THE DEPUTY SECRETARY OF VETERANS AFFAIRS
WASHINGTON

JUL 31 1996

MEMORANDUM

TO: Leon Panetta
Chief of Staff to the President

FROM: Hershel W. Gober
Deputy Secretary of Veterans Affairs

SUBJECT: Presidential Veterans Media Round Table

On June 3, 1996, the President participated in a Veterans Media Round Table with representatives from 12 organizations. During the ensuing discussion, the President requested additional background information on four issues. I requested that each organization prepare an issue paper for the President that outlines the issue and provides its recommendations.

Mr. Charles Jackson, President of the Non Commissioned Officers Association, requested that the President support (1) elimination of enrollment fees for the Montgomery G.I. Bill (MGIB) and making all current service members eligible, or (2) open Montgomery G.I. Bill enrollment period for certain active duty personnel (Enclosure 1). Enclosure 2 represents VA comments on this issue.

Major General Charles Pennington, President of the National Association of Uniformed Services, raised two issues. The first issue dealt with Medicare Reimbursement (Subvention) for Medicare eligible military beneficiaries who are not permitted to utilize their Medicare benefit in Military Medical Treatment Facilities (Enclosure 3). VA, of course, is also very interested in obtaining Medicare reimbursement for veterans who do not now use the VA so that we open our doors to them. The second issue addressed the need to continue the operation of the Uniformed Services University of Health Sciences (USUHS). General Pennington takes issue with the cost estimates to train physicians through the USUHS and submits that it is the most cost-effective method of meeting the medical needs of the Uniformed Services (Enclosure 4).

Mr. David Autry, Assistant Director of Communications of the Disabled American Veterans requested that the Administration support H.R. 1483. This bill was passed by the House of Representatives on May 21, 1996. It would allow a veteran who has a claim for clear and unmistakable error in a prior, final decision of the VA's Board of Veterans Appeals to reopen that appeal and have it decided by the Board on the merits of whether undebatable error exists (Enclosure 5). Enclosure 6 represents VA comments on this issue.

NCOA

Non Commissioned Officers Association of the United States of America

225 N. Washington Street · Alexandria, Virginia 22314 · Telephone (703) 549-0311

For Additional Information
Contact: Larry Rhea

June 10, 1996

Montgomery G.I. Bill Improvements

Statement of the issue:
Open enrollment in the Montgomery GI Bill (MGIB) should be available to all active duty service members not currently eligible for post service education benefits.

Facts bearing on the issue:
1. Current law precludes Montgomery GI Bill enrollment by service members who initially enlisted between January 1, 1977 and June 30, 1985.

2. Current law requires service members who enlist on or after July 1, 1985 to make an irrevocable decision regarding participation in the MGIB within thirty days of entering active duty.

3. Current law provides exceptions to 1 and 2 above for individuals who are separated due to force reductions or for administrative reasons.

Discussion of the facts:
Post-service education benefits have traditionally been used as a tool to entice intelligent and ambitious young people to serve in the armed forces. Additionally, they serve to assist in the readjustment of these young people to civilian life and assist the economy by reducing unemployment during military force reductions. And, while it is difficult to quantify, it is likely that the cost of most GI education programs is offset by increased taxes paid on higher earnings made possible by training under a GI bill.

Nevertheless, Congress terminated the Vietnam era GI bill in 1976 and put in its place the Veterans Educational Assistance Program (VEAP). This program was essentially a savings program that allowed service members to contribute up to $2,700 toward their post-service education. In return, government provided a $2 for $1 match making the maximum benefit $8,100 paid over 36 months of enrollment at $225 per month. The program quickly proved inadequate as either a recruiting or readjustment tool prompting Administration and Congressional efforts to create a new GI bill.

The product of that effort was a measure sponsored by House Veterans Committee Chairman Sonny Montgomery. The Montgomery proposal was a modest GI bill that would provide $300 per month in post service education benefits for up to 36 months in return for a comparable period of honorable service in the armed forces. Provisions of the Montgomery proposal automatically extended these new benefits to active duty service members who enlisted during the VEAP era and enhanced benefits to those who enlisted during the Vietnam era if they extended their service by three years.

Unfortunately, during Senate consideration of the Montgomery proposal, amendments were included to add a non-refundable enrollment fee for new enlistees and eliminate participation by VEAP eligibles who enlisted between January 1, 1977 and June 30, 1985. The Senate amendment also closed enrollment in VEAP thus precluding individuals who entered service during this era from ever being able to enroll in an education program. Further, since the law does not provide for the payment of interest on VEAP deposits or increases in program benefits, the maximum payment available to those who remain enrolled is a rapidly depreciating $225 per month. Since the program was terminated in 1985, tuition in four year public colleges has increased more than 120 percent. Meanwhile, federal contributions to civilian education and national service programs continue to grow. As a consequence, a whole generation of service members has been disenfranchised from post-service education benefits.

The Senate amendments to Montgomery's proposal also provided that new enlistees would have only one irrevocable opportunity to enroll in the MGIB. No exceptions were made to accommodate those who could not enroll due to financial hardship or for other reasons. Currently, nearly one third of military recruits are married upon entering into service. Many have children. Others have financial obligations ranging from medical bills for parents to school debts to high car payments. These people can not afford the pay forfeiture associated with the MGIB during their first enlistment but would reenlist for the benefit if it were an option.

Finally, since the G.I. bill was first created, no wartime veteran has ever had to make a financial contribution to receive its benefits. Yet, even after the United States engaged in armed conflicts in Panama, Grenada, Haiti, Somalia, the Persian Gulf and now Bosnia, no effort has been made to terminate enrollment fees or open enrollment to these neglected groups.

Consequently, a whole generation of war time veterans are either paying for their GI bill or have no access to a GI bill at all.

This inequity is further magnified and aggravated by exceptions made to allow MGIB enrollment by RIFed or administratively separated servicemembers. Individuals administratively separated for weight control, drug use, ineptitude, etc., may enroll in the MGIB even if they previously declined enrollment or were ineligible. Yet, the outstanding performer who is retained in service, frequently through military necessity, is precluded by law from MGIB enrollment.

Conclusions:
Clearly, circumstances have conspired to create a terrible inequity in the treatment of service members with regard to post service education benefits. Something must be done to provide benefits to those who enlisted during the VEAP era and to those who previously declined enrollment in the MGIB.

Recommendations:
NCOA recommends:

1) Eliminate enrollment fees and make all current service members eligible for MGIB benefits. This would be consistent with the tradition of free education benefits for wartime service and in maintaining the MGIB as the nation's premier education program.

2) Open enrollment in the Montgomery GI Bill to all service members who initially enlisted between January 1, 1977 and June 30, 1985.

3) Allow service members who initially enlisted after June 30, 1985 to enroll in the MGIB at any reenlistment point during their career.

VA's Positions on NCOA Proposals: MGIB Improvements

We know that our veterans deserve the very best benefits possible and that, in a sense, no amount of educational assistance benefits would be sufficient to recompense them for the sacrifices they have made for our Nation. In fact, during the past five decades, the various GI Bills have made possible the investment of billions of dollars in education and training for millions of veterans, and the Nation has in return earned many times its investment in increased taxes and a dramatically changed society. Our most recent data from the Department of Defense indicate that, since the beginning of the Montgomery GI Bill-Active Duty (MGIB), 75 percent of those individuals eligible to participate in the program have, in fact, participated. We realize that the cost of education has risen faster than the increases in the MGIB. However, we cannot support all the recommendations of the Non Commissioned Officers Association (NCOA).

We cannot support the first NCOA proposal. Requiring a $1200 pay reduction from service members who participate in the MGIB ensures that participants are serious about obtaining an education. Furthermore, eliminating the $1200 reduction in military pay and making all current service members eligible for the MGIB would raise certain issues of basic equity. For instance, many veterans currently enrolled in the MGIB whose basic pay was reduced as required for such participation fought in the same military actions mentioned in the NCOA letter. Yet, the NCOA proposal makes no provision for their recoupment of the pay reduction; it would simply grant automatic MGIB entitlement without any pay reduction to individuals still on active duty. This "inequity" could be resolved, of course, by making $1200 lump-sum payments to each individual who had previously participated in the MGIB. However, even if considered desirable, it is questionable how this could be funded. The basic pay reductions for MGIB participants are not set aside; they revert to the Treasury. Realistically, therefore, this is not a viable option.

We support the NCOA's second proposal. Current service members who initially entered active duty between January 1, 1977, and June 30, 1985, should be given the opportunity to enroll in the MGIB. This would ensure that those who decided not to participate in the Post-Vietnam Era Educational Assistance Program (VEAP) would have the opportunity to obtain an education upon discharge, while those already enrolled in VEAP would be given equal opportunity to receive assistance under the more beneficial MGIB program.

Finally, we cannot support NCOA's third proposal to permit a service member the option to participate in the MGIB at each reenlistment point in a career. Rather, we believe an early commitment to program participation, as is now required, provides both an important, early focus on educational goals and an incentive for the service member to fully perform the initial service obligation to the best of his or her ability. Moreover, the early vesting of MGIB benefits enables the individual to pursue educational objectives while on active duty and gives the

service member the comfort of knowing that educational assistance otherwise will be available to aid in his or her readjustment upon discharge from active duty. We have found, too, that requiring the pay reduction at the onset of an enlistment has worked well. New enlistees are less likely to miss the portion by which their pay is reduced if that reduction occurs early in their initial service period, usually prior to other, more pressing demands on the individual's salary, such as family needs.

Notwithstanding our objections to opening MGIB enrollment opportunities in the manner proposed by the NCOA, we would support giving current service members who originally declined MGIB participation a one-time, limited "open enrollment" period (e.g., 6 months) in which to reconsider that decision. This would allow those whose financial obligations upon entering on active duty caused them to elect not to participate in the program to now enroll and receive MGIB assistance for their future educational pursuit.

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SOCIETY OF MILITARY WIDOWS
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June 6, 1996

President William J. Clinton
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. President:

Many thanks for allowing me to participate in your Media Roundtable on Monday, 3 June 1996, in the Roosevelt Room. As we discussed, the two issue papers concerning Medicare reimbursement to military medical treatment facilities and the relative cost of providing military physicians through the Uniformed Services University of Health Sciences (USUHS) and the US Health Profession Scholarship Program are enclosed. I will summarize each issue briefly in this letter:

(a) Medicare Reimbursement (subvention)

Medicare-eligible military beneficiaries who have earned lifetime military medical care and have paid by payroll deduction for Medicare are not permitted to use their Medicare benefit in Military Medical Treatment Facilities. The Department of Defense (DoD) proposed a joint DoD/Health and Human Services (HHS) demonstration project on June 27, 1995. To date, HHS has delayed moving ahead with the demonstration. Health Care Financing Administration (HCFA) staff representatives state that they do not have statutory authority to conduct the test.

A review by DoD found no statutory evidence that would prohibit the conduct of a DoD/HHS joint Medicare HMO demonstration project. However, HHS has refused to proceed with the demonstration.

Mr. President, we recommend that you as Commander in Chief and as Chief Executive direct that the demonstration project begin. The project should include both the proposed HMO capitated payment demonstration and a test of reimbursement by HCFA for space available use (as the DVA proposes in one of its demonstrations). Medicare eligible military beneficiaries should be enrolled and begin receiving care by 1 October 1996.

(b) USUHS

You were advised that providing a physician through USUHS was five times more expensive than through the HPSP. A recent GAO

Report indicates that when only part of the costs are considered, the cost of a USUHS graduate could be from 1.9 to 5 times greater than an HPSP graduate. (Page 5, GAO/HEHS - 95-244, Sept. 95).

However, when all costs are considered including those based on expected years of service ($181,575/USUHS vs. $181,169/HPSP) GAO found that there is no real difference in cost between a USUHS and a HPSP graduate. (Pages 7 and 33 GAO/HEHS - 95-244, Sept. 95). There are real differences in capability, however as outlined in the enclosed issue paper.

Further, GAO did not factor in over $18.6 million annually in cost avoidance generated by USUHS for DoD and the federal government. USUHS students during their training provide over 135,000 hours of support to military hospitals which was not considered. As Senator Sarbanes, along with 13 Senators of both parties, stated in an April 24, 1996 letter: "USUHS has been scrutinized by the GAO, the Congressional Oversight Committee and others. In every instance, it has been found to be the most cost effective means of meeting the medical requirements of the Uniformed Services."

For these reasons I urge you to fully support the continuation of USUHS and end the demoralizing and expensive annual attempts to close it.

Again Mr. President, many thanks for hosting the Media Roundtable and for allowing us to participate. As I told you during the meeting, if you will make a positive decision on these issues the military/veteran community will greatly appreciate it. Further, it will show your support of a strong national defense and the men and women who provide the defense of our great nation.

Sincerely,

J.C. PENNINGTON
Major General, USA (Retired)
President

Enclosures

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ISSUE PAPER FOR THE PRESIDENT

SUBJECT: Medicare Reimbursement (subvention) to Military Treatment Facilities

Statement of the Issue:

Military retirees have earned lifetime military medical care and can obtain it in military medical treatment facilities (MTFs) if space is available. They have also paid for Medicare coverage by mandatory payroll deductions throughout their period of active service. However, they are prohibited from using their Medicare benefit in MTFs. Therefore, MTFs cannot be reimbursed for medical care of Medicare eligible military beneficiaries.

Despite bipartisan efforts by members of Congress and the Department of Defense (DoD) to authorize Medicare reimbursement to MTFs, over a period of several years it has not been done.

Facts bearing on the issue:

1. On June 27, 1995, DoD proposed a joint DoD/HHS demonstration project to provide care under the *TRICARE*-Prime program to Medicare eligible beneficiaries on a capitated basis using MTFs and civilian contract HMO providers at 7% below what Medicare pays to private sector Medicare HMO providers. The Departments of Defense and Health and Human Services (Health Care Financing Administration) have been working on this reimbursement (subvention) demonstration project over a year and have not reached final agreement.

2. MTFs can provide medical care as a preferred provider on a fee-for-service, space available basis 24 to 44% less expensively than private sector fee-for-service medical care providers. Therefore, in addition to the HMO (capitated payment) demonstration, a test of Medicare reimbursement for space available use should also be included in the demonstration by DoD/HHS as the Department of Veterans' Affairs plans to do in their test.

3. HHS states that it needs explicit directions to conduct the test as it does not currently have statutory authority. In a review by the Department of Defense of the proposed demonstration, they found no evidence that current statutes prevent conduct of such a demonstration. Both DoD and HHS have the authority to conduct demonstrations involving the delivery of health care.

4. The Joint Chiefs of Staff support a Medicare demonstration as does OMB.

5. DoD states that it currently provides medical care in MTFs to about 330,000 Medicare eligible retirees at a cost of $1.4 billion. Total number of military beneficiaries eligible for Medicare is about 1.2 million.

Discussion of the Facts:

1. Military retirees and their families were routinely promised lifetime medical care in recruiting and retention literature throughout their career. (See copy of Army Recruitment Brochure attached.) Military retirees earned lifetime medical care by serving a full career in the military. They also paid into the Medicare system through payroll deductions throughout their careers. They would like to use their Medicare benefit in military treatment facilities on a space available basis. They would also like the option of enrolling in the DoD Health Maintenance Organization (HMO) program - *TRICARE*-Prime. Currently, when retirees reach age 65 they are expelled from *TRICARE*-Prime and the other DoD sponsored health care programs. They are the only Federal Employees who lose their employer provided health care benefit at age 65. If Medicare subvention is approved for Medicare eligibles enrolling in *TRICARE*-Prime, DoD would receive a capitated payment from Medicare and in return, the military beneficiary would receive all medical care through the DoD *TRICARE*-Prime network. DoD's proposal to the Health Care Financing Administration (HCFA) stated that DoD would provide the care at a saving of seven percent over what private sector HMOs charge. The result is:

- a win for DoD who has access to elderly patients for a full range medical practice necessary for readiness and certification of facilities and physicians which are necessary to keep good doctors in the military;

- Medicare wins by saving 7% for each enrollee; and

- the military beneficiary wins since many elderly retirees would choose to obtain their care in a military health care setting.

2. DoD was authorized by the 1995 Defense Authorization Act to implement a joint DoD/HCFA demonstration project. HCFA has statutory authority to undertake Medicare pilot projects. However, HCFA, in a bureaucratic delay tactic chose to interpret applicable statutes to prohibit even conducting a pilot project or demonstration of the Medicare subvention concept without legislation. HCFA expressed concern that since DoD currently treats the equivalent of 330,000 Medicare eligible retirees in MTFs

that DoD would shift the cost of treating these patients to HCFA. The DoD demonstration project proposal states that it will continue to underwrite the $1.4 billion cost of treating these patients and will seek reimbursement only for Medicare eligibles it treats above the current $1.4 billion threshold. DoD has also offered other guarantees to protect the Medicare Trust Fund.

Conclusion:

Until Medicare reimbursement (subvention) is begun as a demonstration or otherwise, all of the effects will not be known. The government has spent more time already discussing subvention than it took to complete the Manhattan Project. It is time to stop talking and begin the demonstration. We believe the President can direct the demonstration to begin without the need for further legislation.

Recommendation:

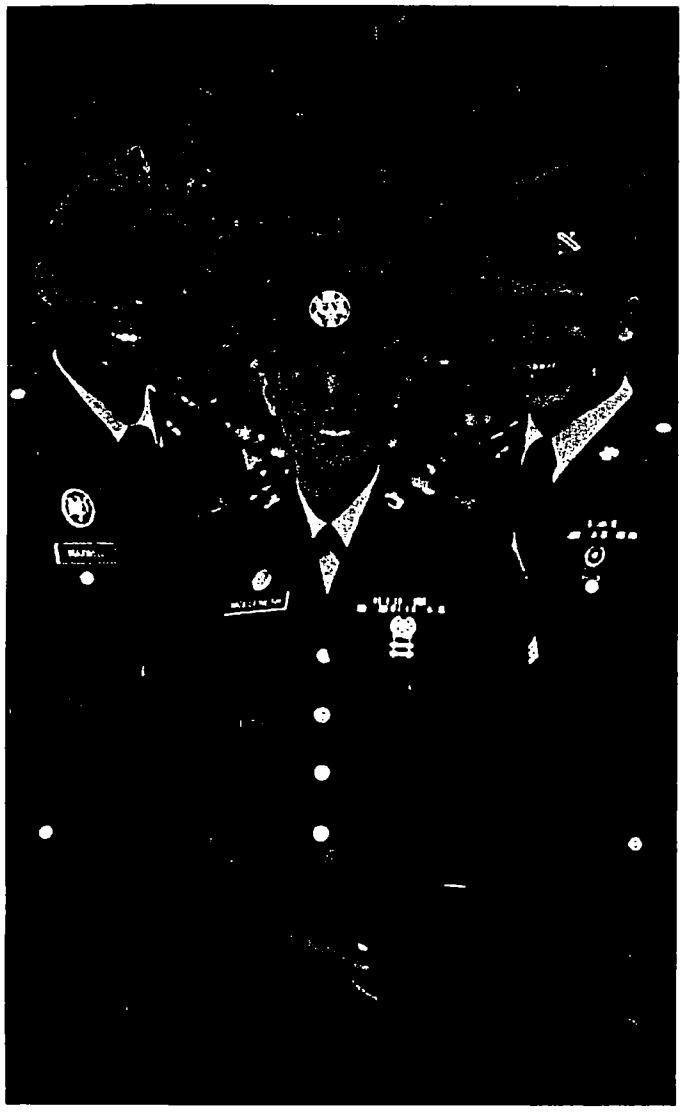
That the President as Commander in Chief and as Chief Executive direct that the demonstration project begin, that the project include both the proposed HMO capitated payment demonstration and a test of reimbursement by HCFA for space available use (as the DVA proposes in one of it's demonstrations) and that Medicare eligible military beneficiaries be enrolled and begin receiving care by 1 October 1996.

Attachments:

Military recruitment literature

ARMY

BENEFITS

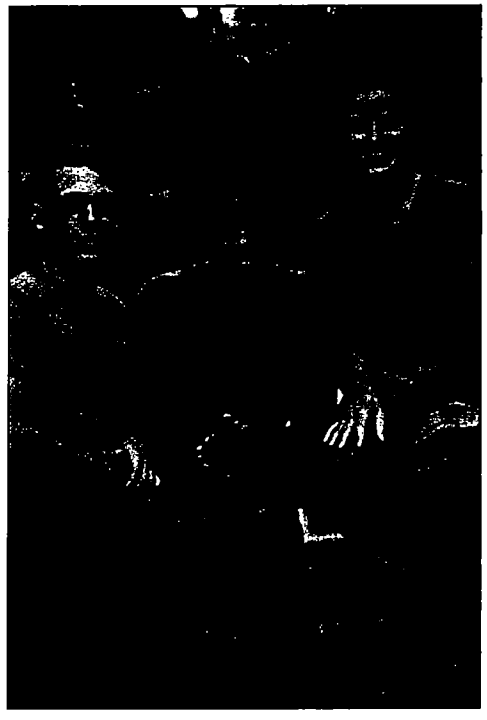


ARMY BENEFITS

HEALTH CARE, HOUSING, SHOPPING AND SCHOOLING

Superb Health Care. Health care is provided to you and your family members while you are in the Army, and for the rest of your life if you serve a minimum of 20 years of active Federal service to earn your retirement.

Housing, shopping, schooling and recreational facilities. The Army provides them all – plus excellent pay – to give you a high standard of living in an attractive and wholesome environment.



Maybe the most personally rewarding Army feature of all is the special pride you'll feel performing a valuable service for your country.

Ask your Army Recruiter for more details on all these benefits and how they can benefit yo

ARMY. BE ALL YOU CAN BE

Note. Information in this publication is subject to change
See your local Army Recruiter for the latest information

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LIFETIME MEDICAL CARE PROMISE

The promise of lifetime medical care is contained in law and tradition that date back more than 100 years. Military retirees thought they had earned lifetime military health care for themselves, their spouses, and survivors by their military service because it was emphasized as a recruitment and retention incentive in all of the services from the recruiting office to every level of command. For additional indisputable evidence that the free lifetime medical promise is still being made, see the following extracts from which we quote:

Marines, Life in the Marine Corps-

> **"BENEFITS...These are only a few of the great extras you'll find when you join the Marine Corps. And the nice part is, should you decide to make a career of the Corps, the benefits don't stop when you retire. In addition to medical and commissary privileges, you'll receive excellent retirement pay..."**

Air Force Pre-reenlistment Counseling Guide, Chapter 5 Medical Care, Section 5-2.f., dated 1 April 1986-

> **"One very important point, you never lose your eligibility for treatment in military hospitals and clinics"**

Air Force Guide for Retirement, Chapter 1, 1 April 1962-

> **"Treatment Authorized. Eligible retired members will be furnished required medical and dental care."**

UNITED STATES COAST GUARD CAREER INFORMATION GUIDE, USGPO 1991-

> **"Retirement**
>
> **Most career Coast Guardsmen retire after serving between twenty and thirty years of service. Current retirement programs allow you to collect about half of your base pay at twenty years and up to three-fourths base pay at thirty years.**
>
> **Retirement benefits mean more than pay too. You continue to receive free medical and dental treatment for yourself plus medical care for dependents. You also remain welcome at military commissaries, clubs and exchanges. Free space-available travel on some military flights allows retirees to travel to exotic foreign lands..."**

HEARINGS ON CHAMPUS AND MILITARY HEALTH CARE (OCT-NOV 1974, HASC NO. 93-70, 93RD CONGRESS)

> **"...the government has a clear moral obligation to provide medical care to retired personnel and their dependents...this Committee has found numerous examples of recruitment and retention literature which pledged...medical care for the man and his family following retirement."**

Now, after the fact, retirees are being told that such care is only space available; it was never promised, and even if it was it is not, in fact, an "enforceable contract" based on a specific code of law.

As shown, lifetime medical care has been expressly promised in military recruitment and retention literature over the years since World War II. DoD must accept full responsibility for providing lifetime medical care for its retirees, regardless of age or physical condition, including those who retired after long years of service or because of medical disability.

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ISSUE PAPER FOR THE PRESIDENT

SUBJECT: Uniformed Services University of the Health Sciences

Statement of the issue:

The Uniformed Services University of the Health Sciences (USUHS) was recommended for closure by the National Performance Review (NPR) based on the assumption that uniformed physicians can be acquired more economically through the Health Professions Scholarship Program (HPSP).

Facts bearing on the issue:

1. The NPR reflected a cost difference of $563,000 vs $111,000 between the USUHS and HPSP graduates. **This direct cost comparison did NOT include the following:**

- the indirect cost of federal subsidies to civilian medical schools;

- the effect on the cost per year of service of USUHS-trained physicians' longer service commitment and ever longer effective retention rates of 86 percent (for USUHS graduates who have completed their service obligation and could leave active duty service); or

- the cost avoidance generated by the other missions/products of USUHS such as continuing medical education for serving medical officers, support for military residency training programs, special military/public health education programs, graduate education in the biomedical sciences, applied and basic science research, consultative services to DoD on health care and health care delivery in times of combat and humanitarian operations, a Graduate School of Nursing, and medical care for military beneficiaries provided by the USUHS clinical faculty in the course of teaching. All of these missions/products are paid for as part of the approximately $85 million operating cost (including military salaries) of USUHS.

2. The NPR recommendation for closure reflected that there is no difference between a physician educated in a civilian medical school and a graduate of the militarily unique curriculum provided by USUHS.

3. The NPR recommendation for closure did not consider the special needs of military medicine or of military medical readiness.

Discussion of the facts:

1. The General Accounting Office (GAO) Report of September 1995 utilized the system life cycle cost approach by including the total federal costs for the education and career compensation of USUHS and scholarship (HPSP) graduates. The GAO cost comparison established the following:

- there is no difference between the cost per year of service for the USUHS and the HPSP graduates - (GAO Report, page 33):

USUHS	vs	HPSP
$181,575		$181,169

- once equalized for the different life cycles, 18.5 years/USUHS vs 9.8 years/HPSP (GAO Report, page 7), **there is no real difference between the cost of the USUHS and HPSP graduates**

USUHS	vs	HPSP
$3,350,883		$3,356,646

- However, in preparation for the GAO review, over $18.6 million of cost avoidance was documented as generated by USUHS for DoD and the federal government...**ongoing requirements that DoD must continue to budget for if the USUHS were closed**...Despite the fact that the annual cost avoidance resulting from the other missions/products of USUHS equated to 22 percent of the total USUHS budget, the GAO determined **NOT** to include cost avoidance in its analysis.

2. **The practice of medicine in the civilian and military communities is not the same.** Those who have studied military medicine recognize that there is a body of knowledge unique to the medical problems and the special needs of military units, either in the field or in a permanently established military post, and that this knowledge base is different from that required in a civilian medical practice. Examples of these differences are:

- during military deployments, such as Bosnia, Somalia or the Gulf, the effects of modern weapons, the stress of continuous operations, and the noise, toxins, and other hazards of the battlefield were encountered or anticipated. In all of these situations, the military physicians had to deal with the realities of risk assessment, prevention, medical evacuation, and the clinical management of diseases and injuries;

- at a permanent military installation, peacetime or deployment, the uniformed physician must display a solid understanding of the social and occupational environments in which his patients must work, including the unique family stresses of the military environment and the legal and regulatory systems that support the military environment; and,

- the military physician must be able to move comfortably between fixed and field medical facilities and provide quality medical care in both.

3. **The military medical system has two principal objectives or special needs.** In peacetime, it maintains military forces fit to fight. In combat, it conserves the fighting strength through counter measures directed at the prevention of disease and injury and through treatment at the lowest possible echelon of care, with a view toward rapid return to duty of sick or injured individuals. Attainment of these special objectives or special needs requires special military and medical training for medical personnel, and special medical organizations able to accompany and support military units as they carry out their missions. The following facts demonstrate that USUHS provides unique graduates who meet the special needs of military medicine and of military readiness:

• the militarily unique courses provided by USUHS are not available through civilian medical schools (American Medical Association letter to the congressional committees of May 14, 1996);

• the USUHS Commandant and the military faculty are successfully teaching the medical students the essentials of officership, leadership and the accompanying responsibilities of command as pointed out by "43 out of 44 commanders of major military medical units" who "perceived that physicians from USUHS have a greater overall understanding of the military, greater commitment to the military, better preparation for operational assignments, and better preparation for leadership roles." (GAO Report, GAO/HEHS-95-244, page 43);

• USUHS graduates' high level of performance and deployability were validated by the three Surgeons General and the Assistant Secretary of Defense for Health Affairs during congressional testimony. The results of the Senate hearings in March and April of 1994 serve as confirmation that the USUHS graduates meet the special needs of military medicine because they:

•• were immediately deployable to combat areas and were able to utilize their military combat, field sanitation, and preventive medicine training during Operations Desert Shield and Desert Storm;

•• volunteered for service with forward combat units, such as Special Forces Units;

•• understood the mission of their units and were able to quickly adapt to the lack of modern conveniences, equipment and military life in the field;

•• understood and successfully coordinated, in the joint service environment, with the organization of medical systems in the three Services;

•• were able to develop training programs in unconventional warfare, such as chemical and biological threats which increased confidence and decreased anxiety in their troops; and,

•• provided continuity, leadership, and experience due to their extensive military training and superb retention rates.

Conclusions:

The NPR recommendation for the **closure of USUHS was based on incomplete and outdated information** in its comparisons of cost; the differences between the practices of civilian and military medicine; and the special needs of military medicine and military medical readiness.

•• As documented in the GAO Report of September 1995, USUHS is cost-effective to the federal government in producing medical graduates who have consistently met the special needs of military medicine and military readiness by providing continuity, leadership and dedication to public service.

•• The recent vote in support of USUHS in the House of Representatives (343 votes for retention vs 82 votes for closure) on May 15, 1996; congressional hearings; legislative language prohibiting the closure of USUHS for the past four budget cycles; and, the consecutive appointment of USUHS graduates on the White House medical staff since 1991...**all illustrate strong bipartisan support for USUHS, the nation's only military medical school.**

•• During April and May of 1996, endorsements of support were written for USUHS by the American Legion, the Military Coalition, the National Association for Uniformed Services, the American Medical Association, and by fourteen U.S. Senators in a letter to the President.

Recommendations:

1. That the President direct the Office of Management and Budget and the Department of Defense to discontinue efforts to close the USUHS. Enough studies have been completed to prove that USUHS is cost-effective in meeting its mission. Continuous efforts at closure are being made at the cost of both time and money at many levels of the federal government, military associations and the private sector.

2. That the President direct the expansion of the USUHS mission in order to continue USUHS' excellent record of cost avoidance and service to the nation, especially in the area of military medical readiness.

Attachments:

A bound reference of documentation, to include a Table of Contents, is attached.

CLEAR AND UNMISTAKABLE ERROR AS PROPOSED IN H.R. 1483

ISSUE:

There should be legislation to give veterans the right to have Board of Veterans' Appeals decisions reviewed on the issue of whether they involve clear and unmistakable error.

FACTS BEARING ON THE ISSUE:

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.

Until the Court of Veterans Appeals (Court) began to require the Department of Veterans Affairs (VA) and the Board of Veterans' Appeals (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 decision of the Court of Veterans Appeals 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 indisputably 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.

Like other administrative and judicial systems, VA proceedings have finality. A regional office rating decision becomes final after one year if not appealed or if affirmed on appeal. 38 C.F.R. § 3.160(d). Thereafter, the matter cannot be readjudicated on the same factual basis. 38 C.F.R. § 3.104(a). The claim can be reopened only with new and material evidence. 38 U.S.C. § 5108.

Exceptions to this general rule are liberalizations of governing law, 38 C.F.R. § 3.114, and clear and unmistakable error, 38 C.F.R. § 3.105(a). Decisions of the Board are also final absent an order for reconsideration, 38 U.S.C. § 7103, or reversal by the Court of Veterans Appeals, 38 U.S.C. §§ 7104(b), 7252.

Pursuant to § 3.105(a), correction of clear and unmistakable error in an otherwise final regional office decision is available as a matter of right. Like any other issue, a veteran may file a notice of disagreement and appeal to the Board and the Court where the decision on the question of clear and unmistakable error is unfavorable. However, if the initial regional office decision was previously affirmed by the Board on appeal, the regional office cannot thereafter entertain a request for reversal under § 3.105(a), the theory being that to do so would constitute a lower tribunal overturning the decision of a superior tribunal.

Currently, the Board has authority, pursuant to title 38 U.S.C. § 7103(c), to correct an obvious error in the record, and the Chairman has the authority to order reconsideration of a decision under § 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 most cases the Chairman's refusal to action is not appealable. For the most part, motions for reconsideration are denied by a letter from the Chairman's office. Therefore, where a clear and unmistakable error occurred because VA overlooked some dispositive law or fact and the Board did the same, there is no remedy if the Board is not inclined to correct its error.

According to the Board's own figures, during the last five fiscal years (FY 1990-FY 1995), the Board acted on approximately 3,600 requests for reconsideration. Two-thirds of those requests were denied by letter. The remaining one-third of those requests for reconsideration were reconsidered and the decision changed, i.e., allowed, remanded, or denied on a different basis.

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 at the regional office level. The other provision would grant a claimant the right to claim clear and unmistakable error in a prior Board decision and to challenge an adverse decision in the Court of Veterans Appeals.

DISCUSSION OF THE FACTS:

Clear and unmistakable errors are those that are undebatable. *Akins v. Derwinski*, 1 Vet.App. 228, 231 (1991). They are distinguishable from questionable judgments and differences of opinion. They are errors that have deprived and continued to deprive VA claimants of benefits for which their entitlement is simply unquestionable. *See Eddy v. Brown*, 9 Vet.App. 52, 58 (1996) (a veteran's argument that the facts were improperly weighed, no matter how compelling, cannot amount to clear and unmistakable error); *Caffrey v. Brown*, 6 Vet.App 377, 383 (1994) (a correct but incomplete record, resulting from the Secretary's breach of his duty to assist, cannot form a basis for a claim of clear and unmistakable error). Because there can be no legitimate debate about the question, there can be no legitimate defense of a decision that is clearly and unmistakably erroneous. It would be unconscionable to discover such error and not correct it. To continue depriving a claimant of benefits to which he or she is fully entitled is reprehensible.

Clear and unmistakable error is fundamentally different from disputes in which neither side of the issue is conclusively supported and over which debate could go on indefinitely, or in which a claimant is unwilling to accept an adverse, yet reasonably supported, decision. Those situations require a rule that at some point ends the dispute, whether to the satisfaction of both sides or not. Clear and unmistakable error, as an exception, does no violence to the rule of finality, however. It allows justice to prevail in cases where it has unquestionably been denied previously. It does not provide an avenue for unending debate. When the allegation is made or the question is raised, it must stand fully on its own merits based on what the law and evidence of record at the time the challenged decisions were made. *Fugo v. Brown*, 6 Vet.App. 40, 44 (1993).

Clear and unmistakable error is a very narrow exception by definition. In order to raise a claim of clear and unmistakable error, the claim must be specific and not a mere broad allegation of a failure to follow the regulations, or the failure to give due process, or any other general, unspecific error. *See Mindenahll v. Brown*, 7 Vet.App. 271, 275 (1994); *Fugo* at 44. Once the issue of clear and unmistakable error has been adequately raised, there is a three-part test for determining whether clear and unmistakable error has been committed:

- Either the correct facts, as they were known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions extant at the time were incorrectly applied,

- The error must be undebatable and the sort which, had it been made, would have manifestly changed the outcome at the time it was made, and

- A determination that there was clear and unmistakable error must be based on the record and law that existed at the time of the prior adjudication in question.

Damrel v. Brown, 6 Vet.App. 242, 245 (1994).

A claimant must establish that all three are satisfied. It should be quite obvious that clear and unmistakable error does not provide an avenue for unending debate nor will it open the "flood gates" of litigation before the Board.

Because clear and unmistakable error review is already available for regional office decisions not previously appealed, H.R. 1483 should have no discernible impact at that level. With review available at the regional office level, experience has shown that claimants invoke their right to such review under § 3.105(a) in a very small percentage of cases. The right to have a review for clear and unmistakable error has not resulted in a flood of these cases at the regional office level. With a smaller universe of Board decisions, the number of requests for clear and unmistakable error review at the Board level should be even smaller. Before the decision of the U.S. Court of Appeals for the Federal Circuit that barred claimants from seeking clear and unmistakable error review of Board decisions, VA had not been flooded with these cases.

Moreover, the Board already corrects these errors through the discretionary reconsideration process, making such review a matter of right should produce very few additional cases.

While this legislation does require the Board to decide each clear and unmistakable error claim on the merits and provide a written decision, it would appear that the Board could adopt procedural rules consistent with the Court's clear guidance to make consideration of appeals raising clear and unmistakable error less burdensome, (i.e., the dismissal of those claims merely alleging error and clear and unmistakable error on its face is not shown.) Whatever the additional workload, this is a situation where equity should prevail over government expedience. The equities involved outweigh the concerns about added workload. The paramount issue here is VA's fulfillment of its stated obligation to "render a decision which grants every benefit that can be supported in law." 38 C.F.R. § 3.103. There should be no hesitation to allow veterans an avenue to obtain benefits unquestionably due them if justice for veterans is truly the overriding goal of the VA. No deserving claimant should be denied benefits because the VA has repeated its mistakes.

The DAV firmly disagrees with the Board's unsubstantiated claim that this legislation "could require the Board to review, literally on demand, hundreds of thousands of its past decisions, including those entered decades ago." Quite frankly, we do not believe that the VA has made that many decisions containing clear and unmistakable error, nor do we believe that large numbers of claimants will avail themselves of this remedy.

CONCLUSIONS:

The Congressional Budget Office (CBO) has determined that H.R. 1483 is budget-neutral. Therefore, the sole question to be answered is whether H.R. 1483 will serve the best interests of veterans. The DAV firmly believes that H.R. 1483 provides a fair, just, and equitable resolution to those claimants who had benefits wrongfully and illegally withheld.

As discussed above, the Board already has the authority to correct obvious error in a final, prior Board decision. There are no stringent standards set for reconsideration, and the mere allegation of error or the mere request for reconsideration will trigger the process. Yet, only 3,600 cases were reconsidered over a five-year period, slightly more than 700 cases per year. It is highly unlikely that claims for clear and unmistakable error would be more numerous than the number of cases that the Board reconsiders annually. Although it is likely that there will be greater activity during the first year that the legislation is in effect, thereafter, the number of claims would be likely to decline. In fact, these claims would probably not be in addition to the number of reconsiderations, but in all likelihood would be in lieu of many of the reconsideration cases, making the net increase in Board cases zero.

There is no legitimate reason why clear and unmistakable error should be allowed to exist in a decision of the Board of Veterans' Appeals. It is unconscionable to allow a clearly and unmistakably erroneous decision to prevent a claimant, who has already established his or her entitlement to a benefit, from receiving VA benefits and services.

RECOMMENDATIONS:

The DAV recommends that this Administration support the passage of legislation to grant claimants a right to have clear and unmistakable error in prior decisions of the Board of Veterans' Appeals corrected. Such legislation has had bipartisan support in the House of Representatives during the 103rd and 104th Congresses. The Board's unsupported allegations that this legislation will result in hundreds of thousands of VA claimants alleging clear and unmistakable error in prior Board decisions, thereby creating additional backlogs at the Board, has caused the Senate Veterans' Affairs Committee to procrastinate on moving this legislation forward. Therefore, this Administration's support of this legislation is vital, if veterans are to be treated in a fair, just, and equitable manner.

ATTACHMENTS:

1. The April 5, 1996 letter of DAV National Commander Thomas A. McMasters, III to the members of the House Veterans' Affairs Committee regarding the passage of clear and unmistakable error legislation.

2. The remarks of Subcommittee Chairman Terry Everett at the Compensation, Pension, Insurance and Memorial Affairs Subcommittee markup on clear and unmistakable error legislation on April 17, 1996.

3. H.R. Rep. No. 104-571, 104th Cong. 2d Sess. (1996), Revision of Veterans' Benefit Decisions Based on Clear and Unmistakable Error.

Motto: "If I cannot speak good of my comrade, I will not speak ill of him."

DISABLED AMERICAN VETERANS

NATIONAL SERVICE and LEGISLATIVE HEADQUARTERS
807 MAINE AVENUE, S.W.
WASHINGTON, D.C. 20024
(202) 554-3501

April 5, 1996

TO ALL MEMBERS OF THE HVAC:

Dear Congressman/Congresswoman:

As National Commander of the more than one million members of the Disabled American Veterans (DAV), I take this opportunity to seek your support for H.R. 1483, a bill to allow the correction of clear and unmistakable error in decisions of the Board of Veterans' Appeals (BVA or Board).

Unlike decisions involving differences of opinion or questionable judgments, those involving clear and unmistakable errors are indisputably and undebatably wrong. They have deprived, and continue to deprive, veterans or their survivors of benefits for which their entitlement simply is unquestionable. It would be unconscionable to discover such an error and not correct it.

While the Board may reconsider its decision on an appellant's motion that error exists in a decision of the Board, such reconsideration is discretionary (more than sixty percent are summarily denied by letter to the claimaint). Further, unless an appellant has filed a motion for reconsideration within 120 days of the prior BVA decision and has a valid notice of disagreement, one filed with the Department of Veterans Affairs (VA) on or after November 18, 1988, there is no access to judicial review of the Board's action. Therefore, where a clear and unmistakable error occurred because VA overlooked some dispositive law or fact and the Board did the same, there is no course a claimant can take if the Board is not inclined to correct its error.

As you know, similar legislation on clear and unmistakable error was favorably reported out of the House Veterans' Affairs Committee and passed by the full House during the 103rd Congress. Like the previous legislation passed by the House, H.R. 1483 provides a fair, just, and equitable resolution to those claimants who had benefits wrongfully and illegally withheld. Additionally, the Congressional Budget Office has determined that this legislation is budget-neutral.

DAV strongly supports the passage of H.R. 1483, as was stated in our testimony before the Subcommittee on Compensation, Pension, Insurance, and Memorial Affairs of the House Veterans Affairs Committee on October 12, 1995, when our position was initially solicited on this and other legislative proposals being considered by the Subcommittee. In addition to the Fiscal Year 1996 and 1997 VA appropriations, DAV views clear and unmistakable error legislation as among the most important veterans' legislation to be considered during the 104th Congress. To ensure passage of

this important legislation is not impeded in any way, H.R. 1483 should remain a stand-alone bill rather than being attached to other legislation with "pay-go" implications.

I strongly urge you to support the budget-neutral clear and unmistakable error legislation contained in H.R. 1483. This legislation will allow justice to prevail in cases where it has unquestionably been denied previously. I look forward to your comments on this matter at your earliest possible convenience.

Sincerely,

THOMAS A. MCMASTERS, III
National Commander

TAM:lmb
cc: Congressman Lane Evans
Selected Department Commanders and Adjutants

Honorable Terry Everett
Remarks
Subcommittee on Compensation, Pension, Insurance and
Memorial Affairs Markup
April 17, 1996

Good morning, the Subcommittee will come to order.

We're here today to mark up several bills that will affect many different veterans benefits. I'd like to thank the VSO's and the Administration for their input, as well as the minority staff for their bipartisan assistance. I'd also like to note that the provisions in the bills before us today - with one exception - are supported or not opposed by the veterans service organizations and the administration.

Before we begin, I'd like to recognize the ranking member for any remarks he may have.

Thank you Lane. Do any of the other members have opening remarks?

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To MR. JOE VIOLANTE	From MR. IRA GREENBERG	
Co./Dept.	Co.	
Phone #	Phone #	
Fax #	Fax #	

Our first bill is HR 2843. The bill makes several changes to the Servicemen's Group Life Insurance and Veterans Group Life insurance programs. The bill's major provisions will:

1. Allow the Secretary to terminate coverage when premiums are not paid within 60 days;

2. Set the automatic coverage at $200,000;

3. Change the name of the program to Servicemembers' Group Life Insurance;

4. Merge the Retired Reserve Servicemembers' Group Life Insurance Program with VGLI and automatically convert Retired Reservists' policies to VGLI;

5. Liberalize the rules concerning renewal and conversion to commercial policies;

There is no cost to the bill.

I also have one technical amendment to the bill that would merely change 1995 to 1996 in the title of the bill and without objection, I will consider the amendment

accepted. Is there any discussion of the bill? Hearing none, I recognize the ranking member.

The question is on reporting HR 2843. All in favor signify by voting AYE.

Those Opposed signify by voting NO.

The Ayes have it, and the bill is ordered reported to full committee.

The next bill is HR 2850. This bill will make the age for burial in a national cemetery consistent with other Title 38 benefits. Currently, there is some confusion in Title 38 about the age of a minor child. With the exception of burial eligibility, Title 38 defines a minor child as under age 18 unless pursuing a course of instruction at an approved educational institution in which case the age is 23. The bill would make children eligible for burial up to age 23 if attending school. There is no cost to this bill.

Is there any discussion on the bill? Hearing none, I recognize the Ranking Member.

The question is on reporting HR 2850. All those in favor signify by voting AYE.

Those opposed signify by voting NO.

The AYES have it and the bill is ordered reported to the full committee.

Our third bill is HR 3248 a bill that revises and improves a wide range of veterans benefits. The bill will:

1. Add Bronchiolo-Alveolar (Bronk-E-Oh-Low Al-Veo-Lar) carcinoma to the list of illnesses presumed to be service-connected for those exposed to ionizing radiation;

2. Add a presumption of permanent and total disability for veterans over 65 if they reside in a nursing home;

3. Allow VBA to contract with private physicians for compensation and pension physicals;

4. Increase the one-time maximum auto allowance from $5,500 to $6,000;

5. Eliminate VA's clothing allowance for incarcerated veterans;

6. Authorize the American Battle Monuments Commission to assume responsibility for some overseas memorials and accept private funds for their maintenance;

7. Provide up to two years of back benefits to survivors of veterans who die while their case in being adjudicated;

8. Pay disability compensation benefits through the day of death, and begin eligibility for DIC on the day after death of the veteran.

This bill contains several items from bills sponsored by the ranking member and I would like to thank him for his work. The last two provisions I mentioned will require offsets due to paygo, and final full committee action on those provisions will depend on the outcome of the Budget Committee's actions. I personally hope we will be able to accomplish these two important changes to survivor's benefits.

I now recognize the ranking member for discussion.

Is there any further discussion?

Hearing none, I recognize the ranking member.

The question is on reporting HR 3248. All those in favor signify by saying AYE.

Those opposed signify by saying NO.

The AYES have it, and the bill is ordered reported to the full committee.

Our final bill is HR 1483. The bill will make several significant changes to a veterans right of appeal at the Board of veterans Appeals and the Court of veterans Appeals. The bill will:

1. Codify the existing regulatory authority for appeal at the regional office on the grounds of clear and unmistakable error;

2. Establish the right of appeal at the Board on the grounds of clear and unmistakable error and allows that appeal to be filed at any time;

3. Provide access to the Court of Veterans Appeals under clear and unmistakable error for any previous Board decision.

I would note that the Administration opposes this bill on the grounds that the liberalization of appeal rights is unnecessary because an equivalent review already exists at the Board and that it offers the potential to further increase the backlog of claims at the board. The staff has asked VA for data to support this contention, but VA has indicated they have not kept such data. CBO has scored the bill as no cost.

The bill has received strong support from the veterans organizations, especially the DAV.

I see this issue as a clash between two rights. On the one hand I feel strongly that an individual veteran's rights must not be abridged. On the other, I am concerned that by strengthening individual rights, we might be delaying justice for the group as a whole, and we have often heard the VSO's state that justice delayed is justice denied. In

the end, I guess the possible outright denial of justice is more serious than a small increase in average processing time. So, with that in mind, I will support the bill. If it proves to be disastrous for the claims processing system, I will take the necessary steps to remedy the situation.

I now recognize the Ranking member for any remarks he may have.

Is there any further discussion of the bill?

Hearing none, I recognize the ranking member.

The question is on reporting HR 1483. All those in favor signify by saying AYE.

Those opposed signify by saying NO.

The AYES have it and the bill will be reported to full committee.

Before we conclude, without objection, the staff is directed to make any necessary technical and conforming

amendments. I would like to thank the members and staffs for their participation and I look forward to bringing this legislation to the full committee.

The Subcommittee stands adjourned.

104TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
104–571

REVISION OF VETERANS BENEFITS DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR

MAY 10, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. STUMP, from the Committee on Veterans' Affairs, submitted the following

REPORT

[To accompany H.R. 1483]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 1483) to amend title 38, United States Code, to allow revision of veterans benefits decisions based on clear and unmistakable error, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

INTRODUCTION

On April 7, 1995, the Ranking Member of the Subcommittee on Compensation, Pension, Insurance and Memorial Affairs, the Honorable Lane Evans, along with the Honorable Frank Mascara, the Honorable Bob Filner and the Honorable Luis V. Gutierrez, introduced H.R. 1483, to allow revision of veterans benefits decisions based on clear and unmistakable error.

The Subcommittee on Compensation, Pension, Insurance and Memorial Affairs met on April 17, 1996 and recommended H.R. 1483 to the full Committee. The full Committee met on May 8, 1996 and ordered H.R. 1483 reported favorably to the House by unanimous voice vote.

SUMMARY OF THE REPORTED BILL

H.R. 1483 would:

1) Codify existing regulations which make decisions made by the Secretary at a regional office subject to revision on the grounds of clear and unmistakable error.

2) Make decisions made by the Board of Veterans' Appeals subject to revision on the grounds of clear and unmistakable error.

BACKGROUND AND DISCUSSION

The VA claim system is unlike any other adjudicative process. It is specifically designed to be claimant friendly. It is non-adversarial; therefore, the VA must provide a substantial amount of assistance to a veteran seeking benefits. When the veteran first files a claim, VA undertakes the obligation of assisting the veteran in the development of all evidence pertinent to that claim.

There is no true finality of a decision since the veteran can reopen a claim at any time merely by the presentation of new and material evidence.

Any decision may be appealed within one year and the grounds for appeal are unlimited. The appeal is initiated by a simple notice of disagreement after which VA is obligated to furnish a detailed statement of the facts and law pertinent to the claim.

The bill would make decisions by VA Regional Offices and the Board of Veterans Appeals (Board) subject to review on the grounds of clear and unmistakable error. Regional office decisions are currently reversible on this basis by regulation, but Board decisions are not. *Smith* v. *Brown*, 35 F. 3d. 1516, 1523 (Fed. Cir. 1994). The bill would effectively codify this regulation, and extend the principle underlying it to Board decisions.

The Board is an appellate body located in Washington, DC, responsible for reviewing claims on a de novo basis. Under current law, a veteran may file a motion for reconsideration at the Board at any time after the decision has been made. If the Chairman of the Board grants a motion for reconsideration, the matter is referred to an enlarged panel for a final decision. Reconsideration of the claim is conducted under the law as it existed at the time of the initial decision, and if an allowance is ordered, the veteran receives the benefit retroactive to the date of the initial decision.

During fiscal years 1991 through 1995, more than 3,600 motions for reconsideration were filed, and more than 800 (22 percent) were granted, resulting in reconsideration and a new decision by a panel of at least three Board members. Of the cases reconsidered, 77 percent resulted in allowances or remands. As of March 31, 1996, there were 59,829 appeals pending at the Board and the average Board response time was 752 days. The Committee will closely monitor the effect of this legislation on the backlog at VA.

"Since at least 1928, the VA and its predecessors have provided for the revision of decisions which were the product of 'clear and unmistakable error'". (citations omitted) The appropriateness of such a provision is manifest." *Russell* v. *Principi*, 3 Vet. App. 310, 313 (1992) (en banc). Congress has provided the Board (but not the regional office or agency of original jurisdiction) authority to correct obvious errors. 38 U.S.C. §7103(c). In arguments before the Court of Veterans Appeals and testimony before this Committee, the VA has stated that there is no substantive difference between the Board's authority to correct "obvious error" and the agency of original jurisdiction's authority to correct clear and unmistakable error.

"The only real difference is that clear and unmistakable error review can be invoked as of right, whereas review for obvious error is committed to the sound discretion of the Board." *Smith, supra*, 1526. With regard to what constitutes clear and unmistakable error, the Court of Veterans Appeals has noted:

> It must always be remembered that clear and unmistakable error is a very specific and rare kind of "error". It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Thus even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, ipso facto, clear and unmistakable. *Russell* v. *Principi*, 3 Vet. App. 310, 313 (1992) (en banc).

Fugo v. *Brown*, 6 Vet. App. 40, 43–44 (1993). As the Court further stated in *Fugo*, clear and unmistakable error is a form of collateral attack on an otherwise final decision, and there is a very strong presumption of validity that attaches to such decisions.

As noted above, this legislation would allow a claimant to raise a claim of clear and unmistakable error with regard to a Board decision. However, it does not follow that by merely averring that such error has occurred, a veteran can collaterally attack an otherwise final decision. At least in cases brought before the Court of Veterans Appeals,

> while the magic incantation "clear and unmistakable error" need not be recited *in haec verba*, to recite it does not suffice, in and of itself, to reasonably raise the issue . . . [S]imply to claim clear and unmistakable error on the basis that previous adjudications had improperly weighed and evaluated the evidence can never rise to the stringent definition of clear and unmistakable error . . . Similarly, neither can broad-brush allegations of "failure to follow the regulations" or "failure to give due process," or any other general, non-specific claim of "error".

Id. Given the Court's clear guidance on this issue, it would seem that the Board could adopt procedural rules consistent with this guidance to make consideration of appeals raising clear and unmistakable error less burdensome.

Finally, the Committee notes that an appellate system which does not allow a claimant to argue that a clear and unmistakable error has occurred in a prior decision would be unique. That is certainly the intent of the original VA regulation allowing correction of such decisions, no matter when the error occurred or which part of the VA made the error. Given the pro-claimant bias intended by Congress throughout the VA system, the Committee concludes that this legislation is necessary and desirable to ensure a just result in cases where such error has occurred.

VIEWS OF THE ADMINISTRATION

STATEMENT OF CHARLES L. CRAGIN, CHAIRMAN, BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS, BEFORE THE SUBCOMMITTEE ON COMPENSATION, PENSION, INSURANCE AND MEMORIAL AFFAIRS ON OCTOBER 12, 1995, PERTAINING TO H.R. 1483

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 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.

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 1,083 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.

SECTION-BY-SECTION ANALYSIS

Section 1(a) would amend chapter 51 of title 38, United States Code, to codify existing regulations which make decisions made by the Secretary at a regional office subject to revision on the grounds of clear and unmistakable error.

Section 1(b) would amend chapter 71 of title 38, United States Code, to make decisions made by the Board of Veterans' Appeals subject to revision on the grounds of clear and unmistakable error.

Section 1(c) would make the provisions of this bill applicable to any determination made before, on, or after the date of the enactment of this Act.

OVERSIGHT FINDINGS

No oversight findings have been submitted to the Committee by the Committee on Government Reform and Oversight.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The following letter was received from the Congressional Budget Office concerning the cost of the reported bill:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 8, 1996.

Hon. BOB STUMP,
Chairman, Committee on Veterans' Affairs,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office (CBO) has reviewed H.R. 1483, a bill to allow revision of veterans benefits decisions based on grounds of clear and unmistakable error, as ordered reported by the House Committee on Veterans' Affairs on May 8, 1996.

The Department of Veterans Affairs (VA) carries a large backlog of claims for benefits, including new applications and appeals based on prior decisions. According to VA, this bill would help streamline its claims adjudication process. This streamlining could result in a more efficient and economical administration of claims and, therefore, a savings in general operating expenses. On the other hand, benefits could be awarded to some veterans sooner than would currently be the case, resulting in higher costs. CBO cannot estimate either budgetary effect.

H.R. 1483 would affect direct spending and thus would be subject to pay-as-you-go procedures under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985. H.R. 1483 contains no intergovernmental or private sector mandates as defined in Public Law 104–4 and would impose no direct costs on state, local or tribal governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mary Helen Petrus. who can be reached at 226–2840.

Sincerely,

JUNE E. O'NEILL,
Director.

INFLATIONARY IMPACT STATEMENT

The enactment of the reported bill would have no inflationary impact.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 38, UNITED STATES CODE

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PART IV—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS

SUBCHAPTER I—CLAIMS

Sec.
5101. Claims and forms.
5102. Application forms furnished upon request.

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5109A. Revision of decisions on grounds of clear and unmistakable error.

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SUBCHAPTER I—CLAIMS

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§ 5109A. Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

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PART V—BOARDS, ADMINISTRATIONS, AND SERVICES

CHAPTER 71—BOARD OF VETERANS' APPEALS

§ 7111. Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Board on the Board's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Board based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.

(f) A claim filed with the Secretary that requests reversal or revision of a previous Board decision due to clear and unmistakable error shall be considered to be a request to the Board under this section, and the Secretary shall promptly transmit any such request to the Board for its consideration under this section.

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APPLICABILITY TO LEGISLATIVE BRANCH

The reported bill would not be applicable to the legislative branch under the Congressional Accountability Act, Public Law 104–1, because the bill would only affect certain Department of Veterans Affairs benefits recipients.

STATEMENT OF FEDERAL MANDATES

The reported bill would not establish a federal mandate under the Unfunded Mandates Reform Act, Public Law 104–4.

○

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

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

- H.R. 1483 would subject all past benefit decisions by VA's Board of Veterans Appeals (BVA) to on-demand reviews by the Board for "clear and unmistakable" error.

- 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).

- 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.

- 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, requests for review would be received from only 5% of those whose appeals were denied from FY's 1977 to 1995. BVA's caseload would increase by 21,700, and its average response time would increase by 53% to an estimated 979 days!

- 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.

  -- 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.

groups that work with the homeless veterans work with them and get more resources to do it; and HUD works on creating circumstances which will help people to stay out of homelessness as we can get them out. That's our basic policy. And I think it's working. We just don't have enough funds to put in it. We just need to keep pushing that. I think that is the approach we should take.

Q I've got a couple of questions of interest to Vietnam veterans, and one specifically I want to -- on behalf of our organization, I guess all Vietnam veterans want to thank you for your leadership last week in announcing the presumptive compensation for peripheral neuropathy and prostate cancer.

Of course, the real question that's not answerable at this moment is the whole issue of spina bifida and what the appropriate remedy looks like. And all of us, I know, are going to be involved in conversations and discussions about that over the weeks and months ahead. But do you have a thought as to a time line that you're interested in seeing this --

THE PRESIDENT: Don't we have to pass legislation in Congress that authorizes help for spina bifida? I think we do. And then my own view is that we ought to -- that the compensation system ought to be worked out the way we do other kinds of permanent conditions that way. I think we've got a lot of guidelines in the way we deal with other kinds of cases.

But to me that's -- I don't want to say one thing is more important than another, but i think it's very important to recognize the high probability, based on the National Academy of Sciences study, that the children of veterans are suffering for their service. So to me it's very important that we get the legislative, that we get the bill passed through Congress and that we set up a scheme, a compensation scheme that's consistent with the way we've handled similar problems like this in the past. And frankly, I'll be surprised if Congress doesn't do it. They've been quite -- I think they'll be responsive to this and I think they'll do it pretty quickly.

Q Let me just follow up on this -- on a related kind of issue. With this last week, also you announced certification that the Vietnamese cooperate to the fullest extent possible with the POW-MIA issue and, of course, earlier we had announced Pete Peterson to be the Ambassador there. Could you discuss that just a little bit more, as to how you arrived at that decision? As you know, we're out here in the field trying to respond to all that.

THE PRESIDENT: Well, I did it based on the work that -- the remains that they've returned, based on the documents they've turned over, based on the cooperation they've given us with our joint operations in Vietnam and in helping us work along the borders, the outer countries that are involved.

The criteria that I set out when I started relating to Vietnam as the President three and a half years ago, in all four areas they have shown some significant advances according to every source in our administration. They all recommended that we do that. And I thought by asking a person who was not only a distinguished veteran and a member of Congress but who was a POW for a very long period of time, to be the Ambassador, I thought that would be a guarantee and a reassurance to the veterans of America that we would never let up on our primary concern to get the fullest possible accounting.

Q Sir, I'd like to go into the realm of heresy if I can and see if the group lets me do that. But I think it's a question that needs to be asked. I'm concerned with what I call the growing

unaffordability of the veterans health care delivery. As the country looks to reduce further the size of the federal government, I think Congress will be less willing to give the VA the money it needs to do what it's doing now. And I also suspect that the country, the sentiment in the country, will question large expenditures on behalf of the veterans. And if this happens, what I fear is that the unique and unchallenged expertise that the Veterans Administration has -- prosthetics, for example -- would be threatened along with those areas where the VA is at best competitive with the private sector. And so I would say, is the best solution to empty beds at VA hospitals expansion through a redefinition of who is eligible for VA care, or is it better to redefine what is VA care? And isn't it time that we do it now? Shouldn't we think about that now, before we face -- when we hit the wall financially?

THE PRESIDENT: It's not only a brave question, it's a good question. Let me just -- I'd like to make three points I think about it. First, let me say by way of introduction, I have -- obviously, I've thought about this for a very long time. You know, I spent a huge amount of time on this health care issue my first two years as President. We had two very fine and very large VA hospitals in Little Rock when I was a governor for 12 years. And I guess I would like to make the following points.

Number one, in the areas where the veterans health care is clearly important and way ahead of general health care -- prosthetics, dealing with spinal cord injuries -- a big issue where I think we are likely to see dramatic progress in the next 10 years based on what I've seen of the latest medical research. And you may have seen it just in the last few days, we were able to allocated $10 million more in research this year to spinal cord injuries.

I think we ought to -- first of all, let's make a commitment that we're going to stay the best in what we're the best at because you're going to continue to have people injured in military service even if we're not at war. We know -- we keep being sadly reminded we lose about 200 veterans a year would lose their lives in the service of their country, even in peace time, because it's inherently dangerous.

Okay. The second thing I think we need to do is to look at reformed eligibility, which we are working on and I think you all are generally familiar with that. And then, thirdly, I don't think we should be averse to looking whether we should restructure the system. We put a doctor in charge of the veterans health care facilities in 1994 with the mission of trying to make sure they survived into the 21st century. And we have been doing some significant reorganization.

And I think that what I would like to do is to keep -- I think that a lot of these hospitals would be quite competitive if they had access to more patients. So I would like to -- I've always supported eligibility reform, but I also think we have to always be looking at ways to make the system more efficient. And I don't think we should wait for a crisis to occur, but it seems to me that given the time line we're on, we're going to know about eligibility possibilities within the next few years. At the same time, we're going to be looking at some systematic reforms.

And I think as long as we do this in an open way and do it together, I think we'll come out in the right place.

But my concern is not to wind up in the situation where any of our veterans are like the 40 million Americans that don't have any health care access. That's what I don't want to wind up doing. And so I wouldn't -- I think we ought to look at whether we can take the system we've got that works well now and make more people eligible

for it and increase the utilization so we can lower the unit cost and make it more efficient. We can always look at ways to make the system more efficient at the margins as well.

But I just would predict to you that there was -- if we can -- the whole health care system is changing so much now, I wouldn't be too alarmed if you think that the health care -- the veterans health network -- is lagging a little behind that, because within four or five years we may have some people who wished they paid a little more attention to getting everybody health coverage that didn't have it.

So I applaud, like I said, the bravery of your question. We should not be -- we should say, well, we may have to reduce or change or modify capacity. But first, let's see if the system could compete if it had access to all the possible customers. And I don't think that one excludes the other.

Q Mr. President, thanks first for meeting with us. And my questions deal with the VA budget. Secretary Brown has said a number of times that you have agreed to meet with him annually to reevaluate the VA budget. And as you may know, Jesse's been taking his licks on the Hill from the appropriators and from others up there. The two-part question is, number one, will you continue to meet with the Secretary on an annual basis with the VA? And, two, what comment would you have for the members of Congress that say by promising this to the VA you open the door to other Cabinet secretaries to do the same thing; therefore, your long-term budget proposal is at the best misleading? And that's being kind. Some of them aren't being that kind.

THE PRESIDENT: Well, I'd say my long-term -- insofar as I've got four years now, my long-term budget record stands up pretty well compared to any in Congress I can think of, dominated by either party. Mine looks -- it looks pretty good. I've shown them a real willingness to hold the line on spending. We're about to go into our fourth year of deficit reduction in a row for the first time since Harry Truman was President, having four years back to back. And I think we proved that you can meet the basic needs of the American people for the present and investment in the future, whether it's national defense or investment in education and research and still whittle this budget down. So I feel comfortable about that.

The reason that I made that commitment to Secretary Brown in particular is that because there are a lot of things that are up in the air here. It's very hard to -- if you look at all the -- the question that Mr. Molino asked just before you asked yours -- we do our very best here to think about what the world is going to be like five or six years from now. But we were on five year budget plans. Then the Congress said, well, let's make a balanced budget in seven years.

Well, the good news was that we were finally going to set a time for balancing the budget. The bad news was we were going from a five-year budget to a seven year budget. No one can possibly predict all the variables that will occur seven years from now. And it seems to me that it would have been irresponsible of me not to agree to Secretary Brown's request.

He said -- he comes to me on your behalf and he says, okay, I'll try to meet these tough budget targets. You're going to be more generous to us in the first two or three years, much more generous than Congress wants to be and then what you say, we're going to have to get tough in the back years. And I'll try to do it, but you've got to promise me that every year you will meet with me so we'll see how much money we have, what our needs are and where we're going, so that we don't get ourselves shackled to an artificial budget

that bears no relationship to the real needs of the veterans.

When you're making five, six, seven-year budgets, that seemed to me to be a very reasonable request and I think it would have been weak and wrongheaded of me not to do it.

Q You're way ahead of me, Mr. President; you answered my question already. (Laughter.) John hit on it, the Paralyzed Veterans, as I said -- was founded 50 years ago to make sure the VA treated their spinal cord injuries so they'd live longer than three to five to 10 years. Of course, they've done miraculously. And naturally, our organization is very concerned with the budget cuts that we do maintain the high quality of the spinal injury units somewhere in the nation, not necessarily 22 around there, but six or eight under -- and our people are getting older, our veterans, as all the veterans are, but we need specialized long-term care, too. So we have worked with Congress and the administration. I just appreciate you supporting us.

THE PRESIDENT: I think that very few Americans know how much work has been done in improving the care and longevity, quality of life for spinal cord injured veterans, and all Americans as a result of what's been done through the veterans health work. It was very interesting, when Christopher Reeve came into see me a couple of weeks ago, and he was telling me -- he was talking, and the first thing he said, he said, when I was in the hospital, the doctor showed me a copy of a 1991 medical text -- 1991 -- that had no treatment for an injury as severe as mine. If that had happened to me just five years ago, I would be dead now. And he said all this started because of the work that was done for veterans.

He was talking to me -- he said, if it hadn't been for the veterans network making people believe they could live and they could recover, he said this was -- had built it all up. And then he told me about all this work that's now being done in Switzerland and other places, showing that we might actually be able to regenerate the nerves in the spinal column and actually help people recover now -- something that would never have been dreamed of before. And so I think that -- my belief is that they'll be a strong level of support for continuing this now. And I assure you that I will do it.

But that goes back to the question John asked, if we're doing something well, the last thing we ought to do is give up something we're doing well, because what we're doing well is not only -- in this case, benefits veterans who are likely to be most severely injured, but also is likely to have the largest amount of benefits to the society as a whole by what other people can learn from what's been done in the veterans network.

Q I'm with the Disabled Americans Veterans, Mr. President. The clear and unmistakable error when VA decisions -- that makes a decision on questions that are relating -- (inaudible.) With such an area outstanding in the VA regional office or the Board of Veterans Appeals Decisions, the veterans by reason of an unjustifiable decision is being deprived of the benefit to which he or she is absolutely entitled. If the VA opposed H.R. 1483, which was supported by veterans groups and passed in the House with strong support -- and that would include the Board of Veterans Appeal Decisions such as those which give veterans the right to appeal on the basis of clear and unmistakable error .

Veterans already have the right to request correction. The Board of Veterans Appeal Decisions are exempt from that. Most of them are summarily dismissed with a letter.

And we consider it purely a matter of justice for veterans -- (inaudible) -- immunizing board for its wrongheaded

actions. Will your administration continue to oppose this legislation when it comes to the Senate; and, if so, can you give us the reasons why?

THE PRESIDENT: Well, the way it's been explained to me by our people is that the board has the authority now -- they do dismiss some, but it's my understanding they can also grant some, it has the authority to grant petitions for review.

And I think that for them it's just a question of wondering about both the capacity and the cost of this. I don't think they have any idea what the consequences of this will be. That's been basically what I understand. If you have -- anything you want me to read about, any more research or anything you want me to know about, that your position, I'll be glad to do it. I literally knew nothing about this issue until I started getting ready for this interview, and I can't tell you, on the basis of what my staff has told me, that we should change our position. But I can tell you if you have any other information you think I should know about, I'll be glad to take another look at it and try to give it an honest shot --and also try to assess what the cost would be of doing it.

Q Since this is an election year we wanted to come up with a platform for both parties, and we call it Reaffirmation of America's Contract with Military Veterans and Retirees. It simply says that a strong national defense is necessary, a volunteer force is most important part of that. If we don't have that, we don't have a national defense. If you don't keep your promises to the veterans of the services of World War II and especially the veterans -- the 20, 30, 35-year veterans, then we're not going to be able, eventually, to recruit a volunteer force. And I hear that more and more as I go out there, and it's especially true of the Medicare --

And John's covered the veterans part of it, but there's another part here, as you know, which is a military veterans system. And while you've made a lot of progress on the VA side here, the demonstration project looks like it's going to work out -- Jesse Brown is doing a whole lot better job with his side of it than defense, and Health and Human Services, they just haven't gotten together and there's a lot of problems there. But we're nowhere with this, with the demonstration project for the older veteran of 20 or 30 years. And the Defense Department can't reach an agreement with HCFA and vice versa.

And, of course, as you know, Senator Dole has introduced a bill for a demonstration project. Senator Gramm has introduced one. He was just making a talk in Texas the other day about it. And they're moving out to try to do this, because it is a very hot issue among some 600,000 military retirees. A case in point: I had 37.5 years service, Korean War, World War II, and so forth, but five years ago when I reached age 65, I was thrown out of the military health system and had to go to Medicare. Well, it's fine except that we've been, for all these years, we've been accustomed to the military system and we're the only federal employee to have been thrown out of the system and has to fend for ourselves.

So Medicare -- thank God we got Medicare, but we know that it would be so much more efficient if we continue to go to the military system and then got some reimbursement --

THE PRESIDENT: Medicare money.

Q It would be cheaper for the whole country. We just simply haven't been able to get it off the ground. We call it the most important part of our reaffirmation of this contract. I think that whoever picks this up, their campaign is really going to have something going for him. And, of course, I've written letters on this to Leon, there -- at Fort Ord. I don't trust the postal service --

(laughter). I want to make sure you get it, Leon. And you wrote a nice letter back last week and told me you were looking at all these things. But I just think it's something that's outstanding.

THE PRESIDENT: We do need to get that --

Q We need to do that. It's just ridiculous. And it will be cost-effective. You know, they say, well, you can't transfer money from the Medicare trust fund to DOD. Well, these are bean counters all screwed around with this thing, and it just would make sense to have a military hospital be an HMO for these people --and the veterans hospital be an HMO.

THE PRESIDENT: We give -- every time we make any Medicare payment it goes from somebody to somebody else.

Q And it's going to be cheaper and --

THE PRESIDENT: I don't see -- I personally don't see it as a big problem. If you're medicare eligible and you want to opt to have your care through the medical -- the military network that you've had all along, and the reimbursement rate is comparable, I don't see what the big issue is. I've had a big -- we've had big arguments with HHS about this, and they're getting -- all their Medicare trustees are giving them all kinds of grief. I think it's, frankly, a load of hooey.

Q They're being forced -- Fitzimmons closes momentarily. They're being forced out. Then they're going to Medicare. They say, well, this will increase our budget. But it won't increase their budget because we earned Medicare through -- I thought I'd earned military after 37 and a half years service. I found out I was lied to about that. Now I pay for it again, or my share, at least, for Medicare. Then I find out I can't choose my provider. This is really wrong. I can't explain it to old soldier.

THE PRESIDENT: And it's interesting because if you're on Medicare -- the really interesting thing is, it's the only provider you can't choose.

Q The only one you can't choose.

THE PRESIDENT: The thing about Medicare, for example, as opposed to a lot of private health insurance plans is that more and more employees cannot choose their health care provider. But in Medicare you can. You can choose every one but the one you want. And I just -- I thought it was a -- when we started this a couple years and I asked them to look into it, I thought it was a pure cost deal. I thought they were going to say that -- so I said, okay, so make the veterans network be competitive in cost. Once you are, I just don't -- I don't see what the trust fund issue is. It's just --

Q You had it in your plan. I mean, it was in your plan.

THE PRESIDENT: It was in our health care plan and I feel very strongly about it. I guess what you're telling me is, if I want to keep on being for it I better get something done on it in a hurry. (Laughter.) I hear you. I got it.

Q We think that -- and you also have Health and Human Services working for you. So we'd like to see the Defense Department and them together and do as well as -- (inaudible). They've gotten together and they're going have -- it looks like a demonstration problem. We're still fooling around trying to get a hall pass, all because the budget people can't get together about how to transfer funds.

Q He's telling the exact -- (inaudible).

THE PRESIDENT: But it's HHS's problem, isn't it?

Q That's right.

Q The DOD offer is to do it for 94 cents on the dollar, six cents cheaper than HCFA would reimburse --

Q And they say, well, we can't do it right now because we might break the Medicare trust fund. It's going to save money. And if they fall out of -- (inaudible) -- with all these hospitals, they have to go to Medicare. So they ought to be on it. They say, we haven't budgeted for it. Well, they have budgeted for it, -- (inaudible). And they're going -- as you said, if they go to any plan downtown he sends the thing in. Why not let them go to another -- and a lot of places the VA would like to have them, you know.

I was just out in Arizona and they would like very much to have retired military come there -- if they can get the money for it -- and take care of them, instead of traveling 200 or 300 miles, especially with the new system that Kaiser's put in. It's great. I think it's really the right move.

Q I'm going out to Fort Ord.

Q Are you really?

Q We've still got a PX the commissary out there.

Q Mr. President, Bill Smith, with the Veterans of Foreign Wars. I think we're, as an organization, greatly encouraged by the efforts toward eligibility reform and some of the things that have been discussed. And some of the questions that I was going to ask have already been answered.

Let me go back to the one on Vietnam. The VFW has been in the forefront of these issues for some time and we're encouraged by the efforts that have been made by the joint task force full accounting and the Vietnamese to date. Now they're at this new level that we're at here, what do you see as the next step; or where do we go from here with an ambassador being assigned, and how do we observe or keep this as a national priority?

THE PRESIDENT: Well, I think -- first of all, I hope that the Congress will give Congressman Peterson -- I hope the Senate will give him a hearing quickly. And I hope that the subject of the hearing, since his qualifications and character couldn't be in doubt, I hope the subject of the hearing will be how -- the very question you just asked me.

And I think -- it seems to me that if that is the whole premise of his appointment, in part, is keeping this a national priority for us, and that's why he was appointed, that's why the Congress is going along with it, that's why the Senate's willing to confirm. That will be a big help. Then I think it's very important that the VA continue to work with the veterans groups in leading missions to Vietnam to continue to oversee this and be involved in it. I think Hershel's been there, I think four times, isn't that right?

And I think that the more Vietnam veterans we send over there, continuing to work on this and continuing to remind them that relationships between our two countries can never be fully resolved until we think that they've done everything they can. I think that we will keep it as a big issue. I think that -- that's a signal I tried to send with the Peterson announcement, and I think that I'm going to

depend upon all of you and your members, through you, to continue to help us and to continue to keep this a big issue. But I think we've made quite a lot of headway on this. And I think if we stay at it, we'll make more.

I'll just say, parenthetically, I was very encouraged by the announcement, the agreement we just got out of the North Koreans to deal with the same issue in the context of the Korean War. It was a long time ago, but it wasn't that very long ago for people who were there. And I think it's going to be a very good thing that we're doing. And I'm glad we kept working with them over these last three years to get this agreement.

Q Mr. President, one of the things that is very important to our organization, the Fleet Reserve Association, has been the cost of living allowance for our retirees. And I know that it is a consideration with budget cuts. One of the things we've always asked for is equal, across the board for civilians and military. And I'm really hopeful this year that, again, we'll have another -- a full COLA. But would you please give us your perspective on working with the Congress on trying to establish full COLA's again? And, also, do you feel that any one particular group should be entitled to COLA's any more than the other? And if you, in fact, you also feel they should be on the same date, same time?

THE PRESIDENT: Well as a general principal, I think, if you're going to have COLA's and they're supposed to reflect the cost of living allowances, that they ought to be the same for everybody who's on a retirement plan. Secondly, my position has been consistently in all my budgets to fund them.

Now, there was -- to be fair to the Congress and some of whom have come under attack on this issue -- there was, I believe, an honest attempt to determine a question that's in some debate, which is whether or not the present method of calculating the Consumer Price Index is an accurate reflection of what the actual cost of living increase is for most retirees. Now, we all know that it's different for different retirees. It depends on how much health care you use, whether you have to pay it out of your pocket, where you live. This is all somewhat arbitrary. But there is an honest debate in the country now among economists and others who deal with this about whether the way the government calculates the Consumer Price Index accurately reflects the real cost of living increase.

What I said was for this budget, since we were trying so hard to get a balanced budget, that it would be better to let the traditional way of calculating the CPI, which was to have the Bureau of Labor Statistics do it, control the budget, which is what we did. And they said it was because inflation had been down, I think, for three years or something, they revised it down by two-tenths of a point -- know what it was -- three-tenths of a point, something like that. So it was revised down in the way it's been done for, I don't know, years and years and years. And that's all we did.

But my position is that they should -- the retirement programs should be treated equally and that we should pay the cost of living allowances. And if there is a legitimate debate on the other -- on the larger issue, it ought to be done in a way that is out in the open with everybody involved and everybody gets a chance to be heard on both sides. I mean, the way it was one in the Senate last time was they had five economists look into it and come back and bring a report to the Senate Finance Committee, but there were no great hearings. You know, they didn't give all of you folks a chance to come in. They didn't give anybody else a chance to come in.

I just believe if you're going to do something like that --I'm thinking about it -- it's interesting, I'm thinking about a lot

-- my stepfather is coming in and he's 82 years old, and he was in the Navy in World War II, and he's coming in to see me tonight, so I've been thinking about this a lot. And, you know, if I asked him to give something to his granddaughter, he'd do it -- if it was fair.

And so I just think the way it was being handled, it sort of looked political the way this debate came up last time. So I just said, look, let's just -- we can balance the budget without this. We ought to go ahead and pass a balanced budget plan, do it, not fool with the COLAs; and then if this is an issue down the road, we ought to have a big open public debate, bring everybody in it, and let's honestly talk about how much inflation is in the average senior citizen's life in America. That's my position. So I think they should be treated fairly, and we ought to pay them.

Q John Kasich wants to do it in the budget resolution without any hearings --

THE PRESIDENT: Yes, but -- let's suppose -- even if he's right, though, then you're going to have millions of people thinking he's not right. There's a -- you've got to do this -- you know, five economists -- they were very distinguished people, the people the Senate had do this study. But, you know, you could probably find five others that would tell you something else. Normally you've got as many opinions as you do economists in America. And so I would -- that's no offense, but, I mean -- I just think if we're going to do this, your group, your group, everybody ought to be able to come in and be heard, and we ought to really go over this in a public debate, and it ought to be treated in a real -- you know, this is not something that ought to be rushed through to make a few budget numbers. This is a big different issue.

Q Changing the whole retirement system in a budget resolution. And you know that's wrong because you --

THE PRESIDENT: Well, that's why I didn't support it.

Q Mr. President, one more thing. In addition to the arguments on the ECI, there are also congressional talk again about cutting -- once that percentage is determined, of cutting the COLA even more -- minus one, minus half. What is your position on this issue?

THE PRESIDENT: That's what I was talking about. In other words, my view -- what I told Senator Breaux and Senator Chafee was that it might be -- they believe, they honestly believe that the Consumer Price Index overstates the cost of living by at least a half of percent, based on what these -- they had five economists do a big study and tell them that. And I'm telling you, I don't know whether it does or not. And if I don't know, and you don't know, and none of us know -- that's not the time to do it. How we should do it is, we should have a -- if we're going to make a change like that because we think it's right or best for America, good over the long run, helps the baby-boomers, Social Security survive, whatever the deal is, there ought to be a big open, public process. It shouldn't be done like that. That's what I feel about it.

Q And you're saying the cuts should be across the board for --

THE PRESIDENT: Oh, absolutely. Absolutely. But what I'm saying is, if that is something that's going to be done, America should do that in a more open way. We shouldn't do that in a kind of hurry-up, slam-dunk, back-door way. We ought to know, everyone ought to have a chance to testify about that, all the infected people. We ought to really have a chance to look at it. I mean, you might agree

have always believed that we should be very careful in amending the Constitution. And often times, when we amend the Constitution -- the Constitution's almost never amended for a specific purpose. And sometimes, when it is, we wind up regretting it like the prohibition. And then there had to be another amendment to undo prohibition.

And so, to me, it never had anything to do with whether flag burning should be unlawful or not, or we should speak out against it or work against, but whether we should amend the Constitution. It was the amendment that I wasn't for. But I don't get a vote in it anyway. I mean, Congress can give the states the power to amend the Constitution without the president signing it. There's no presidential veto there.

But I just -- I can only -- I have supported very few constitutional amendments in my whole life. I was for lowering the voting age to 18, I remember. But once in a while, I support -- I just think you have to be careful when you're doing it. It needs to be something -- a very broad general application. Specific problems can normally be handled by society in a different way -- and by ours. And we've done a pretty good job of it over time. And our country, it seems to me, is probably one of the most patriotic countries that ever existed in human history -- partly because we have a Constitution that provides broad protections, has immutable principals, and is rarely amended.

It's just what I think about amending the Constitution. It has nothing to do with being against flag burning. I don't even agree with the Supreme Court decision that you couldn't legislate it. I didn't agree with it at the time. I didn't think they were right. But the other thing that I would say is I read the Supreme Court decision, and I didn't think that it would outlaw all kinds of legislation. I thought you could actually pass some legislation that would get under the Supreme Court decision.

And secondly, I think you also -- we also have to be somewhat careful about amending the Constitution every time the Supreme Court issues a decision we don't agree with. They issue a lot of decisions I don't agree with, but I don't -- normally if you give it enough time, they come back around to where they should be. That's why we're still here after all these years.

Q Can I just get a follow-up? If the founders, in their great wisdom, specifically constructed the Constitution to be amendable, what is the harm in just giving the issue to the people and saying, let them decide?

THE PRESIDENT: There isn't a harm in it, but the question -- the founders did two things. They constructed it to be amendable, but they also constructed a representative government to handle 99 percent of the questions, and then an opportunity to amend the Constitution when there were issues that came along that needed to be dealt with. For example, extending the franchise to former slaves, extending the franchise to -- if you look at the things that we've amended in the Constitution.

I think the real question is do we give these people, these handful of people who have burned the flag over the years more credit than they're due if you -- are you taking a howitzer to swat a gnat? I mean, that's really my -- if there were a rash of these flag burnings around the country, if it were a really horrible problem and the Supreme Court said we have to tolerate somebody every three days desecrating the American flag, maybe the American people would -- maybe it would be the right thing to do, amend the Constitution.

But since it's never been a huge problem -- my question is, is it a good practice to start amending the Constitution when the

Supreme Court issues a decision we don't agree with, in an area where -- because ninety-some percent of us are opposed to it, it's not a terrible, it's not an overwhelming problem in the United States. That really is why I think we should be reluctant. I don't think we should always be against it, I just think we should be reluctant.

But if the Senate disagrees with me, they can go ahead and do it. Like I said, I don't have a signature of veto and I wasn't even involved in it. I didn't -- I wasn't asked to lobby on the issue, I didn't get involved in it at all. They just voted the way they voted. I didn't even know what they were going to do before they did it.

Q Thank you very much, Mr. President.

Q Mr. President, I'm representing the American G.I. Forum, a Hispanic veterans organization. And I'd like to also join in congratulating and thanking you for your prompt action on the Agent Orange and spina bifida issue; and would also like to say that since the life span of children born with spina bifida is quite brief and also because Hispanics have a higher rate of children with spina bifida, we strongly encourage whatever we can do to help in Congress and help move on that as fast as possible.

THE PRESIDENT: We just need your help to get that bill through Congress just as quick as we can. We just need to hit it, and we'll be in touch with you.

Q Now, my real question -- the American G.I. Forum, as you know, has been in existence for almost 50 years, and we are concerned about -- we all supported your initiatives in reinventing of government and streamlining the budget, we're concerned about two major things. First, Hispanics have been greatly under-represented in federal government. The reductions in force will affect that tremendously. And we're questioning -- in fact, as an example, if Kelly Air Force Base, when Kelly closes, they are the largest employer of Hispanics in all the Department of Defense, which is the largest employer of Hispanics. So, ergo, it's all going to be a tremendous impact.

That we do have a great number of Hispanics serving who have used veterans preference, and we know that it's very helpful in terms of gaining employment. But we would like to see how it's being applied in reductions in force, whether it's being given a priority. and, if not, then we recommend strongly that it should.

Secondly, back to the Kelly Air Force Base, the economic impact on our community is going to be tremendous. Quite a few of the bases are in heavily Hispanic populated communities. We've finally reached a level where we can afford to send our kids to college, and this will mean a setback for us. And we would like to see what type of initiatives are being taken to help reduce the economic impact on these communities.

THE PRESIDENT: Let me deal with the general issue of employment first, and then I'll talk about Kelly specifically. The federal government historically has underemployed Hispanics more than any other minority group in America. And that means either that the federal government has done a lousy job in its affirmative action outreach to Hispanics as opposed to all other minorities. The Hispanics are about 10 percent of America's population, and only about 5.5 percent of the federal work force.

There is one other possible explanation which is that Hispanics, unlike African Americans, are disproportionately concentrated in a few states so that there's probably 40 states where there would be only one or two percent Hispanic employment in the

federal work force. That could account for some of it, but not as much as we've seen.

Now, since I have been here, we've been downsizing the federal government, but Hispanics are about 7.5 percent of our new hire. So we're doing better -- considerably better than the old average. And we have to do better still.

Part of that, ironically, may be because of the veterans. About 31 percent of our new hires have been veterans as opposed to 18 percent -- 18.5 percent for I took office. And since Hispanics are more likely than other Americans to be veterans, it could be that that's helping us get our Hispanic numbers up. So we're doing a little better. But there's a lot of work still to be done on that.

On Kelly Air Force Base, let me say that you may remember, if you followed it, that that incident was responsible for one of the few outbursts of temper of my presidency. I was strongly opposed to closing Kelly. I think it was a -- I think the decision by the Base Closing Commission was wrong. I think we had an alternative plan that would save the Defense Department just as much money. I fought it tooth and nail. And I just didn't prevail.

I have been to San Antonio. I have met with the community people there. They do have a good plan. We are privatizing some of the operations at Kelly. We are going to save, I think, a majority of the jobs there, either in the Defense Department or in other private contractors doing what was being done by the Defense Department. Do you remember what the last estimate was?

MR. PANETTA: It looks like, actually like women wind up protecting most of those jobs.

THE PRESIDENT: About 80 percent of the jobs. So I think we have dramatically reduced the job loss. Now, what we need to do, what we're going to have to do is to modify -- excuse me, what we're going to have to do is to really keep up with what happens to the people who lose their jobs and what happens to the people who go from being Defense Department employees to to contractors working for the Defense Department? And what kind of benefits will they have? What kind of health care benefits will they have? What kind of capacity will they have to educate their children?

You know, San Antonio is our biggest Hispanic city. Forty percent of the -- I think the last I saw was something like forty percent of the Hispanic middle class in San Antonio worked for Kelly Air Force Base. I mean, it was the middle class of the city. So all I can tell you is that I'm working on this. My HUD secretary was the mayor of San Antonio, and we did not agree with it in the first place. And since the decision was made, we've done everything we could to try to minimize the impact of it.

On the other problem, let me just say this. I would welcome anything that you could do and your organization could do to help us do a better job of correcting the disparity in employment in the federal government among Hispanics. I was shocked when I became President. I just had no idea that, except for the military, particularly if you take the military out, the underemployment is dramatic. Some of it can be explained by the fact that most Hispanics live in California, Texas, New York, Michigan, Illinois and New Jersey and, of course, Arizona, New Mexico and Colorado. Some of it can be explained, but not all of it.

Q Frankly, sir, you're the first President in my recollection who has focused on even knowing the numbers that are involved, and I appreciate that.

THE PRESIDENT: It's a big issue. But like I said, it may be that our efforts to hire more veterans have indirectly gotten us more Hispanics -- the disproportionate service of Hispanics in the military.

Q I'd like to know one more thing about the -- you know, the administration of Al Gore's reinvent government targeted uniformed services -- (inaudible). And, of course, it's been -- (inaudible) -- on by Senator Strom Thurmond and others

I think now we've shown that it's just about equal costs to educate the individual area as opposed to outside. And, you know, it is West Point for me. Because there's a tremendous difference in attending to battlefield casualties and an HMO doctor. It's just, you know, it's dreadful. Having been in three wars and been to -- (inaudible) -- and Vietnam and dealing with this. The greatest fear of every soldier is he'll be left on the battlefield to die without adequate effort to sustain him and stabilize him so he can be medivac'd. And it's very important that they teach this.

I've been into great detail because one of my jobs when I was -- (inaudible) of the Army was the Physical Disability Agency, so I got into all of this. Actual events that -- what they teach there is not taught as well any where else. (Inaudible) -- we really need these people. And for battlefield casualties and so forth.

THE PRESIDENT: Do you really believe the cost is comparable?

Q Yes, sir.

THE PRESIDENT: So you think that the figures that I was given -- it costs five times as much -- are wrong?

Q They're wrong, because you weren't figuring out what Medicare and so forth gives to the normal medical schools. In other words, when you figure those in, what it costs you -- and they do public health, too -- they have a public health service and so forth. So when you really look at that, it's about the same. When you look at the subsidy the medical schools get for the -- (inaudible) -- for all doctors, it's about the same.

THE PRESIDENT: Has anybody done a little -- any kind of report or something like that for you?

Q I've got a report that I can get for you.

THE PRESIDENT: Send it to me. I'll read it.

Q (Inaudible).

THE PRESIDENT: Because, see, it put me -- they put me in a bind on that because that's something I'd like to accommodate you on, but then they said, well, you know, this is five times more expensive.

Q When you figure in the subsidy for --

THE PRESIDENT: The other subsidies for med schools?

Q -- for Medicare -- is, you know, Medicare pays the most.

THE PRESIDENT: Yes, a disproportionate pay for Medicare.

Q If you just figure what's coming out of the Defense budget, yes. You know, you say, well, it costs you more. But when

you --

THE PRESIDENT: But if you look at the whole cost for educating doctors --

Q Just figure when a guy goes to medical school, pays himself what it costs, that's one thing. But then you figure all of the subsidy going into the medical schools and Medicare and others, then it's very profitable. I think it's time to call off the dogs on it because -- I even think that Al Gore has sort of ameliorated this thing, but OMB keeps coming back and says, oh, you

know, we've got it on the list. You know how that goes. (Laughter).

MR. PANETTA: It's been on the list for a long time. (Laughter.)

Q (Inaudible) -- list for 20 years. And he got overruled, and he's mad.

THE PRESIDENT: General, they always put a few things on my list that I don't even know are there. I have to disavow my own budget every year because I've got so --

Q (Inaudible).

THE PRESIDENT: Thank you all. This was a very good session. Thank you very much.

END 6:20 P.M. EDT