear weapons test or who served in the occupational zones of Hiroshima or Nagasaki receive compensation. Therefore, the American Legion favors the addition of bronchiolo-alveolar carcinoma to include a more general diagnosis of lung cancer to the list of presumptive diseases currently set forth in 38 United States Code 1112.

Section 7 of H.R. 1482 proposes a number of changes in veterans' benefit programs, in particular it proposes to increase the period for which accrued benefits may be paid from 1 to 2 years. The American Legion is opposed to the current 1-year limitation on the payment of accrued benefits.

We recognize that this provision was enacted as a cost saving measure. However, it fails to recognize the fact that it could take VA more than one year to process a veteran's claim or 2 to 3 years or more if it requires appellate action, in this regard, the American Legion concedes that this is an improvement.

However, we believe to grant accrued benefits up to 2 years, even though it would only be a partial remedy to this problem, the American Legion recommends that accrued benefits be paid back to the date the deceased veteran's claim was initially filed.

Mr. Chairman, that concludes my remarks this morning, and I am available for any questions.

Thank you.

[The prepared statement of Mr. Williams appears on p. 72.]

Mr. EVERETT. Thank you, Mr. Williams.

Let me address all of you. Does anyone have any data on the CUE appeals at the board prior to the Smith case? Do we have any information?

Mr. VIOLANTE. Mr. Chairman, we don't have any real figures on that. I don't know if any figures are kept, but from our experience there hasn't been many.

Mr. SCHOELEN. That would reflect our experience as well.

Mr. WILLIAMS. We concur as well, Mr. Chairman.

Mr. EVERETT. Let me thank each of you for your testimony, as we did the last panel. You made your point very clear, and we appreciate your appearance here today.

Let me also add that one of the underlying things we are talking about is the number of days it takes for cases to get somewhere. Obviously, it is going to influence a lot of different things. And I know our next panel, led by Mr. Vogel—we have had conversation on this. We are determined to see it approved. We are getting cooperation from VBA, and frankly, I have no doubt that we are going to whittle that thing down to an acceptable level. I know this: It will not be for the lack of trying. Thank you again.

Mr. WILLIAMS. You are welcome.

Mr. SCHOELEN. Thank you.

Mr. VIOLANTE. Thank you.

Mr. EVERETT. At this time, I would like to call our next panel: Honorable John Vogel, Under Secretary for Benefits for Department of Veterans Affairs; accompanied by Gary Hickman, Director of Compensation and Pension Service; Thomas Lastowka, Director of Philadelphia Regional Office and Insurance Center; and Honorable Charles Cragin, Chairman of the Board of Veterans' Appeals, Department of Veterans Affairs.

STATEMENTS OF HON. R. JOHN VOGEL, UNDER SECRETARY FOR BENEFITS, DEPARTMENT OF VETERANS AFFAIRS; ACCOMPANIED BY GARY HICKMAN, DIRECTOR OF COMPENSATION AND PENSION SERVICE; PAUL KOONS, ASSISTANT DIRECTOR FOR INSURANCE, PHILADELPHIA REGIONAL OFFICE; AND JACK THOMPSON, ASSISTANT GENERAL COUNSEL

Mr. EVERETT. And, before you begin, I want to note that your staff worked very hard at preparing the testimony to meet the submission deadline, of which I am very appreciative. I think it is very unfortunate that the Office of Management and Budget couldn't do its part equally well. I would like to say for the record OMB's delay in the submission of your testimony is not only rude but unprofessional.

Mr. EVERETT. Good morning to each of you. Mr. Vogel, I will appreciate it if you will proceed

STATEMENT OF HON. R. JOHN VOGEL

Mr. VOGEL. Thank you, Mr. Chairman.

Mr. Chairman, with the departure of Mr. Montgomery, I won't be confused by referring to him as Mr. Chairman. I have been calling him that for so many years and clearly——

Mr. EVERETT. I call him Mr. Chairman.

Mr. VOGEL. The Chairman Emeritus at least. Truly the veterans' friend in the United States Congress. We will all miss him. I look forward to continuing to work with him. I submit in retirement he will still be available for counsel.

Mr. Chairman, Mr. Koons is here from Philadelphia with me.

I have a brief statement I would like to read. Chairman Cragin has separate testimony that he will offer as well, and then we will be pleased to answer any questions you or members of the subcommittee may have.

Seven of the eight legislative proposals in this morning's agenda cover a wide range of issues within VA's benefit programs. Two of the bills, H.R. 2155 and H.R. 2156, are VA proposals. The first would restrict the payment of clothing allowance for incarcerated veterans. We create a presumption of permanent and total disability for pensioners in a nursing home who are at least 65 years old.

H.R. 2156, the Veterans' Insurance Reform Act of 1995 includes a number of amendments which in general would improve benefits to veterans and improve the overall financial performance of our insurance programs. We request prompt consideration and enactment of both bills.

H.R. 2157 would authorize VA to terminate the Ready Reservist's SGLI policy when premiums aren't paid. We support that legislation and suggest that the proposal be expanded to include all SGLI insureds.

H.R. 109 would amend title 38 to change the effective dates for terminating certain disability compensation and pension awards due to a veteran's death and for beginning certain death benefit awards. We support the apparent intent of that proposal to provide some financial relief to a veteran's family upon his or her death. The surviving spouse would receive—should receive a pro rata portion of the veteran's compensation award for the month in which he dies. However, we also recognize there is a cost to that proposal which would require offsets, so we pledge to work with the Committee to find the appropriate offsets.

H.R. 368 would add bronchiolo-alveolar carcinoma to the list of diseases presumed to be service-connected for certain radiation-exposed veterans. Under title 38, we currently adjudicate each radiation-exposure compensation claim on its own merits. We recognize that bronchiolo-alveolar carcinoma may result from radiation exposure. Other carcinogenic agents can also cause this type of lung cancer.

In evaluating each lung cancer claim, VA currently considers factors such as estimated radiation dose exposure and smoking history. We believe that this case-by-case approach is preferable to the one creating the blanket presumption.

H.R. 1482 is the most comprehensive of the proposals.

Section 2 would extend certain exemptions from minimum duty requirements to all title 38 benefits rather than just chapters 30 and 37.

Section 3 would establish a pilot program to use contract physicians to conduct disability examination for VA claimants.

Section 5 would increase the allowance for the purchase of an automobile from $5,500 to $6,000.

Section 7 would extend the accrued benefit period from 1 to 2 years.

And section 8 would allow the VA to retain the costs of collection from the amounts collected on debts.

We support all of those proposals.

Section 4 of H.R. 1482 would discontinue compensation benefits on the last day of the month in which certain veterans die. This would apply to the case of a veteran who was rated 100 percent disabled and was receiving compensation at the time of death. In addition, the veteran would have been receiving compensation for a spouse, but the surviving spouse would not be eligible for DIC. Currently, compensation is discontinued in such cases on the last day of the month prior to the veteran's death.

We do not support that proposal. We see no equitable basis for distinguishing between surviving spouses of veterans rated 100 percent to those at slightly lower levels of disability such as 70, 80 or 90 percent.

Section 6 of the bill would extend the ending date of the program under which certain pension recipients may enter a vocational rehabilitation program. Because the participation rate in that program is so low and its costs so high, we do not support the continuation of it.

Under H.R. 1609, the Social Security Administration and VA would be required to share medical—all medical information that relates to the determinations of disability without regard to the need for or benefit of the information. The VA appreciates the intent of this bill to expedite claims processing. However, we already have mechanisms in place to share the information with social security as situations warrant.

Section 1 of the proposal would require us to process and store more than 400,000 sets of records each year that we may very well never use. Section 2 would make SSA's determinations on disabilities controlling on the VA. We cannot support that proposal. Entitlement to VA disability pension is different than entitlement to supplemental security income, and the criteria to make the eligibility determinations is different.

In closing, I would like to extend my appreciation to you, Mr. Chairman, and your staff and the members of the subcommittee for your continuing support for the programs that we proudly administer for America's veterans.

That concludes my remarks. Mr. Hickman and Mr. Koons, Assistant General Counsel Thompson are available to answer any questions you may have, and I would ask now that Chairman Cragin of the board be allowed to make his statement.

Mr. EVERETT. Without objection.

[The prepared statement of Mr. Vogel appears on p. 77.]

STATEMENT OF HON. CHARLES L. CRAGIN, CHAIRMAN, BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS

Mr. CRAGIN. Good morning, Mr. Chairman.

Initially, we would like to take this opportunity to advocate enactment of the draft bill which Secretary Brown recently transmitted to the Speaker, proposing to amend title 38 of the United States Code to revise the procedures for providing claimants and their representatives with copies of BVA decisions and to protect the right of claimants to appoint veterans' service organizations as their representatives in claims before VA.

This legislation would permit the board to provide copies of its appellate decisions to claimants' representatives reasonably and efficiently. It would also permit VA to continue a longstanding method of claimant representation which has proven efficient and beneficial to claimants. As a result of court interpretations of existing statutes, we feel the legislation is vitally necessary to amend those statutes to be able to provide us with the ability to perform these longstanding activities.

I would like to focus the rest of my time on legislative proposal H.R. 1483.

Mr. Chairman, in the background document which you have promulgated, H.R. 1483 is characterized as a bill which would provide the Board of Veterans' Appeals the authority to reverse or revise a decision when it is established that an error was made when authorizing benefits. May I submit, Mr. Chairman, that the Board of Veterans' Appeals already has that statutory authority to reverse or revise when we determine that an error has been made.

The question is whether it will be done through the discretion of the Chairman through a process of reconsideration or whether it will be accorded to a veteran and appellant as a matter of right. It is essentially analogous to an appellant who has already had a trial and there has been a decision on that trial and the appellant then says I want a new trial.

The question is, does the appellant get the right by saying I want a new trial to automatically get a new trial or does he merely request a new trial and make assertions and then there is some discretionary ability on the part of the judge to decide whether that new trial will be accorded? As I have said, under current law, meritorious cases which involve clear and unmistakable error in board decisions are taken care of through a process in the existing law called reconsideration.

It is the Department's position that H.R. 1483 will require the board to consume time and resources on frankly nonmeritorious cases. We should be devoting that time to deciding new cases and reopen claims in a timely manner.

I would suggest that since I have been Chairman in fiscal year 1991 there have been more than 3,600 motions filed for reconsideration. Of those, more than 800 or 22 percent have been granted. That means that I have decided that the case has been asserted to be meritorious and that we would begin the process of reevaluating that case on its merits. And of the cases that we have reconsidered, 77 percent have resulted in allowances or remands, that when we see an error we recognize it and we do something about it.

If H.R. 1483 were the law, the other 2,800 cases in which we decline to reconsider because we did not feel the assertion had merit would automatically be required to be sent to a board member. The board member would have to review that case on the merits and then prepare another decision. So we know at the very least that there would be 2,800 additional cases that would have been adjudicated by the board under a mandatory you get another right to another appeal at the board by alleging clear and unmistakable error that you don't have today.

Secondly, I would suggest that clear and unmistakable error adjudication as a matter of right at the board is not an historic matter. It was only a brief period of time of a couple of years when the Court of Veterans Appeals held that we were required to make decisions on clear and unmistakable error as a matter of right, not as a matter of discretion of the Chairman. That was a jurisprudential aberration. It was a mistake by the Court of Veterans Appeals interpreting a law. And that court was reversed by the Federal Circuit Court of Appeals saying that they misinterpreted the law and the regulations of the Department.

So what this statute is—this proposal is attempting to do is to change the law to put in place a process that was only in place for a brief period of time as a result of the court's actions.

Mr. Chairman, I would be happy to answer any questions which you have with respect to this or any other matters.

[The prepared statement of Mr. Cragin appears on p. 108.]

Mr. EVERETT. Thank you.

Clearly, the clear and unmistakable error is perhaps the most contentious issue that we have discussed here today. My opening remarks quoted several figures from your statement on the impact on the CUE. What data do you have that supports these figures other than what you just said a moment ago?

Mr. CRAGIN. Well, it is very difficult, Mr. Chairman, to develop data for a process in which we have never at the board undergone it except for that brief period of time which I indicated, and during that period the Department was appealing the decision of the Court of Veterans Appeals, so we stayed adjudication on those issues.

Clearly, in a process of discretion we have had 3,600 motions filed since fiscal year 1991 when people knew that it was discretionary. If people know that it is a matter of right that all they have to do is assert there was clear and unmistakable error in a previous board final decision and that forces the board to immediately reopen that case and readjudicate it on the merits, I would suggest to you that more people will take advantage of that opportunity. There is no disincentive not to do that.

Secondly, this legislation, as presently drafted, goes all the way back to the first decision of the Board of Veterans' Appeals. If a veteran still living had a decision made by the Board in 1933 and came forward today, he could assert that there was clear and unmistakable error in that Board decision and we would be required to go back and evaluate that decision today based on the evidence of record in 1933 and the laws and regulations in effect in 1933. Every one of those cases will require phenomenal amounts of work because of the historical research that will be necessary to ensure

that we are applying only the law that was in existence at that point in time.

Mr. Chairman, what I have tried to do is make our best estimate of the numbers. I would submit to you, though, in testimony to this committee in past occasions we have represented to the committee what we consider our best numbers to be on the basis of whatever information we have available; and, generally speaking, we have been correct.

Mr. EVERETT. You might want to visit with some of the VSOs on those numbers because, obviously, you know they feel much differently about it.

Let me ask this. Is the cost recovery system that would be established under H.R. 1482, section 8, similar to the medical care cost recovery system currently in place in the VA? Is that similar?

Mr. VOGEL. Yes. it is, Mr. Chairman, very similar. The Medical Care Cost Recovery, defrays the cost of collection from the amounts collected. And in the case of debts collected by the Veterans Benefits Administration, we pay for that cost out of the appropriation.

We think it would be a good incentive for our people to be able to defray the costs of the collection. We have about 102, 103 people that very effectively do the debt collection and would like to be able to defray the costs out of what they collect.

Mr. EVERETT. Let me just for a moment recognize the counsel from the Minority for a question that he wanted to ask.

Mr. RYAN. Mr. Vogel, if I understood your written statement, it is that the Department is in favor of section 8 of H.R. 1482, is that correct? That is the debt collection provision that the Chairman just referred to.

Mr. VOGEL. No, we are not.

Mr. RYAN. But——

Mr. VOGEL. You can see the benefit. You can see the benefit that could accrue to the agency if we were allowed to do similarly to what the Veterans Health Administration does in the collection of third party payee debt attendant to medical care.

Mr. RYAN. So we misheard your statement that you were in favor of that?

Mr. VOGEL. Yes.

Mr. RYAN. Thank you.

Mr. EVERETT. You mentioned this, but H.R. 1609 now requires VA and SSA to share information. Do you need that authority or need authority beyond the current section 5106?

Mr. VOGEL. No, we don't, Mr. Chairman.

Mr. EVERETT. How many Board members do you have today, Mr. Cragin?

Mr. CRAGIN. Today I have 58, Mr. Chairman.

Mr. EVERETT. Do you plan to appoint any additional Board members?

Mr. CRAGIN. We are going to be evaluating that very soon. I have three Board members who have announced their resignation, and they are accepting positions at other locations in the government as administrative law judges.

What—we have just gone into a realignment of the Board on October 1st, and so we are going to take a look at that process and see its immediate results. What we want to make sure, Mr. Chair-

man is that we have a steady flow of work at each level of this decision preparation process, and I don't want to appoint any more Board members from our attorney ranks until I am absolutely sure that that is where the constriction is and we need additional resources at that level.

Mr. EVERETT. What is the current backlog at the Board level?

Mr. CRAGIN. We are currently today actively considering cases which were docketed in December of 1993. We have, between the number of cases physically in our possession at the Board and the number of cases that are out in the field at regional offices, having been certified for appeal, approximately 57,000 cases. There are additional cases in which nines have been filed, a notice of appeal, which have been placed on our docket but they are not yet certified as ready for final adjudication.

Mr. EVERETT. Do the math for me real quick. How many days are we talking about?

Mr. CRAGIN. We are currently talking about 740 days, Mr. Chairman. We just finished our fiscal year. And while our final figures are not complete, we had indicated 18 months ago that we projected we would be able to decide 28,000 cases in fiscal year 1995; and we are pretty much right on the money at 28,000 cases, which was a 27 percent improvement over the preceding fiscal year.

Mr. EVERETT. Let me ask you, on H.R. 109, your testimony supports that. Are you looking at ways to find offsets to pay for that change?

Mr. VOGEL. Mr. Chairman, we haven't identified anything yet. We would be pleased to work with you and the committee to find it. We had a bit of an about-face on that position. The Secretary decided that when he was being briefed in preparation for this hearing. He was indeed in favor of the bill, he understands the need to find an offset, and we will work with the committee to find it.

Mr. EVERETT. As usual, I want to thank you for coming in. You have been straightforward, the testimony is well received, and it is certainly good to see you again. I know we will be visiting in the near future.

That does complete our witness list, and I would like to thank all of the witnesses for their time. Over the coming weeks the Members and the staffs will be working through a legislative package to reflect many of the issues brought here today. I certainly look forward to working with the Members to craft legislation that will treat veterans fairly and improve the system.

The hearing is adjourned.

Mr. VOGEL. Thank you, Mr. Chairman.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned.]

APPENDIX

Statement of Rep. Christopher Smith (R-NJ)
House Veterans' Affairs Subcommittee on
Compensation, Pension, Insurance, & Memorial Affairs

Thursday, October 12, 1995

Mr. Chairman, I appreciate the opportunity to appear before this panel today and testify on behalf of H.R. 368. This important legislation would add bronchiolo-alveolar pulmonary carcinoma to the list of cancers that are presumed to be service-connected for veterans who were exposed to radiation, in accordance with the provisions of Public Law 100-321.

While the number of people who would be affected by this measure is small, I believe that simple justice and compassion oblige us to provide relief for the victims.

Mr. Chairman, in 1986 -- almost ten years ago -- I became involved with the case of Joan McCarthy, a constituent from New Jersey. Joan has for many years worked to locate other atomic veterans and their widows, and she founded the New Jersey Association of Atomic Veterans.

Joan's husband Tom was a participant in Operation Wigwam, a nuclear test in May of 1955 which involved an underwater detonation of a 30-kiloton plutonium bomb in the Pacific Ocean, about 500 miles southwest of San Diego.

Tom served as a navigator on the *U.S.S. McKinley*, one of the ships assigned to observe the Operation Wigwam test. The detonation of the nuclear weapon broke the surface of the water, creating a giant wave and bathing the area with a radioactive mist. Government reports indicate that the entire test area was awash with the airborne products of the detonation. The spray from the explosion was described in the official government reports as an "insidious hazard which turned into an invisible radioactive aerosol." McCarthy spent four days in this environment while serving aboard the *McKinley*.

In April of 1981 -- at the age of 44 -- Thomas McCarthy died, and the cause of death was a very rare form of lung cancer, bronchiolo-alveolar pulmonary carcinoma. This illness is a non-smoking related cancer -- which is remarkable given the estimate that about 97 percent of all lung cancer is caused by smoking.

But while smoking can be eliminated as a cause, it has been well-documented that exposure to ionizing radiation can cause this lethal cancer. The National Research Council cited Department of Energy studies in the BEIR V reports, stating that "Bronchiolo-Alveolar Carcinoma is the most common cause of delayed death from inhaled plutonium 239." The BEIR V report notes that this cancer is caused by the inhalation and deposition of alpha-emitting plutonium particles.

Mr. Chairman, the Department of Veterans Affairs has also acknowledged the clear linkage between this ailment and radiation exposure. In May of last year, Secretary Brown wrote to then-Chairman Sonny Montgomery of the Veterans Affairs Committee regarding this issues. Secretary Brown stated as follows:

> The Veterans' Advisory Committee on Environmental Hazards considered the issue of the radiogenicity of bronchiolo-alveolar carcinoma and advised me that, in their opinion, this form of lung cancer may be associated with exposure to ionizing radiation. They commented that the association of exposure to ionizing radiation and lung cancer *has been strengthened* by such recent evidence as the 1988 report of the United Nations Scientific Committee on the Effects of Atomic Radiation, the 1990 report of the National Academy of Sciences' Committee on the Biological Effects of Ionizing Radiations (the BEIR V Report), and the 1991 report of the International Committee on Radiation Protection.

> The Advisory Committee went on to state that when it had recommended that lung cancer be accepted as a radiogenic cancer, it was intended to include most forms of lung cancer, *including bronchio-alveolar carcinoma*. [emphasis added]

Notwithstanding this evidence, however, the VA has repeatedly denied Joan McCarthy's claims for survivor's benefits. Unfortunately, Joan is not alone in being denied the survivor's benefits that she deserves. Consider the case of Gwen Poitras, who lives in Pasco County, Florida. Gwen's husband, Robert Poitras, was in command of the *U.S.S. Takelma*, one of the ships that observed the nuclear tests of Operation Hardtack in the South Pacific.

Just like Thomas McCarthy, Robert Poitras died of bronchiolo-alveolar pulmonary carcinoma. And just like Joan McCarthy, Robert's widow was denied the dependency and indemnity compensation which she applied for after her husband's death.

The VA has claimed in the past that adjudication on a case-by-case basis is the appropriate means of resolving these claims. Unfortunately, the practical experiences of claimants reveal deep flaws in the process used by the VA. A key problem involves the reliance on radiation dose reconstructions that are based on information that is decades old.

Problems with the individual adjudication process were summed up in the recent report of the Advisory Committee on Human Radiation Experiments, which was presented only last week to the President. The panel urged the Human Radiation Interagency Working Group, in conjunction with Congress, to address some of these concerns.

For example, the Advisory Committee noted that there are many concerns with the questionable condition of radiation exposure records that are maintained by the government. It was also noted that the appeals process is especially cumbersome: those who receive an initial denial of their claim are issued a form letter from the VA stating that it will take a minimum of 24 months -- at least two years! -- to resolve the matter.

Mr. Chairman, I believe the widows of our servicemen who participated in these nuclear tests deserve better than this. They should not be required to meet an impossible standard of proof in order to receive DIC benefits, which CBO estimates will cost the government, on average, a mere $10 thousand a year for each affected widow.

I strongly believe that H.R. 368 should be approved on its merits, as it addresses this problem in a manner that is practical, compassionate, and just.

However, I fully understand that Members of the Subcommittee will want to take into consideration the costs of this legislation, since we are operating in an environment of fiscal restraint. I am happy to report that the initial scoring of my legislation by the Congressional Budget Office (CBO) shows nothing more than an asterisk for the next five fiscal years, meaning that this legislation will cost the government less than $500,000 annually.

Using past claims in radiation-related cases as a model, CBO estimates that in Fiscal Year 1996 my legislation is likely to generate all of two (2) compensation cases and about eight (8) DIC cases. The average benefit for a compensation case is $26,000 annually, and it is about $10,000 annually for a DIC case. Run some quick math and it becomes clear that this provision will hardly constitute a burden on the VA's budget. In this case, doing the right thing will not impose burdens that the government cannot meet.

I urge my colleagues to review the evidence and, at the appropriate time, favorably report H.R. 368. Mr. Chairman, I thank you for this opportunity to testify on this important matter.

THE HONORABLE MICHAEL BILIRAKIS

THE SUBCOMMITTEE ON COMPENSATION, PENSION, INSURANCE AND MEMORIAL AFFAIRS

OCTOBER 12, 1995

THANK YOU, MR. CHAIRMAN.

I APPRECIATE THE OPPORTUNITY TO TESTIFY BEFORE THE SUBCOMMITTEE ON BEHALF OF THE FAMILIES OF VETERANS WHO ARE SUBJECT TO A PRACTICE I FIND UNFAIR.

UNDER CURRENT LAW, IF A VETERAN DIES BEFORE THE END OF THE MONTH, EVEN IF IT IS ONLY BY A FEW HOURS, THE SURVIVING SPOUSE WILL HAVE THAT MONTH'S DISABILITY COMPENSATION REVOKED. CLEARLY THIS POLICY CREATES A HUGE FINANCIAL BURDEN FOR A RECENT WIDOW, ESPECIALLY IF SHE IS NOT ELIGIBLE FOR DEPENDENCY AND INDEMNITY COMPENSATION.

I FIND IT APPALLING THAT THE SPOUSE OF ONE OF OUR NATION'S VETERANS WOULD BE PENALIZED. DURING HER TIME OF GRIEF, SHE IS FORCED TO RETURN HER HUSBAND'S MONTHLY COMPENSATION, THE MONEY SHE SPENT ON HIS LIVING EXPENSES.

THEREFORE, I HAVE INTRODUCED LEGISLATION WHICH WOULD PRO-RATE A VETERAN'S LAST COMPENSATION CHECK, PROVIDING COMPENSATION EARNED FOR EACH DAY THE VETERAN LIVED IN THAT FINAL MONTH. FOR EXAMPLE, IF THE VETERAN LIVES UNTIL THE FIFTEENTH, HIS SPOUSE WILL GET HIS COMPENSATION FROM THE FIRST THROUGH THE FIFTEENTH.

THIS LEGISLATION, H.R. 109, WILL PROTECT THE SURVIVING SPOUSE WHO MUST PAY THE MONTHLY BILLS REGARDLESS OF WHETHER THE VA PAYMENT IS MADE. A NEW WIDOW SHOULD NOT HAVE TO RETURN A CHECK ALREADY ISSUED OR DO WITHOUT BECAUSE HER HUSBAND DIED BEFORE THE END OF THE MONTH.

I FIRST BECAME OF AWARE THAT SURVIVING SPOUSES ARE FORCED TO RETURN THE VETERAN'S COMPENSATION CHECK WHEN I SERVED AS THE RANKING MINORITY MEMBER OF THIS SUBCOMMITTEE DURING THE 103RD CONGRESS. A GOOD FRIEND OF MINE AND FORMER COLLEAGUE OF OURS, TOM LEWIS, INTRODUCED SIMILAR LEGISLATION ON THIS ISSUE IN THE PREVIOUS CONGRESS.

LAST YEAR, TOM WORKED VERY CLOSELY WITH OUR COMMITTEE ON THIS ISSUE, AND THE HOUSE OF REPRESENTATIVES APPROVED A MODIFIED VERSION OF HIS LEGISLATION AS PART OF H.R 4088, THE VETERANS BENEFITS ACT.

THE PROVISION AGREED UPON IN H.R. 4088 GRANTS A FULL MONTH'S BENEFIT TO SPOUSES OF TOTALLY DISABLED VETERANS WHO ARE NOT ELIGIBLE FOR DEPENDENCY AND INDEMNITY COMPENSATION. THE CONGRESSIONAL BUDGET OFFICE ESTIMATED THAT THE MEASURE WOULD ONLY COST $2 MILLION PER YEAR. HOWEVER, THIS PROVISION WAS ULTIMATELY DROPPED IN CONFERENCE WITH THE SENATE.

TOM RETIRED AT THE END OF THE 103RD CONGRESS, AND I FEEL IT IS IMPORTANT TO CONTINUE HIS EFFORTS ON THIS ISSUE.

MY BILL HAS RECEIVED WIDESPREAD BIPARTISAN SUPPORT IN THE 104TH CONGRESS. CURRENTLY, H.R. 109 HAS 100 COSPONSORS, INCLUDING SIX MEMBERS OF THE VETERANS AFFAIRS COMMITTEE.

THE CONGRESSIONAL BUDGET OFFICE ESTIMATES THAT IMPLEMENTING H.R. 109 WOULD COST APPROXIMATELY $11 MILLION PER YEAR. I REALIZE THAT IN THESE TIMES OF FISCAL AUSTERITY THIS IS NOT A SMALL AMOUNT OF MONEY. I AM CERTAINLY WILLING TO WORK WITH THE COMMITTEE TO FIND AFFORDABLE ALTERNATIVES.

AT THE VERY LEAST, I BELIEVE WE HAVE A RESPONSIBILITY TO ASSIST THOSE WIDOWS OF TOTALLY DISABLED VETERANS WHO DO NOT QUALIFY FOR DEPENDENCY AND INDEMNITY COMPENSATION. I WOULD HOPE THE COMMITTEE WOULD CONSIDER A PROVISION SIMILAR TO ONE WHICH WAS INCLUDED IN H.R. 4088. THIS IS A VERY SMALL SACRIFICE FOR THE SPOUSE OF A VETERAN WHO MIGHT BE WITHOUT INCOME FOR A MONTH BECAUSE HER HUSBAND DIED A FEW HOURS TOO SOON.

MR. CHAIRMAN, AS THE SUBCOMMITTEE REVIEWS LEGISLATION AFFECTING VETERANS BENEFIT PROGRAMS, I URGE YOU TO SERIOUSLY CONSIDER HOW GRATEFUL VETERANS WOULD BE, KNOWING THEIR SPOUSES WILL RECEIVE FAIR TREATMENT IN THE DIFFICULT MONTHS FOLLOWING THEIR DEATH. I WILL CERTAINLY WORK WITH THE COMMITTEE TO MAKE ANY IMPROVEMENTS TO H.R. 109 IF THEY ARE NEEDED.

ONCE AGAIN, THANK YOU FOR ALLOWING ME THE OPPORTUNITY TO TESTIFY AND I AM HAPPY TO ANSWER ANY QUESTIONS YOU AND THE OTHER MEMBERS MAY HAVE REGARDING THIS ISSUE.

Rep. Jerry Weller

Veteran's Subcommittee on Compensation, Pension, Insurance and Memorial Affairs

Opening Statement

October 12, 1995

I want to add my appreciation to that expressed by my colleagues, to veterans organizations in general, and in particular to those represented here before us today, for their service, dedication and hard work on behalf of America's veterans.

I also want to express my appreciation for the leadership and the hard work which my colleagues have put forth on behalf of Americas veterans. Your expertise and interest in this area is invaluable. I look forward to working with you in resolving the issues before us today.

I'm sure we will all agree that it can never be said often enough that we owe all veterans more than a debt of gratitude, but also our best efforts to support veterans in need. That is why I am especially pleased to see that today, the day after Congress celebrated the fiftieth anniversary of World War II by holding a Joint Session of Congress, we are considering legislation that will not only benefit veterans, but their families as well.

To understand the sacrifices of this nation's veterans, we need only look at the more than 1 million of America's finest citizen soldiers who have died defending the personal and economic freedoms enjoyed throughout this country and most of the world, or recognize the more than 1 ½ million American's who have returned home with service-related disabilities.

I think we all recognize that we would not be sitting here today in this great legislative body, working toward a better tomorrow for all Americans, without the sacrifices these men and all veterans like them have made.

Joint Statement of

Lieutenant General Samuel E. Ebbesen
Deputy Assistant Secretary of Defense
(Force Management Policy)
(Military Personnel Policy)

and

Mr. Al H. Bemis
Deputy Assistant Secretary of Defense
(Reserve Affairs)
(Manpower and Personnel)

before the

Subcommittee on Compensation, Pension, Insurance, and Memorial Affairs

of the

House Committee on Veterans' Affairs

October 12, 1995

NOT FOR PUBLIC RELEASE UNTIL CLEARED BY
THE HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON COMPENSATION,
PENSION, INSURANCE, AND MEMORIAL AFFAIRS

Thank you for the opportunity to appear before this distinguished committee today to discuss the Servicemen's Group Life Insurance (SGLI). The 30-year history of this program is laudable, and much of the credit for its success lies with this committee. We in the Department of Defense (DoD) are also most appreciative of those who have managed this program so well for so long in the Department of Veterans Affairs (VA) and in Prudential's Office of Servicemen's Group Life Insurance (OSGLI). The program today is being operated in a most simple and effective manner, with attractive premiums and top notch service.

The proposals on which we have been asked to comment today can make the program stronger, particularly for Reservists, while retaining the program's simplicity and effectiveness. The Department supports both H.R. 2156 and H.R. 2157.

First, with respect to H.R. 2156. We are pleased to support a renaming from Servicemen's to Servicemember's to reflect the strong contribution of women now serving in all of the Uniformed Services. This bill would also merge the Retired Reserve SGLI program with the recently improved Veteran's Group Life Insurance (VGLI). We recognize that the VGLI program has a rate structure that is more expensive than the rates for the current Retired Reserve SGLI. However, we also know that the VA has already determined that those rates must be increased next year to equal those of the VGLI. Consequently, this bill would help offset the adverse impact of the rate increase by allowing the Retired reservist to retain insurance past age 60, where the Retired Reserve SGLI now ends. Further,

we are hopeful that under a combined program with broader participation, future premiums might be improved for everyone.

Also, this bill would, for the first time, provide an insurance program for the Reservist who separates short of retirement. We believe that this is appropriate as it will extend to these veterans the same insurance options that are extended to those separating from active service. We are working with the VA and OSGLI to identify a means of giving OSGLI timely information to notify eligible reservists of their VGLI options.

The provisions to allow conversion to commercial insurance at any time are appropriate steps towards effectiveness and simplicity, allowing the member full flexibility to pursue personal preferences.

The second bill, H.R. 2157, pertains to persons who are eligible for SGLI coverage as drilling Reservists, but who are in a nonpay status, and who, therefore, must remit their SGLI premiums directly to the Service. The Service is obligated to make a timely payment of this premium to the VA, regardless of the member's timeliness in making the payment to the Service. Some members abuse the situation by ignoring their premium obligation for extended periods. The DoD Inspector General cited this as a management problem. H.R. 2157 would allow us to limit this premium debt problem by terminating the member's insurance.

As you requested, we will address the issue of modifying automatic coverage under the SGLI program. Currently, coverage is automatic at

$100,000 with the option to elect any $10,000 increment up to $200,000. Instead, we would prefer to enroll the member automatically at $200,000 and allow the member to elect less if desired. We believe this would further enhance the program's simplicity and effectiveness with the following advantages: First, any death before completion of the required paperwork would pay the maximum benefit to the surviving beneficiary. When death occurs in transit to the first duty station or shortly after arrival, it is always tragic. Such tragedy need not be compounded by paying less than maximum SGLI. Second, automatic maximum coverage would assure that the survivors never receive less than the maximum except through clear election of a lower level of coverage. True, anyone can elect the maximum if desired, but many people are hard to move off the starting block. Yet tragically, some survivors question payments of benefits at less than the maximum level. And, yes, perhaps this will put some junior enlisted members at a higher level of coverage than they need. However, if it really matters to them, they will change the election. If they aren't inclined to do so and don't change the election, we would prefer the maximum to apply, and frankly, so would most survivors. Automatic maximum with the option for lower coverage worked well for many years. We have found the going a bit bumpier with an automatic coverage at less than the maximum. Certainly the current program is workable and generally effective. We believe it would be even more effective with an automatic maximum provision.

You also asked that we testify about the Services' counseling programs for SGLI. Each Service determines how to best inform their members of the options available. There is no "hard sell" for members to elect a given level of

coverage. Each individual elects the level of coverage appropriate to his or her situation. Insurance is a very personal decision. If anything, the Services do try to ensure each member understands the implications of declining coverage altogether. This emphasis underscores the election form itself which requires that a declination of coverage be made in the member's own handwriting with the words....."I want no insurance."

Our primary goal is that every member is informed of the options available. Nevertheless, at DoD's request, OSGLI has developed a video that will soon be available for use as a standard counseling tool. It will help members consider the factors that influence the decision on how much insurance is appropriate. We believe this video will help facilitate the right choice by each member.

Thank you for the opportunity to testify and for your consideration. Again, we are most appreciative of this Committee and those who manage the SGLI and VGLI programs.

Non Commissioned Officers Association of the United States of America

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STATEMENT OF

LARRY D. RHEA

DEPUTY DIRECTOR OF LEGISLATIVE AFFAIRS

BEFORE THE

SUBCOMMITTEE ON

COMPENSATION, PENSION, INSURANCE AND MEMORIAL AFFAIRS

COMMITTEE ON VETERANS AFFAIRS

U. S. HOUSE OF REPRESENTATIVES

ON

PENDING VETERANS LEGISLATIVE PROPOSALS

OCTOBER 12,1995

Chartered by the United States Congress

The Non Commissioned Officers Association of the USA (NCOA) appreciates the opportunity to appear and present its views on the various legislation being considered by the Subcommittee. The Association thanks the distinguished Chairman and trusts that our comments pertaining to each of the bills will be useful to the Subcommittee members.

H.R. 109

The legislative changes proposed by H.R. 109 would: (1) change the effective date for discontinuance of veterans compensation and pension to the date on which the recipient dies, rather than the last day of the preceding month; and, (2) set the effective date for award of dependency and indemnity compensation as the day following the date on which the veteran's death occurred if application is received within one year from the date of death.

NCOA fully supports both provisions of H.R. 109.

H.R. 368

H.R. 368 proposes to add bronchiolo-alveolar carcinoma to the list of diseases presumed to be service-connected for certain radiation-exposed veterans.

NCOA has no objection to H.R. 368.

H.R. 1482

VETERANS PROGRAMS AMENDMENTS OF 1995

The Veterans Programs Amendments of 1995, introduced by Representative Evans, contains several measures designed to improve veterans benefits and the delivery of such benefits to veterans and their survivors. The provisions of H.R. 1482 that are designed to encourage better services to veterans, increase benefits, or extend existing programs include:

> Permitting certain veterans who are discharged prior to completing two years of service to qualify for veterans benefits.

> Allowing the Veterans Benefits Administration to contract with private physicians to perform disability examinations.

> Permitting the surviving spouse of a veteran who was totally disabled at the time of death to retain the check sent to the veteran in the month following his death.

> Increasing from $5,500 to $6,000 the allowance that is payable to certain severely disabled veterans to assist them in purchasing an automobile.

> Permitting the VA to pay accrued benefits for up to two years to the survivors of a disabled veteran.

> Extending the vocational training program for certain veterans with permanent disabilities.

> Allowing VA to deduct the costs of collecting benefit overpayments and debts from the amount collected.

NCOA supports the various amendments proposed in H.R. 1482 with two exceptions. First, NCOA prefers the provision of H.R. 109 which logically provides compensation to the day the veteran dies and survivor benefits from that day forward. If the committee decides not to advance H.R. 109 then NCOA would prefer that all surviving spouses be allowed to retain the veteran's last compensation check since survivor benefit payments are not effective during that same month. Second, the Association believes, plain and simply, that accrued benefits should be paid in full. **Placing a two-year limit on such payments ignores the realities confronting veterans - realities that are well-known to the sponsor and co-sponsors of the bill, as well as all members of the Full Committee. We have to ask ourselves the question: Why**

should veterans, in effect, be punished for an appeals process that continues to fall further behind on processing incoming appeals while the backlog continues to grow?

H.R. 1483

H.R. 1483 proposes to amend Chapter 51 of Title 38, United States Code, to allow revision of veterans benefits decisions involving error. Under the proposed legislation, a claims decision by the Secretary of Veterans Affairs or a decision by the Board of Veterans Appeal would be subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision would be required to be reversed or revised.

In granting benefits, H.R. 1483 would allow a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error to have the same effect as if the decision had been made on the date of the prior decision.

NCOA has advocated the two central features addressed by this legislation for many years. It is the fair and right thing to do. Further, NCOA believes it is proper to apply the standard to both the adjudicative decisions of the Department of Veterans Affairs and to the decisions of the Board of Veterans Appeal.

NCOA wholeheartedly supports H.R. 1483.

H.R. 1609

H.R. 1609, introduced by Representative Waters (CA), would allow sharing of medical information on a veteran between the Social Security Administration and Department of Veterans Affairs. Under the bill and subject to the consent of the veteran involved, medical information used by the SSA to determine eligibility for supplemental security income may

be transferred to the VA. Such information shall be accepted by the VA in determining the existence and degree of a disability under laws applicable to VA. A determination by SSA that a disability does not exist may not be used by the VA - in such cases, the VA must conduct its own evaluation and adjudication.

NCOA is not opposed to Representative Waters' proposal although, it is only fair to say we are not overly excited about it either. The Association is concerned that the sharing of such information could dilute the service-connection standards of VA even though the legislation addresses this issue. Nonetheless, it is a concern of NCOA.

H.R. 1809

The American Battle Monuments Commission would be authorized under H.R. 1809 to enter into arrangements with the sponsors of a memorial to provide for the repair or long-term maintenance of the memorial. Further, the legislation would establish a fund in the U.S. Treasury to be available to the Commission for that purpose.

NCOA salutes Mr. Stump, the distinguished Chairman of the House Veterans Affairs Committee, and Mr. Montgomery as the principal sponsors of this legislation. NCOA supports H.R. 1809.

H.R. 2155

VETERANS BENEFIT REFORM ACT OF 1995

Two amendments are proposed by H.R. 2155, the Veterans Benefit Reform Act of 1995. The proposed legislation would reduce on a prorated basis the clothing allowance payable to veterans who are incarcerated for a period of more than 60 days when clothing is furnished without charge. Further, H.R. 2155 would confer permanent and total disability status to veterans over age 65 who are nursing home patients.

NCOA has no objections to either of the two provisions in H.R. 2155.

H.R. 2156

VETERANS' INSURANCE REFORM ACT OF 1995

The Veterans' Insurance Reform Act of 1995, legislation introduced by request of the Department of Veterans Affairs, seeks to: rename Servicemen's Group Life Insurance as the Servicemember's Group Life Insurance Program; merge the Retired Reservists' SGLI program into the Veterans' Group Life Insurance Program; extend VGLI coverage to members of the Ready Reserve who retire with less than 20 years of service; permit conversion of VGLI to an individual commercial policy at any time; and, permit conversion of SGLI to an individually purchased commercial policy upon separation from military service.

NCOA has no objection to the cosmetic change to rename Servicemen's Group Life Insurance since the program itself remains unchanged. Similarly, the Association has no objections to the other amendments contained in the bill. NCOA fully supports the provision that would extend VGLI coverage to members of the Ready Reserve who retire with less than 20 years of service.

H.R. 2157

By request of the Department of Veterans Affairs, H.R. 2157 would authorize the termination of Servicemen's (Servicemember's) Group Life Insurance when premiums are not paid. Such termination would be effective 60 days after the date of written notification to the individual concerned but may be vacated if, before the effective date of termination, the individual pays all amounts past due.

NCOA interposes no objections to H.R. 2157. The Association does believe, however, that the language in the bill which reads - "and demonstrates to the satisfaction of the Secretary concerned that the failure to make timely remittances was justifiable" - is overly subjective

and unnecessary. The Association would prefer that the termination shall be vacated if past due amounts are remitted before the effective date of termination in the required written notification. Requiring the veteran to justify late payment and then engaging someone else in a review process to determine if reinstatement is warranted is a needless administrative burden on all parties.

Thank you.

STATEMENT OF

JAMES N. MAGILL, DIRECTOR
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON COMPENSATION, PENSION, INSURANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

VARIOUS LEGISLATIVE PROPOSALS

WASHINGTON, D.C. OCTOBER 12, 1995

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the 2.2 million men and women of the Veterans of Foreign Wars of the United States, I wish to commend you for holding this hearing on several bills that will liberalize and expand benefits provided to our nation's veterans. I would also like at this time to commend you and the members of the subcommittee for your continued support of those entitlements and benefits our nation's veterans have earned.

H.R. 109, introduced by Congressman Michael Bilirakis, amends title 38, U.S. Code, to provide that the effective date for discontinuance of compensation and pension paid by the Secretary of Veterans Affairs shall be the date on which the recipient dies, rather than the last day of the preceding month, in the case of a veteran with a surviving spouse. H.R. 109, is a compassionate liberalization of existing law. The VFW supports H.R. 109 and urges its swift passage.

H.R. 368, introduced by Mr. Smith of New Jersey, amends title 38, U.S. Code, to add bronchiolo-alveolar carcinoma to the list of diseases presumed to be service-connected for certain radiation-exposed veterans. As scientific evidence surfaces linking specific illnesses with direct military experience, the VFW believes the federal government has an obligation to treat and compensate those affected veterans. Therefore, the VFW supports the enactment of H.R. 368.

H.R. 1482, introduced by Congressmen Evans, Montgomery, Mascara, Filner, and Gutierrez, amends title 38, U.S. Code, to improve and extend various veterans programs and benefits specifically section 3 which establishes a pilot program to accept private physician's statements with respect to the filing of disability compensation claims. The bill also expands the effective date of discontinuance of compensation to the last day of the month in which the death occurred if the surviving spouse of the veteran is not eligible for dependency and indemnity compensation; increases the automobile allowance from $5,500 to $6,000; extends vocational rehabilitation for pension recipients from December 31, 1995 to December 31, 1997; increases the period for which accrued benefits may be payable from one year to two years; and, allows the Secretary of Veterans Affairs to retain from any amount recovered by the Secretary of an indebtedness owed to the United States a sum equivalent to the costs incurred by the Secretary in recovering such amount. The VFW supports the provisions of H.R. 1482.

H.R. 1483, introduced by Congressmen Evans, Mascara, Filner, and Gutierrez, amends title 38, U.S. Code, to allow revision of veterans benefits decisions based on clear and unmistakable error by the Secretary or the Board of Veterans Appeals. It only makes sense that if a clear and unmistakable error was made in reaching a decision to deny a veteran's claim, the

law should allow that decision to be reverse. Therefore, the VFW supports the enactment of H.R. 1483.

H.R. 1609, introduced by Ms. Waters, amends the Social Security Act and title 38, U.S. Code, to provide for sharing of medical information relating to determinations of disability between the Social Security Administration and Department of Veterans Affairs. While the VFW supports the exchange of medical information between Social Security and VA, we oppose the provision in the bill which allows the Commissioner of Social Security to make determinations of veterans' eligibility for benefits under laws administered by the Secretary of Veterans Affairs. We strongly recommend that this provision be struck from the bill.

H.R. 1809, introduced by Mr. Stump and Mr. Montgomery, authorizes the American Battle Monuments Commission to enter into arrangements for the repair and long-term maintenance of war memorials for which the Commission assumes responsibility. The VFW has no objection to the enactment of H.R. 1809.

H.R. 2155, introduced by Mr. Stump and Mr. Montgomery (both by request), amends title 38, U.S. Code, to restrict payment, in the case of incarcerated veterans, of the clothing allowance otherwise payable to certain disabled veterans and to create for pension purposes a presumption of permanent and total disability for veterans over age 65 who are patients in a nursing home. Inasmuch as clothing for incarcerated veterans is provided by a federal, state, or local penal institution without charge by that institution, the VFW believes this provision of H.R. 2155 is warranted. The VFW also supports the presumption of permanent and total disability for veterans over the age of 65 who are nursing home patients. Therefore, the VFW supports the enactment of H.R. 2155.

H.R. 2156, again introduced by Mr. Stump and Mr. Montgomery (both by request), amends title 38, U.S. Code, to change the name of the Servicemen's Group Life Insurance program to Servicemembers' Group Life Insurance, to merge the Retired Reservists' Servicemembers' Group Life Insurance program into the Veterans' Group Life Insurance program, to extend Veterans' Group Life Insurance coverage to members of the Ready Reserve of a uniformed service who retire with less than 20 years of service, to permit an insured to convert a Veterans' Group Life Insurance policy to an individual policy of life insurance with a commercial insurance company at any time, and to permit an insured to convert a Servicemembers' Group Life Insurance policy to an individual policy of life insurance with a commercial company upon separation from service. The VFW views the provisions of H.R 2156 as both technical in nature and a liberalization of the the veterans' life insurance programs that will be beneficial to veterans and enjoys our support.

The final bill under consideration today, is ***H.R. 2157***, introduced by Mr. Stump and Mr. Montgomery (by request), amends title 38, U.S. Code, to authorize termination of Servicemen's Group Life Insurance when premiums are not paid. H.R. 2157 provides that if an individual who is required to make a direct remittance of insurance premiums to the Secretary of Veterans Affairs fails to make the required remittance within 60 days of the date on which the remittance is due, that individual's insurance shall be terminated by the Secretary. Notification to the individual will be made in writing and will be effective 60 days after such notification. The Secretary may revoke the notification of termination of insurance if the individual remits all amounts past due and demonstrates to the satisfaction of the Secretary that the failure to make the timely remittances were justifiable. The VFW has no objection to H.R. 2157.

This concludes my statement. I will be happy to respond to any questions you may have.

PARALYZED VETERANS
OF AMERICA
Chartered by the Congress
of the United States

STATEMENT OF

RUSSELL W. MANK, NATIONAL LEGISLATIVE DIRECTOR

PARALYZED VETERANS OF AMERICA

BEFORE THE

SUBCOMMITTEE ON

COMPENSATION, PENSION, INSURANCE

AND MEMORIAL AFFAIRS

OF THE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

TO EXAMINE

LEGISLATIVE PROPOSALS

OCTOBER 12, 1995

Mr. Chairman, and members of the Subcommittee, on behalf of Paralyzed Veterans of America (PVA), I wish to thank you for this opportunity to present testimony today. PVA will address the following legislative proposals: H.R. 109, H.R. 368, H.R. 1482, H.R. 1483, H.R. 1609, H.R. 1809, H.R. 2155, H.R. 2156, and H.R. 2157.

Mr. Chairman, both H.R. 109 and Section 4 of H.R. 1482 address termination of benefits on the death of the veteran. Presently, veterans' benefits are terminated at the end of the month preceding the date of the veteran's death. The legislative proposals extend the termination date to the date of the veteran's death. While this is an improvement over the current law, we recommend extending benefits to the end of the month in which the veteran died. The surviving spouse should not be placed in the position during her period of grief of determining what monies should be returned to the VA. Furthermore, the funds may be necessary to pay funeral expenses, the mortgage, and other sundry expenses. Under our proposal, the Dependency and Indemnity Compensation (DIC) payments would begin the month following the death of the veteran. Section 4 of H.R. 1482 provides for termination of benefits the last day of the month in which death occurred if the veteran was rated totally disabled with an additional amount paid for a spouse and if the surviving spouse is not eligible for DIC. Both proposals are consistent with VA practice in effect prior to 1982. See 38 C.F.R. Section 20.

H.R. 368 adds bronchiole-alveolar carcinoma to the list of diseases presumed to be related to radiation exposure for the purpose of service connection. PVA has no objection to this bill.

H.R. 1609 proposes to share VA medical information with the Social Security Administration (SSA). PVA has no objection to sharing medical information with Social Security; indeed, there are many advantages to the proposal. The bill as written, however, would not

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carry the positive benefits which may be sought. PVA would like to offer the following suggestions:

Section 1 (a). Information obtained by Social Security would be transferred to VA. The Social Security Administration obtains most medical information from the claimant. When the Social Security Administration seeks additional medical evidence, it is generally from a claimant's physician. SSA may opt to gather additional medical evaluations; the claimant may obtain copies from the physician.

Section 1 (b). Transfer of SSA determination information. Social Security determination may assist veterans who are seeking nonservice-connected pensions. The standards for determining unemployability and the "rating" of disabilities by SSA are different from that of VA.

Section 2. VA's use of SSA's information. This section requires SSA disability determinations of eligibility to be accepted by VA rating individual disabilities. VA may not rely on SSA determination that a disability does not exist. The only class of veterans who might be benefited are those seeking VA pension benefits.

We recommend creating a presumption establishing entitlement to nonservice-connected pension for otherwise eligible veterans if they are granted Social Security Supplemental Insurance benefits.

H.R. 1809 is a bill relating to the repair and maintenance of war memorials. PVA has no objection to this proposal.

H.R. 2156 proposes a change in name of Servicemen's Group Life Insurance Program and a merger of the Retired Reserve Service Members' Group Life Insurance and Veterans' Group Life Insurance Programs. It also proposes to offer a Veterans' Group Life Insurance Program to members of the Ready Reserve. PVA has no objections to this bill.

H.R. 2157 proposes the termination of Servicemen's Group Life Insurance when premiums are not paid with the provision for reinstatement if the Secretary of Veterans Affairs is persuaded that failure to pay "was justifiable." PVA believes this standard for excusing nonpayment is too vague. As written, the proviso should provoke plenty of litigation for those who are denied reinstatement.

H.R. 1482

Section 2 extends the availability of "all" benefits to individuals with less than the required service who are discharged from the Armed Forces as the result of downsizing of the military. PVA has no objections.

Section 3 would establish a pilot program to permit compensation, pension, and other benefit examinations to be conducted by non-VA medical personnel. We believe that VA currently has an authority to use non-VA medical personnel for such examinations. See 38 U.S.C. 1703(a)(8). Nevertheless, PVA has no objection to the concept proposed.

Section 4 proposes changes in effective dates. See our comments regarding H.R. 109.

Section 5 proposes an increase in the automobile allowance to $6,000. PVA appreciates this proposal, but urges this Committee to increase the amount to $11,000. Over the years, the rise in automobile prices coupled with the absence of a concomitant increase in automobile allowances has placed a totally disabled veteran in a precarious position for attempting to purchase an automobile.

LEGISLATIVE HISTORY: The program for automobile assistance grants was first established in 1946. The original grant was $1600. The amount of this one-time VA grant was increased to $2800 in 1971 (P.L. 91-666). The purpose of this increase was "to reestablish

generally the comparability which originally existed between the cost of an automobile or other conveyance and the monetary assistance provided for its purchase." S. Report 100-215 at 68 ("Report"). In 1974, the amount of assistance was increase to $3300 (P.L. 93-538). The 1978 amendment to 38 U.S.C. Section 3902 raised the amount to $3800 (P.L. 95-479). Nineteen eighty one saw an increase to $4400 (P.L. 97-66), and in 1984 the amount, once again, was increased to $5000 (P.L. 98-543). In 1988, Congress acted again. "From the date of the last increase, January 1, 1985, to August 1987, the Bureau of Labor Statistics' Consumer Price Index component for new automobiles rose by 9.73 percent." Report at 68-69. The Senate, in S. 9, increased the amount of assistance to $5530. As the Report states (at 69): "Taking into account any further inflation occurring after August and prior to the effective date of the increase, increasing the automobile assistance allowance by 10.6 percent... would thus help protect the value of this benefit from being eroded by inflation." The amount subsequently approved was $5,500 (P.L. 100-322). There have been no further amendments to this amount since 1988.

AVERAGE NEW AUTOMOBILE COSTS SINCE 1950:
Below is the average cost for a new automobile from 1950 to 1994, in five year increments. These figures are from a National Automobile Dealers Association (NADA).

1950	$2050	1975	$4750
1955	$2740	1980	$7530
1960	$2830	1985	$11925
1965	$3030	1990	$15900
1970	$3430	1994	$19200

In 1950, the automobile assistance grant would have covered approximately 78 percent of the average cost of a new automobile. In 1971, the grants represented approximately 82 percent of the average cost. As the average cost of a new automobile has increased steadily, if not dramatically, the automobile assistance grant has failed to keep pace with this increase. Using 1994 average cost of a new automobile, the $6000 would be approximately 31 percent of the cost. PVA urges Congress to raise the automobile assistance grant to $11000.

Section 6 would extend Vocational Rehabilitation for pension recipients. PVA has no objections.

Section 7 would extend accrued benefits from one to two years. PVA believes this proposal is correct, but does not go far enough. At one time, VA processed claims for benefits in a relatively short period and the one year restriction on accrued benefits made some limited sense. Today, however, claims for benefits may take up to four and five years to resolve. Board of Veterans' Appeals statistics illustrate that between 1991 and 1994, the average processing time to decide a claim increased from 323 days to 754 days when no remand was involved. In cases involving one remand, the time increased to 1,076 days from 746 days; with two remands, the length of time went from 1,125 days to 1,424 days. Consequently, the effect of the two-year limitation on benefits is to deprive claimants of monies due them because of the inability of VA to process claims in a timely fashion. Once again, it is the claimant who pays for the VA's failures. For this reason, PVA urges that the effective date for accrued benefits be the date of eligibility for the benefit.

Section 8 proposes recovery of costs modifications. PVA has no objections.

H.R. 1483 is a bill which would revise decisions based on clear and unmistakable error. See 38 C.F.R. 3.105(a) and 20.1000. This proposal has merit and certainly offers to improve on the present situation; however, it leaves several questions unanswered. The bill does not indicate whether clear and unmistakable error claims are based on the evidence at the time the decision was made or if new evidence may be submitted to establish clear and unmistakable error. (38 C.F.R. 3.105 specifies that claims are limited to

evidence on record at the time of the decision.) The section pertaining to the Board of Veterans' Appeals does not specify whether the Board has discretion in deciding claims for clear and unmistakable error or whether resolution of such claims is mandatory. The bill does not make clear whether the Court of Veterans Appeals has jurisdiction over clear and unmistakable error claims.

H.R. 2155

Section 1 is a proposal relating to Clothing Allowance for Incarcerated Veterans. PVA has no objection.

Section 2 relates to the presumption of permanent and total disability for veterans over age 65 who are nursing home patients. The legislation is subject to a narrow interpretation which would not cover such other likely candidates as residents of State homes, domiciliaries, etc. PVA recommends that the presumption of permanent and total disability for ALL veterans 65 and older be restored.

Mr. Chairman, PVA appreciates the opportunity you have given us to testify, and we would be glad to answer any questions.

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A Not-For-Profit Veterans Service Organization Chartered by the United States Congress

"VVA, At Work in Your Community"

STATEMENT OF

VIETNAM VETERANS OF AMERICA

On H.R. 109, H.R. 368, H.R. 1482, H.R. 1483, H.R. 1609, and H.R. 2155

Presented by
Mary J. Schoelen
Service Representative Program

Before the
House Veterans Affairs' Committee

Subcommittee on
Compensation, Pension, Insurance and Memorial Affairs

October 12, 1995

INTRODUCTION

Mr. Chairman and members of the Subcommittee on Compensation, Pension, Insurance and Memorial Affairs, Vietnam Veterans of America (VVA) appreciates the opportunity to present its views on a number of proposals that have been offered relating to several bills affecting matters under your purview. Of those, Vietnam Veterans of America (VVA) is interested in H.R. 109, H.R. 368, H.R. 1482, H.R. 1483, H.R. 1609, and H.R. 2155.

H.R. 109

VVA supports the intent of this provision to extend the period of compensation or pension of veterans to the actual date of death, instead of the last day of the month preceding death, since DIC or death pension rates will generally be less than service-connected compensation or nonservice-connected pension. Thus, even a partial month's compensation or pension payment will be helpful to the veteran's survivors.

However, portions of H.R. 1482 regarding totally disabled veterans with spouses who are not eligible for DIC, conflict with this bill. Please see below.

H.R. 368

Vietnam Veterans of America is in favor of H.R. 368. We have strongly supported the "atomic veterans" in their efforts to gain care and compensation for conditions caused by government actions, and the addition of a presumption that bronchiolo-alveolar carcinoma to the list of service-connected diseases is a good step.

H.R. 1482

Section 2, 5, 6 and 7

VVA strongly supports these amendments to increase benefits and access to benefits for veterans. VVA especially supports the increase in the period for which accrued benefits are payable from one year to two years, but reasserts its general opposition to the limitation on awarding retroactive benefits finally adjudicated after the death of the veteran, when much of the delay involved in deciding the case results from VA's backlog of cases. Veterans and their families should not be denied benefits that the veterans would have otherwise been entitled to, but for their deaths.

VVA also opposes the determination that if the claim has been decided in favor of the veteran but the award check has not been received by the veteran prior to death, the veteran's family is only entitled to accrued benefits. 38 U.S.C. § 5121. VVA urges that the definition of "due and unpaid" exclude cases where a decision has been made, but the retroactive award payment has not been received.

Section 3

VVA supports the pilot program to contract physicians to conduct disability examinations, freeing VA doctors to treat patients. However, we feel that three years is too long a period to wait for a report on the pilot.

Sections 4 and 5

VVA supports the intent of delaying the effective date for termination of compensation benefits upon the death of veterans to the last day of the month in which death occurs, when their spouses do not qualify for dependency and indemnity compensation (DIC). Currently, section 5112 of title 38 of the United States Code, terminates compensation on the last day of the month preceding death, regardless of whether the survivor will draw DIC.

However, this provision may conflict with the change in effective date proposed in H.R. 109 – which changes the effective date for termination of all veterans – in the case of veterans who are totally disabled and the surviving spouses do not qualify for DIC. If Congress wishes both concepts to become law, accommodating language will be needed to exempt veterans and their survivors covered by H.R. 1482.

Section 8

VVA supports this provision that would earmark the costs incurred by VA in recovering monies that VA paid out erroneously to be returned to the appropriate VA account.

H.R. 1483

This bill proposes to reintroduce clear and unmistakable error as an avenue for a final veterans benefits decision to be revisited by the Department of Veterans Affairs (DVA).

Historically, veterans and their dependents have been able to assert that the final decision on their claims (by either the agency of original jurisdiction or the Board of Veterans' Appeals) contained clear and unmistakable error (CUE), allowing them to have their claims readjudicated. If the prior decision was reversed, the effective date for the award of benefits would be the date the underlying (original) claim was filed. This was important because it allowed erroneous decisions at any level to be corrected upon discovery of the error. If an error is made by any DVA decision-maker that injures the claimant, it should not matter who made the error, just that the claimant be given the opportunity to correct it.

In Smith v Brown, the United States Court of Appeals for the Federal Circuit held that final decisions of the BVA are not reviewable for clear and unmistakable error. 35 F.3d 1516 (Fed.Cir. 1994). The United States Court of Veterans Appeals later held that a veteran may not assert that a decision by the agency of original jurisdiction contained clear and unmistakable error, where that decision was affirmed by the Board of Veterans' Appeals (BVA). Duran v. Brown, 7 Vet.App. 216 (1994).

These two decisions foreclosed review by the United States Court of Veterans Appeals, as well as by any part of the DVA, of any decision that had previously been appealed to the Board of Veterans' Appeals. Currently, the only appellate review available for a clearly and unmistakably erroneous decision is a request for reconsideration of the prior BVA decision, under section 7103 of title 38 of the United States Code. However, reconsideration is strictly at the discretion of the Chairman of the BVA and denials of motions for reconsideration based on material error may not be appealed to the U.S. Court of Veterans Appeals. Losh v. Brown, 6 Vet.App 87 (1993), citing ICC v. Locomotive Engineers, 482 U.S. 270, 279 (1987). Therefore, claimants are currently denied access to judicial review of decisions containing CUE.

VVA strongly supports H.R. 1483's efforts to reintroduce collateral review of erroneous decisions that had been appealed to the Board, forcing prior errors to be corrected. In Smith, the Federal Circuit addressed the problem of having a lower adjudicative body (VARO) redeciding an appellate body's (BVA) decision. H.R. 1483 deals with this problem by segregating the claims with final RO decisions from the claims with final BVA decisions, since only the BVA would be able to reexamine prior, final BVA decisions.

VVA also strongly supports H.R. 1483's provision to allow for judicial review of CUE claims filed at the BVA. Without this specific provision, the Court would be forced to look to the notice of disagreement (NOD) filed in the underlying claim to determine whether it has jurisdiction to hear the claim. It is very likely that the NOD would have been filed prior to the jurisdictional threshold date on November 18, 1988. Therefore, many claimants would still not be entitled to judicial review of their erroneous claims. VVA has always fought for broad access to judicial review of DVA determinations. That fight leads us to strongly advocate this bill.

H.R. 1609

This bill would provide for sharing of medical information between the Social Security Administration (SSA) and the Department of Veterans Affairs. It also provides for DVA to rely on SSA disability determinations, in making its own determinations.

Section 1

Information gathered during the course of a Social Security Administration determination of disability often proves highly probative for DVA disability determinations for eligibility to compensation and pension. Social Security records may contain medical records from private treatment, statements by employers and co-workers as to the veteran's ability to work, as well as Social Security's own examination results and determinations.

It has often been difficult for individual claimants, their representatives, and even DVA to acquire copies of SSA records. Repeated requests have gone unanswered. DVA then proceeds to make a determination without the records, and the case may be remanded by the BVA to acquire the very same records.

H.R. 1609 provides for increased sharing of information by formalizing the types of information and setting a framework for discussion between the agencies. VVA strongly supports this portion of H.R. 1609. This will provide information critical to deciding many veterans' DVA claims. However, we propose that the language in Section 1 be changed to require the shared information to contain the Commissioner's determination of the veteran's eligibility for supplemental security income and the basis for that determination, when such a determination has been made.

VVA also supports the privacy portion that requires the veteran's consent before such a transfer of records can be made.

Section 2

This section provides for DVA to request records from SSA when there is an issue of the nature or degree of a disease or disability of the veteran, who has previously applied for SSA. It goes on to require DVA to defer to a SSA determination of the existence of a disability or the nature of the degree of such disability. The DVA could not rely on a determination that a disability does not exist.

A veteran may receive disability benefits from DVA and SSA for the same disability. VVA applauds the intent behind this bill to expedite the adjudication of claims, to reduce the backlog, to ease the development of claims by not making the veteran go through these similar processes twice, when the disability is the same and the determination is similar, and to save DVA expenditures for development and determinations already done by SSA.

However, problems exist in the application of this provision. DVA and SSA have different standards for determining whether someone is disabled, so that he or she is eligible for benefits. For the most part, SSA requires one to have a disability that makes him/her unable to maintain substantially gainful employment for a period of 12 months. DVA individual unemployability compensation does not place any time requirement. If the veteran is currently unemployable, he or she is entitled to a total disability rating. DVA pension requires the veteran to be permanently and totally disabled. Also, SSA disability is a determination of total disability or not total disability. There is no rating between 0 percent and 100 percent, such as in DVA compensation.

VVA suggests instead that this sub-Committee adopt language that would require DVA to get SSA records and SSA determinations to be used as evidence in DVA's decision on entitlement to DVA compensation or pension. We also urge this sub-Committee to adopt language that would allow DVA to accept medical exams performed under an application for SSA benefits that is adequate for DVA rating purposes. This provision would parallel the private physician's examination provision that Congress passed last year in PL 103-418. VVA recommends that the provisions in H.R. 1609, as amended, be effective for any DVA claim already pending at the date of enactment or files an application after the date of enactment.

By amending H.R. 1609 in this manner, Congress will still achieve the results intended by the original bill: the adjudicatory process will be expedited, important evidence will become part of the veteran's DVA records and be considered in making a decision, veterans will not have to go through multiple examinations for the same disability, and DVA

will save money by not having to conduct as many compensation and pension examinations, freeing VHA doctors to treat more patients.

H.R. 2155

Vietnam Veterans of America has no problem with H.R. 2155. Restricting the clothing allowance of incarcerated veterans who are adequately clothed does not, in our view, contradict VVA's long record of support for these veterans. Section 2 thus raises no problem that concerns us.

Section 3, creating a presumption of permanent and total disability for veterans over 65 who are nursing home patients, is a good idea as well. It will save these veterans and their families a great deal of work in proving such disability, and it will spare VA from having to challenge every case.

We see H.R. 2155 as a good example of making sensible, small cuts where they will do no harm, and transferring the savings to a sensible improvement of VA services.

Mr. Chairman, this concludes our testimony.

STATEMENT OF
JOSEPH A. VIOLANTE
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DISABLED AMERICAN VETERANS
BEFORE THE
SUBCOMMITTEE ON COMPENSATION, PENSION, INSURANCE
AND MEMORIAL AFFAIRS
OF THE
COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
OCTOBER 12, 1995

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the more than 1 million members of the Disabled American Veterans (DAV) and its Auxiliary, I wish to thank you for this opportunity to present DAV's views on legislative proposals affecting our nation's service-connected disabled veterans and their families which are currently pending before this subcommittee.

At the outset, Mr. Chairman, we wish to thank you, Ranking Democratic Member Representative Evans and the members of the subcommittee for scheduling today's hearing. Clearly, actions taken by this subcommittee will materially affect the lives of those Americans who gave of themselves in defense of the freedoms we all enjoy.

H.R. 1483

This measure would amend title 38, United States Code, to allow revision cf veterans benefits decisions based on clear and unmistakable error. This legislation is one of the most important measures that Congress will consider this year.

DAV strongly supports the passage of H.R. 1483.

There is, however, one technical correction we would suggest. The second sentences in subsection (a) of section 5109A and subsection (a) of section 7111 should be revised to read as follows: "If *the record* establishes the error...." We believe this change would clarify that no "new evidence" is needed to establish that an error had been made in a prior decision and would be in keeping with Department of Veterans Affairs (VA) rating practices and precedent court decisions which require that consideration of clear and unmistakable error be based on the evidence of record and the law at the time the alleged error was made.

This measure is important for a number of reasons. The first provision of H.R. 1483 would codify what already exists in regulation and is recognized by precedent court decisions -- the Secretary's ability to correct clear and unmistakable error in a rating decision. The other provision would allow the Board of Veterans' Appeals (Board) to correct clear and unmistakable error in its decision and allow a claimant to challenge that new decision in court.

Statutory authority permitting the correction of clear and unmistakable error dates from 1917, and regulatory authority dates back to 1928. In decisions of the courts from the 1920's, 1930's and 1940's, the statutory and inherent authority of the Director of the Veterans' Bureau and the Administrator of the Veterans Administration to correct error in prior decisions has been reaffirmed. Although authority for correction of clear and unmistakable error was contained in earlier statutes-at-large, there is currently no express

statutory authority codified in title 38, but there has been a continuity of regulatory authority from 1928 to the present which authorizes retroactive correction of clear and unmistakable error. This regulatory authority has been held to be in accord with provisions for administrative finality.

Legislative histories reveal Congress' awareness of the promulgation of regulations permitting correction of clear and unmistakable error. Indeed, Congress has itself incorporated the rule regarding retroactive correction of clear and unmistakable error into legislation authorizing benefits for widows and dependent children who, without authority for correction of error, would not be eligible. Under this provision, the surviving spouse of a veteran who would have been in receipt of total compensation for the required ten years but for clear and unmistakable error was made eligible for dependency and indemnity compensation (DIC) notwithstanding the veteran's actual receipt of compensation for less than ten years. If revision of the effective date for total disability under authority for correction of clear and unmistakable error demonstrated the veteran's entitlement for a period of ten years or more, the prohibition against actually paying the retroactive benefits after the veteran's death did not operate to bar DIC otherwise payable on account of the veteran's having suffered total disability for the required ten-year period as provided in section 1318, title 38, United States Code.

Until the Court of Veterans Appeals (COVA or Court) began to require VA and the Board to observe and apply this authority in all appropriate cases, the administrative power to correct clear and unmistakable error was not questioned. However, the VA prevailed in a challenge of a Court of Veterans Appeals' decision on this issue. The United States Court of Appeals for the Federal Circuit reversed a Court of Veterans Appeals decision which held that a veteran can challenge an otherwise final Board decision involving clear and unmistakable error.

This Federal Circuit decision forecloses the veteran or other claimant from obtaining correction of a clearly and unmistakably erroneous decision if the clear and unmistakable error occurred or continued at the Board level. If veterans or other claimants who have been previously denied benefits to which they are undisputably entitled are to have a remedy, it now becomes necessary to have expressed statutory authority for correcting clear and unmistakable error, whether at the Board level or below.

Currently, the Board has authority, pursuant to title 38, United States Code, section 7103(c), to correct an obvious error in the record, and the Chairman has the authority to order reconsideration of a decision under section 7103(a) either on his own initiative or upon motion of the claimant. However, these provisions provide claimants with very little relief because action by the Board is discretionary and, in many cases, not appealable. For the most part, motions for reconsideration are denied by a letter from the Chairman's office. During Fiscal Year 1995, there were approximately 770 letter denials. During that time, the Board reconsidered and wrote new decisions in 124 cases, allowing 58 cases, remanding 45 cases and denying 16 cases (5 cases were "other" dispositions). Regardless of how the motion for reconsideration was denied, a claimant does not have a right to appeal the Board's action to the United States Court of Veterans Appeals unless he has a valid notice of disagreement (NOD) filed on or after November 18, 1988, and has filed his motion for reconsideration with the Board within 120 days of its prior decisions. In too many cases, claimants do not meet these requirements.

While the Board is to be commended for taking corrective action in a large number of the 124 cases decided on reconsideration, this subcommittee must keep in mind that the Board's or Chairman's actions on reconsideration are totally discretionary in nature. Neither the Board nor the Chairman are answerable to anyone for their decision not to reconsider a prior decision. Accordingly, H.R. 1483 would provide claimants with a procedure to make the Board accountable for its decision not to reconsider a prior decision or to deny the benefit sought on reconsideration.

Although H.R. 1483 would subject Board decisions to Court review in cases where the Court would otherwise have no jurisdiction to review these cases due to the limitation imposed by section 402 of the Veterans Judicial Review Act, i.e., where there is a valid NOD and a motion for reconsideration was not filed within 120 days of the prior Board decision, this review would not be so wide-ranging as to be at odds with the initial jurisdictional limitations established by Congress in the Veterans Judicial Review Act. If, as the VA alleges, the VA and Board properly decide all issues and apply appropriate law and regulations to the evidence of record, there will be a finite number of cases of clear and unmistakable error. Regardless of the numbers, however, there is no justification to allow a benefit to be wrongfully denied to an otherwise eligible claimant.

This legislation will not open the flood gates of litigation; however, it will allow claimants who had benefits wrongfully withheld to obtain meaningful consideration on the merits of their claims. As discussed above, no new evidence can be considered in a claim alleging clear and unmistakable error. These cases must be decided on the record and the error "must appear undebatably." *See Akins v. Derwinski*, 1 Vet.App. 228, 231 (1991). Accordingly, if properly handled, these cases can be adjudicated in an expeditious manner.

Again, let me restate DAV's strong support for this measure. At our last convention in Las Vegas, Nevada, July 23-27, DAV delegates passed a resolution which calls for legislation to permit review of Board decisions on the basis of clear and unmistakable error. This is an important issue for all veterans, their dependents and survivors.

DAV urges the enactment of H.R. 1483, one of the most important provisions before this body.

H.R. 2157

Mr. Chairman, this measure would, if enacted, authorize the termination of Serviceman's Group Life Insurance when the premiums are not paid. DAV has no mandate from our membership on this issue and, therefore, we take no position on this measure.

H.R. 2155

H.R. 2155 would restrict payment, in the case of incarcerated veterans, of clothing allowance otherwise payable to eligible veterans. This measure would also create a presumption of permanent and total disability for pension payments for veterans over age 65 who are patients in a nursing home. DAV has no position on these provisions since our membership has not provided us with a mandate on these issues.

We would note, however, that the creation of this presumption of permanent and total disability for pension

purposes would free adjudicators to handle more complicated rating cases.

H.R. 1809

This bill would authorize the American Battle Monuments Commission to enter into arrangements for the repair and long-term maintenance of war memorials for which the Commission assumes responsibility. It is our understanding that this measure would benefit all parties involved. While DAV has no mandate from its membership regarding a position on this bill, its purpose is a beneficial one, and the DAV therefore does not have any opposition to it.

H.R. 109

Mr. Chairman, H.R. 109 would provide for discontinuance of compensation or pension on the date the veteran dies rather than the last day of the preceding month, as is now the case.

As we understand it, this bill would benefit two classes of surviving spouses: the surviving spouse who has no entitlement to survivors' benefits from the VA and the surviving spouse whose own monthly benefit is greater than that received by the veteran. Under current law, neither of these two classes of surviving spouses receives any benefits for the month in which the veteran died.

The interplay of several sections of current law result in these two classes of surviving spouses receiving no benefits for the month of death. Only the surviving spouse of a veteran whose monthly compensation or pension was greater than the survivor's monthly benefit receives monetary payment for the month in which the death occurred.

Under section 5112(b)(1) of title 38, United States Code, the veteran's benefits are discontinued the last day of the month preceding his or her death. Thus, there is no benefit payable for the month or any part of the month of death to the surviving spouse who has no entitlement to survivors' benefits. Under section 5110(d)(1) of title 38, United States Code, the effective date of an award of DIC, for example, for the surviving spouse is the first day of the month of death. However, under section 5111(a) of title 38, United States Code, the general rule is that the effective date from which the monetary entitlement begins to run based on an award is the first day of the month following the month in which the award was effective. Under section 5111(c)(1), this general rule is limited to situations in which the surviving spouse's monthly monetary entitlement is greater than that which the veteran was receiving, the result being that this surviving spouse receives no benefits for the month of death. If the veteran's monthly rate was greater than the surviving spouse's monthly DIC rate, under section 5310 of title 38, United States Code, that surviving spouse will receive for the month in which the veteran died the same rate the veteran would have received but for his or her death. Accordingly, by that twist in the law, the surviving spouse of a veteran whose monthly benefit rate is greater than the spouse's monthly benefit rate receives benefits for the entire month of death, whereas the other classes of spouses receive nothing.

This bill would partially alleviate that inequity in some cases. Under the proposed amendments in H.R. 109, section 5112(b)(1)(B) would discontinue the veteran's award of compensation or pension effective the date on which death occurs. The partial monthly benefit due the veteran would be

paid to the surviving spouse except where the spouse is entitled to a full month's benefits at the veteran's rate as provided under section 5310.

Therefore, those surviving spouses who, under current law, receive no benefits for the month of the veteran's death would, under this amendment, receive a partial amount of the veteran's benefit proportionate to the number of days the veteran lived during that month.

Mr. Chairman, while this bill would partially remedy the inequity in the existing law, it, at the same time, not only leaves in place part of that inequity but also superimposes yet another inequity. Under existing law, surviving spouses receive unequal treatment solely on the basis of whether the veteran's monthly benefit rate was greater or less than the surviving spouse's benefit rate.

Under this bill, the spouse whose own monthly rate is higher than that of the veteran would receive benefits for some part of the month of death. However, that could be from one to thirty-one days. The residual inequity is that one spouse receives a full month of benefits while another receives less than a full month. The added inequity is that two spouses entitled to a partial month's benefits under these amendments might yet be affected very differently, although, other than the date of death, they are situated identically. One spouse might receive benefits for the one day that the veteran lived within that month while a second spouse might receive essentially a full month's benefits if the veteran lived twenty-nine or thirty days out of that month, for example. It is quite unlikely that the real adverse economic impact upon the two surviving spouses because of the veteran's disabilities and deaths would be significantly different, however.

Mr. Chairman, the DAV supports and appreciates the apparent goal underlying this bill. The DAV believes, however, that the simpler and more appropriate remedy would be to amend section 5112 to provide an end of the month rule for discontinuance of compensation or pension with corresponding amendment of section 5111. Section 5111 should be amended to provide for commencement of the payment period for a surviving spouse's benefits to be the first day of the month following the month of death. Section 5310, which now provides for payment of the veteran's rate for the month of death, when greater than the surviving spouse's rate, would become unnecessary because the veteran's benefit would be paid for the month of death by reason of the end of the month rule.

In view of these factors, at our July 1995 National Convention in Las Vegas, Nevada, our membership adopted a resolution that supports legislation to provide for payment of compensation or pension through the end of the month of the veteran's death, plus an additional two months of benefits to help the surviving spouse make adjustments for future living expenses and death benefits.

H.R. 2156

This measure, introduced at VA's request, would, if enacted, change the name of the Serviceman's Group Life Insurance (SGLI) program; merge the Retired Reservists' SGLI program into the Veterans' Group Life Insurance (VGLI) program; extend VGLI coverage to certain members of the Ready Reserve; permit an insured to convert a VGLI policy to an individual policy of life insurance with a commercial insurance company at any time; and permit an insured to convert an SGLI

policy to an individual policy of life insurance with a commercial company upon separation from service.

Mr. Chairman, while we have no mandate from our membership regarding a position on these measures, the bill's purpose is a beneficial one, and the DAV therefore does not have any opposition to it.

H.R. 368

H.R. 368 would add bronchiolo-alveolar carcinoma to the list of diseases presumed to be service-connected for veterans exposed to ionizing radiation.

Bronchiolo-alveolar carcinoma is a form of lung cancer; however, this respiratory cancer is not correlated with smoking. "Lung cancer" is recognized by the VA as a "radiogenic disease" pursuant to the provisions of 38 C.F.R. 3.311, but this disease has not been added to the list of diseases presumed to be service-connected for certain radiation-exposed veterans under the provisions of 38 U.S.C. 1112(c)(2); 38 C.F.R. 3.309(d)(2). We would recommend that "lung cancer" be added to the list of diseases presumed to be service-connected under section 1112(c), title 38, United States Code.

For the most part, atomic veterans have not been very successful in pursuing claims under 38 C.F.R. 3.311 because of low radiation dose estimates provided by the Defense Nuclear Agency (DNA). In fact, at our National Convention in Las Vegas, Nevada, in July 1995, DAV delegates passed a resolution noting the inaccuracy of dose reconstruction estimates provided by DNA and calling for the condemnation of the actions of DNA, as well as urging VA to undertake a review of the accuracy of reconstructed dose estimates by DNA.

It is also interesting to note that pursuant to the Marshall Islands Nuclear Claims Tribunal Act, 25 separate medical conditions are irrebuttably presumed to be the result of radiation exposure and these disabilities are compensable. Unfortunately, the United States Congress has recognized only 15 disabilities presumed to be service-connected for our nation's veterans as a result of exposure to ionizing radiation.

Accordingly, the DAV urges this body to support the addition of lung cancer to the list of diseases presumed to be service-connected as a result of radiation exposure. Further, we urge Congress to ensure that VA undertakes a review of the accuracy of reconstructed dose estimates by DNA.

H.R. 1609

This measure would provide for sharing of medical information relating to determinations of disability between the Social Security Administration and the VA.

It is apparent that the intent of this measure is to make Social Security Administration medical records available to the VA for their use in determining a veteran's eligibility for VA benefits. The DAV is very appreciative of these efforts to ensure that veterans' claims are properly rated by the VA.

However, precedent case law requires that the VA obtain all pertinent medical records, including medical records from the Social Security Administration, when adjudicating a veteran's claim for benefits. Further, the VA's regulations obligate it to assist a claimant in developing the facts pertinent to his claim, *see* 38 C.F.R. 3.103(a); consider each disability

from the point of view of the veteran working or seeking work, *see* 38 C.F.R. 4.2; and rate a veteran totally disabled if that veteran is unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities, *see* 38 C.F.R. 4.16(b).

The DAV has no official position with respect to H.R. 1609 as we have no mandate from our membership on this measure.

H.R. 1482

Section 2 of H.R. 1482 would provide for the extension to all benefits of certain exceptions to minimum service requirements. Section 3 of the bill would authorize a pilot program for using contract physicians for disability examinations. Amending the effective date of discontinuance of compensation upon death of certain veterans is addressed in Section 4. Section 5 of H.R. 1482 would increase the automobile allowance. Vocational rehabilitation for pension recipients would be extended under Section 6. Section 7 would increase the period for which accrued benefits are payable. Section 8 of this measure would allow for recovery of cost of debt collection.

Section 2: would liberalize and expand current law which allows certain veterans separated from the military under four specific conditions to seek benefits under chapters 30 and 37, title 38, United States Code, notwithstanding the fact that they have not completed minimum active-duty service requirements. This provision would be amended to include "any other benefits under the title," instead of being limited merely to chapters 30 and 37 benefits.

The DAV has no mandate from our membership on this measure and does not object to its favorable consideration.

Section 3: would authorize a pilot program for use of contract physicians for disability examinations.

While we are not opposed to such a program, this provision raises a number of questions that need to be addressed. First, what would be the cost of using contract physicians versus VA doctors? Second, although the title of section 3 refers to contract "physicians," the language of the bill does not reflect that the examinations are to be conducted by physicians, but only refers to "persons" other than VA employees. Most importantly, the DAV is concerned that safeguards be put in place to ensure quality, timely, and consistent examinations performed by these contract physicians in accordance with VA rating practices as discussed in the Physicians' Guide.

Finally, we recommend that this body seriously consider the possibility of a VA/Department of Defense (DoD) sharing agreement to provide for VA disability examinations by military doctors. Such a sharing agreement could be of great benefit to both the VA and DoD.

Section 4: would establish the last day of the month as the effective date of discontinuance of compensation by reason of the death of a veteran. This would apply to veterans rated as totally disabled who are in receipt of disability compensation and have a surviving spouse who is not eligible for DIC.

Mr. Chairman, our position on a similar measure and our delegates' mandate have been discussed previously with regard to the provisions of H.R. 109. We would support legislation consistent with our discussion set forth under that heading.

Section 5: would increase the automobile allowance from $5,500 to $6,000.

Mr. Chairman, the automobile allowance has not kept pace with the increased costs of purchasing an automobile. Since this is a one-time only payment limited to certain severely disabled service-connected veterans, the cost of this small increase is minimal. In view of this fact, our membership, for years, adopted a resolution supporting legislation that would provide a realistic increase in the automobile allowance.

The DAV strongly urges the members of this subcommittee to support this provision.

Section 6: would extend vocational rehabilitation for pension recipients for two years to December 31, 1997.

Mr. Chairman, the DAV is unable to support an extension of the so-called "Chapter 15 program," which provides vocational rehabilitation services for certain nonservice-connected disabled veterans.

We understand that the Administration does not favor an extension of this program that has been in effect for a number of years. We believe the program is not cost effective and drains resources from the Chapter 31 program designed for service-connected disabled veterans.

We have not opposed this program as long as it did not adversely impact on service-connected disabled veterans. Regrettably, Mr. Chairman data supports our fear that caseloads in vocational rehabilitation have continually increased, and the Chapter 15 program exacerbates the problem.

In September 1992, we testified before the Subcommittee on Compensation, Pension and Insurance of the House Veterans Affairs Committee on the VA's vocational rehabilitation program. At that time, we reported that 1,832 veterans under age 45, who had nonservice-connected disabilities were evaluated to determine their eligibility for services. Approximately one-third (592) were found feasible for training for employment services and less than half of them (239), actually took advantage of those services.

During fiscal year 1994, 750 nonservice-connected veterans were evaluated and the first nine months of fiscal year 1995 an additional 600 received evaluations. Of these 1,350, approximately 200 (14.8 percent) elected to receive some services.

Mr. Chairman, the Independent Budget for the Department of Veterans Affairs for fiscal year 1995, prepared by four veterans' service organizations -- AMVETS, Disabled American Veterans, Paralyzed Veterans of America and Veterans of Foreign Wars of the United States -- expressed a concern over increased workloads as follows:

> In FY 1991, Congress provided appropriations for 69 additional vocational rehabilitation specialists (VRSs), reducing their average workload from 256 to 229 veterans by the end of FY 1992. In FY 1993, the average workload increased to 230. The average workload was projected to increase to 295 cases in FY 1994 and in FY 1995 to 315 cases. Ideally, a manageable workload per VRS would be 125 cases.
>
> The average amount of time between when a veteran filed an application for vocational rehabilitation with VA to that veteran's first appointment decreased

from 86 days in FY 1991 to 74 days by the end of FY 1992. This downward trend continued in FY 1993 when the figure dropped to 71 days. Projections for FY 1994 and 1995, show a 60 day wait, still double the goal of 30 days.

Mr. Chairman, while service-connected veterans continue to experience long waits for counseling and entry into training programs, we cannot in good conscience support a continuation of this program for nonservice-connected disabled veterans.

Section 7: would increase from one year to two years the period for which accrued benefits are payable.

The DAV, as mandated by the delegates to our National Convention in Las Vegas, Nevada, in July 1995, supports a change in the payment of accrued benefits upon the death of a beneficiary. We are very appreciative that this body would consider expanding the current one-year period for the payment of accrued benefits. However, due to long delays in the current appeals process and the payment of retroactive benefits, our members support legislation which would provide for payment in full of all due and unpaid accrued benefits to the spouse or dependent children.

As an example of the harshness of the current one-year limitation on the payment of accrued benefits, I would like to share with this subcommittee a case that DAV represented. The DAV represented a World War I veteran in his appeal to reinstate his 80 percent rating for his service-connected hearing loss which had been improperly reduced to 20 percent. His appeal to the Board was denied, and an appeal was taken to the Court. While his appeal was pending at the Court, the Court favorably decided the issue in another case, holding that the VA's rating reductions in hearing loss cases were illegal and that the prior ratings must be restored.

The VA appealed the decision of COVA to the Court of Appeals for the Federal Circuit, and all hearing loss reduction cases were held in abeyance. The Federal Circuit upheld the decision of COVA, and the VA was directed to reinstate those hearing loss cases improperly reduced.

It took five to six years to have the 80 percent rating restored. The VA owed this veteran $30,000 to $40,000 in retroactive benefits because, at all times during the pendency of his appeal, he was entitled to the difference between the 20 percent rating and the 80 percent rating because the reduction in his disability compensation was illegal.

However, three weeks after his check was processed, but before it was mailed to the veteran, this 90-year-old World War I veteran died. His surviving spouse received a check in the amount of $8,000. During the pendency of the appeal, this couple spent down their life savings in order to make ends meet and to care for the veteran's medical expenses as he was no longer eligible for VA health care as an 80 percent disabled veteran. Today, this widow leads an impoverish life because the government wrongfully withheld her husband's disability compensation for more than five years.

Section 7 of H.R. 1482 provides a starting point for increasing the period for which accrued benefits are payable. We urge this body to give serious consideration to expanding the current one-year period.

Section 8: would allow the Secretary to retain the administrative costs incurred in recovering debts owed the government.

The DAV does not have a mandate from our membership on this issue, however, its purpose is a beneficial one, and the DAV therefore does not have any opposition to it.

This concludes our statement, Mr. Chairman. I would be happy to respond to any question you may have.

STATEMENT OF CARROLL WILLIAMS, DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION
BEFORE THE SUBCOMMITTEE ON
COMPENSATION, PENSION, INSURANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
OCTOBER 12, 1995

Mr. Chairman and Members of the Subcommittee:

The American Legion appreciates the opportunity to comment on the several bills scheduled for consideration this morning affecting veterans benefits and programs.

H.R. 109 proposes certain changes in the effective date of discontinuance of payment of compensation, dependency and indemnity compensation, and pension benefits.

Title 38 USC, section 5112(b)(1) would be amended to provide that the effective date of reduction or discontinuance of benefit payments - (1) by reason of:

(A) marriage or remarriage of the payee, shall be the last day of the month before the month during which such marriage or remarriage occurs;

(B) the death of the payee, shall be the last day of the month before the month date during which the death occurs, or in the case of a payee who was in receipt of compensation or pension and who has a surviving spouse, the date on which the death occurs.

Section 5112 would be further amended to provide that compensation or pension benefits payable for the final calendar month (or any portion thereof) in which the payee death occurs shall be paid to the surviving spouse.

Section 5110 is amended to provide that the effective date of an award of dependency and indemnity compensation (DIC) for which an application is received within one year from the date of the veteran's death shall, in the case of an eligible surviving spouse, be the day following the date on which death occurs.

Currently, when a veteran who is in receipt of compensation or pension dies, benefits are immediately cut off effective the first day of the month in which the death occurred. Claims for survivors benefits to VA, Social Security, or the military can take months to adjudicate which can cause extreme financial hardship for the surviving spouse during this period. The American Legion believes it is important to ensure the economic support to the veteran's family represented by the monthly compensation or pension payment is available to the surviving spouse to help meet expenses in the month of death.

H.R. 368 proposes to amend 38 USC, section 1112(c)(2), to add bronchiolo-alveolar carcinoma to the list of diseases presumed to be related to exposure to ionizing radiation for the purposes of establishing entitlement to service connection.

Through the years, The American Legion has supported legislation to ensure that veterans who were exposed to ionizing radiation during atmospheric nuclear weapons tests or who served in the occupation of Hiroshima and Nagasaki receive compensation for diseases related to their exposure.

In October 1984, P.L. 98-542, the "Veterans Dioxin and Radiation Exposure Compensation Standards Act", required VA to conduct rule making regarding its guidelines for adjudication of compensation claims based upon disability or death in cases of veterans exposed to herbicides or ionizing radiation while on active duty. In August of 1985, based on the available medical and scientific evidence at the time, VA published final regulations which included new section 38 CFR 3.311b. This section provided a list of 15 radiogenic diseases that would specifically apply to radiation exposed veterans. Among the recognized diseases was "(iv) lung cancer".

Subsequently, in May of 1988, P.L. 100-321, the "Radiation Exposed Veterans Compensation Act of 1988", amended 38 USC section 1112 to provide a statutory presumption of 15 diseases which would be presumed

to be service connected for certain veterans who were exposed to ionizing radiation while on active duty. The listed diseases covered those diseases set forth in 38 CFR 3.311b with the exception of lung cancer. The reason why lung cancer was not included in the legislation is unclear. This legislation did not affect VA's authority to establish service connection for lung cancer on a presumptive basis for veterans exposed to ionizing radiation, under 38 CFR 3.311b.

However, since presumptive service connection for this particular disease is only provided for by VA regulation, at some point in the future, it could be deleted or terminated without congressional approval. The American Legion, therefore, favors the addition of bronchiolo-alveolar cancer, to include the more general diagnosis of lung cancer, to the list of presumptive diseases currently set forth in 38 USC 1112.

H.R. 1482 proposes a number of changes in veterans' benefit programs.

Section 2 proposes that the minimum service requirement provisions contained in 38 USC 5303A(b)(3)(F) apply to all title 38 benefits by removing the current exemption applicable to education assistance benefits under Chapter 30 and GI Home Loan and Small Business Administration Loan eligibility under Chapter 37. The American Legion has no objection to this provision.

Section 3 would authorize the establishment of a three year pilot program at 10 VA regional offices to evaluate the use of contract physicians to conduct VA compensation and pension examinations.

This measure clarifies current authority provided in 38 USC 5106 authorizing other federal departments and agencies to provide VA with information in conjunction with a pending claim for veterans benefits. Under this legislation, the Social Security Administration will, upon the request of the Department of Veterans Affairs and with the veteran's consent, share medical information concerning the veteran which was developed or obtained including a determination of benefit eligibility with the Department of Veterans Affairs.

Section 4 proposes to amend 38 USC 5112 to change the effective date of discontinuance of compensation upon the death of a veteran who was in receipt of a total rating with an additional amount paid for a spouse from the first day of the month in which death occurs to last day of that month. This change would only apply if the surviving spouse is not eligible for dependency and indemnity compensation.

Currently, when a veteran who is in receipt of disability compensation dies, the surviving spouse is not entitled to negotiate the veteran's compensation check which arrives at the first of the month following the veteran's death and covers the month in which the veteran died. In many instances, with the sudden loss of the veteran, the surviving spouse may be faced with a total loss of family income including the financial support represented by monthly disability compensation. This can result in severe and prolonged financial hardship, because of the time it takes before most death claims are paid, such as insurance, Social Security, other survivor's benefits, or VA DIC or death pension.

Under this proposal, if the veteran's death were not due to service related causes, the surviving spouse would be entitled to compensation benefits which would have otherwise been paid to the veteran for the month of death. The American Legion is strongly supportive of this change in the law.

Section 5 proposes to increase the automobile allowance for certain service connected disabled veterans from $5,500 to $6,000. This allowance has not been increased since 1988. The cost of purchasing a car or special adaptive equipment has risen substantially in the interim and The American Legion supports the proposed increase.

Section 6 would extend eligibility for vocational rehabilitation, under Chapter 32 of title 38 USC, for certain pension recipients from December 31, 1995 to December 31, 1997. The American Legion is not opposed to the two year extension of this program for certain nonservice-connected disabled veterans.

Section 7 proposes to amend 38 USC 5121(a) to increase the period for which accrued benefits may be paid from one year to two years.

The American Legion was opposed to the current one year limitation on the payment of accrued benefits. This provision was enacted as a budget savings measure, however, it failed to recognize the fact it could take VA more than a year to process a veteran's claim or two to three years or more to decide an appeal. Many veterans, unfortunately, pass away while waiting for action on their claim or appeal. However, had the veteran lived, the payment of benefits due would have been based on the date of claim. It, therefore, appears to be grossly unfair to deny the full payment of benefits which would otherwise have been payable back to the date the claim was originally filed.

We note that regional office claims processing times have gradually improved since FY 1994 to about an average of five and a half months. The overall response time by the Board of Veterans Appeals remains in excess of two years. The proposal to allow payment of up to two years in accrued benefits, while an improvement, would only provide a partial remedy to this problem. The American Legion recommends that accrued benefits be payable back to the date of the deceased veteran's claim.

Section 8 would authorize VA to collect in the case of an indebtedness, an amount equal to the cost of such collection. The American Legion has no objection to this proposal.

H.R. 1483 proposes amendments to title 38, United States Code, to provide for the revision of decisions made by the regional offices (RO) and the Board of Veterans Appeals (BVA or the Board) in benefit claims on the grounds of clear and unmistakable error in such decisions.

In Smith v. Brown, the Court of Appeals for the Federal Circuit noted that, as a general rule, Board decisions are final. The Federal Circuit then lists the exceptions to this general rule. First, a Board decision can be appealed to the Court of Veterans Appeals under 38 USC 7562, the statute that gives the Court jurisdiction to review Board decisions. Second, 38 USC 5108 requires that the VA reopen a finally denied claim when new and material evidence is presented. Third, 38 USC 7103 provides that a Board decision can be reconsidered in two ways. Section 7103(b) gives the chairman of the Board the authority to order reconsideration of a decision by an expanded panel of the Board. Section 7103(c) allows the Board to correct an obvious error in its own decision. (Obvious error is essentially the same as "clear and unmistakable error". Lizaso v. Brown, 5 Vet.App. 380 (1993); Russell v. Principi, 3 Vet.App. 310 (1992) (en banc)). However, the Court noted it is very limited in its ability to review a denial of a request for reconsideration. The Court has ruled in Patterson v. Brown, 5 Vet.App. 362, 365 (1993) that it can review the Board's denial of a request for reconsideration only if that request claimed that there was new evidence or changed circumstances in the case.

In the Smith opinion, the Federal Circuit pointed out that 38 CFR 3.105(a), which provides that previous determinations which are final and binding will be accepted as correct in the absence of clear and unmistakable error, is found at a part of the regulations that cover adjudication at the regional office level. There is no comparable clear and unmistakable error provision in the parts of the regulations dealing with the Board of Veterans Appeals. Also, the Federal Circuit noted that the language in section 3.104(a) draws a distinction between the agencies of original jurisdiction (AOJ or regional offices), supporting the notion that section 3.105(a) applies only to regional office decisions. The Federal Circuit also reviewed the history of the regulatory language of section 3.105(a), and held that this history also supports the conclusion that 3.105(a) did not apply to decisions by the Board of Veterans Appeals. The Federal Circuit further reasoned that if the Board's decisions were subject to review for clear and unmistakable error, the regional offices would end up reviewing Board of Veterans Appeals decisions, thus reversing the ordinary adjudication process.

With regard to the action on claims for clear and unmistakable error under the Veterans Judicial Review Act, there is an unfair distinction because it separates similarly situated veterans into two

classes, one that can have prior erroneous decisions corrected and another that cannot. For example, suppose two veterans had their total disability ratings unlawfully reduced in the early 1980's. The veteran who may have contested his reduction at the regional office, but did not pursue an appeal to the Board of Veterans Appeals for whatever reason can now, under current law, have his reduction reviewed for clear and unmistakable error and possibly obtain benefits that were unfairly and illegally taken away. However, the other veteran who exercised his right of appeal and was denied by the Board of Veterans Appeals, cannot now have his reduction reviewed by the Court of Veterans Appeals for clear and unmistakable error because his Notice of Disagreement was filed prior to 1988. H.R. 1483 would correct this inequity and The American Legion strongly supports the enactment of this proposal to provide statutory authority for the review and revision of decisions of the regional offices and the Board of Veterans Appeals based on a claim of clear and unmistakable error.

H.R. 1609 would amend both the Social Security Act and title 38, United States Code, to authorize the sharing of medical information between the Social Security Administration and the Department of Veterans Affairs relating to disability determinations. The American Legion has no objection to this pilot program.

H.R. 1809 would authorize the American Battle Monuments Commission to enter into arrangements for the repair and long-term maintenance of war memorials for which the Commission assumes responsibility.

Since 1923, the American Battle Monuments has overseen the construction, administration, and maintenance of military monuments and markers, most of which are located outside of the United States. Currently, there are on foreign soil 24 permanent American military burial grounds as well as seventeen separate markers and monuments, and four memorials in the United States.

This proposal will allow the American Battle Monuments Commission, at the time it assumes responsibility for a particular memorial, to make arrangements with the sponsors of that memorial for its long-term maintenance and repair. The American Legion has no objection to this proposal.

H.R. 2155 proposes to restrict payment of the clothing allowance to eligible incarcerated veterans. The amount of the annual clothing allowance payable to an otherwise eligible disabled veteran would be reduced on a pro rata basis for each day the veteran was so incarcerated during the 12 month period preceding the date on which payment of the allowance would be due. The American Legion has no objection to this proposal.

H. R. 2155 would also establish a statutory presumption of permanent and total disability in the case of veterans over the age of 65 who are patients in a nursing home for the purposes of entitlement to disability pension.

Currently, the criteria of 38 USC 1502 or 38 CFR 4.16 define permanent and total disability for pension purposes in terms of inability to engage in substantial gainful employment or where the veteran is suffering from a disease or disorder that would justify a determination the individual is permanently and totally disabled.

The proposed amendment to 38 USC 1503 would make it clear that if an otherwise eligible veteran who is 65 years of age and is a permanent nursing home patient, total disability will be presumed. This change should eliminate any need for additional proof of total disability and facilitate the processing of future pension claims. The American Legion supports this proposal.

Mr. Chairman, H.R. 2156 and 2157 propose a number of changes in the life insurance programs for former service personnel.

H.R. 2156 has as its intent increasing the flexibility of the Servicemen's Group Life Insurance (SGLI) program in the options it offers to active policyholders. It would correct the title of this program to Servicemember's Group Life Insurance to properly reflect the important contributions made by women service members to ensuring a

strong national defense and The American Legion concurs with this change.

This measure would also provide for the merging of coverage currently afforded retired reservists, under the SGLI program with a 120 day only open period for conversion to a private plan of insurance and terminating at age 60 or upon the reservist receiving his or her first retirement check, whichever is earliest, with no further coverage provided, into the Veterans Group Life Insurance (VGLI) program. As VGLI is now renewable indefinitely in five year periods, The American Legion supports this change as being most beneficial to those in the retired reservist category as coverage could then continue past age 60 (or the receipt of the first retirement check), thereby permitting some or all of a veteran's service life insurance coverage to be carried into ages when it may still be strongly needed and desired.

Additionally, this bill provides for the extension of VGLI coverage to those who retire from the Ready Reserve with less than 20 years of service, would permit the conversion of VGLI to a private plan of insurance with a participating insurance company at any time instead of only at the end of a given five year period (thus allowing a veteran to take advantage of the lower premium rates generally offered at younger ages), and it would permit a similar conversion of SGLI coverage to a private plan of insurance directly upon separation from service, if so desired, without a switch to VGLI first. The American Legion views these changes as fundamentally helpful to veterans since they would be provided a greater range of choices in regard to this valuable insurance coverage.

There are several important considerations for veterans. Although SGLI coverage may be increased in increments up to the full $200,000, the amount of SGLI held at separation determines the maximum amount of VGLI that may be held. Post-service incomes of veterans may change and increase over time, along with personal and family status. These factors may affect their need for future partial or full conversions to additional types of permanent insurance coverage, either government or private plans. As long as SGLI would provide the administration of the SGLI and VGLI along these principles, The American Legion believes the provisions of H.R. 2156 would be a positive addition to the benefits and flexibility of the SGLI and VGLI programs. We would additionally like to recommend, should the proposed changes be enacted, that SGLI make explicit mention of these options in the coverage information and applications offered to veterans, and in their routine correspondence and program literature.

H.R. 2157 would amend title 38, United States Code, to authorize the termination of Servicemen's Group Life Insurance when premiums are not paid within a 60 day grace period from the due date. Such termination will be effective 60 days after the notice of termination is sent to the veteran. Government life insurance is a contractual benefit that requires, due to its basic nature, a periodic premium payment by its policyholders. In this case, it would apply to full-time reservists who are not in a military pay status, but who qualify for retirement benefits and, therefore, for full-time SGLI coverage. Since SGLI premiums are automatically deducted from the pay of regular active duty and reserve personnel and the military service department involved remits premium payments directly to the Department of Veterans Affairs (VA), there should be provisions to allow VA to terminate a policy if the individual does not choose to pay his/her premiums. The American Legion has no objection to this proposal.

Mr. Chairman, that concludes our statement.

STATEMENT OF

R. JOHN VOGEL

UNDER SECRETARY FOR BENEFITS

DEPARTMENT OF VETERANS AFFAIRS

BEFORE THE

SUBCOMMITTEE ON COMPENSATION, PENSION, INSURANCE, AND MEMORIAL AFFAIRS

OF THE

COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES HOUSE OF REPRESENTATIVES

OCTOBER 12, 1995

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to present the views of the Department of Veterans Affairs (VA) on seven bills. They are:

- H.R. 109, a bill to provide that the effective date for discontinuance of compensation and pension paid by the Secretary of Veterans Affairs shall be the date on which the recipient dies, rather than the last day of the preceding month, in the case of a veteran with a surviving spouse, and for other purposes;

- H.R. 368, a bill to add bronchiolo-alveolar carcinoma to the list of diseases presumed to be service-connected for certain radiation-exposed veterans;

- H.R. 1482, the "Veterans Programs Amendments of 1995";

- H.R. 1609, a bill to amend the Social Security Act and title 38, United States Code, to provide for sharing of medical information relating to determinations of disability between the Social Security Administration and VA;

- H.R. 2155, the "Veterans' Benefits Reform Act of 1995";

- H.R. 2156, the "Veterans' Insurance Reform Act of 1995"; and

- H.R. 2157, a bill to authorize the termination of Servicemen's Group Life Insurance when premiums are not paid.

At the request of the Ranking Member, Mr. Montgomery, I will also present VA's views on Section 644 of the Senate-passed version of the Defense authorization bill, H.R. 1530. That provision would automatically provide $200,000 SGLI coverage to service-members who do not opt in writing either to decline SGLI or to be covered at a lesser amount.

The cost estimates provided in this testimony represent the best estimates available to VA at this time and are designed to assist the Committee in its deliberations. They do not, however, represent official Administration estimates.

H.R. 109

Currently, under section 5112(b)(1) of title 38, when a veteran in receipt of disability compensation dies, compensation benefits are terminated effective the last day of the month preceding the month of death.

H.R. 109 would amend title 38 to change the effective dates for discontinuance of certain awards of disability compensation and pension due to the death of the veteran and for commencement of certain awards of death benefits. Section 1(a) of the bill would amend 38 U.S.C. § 5112(b)(1) to provide that termination of the disability compensation or pension award of a veteran who has

a surviving spouse would be effective the date of death of the veteran. Section 1(b) would add a new section 5112(d) to provide that, in situations where disability compensation or pension is discontinued as of the date of death, the compensation or pension payable for the final calendar month or portion of the month shall be made to the surviving spouse. Section 1(c) would add a new paragraph (3) to section 5110(d) to provide that the effective date of an award of dependency and indemnity compensation (DIC) for which application is received within one year of the date of death in the case of a surviving spouse to whom an amount is payable pursuant to section 5112(d) shall be the day following the date of death. (We assume that the reference to section 5111(d) in section 1(c) is a typographical error.)

The enactment of H.R. 109 would recognize that the financial obligations of a veteran's household do not vanish upon the veteran's death. Rent or mortgage payments and other bills will still come due, and a surviving spouse should not be left without any contribution from VA for the last days of a service-disabled veteran's life. We feel that it is appropriate to pay a surviving spouse a pro rata portion of the veteran's compensation award for the month of death and pledge to work with the Committee to find appropriate offsets.

The interplay of H.R. 109 and the current language of 38 U.S.C. § 5310 is unclear. Section 5310 provides that the veteran's rate applies for the month of death when the surviving spouse's DIC rate is less than the amount previously received by the veteran. Section 1(c) of H.R. 109 seems intended to prohibit the possibility of duplicate payments under sections 5310 and the new section 5112(d), which is added by section 1(b) of H.R. 109. Nonetheless, we believe that specific amendments to section 5310 would be in order to clarify this prohibition. We further note that the limitation imposed by the new section 5112(d) would apply only to DIC awards. A similar limitation should apply to death pension benefits as well.

Shown below is the estimated five-year cost for this bill.

Year	Benefit Cost (millions)
1996	$ 9.3
1997	9.5
1998	9.8

1999	10.4
2000	10.7
Total	$49.7

The estimated cost is based on the assumption that H.R. 109 is not meant to allow duplicate payments under section 5310 and new section 5112(d). These costs would be subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990 (OBRA).

H.R. 368

H.R. 368 would add bronchiolo-alveolar carcinoma, a type of lung cancer, to the list of diseases presumed to be service-connected for certain radiation-exposed veterans. For this purpose, a "radiation-exposed veteran" includes a veteran who during military service participated on-site in an atmospheric nuclear weapons test, served with the occupation forces of Hiroshima, or Nagasaki, Japan, or who is a former prisoner of war who had an opportunity for exposure to ionizing radiation comparable to that of the occupation forces of Hiroshima, or Nagasaki, Japan.

Several years ago we accepted the recommendation of the Veterans Advisory Committee on Environmental Hazards and included

lung cancer as a radiogenic disease for purposes of 38 C.F.R. § 3.311. Under section 3.311, we adjudicate each radiation-exposure compensation claim on its own merits. In each case, we obtain and analyze a radiation-dose estimate developed for official military records. A claimant may also submit an alternative dose estimate from an individual qualified in the field of health, physics, nuclear medicine, or radiology. Each case is subject to Central Office review by the Veterans Benefits Administration's Compensation and Pension Service.

We believe that the approach under section 3.311, a review of the facts unique to each case, is preferable to one creating a blanket presumption that would necessarily be overinclusive. While we recognize that bronchiolo-alveolar carcinoma may result from radiation exposure, most atomic veterans had low doses of ionizing radiation in service; and other carcinogenic agents can also cause this histologic subtype of lung cancer. In evaluating each lung-cancer claimant, VA currently considers factors such as estimated radiation-dose exposure and, if relevant, smoking history. This case-by-case adjudication remains the appropriate way of recognizing meritorious claims.

The estimated cost of providing medical care to the additional lung-cancer patients service-connected under the proposed presumption would be approximately $1.9 million per year

over five years. Shown below is the estimated cost of providing medical care and compensation benefits over a five-year period. The additional compensation benefits costs detailed below would be subject to the pay-as-you-go requirement of the OBRA.

Year	Medical Care	Compensation Benefits	Total Estimated Cost (millions)
1996	1.9	1.8	3.7
1997	1.9	1.9	3.8
1998	1.9	2.1	4.0
1999	1.9	2.3	4.2
2000	1.9	2.5	4.4
Total	$9.5	$10.6	$20.1

H.R. 1482

Section 2 of H.R. 1482 would amend section 5303A(b)(3)(F) of title 38 to extend, for the purposes of all benefits under title 38, certain exemptions from the minimum active duty requirements contained in section 5303A(b)(1). Currently, the exception to the minimum active-duty service requirement for individuals discharged or released from active duty for the convenience of the Government and for certain other reasons

applies only to benefits under chapters 30 and 37 of title 38, United States Code.

We have no objection to the expansion of the exceptions to minimum active duty service requirement. We have no data concerning the number of personnel who do not meet current minimum service requirements, but who may become eligible for certain benefits under this proposal. The reasons for discharge referred to in section 5303A(b)(3)(F) include discharge for a preexisting medical condition, for the convenience of the government, for reduction in force, or for a physical or mental condition that interferes with performance of duty. We do not know how many personnel do not complete their service requirement for these reasons. Because we lack reliable data on the number of individuals who would be affected by this provision, we are unable to provide a cost estimate.

Section 3 of H.R. 1482 would give the Secretary of Veterans Affairs discretionary authority to conduct a pilot program under which contract physicians would provide disability examinations to applicants for VA benefits. The Secretary would be authorized to conduct the pilot program at not more than ten regional offices, with payments to be made from amounts available to the Secretary for payment for examinations of applicants for benefits. VA supports this proposal.

Both the volume and complexity of VA claims have increased in recent years, due to things such as military downsizing and judicial interpretations of veterans' benefits laws. The concurrent increase in the volume and complexity of claims consequently increased VA's backlog of claims and the time VA took to decide claims. Although we have been able to decrease the backlog and improve timeliness of claim processing in the last two years, we think further improvements can be made. This proposed legislation would allow us to explore a method for further improvement.

In June 1993, the Deputy Under Secretary for Benefits established a Blue Ribbon Panel on Claims Processing to develop recommendations for reducing VA's claims backlog and the time VA takes to decide claims. One of the panel's recommendations is to transfer responsibility and associated resources for compensation and pension examinations from the Veterans Health Administration to the Veterans Benefits Administration. The Panel concluded that this change would allow the Veterans Benefits Administration to control the quality and timeliness of examinations upon which it must rely and would reduce delays resulting from rescheduling of examinations by giving the Veterans Benefits Administration control over all scheduling activities. The pilot program authorized by this bill would allow VA to study the feasibility

of implementing this recommendation by having the Veterans Benefits Administration contract for compensation and pension examinations.

If the pilot program is implemented at the maximum number of regional offices authorized under the bill, we estimate that the cost of contract examinations provided under the program would be $7.0 million in fiscal year 1996 and $35.0 million for the five-year period 1996 through 2000. The cost to the Veterans Health Administration to conduct these exams would be $10,448,882 per year.

Section 4 of the bill would amend section 5112 of title 38, United States Code, to provide for the discontinuance of compensation benefits, due to death of a veteran, on the last day of the month of death in the case of a veteran who at the time of death was in receipt of compensation for a service-connected disability rated totally disabling and was receiving additional compensation for a spouse, if the surviving spouse is not eligible for DIC. Currently, section 5112(b)(1) provides for discontinuance of compensation as of the last day of the month preceding the month of death.

We do not support this proposal because it would unfairly advantage some claimants over others. The proposal would apply only in the case of veterans receiving benefits

at the rate for 100-percent disability. However, the death of a veteran may cause comparable financial burdens on the surviving spouses of veterans with lower disability ratings, such as 70, 80, or 90 percent. We see no equitable basis for distinguishing for purposes of this benefit between the surviving spouses of veterans with total disability ratings and those whose severely disabled spouses were rated at slightly lower levels of disability. For this reason, we prefer the provisions in H.R. 109 (discussed above).

We estimate that the additional benefit cost for this section would be $6.7 million for fiscal year 1996 and $36.5 million for the five-year period fiscal year 1996 through 2000. These costs would be subject to the pay-as-you-go requirement of the OBRA.

Section 5 of the bill would increase from $5,500 to $6,000 the maximum statutory allowance provided under 38 U.S.C. § 3902(a) for purchase of an automobile or other conveyance. This amendment would apply to purchases made after October 1, 1995. The last increase in this benefit was in April 1988. We support this provision, which takes into account the rising cost of automobiles over the last seven years.

We estimate that enactment of this provision would result in increased costs of $0.4 million for fiscal year 1996 and $2.2 million for the five-year period 1996 through 2000. These costs would be subject to the pay-as-you-go requirement of the OBRA.

Section 6 of the bill would amend section 1524(a)(3) of title 38, United States Code, to extend from December 31, 1995, to December 31, 1997, the ending date of the program under which certain pension recipients may receive vocational training.

We do not support this provision. The level of participation in this program has been very limited since the program's inception and does not justify its continuation. Available resources would be more effectively employed in providing vocational rehabilitation benefits to service-disabled veterans.

We estimate that the additional benefit cost of this proposal would be $0.4 million for fiscal year 1996 and $1.5 million for the five-year period 1996 through 2000. These costs would be subject to the pay-as-you-go requirement of the OBRA.

Section 7 of H.R. 1482 would amend section 5121(a) of title 38, United States Code, to increase from one year to two years the period for which accrued benefits are payable. Under current law, no more that one-year's worth of benefits, due and unpaid to an individual at death, may be paid as accrued benefits to

specified survivors of the deceased or to reimburse those who bore the expense of the deceased last illness and burial.

This proposal apparently reflects concern that, given the present backlogs in the adjudication system, especially at the appellate stage, some number of claimants will die while awaiting a final decision. We have no objection to this proposal.

In fiscal year 1994, accrued benefits were awarded in 4,147 claims. Because of the lack of specific data for both the number of survivors who may be eligible for more than one-year's worth of accrued benefits and the actual amount of these benefits, we are unable to provide a cost estimate for this proposal.

Section 8 of the bill would amend chapter 53 of title 38 to allow VA to retain, from amounts collected by VA on debts owed by reason of participation in VA programs, a sum equivalent to the costs incurred by VA in recovering the debts. The costs of recovering an amount collected would be credited to the account from which the costs were incurred.

We estimate the amounts to be credited to government operating expenses (GOE) under this proposal to be $21.5 million in fiscal year 1996, increasing to $29.2 million in fiscal year 2000. We estimate the total amount to be credited to GOE over the five-year period 1996 through 2000 to be $125.6 million. We cannot support this proposal because it would result in addi-

tional costs of $125.6 million during the next five years. This proposal would reduce current mandatory receipts received by the Treasury; therefore, these costs would be subject to the pay-as-you-go requirement of the OBRA.

H.R. 1609

H.R. 1609 would amend the Social Security Act and title 38, United States Code, to provide for sharing of medical information relating to determinations of disability between the Social Security Administration and Department of Veterans Affairs. VA does not support this bill.

Under section 1 of H.R. 1609, when the Commissioner of Social Security determines that a veteran is eligible for supplemental security income or disability insurance benefits, the Commissioner would be required, with the consent of the veteran, to transfer to the Secretary of Veterans Affairs medical information regarding the veteran which the Commissioner obtained when determining such eligibility. Section 2(a) of the bill would require that the Secretary of Veterans Affairs request medical information from the Commissioner of Social Security for use in resolving issues involving the nature and degree of a veteran's disability for purposes of VA benefits. Section 2(b) of the bill would require that the Secretary accept, for purposes

of determining the existence of a disability or the nature or degree of a disability for purposes of laws administered by VA, determinations previously made by the Commissioner of Social Security as to such issues. Section 2(b) would also require that the Secretary not rely on a determination by the Social Security Administration (SSA) that a disability does not exist. Further, under that section, the Secretary would periodically verify with the SSA the status of a veteran's disability when a veteran is awarded VA benefits on the basis of an SSA determination, and, if the SSA has determined that there has been a change in the existence, nature, or degree of disability, VA must review its own award of benefits.

VA appreciates the intent of the bill to expedite claims processing. However, statutory, regulatory, and procedural mechanisms already exist through which VA can accomplish information sharing with the SSA. Additionally, certain provisions of H.R. 1609 are problematic.

We see no need for the requirements contained in sections 1 and 2(a) regarding sharing of information. Under 38 U.S.C. § 5107 and 38 C.F.R. § 3.159, once a claimant has submitted a well-grounded claim, VA has a duty to assist the claimant in developing the facts pertinent to the claim. This duty to assist includes a duty to request pertinent evidence of which VA is

aware that is maintained by other Federal agencies. In particular, the United States Court of Veterans Appeals has held that VA's duty to assist extends to obtaining pertinent medical evidence from the SSA and giving it appropriate consideration and weight in claim adjudication when VA is on notice that such evidence exists. *See, e.g., Murincsak v. Derwinski*, 2 Vet. App. 363, 370-72 (1992). VA's Veterans Benefits Administration Adjudication Procedure Manual, M21-1, part III, chapter 5, instructs adjudicators regarding the necessity of obtaining SSA medical information. Our regional offices routinely obtain this information and consider it in making disability determinations for VA benefits purposes. In addition, section 5106 of title 38, United States Code, requires that other Federal agencies provide VA upon request information "for purposes of determining eligibility for or amount of benefits, or verifying other information with respect thereto."

Section 1 of the bill would amend 42 U.S.C. §§ 422 and 1383(f) to add requirements that the SSA furnish VA certain medical information regarding "an individual who is a veteran (as defined in 38 U.S.C. § 101 of title 38, United States Code)." The term "veteran" is defined in 38 U.S.C. § 101(2) as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than

dishonorable." Application of this definition requires determination of various factual matters relating to the nature and character of a veteran's service. Such determinations may be complex and are within the expertise of VA, rather than the SSA. This provision may therefore cause administrative difficulties.

Section 1 also requires that the SSA forward to VA medical information on a veteran without regard to whether the veteran has filed a claim for VA benefits. This provision would create a responsibility for VA to maintain or dispose of confidential medical documents concerning individuals who have no claims pending before VA or who have no entitlement to VA berefits for various reasons. Maintenance of records in such situations would be pointless and could lead to unnecessary retention of duplicative records by the SSA and VA.

Section 2(b) requires that VA accept, in certain cases, SSA determinations as to the existence, nature, and degree of disability. Entitlement to supplemental security income based on disability and disability insurance benefits is predicated on impairments that prevent substantial gainful activity and are expected to last at least one year or result in death. Entitlement to VA disability compensation involves both a determination that a disability is service connected and a determination of the degree of disability based upon the average

impairment of earning capacity. Entitlement to VA disability pension is based on total disability that is permanent in nature, i.e., reasonably certain to continue throughout the life of the disabled person. Given the differences in the nature and purpose of VA and SSA disability determinations and the differences in criteria used to make the respective determinations, we cannot support a provision that would make the SSA's determinations controlling on VA.

Assuming adoption of a provision making SSA determinations binding on VA, the requirement of section 2(b) that VA periodically verify with the SSA the status of a veteran's disability when VA has awarded disability benefits in reliance on SSA information would be unnecessary. The Veterans Benefits Administration conducts an annual computer match to verify payments received from the SSA by veterans in receipt of VA pension. We also conduct income verification matches with the SSA and the Internal Revenue Service for veterans receiving pension and compensation at the 100-percent rate on the basis of individual unemployability. Where evidence indicates that SSA disability payments have ceased, VA would be alerted to the need to review the beneficiary's disability status. Although our computer matches do not include most recipients of VA disability compensation, periodic reexaminations by VA are scheduled in the

many cases where the medical evidence does not demonstrate that the currently assigned level of disability is static. We believe that our procedures for computer matches and periodic reexaminations provide adequate controls for ensuring proper disability evaluations.

We also note that a single examination generally is insufficient to warrant a reduction in a VA disability evaluation, although it may show evidence of some improvement in a service-connected condition. Evidence warranting a reduction must demonstrate a sustained improvement over a period of time. Medical information from the SSA indicating improvement in a service-connected disability would not in itself provide a basis for reducing VA benefits. VA would not reduce benefits without first conducting its own medical examination. Section 2(b) could, therefore, have the unintended result of causing rating specialists to schedule examinations that, in the final analysis, may unnecessarily burden both VA and its beneficiaries.

The enactment of H.R. 1609 would require VA to devote significant resources to the handling and storage of SSA records. Based on the bill's mandates and information from the SSA and VA, we estimate that the SSA would make disability determinations subject to the requirements in H.R. 1609 for approximately 413,000 veterans each year. VA would therefore be required to

process and store more than 400,000 sets of records each year in addition to the 300,000 VA currently receives on a routine basis from the Department of Defense for military personnel separating from active duty. We are unable to estimate with accuracy the cost of handling and storing such records.

H.R. 2155

H.R. 2155, the "Veterans' Benefits Reform Act of 1995," is a VA proposal to amend title 38, United States Code, to restrict payment of the clothing allowance, in the case of incarcerated veterans, and to create for pension purposes a presumption of permanent and total disability for veterans over age 65 who are patients in a nursing home. I request prompt consideration and enactment of this bill.

Section 2 of the bill would amend chapter 53 of title 38, United States Code, to restrict the payment of a clothing allowance to incarcerated veterans who are furnished clothing without charge by a penal institution. Under 38 U.S.C. § 1162, VA is required to pay a clothing allowance to each veteran who, because of a service-connected disability, wears or uses a prosthetic or orthopedic appliance which tends to wear out or tear the veteran's clothing, or who uses medication prescribed for a skin condition which is due to a service-connected

disability and which causes irreparable damage to the veteran's outergarments. Although 38 U.S.C. § 5313 limits payment of compensation to certain incarcerated veterans, that statute does not restrict payment of the clothing allowance to them, even though they generally do not pay for their institutional clothing.

A clothing allowance for incarcerated veterans is unnecessary where they receive institutional clothing at no personal expense. We therefore recommend legislation to prohibit payment of the clothing allowance to veterans who are incarcerated in excess of 60 days and are furnished clothing without charge by the institution in which they are incarcerated. Under our proposal, the annual award would be reduced on a pro rata basis for each day of incarceration. This provision would reduce direct spending by less than $500,000 annually.

Section 3 of the bill would create a presumption of permanent and total disability for pension purposes for veterans 65 years of age or older who are patients in a nursing home. Section 8002 of the Omnibus Budget Reconciliation Act of 1990, 104 Stat. 1388-342, eliminated the presumption of total disability for pension purposes for persons 65 years of age and older. As a result, it is currently necessary for a VA rating

board to evaluate disability before pension can be paid to any veteran, regardless of age or physical condition.

We propose that 38 U.S.C. § 1502(a) be amended to provide, for pension purposes, a presumption of permanent and total disability for persons 65 years of age or older who are patients in a nursing home. Enactment of this amendment would reduce the time necessary to process disability-pension claims because, once a veteran's age and status as a nursing-home patient is confirmed, it would no longer be necessary to develop and evaluate medical evidence regarding the veteran's disability.

Adoption of this proposal would not affect the integrity of VA's pension program because an individual 65 years old who is a patient of a nursing home would almost certainly meet the current requirements of section 1502(a), which state that a person is considered to be permanently and totally disabled if he or she is unemployable as a result of disability reasonably certain to continue throughout the life of the disabled person or suffers from a disease or disorder which justifies a determination of permanent, total disability. In addition, VA could adopt procedures to reevaluate entitlement to pension in the event a notice of discharge is received from a veteran whose pension is based on age and confinement in a nursing home.

Enactment of this proposal would result in estimated administrative cost savings of $304,000 in fiscal year 1996 and $1.6 million for the five-year period fiscal year 1996 through fiscal year 2000.

HR 2156

H.R. 2156, the "Veterans' Insurance Reform Act of 1995," is another VA proposal. It would change the name of the Servicemen's Group Life Insurance program to Servicemembers' Group Life Insurance, merge the Retired Reservists' Servicemembers' Group Life Insurance program into the Veterans' Group Life Insurance program, extend Veterans' Group Life Insurance coverage to members of the Ready Reserve of a uniformed service who retire with less than 20 years of service, permit an insured to convert Veterans' Group Life Insurance policy to an individual policy of life insurance with a commercial insurance company at any time, and permit an insured to convert a Servicemembers' Group Life Insurance policy to an individual policy of life insurance with a commercial company upon separation from service. I request consideration and enactment of this bill.

Section 2 of H.R. 2156 would amend title 38, United States Code, to change the name of the Servicemen's Group Life Insurance

program to Servicemembers' Group Life Insurance to reflect gender neutrality.

Section 3 of the bill would merge the existing Retired Reservists' Servicemen's Group Life Insurance (SGLI) program into the Veterans' Group Life Insurance (VGLI) program. Currently, when members of the Ready Reserve retire with 20 years of service or are transferred to the Retired Reserve under the temporary special retirement authority provided in 10 U.S.C. § 1331a, they may continue their SGLI coverage as Retired Reservists' SGLI until they receive their retired pay or reach age 61, whichever comes first. Members of the Ready Reserve who retire with 20 years of service also have the option to convert their SGLI policy to a commercial life insurance policy. We propose to discontinue the Retired Reservists' SGLI program and instead place the insured Retired Reservists in the VGLI program. This proposal would benefit Retired Reservists by making available the lifetime coverage provided under the VGLI program, by giving them a discount when premiums are paid on an annual basis, by allowing them a longer reinstatement period (5 years instead of 3 years), by permitting them to convert their coverage to commercial policies, and by allowing them to pay their premiums by allotment from their retired pay. This proposal would also save administrative expenses.

We recognize that Retired Reservists who are over 44 years of age would have to pay increased premiums for the lifetime VGLI coverage. For example, the monthly premium for $100,000 of SGLI coverage for Retired Reservists who are ages 50-54 is currently $56, and the monthly premium for $100,000 of VGLI coverage for the Retired Reservists who are ages 50-54 would be $65. However, it should be noted that the SGLI Retired Reserve premium rates are currently insufficient to cover the cost of death claims in the program. The actuarial staffs of both VA and the Primary Insurer have agreed that these premium rates should be increased to the level of VGLI premium rates as of July 1, 1996. This would serve to reduce the subsidy required for the SGLI Retired Reservist program from the parent SGLI program. Therefore, even without this legislative proposal, the SGLI Retired Reservist premium rates will be increased to the same level as the VGLI rates. This proposal would have no adverse effect on any other insured member or on the SGLI or VGLI programs and would involve no cost to the Government.

Section 3 would also extend the benefit of VGLI lifetime coverage to members of the Ready Reserve of a uniformed service, whom the Department of Defense considers more important than ever to our national security. When the Veterans' Insurance Act of 1974 was enacted, Congress stated that members of the Ready

Reserve who separate with less than 20 years of service would not be eligible to convert their SGLI coverage to VGLI, unless they are disabled and uninsurable at the time of release. This proposal would improve the overall financial performance of the VGLI program by creating an additional pool of potential insureds and involve no cost to the Government. In addition, it would not adversely affect the SGLI or VGLI programs.

Section 4 of the bill would expand the opportunities of SGLI and VGLI insureds to convert their coverage to commercial life insurance. VGLI coverage is provided under a five-year level premium term plan that is renewable every five years for life. Premiums are based on the insured's age at the time of issue and/or renewal and are increased accordingly at the beginning of each five-year renewal period. Although term policies provide low cost coverage for younger insureds, term insurance becomes very expensive for older insureds. Under the current law, VGLI insureds have the option of converting their VGLI coverage to permanent life coverage with a commercial insurance company at the end of each five-year term period. A permanent life insurance policy, which provides coverage at a level premium throughout the premium paying period of the policy, is an alternative to the ever-increasing cost of term coverage. Since the cost of the converted policy increases as the insured's age

increases, requiring insureds to delay conversion until the end of the five-year period increases the cost. For example, if a VGLI insured converts his or her policy at age 41, the monthly premium for $100,000 of whole life coverage would be $170. However, under H.R. 2156, if the insured were allowed to convert at age 36, rather than waiting until the end of the five-year renewal period, the premium would be $133.

For the same reason, H.R. 2156 would also extend this conversion privilege to SGLI insureds at the time of their separation from service. Currently, SGLI insureds must first convert to VGLI and thereafter can convert their VGLI policy to a commercial permanent life policy at the end of their five-year VGLI period. This increases the cost of conversion to a commercial life policy as discussed above.

Expansion of the conversion privilege would increase the life insurance options of our insured veterans and lower their cost of conversion to a commercial permanent life policy. We do not anticipate a negative effect on the SGLI or VGLI program or any substantial cost to the Government if this proposal were enacted.

We urge that the House promptly consider and pass this bill.

Maximum SGLI Coverage Proposal

Mr. Chairman, the Ranking Member, Mr. Montgomery, has asked that we also comment on Section 644 of the Senate-passed version of the Defense authorization bill, H.R. 1530, and we are pleased to do so.

The provision would change current law regarding coverage under the Servicemen's Group Life Insurance program. Currently, members are automatically insured for $100,000 unless they elect in writing to either decline coverage altogether or to be insured for lesser amounts. In addition, they may elect additional insurance up to a maximum $200,000 total coverage by applying for it in writing.

Under the Senate proposal, coverage at the $200,000 maximum would be automatic unless a member opted in writing either to decline the insurance altogether or to be covered in a lesser amount. In other words, instead of having to affirmatively "opt in" as now for the maximum coverage, a member would have to "opt out" or be covered for the full $200,000. The amendment would not take effect until 180 days after enactment.

Mr. Chairman, we would welcome such a change in law. We would rather the law presume that a member would wish to provide his dependents or other beneficiaries the maximum benefit as opposed to something less. While this would require members who

want less than the maximum coverage to take an affirmative step they need not currently take, in matters as important as adequately providing for survivors we do not feel it is an unreasonable requirement. It should be borne in mind that members must act affirmatively now to be covered for anything less than $100,000. Furthermore, the 180-day lead time built into the amendment gives the services adequate time to instruct members as to the new requirements and to advise them what their premiums would be should they be covered in the maximum amount. Members will be able to decide for themselves whether the increased deductions from pay for the higher premiums are affordable.

H.R. 2157

H.R. 2157, proposed by the Department of Defense, would authorize the termination of SGLI when premiums are not paid. Section 1969(a)(2) of title 38, United States Code, requires the uniformed services to pay SGLI premiums on behalf of members of the Ready Reserves who qualify for SGLI under 38 U.S.C. § 1965(5)(B), and then to seek reimbursement from the members for the amount paid. This is not generally a problem since most members receive a monthly paycheck from the uniformed service. In such cases, the uniformed service simply deducts the amount owed from the monthly pay. Problems arise when a member who does

not receive a monthly check fails to reimburse the uniformed service.

Under the current interpretation of the law, the uniformed service must continue to pay SGLI premiums to VA on behalf of that member, even if the member fails to reimburse the uniformed service. This bill would allow a uniformed service to terminate the coverage of any individual who fails to reimburse the service for SGLI premiums. As drafted, the earliest SGLI coverage could be terminated would be 120 days from the date the premium became overdue.

As to whether such legislation is necessary, we defer to the Department of Defense. VA has supported similar proposals in the past. However, earlier proposals did not limit termination authority solely to Ready Reservists but included all SGLI insureds. We suggest that this proposal be expanded to include all SGLI insureds. There would be no cost to VA if this proposal were to be enacted.

STATEMENT OF

CHARLES L. CRAGIN

CHAIRMAN, BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

BEFORE THE

SUBCOMMITTEE ON COMPENSATION, PENSION, INSURANCE, AND MEMORIAL AFFAIRS

OF THE

COMMITTEE ON VETERANS' AFFAIRS

UNITED STATES HOUSE OF REPRESENTATIVES

OCTOBER 12, 1995

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to present the views of the Department of Veterans Affairs (VA) on two bills. They are:

- H.R. 1483, a bill to allow revision of veterans benefits decisions based on clear and unmistakable error; and

- a draft bill to revise the procedures for providing claimants and their representatives with copies of Board of Veterans' Appeals (Board or BVA) decisions and to protect the right of claimants to appoint veterans service organizations as their representatives in claims before VA.

HR 1483

H.R. 1483 would allow revision of veterans benefits decisions based on "clear and unmistakable error." We oppose enactment of H.R. 1483 for the following reasons.

Section 1(a) of H.R. 1483 would subject decisions of an agency of original jurisdiction to revision on the grounds of clear and unmistakable error. The evidentiary establishment of such error would require reversal or revision of the decision. Reversal or revision of a prior decision on these grounds would have the same effect as if the reversal or revision had been made on the date of the prior erroneous decision. Section 1(a) would permit the Secretary to institute review of a decision for clear and unmistakable error on his or her own motion or upon request of a claimant. A request for such review could be made at any time after the original decision is made and would be decided the same as any other claim.

Section 1(a) would provide by statute what VA already provides in its regulations and claims-adjudication process. Currently, an allegation of error in an otherwise final decision of an agency of original jurisdiction requires a review of that decision for correctness. Under the provisions of 38 C.F.R. § 3.105(a), a finding of clear and unmistakable error requires reversal or amendment of the erroneous decision. The later, correct decision is effective as if it had been made on the date of the previous, incorrect decision. The time during which clear and unmistakable error may be alleged is not restricted. Such allegations are treated as other claims are, even to the extent that the United States Court of Veterans Appeals has held:

> Once there is a final decision on the issue of "clear and unmistakable error" because the

> [agency of original jurisdiction] decision was not timely appealed, or because a [Board of Veterans' Appeals] decision not to revise or amend was not appealed to th[e] Court, or because th[e] Court has rendered a decision on the issue in that particular case, that particular claim of "clear and unmistakable error" may not be raised again.

Russell v. Principi, 3 Vet. App. 310, 315 (1992). Although we have no particular objections to the provisions of section 1(a) of H.R. 1483, we believe that existing law and regulations already afford the same protections so that additional legislation is unnecessary.

Section 1(b) of H.R. 1483 would subject BVA decisions to revision on the grounds of clear and unmistakable error. It would authorize claimants to request a review to determine the existence of clear and unmistakable error in a Board decision at any time after the decision is made. Under section 1(c), those provisions would apply to all Board decisions, and any Board decision on a claim of clear and unmistakable error that was filed after or was pending before VA, the Court of Veterans Appeals, the Court of Appeals for the Federal Circuit, or the Supreme Court on the date of enactment of H.R. 1483 would be subject to review by the Court of Veterans Appeals.

In the interests of the finality of administrative appellate decisions, VA opposes the provisions of section 1(b) and (c). The Board already has the authority, under current 38 U.S.C. § 7103(c), to correct an obvious error in the record, and the Chairman has the authority, under 38 U.S.C. § 7103(a), to order reconsideration of a prior Board decision. Under the provisions of 38 C.F.R. § 20.1000, the Chairman may order reconsideration on the Board's own motion or on an appellant's motion upon an allegation of obvious error of fact or law.

Section 1(c) would in effect rescind the limitation, in section 402 of the Veterans' Judicial Review Act, on which Board decisions are subject to review by the Court of Veterans Appeals. Under that limitation, the Court may review only those decisions in which a notice of disagreement was filed on or after November 18, 1988. Subjecting to Court review any Board decision on a claim of clear and unmistakable error in a prior Board decision would also subject the prior Board decision to Court review. Obviously, the Court could not determine whether a prior Board decision involved clear and unmistakable error without examining that prior decision. Thus, the Court could review any Board decision, regardless of when the notice of disagreement was filed, that was reviewed on a claim of clear and unmistakable error. Such wide-ranging review would seem very much at odds with the carefully circumscribed review afforded under the original Veterans' Judicial Review Act.

Enactment of section 1(b) and (c) now, when the Board is struggling to achieve acceptable response times in working its already heavy caseload, could require the Board to review, literally on demand, hundreds of thousands of its past decisions, including those entered decades ago. From FY 1977 to FY 1994, the Board issued 518,157 final decisions. If claimants challenged only five percent of those otherwise final decisions alleging clear and unmistakable error, the Board's caseload would increase by 25,908 cases. This additional caseload would exceed the Board's entire FY-1994 output of 22,045 decisions and approach the Board's projected FY-1995 output of 28,000 decisions. The Board's average response time for FY 1994 was 781 days and is projected to be 745 days in FY 1995. Assuming that no additional resources would be available to handle the nearly

26,000 additional cases that could result from enactment of section 1(b) and (c), the average response time would increase to 1083 days. Enactment now would come at the worst possible time, and its adverse impact on decisional timeliness could more than offset any gains that may flow from enactment of Public Law 103-271, which authorized single-member Board decisions.

Because some provisions of H.R. 1483 are redundant, and others could aggravate the Board's backlog of appeals, we oppose enactment of the bill.

VA Draft Bill

We would also like to take this opportunity to advocate enactment of a draft bill, which Secretary Brown recently transmitted to the Speaker, to amend title 38, United States Code, to revise the procedures for providing claimants and their representatives with copies of BVA decisions and to protect the right of claimants to appoint veterans service organizations as their representatives in claims before VA. This legislation would permit the Board to provide copies of its appellate decisions to claimants' representatives reasonably and efficiently. It would also permit VA to continue a long-standing method of claimant representation which has proven efficient and beneficial to claimants.

Section 7104(e) of title 38, United States Code, specifies that "the Board shall promptly mail a copy of its written decision to the claimant and the claimant's authorized representative (if any)." In the past, the Board's method of "mailing" a copy of a decision to a representative depended on where the representative was located. For a representative at the Board's offices in Washington, D.C., a contractor hand-

delivered the Board decision to the representative. For a representative at a VA regional office, the Board gave the decision to the contractor, who "bundled" mail for the 58 VA regional offices and delivered the bundles to the United States Postal Service. After the United States Postal Service delivered the bundles to the VA regional offices, each regional office sorted its bundled mail and distributed any Board decision to the appropriate representative at that regional office. For a representative not at an office at a VA facility, the Board mailed its decision directly to the representative.

This past practice made sense considering the number of Board decisions and the number of representatives who have offices at VA facilities. The Board decides more than 25,000 cases per year. In more than 85 percent of those cases, one of the various veterans service organizations represents the claimant. Often, as authorized by 38 U.S.C. § 5902(a)(2), the service organization occupies free office space in either a VA regional office or at the Board's offices in Washington, D.C. Thus, the Board's past practice of distributing decisions to representatives was flexible and efficient.

This past practice, however, was invalidated by the Court of Veterans Appeals. In *Trammell v. Brown*, 6 Vet. App. 181 (1994), the Court of Veterans Appeals held that an apparently late notice of appeal was timely filed because the Board's decision-distribution procedure did not accord with 38 U.S.C. § 7104(e). In *Davis v. Brown*, 7 Vet. App. 298 (1995), the court held that the phrase "the Board shall promptly mail" in section 7104(e) means that the Board decision "must be correctly addressed, stamped with the proper postage, and delivered directly by the [Board] into the custody of the U.S. Postal Service." *Id.* at 303. The

court then concluded that the apparently late notice of appeal in *Davis* was timely filed. *Id.* at 304.

The court's interpretation of section 7104(e) creates problems with logistical solutions the Board has developed over the years to provide representatives with copies of its decisions. Indeed, it leads to some absurd results. For example, instead of a Board employee (or a contractor) simply walking down the hall to deliver a Board decision to a service organization representative on the same floor, now the employee, not a contractor, must place the decision in an envelope, affix proper postage, and deliver it directly into the United States Postal Service's custody. We understand that the Postal Service takes this mail to Maryland for sorting, then returns it to the District of Columbia for delivery. The Postal Service delivers VA mail to the VA building across the street from the Board's offices, where a contractor sorts it for internal delivery. The contractor must then carry the Board decision across the street to the building housing the Board and the service organization representative and deliver it to the representative.

The Board should be permitted to provide representatives with copies of its decisions sensibly. Thus, we propose this legislation to permit the Board to "send" its decisions to claimants and their representatives by any means reasonably calculated to provide them with a copy of the decision within the same time a copy of the decision sent by first-class mail would be expected to reach them.

Section 1(b) of this draft bill would also make a corresponding change to 38 U.S.C. § 7266(a)(1), which currently provides that, to obtain review by the Court of Veterans Appeals, a person adversely affected by a final Board decision must file a

notice of appeal within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e). Our proposed amendment would require that a notice of appeal be filed within 120 days after the date on which notice of the Board decision is sent pursuant to section 7104(e) to the representative or, if none, to the claimant.

Current law authorizes the Secretary to recognize individuals to prepare, present, and prosecute claims for VA benefits on behalf of claimants. Section 5904(a) of title 38, United States Code, authorizes the Secretary to recognize any individual as an agent or attorney for the preparacion, presentation, and prosecution of VA benefit claims. Section 5903 of title 38, United States Code, authorizes the Secretary to recognize any individual for the preparation, presentation, and prosecution of any particular VA benefit claim. In addition, section 5902(a)(1) of title 38, United States Code, authorizes the Secretary to recognize representatives of certain veterans service organizations in the preparation, presentation, and prosecution of VA benefit claims.

With respect to representatives of veterans service organizations, VA's policy and practice has been to recognize any accredited representative of an approved service organization if a claimant files a power of attorney in favor of the organization itself, a specific office of the organization, or a particular representative of the organization. This practice affords several advantages. First, it allows different representatives of an organization to handle a particular claim at different stages of the claim, without the claimant having to file a separate power of attorney for each representative. For example, a representative of an organization at a VA field office can

prosecute a claim there and initiate an appeal. Another representative of the same organization at the organization's national office can then argue the claim on appeal before the Board in Washington, D.C. Second, it allows different representatives of the organization to handle a particular claim at different locations and times, without the claimant having to file another power of attorney. For example, if a claimant moves from New York to Los Angeles while his or her claim is pending, a representative of an organization at a local office in New York can initially handle the claim there, and another representative of the organization at a local office in Los Angeles can subsequently pursue the claim at that location. Similarly, a second representative of an organization can assume responsibility for the prosecution of a claim if the original representative of that organization moves, becomes incapacitated, or leaves the organization. Third, the practice allows VA to notify a claimant's representative in a manner best suited to assure notice is received. For example, the Board can mail a copy of its decision to a representative of a given organization in Washington, D.C., as well as to a local representative at a field station, thereby doubling the likelihood that the claimant's representative will actually receive notice.

Cases pending before or recently decided by the Court of Veterans Appeals are imperiling VA's long-standing practice of recognizing any accredited representative of a veterans service organization in a particular claim. In *Leo v. Brown*, U.S. Vet. App. No. 93-844 (June 16, 1995), the court again held that an apparently late notice of appeal was timely filed because the Board's decision-distribution procedure did not accord with 38 U.S.C. § 7104(e). In this case, the claimant executed a power

of attorney in which, in the space for designation of a representative, he entered the American Legion and the address of the Greenville, South Carolina, Veterans Affairs Office, where the American Legion had a local representative. The Greenville office stated that it had no record of having received a copy of the Board's decision on the veteran's claim. The court ruled that actual receipt of a copy of the decision by the American Legion's national office in Washington, D.C., did not cure the failure to mail a copy to the claimant's designated representative, "i.e., the Greenville, South Carolina, office."

Based on inquiries from the court in cases currently pending, we are concerned that the court may go further and hold that, based on the plain meaning of 38 U.S.C. § 5902(a)(1), a claimant may appoint only an individual, not an organization, to prepare, present, and prosecute a claim before VA on the claimant's behalf. Such a holding would play havoc with the traditional role of veterans service organizations in the claim process and inject additional technical demands into that process. If a claimant could appoint only an individual, the claimant would have to file another power of attorney each time it became necessary or expedient for another accredited representative to assist with his or her claim. VA could not allow another representative of the same organization access to the claimant's files or mail another representative a copy of a Board decision without risking violation of the Privacy Act. Under the *Leo* decision, similar problems would frequently arise in the cases of claimants who designate a particular office of an organization on their power-of-attorney forms.

A recent survey at the Board showed that 79 percent of appellants who designated a veterans service organization on their power-of-attorney form (which, as noted above, occurs in

more than 85 percent of the 25,000 cases that pass through the Board each year) designated only the organization, not a specific office or an individual representative of the organization. Thus, if the court were to invalidate VA's practice of recognizing organizations rather than individuals, it would cast doubt on the validity and meaning of nearly 16,800 powers of attorney in cases coming before the Board alone over one year. It would delay decisions on numerous claims while VA tried to clarify what individual representative, if any, each appellant wanted to represent him or her.

The impact on the Compensation and Pension Service (C&P) would be even greater. Last year, C&P completed action on 2,127,265 compensation and pension claims. As of December 31, 1994, national veterans service organizations represented approximately 36 percent of the beneficiaries receiving monthly compensation or pension payments from C&P. It would be fair to conclude that veterans service organizations represented approximately 36 percent of the compensation or pension claimants whose cases were handled in 1994. Although C&P does not have statistics on the number of claimants who designate only an organization (as opposed to a specific office or recognized representative of an organization), let us assume that, as at the Board, approximately 79 percent of claimants represented by service organizations designated only an organization on their powers of attorney. Thus, an "individuals only" holding by the court would cast doubt on the validity and meaning of nearly 605,000 powers of attorney coming before C&P during one year.

An "individuals only" rule would require extensive and costly reprogramming of the Veterans Benefits Administration's (VBA) automated data processing system and greatly increase VBA's

annual postage costs. In connection with claim development, award notification, and routine communications concerning awards, VBA's regional offices annually produce more than 3 million letters for veterans service organizations representing claimants or beneficiaries. Currently, the Hines, Illinois, computer center prepares and mails one copy of each letter to the claimant or beneficiary and ships three copies to the appropriate regional office, where one copy is filed in the claim folder and two are delivered through internal mail to the organization. If required to notify individual representatives of organizations by mail, VBA would have to reprogram the computer system and, most likely, mail the representatives' copies from Hines. Postage costs alone could approach $1 million annually. We think that such a procedure would waste limited resources, particularly since the current procedure provides an efficient means of notifying organizations.

An "individuals only" rule would also probably force VBA to curtail or eliminate veterans service organizations' access to veterans' computer records. Currently, an accredited representative of an organization may access the records of any veteran represented by that organization. Under an "individuals only" system, however, VBA would have to restrict a representative's access to only the files of those veterans whose powers of attorney designate that representative. The cost of establishing appropriate security for the computer files in a system that includes over 6,000 individual representatives would probably be too great to justify continued access to the records. The Board would also face a similar problem with access it provides veterans service organizations to its computer records.

Section 2 of the draft bill, which we developed after consulting with officials of the major veterans service organizations, would address these problems. Section 2(a) would authorize the Secretary to treat a power of attorney naming an organization, a specific office of an organization, or a recognized representative of an organization as an appointment of the entire organization, unless the claimant specifically indicated his or her desire to appoint only a recognized representative of the organization. Under this amendment, whether a claimant's power of attorney is executed in favor of an approved organization, a local office of that organization, or an individual representative of the organization, the claimant could rest assured of the assistance of an accredited representative of the organization at every stage of the claim or appeal before VA, regardless of location or the inability of a particular individual to continue representation, without having to file additional powers of attorney.

Section 2(a) of the draft bill would also require the Secretary, when required or permitted to notify a claimant's representative, and when the claimant has in effect appointed a veterans service organization as representative, to notify the organization at the address designated by the organization for the purpose of receiving each kind of notification.

Under section 2(b) of the draft bill, the amendments made by section 2(a) would apply to any power of attorney filed with VA regardless of the date of its execution.

We estimate that the savings from enactment of the provision authorizing the sending of Board decisions would be insignificant, *i.e.*, administrative savings of less than $100,000 per year. Depending on how the Court of Veterans Appeals

interprets current 38 U.S.C. § 5902(a), enactment of the provision regarding the appointment of veterans service organizations as claimants' representatives could result in cost avoidance in excess of $1 million annually.

ASSOCIATION OF THE UNITED STATES ARMY

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General Jack N. Merritt
United States Army (Ret.)
President

November 1995

Honorable Terry Everett
Chairman
Subcommittee on Compensation, Pension,
Insurance, & Memorial Affairs
Committee on Veterans Affairs
House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Recently, at a subcommittee hearing (October 12, 1995) a witness suggested that military-related associations might oppose an increase from $100,000 to $200,000 coverage in the Servicemembers' Group Life Insurance Program. This opposition would be motivated, he suggested, by a concern that a higher SGLI amount would cause servicemembers to buy less life insurance sold through individual associations, thereby garnering less profit for the association.

The witness was not a spokesman for the Association of the United States Army and his sentiments do not reflect the views of this Association. The services offered by and through this Association are intended to provide its members the opportunity to fill gaps left by otherwise inadequate military and veterans benefits. A profit motive will never cause AUSA to oppose something that is good for soldiers and their families. That has always been true and is true in this instance.

I ask that this letter be made a part of the hearing record to protect against future misinterpretations. Thank you for your consideration and for the opportunity to comment on this initiative and to speak out in favor of soldiers.

Sincerely,

JACK N. MERRITT
General, USA Retired

WRITTEN COMMITTEE QUESTIONS AND THEIR RESPONSES

Hearing on October 12, 1995

Questions for the Honorable Charles Cragin
Chairman, Board of Veterans' Appeals

from the Honorable Lane Evans, Ranking Minority Member
Subcommittee on Compensation, Pension, Insurance, and Memorial Affairs
House Committee on Veterans' Affairs

Question 1: Are you aware that the VSOs [veterans service organizations] believe that the Smith decision [*Smith v. Brown*, 35 F.3d 1516 (Fed. Cir. 1994)] created a real problem and as a result, all endorse the provisions of H.R. 1483? Are you also aware that identical language was passed unanimously by the Committee and House last year?

Answer: It is my understanding that, of the six veterans service organizations submitting testimony for the Subcommittee's October 12, 1995, hearing, five supported H.R. 1483, while one--the Paralyzed Veterans of America--noted that, while it felt the proposal had merit, it thought that the proposal left several questions unanswered. I do not know whether all VSOs believe that the *Smith* decision created "a real problem."

I do know that the decision by the Federal Circuit in *Smith* cured an anomaly in veterans jurisprudence which began in *Russell v. Principi*, 3 Vet.App. 310 (1992) and ended less than two years later. In *Russell*, the Court of Veterans Appeals suggested that 38 C.F.R. § 3.105(a)--the regulation which permits regional offices to reverse or revise otherwise final decisions--applied to Board decisions, a position opposed by the Secretary as being in conflict with regulations and practice in effect since the Board's inception in 1933. *See Smith*, 35 F.3d at 1524-25. In *Smith*, the Federal Circuit agreed with the Secretary, ruling that the Secretary correctly interpreted the authority in 38 C.F.R. § 3.105(a) as relating only to review of regional office decisions, not to those of the Board. *Smith*, 35 F.3d at 1527. The only "problem" was the original misinterpretation by the Court of Veterans Appeals, which was cured a short time later by the Court of Appeals for the Federal Circuit.

I am aware that, in the 103rd Congress, section 6 of H.R. 3269, which you introduced, was substantively identical to H.R. 1483, and that the Subcommittee on Compensation, Pension, and Insurance incorporated that provision as section 408 of H.R. 4088, the "Veterans' Benefits Act of 1994." I understand further that the full Committee, by voice vote, ordered H.R. 4088 reported on July 21, 1994, and that the House passed the bill on August 8, 1994, and then substituted the text of that bill for the text of S. 1927, and passed S. 1927. I am aware that, on September 14, 1994, the Senate Committee on Veterans' Affairs held a hearing on, among other things, S. 1927 as passed by the House, and that the Senate was unwilling to accept section 408 of that bill.

Finally, I am aware that S. 1649, introduced by Senator Wellstone, was substantively identical to H.R. 3269, and contained a provision substantively identical to section 6 of H.R. 3269. S. 1649 was never reported out of the Senate Committee on Veterans' Affairs.

Question 2: You stated that the first section of H.R. 1483 is unnecessary because its goals are already accomplished through regulations. Given that regulations are always subject to change, why don't you endorse the enactment of statutory language to guarantee veterans these rights?

Answer: The Department has provided these rights to veterans and their families since 1928. *See Smith v. Brown*, 35 F.3d 1516, 1524 (1994). We stated in our testimony before the Subcommittee that we had no particular objections to section 1(a) of H.R. 1483, but that we also believed that additional legislation is unnecessary.

Question 3: Is it true that all VA claimants who have received a denial from BVA, no matter how long ago it was issued, have the right to file a motion for reconsideration with the Board?

Answer: Yes. The Department has interpreted the provisions of 38 U.S.C. § 7103 (relating to reconsideration of Board decisions and correction of obvious error) to permit a motion for reconsideration to be filed at any time subsequent to the issuance of a final Board decision. 38 C.F.R. §§ 20.1000 and 20.1001(b).

Question 3(cont'd): And isn't it true that the BVA or its Chairman must review each motion for reconsideration to determine whether the motion should be granted?

Answer: It is not true that the "BVA" can review motions for reconsideration. Only the Chairman (or the Chairman's delegee pursuant to 38 C.F.R. § 20.102(c)) has the authority to order reconsideration of a case. 38 U.S.C. § 7103(a). Therefore, only the Chairman (or the Chairman's delegee) *must* review each motion.

In the motion, the claimant must set forth clearly and specifically the alleged obvious error, or errors, of fact or law in the applicable decision, or decisions, of the Board, or other appropriate basis for reconsideration. 38 C.F.R. § 20.1001(a). (Other bases include the discovery of new and material service records, or the submission of fraudulent evidence. 38 C.F.R. § 20.1000(b)-(c).) The motion is then reviewed by the Chairman (or the Chairman's delegee), who decides whether to allow or deny the motion. If the motion is allowed, the matter is referred to a panel of not less than three Board members, which reviews the entire record before the Board and makes a decision.

Question 3 (cont'd): Accordingly, why did you indicate that my legislation would open hundreds of BVA decisions to review, when all of these decisions are already subject to review via a motion for reconsideration?

Answer: Section 1(b) of H.R. 1483 would open those Board decisions to a different, lengthier and more complex kind of review than is currently available, and one that, in our judgment, would not materially benefit veterans and their families.

Under current practice, the Chairman has the authority, in effect, to screen such motions, granting a new adjudication to potentially meritorious cases. The statistics show that the current system works well: From FY 1991 through FY 1995, there have been more than 3,600 motions filed for reconsideration. Of those, more than 800--22%--have been granted, resulting in reconsideration (and a new decision) by a panel of at least three Board members. Of the cases reconsidered, 77% have resulted in allowances or remands.

Under section 1(b) of H.R. 1483, an allegation of clear and unmistakable error would *require* a Board decision on the merits as to whether the evidence establishes clear and unmistakable error in *all* cases in which such an allegation were made. Such a rule would, at a minimum, require that (1) the case be docketed and decided in the order docketed, 38 U.S.C. § 7107(a); (2) the claimant be provided the opportunity for a hearing, *id.* § 7101(a); (3) the Board determine the state of the law, regulations and evidence *at the time the original decision was made, cf. Russell v. Principi*, 3 Vet.App. 310, 313 (1992) ("[e]ither the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied"); (4) the Board determine whether or not the claim was "well grounded," *id.* § 5107(a); (5) the Board determine, if the claim were well-grounded, the nature of the Secretary's duty to assist the claimant, *id.*; (6) the Board provide reasons and bases for its decision, *id.* § 7104(d); and (7) the decision on clear and unmistakable error itself be subject to reconsideration under *id.* § 7103.

In effect, section 1(b) of H.R. 1483 would grant, on demand, a "new trial" for any appellant who alleged clear and unmistakable error, which would add considerably to the Board's docket. It is fair to assume that, had section 1(b) been in effect during the period FY 1991-95, at the least, the 3,600 motions for reconsideration filed during that period would have been treated as allegations of clear and unmistakable error, automatically requiring decisions on the merits. Accordingly, the

Board would have had 2,400 additional cases (those whose motion for reconsideration was denied) on its docket during that period.

Nor does section 1(b) of H.R. 1483 comport with other adjudicative systems.

For example, while decisions of a federal trial court are final and not subject to review except on appeal, the Federal Rules of Civil Procedure (Fed. R. Civ. P.) provide several limited "escape hatches" not unlike the current reconsideration procedure. Thus, Fed. R. Civ. P. 59(b) permits a party to file a motion for a new trial *within 10 days* after entry of judgment, and leaves the decision on the motion to the discretion of the trial judge. In addition, Fed. R. Civ. P. 60(b) permits a court, on motion, to relieve a party from a final judgment under certain circumstances (e.g., mistake, newly discovered evidence, or fraud), but generally requires that such motions be filed *within one year.*

Similarly, the Social Security Administration permits a claim to be reopened on the grounds of "clear error" only if an application is filed *within four years* of the decision. 20 C.F.R. § 404.988(b); *id.* § 404.989(a)(3); *id.* § 416.1488(b); *id.* § 416.1489(b).

Because the current system is far more generous than any comparable system; because the current system works; because the proposal would add cases to the docket which probably do not merit full Board decisions; and because, as described in our response to Question 4, the addition of these cases to the docket would, in too many cases, unfairly delay those appellants who are waiting for their first "day in court," we oppose section 1(b) of H.R. 1483.

Question 4: Isn't it true that there are far more final VA regional office decisions that are under today's regulation subject to challenge based on CUE [clear and unmistakable error] than the number of BVA decisions that would be subject to challenge under my legislation?

Answer: Yes. Under 38 C.F.R. § 3.105(a), final decisions by a regional office may be reversed or revised where the evidence establishes clear and unmistakable error.

Question 4 (cont'd): Then why should veterans be denied the right to challenge BVA decisions based on clear and unmistakable error when the existing rights of veterans to challenge final RO decisions on the grounds of CUE imposes a far greater workload burden than any my legislation would create?

Answer: First, it is not necessarily true that the existing rights of veterans to challenge final RO decisions on the grounds of CUE "imposes a far greater workload burden" than enactment of section 1(b) of H.R. 1483. Because the processes and missions of the Board and of the regional offices are different, we do not believe that it is proper simply to compare raw numbers of potential decisions, as your question seems to imply.

The Board and the regional offices have wholly different resources and produce wholly different products. For example, the Board has the unique mission within the Department of producing decisions which can withstand the scrutiny of a Federal appellate court. Further, while the regional offices have had a version of 38 C.F.R. § 3.105(a) review as part of their mission, and while those decisions have always been appealable to the Board, section 1(b) of H.R. 1483 would, in essence, be an "unfunded mandate" for the Board.

Second, it is simply not true that veterans are "denied the right to challenge BVA decisions based on clear and unmistakable error." As discussed above, *any* appellant can challenge a Board decision at any time with a motion for reconsideration on the grounds of "obvious error," a term which the Secretary has represented to the Court of Veterans Appeals as being the equivalent of "clear and unmistakable error." *Russell v. Principi,* 3 Vet.App. 310, 314 (1992). Further, any appellant whose notice of disagreement was filed on or after November 18, 1988, can receive full appellate review of a Board decision by filing a notice of appeal with Court of Veterans Appeals within 120 days of that decision. 38 U.S.C. § 7266(a); Pub. L. No. 100-687, § 402 (1988).

Third, even if it were true that section 1(b) of H.R. 1483 would impose on the Board a "workload burden" which is less than that imposed on regional offices by 38 C.F.R. § 3.105(a), that is no reason for adopting the provision. The fact is that any additional burden on the Board will only serve to lengthen the time it takes to decide appeals. In the context of an overburdened system which already provides unlimited review on motion, we cannot agree that it would be helpful to veterans and their families to add thousands of, frankly, meritless cases to the docket.

Finally, it must be kept in mind that the decisions which would be subject to review under section 1(b) of H.R. 1483 have already gone through the appellate process, while those currently subject to review under 38 C.F.R. § 3.105(a) have not. Prior to July 1994, all those Board decisions were made by panels of three Board members. In more than 90 percent of those cases, the appellant was represented, usually by one of our great veterans service organizations. In every case, the appellant was entitled to a hearing before the Board. Even prior to the enactment of the Veterans' Judicial Review Act, Pub. L. No. 100-687 (1988), appellants enjoyed broad substantive and procedural protections at the Board.

We are not saying that mistakes have not been made. On the contrary, the Board's record in the reconsideration process shows that mistakes have been made, and that the Board is willing to correct them. What we are saying is that the present system is more than adequate to deal with cases in which error is clear and unmistakable. As managers of this system, we do not believe that veterans and their families will be benefited by the automatic addition of the reconsideration cases--and more--to the Board's already burdened docket.

That is why we oppose enactment of section 1(b) of H.R. 1483.

Question 5: Unfortunately, the courts have interpreted the VJRA [Veterans' Judicial Review Act, Pub. L. No. 100-687] in a way that has created two classes of veterans. Let me give you an example: Suppose a veteran had his benefits unlawfully reduced by VA in 1984. If he didn't appeal the RO decision to BVA previously, he could now file a claim for benefits based upon clear and unmistakable error. If, however, he appealed the decision to BVA in the 1980s, VA would not allow a subsequent appeal based upon clear and unmistakable error.

As a principle author of the VJRA, I can assure you that this Committee did not intend to put one class over another when we created the Court. I also believe that is the government's responsibility to ensure that blatant adjudication errors are quickly corrected. Therefore, I ask what you would do to correct this inequity.

Answer: With respect, the Congress purposely created two classes of veterans when it enacted the VJRA: veterans who filed notices of disagreement prior to the law's effective date (November 18, 1988) and veterans who filed notices after that date. The latter have access to the Court of Veterans Appeals; the former do not. In addition, VJRA did nothing to alter the rules regarding challenges based on clear and unmistakable error, which, as the Federal Circuit in *Smith* confirmed, never applied to Board decisions.

With regard to your specific fact pattern, it is our belief that if in fact the veteran whose claim went through the Board had his benefits unlawfully reduced *and* that reduction was the product of clear and unmistakable error, a motion for reconsideration under 38 U.S.C. § 7103(a) would be granted and his appeal decided again by the Board. In other words, to the extent your question assumes clear and unmistakable error, we believe it is fair to assume that the Board would be able to detect and correct "blatant adjudication errors."

Hearing on October 12, 1995

Legislative Proposals

Follow-up Questions for the Honorable R. John Vogel
Under Secretary for Benefits, Department of Veterans Affairs

from Honorable Lane Evans
Ranking Member, Subcommittee on Compensation,
Pension, Insurance and Memorial Affairs

Question 1: Are you aware that the White House Advisory Committee on Human Radiation Experimentation released its final report last week and concluded that the list of presumptive conditions for atomic veterans is "incomplete and inadequate?"

Are you also aware that the Committee found that the standard of proof for those atomic veterans without a presumptive condition cannot be met, and given the incompleteness of exposure records retained by the government, inappropriate?

How many veterans have filed compensation claims under P.L. 98-542 and how many of these claims have been granted?

Noting the Committee's conclusions and VBA's exceedingly high denial rates for radiogenic claims, how can you say that the current procedure is adequate and that adding this condition to the presumptive list is unwarranted?

Answer: The Advisory Committee on Human Radiation Experimentation (ACHRE) did not conclude that the presumptive list is incomplete and inadequate and that the standard of proof for veterans without presumptive conditions could not be met. The ACHRE mentioned these issues as concerns reported by atomic veterans and their families and recommended that both the Human Radiation Interagency Working Group and Congress address these concerns promptly. (Final Report, Advisory Committee on Human Radiation Experiments, pp. 483-87 and 813.)

In our testimony on H.R. 368 at the October 12 hearing, we did not say that adding bronchio-alveolar carcinoma to the presumptive list was unwarranted. We expressed our preference for the regulatory procedures contained at 38 CFR 3.311 and mentioned certain factors reinforcing our preference. Our comments were consistent with the Department's position expressed in the May 31, 1994, report to Congress on whether bronchio-alveolar carcinoma should be presumptive in a radiation-exposed veteran.

As of October 1, 1995, we had received radiation claims in 18,070 cases. We review all radiation claims to determine whether they may be adjudicated under the criteria of 38 CFR 3.311, which implemented P.L. 98-542, but our data base does not specify how many of the 18,070 cases ultimately were considered under the provisions of that regulation.

We have granted service connection in 1,793 cases for conditions claimed to be the result of exposure to ionizing radiation. Although our statistics specifically reflect grants of service connection to 458 individuals for presumptive radiogenic conditions, our data base does not indicate similar statistics for grants under P.L. 98-542. Consequently, we are unable to provide you the number of grants made pursuant to the provisions of that regulation.

Question 2: You stated that Mr. Smith's legislation would cost $3.7 million next year and $20.1 million over 5 years. What is the basis of VA's cost estimate? How many veterans have actually filed compensation claims for bronchiolo-alveolar carcinoma? How many of these claims have been granted?

Answer: Copies of both VBA's and VHA's cost estimates on H.R. 368, including methodology, are enclosed.

We have no figures on the number of claims and grants involving bronchio-alveolar carcinoma specifically. This disease, like all lung cancers, is included under the broader category of respiratory cancers. As of October 1, 1995, respiratory cancer was an issue in 1,372 radiation cases, and service connection was granted in 86 cases.

Question 3: Mr. Smith testified that Secretary Brown assured him last year that the Department would not oppose the addition of bronchiolo-alveolar carcinoma to the list of presumptive conditions. What happened in the past year? Why has the Department's position changed?

Answer: The department's position has not changed. As stated in our response to Question 1, our position has been consistent in preferring the procedures contained in 38 CFR 3.311 over the creation of a presumption. The case-by-case adjudication authorized by § 3.311 is, in our view, the appropriate method of recognizing meritorious claims.

In our May 31, 1994, report on bronchio-alveolar carcinoma, we stated that we would be available to discuss with Congress the merits of legislation on this issue. In fulfillment of that offer, we felt obligated to present for your consideration a brief explanation of the factors that have influenced our preference for the procedures of § 3.311.

Question 4: Let me ask you a generic question relating to my legislation on CUE. Can you cite any situations where VA endorses the provision of benefits or protections to one of group of veterans while denying another equally deserving group simply because their appeals were filed at different times?

Answer: This question would be more appropriately addressed by the Chairman of the Board of Veterans Appeals (BVA), and follows below:

It is extraordinarily difficult, if not impossible, to determine what you mean by "another equally deserving group." Nevertheless, there are veterans who could be distinguished solely on the basis of the procedural status of their appeals:

- Veterans who filed notices of disagreements (NODs) prior to November 18, 1988, whose Board decisions would not be appealable to the Court of Veterans Appeals, and veterans who filed NODs after that date, whose Board decisions would be appealable.

- Veterans who file their NODs within a year of the decision by the agency of original jurisdiction (AOJ), who may have their appeals heard at the Board, and those who file more than one year after the AOJ decision, who may not have their appeals heard.

Question 5: In his September 28 letter to Chairman Stump, Secretary Brown objected to the provisions of H.R. 1483, in large part, because they would permit the Court of Veterans Appeals to examine certain cases decided prior to 1988. Implicit in the Secretary's argument is the fact that there currently exists a basic inequity between classes of veterans.

Is VA really telling the Committee it supports treating two equally deserving groups of veterans in different ways and allowing blatant adjudication errors that have denied veterans their rightful benefits to stand?

Answer: This question would be more appropriately addressed by the General Counsel, and follows below:

Both premises for the question are faulty. First, it assumes that blatant errors have been made by the Board which have gone unremedied through the reconsideration process. Not one of the proponents of H.R. 1483 provided so much as a single example of such a case at the October 12 hearing (nor have they at any other time, so far as we are aware). Our position is that the Board's current reconsideration authority suffices to remedy any such errors, and the on-demand reviews

which would be permitted under H.R. 1483 would be unacceptably costly in terms of compounding the Board's already staggering workload, while offering little if any likelihood of actual benefit to claimants. The potential of judicial review for those whose on-demand reevaluations by BVA remain unfavorable is not a major reason for our opposition to the bill, although this too would of course increase VA's workload -- we mentioned it only because it would seem incongruent with the Congress's reasons for limiting judicial review to more recently decided cases.

Nor are the two categories of claimants -- those who have had adverse decisions only by agencies of original jurisdiction and those whose adverse decisions have been affirmed by the Board -- "equally deserving" in the sense of occupying the same position. While both are of course entitled to correct decisions on their claims, the additional reviews by the Board certainly lessen the likelihood that errors have gone unresolved. It stands to reason that different legal processes would be available to the two different categories of claimants, just as now claimants cannot receive court review until after the Board has entered decisions in their claims.

Question 6: Mr. Vogel, as I understand the Administration's position, you are opposed to section 4 of H.R. 1482 because it would provide the surviving spouses of veterans who are permanently and totally disabled a benefit which spouses of veterans who are less disabled would not receive? However, you have not suggested any offsets to accomplish the purpose of H.R. 109. When can we expect to have your proposals to offset the cost of this legislation?

Answer: In our testimony we pledged to work with the House Committee on Veterans' Affairs to find appropriate offsets and I wish to reaffirm that pledge. In fulfillment, we are currently considering several options and would be happy to consider any recommendations from the Committee. However, since we are seeking to offset an estimated $9.3 million in FY 1996 and $49.7 million over the next five years, all options must be considered carefully to avoid an undesirable deterioration in other benefits and services.

Question 7: Mr. Vogel, I am surprised that the Administration is opposed to section 8 of H.R. 1482, dealing with the cost of debt collection. Wouldn't this program allow the Department to use funds now devoted to collecting debts for other purposes, such as improving services to veterans? Didn't the Vice President's report on Reinventing Government endorse a similar offset arrangement for the recovery of amounts owed to the Veterans Health Administration?

Answer: Section 8 of H.R. 1482 could provide flexibility to the Department to use funds now devoted to collecting debts for other purposes. A similar arrangement does exist in the VHA Medical Care Cost Recovery Program. However, the administration opposes section 8 out of concern for the impact on mandatory vs. discretionary spending levels.

Department of Veterans Affairs

Memorandum

Date: September 22, 1995

From: Under Secretary for Benefits (20)

Subj: Cost Estimate for H.R. 368, 104th Congress

To: General Counsel (022)
THRU: Assistant Secretary for Management (041E)

1. This bill would amend title 38, United States Code, to add bronchiolo-alveolar carcinoma to the list of diseases presumed to be service-connected for certain radiation-exposed veterans.

2. Approximately 210,000 veterans were exposed to atomic radiation. Age specific incident and mortality rates for lung cancer were applied to the number of radiation-exposed veterans to determine the number of veterans with lung cancer. According to VHA, about 1.5 percent of lung cancer is due to the bronchiolo-alveolar subtype. Thus, the estimated caseload was multiplied by 1.5 percent to calculate the number of cases due to bronchiolo-alveolar carcinoma. The estimated number of eligible veterans was then multiplied by two because VHA presumed a "worst case" assumption that radiation exposure might double the number of bronchiolo-alveolar lung cancer cases.

3. This estimate assumed that the veteran average benefit payment for bronchiolo-alveolar carcinoma was equivalent to the average benefit payment of those veterans currently in receipt of disability compensation for lung cancer. The average benefit payment for survivors was assumed to be the current DIC base rate. Average payments were increased each year to account for anticipated cost of living allowances. Shown below is the estimated five-year benefit cost of this bill.

Year	Estimated Veteran Caseload	Estimated Survivor Caseload	Estimated Benefit Cost ($millions)
1996	40	120	$ 1.8
1997	40	130	1.9
1998	40	140	2.1
1999	40	150	2.3
2000	40	160	2.5
Total			$10.6

(original signed by L.E. Smith for)
R. J. Vogel

METHODOLOGY

a) Identification - H.R. 368, 104th Congress, 1st Session

b) Highlights - This bill would amend title 38, United States Code, to add bronchiolo-alveolar carcinoma to the list of diseases presumed to be service-connected for certain radiation-exposed veterans.

c) Estimated Five-Year Costs - SEE MEMO

d) Employment Requirements - None

e) Estimated Caseload - SEE MEMO

f) Benefits Methodology

The estimated number of service persons who either participated in the occupation of Hiroshima or Nagasaki, or who were onsite participants in a test involving the atmospheric detonation of a nuclear device was provided by the Defense Nuclear Agency (DNA). We assumed that the nuclear test population was distributed evenly over the 17 year period from 1946 through 1962. An average age of twenty-five at the time of occurrence was assumed. The populations were aged one year at the time based on age-specific survival rates. Age specific incident and mortality rates for lung cancer were applied annually to each population. This determined the number of cases which would be eligible for veterans' compensation (incidence less mortality). Annual incidence and mortality rates were taken from the May 1989 U.S. Department of Health and Human Services NIH Publication no. 89-2789, Cancer Statistics Review 1973-1986. According to VHA, about 1.5 percent of lung cancer is due to the bronchiolo-alveolar subtype. Thus, the estimated caseload was multiplied by 1.5 percent to calculate the number of cases due to bronchiolo-alveolar carcinoma. VHA also presumed a "worst case" assumption that radiation exposure might double the number of bronchiolo-alveolar lung cancer cases, therefore, our caseload estimated was doubled.

The survivor caseload was predicted using the estimated number of deaths and the historical dependency rate of service-connected disabled veterans. The survivor caseload was then reduced by 20 percent to account for the remarriage of some widows.

Average benefit payments for veterans were based on the distribution of cases currently on the rolls with lung cancer. The survivor's average benefit payment was assumed to be the base reform DIC rate. Rates were increased annually by anticipated COLAs.

g) Other Assumptions - None

h) Previous Estimates - None

i) Individual Responsible for Estimate - Kathleen Hamilton (243E), VBA Business Analysis Team, 273-6715.

Department of
Veterans Affairs

Memorandum

Date: August 30, 1995

From: Assistant Chief Medical Director for Public Health and Environmental Hazards (103)

Subj: HR 368 adding bronchioloalveolar carcinoma to list of diseases presumed to be service-connected for certain radiation-exposed veterans

To: Chief, Legislative Programs Office (101A)

1. This is in response to your memorandum dated August 23, 1995.

2. This office does not support the legislative proposal for the following reasons:

–It is limited to only a single histologic subtype of lung cancer;

–Most veterans were exposed to only low doses of ionizing radiation in service. Less than 1 % are estimated to have received more than 5 rem, according to a recent Institute of Medicine report;

–The proposal ignores the possible role of other carcinogenic agents especially cigarette smoking.

Consequently we believe that it is more reasonable and equitable to evaluate each veteran with lung cancer individually considering such factors as estimated dose exposure and smoking history, as is now done as part of the adjudication process.

3. An estimate of the cost impact is attached.

4. Neil S. Otchin, M.D., may be contacted at 565-7057 for questions or further discussion.

Neil S. Otchin for
Susan H. Mather, M.D., M.P.H.

Attachment.

COST ESTIMATION WORKSHEET

LEGISLATION NUMBER/NAME: HR 368 Adding Bronchiolo-Alveolar Carcinoma to
SUB-TITLE NUMBER/NAME: List of Diseases Presumed to be Service Connected for Certain Radiation - exposed Veterans
SECTION NUMBER/NAME: Section 1. Presumption that Bronchiolo-Alveolar Carcinoma is Service- Connected.

	YEAR 1	YEAR 2	YEAR 3	YEAR 4	YEAR 5	TOTAL
a. Total Cost (000s)	1,900	1,900	1,900	1,900	1,900	9,500
b. FTEE	24	24	24	24	24	24
c. Auth. Specified in Bill (If Any 000s)	--	--	--	--	--	
d. Add'l. Approp. Req. (000s)	--	--	--	--	--	
e. Workload (Units)	100 Patients	100 Pats.	100 Pats.	100 Patients	100 Pats.	100 Pats.

ASSUMPTIONS AND METHODOLOGY OF COST, FTEE, AND WORKLOAD PROJECTIONS
(Attach Additional Worksheets as Needed.)

See attached Sheet

Name of Responsible Service/Program: Public Health & Environmental Hazards Date: 8/30/95
Staff Contact Person: Neil S. Otghin, M.D. Telephone: 565-7057

METHODOLOGY FOR COST ESTIMATION

About 210,000 veterans were exposed to atomic radiation (1995 IOM report, page 63).

The peak annual incidence rate for lung cancer in U.S. white males is about 600 per 100,000 (DeVita, Cancer, 4th edition, 1993, Figure 9-6A, page 162); this rate would result in about 1260 new lung cancer cases per year in "atomic veterans" [ignoring previous deaths, etc.]

Considering the high death rate for lung cancer, a annual prevalence rate of about 3 times the incidence rate is estimated; or about 3780 cases per year in "atomic veterans"

About 1.5% of lung cancer is due to the bronchioloalveolar histologic subtype (Haskell, Cancer Treatment, 3rd edition, 1990, pages 166-167); this would result in a prevalence of about 57 cases of bronchioloalveolar carcinoma in "atomic veterans" per year.

Making a "worse case" assumption that radiation exposure might double the number of bronchioloalveolar lung cancer cases, the number of cases in atomic veterans becomes about 114 per year.

Making a "worse case" assumption that currently about 10 of these cases are treated per year by the VA now and that all will come to the VA for treatment if presumed service connected, the number of additional cases of atomic veterans with bronchioloalveolar carcinoma the VA will have to treat is about 100 per year.

The cost for treating lung cancer in the VA is about $19,000 per patient per year (based on Boston Development Center cost for FY 1994 increased by 20% for inflation 1994 to 1996).

Therefore the cost for treating an additional 100 lung cancer patients is approximately $1.9 million per year.

Approximately 62% of VA medical care costs are for personal services (per information from VHA Budget Office). Therefore the personal services costs for treating these additional 100 patients would be approximately $1.2 million.

The average personal services cost per FTEE in VHA is approximately $50,000 (per information from VHA Budget Office). Therefore approximately 24 additional FTEE will be required to treat these 100 additional lung cancer patients.

Congressman Evans to Lt. Gen. Samuel E. Ebbesen

Mr. Evans: General Ebbesen, the Department's view is that all servicemembers should be automatically enrolled at the maximum $200,000 for SGLI. Although being overinsured isn't a great tragedy, what assurance can you give us that servicemembers are giving any thought to the amount of insurance they purchase from SGLI? Would you tell us for the record at what point in the induction process servicemembers are briefed on SGLI? Does the briefing encourage members to discuss the matter with their spouse or parents?

General Ebbesen: First: When are members briefed on SGLI? Each Service strives to have new members complete their SGLI election as quickly as possible after reporting for basic training, within the first week or two of active duty. They formally offer subsequent opportunities to review and revise their election prior to deployments, change of station, and during periodic reviews of their personnel forms and records. Further, members may change their election at any time they wish to do so. Increased coverage is subject to acceptance based on the member's health condition at that time.

Second: Are members encouraged to consult their spouse and parents? Each Service encourages members to carefully consider their SGLI election by walking them through the election form, during which they must designate the level of coverage desired. The form requires the member to note in his or her own hand writing "I want no insurance" in order to decline coverage completely. The form is structured to make election of the maximum as easy as possible by providing a separate block for that election. All other amounts must be specifically entered according to the member's desires. Typically, a briefer will suggest that those who have not thought through how much insurance they need should take the maximum until they can consult with trusted friends and family members to determine the appropriate coverage for their circumstances. A newly prepared video will soon be released that encourages careful consideration of this decision. The entire context of this video is a recently married member consulting a knowledgeable friend about SGLI.

Third: What assurance do we have that members are giving thought to the amount of coverage they purchase from SGLI? Few eighteen to twenty year olds have ever given life insurance more than cursory consideration, and that is true for the young men and women who enter the Service as well. During basic training, new members are undergoing a period of intense learning and change. Most will not stop to think things through completely during this initial training and orientation, but will either go along with the automatic coverage or make a decision based on personal instinct. This is one of the main reasons we prefer they have full coverage until they have had an opportunity to work out a more reasoned decision. At that point, they can always elect down. If something happens before that, the survivors will benefit from the higher rather than lower coverage.

Questions from the Honorable Lane Evans
Ranking Member, Subcommittee on Compensation,
Pension, Insurance and Memorial Affairs

QUESTION: Mr. Rhea, you noted NCOA's objection to section 6 of HR 1482. I agree that the payment of accrued benefits should be fully retroactive, but we both know that this will not happen given Congress' attitude on the budget. Noting this, does NCOA support extending the time period by one year?

Mr. Rhea: NCOA can support extending the time period to two years with the understanding that the Association views it only as a step toward the overall, proper goal of full retroactivity for payment of accrued benefits.

QUESTION: In its testimony, PVA suggested establishing an entitlement to non-service connected pension benefits for otherwise eligible veterans if they are granted Social Security Supplemental Insurance Benefits. Does your organization believe that VA should be directed to use SSA decisions and automatically grant pension benefits, regardless of whether the veteran has actually filed a claim?

Mr. Rhea: Emphatically, no. NCOA does not believe that VA should be so directed. The independent judgement of VA should, and properly so, remain the sole authority on the granting or denial of non-service connected pension benefits.

QUESTION: The Advisory Committee on Human Radiation Experimentation released its final report last week. It concluded that the list of presumptive conditions for atomic veterans is "incomplete and inadequate." It also noted that the standard of proof for those atomic veterans without a presumptive condition cannot be met, and given the incompleteness of exposure records retained by the government, inappropriate. Do you agree with these conclusions? Would you support expanding the list of presumptive conditions so that atomic veterans receive the same consideration as the Marshal Islanders?

Mr. Rhea: In complete honesty Mr. Evans, NCOA does not have the capability or expertise to either endorse or refute the conclusions of the advisory committee. While it is tempting to agree with the conclusions and to expand the list of presumptive conditions, such agreement and support would have a purely emotional basis only. Rather than let the emotion of the moment dictate the decision, NCOA suggests that both the Committee and VA would be better served by relying on the expertise of the scientific community. By so doing, NCOA believes veterans will be more fairly and equitably served as well.

QUESTION: While the bill was not scheduled for consideration today, I am sure that you are aware that Chairman Hyde and Congressman Fawell have introduced legislation to have VA provide compensation for certain children of atomic veterans. In cases where research indicates that is more likely than not that a dependent's condition was caused by a veteran's exposure to toxic substances or radiation, would you support the provision of either health care or compensation for these conditions?

Mr. Rhea: NCOA believes that the legislation represents a slippery slope and this Association refuses to endorse something that would put VA on such a path. I know this might seem contradictory with our earlier response suggesting a reliance on scientific expertise. The earlier question related to the veteran. This question relates to a third-party, albeit children of veterans, and this is an important distinction that cannot be overlooked. Here again though, the temptation is strong to give the emotional response by endorsing the legislation proposed by Messrs Hyde and Fawell. Other avenues exist, specifically under the Federal Tort Claims Act, that allow compensation claims by third parties. NCOA suggests that such avenues are more appropriate than the immersion of VA in a rather far-reaching precedent. It is rather ironic that we should consider compensating children of veterans when just a few weeks ago the talk was centered around ending the compensation of some veterans with service connected disabilities or injuries. The VA must remain focused on the veteran. As long as other avenues for redress exist, NCOA believes it inappropriate to take scarce VA money to compensate the children of veterans in these cases.

PARALYZED VETERANS
OF AMERICA
Chartered by the Congress
of the United States

Response from Paralyzed Veterans of America
To Follow-Up Questions from Hearing on October 12, 1995
Submitted by the Honorable Lane Evans
Ranking Member, Subcommittee on Compensation,
Pension, Insurance and Memorial Affairs

(1) The Advisory Committee on Human Radiation Experimentation released its final report last week. It concluded that the list of presumptive conditions for atomic veterans is "incomplete and inadequate." It also noted that the standard of proof for those atomic veterans without a presumptive condition cannot be met, and given the incompleteness of exposure records retained by the government, inappropriate.

Do you agree with these conclusions? YES

Would you support expanding the list of presumptive conditions so that atomic veterans receive the same consideration as the Marshal Islanders? YES

(2) While the bill was not scheduled for consideration today, I am sure that you are aware that Chairman Hyde and Congressman Fawell have introduced legislation to have VA provide compensation for certain children of atomic veterans.

In cases where research indicates that is more likely than not that a dependent's condition was caused by a veteran's exposure to toxic substances or radiation, would you support the provision of either health care or compensation for these conditions? YES - BOTH

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A Not-For-Profit Veterans Service Organization Chartered by the United States Congress

"VVA, At Work in Your Community"

November 7, 1995

Hon. Terry Everett, Chairman
Subcommittee on Compensation,
Pension, Insurance and Memorial Affairs
Committee on Veterans' Affairs
335 Cannon House Office Building
Washington, DC 20515

Dear Rep. Everett:

Thank you for the opportunity to expand upon our October 12, 1995 testimony before the Subcommittee on Compensation, Pension, Insurance and Memorial Affairs. As requested, here is our response to Mr. Evans' questions.

QUESTION 1: Does your organization believe that VA should be directed to use SSA decisions and automatically grant pension claim benefits, regardless of whether the veteran has actually filed a claim?

No, we do not. The same objections that we had to Congresswoman Waters' original bill would still apply. (VVA Testimony, Oct. 12, 1995, pp. 6-8) However, in addition to the solutions we have recommended, we suggest that an arrangement be either legislated or negotiated so that SSA would inform veterans that they may be eligible for other benefits, and that information on veterans benefits can be obtained by contacting VA's 800 number.

QUESTION 2: Do you agree with these conclusions?

Yes, we do, and very strongly.

Would you support expanding the list of presumptive conditions so that atomic veterans receive the same consideration as the Marshal Islanders?

VVA would support this provision. Atomic veterans were exposed to radiation with little regard to -- or knowledge of -- what the results could be. They have suffered the same health consequences as the Marshal Islanders. Neither group is capable of proving a direct connection to exposure in their own individual cases, though the presumptive evidence is very clear. Therefore, the atomic veterans should be treated equally under the law.

QUESTION 3: In cases where research indicates that it is more likely than not that a dependent's condition was caused by a veteran's exposure to toxic substances or radiation, would you support the provision of either health care or compensation for these conditions?

VVA would support providing both health care and compensation for such conditions. It has been argued that VA's authority -- beyond the rhetoric of "caring for the widow and orphan" -- ends with providing care and compensation for veterans. Yet that imaginary line was crossed when money was first paid to spouses and children. If these children are ill and require health care, they should not go untreated. If these children are disabled and require compensation, they should not go unpaid.

There can be no evading the government's responsibility to those it injures or places in harm's way. VA was created to do that for veterans and their families. We would not question the duty of the VA to provide for children who lost parents through service-connected mishap. Surely the birth-defected children of atomic and Agent Orange veterans are as directly the VA's responsibility as those whose Bastogne or Khe Sanh veteran fathers died early deaths from service to their nation.

Eligibility of such offspring must necessarily be presumptive in nature, for the same reasons it has been presumptive for their parents. That will require, to some extent, more scientific information than we now have. VVA has long favored legislation for conducting specific Agent Orange research in Vietnam, which would help determine the relationship of dioxin exposure to specific birth defect-related conditions.

Sincerely,

Mary J. Schoelen

Mary J. Schoelen, Esq.

RESPONSES FROM JOSEPH A. VIOLANTE
LEGISLATIVE COUNSEL
DISABLED AMERICAN VETERANS
TO QUESTIONS
BY HONORABLE LANE EVANS
RANKING MEMBER, SUBCOMMITTEE ON COMPENSATION,
PENSION, INSURANCE AND MEMORIAL AFFAIRS

1. In its testimony, PVA suggested establishing an entitlement to nonservice-connected pension benefits for otherwise eligible veterans if they are granted Social Security Supplemental Insurance Benefits.

Does your organization believe that VA should be directed to use SSA decisions and automatically grant pension benefits, regardless of whether the veteran has actually filed a claim?

The Disabled American Veterans (DAV) has a narrow legislative focus defined by its Congressional charter and our constitution and bylaws. We are charged with advancing the interests of wartime disabled veterans, their families and survivors concerning certain federal veterans' benefits and services. Further, these benefits and services have, as part of their eligibility criteria, the establishment of a service-connected disability as the result of wound, injury or disease that occurred during active duty.

The delegates to our last National Convention in Las Vegas, Nevada July 22-27, 1995, failed to produce (or consider) a mandate on the issue of pension benefits for otherwise eligible veterans if they are granted Social Security Supplemental Insurance Benefits. Therefore, the DAV has no official position concerning this matter.

2. The Advisory Committee on Human Radiation Experimentation released its final report last week. It concluded that the list of presumptive conditions for atomic veterans is "incomplete and inadequate". It also noted that the standard of proof for those atomic veterans without a presumptive condition cannot be met, and given the incompleteness of exposure records retained by the government, inappropriate.

Do you agree with these conclusions?

Yes, for the most part, atomic veterans have not been very successful in pursuing claims under the provisions of 38 C.F.R. 3.311 because of the low radiation dose estimates provided by the Defense Nuclear Agency (DNA). The delegates to our last National Convention, Las Vegas, Nevada, in July 1995, passed a resolution noting the inaccuracy of dose reconstruction estimates provided by DNA and called for the condemnation of the actions of DNA, as well as urging VA to undertake a review of the accuracy of reconstructed dose estimates by DNA. It is our firm conviction that many atomic veterans have been wrongfully denied benefits because of inaccurate statistics.

Would you support expanding the list of presumptive conditions so that atomic veterans receive the same consideration as the Marshal Islanders?

The DAV supports expanding the list of presumptive diseases to include those diseases for which compensation is paid to Marshal Islanders. Since our government has already determined that these diseases are related to exposure to ionizing radiation and that the compensation should be paid

to Marshal Islanders for these diseases or disabilities, our nation's atomic veterans should also receive compensation for these disabilities on a presumptive basis.

3. While the bill was not scheduled for consideration today, I am sure that you are aware that Chairman Hyde and Congressman Fawell have introduced legislation to have VA provide compensation for certain children of atomic veterans.

In cases where research indicates that it is more likely than not that a dependent's condition was caused by a veteran's exposure to toxic substances or radiation, would you support the provision of either health care or compensation for these conditions.

The DAV has no official position concerning this matter. The delegates to our last National Convention failed to produce (or consider) a mandate on the issue of providing VA compensation for certain children of atomic veterans.

4. The DAV notes that the vocational rehabilitation program for pensioners only reaches 200 or so veterans each year.

Is that the basis for your statement that the program is not cost effective?

Our belief that this program is not cost-effective is based largely on the increased workloads which take away from an already burdened vocational rehabilitation staff. As mentioned in our statement, there is a system of state vocational rehabilitation offices that these individuals can go through. Certainly, we believe that the rehabilitation of one individual is important to that individual. We believe very strongly that all disabled veterans and people with disabilities should have an opportunity to lead productive, meaningful lives. Employment is one way of doing that. However, the system of vocational rehabilitation was never intended to serve nonservice-connected disabled veterans. Rather, their benefits should, and can be provided through the network of state vocational rehabilitation agencies, which if successful, would result in reduced pension payments.

If $20,000 is spent rehabilitating a veteran, wouldn't that amount be more than repaid in reduced pension payments in about four years?

Yes! We agree that amount would be more than repaid over a period of time. However, there is no guarantee that if a veteran is rehabilitated he or she will return to work. Again, we believe that using the existing network of state vocational rehabilitation agencies would achieve the same possible savings. There would be no initial cost to the VA and no staff time needed. This time could be spent on working with the service-connected disabled veteran.

Rather than terminating this program, isn't there some other way to address the deficits in service to veterans mentioned in your testimony?

This program was originally designed as a pilot and we believe that its history shows that it is not a program we can support. The only way the deficits in service to veterans can be eliminated is by additional staff and funding. Realistically this is not forthcoming. Even if it were, the workloads that currently exist in the vocational rehabilitation and counseling service are so

demanding that additional staffing is needed just to adequately serve the service-connected disabled veteran on a timely and quality basis. The Department of Veterans Affairs might want to enter into an agreement with the Commissioner of Rehabilitation Services to assure those nonservice-connected veterans are referred and receive adequate services through state vocational rehabilitation.

The Independent Budget (IB) recommends an additional 600 employees, which are needed just to provide services to service-connected disabled veterans. I have attached the section from the IB which discusses this in more detail.

TABLE 5

Independent Budget
Recommended Full-Time Employee Equivalents
General Operating Expenses

	FY 1996 Independent Budget Recommendation	FY 1995 Enacted	Additional Staff Recommended by Independent Budget
Veterans Benefits Administration (VBA)			
Executive Direction	345	345	0
Veterans Services	2,440	2,103	337
Compensation, Pension and Education	4,253	4,253	0
Loan Guaranty	1,942	1,942	0
Insurance	435	435	0
Vocational Rehabilitation and Counseling	1,285	685	600
Information Technology	952	952	0
Support Services	2,545	2,545	0
Total VBA	**14,197**	**13,260**	**937**
General Administration (GA)			
Board of Veterans Appeals	499	449	50
General Counsel	637	635	2
Assistant Secretary for Finance and IRM	1,201	1,201	0
Assistant Secretary for Human Resources and Administration	368	368	0
Consolidated Staff Offices	254	254	0
Total GA	**2,959**	**2,907**	**52**
General Operating Expenses (GOE)	**17,156**	**16,167**	**989**
National Cemetery System (NCS)	**1,330**	**1,315**	**15**
Office of Inspector General	**413**	**413**	**0**
Office of Acquisition and Material Management Supply Fund	**702**	**702**	**0**
TOTAL GENERAL OPERATING EXPENSES(GOE)	**19,601**	**18,597**	**1,004**

would offer considerably more flexibility to allocate VA resources where they are needed most.

Recommendations

- The VSOs recommend 2,440 FTEEs, so that VS may begin to satisfy reasonable service levels (additional staff requirements for VS and other GOE programs are shown in Table 5).
- We also recommend that VS update its telephone equipment.

Vocational Rehabilitation and Counseling (VR&C)

Previous *Independent Budgets* have discussed the problems confronting Vocational Rehabilitation and Counseling (VR&C) at length. As the fiscal year 1993 *Independent Budget* predicted, VR&C's workload increased substantially and, currently, it continues to rise.

VR&C services are provided at 56 regional offices or medical and regional office centers, 80 decentralized counseling locations, and many contract guidance centers. Eligible and entitled service-connected disabled veterans and servicemembers receive services and assistance they need to achieve maximum independence in daily living. This program also assists these individuals to become employable and to obtain and maintain suitable employment to the maximum extent possible.

In fiscal year 1991, Congress provided appropriations for 69 additional vocational rehabilitation specialists (VRSs), reducing their average workload from 256 veterans to 229 veterans by the end of FY 1992. In fiscal year 1993, the average workload increased to 230, and in fiscal year 1994, it was 236. The average workload should increase to 247 cases in fiscal year 1995 and, in fiscal year 1996, it will be 259 cases. Ideally,

125 cases per VRS would be a manageable workload.

The average amount of time between a veteran filing an application for vocational rehabilitation with VA to the veteran's first appointment decreased from 86 days in fiscal year 1991 to 74 days by the end of fiscal year 1992. This downward trend continued in fiscal year 1993, when the figure dropped to 71 days; unfortunately, it increased to 81 days in fiscal year 1994. Projections for fiscal year 1995 show a 71-day wait, still more than double the goal of 30 days.

VA predicts a continuing decline in VR&C's ability to provide timely vocational rehabilitation to service-connected disabled veterans, separating service members and eligible dependents.

Fiscal year 1996 projections are not good. VA predicts a continuing decline in VR&C's ability to provide timely vocational rehabilitation to service-connected disabled veterans, separating service members and eligible dependents. VRS case management workload continues to increase. This trend must not continue. Congress must provide VR&C with enough employees to restore timely vocational rehabilitation services to deserving veterans.

In fiscal year 1994, VA received 15,410 applications for Chapter 31 benefits as a result of the Transition Assistance Program (TAP) and Disabled Transition Assistance Program (DTAP). Initially, contractors handle much of the Chapter 31 workload. In this way, veterans are evaluated sooner. However, they still must see VA counseling personnel, and this is where delays occur. In one regional office, there is an 11-month backlog.

Contracting out for Chapter 31 services is a short-term solution and is also burdensome. While it has proven necessary to use contractors in some cases, it is more costly. Resources are needed for supervisory positions and contracting fees. In fiscal year 1994, VA paid $20 million out of the readjustment benefit appropriations for contracted work. Some legal issues have arisen from this, and it is possible that it will be legally determined that GOE must pay these funds.

Currently, VA contracts for about one-half of the education assistance under Chapter 36. Congress has earmarked $5 million for this purpose; however, current needs exceed this amount. If Congress could increase the cap on contract counseling fees and provide sufficient funds to handle all Chapter 36 assistance by contractors, VA could utilize counselors to assist Chapter 31 veterans.

Another temporary solution VA has used to deal with the increased workloads is overtime pay. Some regional offices still use this in fiscal year 1995, but we expect that VA might direct these overtime funds to other needs. The long-term solution is not more overtime pay, but more employees.

The IBVSOs have recommended that VR&C add a substantial number of employees to provide the level of service it provided in fiscal year 1992. Over the years, however, the President's Budget has reduced VR&C staffing. The fiscal year 1995 budget, for example, proposed to reduce staffing by 29 employees.

More disabled veterans continue to need VA's Vocational Rehabilitation Services. This should experience a steady workload growth rate of 10 percent over last year. Congress must provide VR&C with enough employees to meet the existing workload. An additional 600 employees would help it meet its goal and reduce funds spent on contracting.

Over the past several years, VR&C has been unable to provide vocational services in a timely fashion. Yet experts agree that, to be effective, rehabilitation counseling and training must begin as soon as practicable following injury or disease onset. Putting the disabled veteran back to work is cost-effective. A VA study of 3,083 veterans rehabilitated in 1991 points out the importance of vocational rehabilitation. Significant findings of this study provide us with the following information:

- The 3,083 disabled veterans' total annual income before entering vocational rehabilitation was $11.9 million.
- When they entered vocational rehabilitation, 66 percent had no income.
- When they entered training, 84 percent were at or below the poverty level.
- Following vocational training, these veterans'

aggregate income increased to approximately $60 million—representing a 402 percent increase.

- After completing vocational rehabilitation, these veterans paid an estimated $3.7 million to Social Security.
- Following vocational rehabilitation, these individuals paid $13 million in total estimated state and federal income taxes.

In fiscal year 1994, VA placed 5,000 veterans in jobs. VA has estimated that these veterans, in their first year of full-time employment, will pay an estimated $21 million in taxes. VA also estimates that these veterans will have an average work life of 25 years.

From a purely economic standpoint, it is sound public policy to return disabled veterans to meaningful employment following injury or onset of disease. Not only do we assist these disabled veterans to quickly get on a sound economic footing and back to a productive life, but we also expand the tax base. This is certainly a win-win situation. To do this, VR&C will need an estimated 600 additional employees just to provide the level of services it provided in fiscal year 1992.

VA also ran out of money in 1994 for vocational rehabilitation revolving fund loans. Disabled veterans were denied these loans, even though repayment was guaranteed through deductions in the veterans' compensation or military retirement payments. As a result, some disabled veterans withdrew from training for financial reasons, which could have been avoided. We recommend that Congress enact legislation to make these loans available to all disabled veterans.

We also recommend that VA propose legislation to authorize non-paid training/work experience in the private sector. This type of program has been successfully in place in federal agencies for almost 20 years and in state and local governments for three years.

Recommendations

- Add 600 employees to VR&C.
- Increase the cap on contract counseling funds.

If Congress could increase the cap on contract counseling fees and provide sufficient funds to handle all Chapter 36 assistance by contractors, VA could utilize counselors to assist Chapter 31 veterans.

- Provide sufficient funding for vocational rehabilitation revolving fund loans.
- Authorize non-paid training/work experience in the private sector.

Insurance and Indemnities

VA administers seven life insurance programs, which provide insurance protection for veterans and servicepersons. At the end of fiscal year 1994, 2.9 million policies were in effect, with a total face value of $25.8 billion. In addition, VA also supervises the Servicemans' Group Life Insurance (SGLI) and the Veterans' Group Life Insurance (VGLI) programs which, by the end of fiscal year 1994, provided $481 billion of insurance coverage to 3.2 million veterans and servicepersons. The Service Disabled Veterans' Insurance and Veterans' Mortgage Life Insurance programs are the only VA-administered insurance programs still open to new issues. SGLI and VGLI are also open to new issues.

VA has two insurance centers (located in Philadelphia, PA, and St. Paul, MN) that have provided excellent service to America's veterans and their families through the years. The average time to process an insurance claim increased slightly from the fiscal year 1993 level of four days to five days in fiscal year 1994. The outlook for fiscal year 1995, based on a projection of 435 employees without any consideration of overtime pay, is the same—an average processing time of about five days.

The Insurance Service is also obtaining interactive voice response technology, which would allow policyholders to access their accounts through touch-tone phones to obtain information on their accounts. VA hopes that this new system will not only free up personnel from answering routine policy status questions, but also help to eliminate blocked calls. VA has successfully tested this technology and anticipates that this system will be operational in early 1995.

Finally, VA has made significant progress in modernizing the Insurance Service ADP system. Computer software has been rewritten for greater flexibility and easier programming. All workstations now have

November 15, 1995

The Honorable Terry Everett
Chairman
Subcommittee on Compensation, Pension,
Insurance and Memorial Affairs
Committee on Veterans Affairs
U.S. House of Representatives
335 CHOB
Washington, DC 20515

Dear Chairman Everett:

This is in response to your follow-up questions to the Subcommittee hearing of October 12, 1995.

1. In its testimony, PVA suggested establishing entitlement to nonservice-connected pension benefits for otherwise eligible veterans if they are granted Social Security Supplemental Insurance benefits.

Does your organization believe VA should be directed to use SSA decisions and automatically grant pension benefits regardless of whether the veteran has actually file a claim?

Answer:

Eligibility for SSA Disability Insurance and Supplemental Security Income benefits is based on a finding of total disability in terms of the inability to engage in any substantial gainful activity. This is very similar to the criteria contained in 38 CFR 4.17 which applies to determinations of entitlement to pension. Although The American Legion does not believe that determinations of SSA should be binding upon VA, it is important that medical evidence considered by one agency be shared with the other in a timely manner.

To better assist disabled veterans, when a claim for SSDI or SSI is filed, the application should be a dual-use form with an application for VA pension. SSA should automatically refer this to VA for processing along with copies of any needed supporting evidence or documentation.

2. The Advisory Committee on Human Radiation Experimentation released its final report last week. It concluded that the list of presumptive conditions for atomic veterans is "incomplete and inadequate". It also noted the standard of proof for those atomic veterans without a presumptive condition cannot be met, and given the incompleteness of exposure records retained by the government, inappropriate.

Do you agree with these conclusions?

Answer:

Yes.

Would you support expanding the list of presumptive conditions so that atomic veterans receive the same consideration as the Marshal Islanders?

Answer:

The American Legion has long advocated the continued expansion of the list of radiation-related diseases. We were pleased to see that the Secretary of VA has recently issued a

regulation adding two additional cancers to this list. This represents a further step in the right direction. It is, however, unfortunate that it has taken so long to reach this point.

Even though VA has been forced to concede that its list of radiogenic diseases is not exclusive, this is of little benefit when the prevailing criteria in 38 CFR 3.309 and 3.311 make it very difficult to get a claim favorably considered. Traditionally, VA has placed great weight to dose estimates provided by DNA in the final adjudication of radiation-related claims. These estimates have always been questionable, since the records and underlying data have often been incomplete, inaccurate, or unreliable. Many claims by atomic veterans and their survivors have been denied despite the submission of supporting medical opinion and the doctrine of reasonable doubt has not been fairly applied.

With respect to the Marshall Islanders, because we are not familiar with any considerations which apply in their cases, we cannot offer any comments.

We would also point out that veterans have been deprived of legal recourse against the Federal contractors who carried out the nuclear testing program as a result of the Warner amendment. The American Legion continues to seek the removal of this bar.

3. While the bill was not scheduled for consideration today, I am sure that you are aware that Chairman Hyde and Congressman Fawell have introduced legislation to have VA provide compensation for certain children of atomic veterans.

In cases where research indicates that it is more likely than not that a dependent's condition was caused by the veteran's exposure to toxic substances or radiation, would you support the provision of either health care or compensation for these conditions.

Answer:

The American Legion has no official position on the substance of this proposal.

We note, however, that Congress has responded to evidence of radiation-related disability and death among radiation-exposed veterans, civilians who lived downwind of nuclear test sites, and uranium miners. A program of benefits was enacted and is administered by the Department of Justice. If Congress acts to acknowledge the Federal government's responsibility for the effects radiation on an atomic veterans offspring, it would seem logical to extend the current compensation program to these individuals to include payments for their medical care or treatment. It would also seem appropriate to provide for claims against the government based on exposure to toxic substances other than radiation.

Sincerely,

Philip R. Wilkerson
Dep. Dir. for Operations
National VA&R Commission

cc: Steve Robertson

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