STATEMENT OF
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THE AMERICAN LEGION
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
ON
PENDING LEGISLATION
S. 1780, S. 1866, S. 1939, S. 1940, S. 2751, S. 3035, S. 3107, S. 3192, S. 3234, Others

MAY 19, 2010

Mr. Chairman, Ranking Member and Members of the Committee:

Thank you for this opportunity for The American Legion to present its views on the broad list of veterans' legislation being considered by this Committee.

S. 1780: Honor America's Guard-Reserve Retirees Act

This bill would deem certain service in the Reserve components as active service for purposes of laws administered by the Secretary of Veterans Affairs. Specifically, this bill addresses National Guard and Reserve component service members and their the classification of service under Title 10 of the United States Code for the purposes of their status with the Department of Veterans Affairs (VA).

The American Legion has no position on this legislation.

S. 1866

This bill provides for the interment of the parents of certain deceased service members. The bill would address the eligibility of parents of certain deceased veterans for interment in national cemeteries. This bill would apply to service members who at the time of the parent's death do not have a spouse, surviving spouse, or child who have been interred, or who, if deceased, would be eligible to be interred, in a national cemetery.

The American Legion has no position on this legislation.

S. 1939: Agent Orange Equity Act of 2009

The purpose of this bill is to amend title 38, United States Code, to clarify presumptions relating to the exposure of certain veterans who served in the vicinity of the Republic of Vietnam. As frequently stated in the past, The American Legion strongly supports the extension of presumption of exposure to Agent Orange for veterans who served on naval vessels located in

the territorial waters of Vietnam (known as Blue Water Navy veterans) but did not set foot on land in Vietnam.

The Institute of Medicine (IOM), in *Veterans and Agent Orange: Update 2008*, specifically stated that the evidence it reviewed makes the current definition of Vietnam service for the purpose of presumption of exposure to Agent Orange, which essentially limits it to those who actually set foot on land in Vietnam, "seem inappropriate." Citing an Australian study on the fate of the Agent Orange contaminant TCDD when sea water is distilled to produce drinking water, the IOM committee stated that it was convinced that such a process would produce a feasible route of exposure for Blue Water veterans, "which might have been supplemented by drift from herbicide spraying." (See IOM, *Veterans and Agent Orange: Update 2008*, p. 564; July 24, 2009) The IOM also noted that a 1990 Centers for Disease Control and Prevention study found that non-Hodgkin's lymphoma, a classic Agent Orange cancer, was more prevalent and significant among Blue Water Navy veterans. The IOM subsequently recommended that, given all of the available evidence, Blue Water Navy veterans should not be excluded from the group of Vietnam-era veterans presumed to have been exposed to Agent Orange/herbicides.

The American Legion submits that not only does this latest IOM report fully support the extension of presumption of Agent Orange exposure to Blue Water Navy veterans, it provides scientific justification for this current legislation, which admirably seeks to correct the grave injustice faced by Blue Water Navy veterans. The American Legion strongly supports this legislation.

S. 1940

The purpose of this bill is to direct the Secretary of Veterans Affairs to complete, and report to the congressional veterans' committees on, a study of the effects on children of their parents' exposure to herbicides used in support of U.S. and allied military operations in the Republic of Vietnam during the Vietnam era, to include but not limited to multiple sclerosis and asthma.

The American Legion's longstanding position with regard to the health effects of herbicides such as Agent Orange has been to aggressively facilitate an understanding of these effects and help ensure that veterans and their families are properly treated and compensated for the effects of such exposures. With regard to the effects of a parent's exposure on their offspring, The American Legion acknowledges the progress to date.

Namely, in 1996, President Clinton and VA Secretary Jesse Brown asked Congress to pass legislation providing health care, monthly disability compensation, and vocational rehabilitation to the children of Vietnam veterans suffering from the serious birth defect spina bifida, which has been linked to the veterans' exposure to Agent Orange. Congress passed the legislation, marking the first time our nation had ever compensated the children of veterans for a birth defect associated with their parent's exposure to toxic chemicals during their military service.

In 2003, Congress, with the support and endorsement of The American Legion, authorized with the passage of the Agent Orange Veterans' Disabled Children's Benefits Act, the expansion of these benefits to children with spina bifida of certain veterans who served at or near the

demilitarized zone in Korea between September 1, 1967 and August 31, 1971, because Agent Orange is known to have been sprayed in that area.

Only additional scientific and medical studies, though, can determine the full ramifications of the effects on children of their parents' exposure to herbicides. Studies of the type called for in this legislation can help establish the associations necessary to allow the VA to provide entitlement to all benefits due to the child or children of any veteran exposed to a Vietnam-era herbicide agent, in any location, including those outside of Vietnam, where herbicides were tested, sprayed, or stored.

The American Legion supports this legislation.

S. 2751

This bill would designate the Department of Veterans Affairs medical center in Big Spring, Texas, as the George H. O'Brien, Jr., Department of Veterans Affairs Medical Center.

The American Legion has no position on this piece of legislation.

S. 3035: Veterans Traumatic Brain Injury Care Improvement Act of 2010

Under the provisions of the bill, VA would establish an official VA Polytrauma Rehabilitation Center in the Northwestern area of the United States within Veteran Integrated Service Network (VISN) 19. Additionally, a report on the Polytrauma Rehabilitation Center would determine the levels of care of the VA Medical Centers in VISN 19, the differences of Traumatic Brain Injury (TBI) treatment between urban and rural areas, as well as a study to determine if TBI conditions are worsened by living in an urban environment.

VA designed Polytrauma Rehabilitation Centers to address the many unique and multiple injuries faced by service members in Iraq and Afghanistan who are surviving improvised explosive device (IED) blasts. VA Polytrauma Rehabilitation Centers provide treatment through multi-disciplinary medical teams including Cardiologists, Internal Medicine, Physical Therapist, social work and Transition Patient Case managers and much more specialty medical service areas, to help treat the multiple injuries. Currently, VA maintains four VA Polytrauma Rehabilitation Centers in Richmond, VA; Minneapolis, MN; Palo Alto, CA and Tampa, FL. In February 2010, VA also announced funding for a new Polytrauma Center to be built in San Antonio, TX. As advances in battlefield medicine and evaluation continue to evolve, it is also important that VA continue to expand its network of care closer to the veteran and his or her family's community.

The American Legion has not historically advocated for specific locations for VA Medical Centers, Community-Based Outpatient Clinics (CBOCs), or Vet Centers due to competing funding and state interests. However, The American Legion's Resolution 220 on rural health care clearly urges VA to improve access to quality primary and specialty health care services for veterans living in rural and highly rural areas. Furthermore, The American Legion believes that

veterans should not be penalized or forced to travel long distances to access quality health care based on where they choose to live.

The American Legion has long advocated for improvements for one of the "signature wounds" of Iraq and Afghanistan, Traumatic Brain Injury. The American Legion supports the provision in this bill for research and evaluation of TBI treatment between the urban and rural areas. Further, The American Legion urges this Committee to examine the possibility of including and funding additional areas of TBI study and emerging treatments in the private sector such as- Hyperbaric Oxygen Therapy (HBOT) and the Mt. Sinai Hospital's Brain Injury Screening Questionnaire.

The Hennepin County Medical Center in Minneapolis, MN conducted a study on Hyperbaric Oxygen treatment for Patients with Traumatic Brain Injury in January 2010. This study found a significant benefit from hyperbaric oxygen treatment to improve brain metabolism and its ability to recover from injury. The findings were recently published in the Journal of Neurosurgery. Additionally, the study showed that cells need oxygen to fuel metabolism for cellular growth and repair. After a traumatic brain injury, there's a direct correlation between clinical outcome and the degree to which a brain's metabolism is restored. Dr. Gaylan Rockswold, who conducted the study stated. "In previous research we learned that the brain's energy is improved and maintained with hyperbaric oxygen treatment, but this study confirms that hyperbaric oxygen treatment has a major impact in terms of increased energy production." The American Legion encourages this Committee to work closely with the medical community to ensure our nation's veterans continue to receive the highest in quality and type of care for TBI.

Additionally, Mt. Sinai developed a Brain Injury Screening Questionnaire. DoD's TBI screening questions were initially developed by the Defense and Brain Injury Center (DVBIC), modified by VA and refined and adopted by DoD. In April 2007, VA began implementing similar TBI screening questionnaires for Iraq and Afghanistan veterans to be administered by health care providers at VA Medical Center facilities. DoD and VA both use a four-question test but Mt. Sinai uses 100 questions through the Brain Injury Screening Questionnaire. The American Legion remains concerned that the private sector uses a 100 question screening test while DoD and VA only use a four-part questionnaire.

The American Legion also recommends examining the establishment of a toll-free number for service member and veteran patients, their families, clinicians, veteran service organizations and other federal, state and local organizations to ask questions or receive literature on evaluation, diagnosis and treatment of TBI. In addition, within this call center, a TBI registry could be created to track the statistics of service members afflicted with TBI and those service members from DoD and VA who are receiving treatment.

S. 3107: Veterans Compensation Cost of Living Adjustment Act of 2010

The purpose of this bill is to increase, effective as of December 1, 2010, the rates of compensation for veterans with service-connected disabilities and the rates of dependency and indemnity compensation for the survivors of certain disabled veterans. The amount of increase

shall be the same percentage as the percentage by which benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased effective December 1, 2010.

The American Legion supports this annual cost-of-living adjustment in compensation benefits, including dependency and indemnity compensation (DIC) recipients. It is imperative that Congress annually considers the economic needs of disabled veterans and their survivors and provide an appropriate cost-of-living adjustment to their benefits, especially should the adjustment need to be higher than that provided to other Federal beneficiaries, such as recipients of Social Security.

S. 3192: Fair Access to Veterans Benefits Act of 2010

The purpose of this bill is to address recent rulings by the courts regarding equitable tolling and how that affects veterans filing claims within the court system. Equitable tolling is a doctrine or principle of tort law: a statute of limitations will not bar a claim if despite use of due diligence the plaintiff did not or could not discover the injury until after the expiration of the limitations period.

Under 38 U.S.C. § 7266(a), an appellant has 120 days from the date the notice of a final decision of the Board of Veterans' Appeals (BVA) is mailed to file a notice of appeal (NOA) to the United States Court of Appeals for Veterans Claims (CAVC). From 1998-2008, previous precedential decisions of the United States Court of Appeals for the Federal Circuit (Bailey) had permitted equitable tolling by the CAVC for the 120 day time period under § 7266(a). The Supreme Court, however, in Bowles v. Russell, 551 U.S. 205 (2007), made it clear that the timely filing of a NOA in a civil case is a jurisdictional requirement and that courts have no authority to create exceptions. The Supreme Court further concluded that only Congress can make such exceptions.

In *Henderson v. Shinseki*, the CAVC ultimately dismissed the veteran's appeal because he had missed the 120 day deadline by 15 days. The veteran argued that his service-connected mental disorder, rated 100 percent disabling, caused him to miss the deadline. While Mr. Henderson's appeal was pending at the CAVC, the Supreme Court rendered its decision in *Bowles*, in which it stated that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," and thus cannot be waived. The Court also stated that it had no authority to create equitable exceptions to jurisdictional requirements.

On July 24, 2008, the CAVC ruled in a 2–1 decision that the holding in *Bowles* prohibited it from using equitable tolling to extend the 120-day appeal period set forth in § 7266(a). The CAVC determined that Congress had "specifically authorized" it to conduct "independent judicial appellate review" of the BVA, and that well-settled law established that its cases were "civil actions." Starting from that premise, the CAVC concluded that § 7266(a) was a notice of appeal provision in a civil case, and that it was jurisdictional and could not be equitably tolled. Accordingly, the court ruled that the Federal Circuit's precedent in *Bailey* was effectively overruled, and it dismissed Mr. Henderson's appeal for lack of jurisdiction.

Mr. Henderson subsequently filed a timely appeal of the CAVC decision with the United States Court of Appeals for the Federal Circuit. On December 17, 2009, the Federal Circuit affirmed the decision of the CAVC dismissing the veteran's appeal for lack of jurisdiction.

The Federal Circuit decision in *Henderson*, citing the Supreme Court decision in *Bowles*, has made it quite clear that equitable tolling in veterans' appeals at the Federal court level is prohibited. Senator Arlen Specter (PA) recently introduced S. 3192, the Fair Access to Veterans Benefits Act, to require the CAVC to consider if a veteran's service-connected disability would have made it difficult or impossible for him or her to meet a deadline for filing an appeal.

Resolution No. 32, adopted by The American Legion at the 2008 National Convention, specifically supports legislation to extend the 120-day CAVC appeal deadline to one year following the BVA final denial of an appeal. Given the specific intent of this resolution, measures which would extend the period of time available for veterans to file with the CAVC are supported by The American Legion. Particularly in the case of certain veterans whose service connected disabilities may impact their ability to timely file appeals to the court, measures such as this bill have the potential to positively impact the ability of those veterans to achieve justice within the system of benefits claims adjudication.

The American Legion supports this bill.

S. 3234: Veterans Employment Assistance Act of 2010

The American Legion strongly supports S. 3234 and regards this comprehensive new bill as an important means of addressing the education, employment, and training needs of veterans. If enacted, S. 3234 would improve employment, training, and placement services furnished to veterans, especially those serving in Operation Iraqi Freedom and Operation Enduring Freedom.

The problem is clear: the unemployment rate for all veterans of Iraq and Afghanistan stands at 14.7 percent, while for OIF/OEF veterans between the ages of 18 to 24 it is 30.2 percent. The total number of unemployed veterans of the two wars is about 250,000. This legislation would provide these veterans with the training and additional skills they need in order to acquire gainful employment in today's marketplace.

This bill contains several provisions that The American Legion has been advocating for some time. For example, under the current Post-9/11 GI Bill, vocational schools, apprenticeships and on-the-job training programs are not given the same equity as Institutions of Higher Learning (IHLs). But, not all veterans desire to attend IHLs. Many veterans prefer forms of employment that do not require a college degree and/or may require employment as quickly as possible for personal or family reasons. S. 3234 would expand GI Bill education benefits to include apprenticeship and training programs, so that veterans can get the licenses and certificates they need for new high-potential careers in an expeditious manner.

In addition, the legislation calls for small business training and counseling, and creates pilot programs to help veterans market their military training more effectively in the civilian sector. The Act also addresses training requirements for new Disabled Veterans' Outreach Program

Specialists and Local Veterans' Employment Representatives, who play such an important role in helping veterans overcome employment barriers and become more marketable.

In sum, The American Legion strongly supports S. 3234, because it touches all the bases in addressing key challenges faced by unemployed and underemployed veterans. No mission is more critical at this time in our history -- given the nation's involvement in two wars and the uncertain economic situation -- than enabling America's veterans to have a seamless transition from military service to the civilian workforce. Toward that end, The American Legion is committed to working together with Congress, Federal agencies and the private sector to ensure that America's veterans are provided with the highest level of service and employment assistance.

S. 3314

The American Legion supports this piece of legislation because it will serve to increase use of medical care services to those residing in the Appalachia Region. We also believe collaboration between both VA and the Appalachian Regional Commission will help with the seamless transition process as service members return to their respective communities.

H.R. 2879, the Rural Veterans Health Care Improvement Act of 2009, would establish Rural Health Centers located in three regions of the country, to include the Eastern Region, Central Region, and Western Region. In addition, The American Legion's position on H.R. 2879 included an increase of the presence of these Centers due to the vastness of rural areas. We also stated that the reason for the increase included lack of access of medical facilities, lack of medical professionals, and the ability to address the issues of women veterans, as well as homeless veterans. In the case of this bill, we believe other Center(s) should be established to assist with accommodation of veterans residing in the Appalachia Region.

In contracting with public or private organizations to provide information, advice, and technical assistance, as stipulated in section (c) and (d) of the bill proposal, it is the contention of The American Legion that VA maintain proper oversight of each contract that provides medical care, utilization of facilities and resources, education of veterans' employment rights, and provision of technical assistance to veteran-owned businesses, to ensure veterans are represented as intended by order of the mission statement as set forth by President Lincoln; "To care for him who shall have borne the battle and for his widow, and his orphan."

S. 3325

The American Legion concurs with this piece of legislation and its proposal to prohibit collection of copayments for TeleHealth or telemedicine. Further, it is The American Legion's contention that veterans should not be penalized due to their geographical residence preferences. Regarding the subject of copayments, it is the discretion of each VA Medical Center director to collect a copayment. As such, oversight should ensure that these copayments are assessed consistently and not subject to regional variations.

The American Legion supports the insertion of 1722B. Copayments: prohibition on collection for TeleHealth or telemedicine visits of veterans into Chapter 17, Title 38.

S. 3368

The purpose of this bill is to provide the ability of legally designated representatives to sign claims on behalf of veterans or their dependent children eligible for benefits in certain circumstances such as when issues of legal majority, mental competency, and/or physical disability prevent the beneficiary from signing such forms themselves. This is well intentioned legislation that, with proper oversight, could offer benefit to veterans and their families in certain circumstances.

Veterans can suffer from some disabilities that greatly limit their ability to complete activities of daily living such as competency or ability to properly execute the necessary paperwork required in the filing of claims. There already exist provisions within VA law to provide for responsible parties to manage affairs for veterans when they are not capable of managing those affairs for themselves. Under the present system, appointed fiduciaries as well as designated powers of attorney are authorized to perform some actions on behalf of the veteran, almost always to their benefit.

It is important to recognize however, the necessity of proper oversight in situations such as this. Veterans in need of the provisions of this legislation are in many ways the most vulnerable of veterans. Dedicated oversight is necessary to ensure that the veterans affected, most of whom have little ability to protect themselves in such situations, are not subject to being taken advantage of by unscrupulous individuals or institutions. While some veterans do indeed require an advocate to act on their behalf to ensure they receive the benefits to which they are entitled, it is equally important to ensure that the rights of those veterans are not infringed upon.

As acting on behalf of the veteran is essentially similar to being a designated fiduciary on behalf of the veteran, it is important to point out some of the concerns about the existing fiduciary system. In previous testimony before the House Veterans' Affairs Subcommittee on Disability and Memorial Affairs, The American Legion noted that the Government Accountability Office (GAO) released a report in February 2010, "Improved Compliance and Policies Could Better Safeguard Veterans' Benefits". This report recommended VA "strengthen Fiduciary Program policies for monitoring fiduciaries, improve staff compliance with program policies, evaluate alternative approaches to meet electronic case management system needs and evaluate the effectiveness of consolidating 14 western Fiduciary Program units." In that testimony, The American Legion recommended authorizing personnel solely to administer the Fiduciary Program to ensure this program remains the priority and expertise of the personnel assigned to the Fiduciary Program. Similarly, specifically tasked personnel assigned to ensuring that those signatories acting on behalf of veterans deemed not capable of signing the proper paperwork by themselves would seem important to protecting these veterans and ensuring that they are not taken advantage of.

Under conditions that ensure that the rights of the affected veterans are being protected, and with proper oversight, The American Legion supports this legislation.

S. 3348

This bill would provide for appeals misfiled to the Department of Veterans Affairs (VA) to be treated as a motion for reconsideration if the VA fails to forward the appeal properly to the Court of Appeals for Veterans Claims (CAVC) within the proper period of time. The veteran must have filed an appeal to the VA within the 120 days after the notification of a decision by the Board of Veterans Appeals (BVA) required to appeal a claim to the CAVC.

The bill is predicated on the fact that many veterans, unfamiliar with the structure of the veterans' claims benefits system, may mistakenly file an appeal to the VA, rather than the CAVC, after the claim has been finally adjudicated at the BVA. In proper legal procedure, a veteran disagreeing with a decision of the BVA has 120 days after receiving notification of that decision to appeal the claim to the Court. The veteran may also file for a motion for reconsideration within the VA.

Many veterans are unaware that the CAVC and VA are in fact separate entities. Therefore, veterans mistakenly file their intent to appeal to VA rather than the CAVC as would be the proper procedure. This legislation would offer protection to veterans who file in error in cases such as this.

In keeping with the spirit of the uniquely pro-claimant system of veterans' compensation benefits adjudication, this legislation can serve as a safety net for veterans already confused by a complex system such as the system for the adjudication of veterans benefits. The American Legion by resolution supports the extension of the 120 day period of eligibility to file an appeal to the CAVC to a period of one year. This position is predicated upon the need for a system that protects the rights of veterans who face challenges in the appeals system. The American Legion supports this legislation.

As always, The American Legion thanks this Committee for the opportunity to testify and represent the position of the over 2.5 million veteran members of this organization. We hope that we not only express what is in the best interests of our members, but also of the totality of veterans in this country. We stand ready to answer any questions or clarify any positions for this committee, whether orally or in writing, and to address any future issues such as the Committee should require of us.