

NLWJC - Kagan

DPC - Box 054 - Folder-005

Tobacco-Veterans

in Commerce Veterans

Tob-veterans

AMENDMENT NO.

CAL. NO.

Purpose: To ensure funding for Veterans' Administration treatment of tobacco-related illnesses, and for other purposes.

IN THE SENATE OF THE UNITED STATES_ 105 th Cong., 2 d Sess.

S. 1415, 105 th Congress, 2 d Session

June __, 1998

() Referred to the Committee on _____ and ordered to be printed

() Ordered to lie on the table and to be printed

Intended to be proposed by Mr. _____

Viz:

On page 136, line 5, before ``and" insert ``veterans,".

On page 138, line 9, before ``and" insert ``veterans,".

On page 196, after line 24, insert the following:

(E) Veterans' Administration tobacco-related healthcare costs. Of the total amounts allocated to this account, not less than \$300,000,000 per year are to be used to carry out Veterans' Administration tobacco-related healthcare activities under section 1301.

On page 198, between lines 19 and 20, insert the following:

(F) Veterans' Administration tobacco-related healthcare costs. Of the total amounts allocated to this account, not less than \$300,000,000 per year are to be used to carry out Veterans' Administration tobacco-related healthcare activities under section 1301.

On page 403, beginning with line 3, strike through line 19 on page 407, and insert the following:

SEC. 1301. VETERANS' ADMINISTRATION TOBACCO-RELATED HEALTHCARE AND COMPENSATION PROGRAMS.

The Secretary of the Veterans' Administration shall use amounts allocated under section 451(b)(2)(E) and (c)(2)(F) to carry out tobacco-related healthcare activities under chapter 17 of title 38, United States Code, and to provide other appropriate assistance for tobacco-related veterans' health care illnesses and disability under such title.

violent crime, and terrorism. Through this partnership, these technologies and capabilities can be applied to Federal, State and local law enforcement needs and activities. This partnership will directly benefit local and State law enforcement agencies.

- **CNN Financial News:** On May 20, Secretary Peña will discuss electricity restructuring and competition in an interview with CNN Financial News.
- **Nuclear Material Protection Control and Accounting (MPC&A):** On May 25, DOE and Congressional representatives will attend commissioning ceremonies to mark the completion of MPC&A systems at several sites in Russia. The ceremonies will showcase an important milestone in DOE's efforts to direct-use nuclear material in Russia, the NIS, and the Baltics.

DEPARTMENT OF EDUCATION

- **Teacher Professional Development Awards:** On May 18, Secretary Riley will present awards to the recipients of the Second National Award for Model Professional Development. The program recognizes a variety of schools and districts with professional development programs for pre-K through 12 grade educators that have led to increased student achievement.
- **Religious Expression in Schools:** On May 27, Secretary Riley is tentatively scheduled to release revisions to DOEd's guidance on religious expression in public schools. The revisions are intended to make the guidance consistent with the Supreme Court's decision overturning the Religious Freedom Restoration Act.
- **Blue Ribbon Schools:** Next week, DOEd will notify members of Congress of the selection of 1998 Blue Ribbon Schools, and will announce the awards on May 22.
- **Hemispheric Education Ministers:** On June 4-5, Secretary Riley will participate in a meeting with Western Hemisphere education ministers in Washington D.C.
- **America Reads:** As of April 30, over 1,000 colleges and universities have signed on to the America Reads Challenge.

VETERANS AFFAIRS

- **Tobacco Estimates:** Official estimates of VA annual health care costs for treatment of tobacco-related conditions were cleared by OMB, and are being provided to Congress this week. Estimated costs amounted to \$3.6 billion for FY '97. The estimate also projects the possibility of an additional \$2.9 billion over five years for veterans who would become newly service-connected if VA's proposed tobacco legislation is not passed.

Cabinet Weekly Report, May 9 - 15, page 10

Issue - When and why is this going up? It's going to provide for an amendment to provide funds to vets in these amounts. Can we / Should we stop it? Etc



THE DIRECTOR

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

January 21, 1998

MEMORANDUM FOR THE PRESIDENT

FROM: Franklin D. Raines

SUBJECT: **Veterans Education and Training Benefits Initiatives**

This is to inform you of new veterans programs included in the FY 1999 Budget utilizing tobacco offsets. As you know, the budget will again propose legislation to reverse a recent Department of Veterans Affairs (VA) legal opinion awarding VA disability benefits for smoking-related disabilities acquired after service, but due to nicotine dependence begun in the military. This proposal will be seen as "taking away" benefits, so we included in the FY 1999 budget \$87 million (\$0.4 billion over 5 years) in discretionary funds for a new veterans smoking-cessation program.

However, the total benefits that would be eliminated by the legislation are much larger. Deputy Secretary Guber met with me and my staff to stress the Department's strong feeling that the veterans groups and the Congress would consider the smoking-cessation program too little compensation for what will clearly be a difficult vote. Without something much more substantial, VA expects that Congress will not pass the legislation and Veterans Service Organizations will criticize the Administration for proposing it.

To help address this concern, we have raised our estimate of the PAYGO savings from \$15.5 billion to \$17 billion and, using the resulting PAYGO credits as offset, have included an additional \$1.5 billion of resources over 5 years for expanded veterans benefits. **We worked with VA to develop a combination of education and training programs that would benefit veterans, would fit into your overall agenda, and would likely be supported by Congress and veterans organizations.** Our proposals:

- Provide a \$100 million increase each year (\$500 million over 5 years) to VA readjustment benefits. These funds will be transferred to programs in the Department of Labor that provide assistance to veterans, with a special focus on veterans of the Vietnam era and their special training and retraining needs. Since almost 30% of adult males are veterans, this would particularly help older displaced workers. It would double the current DOL program. This will add new resources to our efforts to make worker training and retraining universally available.

- ▶ Provide a one-time increase of 20% for education benefits to veterans, dependents, and survivors under the Montgomery GI Bill (\$1.0 billion over 5 years). An increase in this program has been a major objective both of the VA and the veterans organizations, and it will be very well-received. This is consistent with our effort to make college universally available.

After discussion with Erskine Bowles, John Hille, Gene Sperling, and Sylvia Mathews, we included these proposals in the FY 1999 budget. VA will strongly support these proposals, but none of us expect the proposals by themselves to be sufficient to achieve passage of the VA tobacco legislation. However, it will assist Rep. Stump in his efforts to enact the legislation. VA believes that some veterans organizations may support our legislation and criticism from the others will be sharply reduced.

- **Girl Power Campaign:** In early October, The Girl Power! Campaign developed by SAMHSA's Center for Substance Abuse Prevention (CSAP) received a number of awards from the National Health Information Resource Center, which serves as a health information clearinghouse for professionals and managers in the field. The Girl Power! Campaign was recognized as one of the nation's best in producing consumer health information programs and materials.
- **New Pediatric Drugs:** On October 27, FDA and the American Academy of Pediatrics co-sponsored a public meeting on the proposal to provide physicians with more information on using new drugs for children. FDA requested comments on the proposal, which was announced by you on August 13, and would require pediatric-use data for any medicine which may offer improved treatment for children over existing remedies.
- **Undergraduate Medical Education:** On October 24, HRSA announced a \$6.5 million contract award to the American Association of Colleges of Osteopathic Medicine to develop curricula, in collaboration with U.S. schools of medicine and osteopathy, for preparing physicians to practice in health care systems, including managed care, integrated network service systems and non-traditional service sites. As many as eight medical schools will be selected to help develop the Undergraduate Medical Education for the 21st century (UME-21).

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

- **Homeownership Rate:** On October 23, the Vice President joined the Secretary in announcing that the U.S. homeownership rate for the third quarter of this year reached 66 percent, the highest level in America's history. A record 67.6 million American families now own their own homes, including record numbers of African American, Hispanic, and female-headed households.
- **MI Loan Guarantees:** On October 28, Secretary Cuomo announced that HUD will make available \$60 million in new loan guarantees to Detroit, MI, to help Mayor Archer finance the demolition of 7,000 - 8,000 abandoned residential and commercial buildings.

VETERANS AFFAIRS

- **Tobacco Legislation:** The Chairman of the House Veterans' Affairs Committee (HVAC) has indicated that he may be able to get the HVAC to support the Administration's legislative proposal to prohibit the payment of VA compensation for diseases related to smoking. Some veterans service organizations have expressed their opinion that the cost of VA health care to treat smoking-related diseases should be borne by the tobacco companies. On October 29, Acting Secretary Goyer and Director Raines will meet with the Ranking Minority Member of the Committee to discuss the impact on the federal budget for compensating veterans for smoking related diseases.

Bruce -
Did you
see?
Elena

Tobacco - Veterans

DRAFT--NOT FOR RELEASE--DRAFT--NOT FOR RELEASE--DRAFT--NOT FOR RE

[Letter from Director Raines to House and Senate Leadership and Vets Committee chairmen and ranking]

Dear :

As Veterans Day approaches, the Administration requests that the Congress enact a temporary stopgap measure aimed at preserving the effective delivery of compensation to our Nation's veterans.

Earlier this year, the Department of Veterans Affairs (VA) General Counsel issued an opinion interpreting current law to require the Department to compensate veterans for smoking-related illnesses which result from nicotine dependence incurred during military service. This interpretation of law requires the Department to process these compensation claims, which it began doing in July of this year.

Processing these nicotine-dependence claims is expected to put a severe strain on the veterans compensation system. The time to process any compensation claim could more than double -- from 113 days to 241 days. The total number of backlogged claims in the system would grow from less than a half million (currently) to over 2 million in FY 2000. The VA estimates that as many as 540,000 claims for tobacco benefits could be filed in the next year, a 23% increase in workload. This backlog and increase in waiting times affect all veterans who file compensation claims with the VA, regardless of the nature of the claim.

Since veterans with service-connected disabilities receive priority VA medical care, processing these tobacco-related claims could push lower-priority low-income veterans out of the VA medical care system unless new resources are added to the system.

Therefore, the Administration requests that the Congress enact -- before adjourning -- the attached provision to authorize the VA to temporarily defer these claims until the next Congress, thereby giving Members an adequate opportunity to consider: how to cope with the severe strain on the veterans compensation program; whether and how to include veterans' tobacco-related claims and health care costs in tobacco industry legislation; and how to pay for the estimated billions of dollars in liability associated with these claims, within the context of the Bipartisan Budget Agreement

I have discussed this request with the Acting Secretary of Veterans Affairs, who shares our concern. We would appreciate your timely consideration of the attached measure to protect the effective delivery of services to veterans, while the Congress addresses these important and complex policy issues.

DRAFT

Viz: At the end of the bill, add the following new section:

SEC. ____ MORATORIUM ON PROCESSING CERTAIN CLAIMS; ADVANCE NOTIFICATION OF CONGRESS.

(a) Moratorium period – Notwithstanding any other provision of law, the Secretary of Veterans Affairs may, for 90 days from the date of enactment of this section, hold in abeyance and not process applications for disability compensation or dependency and indemnity compensation under title 38, United States Code, predicated on disabilities or deaths claimed to be the result of injury or disease attributable to nicotine dependence resulting from the use of tobacco products by a veteran during the veteran's service.

(b) Nothing in subsection (a) shall be construed as precluding the processing of applications for benefits based upon disability or death from a disease or injury which is otherwise shown to have been incurred or aggravated in active military, naval or air service or which became manifest to the requisite degree of disability during any applicable presumptive period specified in sections 1116 or 1117 of title 38, United States Code.

(c) Subsection (a) shall apply only with respect to claims filed on or after the date of enactment of this section.

(d) Upon the expiration of the 90-day period referenced in subsection (a), the Secretary of Veterans Affairs may extend such moratorium period for an additional 90 days, and may issue additional 90-day extensions, *provided that* no such extension is effective beyond February 28, 1999, and *provided further that* the Secretary provides a twenty-one day advance written notification of the impending extension to the Committees on Veterans Affairs of the House of Representatives and of the Senate.

(E) Claims filed prior to the date of enactment of this section will be adjudicated in accordance with the law in effect on that date. Claims filed on or after the date of enactment of this section and prior to expiration of the moratorium period referenced in subsection (a) and any extensions pursuant to subsection (d), will be adjudicated in accordance with the law in effect on the date of such expiration, unless subsection (a) is repealed prior to such expiration, in which case such claims will be adjudicated under the law in effect on the date the repeal becomes effective.



George.Phillips @ justice.usdoj.gov
08/26/97 02:20:00 PM

Record Type: Record

To: elena kagan

cc:

Subject: VA Letter for Review

Elena:

I got a call from the VA Counsel's office on whether I thought the letter they proposed to send to Senator John Kerry in response to a letter he received from Thomas M. Sobol asking that the VA "seriously consider taking action on behalf of the federal government against the United State tobacco industry," was okay.

I faxed over a copy of their draft letter last week. In their draft response the VA responds, "The Department of Justice advises us the tobacco industry's potential liability for Federal health-care cost is being considered as part of the Administration's overall review of the proposed settlement of the states' cases against the industry."

I thought the draft was okay, but wanted to make sure you agreed.

Let me know,
Thanks, George
514-5713

(I am interested to see if the Internet e-mail works. If it does, I promise not to e-mail you too much!)



U.S. Department of Justice
Office of the Assistant Attorney General
Civil Division

George Jordan Phillips
Counselor to the Assistant Attorney General

950 Pennsylvania Ave., N.W., Room 3143
Washington, D.C. 20530
(202) 514-5713 Fax (202) 514-8071

August 21, 1997

VIA FACSIMILE
(202) 456-2878

Ms. Elena Kagan
Deputy Assistant to the President for Domestic Policy
Old Executive Office Building, Room 218
Washington, D.C. 20501

RE: Draft Letter from VA

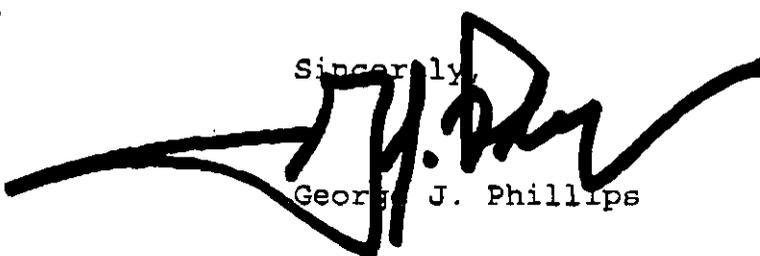
Dear Ms. Kagan:

Enclosed is a draft letter from the VA to Senator John Kerry in response to a letter he received from Thomas M. Sobol asking that the VA "seriously consider taking action on behalf of the federal government against the United State tobacco industry."

in their draft response the VA responds, "The Department of Justice advises us the tobacco industry's potential liability for Federal health-care cost is being considered as part of the Administration's overall review of the proposed settlement of the states' cases against the industry."

I wanted to see if you thought that was appropriate before I responded to the VA.

Sincerely,



George J. Phillips

Enclosures
cc: James Castello

D R A F T

The Honorable John F. Kerry
One Bowdoin Square
Boston, MA 02114

Dear Senator Kerry:

This is in response to your inquiry on behalf of Mr. Thomas M. Sobol, who wrote you about the Department of Veterans Affairs' (VA's) legislative proposal regarding tobacco-related disabilities. Mr. Sobol also urges VA to consider a lawsuit against the tobacco industry.

The legislation to which Mr. Sobol refers would prohibit service connection of a death or disability on the basis that it resulted from injury or disease attributable to use of tobacco products. We believe this proposed amendment is consistent with provisions of the 1990 budget reconciliation act which prohibited compensation for disabilities which are the result of veterans' abuse of alcohol and drugs. This was fiscally responsible action which enhanced the integrity of our compensation program, and our proposal regarding tobacco use is offered in that same spirit. Our proposal would not preclude establishing service connection for disability or death from a disease or injury which became manifest or was aggravated during active service or became manifest to the requisite degree of disability during any applicable presumptive period specified in 38 U.S.C. §§ 1112 or 1116. This amendment would apply only to claims filed after the date of its enactment.

There is no legal authority for VA to recoup the costs of compensating veterans and their survivors for tobacco-related illnesses from third parties. However, the Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. §§ 2651-53, would authorize the United States to pursue tort litigation against tobacco companies to recover the reasonable costs of providing medical care to veterans with such illnesses that are not service connected. Initiating such an action would be an enormous undertaking, and any such suit would be subject to all of the legal defenses the tobacco companies have raised in actions by private parties. The Department of Justice advises us the tobacco industry's potential liability for Federal health-care costs is being considered as part of the Administration's overall review of the proposed settlement of the states' cases against the industry.

2.

The Honorable John F. Kerry

I hope the foregoing assists you in responding to your constituent.

Sincerely yours,

Mary Lou Keener
General Counsel

United States Senate

WASHINGTON, DC 20510

One Bowdoin Square
Tenth Floor
Boston, MA 02114
(617) 565-8519

July 31, 1997

Mr. Philip R. Mayo
Acting Chief, Senate Congressional Liaison
Department of Veterans Affairs
637-A Hart Senate Office Building
U.S. Senate
Washington, D.C. 20510

Dear Mr. Mayo:

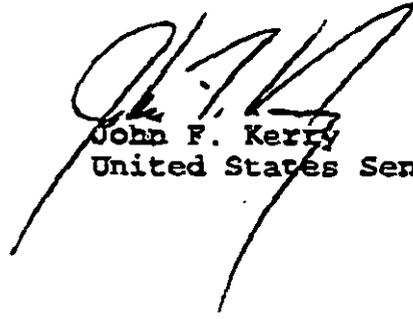
I am forwarding to you a copy of a letter from Thomas M. Sobel concerning tobacco and service connected disabilities.

Because of the desire of this office to be responsive to all inquiries and communications, your consideration of the attached is requested.

I would appreciate your looking into this matter, keeping me informed of all developments, and sending copies of your findings and views to Christopher Wyman, in care of my office.

Thank you for your cooperation in this matter.

Sincerely,



John F. Kerry
United States Senator

JFK/crw

08/21/97 12:01 FAX 202 514 8071

AUG-15-87 08:00 FROM: VA GENERAL COUNSEL PSG II ID: 2022736404

RUDNICK
FREED &
GESMER

CW

THOMAS M. SOBOL, ESQUIRE

July 22, 1997

Senator Edward M. Kennedy
SR-315 Russell Senate Office Bldg.
Washington, D.C. 20510-2101

Senator Frank R. Lautenberg
SH-506 Hart Senate Office Bldg.
Washington, D.C. 20510-3002

Senator John F. Kerry
SR-421 Russell Senate Office Bldg.
Washington, D.C. 20510-2102

Congressman Robert Filner
330 Cannon House Office Bldg.
Washington, D.C. 20515-0550

Congressman John Joseph Moakley
235 Cannon House Office Bldg.
Washington, D.C. 20515-2109

Congressman Martin T. Meehan
2434 Rayburn House Office Bldg.
Washington, D.C. 20515-2105

Congressman Henry A. Waxman
2204 Rayburn House Office Bldg.
Washington, D.C. 20515-0529

Congressman Joseph P. Kennedy, II
2242 Rayburn House Office Bldg.
Washington, D.C. 20515-2108

RE: National Tobacco Liability Issues Relating to Veterans

Dear Distinguished Sirs:

This letter is to seek your assistance on the important smoking and health issues that face American veterans at this critical point in time. As you are aware, Congress is currently addressing the proposed tobacco settlement of Attorney General and other litigation which, if effectuated, will work a sweeping change in how business is undertaken by the tobacco industry in this country. In stark contrast, not only has the Department of Veterans' Affairs failed to take action itself against the tobacco industry but, at the same time, is seeking to cut away benefits from American veterans for smoking-related illnesses. This public policy contradiction has its most devastating effects on veterans who are homeless.

By way of background, I am a member of the Boston law firm of Brown, Rudnick, Freed & Gesmer, P.C. I currently serve as a Special Assistant Attorney General for the Commonwealth of Massachusetts in connection with its litigation against the United States tobacco industry. For years, I have been the general counsel for the New England Shelter for Homeless Veterans, otherwise known as the Vietnam Veterans Workshop, Inc., located at 17 Court Street, Boston, Massachusetts (the "Veterans' Shelter"). I recently was appointed Chairman of the Board of the

A Partnership of
Professional Corporations
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Hartford : Providence

7/22/97
Page 2

Veterans' Shelter, which is the largest private multi-service shelter for American veterans who are homeless in this country. The views expressed in this letter are mine, although obviously these experiences inform my judgment.

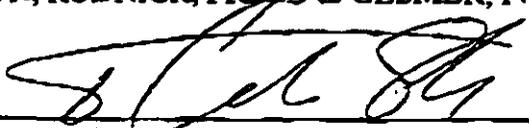
Last Friday, I wrote Acting Secretary Gober of the Department of Veterans' Affairs. Enclosed please find that letter. As you can see, I have asked Secretary Gober to reconsider the position recently taken by the VA to bar compensation claims for smoking-related illnesses suffered by American veterans. I also asked that he seriously consider taking action on behalf of the federal government against the United States tobacco industry.

I seek an audience for these concerns and, therefore, ask that your office get involved. If you think the issues raised in my letter to Acting Secretary Gober have merit, and wish to continue a discussion on them, please contact me as soon as you can.

Thank you very much for your time and consideration.

Very truly yours,

BROWN, RUDNICK, FREED & GESMER, P.C.

By: 
Thomas M. Sobol

TMS/rsg
Enc.

**BROWN
RUDNICK
FREED &
GESMER**

July 17, 1997

VIA FEDERAL EXPRESS AND FACSIMILE

The Honorable Hershel W. Gober
Deputy Secretary of Veterans Affairs
Acting Secretary of Veterans Administration
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Re: National Tobacco Liability Issues Relating to Veterans

Dear Acting Secretary Gober:

This letter is to address the important tobacco issue that relates to American veterans, and particularly American veterans who are homeless. This letter also urges you to help cause federal litigation to be initiated to recover from the tobacco industry the costs of treating the many veterans suffering and dying from smoking-related illness.

I am the general counsel for the New England Shelter for Homeless Veterans, otherwise known as the Vietnam Veterans Workshop, Inc., located at 17 Court Street, Boston (the Veterans' Shelter). I recently was appointed Chairman of the Board of the Veterans' Shelter, which is the largest private multi-service shelter for American veterans who are homeless in this country. I am also a member of the Boston law firm of Brown, Rudnick, Freed & Gesmer, P.C. and currently serve as a Special Assistant Attorney General for the Commonwealth of Massachusetts in connection with its litigation against the United States tobacco industry. The views expressed in this letter are mine, although obviously these experiences inform my judgments.

Candidly, federal regulators and policy makers have largely ignored the United States veteran on the issues of smoking and health. This national lack of support has resulted in enormous human cost and suffering to American veterans, and these problems are felt most particularly by the disenfranchised veteran who is homeless. From public reports, it appears the current national tobacco debate in Congress is not adequately addressing this federal issue.

A FRENCH & N
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MORNING / P. M. SERVICE



Some background facts are in order.

Veterans and Smoking.

Large numbers of veterans in our society are addicted to cigarette smoking. A large body of literature strongly indicates that the prevalence of cigarette smoking among United States enlisted personnel greatly exceeds that of the general population, although this disparity (particularly with respect to the higher educated in the military) has been decreasing. Studies comparing the prevalence of cigarette smoking between veterans and the general population reach different conclusions, but generally indicate that veterans smoke more than the general population. These latter studies apparently do not adjust for socioeconomic status. It is suspected that among the lower socioeconomic classes of veterans (particularly veterans who are homeless or others likely to rely exclusively on the VA for medical services), smoking is substantially higher than in the general population.

The veteran population faces the most immediate threat of suffering the consequences of tobacco-related illnesses. Through the 1970s and 1980s, our Veterans Administration hospitals treated our dying World War II veterans who suffered smoking-related illnesses such as lung cancer, heart disease, and emphysema. As members of the Vietnam-era veteran population reach their late forties and fifties, they have now been smoking for about thirty years. Without immediate measures to assist that population to decrease substantially the incidence of cigarette smoking, no significant reduction in tobacco-related diseases for this population will be made. As a result, our federally-funded hospitals will increasingly have to take on the burden of treating thousands of dying Vietnam-era veterans for illnesses contracted from their cigarette smoking. Of course, hardest hit within the veteran population will be the homeless, whose drastically high incidence of cigarette smoking will result in widespread death and disease.

Federal Government Complicity.

The federal government must shoulder some of the responsibility for this widespread problem. The United States Government, through the Department of Defense, has likely been the largest distributor of cigarettes during the last 50 years. At least in times of combat, if not other occasions, the United States military purchases cigarettes for direct distribution to military personnel. For decades, the United States military has also purchased cigarettes for resale to enlisted personnel and veterans at numerous exchanges on military bases. The Department of Defense and its predecessor defense components have fostered and maintained tobacco addiction throughout the veteran population, and particularly within the economically marginal population.

Fraud Upon the United States Government.

While the military bears some responsibility for fostering the problem of tobacco addiction, it also is in equal measure a victim. The United States military is probably the single largest purchaser of cigarettes in history. On the basis of information currently available to me, it appears that the United States military purchases hundreds of millions of dollars' worth of



cigarettes annually, and appears to purchase close to, or exceed, one billion dollars worth of cigarettes annually.

As you are aware, 40 states have now brought suit against the United States tobacco industry in connection with allegedly fraudulent activities regarding the withholding from the American public of information about the health hazards of cigarette smoking and nicotine addictiveness. There is no reason to think that the United States government has any less significant claim against the tobacco industry. After all, it is wholly reasonable to assume that the United States military or others may have changed military procurement practices in very important ways had they known decades earlier the information that was then available to the tobacco industry itself, especially information relating to the manipulation of nicotine levels in order to maintain pharmacologic addiction in the user.

Judicial Relief Available to the United States Government.

The United States government has two separate and strong avenues to obtain judicial relief against the United States tobacco industry. My office, in conjunction with the Office of the Attorney General of Massachusetts, has studied each of these claims we are prepared to share fully our findings and conclusions.

First, the False Claims Act, 31 U.S.C. §3729, sets forth a civil liability scheme for persons who make "false claims" against the United States government or a member of the armed forces of the United States. Any person who commits a wide range of fraudulent conduct in connection with federal procurement may be liable to the United States government for a civil penalty of not less than 5,000 dollars and not more than 10,000 dollars per violation, plus three times the amount of damages which the government sustains because of the act of that person.

Second, a viable third-party recovery claim exists on behalf of the United States in a fashion very similar to the actions that have been brought by the 40 state's attorneys general. Under the federal Medicare Care Recovery Act (the "MCRA"), 42 U.S.C. §§2651-53, the federal government may recover medical expenses it incurs when military personnel (or their dependents) are injured as a result of the tortious conduct of third parties. Under the MCRA, the federal government may recover directly from a tortfeasor the medical and pay-related expenses it has incurred as a result of its obligation to provide medical care and support to military personnel. The MCRA provides the federal government a statutory claim that is independent of any action brought by the injured party against the tortfeasor, and which is not subject to or limited by any of the procedural infirmities or personal defenses which may bar or limit recovery by the injured party. For these reasons, the MCRA provides the federal government with a viable and attractive mechanism for the recovery of the costs of providing medical treatment to current and former military personnel and their dependents necessitated by tobacco-related illnesses.

One study estimates that in 1995, the tobacco-related health care costs incurred by the Department of Veterans' Affairs totaled \$210 million. There is good reason to think that that estimate was very conservative, and of course, it is not adjusted for escalating costs of health

B
R
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care. In rough terms, if one estimates that about eight percent of the total VA health care budget exists by reason of tobacco-related illnesses (an assumption which I think significantly low, particularly given the high historic prevalence of smoking among military personnel and veterans), then *the annual costs incurred by the Department of Veterans' Affairs in treating tobacco-related illnesses from fiscal years 1992 through 1995 are in the range of about one billion dollars per year to 1.36 billion dollars per year.* This, obviously, does not include DOD health care expenses in treating tobacco-related illnesses.

Federal Agency and Congressional Inaction.

Although the federal government has at least two powerful judicial vehicles to recoup substantial federal dollars from the United States tobacco industry -- a False Claims Act action for fraud in connection with the federal government's procurement of tobacco products, and an MCRA action to seek third-party recovery due to federal dollars spent on treating tobacco-related illnesses -- no legal action has been taken. Similarly, Congress has not urged the federal agencies to act to protect veterans from smoking-related illness.

Many Veterans Believe The Veterans Administration Is Now Pro-Tobacco.

The final blow to the veterans' community came when the VA decided, apparently under the blessing of the Clinton administration, to urge Congress to deny veterans their last potential avenue to obtain meaningful compensation for the suffering of tobacco-related illnesses. In April, former Secretary Brown proposed legislation to prohibit service connection of disabilities or deaths based on their being attributable, in whole or in part, to veteran use of tobacco products during service. A Department of Veterans' Affairs spokesman said flatly, "We do not believe we should pay for any compensation to veterans for diseases that may be related to their nicotine dependence, unrelated to their service."

Thus, it appears that the Clinton administration's VA would rather have veterans, and particularly homeless veterans, suffer the consequences of tobacco addiction which began, was maintained, and/or was fostered during the time of enlistment or while the person was a veteran even though the VA has viable claims to recoup the costs of veteran programs from the powerful and wealthy tobacco industry.

It must be emphasized that veterans, and particularly veterans who are homeless, have no recourse to find meaningful relief except within the VA system. The Department of Veterans' Affairs could have chosen to look to the United States tobacco industry for third-party recoupment of billions of dollars in medical expenses incurred in treating veterans with tobacco-related illnesses for many, many years. The Clinton administration similarly could have looked to the United States tobacco industry to pay a fair share of monies back to the federal government in connection with federal procurement of tobacco products over the years. All these monies could have been made available in order to provide funds for veteran cessation and education programs. The funds could have been made available to defray VA health care costs in treating veterans with tobacco-related illnesses. The dollars also could have been made available to serve as compensation for veterans suffering disabilities or deaths based in whole or



in part on the veterans' use of tobacco products during service. Instead, the Clinton administration's VA did not seek to obtain this compensation from the United States tobacco industry; instead, it has simply sought to cut veterans' benefits.

In the end, it is the veterans who are homeless that will suffer the most dire consequences of this bad policy making. With a high incidence of cigarette smoking and 30 years of smoking history, the increasingly older Vietnam veteran is increasingly suffering tobacco-related illnesses. The bullets and the bombs in Vietnam killed far too many American boys. Post-traumatic stress disorder has become widespread, rendering many lives difficult and at times impossible to live. The spray of Agent Orange, too, killed many. But ultimately, it appears that one commodity, far more insidious but equally deadly, will kill the most of our American veterans -- tobacco. It is tobacco, or Agent Brown, that was widely distributed and urged upon young American men over many years, and continued to be made available to these men as they grew older and older over the years. There was once a time for Agent Orange litigation; perhaps it is now a time for Agent Brown litigation.

I hope that you can give the points raised in this letter serious consideration. We seek an audience with you to make sure that these important issues do not get missed in the context of the current tobacco public policy debate.

Sincerely yours,

Thomas M. Sobol, Esq.

Tobacco-vets



Barry J. Toiv

06/24/97 08:36:29 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Michael D. McCurry/WHO/EOP, Joseph P. Lockhart/WHO/EOP

Subject: tobacco/veterans

I think we're going to have to have a good answer tomorrow to the questions regarding VA's position on disability benefits for veterans suffering from smoking-related illnesses.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Nancy A. Min/OMB/EOP
LUZZATTO_A @ A1 @ CD @ LNGTWY
RUBIN_E @ A1 @ CD @ LNGTWY

- **Internet:** On June 17, FDA issued a warning to consumers about home abortion kits and female self-sterilization kits being advertised on the Internet. These kits contain unapproved drugs which pose significant, possibly life-threatening health risks. FDA is urging consumers not to purchase or use these or similar products promoted via the Internet and is continuing to investigate.
- **Cyclospora:** HHS is working with Guatemalan health authorities to determine when exports of fresh raspberries, which were voluntarily stopped by the government of Guatemala on May 30, can resume. CDC issued an update on outbreaks of cyclosporiasis in the U.S. and Canada in the June 13 issue of the *Morbidity and Mortality Weekly Report*.
- **Dietary Supplements:** On June 23, the Commission on Dietary Supplement Labels (Commission) will issue its draft report. In October, 1995, you appointed the Commission as required by the Dietary Supplement Health and Education Act (DSHEA) of 1994. DSHEA was enacted following public debate concerning the importance of dietary supplements in leading a healthy life, the need for consumers to have current and accurate information about supplements, and controversy over FDA's regulatory approach to dietary supplements.
- **Press/Media Inquiries:**
 - ▶ The July issue of *Epidemiology* will include the results of a California health study on birth defects and hazardous waste sites. The study's findings suggest that women who live within 1/4 mile of a Superfund site during early pregnancy were 2 times as likely to have babies with neural tube defects, and 4 times as likely to give birth to a baby with serious heart defects. The study was funded by the Agency for Toxic Substances and Disease Registry.
 - ▶ CBS is preparing a one-hour special on the community of Grand Bois, LA, home to approximately 300 native American and Cajun residents, and the 70-acre oil waste disposal site that is eight-tenths of a mile from the community. More than one million barrels of oil field waste are disposed there in unlined pits. Self-reported health surveys of the area residents show a statistically significant presence of a wide range of symptoms, including respiratory problems, neurological problems, and gastrointestinal problems.

VETERANS AFFAIRS

- **Tobacco Use in Military:** Several major veterans service organizations are opposing the Administration's legislative proposal to disallow compensation claims for disabilities based on illness resulting from tobacco. They argue that since the Administration considers tobacco addictive, it should not oppose paying compensation to those who became addicted during service -- especially when the Armed Forces were providing free cigarettes and condoning (if not encouraging) smoking.

Tobacco - veterans

leg benefits
legislation

DEPARTMENT OF VETERANS AFFAIRS
ASSISTANT SECRETARY FOR PUBLIC AND INTERGOVERNMENTAL AFFAIRS
WASHINGTON DC 20420

Memorandum To: Kitty Higgins and Rahm Emanuel
 From: Kathy Jurado *Kathy Jurado*
 Subject: VA talking points on nicotine dependence including:

- 1) VA Under Secretary for Health opinion as to whether nicotine dependence may be considered a disease for compensatory purposes,
- 2) VA General Counsel opinion on eligibility for compensation based on] nicotine dependence, and
- 3) Administration's proposed legislation.

Date: June 20, 1997

1) May 5, 1997 Opinion of VA Under Secretary for Health
May nicotine dependence be considered a disease for VA compensation purposes?

VA Under Secretary for Health determined that nicotine dependence may be considered a disease for compensation purposes, however, there are no scientific bases to determine how long it takes to become nicotine dependent. (See Attachments 1 & 2)

2) May 13, 1997 Opinion of VA General Counsel
Can VA pay compensation for disabilities or deaths attributable to veterans' use of tobacco products?

Veterans and their survivors are entitled to compensation for "service connected" disabilities or deaths, i.e. those due to injuries or diseases incurred or aggravated during military service. In a 1993 opinion, the former General Counsel determined that compensation is payable for disabilities or deaths attributable to veterans' use of tobacco products during service.

VA historically has also considered service connected on a "secondary" basis disabilities proximately due to service-connected diseases. In 1997, VA program officials asked the General Counsel for a formal opinion as to whether nicotine dependence acquired in service, leading to postservice smoking which ultimately causes physical illness (such as lung cancer or cardiovascular disease), can be the predicate for service connecting the smoking-related illness. In other words, is compensation payable for the results of even postservice smoking if it is due to nicotine dependence acquired in service?

The resulting May 13, 1997 opinion stated that the initial inquiry must be whether nicotine dependence is a disease. Citing a May 5, 1997, memorandum from the Under Secretary for Health to the effect that nicotine dependence may be considered a disease for VA-compensation purposes, the General Counsel stated that the remaining issues which must be decided in judging these claims are 1) whether the nicotine dependence was acquired in service, and 2) whether the nicotine dependence was the "proximate" cause of the claimed illness -- both acknowledged to be very difficult questions of fact.

Regarding the proximate-cause issue, the opinion stated the causal connection would be broken if, for example, there had been sustained full remission of the nicotine dependence following service and subsequent resumption of tobacco use, or exposure to a toxic substance which constituted a supervening cause of the claimed disability or death. (See Attachment 3)

Page 2
VA Talking Points on Nicotine Dependence

3) Administration's proposed legislation

Under current law, VA adjudicators in resolving a claim would have the burden of determining whether a veteran acquired a nicotine dependence during service and whether that nicotine dependence, which arose during service, is the proximate cause of disability -- both acknowledged to be very difficult questions of fact. However, the Administration has submitted legislation to Congress that would make it unnecessary to ascertain any link between inservice tobacco use and postservice diseases.

The Administration proposes to amend Title 38 to prohibit service-connection of disabilities or deaths based solely on their being attributable, in whole or in part, to veterans' use of tobacco products during service. This proposal would not preclude establishing service-connection based on a finding that a disease or injury became manifest or was aggravated during active service, or became manifest to the requisite degree of disability during an applicable statutory presumptive period. Under current law, a veteran could be service-connected for diseases and conditions that could be caused by tobacco use and manifest themselves during service or an applicable presumptive period, regardless of whether the veteran used tobacco.

The proposed legislation defines the limits of the government's responsibility as not encompassing a veteran's risks from smoking. This proposal would apply to the adjudication of new claims for monthly compensation filed after enactment and would not affect pending claims. The proposal is not an argument against the health consequences of smoking or the addictive nature of tobacco, which are well-recognized, but is a statement that reinforces the traditional role of the benefits system. The system was designed to aid veterans disabled while serving their country, who to varying degrees put themselves at risk, while carrying out their responsibilities as soldiers. (See Attachment 4)

Department of Veterans Affairs

Memorandum

Date: APR 9 1997
From: General Counsel (022)
Subj: Request for Opinion -- Nicotine Dependence
To: Under Secretary for Health (10)

RECEIVED
1997 APR -9 PM 1:54
VETERANS BENEFITS ADMINISTRATION
CONFERENCE

1. As you know, under 38 U.S.C. §§ 1110, 1131, and 1310, compensation is payable for disability "resulting from personal injury suffered or disease contracted in line of duty . . . in the active military, naval, or air service" and for death from a service-connected disability. Disability which is proximately due to or the result of a service-connected disease or injury is considered service connected under 38 C.F.R. § 3.310(a). A 1993 precedent opinion, VAOPGCPREC 2-93 (O.G.C. Prec. 2-93), held that direct service connection of disability or death may be established if the evidence establishes that injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service. The opinion also noted that, if nicotine dependence is considered a disease or injury for compensation purposes, such dependence began in service, and resulting tobacco use led to disability subsequent to service, service connection could be established for that disability pursuant to 38 C.F.R. § 3.310(a).

2. The Veterans Benefits Administration (VBA) recently requested an opinion from this office regarding the circumstances under which service connection may be established for tobacco-related disability or death on the basis that such disability or death is secondary to nicotine dependence which arose from a veteran's tobacco use during service. In VAOPGCPREC 2-93, the General Counsel stated that nicotine dependence, which was classified by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, as a psychoactive substance-use disorder, clearly would fall outside the scope of the term "injury." The same conclusion would follow under the Fourth Edition of the Diagnostic and Statistical Manual, which classifies nicotine dependence as a "substance use

2.

Under Secretary for Health (10)

disorder." Resolution of the question posed by VBA, therefore, necessarily depends upon whether nicotine dependence may be considered a disease for compensation purposes.

3. In VAOPGCPREC 82-90 (O.G.C. Prec. 82-90), a precedent opinion discussing the definition of the term "disease" as used in 38 U.S.C. §§ 1110 and 1131, the General Counsel cited *Dorland's Illustrated Medical Dictionary* 385 (26th ed. 1974) as defining the term "disease" as "any deviation from or interruption of the normal structure or function of any part, organ, or system of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown." The most recent edition of *Dorland's Illustrated Medical Dictionary* 478 (28th ed. 1994) provides virtually the same definition of "disease." The General Counsel also pointed out that, in *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954), the United States Court of Appeals for the District of Columbia Circuit indicated that the term "disease" refers to a condition which is capable of improvement or deterioration. See also VAOPGCPREC 67-90 (O.G.C. Prec. 67-90) (stating that a disease is usually capable of improvement or deterioration). As stated in VAOPGCPREC 2-93, a determination of whether nicotine dependence may be considered a disease for compensation purposes requires application of accepted medical principles relating to that condition. We therefore request your opinion as to whether, under the above criteria, and in light of the latest available information on nicotine dependence, including newly reported material concerning its etiology, pathology, and prognosis, nicotine dependence may be considered a disease for compensation purposes.

4. We request your prompt attention to this matter so that we may advise VBA, which is awaiting guidance prior to adjudicating numerous claims which have been set aside pending resolution of issues relating to tobacco-related disabilities.



Mary Lou Keener

**Department of
Veterans Affairs****Memorandum**

Date: MAY 5 1997
From: Under Secretary for Health (10)
Subj: Request for Opinion – Nicotine Dependence
To: General Counsel (022)

1. In response to your request of April 9, 1997, regarding VHA's opinion as to whether nicotine dependence may be considered a disease for compensatory purposes, please be advised that the Diagnostic and Statistical Manual of Mental Disorders (4th edition) classifies nicotine dependence as a substance use disorder. Thus, I suppose that nicotine dependence may be considered a disease, as illustrated in your reference to VAOPGCPREC 67-90 (which states that a disease is usually capable of improvement or deterioration).

2. An individual who becomes dependent on nicotine can go into remission by eliminating the use of products/substances containing nicotine, such as tobacco products. Sometimes this is facilitated by or requires medical treatment.

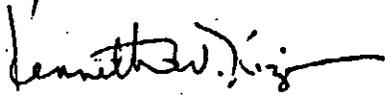
3. I must point out that, however, another important issue in this regard is the time at which a person becomes dependent on nicotine, or for that matter, any substance. At present, there are no physiologic criteria, medical data, or other scientific bases to determine how long it takes to become dependent on nicotine. Dependence may occur after smoking the first few packs of cigarettes, or after the first month of smoking, or many months after starting to smoke.

4. For those persons whose nicotine dependence requires medical treatment, please be advised that there exists a variety of treatment regimens, including use of tapering doses of nicotine delivered by a skin patch or gum. When one quits smoking, with or without the assistance of medical treatment, I suppose you could consider the nicotine dependence to be in remission, although it is not customarily thought of in this way. However, since everyone is susceptible to the addictive potential of nicotine, as far as we know, it cannot be scientifically stated, at this time, whether the reoccurrence of nicotine dependence that would occur with resumption of tobacco use is a relapse of the original condition or a *de novo* reoccurrence of the condition.

5. Finally, please be advised that the use of "proximate" as related to disability or death caused by conditions associated with nicotine dependence, and as commonly defined, is not supported by medical evidence. For example, it cannot be medically determined that an individual who smoked and died from arteriosclerosis or congestive heart failure (CHF) due to chronic obstructive pulmonary disease would not have died from CHF if

he/she did not smoke. Other risk factors such as diet, exercise, cholesterol levels, etc., also substantially influence the development of heart disease and the relative etiologic contribution of such factors cannot be scientifically apportioned.

6. If I may be of further assistance to you in this matter, please do not hesitate to contact my office.



Kenneth W. Kizer, M.D., M.P.H.

Department of
Veterans Affairs

Memorandum

Date: May 13, 1997 VAOPGCPREC 19-97

From: General Counsel (022)

Subject: Secondary Service Connection Based on Nicotine Dependence

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Under what circumstances may service connection be established for tobacco-related disability or death on the basis that such disability or death is secondary to nicotine dependence which arose from a veteran's tobacco use during service?

COMMENTS:

1. Section 3.310(a) of title 38, Code of Federal Regulations, provides, in pertinent part, that, "[d]isability which is proximately due to or the result of a service-connected disease or injury shall be service connected." The disabling condition stemming from the service-connected disease or injury is referred to in the regulation as a "secondary condition." Where a claimant can establish that a disease or injury resulting in disability or death was a direct result of tobacco use during service, e.g., damage done to a veteran's lungs by in-service smoking gave rise to lung cancer, service connection may be established without reference to section 3.310(a). However, where the evidence indicates a likelihood that a veteran's disabling illness had its origin in tobacco use subsequent to service, and the veteran developed a nicotine dependence during service which led to continued tobacco use after service, the issue then becomes whether the illness may be considered secondary to the service-incurred nicotine dependence and resulting disability or death may be service connected on that basis pursuant to section 3.310(a).
2. VAOPGCPREC 2-93 (O.G.C. Prec. 2-93) held that determination of whether nicotine dependence may be considered a disease for compensation purposes is essentially an adjudicative matter to be resolved by adjudicative personnel based on accepted medical principles. That opinion also noted in passing that, if nicotine dependence is considered a disease for compensation purposes, such dependence began in service, and resulting tobacco use led to disability, the issue would become whether secondary service connection could be estab-

2.

Director, Compensation and Pension Service (21)

lished for that disability pursuant to 38 C.F.R. § 3.310(a). The threshold question which must be answered with regard to claims for secondary service connection of tobacco-related disability or death is whether nicotine dependence may be considered a disease within the meaning of the veterans' benefit laws. See VAOPGCPREC 2-93, paras. 2-4. In a May 5, 1997, memorandum, the Under Secretary for Health, relying upon the criteria set forth in VAOPGCPREC 67-90 (O.G.C. Prec. 67-90), stated that nicotine dependence may be considered a disease for VA compensation purposes.

3. Assuming the conclusion of the Under Secretary for Health that nicotine dependence may be considered a disease for compensation purposes is adopted by adjudicators, secondary service connection may be established, under the terms of 38 C.F.R. § 3.310(a), only if a veteran's nicotine dependence, which arose in service, and resulting tobacco use may be considered the proximate cause of the disability or death which is the basis of the claim. We note initially that a determination of proximate cause is basically one of fact, for determination by adjudication personnel. VADIGOP, 3-17-71 (Vet). "Proximate cause" is defined by *Black's Law Dictionary* 1225 (6th ed. 1990) as "[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." This definition is very similar to the following definition of proximate cause adopted by the General Counsel of the Bureau of War Risk Insurance in a January 12, 1921, opinion, 13 Op. G.C. 141 (Bureau of War Risk Ins. 1921):

An act which directly produced the injury * * *.
That cause which naturally leads to and which might have been expected to produce the result.
That from which the effect might be expected to follow without the concurrence of any unusual circumstances. That which immediately produces the effect as distinguished from a predisposing cause.
(32 Cyc. 745).

See also VADIGOP 3-17-71 (Vet) (quoting same definition).

4. A subsequent event, which is referred to as an "intervening" cause, may interrupt the causal connection between an event or circumstance and subsequent incurrance of disability or death. See, e.g., *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1051-52 (5th Cir. 1983). An "intervening" cause which "turns aside the[] course [of events],

3.

Director, Compensation and Pension Service (21)

prevents the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably anticipated" may be considered a supervening cause of injury which severs the causal connection between the original act and the injury. *Sheehan v. New York*, 354 N.E. 2d 832, 835-36 (N.Y. 1976) (quoting 1 Warren's N.Y. Negligence § 5.08).¹

5. Again, assuming that adjudicators adopt the Under Secretary for Health's conclusion that nicotine dependence may be considered a disease, the two principal questions which must be answered by adjudicators in resolving a claim for benefits for tobacco-related disability or death secondary to nicotine dependence are: (1) whether the veteran acquired a dependence on nicotine during service; and (2) whether nicotine dependence which arose during service may be considered the proximate cause of disability or death occurring after service. With regard to the first question, determination of whether a veteran is dependent on nicotine is a medical issue. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994) (DSM-IV) at 243, the criteria for diagnosing substance dependence are generally to be applied in diagnosing nicotine dependence. Under those criteria, as applied to the specific circumstances surrounding nicotine use, nicotine dependence may be described as a maladaptive pattern of nicotine use leading to clinically significant impairment or distress, as manifested by three or more of the following criteria occurring at any time in the same 12-month period: (1) tolerance, as manifested by the absence of nausea, dizziness, and other characteristic symptoms despite use of substantial amounts of nicotine or a diminished effect observed with continued use of the same amount of

¹ Relevant considerations in determining whether an "intervening" cause supercedes an earlier event as the proximate cause of an injury include: (1) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the original event; (2) the extraordinary, rather than normal, nature of the force's operation; (3) the fact that the intervening force is operating independently of any situation created by the original event or is or is not a normal result of such an event; (4) the fact that the operation of the intervening force is due to another's action or failure to act; (5) the fact that the intervening force is due to an act of another which is wrongful and subjects the actor to liability; and (6) the degree of culpability of a wrongful act of another which sets the intervening force in motion. Restatement (Second) of Torts § 442 (1965).

4.

Director, Compensation and Pension Service (21)

nicotine-containing products; (2) withdrawal, marked by appearance of four or more of the following signs within twenty-four hours of abrupt cessation of daily nicotine use or reduction in the amount of nicotine used: (a) dysphoric or depressed mood; (b) insomnia; (c) irritability, frustration, or anger; (d) anxiety; (e) difficulty concentrating; (f) restlessness; (g) decreased heart rate; or (h) increased appetite or weight gain; or by use of nicotine or a closely related substance to relieve or avoid withdrawal symptoms; (3) use of tobacco in larger amounts or over a longer period than was intended; (4) persistent desire or unsuccessful efforts to cut down or control nicotine use; (5) devotion of a great deal of time in activities necessary to obtain nicotine (e.g., driving long distances) or use nicotine (e.g., chain-smoking); (6) relinquishment or reduction of important social, occupational, or recreational activities because of nicotine use (e.g., giving up an activity which occurs in smoking-restricted areas); and (7) continued use of nicotine despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by nicotine. *Id.* at 181, 243-45.

6. If it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must determine whether the post-service usage of tobacco products was the proximate cause of the disability or death upon which the claim is predicated. As discussed above, a supervening cause of the disability or death would sever the causal connection to acquisition of the nicotine dependence in service. Post-service exposures to environmental or occupational toxins other than tobacco products may also be found, under the facts of particular cases, to constitute supervening causes of the disabilities or deaths so as to preclude findings of service connection.

7. Moreover, if a nicotine-dependent individual has achieved sustained full remission and then resumes use of tobacco products, the question arises whether such resumption constitutes a supervening cause which breaks the connection between the individual's prior tobacco use and disability or death resulting from resumed use of tobacco and results in de novo reoccurrence of the nicotine dependence. DSM-IV, at 180, indicates that sustained full remission is achieved when none of the criteria for nicotine dependence has been met for twelve months or longer. Where a veteran achieves sustained full remission of nicotine dependence following service and subsequently resumes tobacco use, and it can be determined that disability or death resulted from tobacco use, and a de novo dependence, which occurred after

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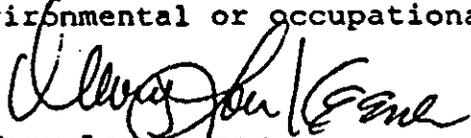
Director, Compensation and Pension Service (21)

the resumption, the causal connection between nicotine dependence incurred during service and the claimed secondary condition should, in our view, be considered to have been severed.

HELD:

a. A determination as to whether service connection for disability or death attributable to tobacco use subsequent to military service should be established on the basis that such tobacco use resulted from nicotine dependence arising in service, and therefore is secondarily service connected pursuant to 38 C.F.R. § 3.310(a), depends upon whether nicotine dependence may be considered a disease for purposes of the laws governing veterans' benefits, whether the veteran acquired a dependence on nicotine in service, and whether that dependence may be considered the proximate cause of disability or death resulting from the use of tobacco products by the veteran. If each of these three questions is answered in the affirmative, service connection should be established on a secondary basis. These are questions that must be answered by adjudication personnel applying established medical principles to the facts of particular claims.

b. On the issue of proximate cause, if it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must consider whether there is a supervening cause of the claimed disability or death which severs the causal connection to the service-acquired nicotine dependence. Such supervening causes may include sustained full remission of the service-related nicotine dependence and subsequent resumption of the use of tobacco products, creating a de novo dependence, or exposure to environmental or occupational agents.


Mary Lou Keener



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

MAY 9 1997

The Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Transmitted herewith is a draft bill, the "Veterans' Compensation Cost-of-Living Adjustment and Benefit Programs Improvement Act of 1997," to authorize a cost-of-living adjustment (COLA) for fiscal year (FY) 1998 in the rates of disability compensation and dependency and indemnity compensation (DIC), and to revise and improve certain veterans compensation, pension, and memorial affairs programs, and for other purposes. I request that this draft bill be referred to the appropriate committee for prompt consideration and enactment.

Section 101 of the draft bill would direct the Secretary of Veterans Affairs to increase administratively the rates of compensation for service-disabled veterans and of DIC for the survivors of veterans whose deaths are service related, effective December 1, 1997. The rate of increase would be the same as the COLA that will be provided under current law to veterans' pension and Social Security recipients, which is currently estimated to be 2.7 percent. We believe this proposed COLA is necessary and appropriate in order to protect the benefits of these most deserving recipients from the eroding effects of inflation. We estimate that enactment of this section, in conjunction with section 102 of this draft bill, would result in benefit costs of \$330.7 million during FY 1998 and \$1.94 billion over the five-year period beginning in FY 1998. The costs associated with the compensation COLA are considered to be part of the compensation baseline and not subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990.

Section 102 would require the Secretary of Veterans Affairs, in computing new rates of (or limitations affecting) disability compensation and DIC pursuant to the enactment of any legislation requiring the Secretary to increase such rates to provide a COLA for fiscal year 1998 and thereafter, to round down to the next lower whole dollar any rate that is not evenly divisible by one dollar. This proposal is consistent with the congressionally-mandated calculation methods applied to COLA's for fiscal years 1994, 1995, and 1996. We estimate this proposal would reduce FY 1998 benefit cost associated with the COLA proposed in section

The Honorable Newt Gingrich

101 of this draft bill by \$17 million and reduce the five-year benefit cost for FY 1998 through FY 2002 by \$287 million, as compared to the cost of that COLA and future COLAs based on rounding odd dollar amounts to the nearest whole dollar. The savings are subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990.

Section 103 would amend titles 26 and 38 of the United States Code to make permanent the authority of the Department of Veterans Affairs (VA) to access unearned income information from the Internal Revenue Service (IRS) and wage, self-employment, and retirement income information from the Social Security Administration (SSA) for purposes of income verification in determining eligibility for VA means-tested benefits such as pension and medical care for certain non-service-related illnesses or conditions.

Experience has shown that authority to match unearned income information from IRS and wage, self-employment, and retirement income information from SSA with VA data for purposes of income verification in determining eligibility for or the proper amount of VA means-tested benefits has been an effective savings measure and has had a significant program-abuse deterrent effect. We estimate that enactment of this proposal would result in savings in monetary benefits of \$10 million in FY 1999 and \$120 million during the four-year period beginning in FY 1999. These savings are subject to the pay-as-you-go provisions of the Omnibus Budget Reconciliation Act of 1990.

Section 104 would amend section 5503(f) of title 38, United States Code, to make permanent the \$90 limitation on monthly VA pension payments that may be made to beneficiaries, without dependents, who are receiving Medicaid-covered nursing-home care. The current payment limitation, which is due to expire at the end of fiscal year 1998, works to the advantage of these nursing-home residents because it permits them to keep the \$90 to apply toward personal expenses rather than have it "pass through" to the Medicaid program. This section would simply remove the existing September 30, 1998, expiration date for section 5503(f). We estimate this proposal would result in government-wide savings because a beneficiary's nursing-home care costs, previously paid for with VA pension benefits, would be paid for by the Medicaid program, which shares a portion of the costs with the States. Government-wide savings are estimated to be \$206 million in FY 1999 and a total of \$893 million during the four-year period beginning in FY 1999.

Under current law, direct service connection of a disability or death may be established if the evidence establishes that

3.

The Honorable Newt Gingrich

injury or disease resulted from tobacco use in line of duty in the active military, naval, or air service, notwithstanding that the disability or death did not occur until after service and expiration of any applicable presumptive period. Section 105 would amend title 38, United States Code, by adding a new section that would have the effect of prohibiting service connection of a death or disability on the basis that it resulted from injury or disease attributable, in whole or in part, to the use of tobacco products by the veteran during the veteran's service. This amendment is consistent with the 1990 budget reconciliation act, in which Congress prohibited compensation for disabilities which are the result of veterans' abuse of alcohol and drugs. This was fiscally responsible action which enhanced the integrity of our compensation program, and our proposal regarding tobacco use is offered in that same spirit. In addition, claims based upon tobacco-related disorders present medical and legal issues which could impede ongoing efforts to speed claim processing by placing significant additional demands on the adjudicative system. This provision would not preclude establishment of service connection for disability or death from a disease or injury which became manifest or was aggravated during active service or became manifest to the requisite degree of disability during any applicable presumptive period specified in section 1112 or 1116 of title 38, United States Code. This amendment would apply to claims filed after the date of its enactment.

This provision would result in some level of benefit cost avoidance and avoid potential delays in claim processing resulting from increased workload.

Section 106 would authorize the Veterans Benefits Administration (VBA) to reimburse, from the general operating expenses account, the Veterans Health Administration (VHA) for the cost of medical examinations conducted with respect to veterans' claims for compensation or pension. Currently, such examinations are paid for out of VA's medical-care fund.

In order to assure that funding for compensation and pension medical examinations is available throughout FY 1998, appropriate language would need to be included in both the "Medical care" and "General operating expenses" appropriations. It is contemplated that VBA will enter into a memorandum of understanding with VHA to provide that, should funds budgeted under general operating expenses for the purpose of "purchasing" compensation and pension medical examinations prove insufficient, alternate funding under "Medical care" would be available to permit VHA to continue to provide these examinations. Medical care funds would be used for this purpose only in the event of a shortfall in general operat-

4.

The Honorable Newt Gingrich

ing expenses. There are no costs or savings associated with this proposal.

Section 201(a) would amend section 2408(b) of title 38, United States Code, to make state cemetery grants more attractive to States. Section 2408 authorizes the Secretary of Veterans Affairs to make grants to States to assist them in establishing, expanding, or improving State veterans' cemeteries. Currently, the amount of a State cemetery grant is limited to 50 percent of the total of the value of the land to be acquired or dedicated for a cemetery and the cost of improvements to be made on the land. The remaining amount must be contributed by the State receiving the grant. Pursuant to the amendments proposed in this section, the amount of a State cemetery grant could not exceed, in the case of the establishment of a new cemetery, the total of the cost of improvements to be made on land to be converted into a cemetery and the initial cost of equipment necessary to operate the cemetery. In the case of the expansion or improvement of an existing cemetery, the amount of the grant could not exceed the total of the cost of improvements to be made on any land to be added to the cemetery combined with the cost of improvements to be made to the existing cemetery. If the amount of a grant should, for any reason, be less than the amount of those costs, the State receiving the grant would be required to contribute the remaining amount, in addition to providing any land necessary for the cemetery project.

Also, under current law, if at the time of a grant the State receiving the grant dedicates for the cemetery land which it already owns, the value of the land may constitute up to 50 percent of the State's contribution. Once that land value is so used, it may not constitute part of the State's contribution for any subsequent grant under section 2408. Under the amendments proposed in section 201(a) of this draft bill, a State would be responsible for providing any land required for a cemetery project, since the grant amount would no longer be based partly on the value of land to be acquired or dedicated for a cemetery.

We believe that excluding the value of land to be acquired for a cemetery from the basis of a grant would encourage states to be active partners in the cemetery grants program. In our experience, no State has acquired land for a cemetery in connection with a grant under section 2408. In every case, the State has dedicated land that was donated or transferred for that purpose, or land that it already owned. Further, any reduction of the basis from which a grant is calculated may be offset by an increase from 50 percent to up to 100 percent in the proportion of the amount of a project's cost that could be assumed by the Federal Government. Moreover, since, under the proposal, a grant may

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The Honorable Newt Gingrich

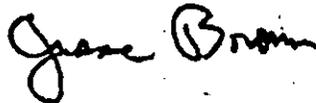
cover the entire cost of improvements (and initial cost of equipment in certain cases), a State may not have to contribute cash toward the initial cost of a project.

Another feature that would make grants more attractive to States is the inclusion in the basis of a grant of the initial cost of equipment necessary to operate the cemetery. Providing funds to acquire the equipment necessary to operate a cemetery will, we believe, be a critical financial incentive to encourage States to establish new cemeteries. Such equipment is as essential to the establishment of an operational cemetery as are the land and the improvements made on it. However, because our proposed amendment includes only the initial cost of equipment for the establishment of a cemetery, the State would retain the responsibility for long-term maintenance and operation of the cemetery, including costs associated with the acquisition of replacement equipment. Each Federal grant would assist in the establishment and activation of new veterans' cemeteries, or in the expansion or improvement of existing cemeteries, but the States would bear the costs of continuing operation and long-term maintenance.

Section 201(b) of the draft bill would authorize "no-year" appropriations for the State cemetery grants program. Under current 38 U.S.C. § 2408(d), funds appropriated for State cemetery grants remain available only until the end of the second fiscal year following the fiscal year for which they are appropriated. However, in Public Law No. 104-204, 110 Stat. 2874 (1996), Congress appropriated funds for State cemetery grants, "to remain available until expended." Section 201(b) would amend section 2408(d) to reflect this no-year-funding policy.

The Office of Management and Budget advises that there is no objection to the submission of this draft bill to the Congress, and that its enactment would be in accord with the Administration's program.

Sincerely yours,



Jesse Brown

Enclosures
JB/fjb

105th Congress
1st Session

A BILL

To amend title 38, United States Code, to authorize a cost-of-living adjustment in the rates of disability compensation for veterans with service-connected disabilities and dependency and indemnity compensation for survivors of such veterans and to revise and improve certain veterans compensation, pension, and memorial affairs programs; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCES TO TITLE 38, UNITED STATES CODE.

(a) **SHORT TITLE.**--This Act may be cited as the "Veterans' Compensation Cost-of-Living Adjustment and Benefit Programs Improvement Act of 1997".

(b) **REFERENCES.**--Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision,

the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I-COMPENSATION AND PENSIONS

SEC. 101. INCREASE IN COMPENSATION RATES AND LIMITATIONS.

(a) IN GENERAL.--(1) The Secretary of Veterans Affairs shall, as provided in paragraph (2), increase, effective December 1, 1997, the rates of and limitations on Department of Veterans Affairs disability compensation and dependency and indemnity compensation.

(2) The Secretary shall increase each of the rates and limitations in sections 1114, 1115(1), 1162, 1311, 1313, and 1314 of title 38, United States Code, that were increased by the amendments made by the Veterans' Compensation Cost-of-Living Adjustment Act of 1996 (Public Law 104-263; 110 Stat. 3212). This increase shall be made in such rates and limitations as in effect on November 30, 1997, and shall be by the same percentage that benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) are increased effective December 1, 1997, as a result of a determination under section 215(i) of such Act (42 U.S.C. 415(i)).

(b) SPECIAL RULE.--The Secretary may adjust administratively, consistent with the increases made under subsection (a)(2), the rates of disability compensation payable to persons within the purview of section 10 of Public Law 85-857 (72 Stat. 1263) who

**SEC. 104. EXTENSION OF LIMITATION ON PENSION FOR CERTAIN
RECIPIENTS OF MEDICAID-COVERED NURSING HOME CARE.**

Section 5503(f) is amended by striking out paragraph (7).

**SEC. 105. PROHIBITION REGARDING PAYMENT OF COMPENSATION FOR
DISABILITY OR DEATH DUE TO TOBACCO USE.**

(a) SERVICE CONNECTION.—Chapter 11 is amended by adding at the end of subchapter I the following new section:

"§ 1103. Special provisions relating to claims based upon effects of tobacco products.

"(a) Notwithstanding any other provision of law, a veteran's disability or death shall not be considered to have resulted from personal injury suffered or disease contracted in line of duty in the active military, naval, or air service for purposes of this title on the basis that it resulted from injury or disease attributable in whole or in part to the use of tobacco products by the veteran during the veteran's service.

"(b) Nothing in subsection (a) shall be construed as precluding the establishment of service connection for disability or death from a disease or injury which became manifest or was aggravated in active military, naval or air service or became manifest to the requisite degree of disability during any applicable presumptive period specified in section 1112 or 1116 of this title."

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 11 is amended by adding the following new item after the item relating to section 1102:

"1103. Special provisions relating to claims based upon effects of tobacco products."

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to claims filed after the date of enactment of this Act.

**SEC. 106. REIMBURSEMENT OF COSTS ASSOCIATED WITH
COMPENSATION AND PENSION MEDICAL EXAMINATIONS.**

(a) AUTHORIZATION.—Chapter 77 of title 38, United States Code, is amended by adding at the end of subchapter I the following new section:

"7705. Reimbursement for compensation and pension medical examinations.

"(a) REIMBURSEMENT.—The Under Secretary for Benefits is authorized to reimburse the Veterans Health Administration for costs associated with the conduct of medical examinations requested by the Veterans Benefits Administration in connection with claims for benefits under this title.

"(b) SOURCE OF FUNDS.—Reimbursements under this section shall be made from amounts available to the Secretary of Veterans Affairs for payment of general operating expenses."

(b) CLERICAL AMENDMENT.-The table of sections at the beginning of chapter 77 is amended by adding the following new item after the item relating to section 7703:

"7705. Reimbursement for compensation and pension medical examinations."

TITLE II - MEMORIAL AFFAIRS

SECTION 201. STATE CEMETERY GRANTS PROGRAM.

(a) (1) AMOUNT OF GRANT RELATIVE TO PROJECT COST.-Section 2408(b) is amended by striking out paragraphs (1) and (2) and inserting in lieu thereof the following:

"(1) The amount of any grant under this section may not exceed—

"(A) in the case of the establishment of a new cemetery, the total of—

"(i) the cost of improvements to be made on the land to be converted into a cemetery, and

"(ii) the initial cost of equipment necessary to operate the cemetery; or

"(B) in the case of the expansion or improvement of an existing cemetery, the total of—

"(i) the cost of improvements to be made on any land to be added to the cemetery, and

"(ii) the cost of any improvements to be made

to the existing cemetery.

"(2) If the amount of a grant under this section is less than the amount of costs referred to in paragraph (1), the State receiving the grant shall contribute the amount by which the costs exceed the grant, in addition to any land acquired or dedicated by the State for the cemetery."

2) EFFECTIVE DATE.-The amendment made by this subsection shall become effective 60 days after the date of enactment of this Act.

b) AUTHORIZATION OF NO-YEAR APPROPRIATIONS.-Section 2408(d) is amended by striking out "the end of the second fiscal year following the fiscal year for which they are appropriated" and inserting in lieu thereof "expended".