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SENATE

{ REPORT
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VETERANS HEARING LOSS COMPENSATION ACT OF 2002

AUGUST 1, 2002.—Ordered to be printed

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

REPORT

[To accompany S. 2237]

The Committee on Veterans' Affairs, to which was referred the bill S. 2237, to amend title 38, United States Code, to enhance compensation for veterans with hearing loss, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and an amendment to the title, and recommends that the bill, as amended, do pass.

INTRODUCTION

On April 24, 2002, Committee Chairman John D. Rockefeller IV introduced S. 2237. S. 2237, as introduced, would have amended provisions of title 38, United States Code, to enhance compensation for veterans with hearing loss.

On June 27, 2001, S. 1113 was introduced by Ranking Committee Member Arlen Specter. Senator Mary Landrieu later cosponsored the bill. S. 1113 would have increased the amount of Medal of Honor Roll special pension, to provide for an annual adjustment in the amount of that special pension.

On November 13, 2001, S. 1680 was introduced by Committee member Paul D. Wellstone. The bill was later cosponsored by Senators Joseph R. Biden Jr., Christopher S. Bond, Thomas R. Carper, Hillary Rodham Clinton, Mark Dayton, Richard J. Durbin, Judd Gregg, Tim Johnson, Patrick J. Leahy, Harry M. Reid, and Charles E. Schumer. S. 1680 would have amended the Soldiers' and Sailors' Civil Relief Act of 1940 to provide that duty of the National Guard mobilized by a State in support of Operation Enduring Freedom, or

otherwise at the request of the President, would qualify as military service under that Act.

On January 29, 2002, S. 1905 was introduced by Chairman Rockefeller at the request of the Administration. S. 1905 would have enhanced veterans' programs and the ability of the Department of Veterans Affairs to administer them.

On March 8, 2002, S. 2003 was introduced by Senator Bill Nelson and cosponsored by Senators Jeff Bingaman, John B. Breaux, Kent Conrad, Tim Johnson, Mary L. Landrieu, and John McCain. The bill was later cosponsored by Committee members Larry Craig, Patty Murray, and Ben Nelson, and Senators Max Cleland, Durbin, Daniel K. Inouye, John F. Kerry, Carl Levin, Joseph I. Lieberman, and Jeff Sessions. S. 2003 would have clarified the applicability of the prohibition on assignment of veterans benefits to agreements regarding future receipt of compensation, pension, or dependency and indemnity compensation.

On March 22, 2002, S. 2073 was introduced by Committee member Craig. S. 2073 would have provided for the retroactive entitlement of Ed W. Freeman to Medal of Honor special pension.

On April 9, 2002, S. 2079 was introduced by Chairman Rockefeller. The bill was later cosponsored by Senators Kent Conrad and Tim Johnson. S. 2079 would have facilitated and enhanced judicial review of certain matters regarding veteran's benefits.

On April 18, 2002, Chairman Rockefeller introduced S. 2205. S. 2205 would have clarified the entitlement to disability compensation of women veterans who have service-connected mastectomies, to provide permanent authority for counseling and treatment for sexual trauma, and for other purposes.

On April 23, 2002, Ranking Committee Member Specter introduced S. 2230 with the co-sponsorship of Chairman Rockefeller. The bill was later cosponsored by Committee member Craig. S. 2230 would have made permanent the authority of the Secretary of Veterans Affairs to guarantee adjustable rate mortgages, and to authorize the guarantee of hybrid adjustable rate mortgages.

On April 23, 2002, Ranking Committee Member Specter introduced S. 2231 with the cosponsorship of Chairman Rockefeller. Committee member Craig later cosponsored the bill. S. 2231 would have provided an incremental increase in amounts of educational assistance for survivors and dependents of veterans.

On May 2, 2002, the Committee held a hearing, chaired by Senator Rockefeller, to receive testimony on S. 1113, S. 1680, S. 1905, S. 2003, S. 2073, S. 2079, S. 2205, S. 2230, S. 2231, and S. 2237.

Testimony was heard from: The Honorable Tim McClain, General Counsel, Department of Veterans Affairs; Mr. James Fischl, Director, National Veterans Affairs and Rehabilitation Commission, The American Legion; Mr. Joseph Violante, National Legislative Director, Disabled American Veterans; Mr. David Tucker, Associate Legislative Director, Paralyzed Veterans of America; and Mr. Dennis Cullinan, Director, National Legislative Service, Veterans of Foreign Wars.

After carefully reviewing the testimony from the foregoing hearing, the Committee met in open session on June 6, 2002, and voted unanimously to report favorably S. 2237, as amended to include provisions from S. 1680, S. 1905, S. 2003, S. 2073, S. 2079, S. 2205,

S. 2230, S. 2231, and S. 2237. Present were Senators Rockefeller, Jeffords, Wellstone, Murray, Miller, Nelson, Specter, Thurmond, Murkowski, Hutchinson and Hutchison. Speakers included Senators Rockefeller, Jeffords, Wellstone, Murray, Specter and Murkowski. The vote to pass the Committee's bill was unanimous.

SUMMARY OF THE COMMITTEE BILL AS REPORTED

S. 2237 as reported (hereinafter referred to as the "Committee bill") contains various amendments to title 38 of the United States Code and other freestanding provisions that would:

(a) clarify the entitlement to special monthly compensation for women veterans who have service-connected mastectomies by specifying that female veterans who have lost half or more of a breast's tissue are eligible for compensation;

(b) remove the "total deafness" requirement for the non-service-connected ear for compensation for hearing loss in paired organs, allowing the Department of Veterans Affairs (hereinafter "VA") to consider partial non-service-connected hearing loss when rating disability;

(c) give authority for presumption of service-connected hearing loss associated with particular military occupational specialties and allow VA to contract with an independent scientific organization to review evidence of occupational hearing loss, particularly that suffered during military service;

(d) increase Medal of Honor pension from \$600 to \$1000 per month, provide a cost of living adjustment for the pension, and make retroactive lump-sum payments of pension;

(e) prohibit the assignment of monthly veteran's benefits;

(f) extend the effective date of certain Omnibus Budget Reconciliation Act provisions to September 30, 2011;

(g) provide for an increase in the aggregate annual amount authorized for State approving agencies for administrative expenses from \$14,000,000 to \$18,000,000 in the Fiscal Years 2003, 2004, and 2005;

(h) clarify and correct various authorities relating to VA;

(i) authorize a pilot program to guarantee adjustable rate mortgages and hybrid adjustable rate mortgages;

(j) specify that duty of National Guard members mobilized by States at the request of a Federal law enforcement agency for homeland security activities be treated as military service under the Soldiers and Sailors' Civil Relief Act;

(k) prohibit certain benefits for persons who commit capital crimes;

(l) modify the standard of review for the United States Court of Appeals for Veterans Claims on findings of fact by the Board of Veterans' Appeals;

(m) authorize review by the United States Court of Appeals for the Federal Circuit of certain decisions of law of the United States Court of Appeals for Veterans Claims;

(n) enhance authority of the United States Court of Appeals for Veterans Claims to award fees under the Equal Access to Justice Act for non-attorney practitioners; and

(o) clarify the retroactive application of the "duty to assist" provisions in the Veterans Claims Assistance Act.

COMMITTEE BILL

SECTION 101: ELIGIBILITY FOR SPECIAL MONTHLY COMPENSATION DUE
TO LOSS OF A BREAST*Background*

VA estimates that women now comprise about 5% of enrolled veterans in the VA healthcare system, a percentage expected to double over the next two decades. Congress and VA must ensure that health care and compensation benefits adapt to meet this growing population's specific needs. The Veterans Benefits and Health Care Improvement Act of 2000, Public Law 106-419, authorized VA to provide special monthly compensation to any woman veteran who "has suffered the anatomical loss of one or both breasts (including loss by mastectomy)" as a result of military service. 38 U.S.C. § 1114 (k).

On February 14, 2002, VA published a final rule addressing adjudication of claims for this special monthly compensation. 67 Fed. Reg. 6872. This rule specified that "Anatomical loss of a breast exists when there is complete surgical removal of breast tissue (or the equivalent loss of breast tissue due to injury). As defined in 38 C.F.R. § 4.116, radical mastectomy, modified radical mastectomy, and simple (or total) mastectomy result in anatomical loss of a breast, but wide local excision, with or without significant alteration of size or form, does not." This decision appears inconsistent with requirements for "acquired absence" of other creative organs as defined in 38 C.F.R. § 3.350, which describe very specifically how reductions in size or changes in form of male creative organs can be used to establish loss of use. Measuring loss of breast tissue should not prove more clinically challenging than measuring physical or functional loss of male creative organs.

Although some patients do require mastectomy following a diagnosis of breast cancer, an increasing number of clinicians recommend breast-tissue conserving procedures such as wide local excision for specific patients. Conservation of some breast tissue does not obviate the need for subsequent reconstructive surgery, especially if the excision resulted in significant alteration of size or form, or for additional intervention with radiation therapy or chemotherapy. Even if restricting eligibility for compensation to those who have undergone mastectomy does not influence medical decisions, it fails to acknowledge that women who undergo significant loss of breast tissue contend with physical, emotional, and financial challenges in returning to health.

Committee Bill

Section 101 amends 38 U.S.C. § 1114(k) to specify that women veterans who have suffered the anatomical loss of half of the tissue of one or both breasts in or as a result of military service may be eligible for special monthly compensation. This provision restores the intent of the original legislation and makes this provision consistent with other benefits extended for partial loss or loss of use of an organ.

Cost: Congressional Budget Office (hereinafter “CBO”) estimates that the direct spending cost will be less than \$300,000 a year and total about \$2 million over the 2003–2012 period.

SECTION 102: ELIMINATES THE “TOTAL” DEAFNESS REQUIREMENT FOR THE NON-SERVICE-CONNECTED EAR, ALLOWING VA TO CONSIDER PARTIAL NON-SERVICE-CONNECTED HEARING LOSS WHEN RATING DISABILITY

Background

In 1962, Public Law 87–610 was enacted requiring special consideration for certain cases involving blindness or bilateral kidney dysfunction when disability of only one eye or kidney is service-connected. Public Law 87–610 allowed for compensation as if the “blindness in both eyes or such bilateral kidney involvement were the result of service-connected disability.” Congress extended the principle of “paired organ” impairment to the ears in 1965 with Public Law 89–311. “This [paired organ] principle recognizes the additional disability attendant on the non-service-connected loss of function of a second paired organ when service connection has been established for the other organ and the committee believes constitutes a reasonable liberalization of existing law.” S. Rept. No. 89–861 (1965). The amendment provided for a “veteran [that] has suffered total deafness in one ear as a result of service-connected disability and total deafness in the other ear as a result of non-service-connected disability . . . the Secretary shall assign and pay to the veteran the applicable rate of compensation under this chapter as if the combination of disabilities were the result of service-connected disability.”

Under current 38 U.S.C. § 1160, special consideration is extended to veterans’ service-connected disabilities in “paired organs or extremities,” such as eyes, kidneys, lungs, feet, or hands. For these paired organs or extremities, VA is authorized to consider any degree of damage to both organs, even if only one resulted from military service, when rating disability. Total impairment is not a requirement for eyes, kidneys, hands, feet, or lungs. In fact, proportional impairment, such as “the loss or loss of use of one kidney as a result of service-connected disability and involvement of the other kidney as a result of non-service-connected disability,” is specifically provided for in subsections (1), (2), (4), and (5) of section 1160(a) of title 38. However, the requirement of total deafness remains unchanged under current law. 38 U.S.C. § 1160 (a)(3).

Boyer v. West, 210 F.3d 1351 (2000), demonstrated how this requirement can affect veterans. Gerald Boyer applied to VA for service connection for bilateral hearing loss. VA granted Boyer service connection for the hearing loss in his left ear at zero-percent disability, but denied service connection for the hearing loss in his right ear. Under 38 U.S.C. § 1160(a)(3), Boyer’s right-ear hearing loss could not be considered in rating his service-connected left-ear hearing loss because the right-ear hearing loss was less than total. On appeal, the Board of Veterans’ Appeals (hereinafter “BVA”) concluded that, for the purposes of evaluating the left-ear hearing loss, Boyer’s right-ear hearing had to be considered normal. As a result, Boyer was not entitled to a compensable rating for his left-ear loss.

Boyer appealed BVA's decision to the U.S. Court of Appeals for Veterans Claims (hereinafter "CAVC"). Relying on 38 U.S.C. § 1160(a) and 38 C.F.R. § 4.85, CAVC affirmed BVA's decision on Boyer's claim for a compensable rating for his service-connected left-ear hearing loss. That decision, in turn, was affirmed by the U.S. Court of Appeals for the Federal Circuit, stating that 38 U.S.C. § 1160(a)(3) "plainly speaks to the issue and precludes any consideration of Mr. Boyer's right-ear hearing loss for the purposes of evaluating his service-connected hearing loss in his left ear."

Committee Bill

Section 102 of the Committee bill would eliminate the "total deafness" requirement and, thus, allow VA to consider partial non-service-connected hearing loss when rating disability for veterans like Gerald Boyer. The striking of the word "total" in both clauses would allow veterans with less than total hearing loss in both ears to have their non-service-connected degree of hearing loss be a factor in evaluation of service-connected hearing loss. This change would mirror the exceptions made for other "paired" organs and extremities in section 1160 and is necessary to compensate veterans whose hearing has been more greatly impaired by service than it would have been had they not served.

Cost: CBO estimates the direct spending cost will be \$2 million in 2003, and about \$53 million over the 2004–2007 period, and \$178 million over the 2003–2012 period. CBO estimates that spending subject to appropriations will increase by \$2 million over the 2003–2007 period.

SECTION 103: INDEPENDENT SCIENTIFIC STUDY ON POTENTIAL CONNECTION BETWEEN MILITARY SERVICE AND HEARING LOSS

Background

According to the February 2001 VBA Annual Benefits Report, more than 28,000 veterans—almost 11% of those receiving compensation for the first time—qualified in Fiscal Year 2000 for service-connected disability compensation on the basis of hearing loss. Tinnitus, a ringing of the ears, and loss of auditory acuity ranked second and third, respectively, in the numbers of disabilities most frequently service-connected in newly compensated veterans. Of these, just over half were rated 10% disabled, and more than 40% were assigned a rating of 0% disability. A VBA White Paper dated April 4, 2002, showed that a total of more than 300,000 veterans had been service-connected for hearing loss by the end of Fiscal Year 2001, with about 60,000 of these receiving compensation for hearing loss as their major disability.

In order to establish service connection for hearing loss or tinnitus, adjudicators must distinguish between noise-induced hearing loss potentially related to in-service exposures and hearing disorders unrelated to service. Such disorders may include age-related hearing loss, one of the most common health complaints among Americans over the age of 65. Although research clearly demonstrates a relationship between occupational or environmental noise and hearing loss in older adults, establishing a link between a veteran's noise exposure during service and hearing loss diag-

nosed years after separation can be hampered by incomplete medical records and uncertain clinical evidence.

Research has shown that sound impulses generated by gunfire can be statistically related to hearing threshold shift—a change in ability to detect sounds—in exposed recruits. A study of healthy Finnish military conscripts published in the journal *Military Medicine* in 1992 showed that exposure to about 200–300 rifle shots in the course of training, absent any other acoustic trauma, caused hearing loss that could be measured clinically but not necessarily noticed subjectively. A 1995 study of hearing loss in thousands of U.S. Army personnel roughly grouped into high- and low-noise specialties showed that, despite hearing conservation programs initiated in the 1950's, soldiers in the armor, artillery, and infantry branches had greater hearing loss than their counterparts in other areas of service. L.W. Henselman, D. Henderson, J. Shadoan, M. Sumramaniam, S. Saunders, D. Ohlin. *Effects of Noise Exposure, Race, and Years of Service on Hearing in U.S. Army Soldiers*. *Ear and Hearing* 1995;16;382–391. This survey also demonstrated the difficulty of studying service-related hearing loss, as only 25% of the soldiers in the armor, artillery, and infantry branches—branches classified as “high-noise”—had hearing tests available for evaluation through the Army's hearing conservation data registry.

Evaluating service-related hearing loss in veterans whose separations from service occurred many years ago, especially during wartime, can prove even more challenging. Anecdotally, veterans have reported that the scarcity of audiometric resources in the field following World War II meant a wait of days or weeks, post-discharge, to receive testing prior to returning home, an unacceptable delay for many. The frequency with which veterans discharged in this era received audiometric evaluation—as well as the sensitivity and accuracy of such testing—are not easily estimated, nor are data uniformly available for later periods. Even more than forty years after initiation of military hearing conservation programs, the adequacy of hearing protection and post-separation testing have not been conclusively determined.

This lack of a clear clinical history presents an obstacle to both veterans and VA claims processors in weighing whether individual hearing loss is service-connected. A veteran who incurred hearing loss during service might not notice or seek treatment for that hearing loss for many years. Such a delay may be especially prevalent given the potentially additive effects of service-related and age-related hearing disorders, and the common denial of symptoms.

Although it is plausible to link hearing loss diagnosed years after separation to noise exposure or acoustic trauma during service, current data is insufficient to assume this nexus. When faced with situations of potential exposures with incomplete scientific evidence and clinical records previously, the Committee has called upon scientific experts to examine whether evidence supports a presumption of connection between in-service exposures and subsequent health effects.

Committee Bill

Section 103 would authorize VA to create a presumption of service-connection for hearing loss or tinnitus in veterans who served

in certain military occupational specialties if an outside scientific authority finds that evidence warrants such a presumption.

The Committee bill would require VA to enter into a contract with the National Academy of Sciences (hereinafter “NAS”) or an equivalent scientific organization to review data related to hearing loss, tinnitus, and military service. NAS would be charged with reviewing relevant scientific publications on occupational hearing loss, and identifying forms of acoustic trauma (including continuously high noise levels) experienced by servicemembers that could contribute to hearing loss, hearing threshold shift, or tinnitus. NAS would be tasked with determining whether hearing disorders resulting from such exposure would occur immediately or might be noticed only after a delay, and whether evidence points to cumulative or progressive hearing problems after the initial insult. NAS would also be directed to identify military occupational specialties most likely to be associated with exposures that could be expected to lead to hearing loss.

Section 103 would also direct NAS to assess whether the audiometric data collected by the military services are sufficiently complete and adequate in terms of rate of participation, thoroughness, and sensitivity to allow an objective assessment of individual exposure. This would be based upon a survey of hearing threshold shift records in a representative sample of members of all service branches during or after each major conflict of the past century. The scientific authorities would be asked to use this information to determine when, if ever, hearing conservation programs provided sufficient protection and audiometric testing to make adjudication of hearing loss on an individual basis practical.

VA would be directed to review its own records on hearing disorders, and to report on the number of claims for disability compensation for hearing loss, tinnitus, or both from 1999–2001; the number of those claims awarded, and the disability ratings assigned; and the total amount of compensation based on those claims. This report would also include an estimate of the total cost to VA of adjudicating those claims in full-time-employee equivalents. Finally, VA would be required to report on medical care provided to veterans for hearing disorders in each of the report years, including the number and cost of hearing aids provided and the military occupational specialties of those veterans during service.

Collectively, these data would be used by VA to determine if the evidence warrants a presumption that veterans who served in specific military occupational specialties during specific periods were exposed to sufficient noise or acoustic trauma to cause hearing disorders, regardless of the adequacy of the individual veteran’s audiometric history at separation. Based on the recommendations of the outside authority and VA’s report, VA would be authorized by the Committee bill to create a presumption of service connection for hearing loss or tinnitus for these veterans.

Cost: CBO estimates the cost will be \$1 million over the 2003–2007 period in spending subject to appropriations.

SECTION 104: INCREASES THE RATE OF THE MEDAL OF HONOR SPECIAL PENSION

Background

Section 1562 of title 38, of the United States Code provides a special pension to recipients of the Medal of Honor. When established in 1916, this pension was meant to recognize, in some small measure, the extraordinary heroism of the recipients of our Nation's highest military honor. S. Rept. No. 64-240 (1916). However, the Medal of Honor special pension has evolved into a form of supplemental income for many recipients.

There are currently 142 living Medal of Honor recipients. According to testimony presented to the Committee in July 1997 by AMVETS, the majority of Medal of Honor recipients live solely on Social Security benefits, supplemented by the Medal of Honor pension. Many recipients also travel extensively, often at their own expense, to speak at patriotic and commemorative events. These commitments present an additional financial strain for these gallant men that ought to be compensated. The Medal of Honor special pension is currently \$600 per month.

Periodically, the pension amount has been increased to keep pace with inflation and needs of its recipients. However, these increases have been irregular in amount and frequency. Since its inception more than 80 years ago, the pension amount has been increased on four occasions in amounts ranging from \$90 to \$200 (Public Laws 87-138, 95-479, 103-161, and 105-368) to its current level. For more than 5 years, the Medal of Honor Society, an organization comprised entirely of Medal of Honor recipients, has sought to increase the pension amount to \$1000 with an automatic cost-of-living adjustment thereafter.

Eligibility to receive the Medal of Honor special pension is contingent upon having first been awarded the Medal of Honor. There has been, in some cases, a delay between the date of a recipient's act of gallantry for which the Medal of Honor is being awarded, and the date on which the Medal of Honor is actually awarded. This delay has created a situation which has resulted in some Medal of Honor recipients receiving lower aggregate amounts of special pension, based not on differences of when a recipient's act of valor occurs, but on differences of when official recognition of that act occurs. Congress has, in some cases, addressed delay of the award of the Medal of Honor by conferring retroactive entitlement to special pension on recipients or their survivors. Section 577 of the National Defense Authorization Act for Fiscal Year 1998, Public Law 105-85.

Committee Bill

Section 104 of the Committee bill would increase the Medal of Honor special pension from \$600 to \$1000. Beginning in January 2003, the pension amount would be adjusted annually to maintain the value of the pension in the face of the rising cost of living. The amount of this adjustment would match the percentage of the increase paid to Social Security recipients. The Committee bill would also provide for a one-time, lump-sum payment in the amount of pension the recipient would have received between the date of the

act of valor and the date that the recipient's pension actually commenced.

Cost: CBO estimates the cost will be \$2 million in 2003, \$6 million over the 5-year period, and \$8 million over 10-years.

SECTION 105: PROHIBITS ASSIGNMENT OF MONTHLY VETERANS BENEFITS AND CREATES AN EDUCATION AND OUTREACH CAMPAIGN ABOUT FINANCIAL SERVICES AVAILABLE TO VETERANS

Background

Section 5301 of title 38 of the United States Code currently prohibits the assignment or attachment of a veteran's disability compensation or pension benefits. Section 5301(a) provides that:

payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

In recent years, private companies have offered contracts to veterans that exchange up-front lump sums for future benefits, generally valued at a mere 30% of their estimated future amount. VA's Office of General Counsel has determined that section 5301(a) provisions were circumvented by arrangements in which a veteran contracted to pay for services with future VA benefit payments. These arrangements often require a veteran to open a joint bank account with the company, or arrange to have VA benefit checks deposited into an account identified by the company. The company can then legally withdraw the money from that account. Some companies have the veterans arrange for their checks to be sent to a post office box operated by the company with, presumably, an arrangement with the veteran to allow the company to cash the check. Some companies also require the veteran to provide collateral, such as a home or life insurance policy, in case the veteran stops payment or dies.

Committee Bill

Section 105 clarifies the applicability of the prohibition on assignment of veterans benefits through agreements regarding future receipt of compensation, pension, or dependency and indemnity compensation. Section 105 would prohibit companies from entering into agreements with veterans to turn over their monthly disability compensation benefits to the company in exchange for a reduced up-front lump sum. It would make the violation by the companies punishable by a fine and up to one year in jail. This provision would also require VA to create a five-year education and outreach campaign to inform veterans about available financial services, ensuring that those in dire financial straits are not left without a place to turn.

Cost: CBO estimates that section 105 would have no effect on direct spending and a negligible effect on spending subject to appropriation.

SECTION 106: EXTENSION OF INCOME VERIFICATION AUTHORITY

Background

Section 106 would extend provisions which originated in Public Law 101–508, the Omnibus Budget Reconciliation Act of 1990, giving the Internal Revenue Service (hereinafter “IRS”) authority to furnish income information to VA from IRS records. The Act required IRS to disclose to VA income information so that VA might determine eligibility for VA needs-based pension, parents’ dependency and indemnity compensation, and VA health-care services.

In 1985, Committee member Murkowski requested that the General Accounting Office (hereinafter “GAO”) review the accuracy of self-reported beneficiary income using certain income tax data maintained by IRS. The study found discrepancies between the income data the beneficiaries reported to VA and that reported to IRS in nearly half of the sample cases. S. Rept. No. 101–134 (1989). This review provided the impetus for the original legislation, intended to prevent the payment of needs-based benefits to claimants who under-report their income.

This provision, codified at Internal Revenue Code § 6103(l)(7)(D)(viii), was authorized to remain in effect through September 30, 1992, by Public Law 101–508. In 1992, Public Law 102–568 extended the authority through September 30, 1997. Public Law 103–66 extended the authority to September 30, 1998, and in 1997, this authority was extended again through September 30, 2003, by Public Law 105–33.

Additional provisions of Public Law 101–508, codified at 38 U.S.C. § 5317, provide parallel authority for VA to use IRS information and require VA to notify applicants for needs-based benefits that income information furnished by the applicant may be compared with the information obtained from the Departments of Health and Human Services and Treasury under Internal Revenue Code § 6103(l)(7)(D)(viii). This parallel authority was originally in effect through September 30, 1992, pursuant to Public Law 101–508. In 1992, Public Law 102–568 extended the authority to September 30, 1997. In 1993, Public Law 103–66 extended it to September 30, 1998. In 1997, Public Law 105–33 extended the authority to September 30, 2002. The VA Secretary’s authority to use IRS income data is now scheduled to expire on September 30, 2008, pursuant to Public Law 106–409.

Committee Bill

Section 106(a) of the Committee bill would extend Internal Revenue Code § 6103(l)(7)(D)(viii) until September 30, 2011, and section 106(b) would extend 38 U.S.C. § 5317 until September 30, 2011.

Cost: CBO estimates that this provision will result in savings of \$7 million in 2003, \$76 million over 5-years, and \$231 million over the 2004–2012 period.

SECTION 201: INCREASES THE AMOUNT OF FUNDING AUTHORIZED TO
STATE APPROVING AGENCIES

Background

Under chapter 36 of title 38, United States Code, State Approving Agencies (hereinafter “SAAs”) assist VA in ensuring the quality and integrity of educational institutions and job-training establishments where veterans, spouses and eligible children use VA educational benefits. Recent legislation has expanded the number and types of learning opportunities available to veterans and other beneficiaries, thereby increasing the workload of the SAAs.

In 2000, Congress enacted Public Law 106–419, which allows veterans education benefits to be used for the payment of licensing and certification tests required for certain professions. SAAs evaluate and approve entities offering these tests. Public Law 107–103, enacted in 2001, expanded the definition of “educational institution” for Montgomery GI Bill (hereinafter “MGIB”) payment eligibility to include certain private entities offering courses to advance trainees in high technology vocations. Public Law 107–103 also allowed the use of MGIB benefits to enroll in non-college degree programs offered by institutions of higher learning. SAAs are responsible for determining eligibility and approving such courses and programs. Under Public Law 107–103, SAAs also assumed greater veterans outreach responsibilities.

The last permanent increase in authorized funding for SAAs was in Public Law 103–446 for Fiscal Year 1995. Section 123 of Public Law 106–419 specified a temporary increase until the end of Fiscal Year 2002. Without Congressional action, the funding level will revert from \$14 million to \$13 million. SAA funding does not receive cost-of-living adjustments.

Committee Bill

Section 201 would increase the amount authorized for SAA funding to \$18 million through Fiscal Year 2005.

Cost: CBO estimates the cost will be \$5 million in 2003, and \$15 million over 2003–2005.

SECTION 202: TECHNICAL CORRECTIONS TO VARIOUS AUTHORITIES
RELATING TO VA EDUCATION ASSISTANCE BENEFITS

Committee Bill

This section clarifies and makes technical amendments to various education authorities.

Cost: CBO did not estimate any cost to be associated with section 202.

SECTION 301: AUTHORIZES VA TO CREATE A PILOT PROGRAM TO GUARANTEE ADJUSTABLE RATE AND HYBRID ADJUSTABLE RATE HOME MORTGAGE LOANS

Background

The VA Home Mortgage Loan Guarantee program, established in 1944 by Public Law 78–346, was meant to help veterans readjust to civilian life following service in World War II. As private mort-

gage lending practices have evolved, this VA guaranty program has not kept pace.

For more than a decade, adjustable rate mortgages (hereinafter “ARMs”) have been commonplace in the home loan market. These loans provide potential home buyers with greater flexibility by offering, in the early years of the loan, lower interest rates than conventional fixed-rate home mortgage loans. While there is a risk that interest rates may increase over the life of the loan, this risk is mitigated by generally accepted safeguards limiting the amount that the interest rate may increase per year and over the life of the loan.

More recently, hybrid adjustable rate mortgages have gained prominence within the home mortgage industry. This type of mortgage provides a fixed interest rate for the first 3 to 10 years of the loan, with annual interest rate adjustments thereafter. Much like conventional ARMs, hybrid ARMs offer lower interest rates during the early years of the loan.

Currently, VA is the only major mortgage market participant without authority to guarantee ARMs and hybrid ARMs. These options are available under the Federal Housing Administration’s loan insurance program. The Committee believes that a pilot program should be established to determine if these loan options would significantly benefit veterans seeking to purchase a home by creating greater flexibility in financing options.

Committee Bill

Section 301 of the Committee bill would authorize VA to establish a 3-year pilot program to guarantee hybrid ARMs and re-authorize a 1995 pilot program to guarantee conventional ARMs. This authority would begin in Fiscal Year 2003 and expire at the end of Fiscal Year 2005.

Cost: CBO estimates the subsidy cost of vendee loans and sales of vendee loans would be less than \$500,000 a year over the 2003–2005 period and about \$1 million a year over the 2006–2012 period.

SECTION 401: EXTENDS SOLDIERS AND SAILORS CIVIL RELIEF ACT PROTECTION TO NATIONAL GUARD MEMBERS CALLED TO ACTIVE DUTY UNDER TITLE 32, UNITED STATES CODE

Background

The Soldiers and Sailor’s Civil Relief Act of 1940 (hereinafter “SSCRA”), 50 U.S.C. §§ 501–90, applies to servicemembers on active service. It was enacted to promote and strengthen the national defense by suspending enforcement of certain civil liabilities of servicemembers on active duty, thus allowing them to devote their energies to the defense needs of the Nation. SSCRA provides certain rights and legal protections to servicemembers who have been called up for active duty. For example, interest on debts that preceded active duty, such as mortgages, is reduced to 6%. Servicemembers and their families cannot be evicted or have their home mortgages foreclosed upon during active duty and life insurance cannot be canceled, unless it specifically excludes coverage for military service. Certain legal judgments cannot be rendered

against absent servicemembers by default, and property cannot be sold to pay taxes during the servicemember's absence.

National Guard members may be activated under titles 10 or 32 of the U.S. Code. Title 10 authority is used for missions of national defense funded by the Federal government and commanded by the President and the Secretary of Defense. National Guard members called to duty under title 32 authority fall under the command of their State Governor. Section 502(f) of title 32 allows National Guard members to be called up "to perform training or other duty." These missions are funded by the Federal government, but the National Guard units are under the command of the governor. Only National Guard members who are called up under title 10 are protected by SSCRA.

Following the events of September 11, 2001, National Guard members were activated by States to guard airports at the request and expense of the Federal government. Under the direction of President George W. Bush, the Federal Aviation Administration asked the Department of Defense to coordinate the use of National Guard members at commercial airports nationwide for a period of four to six months. Clearly, these servicemembers were called up to serve a national mission, but their title 32 status prohibited them from receiving SSCRA protections.

S. 2514, the National Defense Authorization Act for Fiscal Year 2003, would specifically authorize the Governor of a State, upon a request by the head of a Federal law enforcement agency and with the concurrence of the Secretary of Defense, to order National Guard members of a State to perform full-time duty under 502(f) of title 32 for the purpose of carrying out homeland security activities.

Committee Bill

Section 401 of the Committee bill would expand SSCRA protections to include those National Guard members serving full-time, upon an order of the Governor of a State, by request of the head of a Federal law enforcement agency and with the concurrence of the Secretary of Defense, under 502(f) title 32 for homeland security purposes. Thus, SSCRA benefits will be provided to National Guard members called up under the specific authority contemplated under the Defense Authorization Act in response to the Nation's current focus on homeland security.

Cost: CBO estimates that this provision would have little or no net effect on federal direct spending and a negligible effect on State and local tax revenues. CBO was unable to estimate private sector costs associated with section 401.

SECTION 402: PROHIBITS CERTAIN ADDITIONAL BENEFITS FOR PERSONS COMMITTING CAPITAL CRIMES

Background

Under current law, veterans are eligible for a number of benefits by virtue of their service to the Nation. These benefits are generally provided without consideration of the veteran's conduct following his or her discharge from the Armed Services. However,

Congress has limited VA benefits available to veterans who die while fleeing prosecution or after being convicted of a capital crime.

Sections 6103, 6104, and 6105 of title 38, United States Code, state that a veteran who has been convicted of fraud, treason, or subversion forfeits all rights and claims to VA benefits or compensation. Congress extended this forfeiture of benefits in 1997 with the passage of Public Law 105–116. That statute prohibited persons who committed capital crimes from interment or memorialization in the National Cemetery System, Arlington National Cemetery, or in State cemeteries that receive VA grant funding. 38 U.S.C. §§ 2411 and 2408(d). However, this limitation was not extended to the provision of Presidential Certificates of Appreciation, burial flags and VA grave markers.

Committee Bill

Section 402 of the Committee bill, would prohibit the issuance of Presidential Certificates of Appreciation, flags, and memorial headstones or grave markers to veterans convicted or fleeing from prosecution of a State or Federal capital crime.

Cost: CBO estimates that this provision would have little or no net effect on direct spending.

SECTION 403: MODIFIES THE PROCEDURES FOR DISQUALIFICATION OF PERSONS COMMITTING CAPITAL CRIMES FOR INTERMENT OR MEMORIALIZATION IN NATIONAL CEMETERIES

Background

Section 2411 of title 38 of the United States Code prohibits interment or memorialization in a cemetery in the National Cemetery System or in Arlington National Cemetery of any person convicted of a capital crime. In addition, it prohibits interment or memorialization of persons found by the Secretary of Veterans Affairs or the Secretary of the Army to have committed capital crimes but who avoided conviction of the crime through flight or death preceding prosecution. 38 U.S.C. § 2411(b). In such cases, the VA Secretary or the Secretary of the Army must receive notice from the Attorney General of the United States, or the appropriate State official, of the Secretary's own finding before the prohibition shall apply.

This requirement is administratively unwieldy and unnecessarily redundant.

Committee Bill

Section 403 of the Committee bill would eliminate the requirement that the VA Secretary or the Secretary of the Army be notified of a finding by the Attorney General or the appropriate State official, in cases of persons who are found to have committed capital crimes but who avoided conviction of the crime through flight or death preceding prosecution.

Cost: CBO did not estimate any cost to be associated with section 403.

SECTION 501: STANDARD FOR REVERSAL BY COURT OF APPEALS FOR
VETERANS CLAIMS OF ERRONEOUS FINDING OF FACT BY BOARD OF
VETERANS' APPEALS

Background

Under 38 U.S.C. § 7261(a)(4), CAVC applies a “clearly erroneous” standard of review to findings of fact made by BVA. The “clearly erroneous” standard has been defined as requiring CAVC to uphold BVA findings of fact if the findings are supported by “a plausible basis in the record . . . even if [CAVC] might not have reached the same factual determinations.” *Wensch v. Principi*, 15 Vet. App. 362, 366–68 (2001) (affirming BVA’s denial of service connection where appellant provided substantial medical evidence in support of the claim).

The “clearly erroneous” standard was originally adopted in 1988 in the Veterans’ Judicial Review Act, Public Law 100–687, which established the current system of appellate adjudication for VA benefits cases. The statute was amended slightly by Public Law 101–237 in 1989, although the “clearly erroneous” standard of judicial review remained unchanged.

The “clearly erroneous” standard emerged as part of a compromise agreement after Senate approval of S. 11 and the House of Representatives approval of H.R. 5288. S. 11 directed CAVC to set aside a BVA factual finding only “when it is so utterly lacking in a rational evidentiary basis that a manifest and grievous injustice would result if the finding were not set aside.” H.R. 5288 precluded any CAVC review of BVA factual determinations “unless a constitutional issue is presented.” The House and Senate Committees on Veterans’ Affairs noted that the “clearly erroneous” standard adopted at conference is “markedly wider than the standard specified in the Senate bill.” 134 Cong. Rec. 31772 (1988).

More than a decade of experience with CAVC’s application of the “clearly erroneous” standard suggests that CAVC is not consistently performing thorough reviews of BVA findings and that the Congressional intent for a broad standard of review has often been narrowed in application. In the recent U.S. Court of Appeals for the Federal Circuit decision of *Hensley v. West*, 212 F.3d 1255 (Fed. Cir. 2000), the Federal Circuit vacated a CAVC decision that BVA had not erred in finding that a veteran’s claim was not well-grounded. The Federal Circuit rejected CAVC’s de novo review, which it characterized as a “dissecting [of] the factual record in minute detail.” *Id.* at 1264. The Federal Circuit emphasized that CAVC should perform only limited, deferential review of BVA decisions, and stated that BVA fact-finding “is entitled on review to substantial deference.” *Id.* at 1263. The Committee is concerned with the high level of deference that *Hensley* suggests CAVC should employ in its review of BVA findings.

The limited extent of CAVC’s review of BVA fact-finding is also evident in CAVC opinions. CAVC has described its level of review as “significantly deferential” and providing only “very narrow bases for the Court to overturn [BVA] . . . determinations.” *Butts v. Brown*, 5 Vet. App. 532, 544 (1993) (sustaining BVA’s rejection of a veteran’s claim of service connection); see also *Ammons v. Gober*, 2000 WL 1114147 (Vet. App. 2000); accord *Presley v. West*, 2000

WL 1114124 (Vet. App. 2000) (describing the “clearly erroneous” standard as “deferential” and upholding BVA’s denial of service connection). Although Ammons and Presley are both unpublished memorandum decisions, they exemplify the limited extent of the review CAVC is performing of BVA fact-finding. This undesirable situation may be the result of confusion concerning the “clearly erroneous” standard, which exists outside the rubric set forth in the Administrative Procedure Act (hereinafter “APA”). 5 U.S.C. § 5107(2)(e).

In their testimony at the Committee hearing on May 2, 2002, veterans service organizations (hereinafter “VSOs”) voiced frustration with the perceived lack of searching appellate review of BVA decisions. These groups argued that the large measure of deference that CAVC affords BVA fact-finding is detrimental to claimants and may result in failure to consider the “benefit of the doubt” rule in 38 U.S.C. § 5107(b). Section 5107(b) provides that VA must find for the claimant when, considering the evidence of record, there is an approximate balance of positive and negative evidence regarding any material issue including the ultimate merits of the claim. This “benefit of the doubt” standard is distinctly different from standards applicable to most adjudicatory proceedings, where claimants are required to produce a preponderance of evidence so that the weight of the evidence favoring their claims.

VA also testified at the Committee hearing on May 2, 2002, and opined that CAVC routinely considers whether BVA has applied the “benefit of the doubt” rule. However, VA suggested that if the Committee believed a less restrictive standard than “clear erroneous” was warranted that the substantial evidence standard of the APA was appropriate.

The Committee solicited comments from CAVC, the Federal Circuit, and the Administrative Office of the United States Courts. All declined to comment.

Committee Bill

Section 501 amends section 7261(a)(4) of title 38 to change the standard of review CAVC applies to BVA findings of fact from “clearly erroneous” to “unsupported by substantial evidence.” Section 502 also cross-references section 5107(b) in order to emphasize that the Secretary’s application of the “benefit of the doubt” to an appellant’s claim shall be considered by CAVC on appeal. The combination of these changes is intended to provide far more searching appellate review of BVA decisions, and thus give full force to the “benefit of the doubt” provision. The formula “unsupported by substantial evidence of record” is similar to the standard specified in the APA, and should be interpreted as such except that the interpretation must reflect the “benefit of the doubt” rule and thus provide a unique bias in favor of the claimant when the evidence is balanced.

Change in CAVC’s standard of review was first proposed in S. 2079. That bill would have changed the “clearly erroneous” standard by allowing CAVC reversal of BVA fact-finding whenever that finding was “not reasonably supported by a preponderance of the evidence.” The Committee modified this standard in order to provide a more familiar and judicially-recognized standard of appellate

review. Although the “clearly erroneous” standard has been interpreted by some to require an incrementally more searching review than “substantial evidence,” the “substantial evidence” standard is within the APA’s rubric.¹ Under the APA’s rubric for agency review, “substantial evidence” review is the least deferential review an appellate court may apply short of “de novo” review. By including specific reference to the “benefit of the doubt” rule in the amendment made by section 501 and moving to a standard that is recognized to provide for searching review, the Committee intends for section 501 to make it clear that CAVC is to provide a thorough review of VA benefits claims on appeal.

The Committee intends the “substantial evidence” standard to mandate a limited degree of deference to BVA fact-finding, with substantial deference given to findings of fact based on demeanor evidence, but to provide for searching judicial review of VA benefits claims encompassing the “benefit of the doubt” rule. The Committee believes this formula will achieve this goal.

Cost: CBO was unable to provide a cost estimate associated with section 501.

SECTION 502: REVIEW BY THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT OF CERTAIN DECISIONS OF LAW

Background

In their testimony at the Committee hearing on May 2, 2002, VSOs expressed concerns about the perceived inability of the U.S. Court of Appeals for the Federal Circuit to review certain CAVC decisions, specifically those involving questions of law not “with respect to the validity of any statute or regulation.” 38 U.S.C. § 7292(a). In the Independent Budget for Fiscal Year 2003, the veterans service organizations offered the “treating physician rule” as an example of judge-made law that is not derived from a specific regulation or statute. The “treating physician rule” refers to an evidentiary rule applied in Social Security cases where greater weight is given to the opinion of a physician who treated the claimant than the opinion of a non-treating expert. The veterans service organizations argued that there is no valid reason why this particular class of legal decisions should be exempt from judicial review, while legal decisions that involve interpretation of regulations or statutes receive appellate review. VA responded at a Committee hearing on May 2, 2002, asserting that the Federal Circuit has assumed the power to address such questions, specifically citing *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), where the Federal Circuit examined the validity of the “treating physician rule,” and implicitly found jurisdiction to determine the issue, but did not object to the provision. In sum, confusion has developed as to the extent of the Federal Circuit’s jurisdiction to hear appeals of CAVC decisions that are not clearly legal interpretations of statutes or regulations.

¹The “substantial evidence” formula has been judicially interpreted to be slightly *more* deferential than a traditional “clearly erroneous” standard. *Dickinson v. Zurko*, 527 U.S. 150, 162–163 (1999). However, the difference, if any, is slight: the Supreme Court stated in *Dickinson*: “[T]he difference is a subtle one—so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome.” *Id.*

Committee Bill

Section 502 responds to the concerns raised above by amending sections 7292(a) and (c) of title 38 to provide for appellate review of a CAVC decision on any rule of law. The purpose of this change is to clarify the jurisdiction of the Federal Circuit when reviewing CAVC decisions so as to include, unequivocally, CAVC decisions involving rulings of law not derived from a statute or regulation.

Cost: CBO was unable to provide a cost estimate associated with section 502.

SECTION 503: AUTHORITY OF COURT OF APPEALS FOR VETERANS CLAIMS TO AWARD FEES UNDER EQUAL ACCESS TO JUSTICE ACT TO NON-ATTORNEY PRACTITIONERS

Background

Currently, VA claimants who enlist the aid of attorneys and non-attorney practitioners supervised by attorneys, and who are successful in their claims and satisfy certain statutory requirements, can avail themselves of the benefits of the Equal Access to Justice Act (hereinafter “EAJA”), 28 U.S.C. § 2412(d). The EAJA shifts the burden of attorney fees from the citizen to the government in cases where the government’s litigation position is not substantially justified and the citizen does not exceed certain income and asset criteria. In the case of VA claims, claimants are often represented up to and through CAVC by qualified non-attorney representatives from the VSOs.

Based upon a long-standing limitation on paying attorney fees in veterans’ benefits cases, there had not been an active veterans’ bar until the enactment of the Veterans Judicial Review Act, Public Law 100–527. As a result, non-attorney volunteers and employees of veterans service organizations and other non-profit organizations began to represent veteran claimants before VA without direct supervision by an attorney. VA policy has never required that these representatives be attorneys, only that they be credentialed by a VA-recognized VSO. Currently, these non-attorney practitioners, who have been credentialed by VSOs and admitted to practice before CAVC, are not eligible for EAJA fees unless the EAJA application is signed by an attorney.

Committee Bill

Section 503 would allow VSOs to be awarded fees under the EAJA for representation provided to VA claimants by their employee non-attorney practitioners without the requirement that attorney sign the EAJA application.

Cost: CBO estimates that this provision would have no effect on mandatory spending and an insignificant effect on discretionary spending.

SECTION 504: CLARIFICATION OF RETROACTIVE APPLICATION OF PROVISIONS OF THE VETERANS CLAIMS ASSISTANCE ACT

Background

Public Law 106–475, the Veterans Claims Assistance Act of 2000 (hereinafter “VCAA”), restored and enhanced VA’s duty to assist

claimants in developing their claims for veterans benefits. VCAA requires VA to take very specific steps to assist claimants.

Although VA was already required to notify a claimant whose application was incomplete, under VCAA VA must also inform a claimant of any medical or lay evidence necessary to substantiate his or her claim. VCAA also specified that this notice must indicate which portion of the evidence is to be provided by the claimant and which portion VA will attempt to obtain on behalf of the claimant.

VCAA clarified VA's duty to assist claimants in developing evidence for their claims for benefits. Section 3 requires VA to make reasonable efforts to assist in obtaining evidence necessary to substantiate a claimant's eligibility for benefits, but allows VA to decide a claim without providing such assistance when no reasonable possibility exists that such assistance will aid in substantiating the claim. Relevant records must be obtained by VA if the claimant adequately identifies them to VA and authorizes them to be obtained. VA must inform the claimant whenever it is unable to obtain such records.

In the case of a veteran's claim for disability compensation, section 3 also requires that VA obtain the claimant's relevant service medical records and, if the claimant has furnished sufficient information, other relevant service records, existing records of relevant medical treatment or examination at VA health care facilities, and any other relevant records held by a Federal department or agency. VA must provide a medical examination or obtain a medical opinion when the evidence indicates that the claimant has a current disability or persistent or recurrent symptoms of disability, which may be associated with active military service, and when such an examination or opinion is necessary for VA to make a decision on the claim.

Two recent decisions by the U.S. Court of Appeals for the Federal Circuit have found that the provisions in section 3 of VCAA pertaining to VA's duty to assist cannot be applied retroactively to claims pending at the time of enactment. In *Dyment v. Principi*, 287 F.3d 1377 (Fed. Cir. 2002), the Federal Circuit stated: "The Supreme Court has held that a federal statute will not be given retroactive effect unless Congress has made its contrary intention clear. There is nothing in the VCAA to suggest that section 3(a) was intended to applied [sic] retroactively." In *Bernklau v. Principi*, 291 F.3d 795, 806 (2002), the Court again concluded: "[S]ection 3(a) of the VCAA does not apply retroactively to require that proceedings that were complete before the Department of Veterans Affairs and were on appeal to the Court of Appeals for Veterans Claims or this court be remanded for readjudication under the new statute."

Committee Bill

Section 504 clarifies Congress' intention that section 3 of VCAA, be applied retroactively to cases that were ongoing either at the various adjudication levels within VA or pending at the applicable Federal courts prior to the date of VCAA's enactment. In order to prevent the creation of a group of VA claimants who would have their claims decided without the benefit of the additional VA assistance under VCAA, section 505 of the Committee bill contains language that would provide for claims decided between the handing

down of the *Dymert* case and enactment of this provision to receive the full notice, assistance, and protection afforded under VCAA. VCAA was enacted to ensure that VA assist veterans in obtaining evidence that is vital to their claims. This provision clarifies that section 3 of the VCAA applies retroactively in order to ensure that those VA claimants whose claims are denied or dismissed during the period between April 24, 2002 and the date of enactment of this Act, are given the higher level of VA assistance required.

Cost: CBO estimates that this provision would have no effect on mandatory spending and an insignificant effect on discretionary spending.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 1, 2002.

Hon. JOHN D. ROCKEFELLER IV,
Chairman, Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2237, the Veterans Benefits Improvement Act of 2002.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Melissa E. Zimmerman.

Sincerely,

BARRY B. ANDERSON,
for DAN L. CRIPPEN, *Director.*

S. 2237 Veterans Benefits Improvement Act of 2002 (As ordered reported by the Senate Committee on Veterans' Affairs on June 6, 2002)

SUMMARY

S. 2237 would affect several veterans programs, including compensation, pensions, burial benefits, housing, and education. The bill contains provisions that would increase direct spending for certain veterans' compensation, housing, and education programs. It also contains a provision to extend income verification authorities that would reduce direct spending over the 2004–2012 period. On balance, CBO estimates that enacting S. 2237 would result in a net increase in direct spending totaling \$31 million in 2003, \$69 million over the 2003–2007 period, and \$49 million over the 2003–2012 period. The bill also contains one provision that could affect revenues, but we cannot estimate the amounts of any such effects. Because the bill would affect direct spending and revenues, pay-as-you-go procedures would apply.

In addition, CBO estimates that implementing S. 2237 would increase spending subject to appropriation by \$2 million in 2003 and \$4 million over the 2003–2007 period, assuming appropriation of the necessary amounts.

While S. 2237 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA), CBO estimates that the costs of complying with that mandate would not exceed

the threshold established in that act (\$58 million in 2002, adjusted annually for inflation).

The bill also contains a private-sector mandate as defined by UMRA that would extend coverage under the Soldiers and Sailors Civil Relief Act to certain National Guard members who are performing homeland security activities. While the number of National Guard members affected by this extension is currently quite small, CBO cannot estimate how many members might be called up to perform these duties in the future, and thus, we cannot determine the extent of the mandate. CBO expects that the cost could exceed the UMRA threshold for private-sector mandates (\$115 million in 2002, adjusted annually for inflation) if, in the future, a large number of National Guard members were called up by the states to perform homeland security activities.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of S. 2237 is shown in Table 1. The costs of this legislation fall within budget functions 700 (veterans benefits and services) and 750 (administration of justice).

Table 1.—Estimated Budgetary Impact of S. 2237
[By Fiscal Year, in Millions Dollars]

	2003	2004	2005	2006	2007
CHANGES IN DIRECT SPENDING ^{a, b}					
Estimated Budget Authority	31	27	25	—6	—8
Estimated Outlays	31	27	25	—6	—8
CHANGES IN SPENDING SUBJECT TO APPROPRIATION ^a					
Estimated Authorization Level	2	^c	^c	^c	^c
Estimated Outlays	2	^c	^c	^c	^c

^a In addition to the bill's impact on direct spending and discretionary spending, CBO estimates that S. 2237 could increase revenues into the Crime Victims Fund over the 2003–2012 period for settlement of court cases brought by the Department of Veterans Affairs (VA) against veterans who sign over their rights to compensation to another party. CBO cannot provide a specific estimate, however, given the uncertainty surrounding the number of cases that might be brought by VA, when any such cases might be resolved, or the size of any penalties that a court might impose.

^b A provision in S. 2237 would direct VA to presume that, for veterans who served on active duty during certain time periods and in certain military occupations, hearing loss and tinnitus are service-connected disabilities for the purposes of compensation. CBO cannot estimate the cost of any increase in compensation payments that may result from enacting this provision because we cannot estimate the number of veterans who might be eligible for compensation benefits until the National Academy of Sciences completes a study and VA writes the necessary regulations. It is possible, however, that the costs of this provision could be significant depending on how many veterans could gain eligibility for compensation under the new regulations.

^c Less than \$500,000.

BASIS OF ESTIMATE

Direct Spending and Revenues

The legislation would affect direct spending in veterans' programs for compensation, pensions, burial benefits, housing, and education. Table 2 summarizes those effects, and the individual provisions that would affect direct spending are described below.

Table 2.—Estimated Direct Spending Under S. 2237
[By Fiscal Year, Outlays in Millions of Dollars]

	2002	2003	2004	2005	2006	2007
COMPENSATION, PENSIONS, AND BURIAL BENEFITS						
Spending Under Current Law	24,406	25,678	26,910	30,115	28,674	27,013
Proposed Changes	0	4	—1	—4	—7	—9
Spending Under S. 2237	24,406	25,682	26,909	30,111	28,667	27,004

Table 2.—Estimated Direct Spending Under S. 2237—Continued
[By Fiscal Year, Outlays in Millions of Dollars]

	2002	2003	2004	2005	2006	2007
COMPENSATION, PENSIONS, AND BURIAL BENEFITS						
HOUSING						
Spending Under Current Law	–1,041	299	317	326	335	341
Proposed Changes	0	22	23	24	1	1
Spending Under S. 2237	–1,041	321	340	350	336	342
VETERANS' READJUSTMENT BENEFITS						
Spending Under Current Law	1,959	2,276	2,544	2,715	2,875	3,036
Proposed Changes	0	5	5	5	0	0
Spending Under S. 2237	1,959	2,281	2,549	2,720	2,875	3,036

COMPENSATION, PENSIONS, AND BURIAL BENEFITS. Several sections of the bill would affect spending for veterans' disability compensation, pensions, and burial benefits (see Table 3). Together, those provisions would increase spending by \$4 million in 2003, but would lower spending by \$17 million over the 2003–2007 period and by \$42 million over the 2003–2012 period.

COMPENSATION FOR HEARING LOSS IN PAIRED ORGANS. For veterans with hearing loss, current law requires that both ears must be diagnosed as totally deaf for hearing loss that was not caused by military service to be rated as service-connected for the purposes of disability compensation. Section 102 would modify this requirement so that any degree of hearing loss in one ear that was not caused by military service would be rated as service-connected if any degree of hearing loss in the other ear was rated as service-connected.

Table 3. Estimated Changes in Direct Spending for Compensation, Pensions, and Burial Benefits Under S. 2237

[By Fiscal Year, Outlays in Millions of Dollars]

Description of Provision	2003	2004	2005	2006	2007
Compensation for Hearing Loss in Paired Organs	2	7	11	15	18
Income Verification Extension	0	–9	–16	–23	–28
Medal of Honor Special Pension	2	1	1	1	1
Mastectomy Benefits	a	a	a	a	a
Denial of Burial Benefits	a	a	a	a	a
Retroactive Claims Assistance	a	a	a	a	a
Total Changes in Compensation, Pensions, and Burial Benefits ^b	4	–1	–4	–7	–9

^a Less than \$500,000.

^b A provision in S. 2237 would direct VA to presume that, for veterans who served on active duty during certain time periods and in certain military occupations, hearing loss and tinnitus are service-connected disabilities for the purposes of compensation. CBO cannot estimate the cost of any increase in compensation payments that may result from enacting this provision because we cannot estimate the number of veterans who might be eligible for compensation benefits until the National Academy of Sciences completes a study and VA writes the necessary regulations. It is possible, however, that the costs of this provision could be significant depending on how many veterans could gain eligibility for compensation under the new regulations.

Based on data provided by the Department of Veterans Affairs (VA), CBO estimates that enacting this provision would increase the disability compensation paid to eligible veterans by about \$100 a month on average. CBO estimates that, over the 2003–2007 period, about 6,000 veterans who are already receiving disability compensation for hearing loss would apply for a reevaluation of their rating and receive an increase in their monthly disability payment.

33,000 veterans who would receive ratings for hearing loss for the first time each year.

Considering expected mortality and new disability claims for hearing loss, CBO estimates that about 13,000 veterans would be receiving the increase in compensation in 2007 and about 19,000 veterans would receive it in 2012. After accounting for cost-of-living adjustments (COLAs) over the 2003–2012 period, CBO estimates that section 102 would increase direct spending by about \$2 million in 2003, \$53 million over the 2003–2007 period, and \$178 million over the 2003–2012 period. (CBO estimates that implementing this section also would increase spending subject to appropriation by about \$2 million over the 2003–2007 period, assuming appropriation of the estimated amounts. CBO’s estimate of those outlays is discussed below under the heading of “Spending Subject to Appropriation.”)

Income Verification Extension. Section 106 would extend authorities under current law that allow VA to acquire information on income reported to the Internal Revenue Service (IRS) to verify income reported by recipients of VA pension benefits. The authorization allowing the IRS to provide income information to VA will expire on September 30, 2003, while the authorization allowing VA to acquire the information will expire on September 30, 2008. Section 106 would extend these authorities through September 30, 2011, for both VA and the IRS. Because current law allows VA and the IRS to conduct income verification through the end of fiscal year 2003, CBO estimates that enacting this provision would provide no additional cost savings for that year.

CBO estimates that, based on recent experience, VA will save (under current law) approximately \$7 million in pension benefit overpayments from verifying veterans’ incomes in 2003. Using that information, CBO estimates that enacting section 106 would result in direct spending savings of \$76 million over the 2004–2007 period and \$231 million over the 2004–2012 period.

Medal of Honor Special Pension. Section 104 would increase the special pension paid to most Medal of Honor recipients from \$600 to \$1,000 a month and, beginning on December 1, 2003, increase the pension each year by the same cost-of-living adjustment payable to Social Security recipients. This provision also would direct VA to pay a lump-sum payment to compensate each recipient of the special pension for the time period between the recognized act of valor and the first special pension payment. The amount of the payment would be calculated using the rate of compensation that was in effect during the applicable time period. According to VA and the Congressional Medal of Honor Society, there are 145 Medal of Honor recipients that would receive the special pension increase and COLAs under this provision, and 139 recipients who would be eligible for the lump-sum payments.

CBO estimates that this provision would cost roughly \$2 million in 2003, the year the lump-sum payments would be made. In each subsequent year, CBO estimates the provision would cost less than \$1 million a year. In total, CBO estimates the provision would cost \$8 million over the 2003–2012 period.

Mastectomy Benefits. Veterans who have suffered certain service-connected anatomical losses (e.g., the loss of a hand, a foot, etc.)

are eligible to receive a special compensation payment of \$80 a month in addition to any other disability compensation they receive. Under current law, to be entitled to this special compensation for the loss of breast tissue caused by breast cancer that was diagnosed during military service, a woman must have lost an entire breast as the result of a mastectomy. Section 101 would change this standard by providing the special compensation to women who have lost half or more of the breast tissue as a result of a mastectomy for breast cancer that was diagnosed during military service.

Based on data provided by VA, CBO estimates that less than 150 women would be entitled to the special compensation in 2003 under this provision, with about 10 new cases occurring each year after that. CBO estimates that the additional cost to provide special payments to the affected women would be less than \$300,000 a year and total about \$2 million over the 2003–2012 period.

Presumption of Service Connection for Hearing Loss. Section 103 would direct VA to presume that, for veterans who served on active duty during certain time periods and in certain military occupations, hearing loss and tinnitus are service-connected disabilities for the purposes of compensation. VA would be authorized to issue regulations specifying the qualifying time periods and occupations, and to subsequently provide monthly disability compensation payments to qualifying veterans based on a study to be conducted by the National Academy of Sciences (NAS) in 2003. Because of the time needed to conduct the study and draft the regulations, CBO estimates that VA would not increase disability compensation benefits to eligible veterans under this provision until 2004.

CBO cannot estimate the cost of any increase in compensation payments that may result from enacting this provision because we cannot estimate the number of veterans who might be eligible for compensation benefits until the NAS completes the study and VA writes the regulations. It is possible, however, that the costs of this provision could be significant depending on how many veterans could gain eligibility for compensation under the new regulations. (CBO estimates that implementing this section also would increase spending subject to appropriation by \$1 million over the 2003–2007 period, assuming appropriation of the estimated amounts. CBO's estimate of those outlays is discussed below under the heading of "Spending Subject to Appropriation.")

Prohibition on Assigning Benefits. Section 105 would prohibit beneficiaries from signing over their rights to receive veterans' compensation, pension, or dependency and indemnity compensation benefits to another person. Any person, including the beneficiary, who participates in an arrangement to reassign benefits would be subject to a fine, imprisonment, or both penalties. This provision also would direct VA to conduct a five-year outreach program to inform veterans about the prohibition on assigning benefits.

Because those prosecuted and convicted under section 105 could be subject to criminal fines, the government might collect additional fines if this provision is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund, and later spent. CBO cannot estimate the impact on receipts because we cannot determine how many alleged violators VA might file suit against, wheth-

er the agency would win such legal action, or the size of any penalties that a court might impose. (CBO estimates that implementing this section also would increase spending subject to appropriation by a negligible amount over the 2003–2007 period, assuming appropriation of the estimated amounts. CBO’s estimate of those outlays is discussed below under the heading of “Spending Subject to Appropriation.”)

Standard of Reversal and Scope of Authority. Under current law, the Court of Appeals for Veterans Claims (CAVC) must determine that any finding of material fact in a veteran’s appeal of a VA decision is “clearly erroneous” to disregard it in reaching a decision. Section 502 would direct the CAVC to apply a less restrictive standard to evaluate findings of material fact that are adverse to the claimant. It also would allow the CAVC to reverse a finding under this standard.

Based on information provided by the Board of Veterans Appeals, CBO expects that enacting this provision could make it more likely that the CAVC would set aside VA findings of fact that are adverse to the claimant which could result in more cases being remanded to VA or decided in favor of the claimant. CBO cannot estimate the cost of enacting this provision, however, because we cannot predict the outcome of such litigation before the CAVC.

Review by Court of Appeals for the Federal Circuit. Section 503 would expand the jurisdiction of the U.S. Court of Appeals for the Federal Circuit (CAFC) to allow the court to review a “rule of law.” A rule of law is a legal issue that does not involve a statute, regulation, or constitutional provision, but that may involve judicially created legal principles. According to VA, enacting section 503 would likely cause more cases to fall under CAFC jurisdiction. Because we cannot predict the outcome of litigation brought before the CAFC, however, CBO cannot estimate any potential increase in direct spending that may result from a change in the number of decisions being reversed in favor of claimants.

Other Provisions. CBO estimates that the following provisions would have an insignificant budgetary impact on direct spending:

- **DENIAL OF BURIAL BENEFITS.** Current law authorizes VA to provide a Presidential Memorial Certificate, a flag to drape the casket, and a headstone or grave marker for veterans who were discharged or separated from active duty under conditions other than dishonorable to memorialize their death. Section 402 would authorize VA to deny these benefits to veterans who have been convicted of a capital crime and sentenced to death or life imprisonment.

CBO estimates that enacting this section would have an insignificant effect on the federal budget. Using data from the U.S. Bureau of Justice Statistics and the Federal Bureau of Prisons, CBO estimates that the prohibition would authorize VA to deny these benefits to only a small number of veterans each year. Based on information from the National Cemetery Administration, the cost savings would be less than \$150 a person, CBO estimates.

- **RETROACTIVE CLAIMS ASSISTANCE.** The Veterans Claims Assistance Act of 2000 (VCAA), enacted on November 9, 2000, directed VA to provide assistance to veterans who file claims

for VA benefits. VA interpreted the VCAA as being retroactive for certain cases that were open on or after the VCAA was enacted; however, in 2002, the CAVC ruled that the VCAA does not apply retroactively for any case.

Section 505 would amend the law to specify that the VCAA applies retroactively for all cases. It also would direct VA to assist the veterans whose claims were affected by the court's ruling by helping them document their claim for reconsideration by the department. This provision would only apply to certain cases that were pending before a court on November 9, 2000, and had been denied after April 24, 2002. According to information provided by VA, less than five cases would be eligible to be reopened. While we cannot predict the outcome of these appeals, CBO estimates that because of the very small number of cases, the cost of enacting this provision would be negligible.

Housing. Section 301 would authorize VA to guarantee adjustable rate mortgages (ARMs) through 2005, including a relatively new mortgage product, known as a hybrid ARM. These mortgages carry an initial fixed interest rate for longer than one year and then are subject to interest rate adjustments. The hybrid ARMs authorized under the bill would carry an initial fixed interest rate for a period of not less than three years of the mortgage term.

Based on information from VA and the Federal Housing Administration, CBO estimates that about 10,000 new ARMs worth roughly \$1.6 billion would be guaranteed each year under this new authority and that these loans would be 20 percent larger and 20 percent more likely to enter into default than fixed-rate mortgages. (CBO estimates that fixed-rate mortgages have a default rate of 10.5 percent and that these ARMs would have a default rate of 12.4 percent.) CBO estimates that the net subsidy cost, as defined by the Federal Credit Reform Act, of providing guarantees for these ARMs would average \$23 million over the 2003–2005 period. That estimate reflects gross costs averaging about \$27 million a year, offset by savings of about \$4 million a year for having fewer guarantees of fixed-rate mortgages. (Under the Federal Credit Reform Act, the subsidy cost of a new guaranteed loan is the net present value of estimated costs—at the time the loan is disbursed—of expected payments by the government to cover defaults and delinquencies, and other payments, net of expected payments to the government including any loan fees, penalties, and recoveries.)

When a guaranteed loan defaults and goes into foreclosure, VA often acquires the property and issues a new direct loan (called a vendee loan) when the property is sold. VA sells most vendee loans on the secondary mortgage market and guarantees their timely repayment. Based on information from VA, CBO estimates the subsidy cost of vendee loans and sales of vendee loans would be less than \$500,000 a year over the 2003–2005 period and about \$1 million a year over the 2006–2012 period.

Veterans' Readjustment Benefits. Section 201 would increase the amount available to state approving agencies by \$5 million each year in 2003, 2004, and 2005. CBO expects this change would increase direct spending by \$15 million over the 2003–2005 period.

SPENDING SUBJECT TO APPROPRIATION

CBO estimates that implementing S. 2237 would increase discretionary spending for VA's general operating expenses by \$2 million in 2003 and \$4 million over the 2003–2007 period, assuming that the necessary amounts are appropriated.

Compensation for Hearing Loss in Paired Organs. For veterans with hearing loss, current law requires that both ears must be diagnosed as totally deaf for hearing loss that was not caused by military service to be rated as service-connected for the purposes of disability compensation. Section 102 would modify this requirement so that any hearing loss in one ear that was not caused by military service would be rated as service-connected if any degree of hearing loss in the other ear was rated as service-connected. CBO estimates that enacting this provision would cause certain veterans with hearing loss to seek a reevaluation of their rating for disability compensation from VA. CBO estimates that, as a result of implementing this provision, about 4,000 veterans would submit applications for a reevaluation of their rating in 2003 on top of VA's routine workload for rating applications. CBO also estimates that in 2003, under this provision, about 500 veterans would apply for disability compensation for hearing loss that would otherwise not apply. Processing these additional applications would cost less than \$1 million in 2003 and about \$2 million over the 2004–2007 period, CBO estimates.

Presumption of Service Connection for Hearing Loss. Section 103 would direct the Secretary of Veterans Affairs to enter into an agreement with the NAS or another appropriate scientific organization to conduct a study to determine the military occupations and time periods, if any, under which servicemembers may have been exposed to conditions likely to cause or contribute to hearing loss or tinnitus. Based on information provided by NAS, CBO estimates that it would cost about \$1 million in 2003 to perform this study.

Review by Court of Appeals for the Federal Circuit. Section 503 would expand the jurisdiction of the U.S. Court of Appeals for the Federal Circuit to allow the court to review a "rule of law." According to VA, enacting section 503 would likely increase the number of cases brought before the court. CBO cannot estimate the costs associated with this larger workload because we have no basis on which to predict the number of veterans that might file an appeal under this provision.

Standard of Reversal and Scope of Authority. Section 502 would direct the CAVC to apply a less restrictive standard to evaluate findings of material fact that are adverse to the claimant and allow the court to reverse a finding under this new standard. Based on information provided by the Board of Veterans Appeals, CBO expects that more cases could be remanded to VA or decided in favor of the claimant than under current law. Thus, CBO believes that CAVC actions could, under section 502, increase VA's discretionary costs for processing and paying claims. CBO cannot estimate the likelihood or magnitude of such effects, however, because there is no basis to predict the outcome of such litigation before the CAVC.

Other Provisions. CBO estimates that implementing the following provisions would cost less than \$500,000 a year:

- **FEES FOR NON-ATTORNEY PRACTITIONERS.** Current law authorizes the CAVC to award fees and expenses to attorneys who successfully represent clients before the court. Section 504 would authorize the CAVC to award these fees and expenses to individuals who are not attorneys as well. According to VA, there are less than 35 of these practitioners who present a small number of cases before the court each year. Thus, CBO estimates that the cost of implementing this provision would be insignificant.

- **RETROACTIVE REQUIREMENT TO ASSIST CLAIMANTS.** Section 505, described above under the heading of “Direct Spending,” would increase administrative costs for the CAVC because it would expand the docket for that court. However, CBO estimates that the costs of implementing this provision would be negligible because the court’s docket would grow by less than five cases.

- **PROHIBITION ON ASSIGNING BENEFITS.** Section 105 would prohibit beneficiaries from signing over their rights to receive veterans’ compensation, pension, or dependency and indemnity compensation benefits to another person. Any person, including the beneficiary, who participates in an arrangement to reassign benefits would be subject to a fine, imprisonment, or both penalties. This provision also would direct VA to conduct a five-year outreach program to inform veterans about the prohibition on assigning benefits. According to VA, the department would carry out this outreach program by adding information about the prohibition into its regular mailings to veterans. CBO estimates that the cost of updating these documents would be negligible.

PAY-AS-YOU-GO CONSIDERATIONS

The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays that are subject to pay-as-you-go procedures are shown in Table 4. For the purposes of enforcing pay-as-you-go procedures, only the effects through fiscal year 2006 are counted.

Table 4.—Estimated Impact of S. 2237 on Direct Spending and Receipts
[By Fiscal Year, in Millions of Dollars]

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Changes in outlays ^a	0	31	27	25	–6	–8	–11	–13	–14	–14	32
Changes in receipts	0	^b	^b	^b	^b	^b	^b	^b	^b	^b	^b

^a A provision in S. 2237 would direct the Department of Veterans Affairs to presume that, for veterans who served on active duty during certain time periods and in certain military occupations, hearing loss and tinnitus are service-connected disabilities for the purposes of compensation. CBO cannot estimate the cost of any increase in compensation payments that may result from enacting this provision because we cannot estimate the number of veterans who might be eligible for compensation benefits until the National Academy of Sciences completes a study and VA writes the necessary regulations. It is possible, however, that the costs of this provision could be significant depending on how many veterans could gain eligibility for compensation under the new regulations.

^b CBO estimates that S. 2237 could increase revenues into the Crime Victims Fund over the 2003–2012 period for settlement of court cases brought by the Department of Veterans Affairs against veterans who sign over their rights to compensation to another party. CBO cannot provide a specific estimate, however, given the uncertainty surrounding the number of cases that might be brought by VA, when any such cases might be resolved, or the size of any penalties that a court might impose.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

S. 2237 contains an intergovernmental mandate as defined in UMRA because it would extend coverage under the Soldiers and

Sailors Civil Relief Act (SSCRA) to National Guard members who are called up by the states but are performing homeland security activities upon the request of a federal law enforcement agency. This coverage would extend to those National Guard members certain protections including the right to maintain a single state of residence for purposes of state and local personal and income taxes, and the right to request a deferral in the payment of certain state and local taxes and fees.

While CBO has no basis for estimating the number of National Guard members that would ultimately be eligible for such protections, based on information from the Federation of Tax Administrators, we expect that relatively few would take advantage of these protections and that the per capita cost would be small. We thus estimate that any lost tax revenues to state and local governments are unlikely to exceed the threshold for intergovernmental mandates (\$58 million in 2002, adjusted annually for inflation).

The remaining provisions of S. 2237 contain no intergovernmental mandates and would impose no costs on state, local, or tribal governments.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

The bill contains a private-sector mandate as defined by UMRA. Section 401 would extend coverage under SSCRA to National Guard members who are called up by the states but are performing homeland security activities upon the request of a federal agency and with the agreement of the Department of Defense.

SSCRA requires creditors to reduce the interest rate on servicemembers' obligations to 6 percent when such obligations predate active-duty service, unless the creditor convinces a court that a member's financial situation has not been materially affected by reason of military service. SSCRA also allows the courts, when they find that active-duty service has adversely affected a member's financial condition, to temporarily stay certain civil proceedings, such as evictions, foreclosures, and repossessions.

Since the number of affected personnel, while currently small, fluctuates, CBO cannot determine the extent of the mandate. The per capita mandate would be small, but the cost could exceed the UMRA threshold if, in the future, a large number of National Guard members fell into this category. UMRA's threshold for private-sector mandates is \$115 million in 2002 (and is adjusted annually for inflation).

PREVIOUS CBO ESTIMATE

On June 10, 2002, CBO transmitted a cost estimate for H.R. 4085, the Veterans' and Survivors' Benefits Expansion Act of 2002, as ordered reported by the House Committee on Veterans' Affairs on May 9, 2002. Section 6 of H.R. 4085, which increases funds for state approving agencies, is effectively identical to section 201 of H.R. 2237. CBO estimates both sections would cost \$15 million over the 2003–2007 period.

Estimate prepared by: Federal Costs: (Compensation, Pensions, Burial Benefits, and Court of Appeals for Veterans Claims) Melissa E. Zimmerman; (Education Benefits) Sarah T. Jennings; (Housing)

Sunita D'Monte. Impact on State, Local, and Tribal Governments: Theresa Gullo. Impact on the Private Sector: Sally S. Maxwell.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE COMMITTEE BILL, AS
REPORTED

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 38, UNITED STATES CODE

* * * * *

§ 112. Presidential memorial certificate program

* * * * *

(c) *A certificate may not be furnished under the program under subsection (a) on behalf of a deceased person described in section 2411(b) of this title.*

* * * * *

§ 1113. Presumptions rebuttable

(a) Where there is affirmative evidence to the contrary, or evidence to establish that an intercurrent injury or disease which is a recognized cause of any of the diseases or disabilities within the purview of section 1112, 1116, 1117, [or 1118] *1118, or 1119* of this title, has been suffered between the date of separation from service and the onset of any such diseases or disabilities, or the disability is due to the veteran's own willful misconduct, service-connection pursuant to section 1112, 1116, [or 1118] *1118, or 1119* of this title, or payments of compensation pursuant to section 1117 of this title, will not be in order.

(b) Nothing in section 1112, 1116, 1117, [or 1118] *1118, or 1119* of this title, subsection (a) of this section, or section 5 of Public Law 98-542 (38 U.S.C. 1154 note) shall be construed to prevent the granting of service-connection for any disease or disorder otherwise shown by sound judgment to have been incurred in or aggravated by active military, naval, or air service.

§ 1114. Rates of wartime disability compensation

For the purposes of section 1110 of this title—

* * * * *

(k) if the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of one or more creative organs, or one foot, or one hand, or both buttocks, or blindness of one eye, having only light perception, has suffered complete organic aphonia with constant inability to communicate by speech, or deafness of both ears, having ab-

sence of air and bone conduction, or, in the case of a woman veteran, has suffered the anatomical loss of *half or more of the tissue* of one or both breasts (including loss by mastectomy), the rate of compensation therefor shall be \$80 per month for each such loss or loss of use independent of any other compensation provided in subsections (a) through (j) or subsection (s) of this section but in no event to exceed \$2,691 per month; and in the event the veteran has suffered one or more of the disabilities heretofore specified in this subsection, in addition to the requirement for any of the rates specified in subsections (l) through (n) of this section, the rate of compensation shall be increased by \$80 per month for each such loss or loss of use, but in no event to exceed \$3,775 per month;

* * * * *

CHAPTER 11—COMPENSATION FOR SERVICE- CONNECTED DISABILITY OR DEATH

SUBCHAPTER I—GENERAL

Sec.

	*	*	*	*	*	*	*
1119.	<i>Presumption of service connection for hearing loss associated with particular military occupational specialties.</i>						
	*	*	*	*	*	*	*

§ 1119. *Presumption of service connection for hearing loss associated with particular military occupational specialties*

(a) For purposes of section 1110 of this title, and subject to section 1113 of this title, hearing loss, tinnitus, or both of a veteran who served on active military, naval, or air service during a period specified by the Secretary under subsection (b)(1) and was assigned during the period of such service to a military occupational specialty or equivalent described in subsection (b)(2) shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such hearing loss or tinnitus, as the case may be, during the period of such service.

(b)(1) A period referred to in subsection (a) is a period, if any, that the Secretary determines in regulations prescribed under this section—

(A) during which audiometric measures were consistently not adequate to assess individual hearing threshold shift; or

(B) with respect to service in a military occupational specialty or equivalent described in paragraph (2), during which hearing conservation measures to prevent individual hearing threshold shift were unavailable or provided insufficient protection for members assigned to such military occupational specialty or equivalent.

(2) A military occupational specialty or equivalent referred to in subsection (a) is a military occupational specialty or equivalent, if any, that the Secretary determines in regulations prescribed under this section in which individuals assigned to such military occupational specialty or equivalent in the active military, naval, or air service are or were likely to be exposed to a sufficiently high level

of acoustic trauma as to result in permanent hearing loss, tinnitus, or both.

(c) In making determinations for purposes of subsection (b), the Secretary shall take into account the report submitted to the Secretary by the National Academy of Sciences under section 103(c) of the Veterans Benefits Improvement Act of 2002.

(d)(1) Not later than 60 days after the date on which the Secretary receives the report referred to in subsection (c), the Secretary shall determine whether or not a presumption of service connection for hearing loss, tinnitus, or both is warranted for the hearing loss, tinnitus, or both, as the case may be, of individuals assigned to each military occupational specialty or equivalent, and during each period, identified by the National Academy of Sciences in such report as a military occupational specialty or equivalent in which individuals are or were likely to be exposed during such period to a sufficiently high level of acoustic trauma as to result in permanent hearing loss, tinnitus, or both to a degree which would be compensable as a service-connected disability under the laws administered by the Secretary.

(2) If the Secretary determines under paragraph (1) that a presumption of service connection is warranted with respect to any military occupational specialty or equivalent described in that paragraph and hearing loss, tinnitus, or both, the Secretary shall, not later than 60 days after the date of the determination, issue proposed regulations setting forth the Secretary's determination.

(3) If the Secretary determines under paragraph (1) that a presumption of service connection is not warranted with respect to any military occupational specialty or equivalent described in that paragraph and hearing loss, tinnitus, or both, the Secretary shall, not later than 60 days after the date of the determination—

(A) publish the determination in the Federal Register; and

(B) submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives a report on the determination, including a justification for the determination.

(e) Any regulations issued under subsection (d)(2) shall take effect on the date provided for in such regulations. No benefit may be paid under this section for any month that begins before that date.

* * * * *

§ 1160. Special consideration for certain cases of loss of paired organs or extremities

(a) Where a veteran has suffered—

* * * * *

(3) **[total]** deafness in one ear as a result of service-connected disability and **[total]** deafness in the other ear as the result of non-service-connected disability not the result of the veteran's own willful misconduct;

* * * * *

§ 1562. Special provisions relating to pension

(a) The Secretary shall pay monthly to each person whose name has been entered on the Army, Navy, Air Force, and Coast Guard

Medal of Honor roll, and a copy of whose certificate has been delivered to the Secretary under subsection (c) of section 1561 of this title, a special pension at the rate of **[\$600]** *\$1,000, as adjusted from time to time under subsection (e),* beginning as of the date of application therefor under section 1560 of this title.

* * * * *

(e) Effective as of December 1 each year, the Secretary shall increase the amount of monthly special pension payable under subsection (a) as of November 30 of such year by 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 of such year as a result of a determination under section 215(i) of that Act (42 U.S.C. 415(i)).

* * * * *

§ 2301. Flags

* * * * *

(g) A flag may not be furnished under this section on behalf of a deceased person described in section 2411(b) of this title.

[(g)] *(h)(1) The Secretary may not procure any flag for the purposes of this section that is not wholly produced in the United States.*

* * * * *

§ 2306. Headstones, markers, and burial receptacles

* * * * *

(g)(1) A headstone or marker may not be furnished under subsection (a) for the unmarked grave of a person described in section 2411(b) of this title.

(2) A memorial headstone or marker may not be furnished under subsection (b) for the purpose of commemorating a person described in section 2411(b) of this title.

(3) A marker may not be furnished under subsection (d) for the grave of a person described in section 2411(b) of this title.

* * * * *

§ 2411. Prohibition against interment or memorialization in the National Cemetery System or Arlington National Cemetery of persons committing Federal or State capital crimes

(a)(1) * * *

* * * * *

(2) [The prohibition] *In the case of a person described in subsection (b)(1) or (b)(2), the prohibition under paragraph (1) shall not apply unless written notice of a conviction [or finding under subsection (b)] referred to in subsection (b)(1) or (b)(2), as the case may be, is received by the appropriate Federal official before such official approves an application for the interment or memorialization of such person. Such written notice shall be furnished to such official by the Attorney General, in the case of a Federal capital crime,*

or by an appropriate State official, in the case of a State capital crime.

* * * * *

§ 3011. Basic educational assistance entitlement for service on active duty

(a) Except as provided in subsection (c) of this section, each individual—

(1) who—

* * * * *

(C) as of December 31, 1989, was eligible for educational assistance benefits under chapter 34 of this title and—

* * * * *

(ii) reenlists or reenters on a period of active duty [on or] after October 19, 1984; and

* * * * *

CHAPTER 30—ALL-VOLUNTEER FORCE EDUCATIONAL ASSISTANCE PROGRAM

SUBCHAPTER I—PURPOSES; DEFINITIONS

Sec.

* * * * *

[3014A. Accelerated payment of basic educational assistance for education leading to employment in high technology industry.]

3014A. Accelerated payment of basic educational assistance for education leading to employment in high technology occupation in high technology industry.

* * * * *

[§ 3014A. Accelerated payment of basic educational assistance for education leading to employment in high technology industry]

§ 3014A. Accelerated payment of basic educational assistance for education leading to employment in high technology occupation in high technology industry

* * * * *

(b) An individual described in this subsection is an individual who is—

(1) enrolled in an approved program of education that leads to [employment in a high technology industry] *employment in a high technology occupation in a high technology industry* (as determined pursuant to regulations prescribed by the Secretary); and

* * * * *

§ 3035. Allocation of administration and of program costs

* * * * *

(b)(1) Except to the extent provided in [paragraphs (2) and (3) of this subsection,] *paragraphs (2), (3), and (4)*, payments for entitlement earned under subchapter II of this chapter shall be made

from funds appropriated to, or otherwise available to, the Department of Veterans Affairs for the payment of readjustment benefits and from transfers from the Post-Vietnam Era Veterans Education Account pursuant to section 3232(b)(2)(B) of this title.

* * * * *

(4) *Payments attributable to the increased usage of benefits as a result of transfers of entitlement to basic educational assistance under section 3020 of this title shall be made from the Department of Defense Education Benefits Fund established under section 2006 of title 10 or from appropriations made to the Department of Transportation, as appropriate.*

* * * * *

§ 3232. Duration; limitations

* * * * *

(c)(1) Subject to paragraph (3), the amount of educational assistance payable under this chapter for **[a licensing]** *a particular licensing* or certification test described in section 3452(b) of this title is the lesser of \$2,000 or the fee charged for the test.

* * * * *

§ 3512. Periods of eligibility

(a) * * *

* * * * *

(3) if the Secretary first finds that the parent from whom eligibility is derived has a service-connected total disability permanent in nature, or if the death of the parent from whom eligibility is derived occurs, after the eligible person's eighteenth birthday but before the person's twenty-sixth birthday, then (unless **[paragraph (4)]** *paragraph (4) or (5)* applies) such period shall end 8 years after the date that is elected by that person to be the beginning date of entitlement under section 3511 of this title or subchapter V of this chapter if—

* * * * *

(4) *if the person otherwise eligible under paragraph (3) fails to elect a beginning date of entitlement in accordance with that paragraph, the beginning date of the person's entitlement shall be the date of the Secretary's decision that the parent has a service-connected total disability permanent in nature, or that the parent's death was service-connected, whichever is applicable;*

[(4)] (5) if the person serves on duty with the Armed Forces as an eligible person after the person's eighteenth birthday but before the person's twenty-sixth birthday, then such period shall end 8 years after the person's first discharge or release from such duty with the Armed Forces (excluding from such 8 years all periods during which the eligible person served on active duty before August 1, 1962, pursuant to (A) a call or order thereto issued to the person as a Reserve after July 30, 1961, or (B) an extension of enlistment, appointment, or period of duty with the Armed Forces pursuant to section 2 of Public

Law 87–117); however, in no event shall such period be extended beyond the person’s thirty-first birthday by reason of this paragraph;

[(5)] (6) if the person becomes eligible by reason of the provisions of section 3501(a)(1)(A)(iii) of this title after the person’s eighteenth birthday but before the person’s twenty-sixth birthday, then (unless [paragraph (4)] *paragraph (5)* applies) such period shall end eight years after the date on which the person becomes eligible by reason of such provisions, but in no event shall such period be extended beyond the person’s thirty-first birthday by reason of this clause;

[(6)] (7)(A) if such person is enrolled in an educational institution regularly operated on the quarter or semester system and such period ends during a quarter or semester, such period shall be extended to the end of the quarter or semester; or

* * * * *

[(7)] (8) if the person is pursuing a preparatory course described in section 3002(3)(B) of this title, such period may begin on the date that is the first day of such course pursuit, notwithstanding that such date may be before the person’s eighteenth birthday, except that in no case may such person be afforded educational assistance under this chapter for pursuit of secondary schooling unless such course pursuit would otherwise be authorized under this subsection.

* * * * *

§ 3674. Reimbursement of expenses

(a)(1) * * *

(4) The total amount made available under this section for any fiscal year may not exceed \$13,000,000 or, for each of [fiscal years 2001 and 2002, \$14,000,000] *fiscal years 2003, 2004, and 2005, \$18,000,000*. For any fiscal year in which the total amount that would be made available under this section would exceed the amount applicable to that fiscal year under the preceding sentence except for the provisions of this paragraph, the Secretary shall provide that each agency shall receive the same percentage of the amount applicable to that fiscal year under the preceding sentence as the agency would have received of the total amount that would have been made available without the limitation of this paragraph.

* * * * *

§ 3689. Approval requirements for licensing and certification testing

* * * * *

(b) REQUIREMENTS FOR TESTS.—(1) Subject to paragraph (2), a licensing or certification test is approved for purposes of this section only if—

* * * * *

(B) the Secretary determines that the test is generally accepted, in accordance with relevant government, business, or industry standards, employment policies, or hiring practices, *and with such other standards as the Secretary may prescribe,*

as attesting to a level of knowledge or skill required to qualify to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession.

* * * * *

(c) REQUIREMENTS FOR ORGANIZATIONS OR ENTITIES OFFERING TESTS.—(1) Each organization or entity that is not an entity of the United States, a State, or political subdivision of a State, that offers a licensing or certification test for which payment may be made under chapter 30, 32, 34, or 35 of this title and that meets the following requirements, shall be approved by the Secretary to offer such test:

(A) The organization or entity certifies to the Secretary that the licensing or certification test offered by the organization or entity is generally accepted, in accordance with relevant government, business, or industry standards, employment policies, or hiring practices, *and with such other standards as the Secretary may prescribe*, as attesting to a level of knowledge or skill required to qualify to enter into, maintain, or advance in employment in a predetermined and identified vocation or profession.

(B) The organization or entity is licensed, chartered, or incorporated in a State and has offered **the test** *such test, or a test to certify or license in a similar or related occupation*, for a minimum of two years before the date on which the organization or entity first submits to the Secretary an application for approval under this section.

* * * * *

§ 3707. Adjustable rate mortgages

(a) The Secretary shall carry out a demonstration project under this section **during fiscal years 1993, 1994, and 1995** *through fiscal year 2005* for the purpose of guaranteeing loans in a manner similar to the manner in which the Secretary of Housing and Urban Development insures adjustable rate mortgages under section 251 of the National Housing Act.

(b) **Interest rate adjustment provisions** *Except as provided in subsection (c)(1), interest rate adjustment provisions of a mortgage guaranteed under this section shall—*

(c) *Adjustable rate mortgages that are guaranteed under this section shall include adjustable rate mortgages (commonly referred to as “hybrid adjustable rate mortgages”) having interest rate adjustment provisions that—*

- (1) *are not subject to subsection (b)(1);*
- (2) *specify an initial rate of interest that is fixed for a period of not less than the first three years of the mortgage term;*
- (3) *provide for an initial adjustment in the rate of interest by the mortgagee at the end of the period described in paragraph (2); and*
- (4) *comply in such initial adjustment, and any subsequent adjustment, with paragraphs (2) through (4) of subsection (b).*

[(c)] (d) The Secretary shall promulgate underwriting standards for loans guaranteed under this section, taking into account—

* * * * *

[(d)] (e) The Secretary shall require that the mortgagee make available to the mortgagor, at the time of loan application, a written explanation of the features of the adjustable rate mortgage, including a hypothetical payment schedule that displays the maximum potential increases in monthly payments to the mortgagor over the first five years of the mortgage term.

* * * * *

§ 5301. Nonassignability and exempt status of benefits

(a)(1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

(2) For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving a benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(3)(A) *For purposes of this subsection, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, whether by payment from the beneficiary to such other person, deposit into an account from which such other person may make withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is prohibited.*

(B) Any agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited.

(C)(i) Any person who enters into an agreement that is prohibited under subparagraph (A), or an agreement or arrangement that is prohibited under subparagraph (B), shall be fined under title 18, imprisoned for not more than one year, or both.

(ii) This subparagraph does not apply to a beneficiary with respect to compensation, pension, or dependency and indemnity com-

pensation to which the beneficiary is entitled under a law administered by the Secretary.

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§ 5317. Use of income information from other agencies: notice and verification

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(g) The authority of the Secretary to obtain information from the Secretary of the Treasury or the Secretary of Health and Human Services under section 6103(l)(7)(D)(viii) of the Internal Revenue Code of 1986 expires on **September 30, 2008** *September 30, 2011*.

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§ 7261. Scope of review

(a) In any action brought under **[this chapter]** *section 7252(a) of this title*, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

* * * * *

(4) in the case of a finding of material fact made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside *or reverse* such finding **[if the finding is clearly erroneous]** *if the finding is adverse to the claimant and the Court determines that the finding is unsupported by substantial evidence of record, taking into account the Secretary's application of section 5107(b) of this title.*

* * * * *

(e)(1) *In making a determination on a finding of material fact under subsection (a)(4), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title.*

(2) *A determination on a finding of material fact under subsection (a)(4) shall specify the evidence or material on which the Court relied in making such determination.*

* * * * *

§ 7292. Review by United States Court of Appeals for the Federal Circuit

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of *a decision of the Court on a rule of law or of any statute or regulation* (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals for United States district courts.

* * * * *

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of a *decision of the Court of Appeals for Veterans Claims on a rule of law or of any statute or regulation or any interpretation thereof* brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of [such court] *the Court of Appeals for the Federal Circuit* shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

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SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940

OCT. 17, 1940, CH. 888, 54 STAT. 1178

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Sec. 511. Definitions

(1) The term “person in the military service”, the term “persons in military service”, and the term “persons in the military service of the United States”, as used in this Act (sections 501 to 593 of this Appendix), shall include the following persons and not other: All members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, the Coast Guard, [and all] *all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy, and shall include service of the National Guard, pursuant to a call or order to duty by the Governor of a State, upon the request of a Federal law enforcement agency and with the concurrence of the Secretary of Defense, to perform full-time duty under section 502(f) of title 32, United States Code, for purposes of carrying out homeland security activities.* The term “military service”, as used in this Act (said sections), shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms “active service” or “active duty” shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

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TITLE 26—UNITED STATES CODE

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Sec. 6103. Confidentiality and disclosure of returns and return information

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(1) Disclosure of returns and return information for purposes other than tax administration

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(7) DISCLOSURE UPON REQUEST OF INFORMATION RELATING TO TERRORIST ACTIVITIES, ETC.—

(E) TERMINATION.—No disclosure may be made under this paragraph after **December 31, 2003** *September 30, 2011*.

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