

VA'S POSITION ON H.R. 1483, 104TH CONGRESS

o VA opposes enactment of H.R. 1483 because, on balance, *it would not be good for veterans.*

o H.R. 1483 would subject all past benefit decisions by VA's Board of Veterans Appeals to on-demand reviews by the Board for "clear and unmistakable" error. But, *Board decisions are already subject to review for error* in two ways:

--on motion to the Board's Chairman (at any time) for *reconsideration* by the Board; and

--on *judicial review* (of Board decisions in cases appealed to it since November 18, 1988).

o Are these safeguards adequate? Apparently so, since in the four years this legislation has been considered by the Congress, *no one has cited an example of the Board declining to correct clear and unmistakable error.* H.R. 1483 is a solution without a problem!

o But, what's the bill's harm? *The harm is that these on-demand reviews could increase considerably the time all appellants must wait for Board decisions.* The Board predicts that if H.R. 1483 were enacted and it obtained requests for review from only 5% of those whose appeals were denied from FY's 1977 to 1995, its caseload would increase by 21,700 and its average response time would increase by 53% to an estimated 979 days!

o Adding to the Board's response times *could* be acceptable if at least some veterans might be expected to benefit from H.R. 1483, but *it is extremely unlikely any veteran would benefit* from it. As noted above, appellants may already petition the Board for correction of error. If an appellant could not convince the Board now of clear error in its earlier decision, it is virtually inconceivable that a reviewing Court of Veterans Appeals would overturn such a decision, given the "arbitrary and capricious" standard of review it has said it must use. It would not be enough to convince the court that prejudicial error had occurred in an earlier Board decision -- the court would have to conclude further that no reasonable person could decide, as had the Board, that clear and unmistakable error had not occurred.

HR 1483

7/24

Jack Thompson

VA firmly opposed

- passed H^(also passed H in 103rd → killed in Senate)
- referred to S. Vets Committee - expected to die there

- tie up → increase backlog - very little, if any, benefit to veterans

VA has met w/DAV → DAV still pushing, but understood on position sth

ample opp'ty to appeal

since 1988 → Court of Vets Appeal

if before, only need to appeal to Chairman for reconsideration

"remedy into a problem"

it to get full board here just by alleging ~~that~~ error in prior dec → Bd would have to re-open case

Structure:

VBA: 50+ Regional Office

if turned down, then appeal to BVA → from there to Court of Vets Appeals

**DEPARTMENT OF VETERANS AFFAIRS****OFFICE OF THE GENERAL COUNSEL****810 VERMONT AVENUE, N.W.****WASHINGTON, D.C. 20420****FAX TRANSMITTAL****Professional Staff Group II****Fax Number: (202) 273-6404**

In Reply Refer To: 022

DATE:6-3-96

TO: Molly	FROM: Jack Thompson
Fax: 456-7431	202-273-6316

NUMBER OF PAGES INCLUDING COVER: 4**COMMENTS:** Per discussion, proposed answer re question on H.R. 1483. Also enclosed for background is the formal Statement of Administration Policy on the bill.

OMS Backlog improvement
DOL Empl + Training -
Comm. chaired by Ron Drach

Hear
Subvention - VA + DOD

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June 3, 1996

Honorable William J. Clinton

On May 21, 1996, the House of Representatives passed H.R. 1483. This measure would allow a veteran who has a claim for clear and unmistakable error in a prior, final decision of the Board of Veterans' Appeals to reopen that appeal and have it decided by the Board on the merits of whether undebatable error exists. This legislation would ensure that any veteran who had a claim for benefits wrongfully denied has an opportunity to have the illegal action corrected. Presently, the Senate is less than enthusiastic in its support for this important legislation.

Can veterans count on your Administration's support for this necessary and long overdue legislation?

DAU-

Proposed Response To Question On H.R. 1483

I have been advised that adequate remedies already exist for these claimants, and that enactment of H.R. 1483 would increase the backlog at an already severely burdened Board of Veterans Appeals. By forcing the appeals board to review on demand any of the hundreds of thousands of appeals it has decided since 1933, the bill could further add to the time all claimants must wait for decisions on their appeals. For that reason, the Administration has gone on record as opposing H.R. 1483.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 21, 1996 (SENT)
(House)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 1483 - Revision of Decisions Based on Clear
and Unmistakable Error
(Evans (D) IL and 22 cosponsors)

The Administration opposes H.R. 1483, which would subject decisions by the Board of Veterans' Appeals (BVA) to revision based on new avenues for appeal, thereby potentially reopening cases dating back to 1933. H.R. 1483 would increase the BVA's significant backlog of cases and the costs associated with adjudicating benefit claims, while not offering claimants any greater opportunity for remedy than currently available.

Nearly all BVA decisions entered today may be appealed to the Court of Veterans Appeals for correction of alleged errors. Moreover, current law affords unsuccessful claimants the right to petition the BVA's Chairman at any time for reconsideration of adverse decisions made even decades ago. Although denials of these petitions are not themselves judicially reviewable, there is no indication that BVA has failed to correct errors of the "clear and unmistakable" sort that are the subject of this legislation.

Scoring for Purposes of Pay-As-You-Go

H.R. 1483 would affect direct spending; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget and Reconciliation Act of 1990. OMB's preliminary scoring estimate is that the bill would increase direct spending by an insignificant amount.

* * * * *



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DATE:6-3-96

TO: Molly Brostrom

FROM: Jack Thompson
202-273-6316

Fax: 456-7431

NUMBER OF PAGES INCLUDING COVER: 5

COMMENTS: Per discussion, I am forwarding VA's views letter on H.R. 1483 outlining our objections in somewhat more detail.

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WASHINGTON

SEP 28 1995

The Honorable Bob Stump
Chairman, Committee on Veterans' Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am pleased to furnish the views of the Department of Veterans Affairs (VA) on H.R. 1483, 104th Congress, a bill "to allow revision of veterans benefits decisions based on clear and unmistakable error." We oppose enactment of H.R. 1483 for the reasons explained below.

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

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The Honorable Bob Stump

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 Board of Veterans' Appeals (Board) 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.

The Honorable Bob Stump

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.

4.

The Honorable Bob Stump

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.

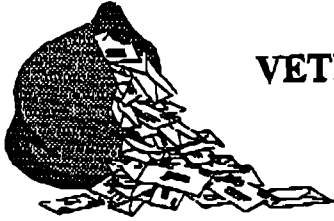
The Office of Management and Budget advises that there is no objection from the standpoint of the Administration's program to the submission of this legislative report to the Congress.

Sincerely yours,

Jesse Brown

JB/mjt

JHT received OMB
clearance from
Bob Pellicci by
FAX on 9/19/95,
at 8:45 a.m.



VETERANS AFFAIRS/PERSONNEL DIVISION
Office of Management and Budget

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TO: Molly Brastrom

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67431

67028

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COMMENTS:

As requested

Date: 5/31/96

Time: 6:55 pm

Number of Pages (including this page) 4

273- 0329

*VA BR
Comments**5/17/96*

DRAFT -- NOT FOR RELEASE

May , 1996
(House)*and the
costs associated
w. the adjudicating
benefit claims*

H.R. 1483 - Revision of Decisions Based on Clear
and Unmistakable Error
(Evans (D) IL and ___ cosponsors)

The Administration opposes H.R. 1483, which would subject decisions by the Board of Veterans' Appeals (BVA) to revision based on new avenues for appeal, thereby potentially reopening cases dating back to 1933. H.R. 1483 would increase the BVA's significant backlog of cases, while not offering claimants any greater opportunity for remedy than currently available.

Nearly all BVA decisions entered today may be appealed to the Court of Veterans Appeals for correction of alleged errors. Moreover, current law affords unsuccessful claimants the right to petition the BVA's Chairman at any time for reconsideration of adverse decisions made even decades ago. Although denials of these petitions are not themselves judicially reviewable, there is no indication that BVA has failed to correct errors of the "clear and unmistakable" sort that are the subject of this legislation.

Scoring for Purposes of Pay-As-You-Go

H.R. 1483 would affect direct spending; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget and Reconciliation Act of 1990. OMB's preliminary scoring estimate is that the bill would increase direct spending by ~~less than~~ ~~\$500,000 annually~~ *an insignificant amount.*

* * * * *

(Do Not Distribute Outside Executive Office of the President)

This position was developed by the Legislative Reference Division (Cook) in consultation with VAPD (), BASD (Chellara), OIRA (Eydt), and WH Counsel (Kagan). The Departments of Veterans Affairs (Zeglin), Defense (Diamato), and Justice (Jones) concur with this position.

OMB/LA Clearance: _____

H.R. 1483 was reported by the House Veterans' Affairs Committee on May 10, 1996. The description of the bill is based on the Committee report.

Administration Position to Date

On October 12, 1995, VA testified before the House Veterans' Affairs Subcommittee on Compensation, Pension, Insurance, and Memorial Affairs in opposition to H.R. 1483. In its testimony, VA opposed the bill "[b]ecause some provisions of H.R. 1483 are redundant, and others could aggravate the Board's backlog of appeals."

Summary of H.R. 1483

VBA

Currently, VA decisions on veterans' benefits claims are reviewable (i.e., appealable) under regulation on the basis of "clear and unmistakable error" both upon request of the claimant and the VA Secretary. BVA decisions are not reviewable on these grounds, but BVA does have the authority to correct cases of "obvious error".

H.R. 1483 would codify existing regulatory authority for appeal of veterans' benefit claims at VA on the grounds of clear and unmistakable error. If clear and unmistakable error is found, the original decision would be reversed or revised back to the date of the earlier erroneous decision. Consistent with current practice, the Secretary could initiate such a review on his own motion or upon request of a claimant. A request could be made at any time after the original decision is made and would be decided the same as any other claim.

VBA
✓
BVA

H.R. 1483 would also subject BVA decisions to review on the grounds of clear and unmistakable error. It would allow claimants or the BVA to request at any time a review of a BVA decision on these grounds. The bill would apply to all (i.e., past, present, and future) BVA decisions. In addition, H.R. 1483 would effectively remove the current law limitation on which BVA decisions are subject to review by the Court of Veterans Appeals. (Currently, the Court is limited to reviewing only cases where the notice of disagreements were filed on or after November 18, 1988.) Under H.R. 1483, the Court could review any BVA decision,

regardless of when the notice of disagreement was filed, if appealed on the grounds of clear and unmistakable error.

Pay-As-You-Go Scoring

According to VAPD () and BASD (), H.R. 1483 would affect direct spending; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget and Reconciliation Act of 1990. OMB's preliminary scoring estimate is that the bill would increase direct spending by ~~less than \$500,000~~ annually. CBO agrees that this bill is pay-go, but cannot estimate the budgetary effect (formally).

by an insignificant amount

LEGISLATIVE REFERENCE DIVISION DRAFT
May , 1996 - p.m.