

**STATEMENT OF
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DEPARTMENT OF VETERANS AFFAIRS (VA)
BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS SUBCOMMITTEE**

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Good Morning Chair Luria, Ranking Member Bost and Members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss 8 bills – 5 on Veterans' burial and funeral benefits; 1 on VA's insurance programs; 1 on Veterans' legal support; and 1 on the review of proposed benefit determinations. Accompanying me today are Sean Clark, National Director, Veterans Justice Program, Veterans Health Administration (VHA); Dan Keenaghan, Executive Director, VA Insurance Service, Veterans Benefits Administration (VBA); and Laurine Carson, Deputy Executive Director, Compensation Service, VBA.

H.R. 697

H.R. 697 would amend 38 U.S.C. § 2308(a) to expand the scope of VA's monetary allowance to pay for transportation of deceased eligible Veterans to the nearest Veterans cemetery that has received a grant under VA's Veterans Cemetery Grants Program, authorized under 38 U.S.C. § 2408.

VA currently has authority under this section to pay the cost of transportation of the remains of certain Veterans, including Veterans who have no next of kin, to the nearest VA National Cemetery; however, the statute does not cover costs for transportation to a state or Tribal Veterans cemetery. VA strongly supports this legislation, which would help ensure Veterans who have earned the right to burial in a Veterans cemetery be afforded the honor of a dignified burial in a VA-funded state or Tribal Veterans cemetery. Further, this legislation is supportive of the Department's efforts to assist homeless Veterans because the remains of homeless Veterans are often unclaimed.

This proposed legislation is consistent with a VA proposal in the President's Budget for fiscal year (FY) 2021. Costs to the mandatory compensation and pension appropriation are estimated to be insignificant.

H.R. 5019 – Veterans Legal Support Act of 2019

H.R. 5019, the "Veterans Legal Support Act of 2019," would authorize VA to provide support to one or more eligible university law school programs that are designed to provide legal assistance to Veterans. Eligible programs may include

university law school programs that assist Veterans with filing and appealing claims for VA benefits and such other civil, criminal and family legal matters as VA considers appropriate. VA could provide financial support of the program, but the total amount of financial support provided in any fiscal year could not exceed \$1 million. Funding for such programs would be derived from amounts appropriated or otherwise made available to the VA Medical Services account.

VA supports the concept in part but underscores the Administration's proposal that was included in the Fiscal Year 2021 Budget. The Administration's proposal would allow VA to enter into agreements with public or private entities, through the award of grants or the use of cooperative agreements, to fund the provision of general legal services to homeless Veterans or Veterans with unmet legal needs who are at risk of becoming homeless. This proposal is intended to give the Veterans Health Administration's (VHA) Homeless Programs the means to support the provision of needed legal services to homeless and at-risk Veterans in areas where there is a substantial and continuous need. We note that, as drafted, H.R. 5019 would use VA Medical Services funding to pay for legal services beyond those currently authorized, such as assistance with filing and appealing claims for VA benefits. VA opposes using the Medical Services account to fund assistance with benefits programs and recommends that Medical Services funding continue to be used for the provision of medical care and services for eligible Veterans, and for assistance to eligible homeless and at-risk Veterans. However, we share the goal of increasing access to legal services, particularly for Veterans who are homeless or at risk of homelessness. We also welcome the opportunity to provide technical assistance on this legislation. VA anticipates the cost related to this legislation to be estimated at no cost for FY 2021; \$4 million over 5 years; and \$8.9 million over 10 years.

H.R. 5048 – Fairness for Local Veteran Cemeteries Act

H.R. 5048, the "Fairness for Local Veteran Cemeteries Act," would amend 38 U.S.C. § 2408 to authorize VA to provide grants to counties (in addition to states) for the establishment, expansion and improvement of Veterans' cemeteries or the operation and maintenance of such cemeteries.

VA does not support this legislation. The Department's longstanding collaboration with states has been critical in providing burial access to Veterans and to meeting our strategic goal of providing 95% of the Veteran population with reasonable burial access. Under the current program, states have proven to be reliable partners in serving Veterans and their families. This bill may undercut VA efforts to convince certain states to apply for grants and introduce unnecessary risk in the management of the program.

Currently, there are four states that do not have a grant-funded Veterans cemetery. VA has been working with these states to encourage their participation in the program. The bill has the potential to dampen these efforts, as states may disengage in discussions with VA and defer to counties to apply for grants. It would also dilute a

state's ability to establish cemetery construction priorities and determine placement of facilities.

VA does not believe that a county-level approach to grants provides long-term stability to the program. VA requires that grantees operate and maintain cemeteries solely for Veterans and other eligible individuals and maintain them as national shrines. Grantees must also commit to providing sufficient funds to operate and maintain the cemeteries after construction. States and tribal organizations expend resources to ensure that Veterans are interred in cemeteries that meet national shrine standards of appearance. With more limited resources, counties would be challenged to maintain and operate grant-funded cemeteries at national standards.

H.R. 5487 – The Veterans Cemetery Grants Improvement Act

H.R. 5487, the “Veterans Cemetery Grants Improvement Act,” would provide for an increase in the maximum amount of VA grants to states and Tribal organizations for operating and maintaining Veterans cemeteries. The bill would amend 38 U.S.C. § 2408(e)(2) to increase from \$5 million to \$10 million the annual statutory limit on operation and maintenance grants that VA may award to state and Tribal Veterans cemeteries. The bill would enhance VA’s capability to assist states and Tribal organizations in the key areas of cleanliness of headstones, marker height and alignment, and leveling of gravesites and turf conditions, which are projects that support the high appearance standards set for our Nation’s Veterans cemeteries. This legislation is consistent with a VA proposal in the President’s Budget for FY 2021, and as such, VA supports H.R. 5487.

This proposed legislation would have no budgetary impact. This proposal does not seek an increase in Veterans Cemetery Grants Program annual appropriations and would not result in additional expenditures by the program. Raising the \$5 million cap to \$10 million would allow for greater flexibility in prioritizing and funding the projects identified on the annual Veterans Cemetery Grants Program priority list.

H.R. 5639 – Chuck Osier Burial Benefits Act

H.R. 5639, the “Chuck Osier Burial Benefits Act,” would authorize VA to furnish urns or commemorative plaques for the cremated remains of certain Veterans. The bill would amend 38 U.S.C. § 2306 to authorize VA to issue an urn for placement of cremated remains of eligible decedents, or a commemorative plaque, both of which signify an individual’s status as a Veteran, in lieu of a Government-furnished headstone or marker. The bill would limit provision of the urn or commemorative plaque to deceased individuals who served in the Armed Forces on or after April 6, 1917, who are eligible for a headstone or marker under section 2306(d), and whose cremated remains are not interred in a National Cemetery, State Veterans cemetery, Tribal cemetery or private cemetery. The urn or commemorative plaque would be in lieu of a headstone or marker and interment in a VA National Cemetery.

VA does not support this legislation. We believe there are sufficient burial and memorial products to recognize the service and sacrifice of all eligible Veterans, including those who are not interred in a cemetery. At present, VA provides reimbursements for the purchase of urns or caskets only for a Veteran's remains that are unclaimed by a family member or another individual. Memorial markers are provided only when a Veteran's remains are unavailable for burial. In no instance does VA provide a memorial marker for placement outside a cemetery. The bill would establish an inequity in the provision of burial benefits by singling out Veterans who are cremated and whose remains are not interred in a cemetery.

Along with headstones and markers, VA believes that the provision of a Presidential Memorial Certificate is a fitting recognition of a decedent's military service. In addition, VA provides a U.S. flag to families. These tributes serve essentially the same purpose as the proposed commemorative plaque.

The bill could also exacerbate potential familial disputes regarding the final disposition of Veterans' remains. In jurisdictions where dividing cremated remains is legal, there is a risk of increased familial disputes over disposition of such remains, as well as the potential that VA could receive multiple claims for the same decedent from different individuals in possession of some portion of a decedent's remains.

If this legislation is enacted, VA would need increased funding and other resources to implement the program effectively.

H.R. 6013 – Veteran Families Financial Support Act

H.R. 6013, the "Veteran Families Financial Support Act," would amend 38 U.S.C. chapter 19 to create a new VA life insurance program for Veterans with service-connected disabilities and sunset the current Service-Disabled Veterans Insurance (S-DVI) program.

VA cannot support this bill in its current state as it partially duplicates the existing S-DVI program. In addition, VA has not finalized the costing of this bill, and it is unclear whether there may be associated costs.

H.R. 6060 – Veterans Burial Benefit Correction Act

H.R. 6060, the "Veterans Burial Correction Act," would amend 38 U.S.C. § 2306(e) to authorize the provision of an outer burial receptacle (OBR) for each new grave in a state or Tribal Veterans cemetery that has received a grant from VA.

VA currently has authority under this section to provide an OBR for new casketed gravesites in VA National Cemeteries. This bill would provide a commensurate OBR benefit for any casketed gravesite for an eligible Veteran or family member interred in a state or Tribal Veterans cemetery that received grant funding through VA's Veterans Cemetery Grants Program.

VA supports this proposed legislation, which is consistent with a VA proposal in the President's Budget for FY 2021. Currently, VA administers the OBR authority in VA National Cemeteries by funding the cost of pre-placed crypts as a part of major and minor construction projects; providing on-hand inventory of OBRs at VA National Cemeteries; and reimbursing family members with qualifying interments. Costs to the compensation and pension appropriation are estimated to be \$469 thousand in FY 2021; \$9.5 million over 5 years; and \$30.4 million over 10 years.

H.R. XX – Veterans Claim Transparency Act of 2020

This unnumbered bill would amend title 38, U.S.C., chapter 59, to require the Secretary of Veterans Affairs to provide the representative of record of a claimant for compensation or benefits administered by the Secretary an opportunity to review a proposed determination regarding that claim.

The proposed bill, under section 2, would amend title 38, U.S.C., by adding a new section, § 5906, requiring VA, in each claim for compensation or benefits under title 38 in which the claimant has designated a representative of record, to provide that representative an opportunity to review a proposed determination before it becomes final. *Representative of record* would include representatives recognized under 38 U.S.C. § 5902 (i.e., Veterans Service Organizations (VSO)) and 38 U.S.C. § 5904 (i.e., claims agents and attorneys).

The bill would require VA to submit notification in writing to a representative of record that a proposed determination is ready for review and would provide that the review period begin at the moment the representative receives notification from VA and end on the earlier of (i) the moment that the claimant or the representative of record indicates to VA that the claimant does not dispute the proposed determination, or (ii) the moment that is 48 hours after the moment the representative receives such notification from VA.

VA strongly opposes this bill. VBA discontinued this practice because it is no longer appropriate and is legally suspect. Moreover, the bill would not *codify* VBA's prior practice but greatly expand it. What was a quick, informal review by a local VSO down the hall from a VBA regional office would now be codified as an enforceable legal right to a formal review available to every representative across the country. What was a period for correcting errors, and not expressing disagreements, would now seem to be open for comments of all varieties. What was a review period for compensation decisions would now delay every type of benefits determination, and thus delay every benefits payment and service provided across the VA spectrum.

By providing a 48-hour review period in chapter 59, rather than chapter 11 of title 38, for "each claim for compensation or benefits," the bill is most reasonably read as applying to all VA benefits. This means that time-sensitive determinations regarding burial and health care, for example, would be delayed while VA (i) searches to

determine whether there is a representative of record it is required to notify; (ii) waits 48 hours for a review that may not even occur; and (iii) then takes the time to consider any comments received. Thus, the delay would be beyond 48 hours—and exceedingly problematic for claimants in time-sensitive contexts. VA has a responsibility to decide claims *efficiently* and *without delay*. To this end, VA is concerned about the delays in providing payments and services to Veterans that will occur as a result of this bill.

As written, the bill implies that the 48-hour review period applies whether or not the representative has access to VBA systems. It should be stressed that, practically, the bill cannot serve its apparent purpose without being limited *to representatives with electronic access to VBA systems*. Due to the realities of the mail system, it would be infeasible for VA to mail out a pre-decisional determination and then receive a representative's response within a 48-hour period.

While the Committee's intent may be to simply codify and reinstate VBA's discontinued legacy practice that will not be the effect. Adding a practice to the United States Code has independent consequences. The allegation that VBA did not provide the required review period would become grounds for appeal. This bill will create new appellate workload over procedural issues rather than substantive issues, at a time VBA is making progress toward its goal of implementing the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) and delivering a more efficient experience for all Veterans who desire appellate review. Moreover, by allowing claimants to "dispute" a proposed determination, the bill threatens to create a new mechanism for raising disagreements of any type with the determination, which will undoubtedly create confusion as to how this new dispute mechanism interacts with the carefully designed AMA structure.

Second, the bill would codify disparate treatment between represented and unrepresented claimants—as the latter would not receive this opportunity to review a VBA decision and provide comment before it becomes final. A pivotal reason for VBA discontinuing its 48-hour review practice was the strong indication from the U.S. Court of Appeals for Veterans Claims (CAVC) that a 48-hour review policy premised on disparate treatment could not withstand legal scrutiny. Specifically, in *Rosinski v. Shulkin*, a majority of judges on the panel expressed a view that the limited scope of the 48-hour review policy was arbitrary and capricious, and the Chief Judge encouraged VBA to "reflect on its policy, consider whether the justifications behind it and enforcement of it are consistent with the current realities of attorney and VSO practice, and make the review process available to all or to none." 29 Vet. App. 183, 194 (2018) (Davis, C.J., concurring); see also *id.* (Greenberg, J., dissenting). The bill would run afoul of the same concerns identified by CAVC. An extension of the 48-hour review practice to unrepresented claimants would only create further problems, as unrepresented claimants may not have access to an electronic system enabling review within the 48-hour timeframe.

VBA has transformed and transitioned its processes into a modern and paperless environment, moving from a paper-based claims environment to an electronic

environment that routes claims efficiently through the National Work Queue. Moreover, VBA now has a robust quality review program that reviews claims throughout the claims process, greatly obviating the prior need for VSO assistance in that regard. Under the AMA system, claimants have the ability to receive reconsideration of VBA benefits decisions within shorter timeframes through the higher-level review and supplemental-claim lanes. 38 U.S.C. § 5104C.

Based on the language of the bill, a claim may be unnecessarily delayed. The bill allows for the 48-hour period to end early once a claimant or representative expressly indicates that he or she does not dispute the proposed determination. In addition, if a claimant or representative *did* dispute the proposed determination, it would seem that VBA would have an obligation to review that disagreement and determine whether the decision was accurate. This process would involve returning the claim to the original adjudicator for review. If the adjudicator determines the claim was decided appropriately, then the claim was unnecessarily delayed from becoming finalized and that adjudicator missed the opportunity to work on another Veteran's claim. However, if correction was needed to the decision, the adjudicator would complete a revised decision, and the claim would potentially undergo another 48-hour review period. A representative could potentially continue to non-concur during the 48-hour review period until they were completely satisfied with the decision and indefinitely expand the life of the claim.

Since VBA already has a policy in place for reviewing claims through the supplemental claims process under AMA, this bill seems to be duplicating this effort. It must be emphasized that AMA revolutionized and streamlined the process for appealing and correcting initial decisions, and imposing an additional layer of review and delay to this new, streamlined system would negatively affect the progress currently being made on timeliness.

The bill would duplicate an already established VBA procedure. Currently, when adjudicators make decisions on claims, these decisions are uploaded in the electronic record and may be subject to a quality review check through VBA's Individual Quality Review (IQR) program that affects an employee's individual performance. A representative's review of a decision before becoming final is similar to VBA's IQR process. Since there would be a degree of duplication, VBA would have to consider changing its quality review program to have claims reviewed for quality assurance after the 48-hour review was completed and the decision has been finalized. Updating the quality review process would pose a significant administrative burden on VA.

VBA would require a significant amount of resources to effectively implement this bill, which would include a new program office to manage and oversee the activities related to accredited representatives. First, VBA would require resources to make systematic changes, which would include updating its policies, procedures, systems, training, online content and communications. To operationalize this process, VBA needs dedicated resources for, but not limited to, the following duties: processing access requests, managing existing users, and terminating access as needed; updating

existing training for representatives; developing and providing training to accredited representatives on how to use VBA electronic systems, specifically the new 48-hour review functionality; and developing policies and procedures for both representatives and claims processors regarding utilizing the 48-hour review.

In order to accomplish these duties, VBA would need additional personnel including field personnel decision makers to make up for time spent on reviewing representative non-concurrence; accredited representative coordinators in each regional office to be the primary field points of contact for any issues that arise from the new process; and VA Central Office personnel to ensure compliance, oversee data analysis and manage access issues. Since VBA currently lacks these types of dedicated resources for representatives, VBA would need to stand up a new program office, appropriately staffed to realize full implementation of this enhanced processing.

VBA would need to develop several electronic functionality upgrades, such as but not limited to, ensuring determinations are not processed before the expiration of the 48-hour period; creating new claims status identifiers; creating an indicator on decisions to designate them as pre-decisional; and updating how cases are routed for review.

In addition, VBA would need to update and expand the VSO queue functionality that was previously used to create user roles for these representatives; create notifications to representatives that decisions were ready for review; create new functionality for representatives to indicate whether they concur or non-concur on the decision and reasons for non-concurrence; and create new functionality for adjudicators to respond to representative non-concurrence.

Finally, VBA would need new data reporting functionality to track how many representatives are using the review; how long it took to complete the reviews; whether a change was made to the decision; and the reasons for representative's non-concurrence.

It is important to note that the development of such functionalities and data collection reporting would result in the delay of other information technology (IT) projects aimed at modernizing the claims process. For example, VBA is currently in the process of developing a major pension automation project, set to release in September 2020, that will improve VBA's ability to process death pension and burial claims faster and more accurately for survivors. The IT requirements necessary to comport with the bill would delay the implementation of this project and others. VBA believes that IT projects designed for the efficient delivery of benefits, payments and services to Veterans and dependents should be prioritized over those projects creating additional review opportunities on top of the already-comprehensive AMA.

Also, by formalizing this review process, the bill will result in more representatives requesting Veterans Benefits Management System (VBMS) access. Under existing Federal information security guidelines, VBA cannot allow third parties

access to protected claimant data without instituting precautionary background checks. Consistent with 38 U.S.C. § 5722 and 44 U.S.C. § 3554, VBA is required to establish positive identification to verify an individual's enrollment in a system; suitability for an individual's access to internal VBA systems; and hardware and software safeguards necessary to ensure secure connections with the authorized individuals.

Currently, VBA is covering these expenses, which inadvertently results in substantial costs to taxpayers. Adding more users will proportionally increase the overall direct and indirect costs. Depending on the number of users added, this cost could increase dramatically. VBA covers the cost of a special agreement check, background investigation, Personal Identity Verification (PIV) enrollment, PIV credential printing and issuance and PIV credential annual maintenance. In addition, there are almost 20,000 accredited representatives currently on the rolls. The Office of General Counsel (OGC) receives about 100 applications from attorneys and claims agents and 200 applications per month from VSOs for accreditation. This bill could potentially greatly expand the number of representatives needing access which will increase the cost of VBA providing access and require more oversight and full-time employees (FTE) to manage new users and to ensure VBA terminates access in a timely manner, as appropriate.

Finally, it must be noted that, even without this bill, representatives may still review the claimant's entire electronic record at any time and specifically, may use filters within VBMS to see when a particular claim advances to the "Rating Decision Complete" status. This allows representatives to bring up any quality concerns during the claims process. *There is no need to codify a hold of all benefits decisions for 48 hours when representatives can be heard at multiple points in the decision-making process.*

No mandatory costs or savings are associated with this bill. VBA general operating expense costs for the first year are expected to be \$64.7 million and include salary, benefits, rent, other services, supplies and equipment. Five-year costs are estimated to be \$321.6 million, and 10-year costs are estimated to be \$631.6 million.

Initial rough order of magnitude development cost estimates from the Office of Information and Technology (OIT) are estimated at \$23.5 million. This cost estimate is based upon business estimation of changes in both VBMS and to support Pension Automation changes. Neither formal business nor technical requirements have yet been documented. The \$23.5 million allows for 12 months of IT resourcing in VBMS for architecture, solutioning, development, testing and implementation as well as 12 months of IT resourcing for Pension Automation architecture, solutioning, development, testing and implementation. Degree of error for unknown unknowns, per OIT is 85% for VBMS and 90% for Pension Automation. Significant additional resource investment would be required to capture formal business and technical requirements toward improved confidence in cost estimate from OIT.

IT costs for the first year are \$1.6 million and align to the 3-year refresh cycle. Five-year costs are estimated to be \$6 million, and 10-year costs are estimated to be

\$11.5 million. This includes the IT equipment for FTE, installation, maintenance and IT support.

To the extent this bill would apply to VHA and NCA determinations, VA anticipates there would be additional costs but does not have an estimate of those costs at this time. There would also be indirect costs for OGC's accreditation and discipline program, which is in charge of accrediting the representatives and overseeing their conduct. As the number of representatives who VA permits to access their databases based on their accreditation with OGC rises, there will be an increased need for heightened coordination between OGC's IT systems and those of the other offices as well as significantly-heightened communication and coordination between OGC and those offices.

Conclusion

This concludes my testimony. The witnesses and I are happy to answer any questions you may have.