S. HRG. 109–394

PENDING NOMINATIONS

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

SEPTEMBER 29, 2005

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PENDING NOMINATIONS

THURSDAY, SEPTEMBER 29, 2005

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10:00 a.m., in room SR–418, Russell Senate Office Building, Hon. Larry E. Craig (chairman of the committee) presiding.

Present: Senators Craig, Specter, Hutchison, Burr, Akaka, Obama, and Salazar.

OPENING STATEMENT OF HON. LARRY E. CRAIG, U.S. SENATOR FROM IDAHO

Chairman CRAIG. Good morning, ladies and gentlemen. The Committee on Veterans' Affairs will now come to order.

This morning we will receive testimony from five individuals who have been nominated by the President of the United States to serve in posts at the U.S. Department of Veterans Affairs: William Tuerk, whom many of us know, nominated to serve as Under Secretary for Memorial Affairs; Robert Henke, nominated to serve as Assistant Secretary for Management; Lisette Mondello, nominated to serve as Assistant Secretary for Public and Intergovernmental Affairs; John Molino, nominated to serve as Assistant Secretary for Policy, Planning, and Preparedness; and George Opfer, nominated to serve as Inspector General.

Well, first and foremost, congratulations to all of you for your nominations, and welcome to the committee. Also, I want to welcome all of your families—I have had a chance to meet some of them—and your friends who are accompanying you here today. I look forward to you taking the opportunity to introduce them to the committee.

I believe Senator Hutchison will be joining us in a few minutes to introduce you, Lisette, and so I will move on with the introductions of our other nominees. However, I do want to comment on some of the important responsibilities in this process that each of the nominees will undertake if confirmed. I also want to introduce Mr. Tuerk, Chief Counsel of the committee, as a valued member of our staff.

After earning his undergraduate degree from the University of Notre Dame, Mr. Tuerk served as a military policeman in the Army from 1971 to 1973. He then earned a law degree from George Washington University. Mr. Tuerk began his long and distinguished career in service of veterans in 1985, when he served on the health care legal staff of VA's General Counsel. In 1991, he

joined the Veterans' Affairs Committee where he has served as the Republican General Counsel, the Republican Chief Counsel and Staff Director, and currently is our Chief Counsel.

I am extremely pleased that Bill, who has served this committee with distinction for 14 years, has been nominated to serve our Nation's veterans as the Under Secretary for Memorial Affairs. I also understand the personal circumstance in your family at this moment, and we certainly wish your wife the very, very best.

The incumbent is responsible for overseeing our National Cemetery Administration, which operates and maintains our national cemeteries and administers programs that honor our deceased veterans. Especially during a time of war, when we have fallen soldiers returning from the battlefield, we must ensure that our Nation's heroes are laid to rest on sacred grounds befitting of their service and their sacrifice. We must also ensure that their grieving families receive the respect and sympathies of a grateful Nation.

Bill, these are important responsibilities, and I want to thank you for your willingness to undertake them and for your professionalism and the work that you must have before you at this time.

We will also hear today from Robert Henke, the nominee for Assistant Secretary for Management. Mr. Henke served in the Navy from 1988 to 1992, including combat service during Operation Desert Shield and Desert Storm, and he continues to serve in the Navy Reserve. Mr. Henke is a former staffer for the Senate Appropriations Committee and currently serves as the Principal Deputy Under Secretary of Defense for the Department of Defense. Of the many roles the Assistant Secretary for Management assumes, perhaps the most challenges is serving as VA's chief budget officer.

Mr. Henke, as we discussed at meetings in my office earlier, if confirmed, you will play a critical role in assuring that Congress is provided with timely and accurate information regarding VA's funding requirements so that we will not again be caught off guard by a shortfall in VA's budget.

As I have stated previously, I will be requiring VA to provide quarterly updates as to its financial picture, and I will expect complete candor from VA in providing those updates. Mr. Henke, thank you very much for your willingness to undertake this challenging role. I guess the most and the least I can say is good luck.

[Laughter.]

Chairman CRAIG. Also joining us today is John Molino, the nominee for Assistant Secretary for Policy, Planning, and Preparedness. Mr. Molino served in the Army from 1974 to 1995 and is the recipient of numerous awards, including the Army Commendation Medal. After retiring from the Army, he served as the Director of Government Affairs for the Association of the U.S. Army and as legislative assistant to Senator Dan Coats. Currently, he is the Deputy Under Secretary of Defense for Military, Community, and Family Policy. Ambassador Coats, Senator Coats, Congressman Coats, has been a personal friend of mine for a good long while.

Among a wide range of other functions performed by the Assistant Secretary for Policy, Planning, and Preparedness, the incumbent is responsible for ensuring that VA has emergency preparedness policies in place across the Nation. As demonstrated by the decisive and heroic actions of VA's personnel in dealing with Hurri-

canes Katrina and Rita, preparedness is extremely important to the safety and well-being of VA's patients and employees, as well as those in surrounding communities. I trust you understand VA's responsibility there and will continue to perform admirably in that situation. A lot of untold stories of sacrifice of VA staff and personnel and a tremendous record coming out of those very difficult situations in the Gulf area.

Now turning to our nominee for Assistant Secretary of Public and Intergovernmental Affairs, Lisette Mondello, the incumbent in this position will play an important role in fostering VA's reputation as a leader in health care services and, more importantly, will be responsible for ensuring that all veterans have access to information about benefits and services that VA provides.

Mrs. Mondello, welcome, and thank you very much for the work you will do.

Last, we will hear from George Opfer, the nominee for Inspector General. From 1996 to 2004, Mr. Opfer worked for the U.S. Secret Service, retiring as an Assistant Director of the Office of Investigation. He then served as Inspector General for the Federal Emergency Management Agency and is currently the Deputy Inspector General for the Department of Labor.

The VA Inspector General is responsible for inspecting VA's programs, recommending policy to promote economy and efficiency, and to seek to prevent and detect criminal activities, waste, abuse, and mismanagement. In a time when the budget is so tight, it is more important than ever that the Inspector General vigilantly reviews VA's programs to find ways to increase efficiencies and to ensure that taxpayer money is being well spent.

George, with your extensive investigative background, I fully appreciate that you will be up to the challenge. I look forward to hearing from you, and, again, we want to thank you for your willingness to serve our Nation's veterans.

Both the Ranking Member and Senator Hutchison are not here yet—oh, Danny has just arrived, so let me allow the Ranking Member to settle in, and we will ask him if he has any comments before we administer the oath and hear from all of you.

Senator Akaka.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

Senator AKAKA. Thank you so much, Mr. Chairman. As I mentioned before and I continue to tell you, I enjoy working with you on the Committee on Veterans' Affairs.

Today the committee has the pleasure of examining five pending nominations for critical positions at the Department of Veterans Affairs, and I have had the opportunity to visit the nominees before their hearing. These vacant positions are vital to VA's mission and must be filled with qualified, competent individuals.

Mr. Chairman, I am confident that my colleagues on the committee will give the thoughtful consideration that these nominations deserve. I would also like to welcome the witnesses and their families who are here to this hearing.

Mr. Bill Tuerk has been nominated to be Under Secretary for Memorial Affairs. The Under Secretary for Memorial Affairs over-

sees the National Cemetery Administration, which is responsible for honoring veterans with final resting places in national shrines that commemorates their service to their Nation. As we all know, Bill's face is a familiar one in this committee. He certainly has a wealth of experience, and I must say this is a good time of the year for Bill Tuerk, nominated for a prestigious position at VA, and his beloved Notre Dame football team is off to a good start.

[Laughter.]

Senator AKAKA. Mr. Robert Henke is nominated for the position of Assistant Secretary for Management. If confirmed, Mr. Henke would oversee all resource requirements, development and implementation of agency performance measures and financial management activities relating to VA programs and operations. This position plays a major role in the budgeting process. I look forward to discussing with Mr. Henke ways to prevent any repeats of the budget shortfall that we had earlier this year.

Mr. George Opfer is nominated to be Inspector General for the Department. In my time in the Senate, I have worked hard to ensure transparency in Government. Currently, the VA IG is conducting an investigation that I requested on enrollment. I urge you, Mr. Opfer, to give this investigation the attention that it deserves.

Mr. John Molino is nominated for Assistant Secretary for Policy, Planning, and Preparedness, and I will be interested to hear Mr. Molino's comments on VA disaster relief in light of the recent national disasters. I know Mr. Molino from his tenure at DOD, where I worked closely with him on financial literacy issues. I am sure Mr. Molino and I can build upon this relationship to work together in his new position.

Ms. Lisette Mondello is nominated for Assistant Secretary for Public and Intergovernmental Affairs. This position plays an integral role in VA's public relations. While VA has made tremendous strides in public relations, we all know that some do not hold VA in the highest regard. I urge Ms. Mondello—and we had a good discussion—to make every effort to be open and honest with the public about VA issues to ensure transparency.

Mr. Chairman, I would like to make a general comment to all nominees. In order for this committee to properly conduct its oversight role, we need timely and accurate information from VA. As you all assume your new positions, I urge you to develop relationships with the committee members and staff so that both VA and this committee can better serve the veterans of this great Nation.

Mr. Chairman, I look forward to their testimony and this confirmation hearing, and I thank you very much for your leadership.

Chairman CRAIG. Senator Akaka, thank you very much for those comments, and I think they are very instructive to all of the nominees as we work with them in future days.

I had referenced that Senator Hutchison would be here to make opening introductions of Ms. Mondello, so let me turn to Kay at this moment.

Kay.

OPENING STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM TEXAS

Senator HUTCHISON. Thank you. I am very pleased to be here to introduce my friend and fellow Texan, Lisette Mondello. She is now senior advisor to the Secretary of Education, and before that, for 4 years she was my Director of Communications in my Senate office. She did a great job, as she does in every position that she has ever held.

I think the experience that she has had both in the Senate office and at the Secretary of Education's office will really help her with this very important job at the Department of Veterans Affairs. I think what Senator Akaka said is right. We need someone who can communicate the many good things that are being done at Veterans Affairs, and there is so much.

One of the best things has just happened during this tragedy of hurricanes in Louisiana, Mississippi, Alabama, and Texas, where not one veteran in a Veterans Affairs care hospital or clinic was injured or in any way hurt because of being left or not treated. The Veterans Affairs Department even opened its doors when they had clinics open to anyone who walked in, not just veterans. They did not refuse service to anyone, so that needs to be out there and it needs to be told. If anyone can do it, it is Lisette Mondello.

Lisette received her bachelor of arts degree from Trinity University in San Antonio, TX, the same university as my colleague, John Cornyn, graduated from. She obtained a certificate in finance from Southern Methodist University in Dallas, Tx.

Lisette Mondello will do a great job, and I hope that she will be confirmed. I am not as familiar with all of the rest of you, and I know all of you will also serve our Veterans Affairs Department well. But I am happy to introduce Lisette Mondello.

Thank you.

Chairman CRAIG. Kay, thank you very much, and for all of you nominees, while Kay serves on this authorizing committee, you are aware that she chairs the MilCon and VA appropriations subcommittee.

Senator HUTCHISON. I am sure they would never have thought——

[Laughter.]

Chairman CRAIG. Well, we just want to make sure that you keep a close, direct, and clear relationship with the chairman of these committees.

Let me ask my other colleagues that have joined the committee today if they have any comments.

Senator Burr.

OPENING STATEMENT OF HON. RICHARD BURR, U.S. SENATOR FROM NORTH CAROLINA

Senator BURR. Mr. Chairman, I thank you for assembling this hearing. I thank the nominees for their attendance. I have had an opportunity to meet with each and every one. Not only do they bring with them the qualifications, I found it refreshing that they brought an eagerness to work at the VA. I think it is safe to say that the VA is not the most glamorous Government job that you can have, but it is incredibly important because it brings with it

the responsibility to fulfill the promise of a Nation. I would encourage this committee, even though we don't have it scheduled, that we schedule their confirmation process, the markup, very, very quickly and that we expedite these nominations to the floor so that they can begin their service.

I thank you.

Chairman CRAIG. Senator Burr, thank you.

Senator Salazar.

OPENING STATEMENT OF HON. KEN SALAZAR, U.S. SENATOR FROM COLORADO

Senator SALAZAR. Thank you very much, Chairman Craig and Senator Akaka. Your leadership on this committee and your work in the Senate make me a very proud member of this chamber, and I thank you for your leadership and your mentorship.

I want to thank the nominees as well for your service to our country and to congratulate your families. I know many of your families are here, and this is an important day in the life of each of your families.

To Bill Tuerk, we are going to miss you. I have only been a Member of the Committee for a few months, but I know that your service here is legendary. I know you have served Senator Craig and Senator Specter before him and all the Members of this Committee extremely well, and I know that you have been a tireless advocate for the veterans of our country. In your 14 years of service, you have left a powerful legacy of good work, and you leave behind a talented group of individuals to carry on that good work. Congratulations to you and your wonderful family and your colleagues for the great honor that is being bestowed upon you.

The most pressing challenge I believe that we will face on veterans issues in one way or another is the VA's budget and the broken planning process for that budget that we saw this last year. As everyone here knows, this year the VA announced its $1.27 billion budget shortfall, and we took action in the Senate, in part through the leadership of this committee, to rectify that problem. That announcement that the VA had that problem came about only a few weeks after this committee was told that we did not have a problem. That is going to be an area where the VA has to have a collective focus on that issue, and it is something that I raise with Secretary Nicholson when he and I met in private to talk about the future of the VA. This issue is something that will affect each and every one of you who is before this committee this morning.

The appointments we are examining today will have a huge impact on the lives of all of our Nation's veterans. It is clear from your resumes that you are all well qualified. It is also clear that you need to prove to this committee and to the Nation's veterans that you can be independent in your thinking and that you will stand up for the needs of veterans in our country. I have no doubt that you will do that, and I look forward to a speedy confirmation process for all of you for these positions.

Thank you very much. Thank you, Mr. Chairman.

Chairman CRAIG. Ken, thank you very much.

Senator Obama, any opening comments?

OPENING STATEMENT OF HON. BARACK OBAMA, U.S. SENATOR FROM ILLINOIS

Senator OBAMA. Thank you very much, Mr. Chairman, Ranking Member Akaka. Thanks for your good works day in and day out, as well as holding this hearing today.

I will be very brief. I congratulate all of you for your nomination. Mr. Tuerk, in particular, congratulations to you for the outstanding work that you have done on this committee, and we are very proud of you. I think everybody on the committee—although, like Senator Salazar, I have not been on the committee long, everybody has been extraordinarily impressed with your knowledge and hard work and regard for veterans. I am not saying that, you know, the skids are greased for you, but I think you are in pretty good shape here.

[Laughter.]

Senator OBAMA. All of you are accepting a call to public service. Many of you have been involved before. I appreciate that very much. Obviously, over the last several weeks, I think there has been a lot of attention focused on appointees to the Federal Government, and, frankly, I think all of us are aware of the fact that although sometimes people who work for the Federal Government are dismissed as bureaucrats or what have you, it turns out that having qualified people in their jobs who take their jobs seriously makes an enormous difference. In some cases, it can be a life or death situation.

I appreciate all of you participating in this process. I will have a few questions for some of you in terms of just talking about how we can make sure that not only the budget process for the VA system is working the way it needs to, but that we have a customer-oriented VA in which the bias is towards helping as opposed to simply saving money. I am going to want to hear some ideas from you about how you intend to discharge your duties.

With that, thank you very much, Mr. Chairman.

Chairman CRAIG. Senator Obama, thank you very much.

We have been joined by the former chairman of this committee, Senator Arlen Specter, who now chairs the Judiciary Committee and is just coming off from a 2-week vacation.

[Laughter.]

Chairman CRAIG. I understand he will resume his responsibilities on that committee. Anyway, Senator Specter, thank you very much for coming by. I know you wanted to be here and I am glad you are here to make comments about a former staffer of yours, Bill Tuerk.

OPENING STATEMENT OF HON. ARLEN SPECTER, U.S. SENATOR FROM PENNSYLVANIA

Senator SPECTER. Well, thank you very much, Mr. Chairman, and I congratulate you, Senator Craig, on the outstanding job you are doing in taking over the chairmanship of this committee and your work with Senator Akaka on a very distinguished committee doing very important work for America's veterans. There is no higher calling. After the very heavy workload of the Veterans Affairs Committee, it was a relief to take over the chairmanship of the Judiciary Committee.

[Laughter.]

Senator SPECTER. Where it is practically a full-time vacation.

I can only be with you for a few minutes because we are now in the process of final statements on the confirmation of Judge Roberts to be Chief Justice, and as you all know, we will be voting on him at 11:30. Senator Leahy is scheduled to speak at 10:30 and I at 10:45, and then the Leaders will speak, and it is really a historic day for the 17th Chief Justice of the United States.

The work of the Veterans Affairs Committee, notwithstanding the Judiciary Committee and notwithstanding Chief Justice, is second to none in taking care of the veterans of America. I know it is a very dedicated committee.

I am delighted to see Bill Tuerk up for a very important position as Under Secretary for Memorial Affairs. He will have the obligation to oversee the National Cemetery Administration, 125 national cemeteries, 33 soldiers' lots, and that raises very, very delicate questions to care for the memory of veterans and to accommodate families. I have seen the issue across the country, and we are in the midst now of trying to find a national cemetery location in southeastern Pennsylvania. You see the emotion when people are faced with a locale. Where will their loved ones be interred? What access will they have to visit them? It takes a very, very sensitive person.

Bill Tuerk has an extraordinary background. His work with the VA goes back 20 years where he was an attorney in the General Counsel's office. In 1991, I was fortunate enough to hire Mr. Tuerk to serve as my General Counsel when I was Ranking Member, and he has been Chief Counsel, Staff Director, and taken on very, very heavy responsibilities.

We are all concerned about Bill's wife, Vivian, who has had her own problems. It is unfortunate she could not be with Bill today, and all of us, for this very significant event in a very distinguished career, but Bill's children are here. I have every confidence he will be approved by this committee and by the full Senate and do an outstanding job in the service of America's veterans.

Thank you very much, Mr. Chairman, for recognizing me immediately upon my arrival, and I appreciate the courtesy.

Chairman CRAIG. Chairman Specter, thank you, and thank you for you stewardship of this committee. Most importantly, thank you for the very respectful and honorable way you have handled the Judiciary Committee over the last several weeks under very challenging circumstances. You are right, we are engaged in a very historic time here as new people come to the Court that will ultimately shape the Court for a good number of years to come.

Thank you for your leadership.

Senator SPECTER. Thank you, Larry.

Chairman CRAIG. Now we turn to all of you, and if you would please stand with me and raise your right hand. Do you solemnly swear or affirm that the testimony you are about to give the committee at this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. TUERK. I do.

Mr. HENKE. I do.

Mr. MOLINO. I do.

Mrs. MONDELLO. I do.

Mr. OPFER. I do.

Chairman CRAIG. Thank you. Please be seated.

Bill, we will now turn the floor to you, and, of course, we would ask all of you who have brought family, if you so choose, to introduce those who have come with you.

Bill Tuerk.

STATEMENT OF WILLIAM F. TUERK, NOMINEE TO BE UNDER SECRETARY FOR MEMORIAL AFFAIRS, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. TUERK. Thank you, Mr. Chairman.

Chairman Craig, Ranking Member Akaka, Senator Burr, Senator Obama, Senator Salazar, thank you for honoring me with the opportunity to appear before this committee. As you know, I have been nominated by the President to serve as Under Secretary for Memorial Affairs at VA. After all these years of working in this room, I am thrilled to be sitting at this end of the table.

If I may add a minor aside. I will say to all my fellow staff members here, it looks a whole lot different from this side of the room.

[Laughter.]

Mr. TUERK. What a difference 20 feet makes.

I appreciate your welcome, and I appreciate the kind comments of all of the Members of this Committee, particularly the kind comments of a personal nature that a number of you have made to me.

Before I get into the substance of my statement, there are some people who are responsible for me being here, and I have to start by thanking them. First, I have to thank the President of the United States for nominating me to serve in this high position. Equally, I have to thank Secretary Jim Nicholson. Secretary Nicholson recommended this appointment to the President. Without that, obviously I would not be here.

There are two other high officials within VA that I want to recognize. Without their support, I would not be here. One of them is with us. He is the Honorable Gordon Mansfield, the Deputy Secretary of Veterans Affairs, who is seated behind me. The other gentleman, who is a senior official at VA that I want to recognize, is General Mick Kicklighter, Secretary Nicholson's Chief of Staff. Either of these men could have killed this idea very quickly by, for example, damning me with faint praise. I appreciate their support.

Finally, I have to thank two members of this body: first, the former chairman, Senator Specter, who made a statement a moment ago. It is he who hired me here in 1991. It is he who gave me the opportunity to be General Counsel, Chief Counsel, and Staff Director of this committee. It is he who first urged the President to consider my qualifications for high appointment. I am very much indebted to him.

The other member of this body that I want to express my appreciation to is the Chairman. He has been very supportive of me during his brief but very distinguished tenure as Chairman, and I thank you, sir, for that.

I know it is customary for nominees at this point to also thank their spouses and family members, and I am not going to depart from that tradition. As has been alluded to, my wife, Vivian, isn't

able to be here today. She would be here if she could be here. She has supported me at every step in my career, starting in the second year of law school. I am very much indebted to her for her support, but that is a minor reason for my devotion to her. The major reason—the major two reasons—are present here in the room, and they are my daughter, Jackie, and my son, Peter. They are here, and since, Mr. Chairman, you gave us the opportunity to introduce our family members, I would like to do so. They are seated right here.

Chairman CRAIG. Please. Thank you. Nice to see you both.

[Applause.]

Mr. TUERK. Now we get to the substance. I am here this morning, Mr. Chairman, Ranking Member Akaka, and Members of the Committee, to ask for your recommendation to the Senate that I be approved to this position. My qualifications for this job stem greatly, though not entirely, from my service in this room in this suite of offices, and also from my service as a lawyer in the Department of Veterans Affairs. In these two slots, I learned a lot about law and policy as it relates to veterans issues, but I learned a whole lot more. I learned how to be a team member and a team builder. I learned, especially with these fine people who are seated behind the table, how to empower staff and to trust their decisions and to trust their judgment. I learned the importance of garnering support across the political spectrum if you are going to get anything done around here. I learned that one must earn the trust of veterans and veterans service organizations, and also that that trust is earnable, even when you have to say no to veterans on occasion, so long as there is a common understanding that we share devotion to and respect for veterans.

These are the lessons I want to take to VA. I have outlined in my prepared statement some of the things I want to accomplish. I want to get 11 cemeteries up, open, and operating before I finish. I want to re-energize VA's National Shrine Commitment Program. I want to enhance the State Cemetery Grant Program so that veterans in less urban areas can have the benefit of burial among their comrades in a place of honor. I want to leave behind a plan for the burial of my generation when I am gone.

Mr. Chairman, Members of the Committee, I do not believe in fixing something that isn't broken. As you know, the National Cemetery Administration recently was awarded the highest customer satisfaction scores of any organization anywhere, public or private. Beat General Electric. Beat Federal Express. Beat whatever organization you think serves customers well. I am not going down to VA to change NCA. It doesn't need changing. I am going down with the idea of shepherding the resources that NCA has to meet future challenges, and if I am given that opportunity, I pledge to you that I will work tirelessly to earn the confidence and support of the staff down there, to earn the confidence and trust of veterans, and to earn the confidence and trust of this committee.

I owe that to the President who nominated me. I owe that to the Congress that I hope will confirm me. But, most importantly, I owe that to veterans.

With that, I will end my statement, and I will be happy to answer your questions. Thank you.

[The prepared statement of Mr. Tuerk follows:]

PREPARED STATEMENT OF WILLIAM F. TUERK, NOMINEE TO BE UNDER SECRETARY FOR MEMORIAL AFFAIRS, U.S. DEPARTMENT OF VETERANS' AFFAIRS

Chairman Craig, Ranking Member Akaka, and Members of the Committee: thank you for honoring me with an invitation to appear before the Committee. As you know, I have been nominated by the President to serve as Under Secretary for Memorial Affairs in the United States Department of Veterans Affairs. I am thrilled to be sitting, after all these years of working in this room, on this side of the table. I am more than a little humbled.

Before I get into the substance of my statement, there are some people—people who are responsible for me being here—that I need to publicly thank. First, allow me to express my gratitude to the President of the United States, the Honorable George W. Bush, for nominating me to serve in this high position. Let me also thank VA Secretary Jim Nicholson for recommending my candidacy to the President. In addition, I need to express my gratitude to two senior VA officials, Deputy Secretary Gordon Mansfield and Secretary Nicholson's Chief of Staff, General Mick Kicklighter; without the support of these two distinguished men, I would not be here this morning. I am also indebted to former VA officials who I count as friends (most particularly, to former Secretary of Veterans Affairs Tony Principi; to former Under Secretary for Memorial Affairs, General Jack Nicholson; and to my boss at VA some years ago, former Assistant General Counsel, Audley Hendricks. I have been honored with the support of the senior Republican Member of this Committee, Senator Arlen Specter. It is he who bestowed upon me the privilege of serving as Chief Counsel and Staff Director of this Committee during his chairmanship. And it is he who first urged the President to consider my qualifications for a senior appointment in this Administration.

Finally, Mr. Chairman, I know it is customary for nominees to thank their spouses, children, and other family members at this point in the proceedings. Mr. Chairman, my wife, Vivian, is not able to be here today, but she certainly would be here if she could be here. She has supported my career at every step of the way, but that is a minor reason for my devotion to her. I am most indebted to her for my daughter, Jackie, and my son, Peter. They are here this morning. If I may, Mr. Chairman, I would like to introduce them to the Committee.

Mr. Chairman, I am here this morning to ask that this Committee recommend my confirmation to the Senate as a whole. My qualifications for service in an appointed position at VA stem greatly, but not entirely, from my service to veterans right here in this suite of offices. Here, and also as an attorney in the health care practice group at VA, I learned many substantive issues relating to law and policy that affect veterans and their survivors. But I learned more. I learned how to be a team member and a team builder. I learned the importance of garnering support across the political spectrum. I learned that one must earn the trust of veterans and their representatives, the veterans service organizations, and also that that trust is earnable, even by those who, at times, have to say "no" so long as there is common agreement on the fundamental worthiness of veterans to the Nation's respect and gratitude. In short, I think I learned how to get things done in Washington, and more importantly, how to identify the things that ought to get done in Washington.

These are the lessons I will take to the VA, if I am confirmed. And there are many things, concrete things, that I intend to get done in the relatively short period of time that will be available to me if I am confirmed. First and foremost, there are 11 new cemeteries in various stages of development that I intend to get fully opened and operating before I leave VA—in Atlanta; in Detroit; in Miami; in Pittsburgh; in Sacramento; in Bakersfield; in Birmingham, Alabama; in Greenville/Columbia, South Carolina; in Jacksonville; in Philadelphia; and in Sarasota. I intend to find ways to enhance the VA's State Cemetery Grant Program so that veterans in less densely populated areas might better be able to gain access to burial among comrades in a place of honor. I hope to re-energize VA's National Shrine Commitment program so that veterans cemeteries might truly be monuments to the men and women who have served. And I intend to leave the National Cemetery Administration with a plan to meet the burial needs of my generation, and with a committed, enthusiastic, well-trained, and diverse workforce. It is to the accomplishment of these goals that I intend to devote my energies and talents if I am confirmed.

Mr. Chairman, I do not believe in fixing that which is not broken. I know very well from personal experience how committed, sensitive, and responsive the employees of the National Cemetery Administration are. It's worth saying over and over again that the National Cemetery Administration recently earned the highest customer satisfaction scores ever awarded to any organization, public or private. My

mission, then, will not be to change the National Cemetery Administration. It doesn't need changing. It will be to channel the exceptional capabilities and devotion of NCA staff to satisfy evolving needs while continuing to meet the superior standard that it has set for itself. And while I know that I am lucky, extraordinarily lucky, to have the potential opportunity to lead such a class organization, I also know that leading the Nation's recognized leader in customer service will be a personal challenge of the greatest magnitude. I gain confidence from the fact that I have experience in leading a smaller, but no less elite, staff (the staff of this Committee). If I have earned their trust and confidence, and I think I have, I think I will have a good shot of earning the trust and confidence of the National Cemetery Administration's workforce and, most importantly, the veterans and survivors that they serve. I give you my solemn commitment that, if my nomination is approved by the Committee and by the Senate, I will work tirelessly to earn that trust and confidence. The President, the Committee, and the Nation's veterans deserve no less.

Mr. Chairman, Ranking Member Akaka, and Members of the Committee, I would be pleased to respond to your questions.

QUESTIONAIRE FOR PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

1. Name: Tuerk (LAST) William (FIRST) F. (OTHER)

2. Present Address: 4512 Demby Drive Fairfax (CITY) Virginia (STATE) 22032 (ZIP CODE)

3. Position to which nominated: Under Secretary for Memorial Affairs, Department of Veterans Affairs

4. Date of nomination: July 29, 2005

5. Date of birth: 08 (DAY) 12 (MONTH) 1949 (YEAR)

6. Place of birth: Peoria, Illinois

7. Marital Status: Married

8. Full name of spouse: Vivian Chapin Tuerk

9. Names and ages of children: Jacquelyn C. Tuerk -- 37; Peter W. Tuerk -- 33

10: Education:

Institution (including city and State)	Dates attended	Degrees received	Dates of degrees
Bergan High School Peoria, Illinois	1963 - 1967	Diploma	May 1967
University of Notre Dame Notre Dame, Indiana	1967 - 1971	A.B.	May 23, 1971
George Washington University Washington, DC	1974 - 1975	None	
George Washington University Washington, DC	1975 - 1978	J.D.	May 21, 1978

11. Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

National Defense Medal, United States Army, 1971

12. Memberships List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable, and other organizations for the last 5 years and any other prior memberships or offices you consider relevant

Organization	Office held (if any)	Dates
Holy Spirit Roman Cath. Church, Annandale, VA		1984 - present
St. George Gr. Orthodox Church, Bethesda, MD		1980 - present
Federal Bar Association, Washington, DC		1998 - present
Republican Nat'l Lawyers Association, Wash., DC		1999 - present
Ethics Committee, Fairfax Hospital, Fairfax, VA		1986 – present

13. Employment record: List below all employment (except military service) since your 21st birthday, including the title or description of job, name of employer, location of work, and inclusive dates of employment.

6/71 – 9/71: Peoria Park District, Madison Golf Course – Grounds Crew

5/74 – 10/74: Rex Liquor Store, Washington, DC – Sales Clerk

10/74 – 1/76: U.S. Treasury Department, Washington, DC – Research Assistant.

6/76 – 9/76: Washington Experts Limited – Writer, Editor

6/77 – 4/85: Cotten, Day & Doyle, Washington, DC – Law Clerk (1977 – 1978); Associate (1978 – 1981); Equity Partner (1982 – 1985).

6/85 – 8/91: Department of Veterans Affairs, Office of the General Counsel – General Attorney.

8/91 – present: United States Senate, Committee on Veterans Affairs – Republican General Counsel (1991 – 1999); Republican Chief Counsel/Staff Director (1999- 2005); Republican Chief Counsel (2005 – present)

14. Military service: List below all military service (including reserve components and National Guard or Air National Guard), with inclusive dates of service, rank, permanent duty stations and units of assignment, titles, descriptions of assignments, and type of discharge.

11/04/1971 – 11/03/1973: United States Army – Basic Training, Ft. Lewis, WA, (11/71 – 1/72); Military Police School, Ft. Gordon, GA (1/72 – 5/72); Military Policeman, U.S. Army Confinement Facility, Mannheim, Federal Republic of Germany, Honorable Discharge at rank of SP-4

15. Government record: List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments other than those listed above.

None.

16. Published writings: List the titles, publishers, and dates of books, articles, reports, or other published materials you have written.

See Attachment A.

17. Political affiliations and activities: (a) List all memberships and offices held in and financial contributions and services rendered to any political party or election committee during the last 10 years.

See Attachment B.

(b) List all elective public offices for which you have been a candidate and the month and year of each election involved.

None.

18. Future employment relationships:

(a) State whether you will sever all connections with your present employer, business firm, association, or organization if you are confirmed by the Senate.

I will.

(b) State whether you have any plans after completing Government service to resume employment, affiliation, or practice with your previous employer, business firm, association, or organization.

I do not.

(c) What commitments, if any, have been made to you for employment after you leave Federal service?

None.

(d) (If appointed for a term of specified duration) Do you intend to serve the full term for which you have been appointed?

N/A

(e) (If appointed for an indefinite period) Do you intend to serve until the next Presidential election?

Yes.

19. Potential conflicts of interest:

(a) Describe any financial arrangements, deferred compensation agreements, or other continuing financial, business, or professional dealings which you have with business associates, clients, or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None.

(b) List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

None.

(c) Describe any business relationship, dealing, or financial transaction which you have had during the last 5 years, whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

None.

(d) Describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any Federal legislation or for the purpose of affecting the administration and execution of Federal law or policy.

None.

(e) Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements involved.)

N/A

20. Testifying before the Congress:

(a) Do you agree to appear and testify before any duly constituted committee of the Congress upon the request of such committee?

I do.

(b) Do you agree to provide such information as is requested by such a committee?

I do.

ATTACHMENT A

PUBLISHED WRITINGS

- "VA Patients' Self-Determination Rights: Impact of the *Cruzan* Decision on VA Policy Options," National Center for Clinical Ethics Quarterly, Vol. 3, No. 3.
- "*Cruzan v. Harmon:* The Projected Impact of Pending Supreme Court Litigation on Withdrawal of Life-Sustaining Treatment," National Center for Clinical Ethics Quarterly, Vol. 3, No. 1.
- "Evolving Federal Law on the 'Right to Die'," National Center for Clinical Ethics Quarterly, Vol. 2, No. 1.
- "*Tune v. Walter Reed Army Medical Center:* Onto a 'Natural Death' Slippery Slope?", Federal Practitioner (Cahners Pub. Co.), March 1987.

William F. Tuerk, JD

Tune v. Walter Reed Army Medical Center: onto a slippery slope?

In *Tune v. Walter Reed Army Medical Center,* 602 F. Supp. 1452 (D.D.C. 1985), a federal court held, in a case of first impression,[1] that competent patients in federal health care facilities "have the right to determine for themselves whether to allow their lives to be prolonged by artificial means, including the right to demand the cessation of life support once begun." (*Id.* at 1456.) So holding, the court authorized the removal of a respirator, the Army's policy to the contrary and objections notwithstanding.

The *Tune* decision, of itself, is not a "breakthrough"; its plaintiff was a competent adult—a fact which, most legal and medical authorities would agree, rendered her claim to "self-determination" relatively noncontroversial, particularly as it concerned the withdrawal of an "extraordinary" treatment modality. Clearly, however, *Tune* represents the tip of a legal iceberg which is yet to be uncovered as a matter of federal law. In the absence of federal policy-making which gives force to "patients' rights" in this context, federal courts will surely be called upon at some point to address, in the words of the *Tune* decision, "the difficult issues presented when the patient is comatose or otherwise incompetent, and a 'substituted judgment' must be made." (*Id.* at 1454.)

A reading of *Tune* against the backdrop of state court precedent, on which *Tune* relied heavily, suggests that principles which have evolved in the state courts might be embraced at the federal level when controversies dictating consideration of the issues arise. Certainly, an appreciation of the legal context (as established by the state courts) from which *Tune* emerged aids in understanding what *Tune* did—and did not—say. More important, the evolution of state law serves as an indicator of where *Tune* might lead. State court rulings have weakened legal barriers to at least "passive" forms of suicide and euthanasia to the point of near insignificance. At the same time, state courts have eroded the authority of physicians and administrators to establish policies restraining the exercise of the "right to die," even by nonterminal and incompetent patients, in institutions that are entrusted to their management.

Tune represents the tip of a legal iceberg which is yet to be uncovered as a matter of federal law

State court rulings

The source of the patient's "right to die." The seminal case which defined the substantive right of patients to a "natural death" was the Karen Ann Quinlan case.[2] *Quinlan* ruled that "natural death" issues fall within the scope of an unwritten and "prenumbral" right to privacy, which is protected by the U.S. Constitution. Numerous cases have followed suit, although some (including a subsequent decision by the court that ruled in *Quinlan*[3]) have cited an additional, and alternate, basis for the exercise of patient choice: the common-law right to "self-determination," which includes the right "to be free from nonconsensual invasions of bodily integrity."[4]

Only New York has expressly declined to find a constitutional basis for the exercise of patient choice in the "natural death" context. The *Storar* case[5] held that because a common-law basis exists for the "right to die," analysis of the constitutional issues is unnecessary.

The extension of competents' rights to the incompetent. Cases dating at least as far back as the *Schloendorff* decision in 1914[6] have stood for the proposition that competent patients have ultimate decision-making authority in matters pertaining to medical care. *Quinlan* and *Saikewicz* extended that right, in the "natural death" context, to incompetent persons by permitting surrogate decision-making on behalf of such patients. Much debate on the issue of who is the proper surrogate—family members or courts of law, but not physicians—has ensued.[7] Nonetheless, legal consensus reflects the idea that incompetent patients enjoy the same rights as do competent ones. (*See,* e.g., *Colyer* at 1744.)

Courts (and, to a limited extent, legislatures) have resorted to a number of devices to recognize the incompetent patient's will regarding treatment questions and, thus, to effect his or her "right to die." Ideally, the patient will have expressed his or her views on the topic through a "living will," or at least by means of thoughtful, solemn, oral communication. Often, however, no reliable indicator of the patient's wishes exists. Two options are then available: to maintain treatment even when such a course is deemed repugnant; or to resort to decision-making by a surrogate. Whether they be courts, guardians, or family members, surrogates are generally bound by available indications of what the *patient* would want. When a currently in-

competent patient was previously unable (or unwilling) to formulate or express such views, surrogates must be guided by their own conception of what course is in the patient's "best interests." (*See*, e.g., *Conroy*.)

When may the "right to die" be exercised? No person's rights are absolute; they must bow to the dictates of an orderly society. In "natural death" cases, state courts have indicated that the "right to die" may be exercised only when various governmental interests are insufficient to override individual choice (as expressed personally or through a surrogate). In theory, four governmental interests—the government's interests in preserving life; in preventing suicide; in safeguarding the ethics and integrity of the medical profession; and in protecting innocent third parties from harm—may have overriding effect. In practice, none has generally preemptive impact.

Quinlan established that when three factors are present—coma, a terminal prognosis, and "invasive" treatment—and no harm will be suffered by innocent third parties (e.g., the patient's minor children), the right of privacy will protect the patient's right to decline, or order the withdrawal of, the "invasive" treatment in question. Subsequent rulings by the *Quinlan* court in *Conroy*, and by other courts,[8] have firmly established that the presence of coma (or a chronic vegetative state) is not a prerequisite to the exercise of choice by incompetent patients acting through surrogates. Thus, *Quinlan* would suggest that a terminal prognosis is required and, even then, only "invasive" treatment may be withheld or withdrawn.

Decisions rendered subsequent to *Quinlan*, however, have revealed that "invasiveness" is not a crucial issue—at least if the term is construed to imply aggravation, discomfort, or inherent indignity. In the face of arguments (and lower-court precedent) that to so rule would constitute state-authorized suicide and a total disregard for the government's interest in preserving respect for the sanctity of life, *Conroy* and other decisions[9] have held that nourishment and hydration may be withheld or withdrawn; at least one case has ruled that medication may also be withheld.[10] If, indeed, any element of *Quinlan's* calculus continues to be valid, would this not mean that a terminal prognosis is still required before the individual's constitutional rights will supersede potentially preemptive governmental interests?

No person's rights are absolute; they must bow to the dictates of an orderly society

It is possible that a terminal prognosis is still required in New Jersey, the state in which *Quinlan* was decided, although the facts (if not the terminology) in *Conroy* raise considerable doubt. In any case, a requirement of terminal prognosis has been abandoned by recent cases in Massachusetts and California.

The *Bouvia* decision,[11] which dealt with the question of whether a *nonterminal* and competent patient could order the removal of hydration and nourishment, speaks for itself: "[A] patient has the right to refuse *any* medical treatment or medical service. . . . This right exists even if its exercise *creates* a 'life-threatening condition.' " (*Bouvia* at 300 [emphasis added].)

Brophy[12] extended the substance of *Bouvia* to situations involving nonterminal, *incompetent* patients by affirming a "substituted judgment" which, although based on the court's finding of the patient's viewpoint, was rendered *for* the nonterminal incompetent patient. Cases such as *Conroy* show that no legal impediment blocks nonsubjective "best interests" decision-making for incompetent persons whose views on the subject of "natural death" are unknown. To put it another way, state precedent would now appear to sanction a surrogate's decision to withhold or withdraw treatments like nourishment, hydration, and medication based entirely on the surrogate's own view of what is "best" for the patient—even when the patient is not terminal. If such is the case, it must be concluded that governmental interests in preserving life and preventing suicide are nonoperative in the "natural death" context.

It might be argued that the governmental interest in preserving the integrity and ethics of the medical profession persists to block unfettered patient or surrogate autonomy over treatment decisions. After all, *Brophy* stated that although a patient or surrogate has the right to order the removal of hydration or nourishment, medical staff could not, over its moral or ethical objections, be compelled to accede to that right by participating in the withholding of food and water. As was ruled by *Bouvia*, however, the exercise of the patient's "right to die" is not subject to the "veto" of the medical profession; the hospital in question was thus *ordered* to withdraw unwanted treatment. Similarly, in the *Bartling* case, a "Christian, pro-life [Adventist] hospital" was *ordered* to cease life support despite its professed religious objections. Suffice it to say that this nation's jurisprudential history demonstrates little tol-

erance for any person's obstruction, no matter how well-intentioned or how deeply rooted in moral, religious, or ethical belief, to the actual exercise by another of his or her constitutional rights.

Tune revisited

The source of the federal patient's "right to die." Like the *Storar* decision (and unlike the remainder of the state cases discussed above), *Tune* declined to rule that the federal patient's "right to die" has its source in the U.S. Constitution. While *Tune* did find some constitutional underpinning for such a right in analogous cases dealing with the rights of mental patients to resist the forcible administration of antipsychotic drugs, it ultimately settled on a "common-law" approach. The court stated as follows:

> [I]t is now a well-established rule of general law, as binding upon the government as it is on the medical profession at large, that it is the patient, not the physician, who ultimately decides if treatment—any treatment—is to be given at all. . . . [A] competent, mature patient has the right to be fully informed of the possible consequences of a course of treatment before he permits the medical ministrations to begin, and . . . attending physicians are in breach of duty to the patient if they initiate treatment without the patient's informed consent. The rule has never been qualified in its application by either the nature or purpose of the treatment or the gravity of the consequences of acceding to or foregoing it. And at least one corollary pertinent here is necessarily implicit in it: such a patient . . . has the right to insist that treatment be halted. . . . (*Tune* at 1455 [citation omitted].)

The extension of competents' rights to the incompetent. As is noted above, *Tune* did not have to face the issue of whether, and when, the rights of competent patients should be extended to the incompetent. Thus, no federal precedent currently exists on the issue of whether incompetent patients have a "right to die." However, the *Tune* court's search for federal case precedent to guide it would appear to indicate that when the issue is raised, federal courts will find not only that such a right exists, but also that it may be exercised through surrogate decision-making. For supportive federal precedent already exists.

No federal precedent currently exists on the issue of whether incompetent patients have a "right to die"

Lojuk v. Quandt, 706 F.2d 1456 (7th Cir. 1983), took up the issue of whether an incompetent patient in a VA facility could be subjected to electroconvulsive therapy without his consent, and over the objections of his family. The court stated as follows:

> This case . . . involves an incompetent patient. However, a patient's incompetency should not deprive him of a liberty interest in "making" treatment decisions. Such a rule would have the absurd result of granting less protection to those incompetent patients who are in greater need of it. It is of course evident that a person who is by definition incompetent will not really be able to "make" these decisions on his own. But this simply means that someone else acting in the patient's best interests will have to make the decision for him. (*Id.* at 1466.)

When may the federal patient's "right to die" be exercised? Tune held only that "competent, adult patients . . . with terminal illnesses and in the circumstances presented here have the right to determine for themselves whether to allow their lives to be prolonged by artificial means." (*Tune* at 1456.) Obviously, the decision is narrow in scope—particularly if it is viewed in the context of the state rulings discussed above. The patient must not only be competent for *Tune* to apply, but must, as well, be terminal and faced with imminent death. *Tune's* application would also appear to be limited to cases where the withdrawal or withholding of "extraordinary" treatment modalities—and, perhaps, other forms of "invasive" treatment—is envisioned.

Tune's weighing of potentially preemptive governmental interests is somewhat perfunctory. Nonetheless, it is revealing. Most significantly, *Tune* considers only those governmental interests (discussed above) that had been identified by leading state cases, and discusses them on the same terms as those precedents. Like many state cases, *Tune* dismisses the suicide, ethics, and third party concerns with minimal discussion, ruling in a footnote as follows:

> The prevention of suicide is not involved when permission is not being sought to terminate a healthy life by artificial, self-induced means, but merely to allow nature to take its course. Consideration of the rights of innocent third parties is generally

limited to situations in which the interests of the patient's dependents may be adversely affected. And medical ethics incorporates the duties owed the patients, including, among others, administering treatment only with consent in the case of a competent adult. (*Tune* at 1455 [citation omitted].)

It then concludes that "society's concern for the preservation of human life" is "the only [interest] . . . [which] is implicated to any significant extent here." (*Id.*) But while that interest may be "implicated," *Tune* concludes that it is not preemptive:

> While preservation of life . . . is no doubt a transcendent goal for any society which values human life, the state's interest in maintaining life must defer to the right to refuse treatment of a competent, emotionally stable, but terminally ill adult whose death is imminent and who is, therefore, the best, indeed, the only, true judge of how such life as remains to him may best be spent. (*Id.*)

Conclusion

It is apparent that *Tune* has opened the way to a potential—but not inevitable—evolution of federal case law along the lines suggested by the state cases. Only time will tell whether federal law ultimately arrives at the same conclusions expressed in (and suggested by) *Bouvia* and *Brophy*, and whether in so doing federal case precedent, like state appellate decisions, abandons the premises which had initially appeared to circumscribe the unfettered exercise of "patient choice." The reader, of course, is capable of reaching his or her own conclusions on the question of whether such an evolution is desirable. In the writer's view, state appellate precedent is perilously close to sanctioning even "active" forms of euthanasia and suicide—and mandating that hospitals "assist" in the accomplishment of those acts. *See Bouvia v. Superior Court, supra* at 307 (Roth concurring):

> Elizabeth apparently has made a conscious and informed choice that she prefers death to continued existence. . . . I believe she has an absolute right to effectuate that decision. This state and the medical profession . . . should be . . . assisting her to die with ease and dignity. The fact that she is forced to suffer the ordeal of self-starvation to achieve her objective is in itself inhumane.

Managers and practitioners should note that a recognition of a "right to die" in the Constitution must be accompanied by, at minimum, severe restrictions on institutional and professional controls over if, when, and how such rights will be exercised.

A seemingly minor feature of *Tune* would appear to encourage federal policymakers (including, most appropriately, Congress) to take control of this issue and, at least, reduce the likelihood of hospital regulation by judicial pronouncement. As is noted above, *Tune* displayed a restraint not shown by state case authorities (other than *Storar*) in finding that the "right to die" has its origins in the patient's common-law right of self-determination. Unlike constitutional rights, rights stemming from the common law "can be abrogated by statute . . . subject only to due process requirements. . . . Constitutional rights, on the other hand, cannot be abrogated." (*Eichner v. Dillon*, 73 A.D. 2d 431, 426 N.Y.S. 2d 517, 540-541 (1980), *on appeal, Matter of Storar, supra.*) They may also be "abrogated" by statutorily authorized, executive branch policy-making. Whatever position one might take on the proper resting place of federal law on this issue, the democratic process ought not to be feared—and ought not to fear the issue.

References

1. *See Tune* at 1455. *See* also *Foster v. Tourtellotte*, 704 F.2d 1109 (9th Cir. 1983).
2. *Matter of Quinlan*, 137 N.J. Super. 227, 348 A.2d 801 (1975), *modified and remanded*, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied sub. nom. Garger v. New Jersey*, 429 U.S. 922 (1976).
3. *In re Conroy*, 190 N.J. Super. 453, 464 A.2d 303 (1983), *rev'd and remanded*, 98 N.J. 321, 486 A.2d 1209 (1985).
4. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417, 424 (1977). *See* also *Welfare of Colyer*, 99 Wash. 2d 114, 660 P.2d 738, 743 (1983).
5. *Matter of Storar*, 52 N.Y.2d 363, 420 N.E.2d 64 (1981), *cert. denied sub. nom. Storar v. Storar*, 454 U.S. 858 (1981).
6. *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92, 93 (1914). *See* also *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972).
7. *See*, e.g., Relman, *The Saikewicz Decision: Judges as Physicians*, 298 New Engl. J. Med. 508 (1978); Baron, *Medical Paternalism and the Rule of Law*, 4 Am. J.L. & Med. 337 (1978). *See* also Annas, *Reconciling Quinlan and Saikewicz: Decision Making for the Terminally Ill Incompetent*, 4 Am. J.L. & Med. 367 (1978).
8. *See*, e.g., *Matter of Hier*, 18 Mass. App.Ct. 200, 464 N.E.2d 959 (1984).
9. *See*, e.g., *Matter of Hier, supra; Barber v. Superior Court*, 147 Cal.App.3d 1006, 195 Cal.Rptr. 484 (1983).
10. *In re Severns*, 425 A.2d 156 (Del. 1980).
11. *Bouvia v. Superior Court*, 179 Cal. App.3d 1127, 225 Cal.Rptr. 297 (1986).
12. *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986).

William F. Tuerk, JD, is an attorney in the Office of the General Counsel at VA Central Office.

Veterans Administration Northeast Regional

Center for Clinical Ethics

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Evolving Federal Law on the "Right to Die"

by William F. Tuerk

Introduction

Readers of this newsletter are familiar with the evolution of State law over the years on "right to die" issues. Only recently, however, has Federal law on the subject begun to emerge—without the "fanfare" which accompanied groundbreaking State precedents. This article outlines still-developing federal law on the subject.

Background

Perspective on the development of Federal "natural death" law is gained by an appreciation of ground already covered by State courts. To summarize, State courts faced with "right to die" issues have generally ruled as follows:

- "Ordinary" and "disproportionate" treatment regimes are subject to the patient's right to informed consent;
- Treatment must therefore be withdrawn, even if death will ensue, when the patient withdraws consent (so long as no harm to innocent third parties, e.g., dependent children, is caused);
- Incompetent patients may exercise the right to decline "life-sustaining" treatment through a "living will" or similar anticipatory writing;
- A "surrogate" may exercise that right on behalf of the incompetent patient in the absence of such a writing;
- Courts will approve "surrogate" decisionmaking when there is clear and convincing evidence of the patient's own subjective wishes; and
- Courts in some States will approve "surrogate" decisionmaking, even in the absence of such evidence, based on an assessment of the patient's "best interests." See, e.g., In re Conroy, 486 A.2d 1209, 1231-2 (N.J. 1985); Barber v. Superior Court, 195 Cal. Rptr. 484, 493 (1983). But see Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988); In re O'Connor, 534 N.Y.S.2d 886, 531 N.E.2d 607 (1988).

Due, at least in part, to advancements in State law relative to Federal law, the VA has elected (except in the "DNR" context) to follow State law in situations involving the withholding or withdrawal of "life-sustaining procedures." See DM&S Circular 10-87-74 (July 28, 1987). The Congress, however, has not defined VA patients' "self-determination" rights in terms of State law. 38 U.S.C. § 4131 instructs VA to "prescribe regulations . . . to ensure that . . . all patient care [is] . . . carried out only with the full and informed consent of the patient . . . or, in appropriate cases, a representative thereof." That universal statutory directive, coupled with the constitutional principle that States have no authority over "Federal enclaves," frees the VA to adopt system-wide "natural death" policies. Federal law has now emerged to guide such an endeavor.

Discussion

Three Federal cases are now available to guide VA policymaking. They are:

- Tune v. Walter Reed Army Medical Center, 602 F.Supp. 1452 (D.D.C. 1985);
- Newman v. William Beaumont Army Medical Center, No. EP-86-CA-276 (W.D. Tex. October 30, 1986) (order denying declaratory and injunctive relief and dismissing complaint); and
- Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988).

Viewed as a "package," these cases are consistent with previously-identified trends in State law (except the

still-controversial issue of decisionmaking on the basis of the patient's "best interests" has not yet been addressed).

Tune v. Walter Reed Army Medical Center, supra, was the first case which articulated a Federal patient's "right to die." In Tune, an Army hospital refused to accede to the request of a competent patient with terminal adenocarcinoma of the pericardium that a respirator be withdrawn. In so refusing, the Army stated that, under its policies, patients could decline the initiation of "life support," but that once such therapy was initiated it could not, and would not, be discontinued. The District Court found these policies to be unlawful and ordered termination of the respirator, ruling that competent, terminal, adult patients in Federal health care facilities "have the right to determine for themselves whether to allow their lives to be prolonged by artificial means, including the right to demand the cessation of life support once begun." Id. at 1456. In so ruling, the court reasoned that, in such cases, the Government's interest in "maintaining life" is outweighed by the individual's right to determine his or her own medical destiny, and held that the patient's right to "insist that treatment be halted once he is fully informed of the consequences and does not wish to incur them" must be honored irrespective of "the nature or purpose of the treatment, or the gravity of the consequences of... foregoing it." Id. at 1455. The Tune court, however, expressly disclaimed treatment of "the difficult issues presented when the patient is comatose or otherwise incompetent, and a 'substituted judgment' must be made." Id. at 1454. Such a "difficult" case first arose in Newman.

In Newman v. William Beaumont Army Medical Center, supra, the court considered Army policies adopted in the wake of Tune—but which went beyond Tune into the "difficult" area of "surrogate" decisionmaking on behalf of incompetent patients. By the time Newman arose, Army regulations authorized the withdrawal of "life-sustaining procedures" from incompetent patients under the "doctrine" of substituted judgment. That is, Army policies permitted the withdrawal of such treatment in circumstances which indicate that the patient, if competent, would request such action. The court was faced with applying that policy to a situation in which the Army refused to honor the request of a comatose patient's spouse (and court-appointed guardian) that nasogastric nutrition and hydration be withdrawn.

The Newman court declined to order the withdrawal of nasogastric sustenance, finding that the only available evidence of the patient's wishes—a single past statement that the patient would not want to be "maintained" on "life-support equipment"—was "insufficient to prove" that the patient would refuse nutrition and hydration. Slip op. at 8. Notably, however, the court stated no objection to the "surrogate's" contention that sustenance could be withheld under the Army's "life-sustaining procedures" rubric. Neither did it find that State law (which barred the withholding of "life-sustaining procedures" from non-terminal patients) was applicable. To the contrary, Newman ruled that State law was preempted and, thus, did not govern the policies of "a federal facility under the exclusive jurisdiction of the Department of the Army." Slip op. at 2.

Gray v. Romeo, supra, went a giant step further. As in Newman, the patient in question was in a persistent vegetative state, but was not terminal. Moreover, the treatment under consideration by the Gray court, as in Newman, was sustenance (though, in Gray, nutrition and hydration were being supplied via a surgically-implanted "G-tube.") Unlike the Newman court, however, the Gray court was presented with evidence of the patient's specific prior statements that she would decline "artificial feeding" were she ever to be irreversibly comatose. Armed with these facts, the court reached a different result than in Newman, ruling as follows:

- A patient has a constitutional right to "control medical decisions affecting one's body," Id. at 584;
- That right extends to "extreme"—i.e., life and death—situations, Id. at 586;
- That right extends to decisionmaking involving the subsequent cessation, as well as the initial declining, of treatment, Id. at 588;
- That right extends to decisionmaking involving "artificial feeding," as well as other "life support" measures, Id. at 586;
- Incompetent patients possess the full "panoply" of constitutional rights enjoyed by the competent, including the right to decline, or order the cessation of, "life-sustaining" medical treatment, Id. at 587;

- The constitutional right to decline "life-sustaining" treatment supercedes the Government's interest in the "preservation of life"—at least in cases where the incompetent patient's actual wishes are known and, thus, no Governmental interest in protecting potentially victimized persons from harm arises, Id. at 589, compare Cruzan v. Harmon, supra; and
- Providers who do not issue advance notice of policies inconsistent with the foregoing rights will be required to accede to patient desires in cases where a patient transfer cannot be affected, Id. at 591.

Conclusion

The foregoing decisions were issued by U.S. District Courts, not Federal Courts of Appeal. Thus, they are not binding in a precedential sense. Tune and Gray, however, are well reasoned opinions which are solidly grounded in parallel State, and analogous Federal, precedent. See, e.g., Lojuk v. Quandt, 706 F.2d 1456 (7th Cir. 1983) ("[A] patient's incompetency should not deprive him of a liberty interest in 'making' treatment decisions [concerning the provision of electroconvulsive therapy by the VA]....[T]his simply means that someone else acting in the patient's best interest will have to make the decision for him.") Accordingly, these cases are, at minimum, reliable guides to the proper direction of Federal policymaking.

As is noted above, current VA policy specifies that individual medical centers will follow State "natural death" law. When this policy was adopted, no Federal law on the subject of "natural death" existed. Thus, the VA's stance on the issue was thoroughly understandable. Unfortunately, however, many States still have no legal precedents which govern these thorny issues. Indeed, many States have not even formally recognized the validity of "living wills." Thus, patients within VA's unitary health care system are treated disparately as a consequence of geographic accident. More importantly, VA's policy of following State law, which was intended to advance patients' rights, has the contrary result of retarding the recognition of rights, such as those specified in Gray, in States where the law remains unclear or undeveloped. The Tune, Newman, and Gray cases—and the statutory directive that the VA recognize the informed consent rights of all patients—support rectification of this anomaly through the adoption of a single VA "natural death" policy, to be applied on a system-wide basis.

Mr. Tuerk is an attorney in the Office of the General Counsel, VA Central Office.

Please write or call us with comments or items of interest.

ANNOUNCEMENTS

March 27-29 The National Health Council's 36th National Health Forum is presenting a program entitled "Healing Encounters: Patient-Provider Collaboration." For further information, contact National Health Council, 622 Third Avenue, New York, NY 10017-6765, (212)972-2700.

April 5-6 A Cleveland RMEC sponsored program entitled, "Legal Ethical Issues in the Health Care Setting" is being held at the Cleveland RMEC, 10000 Brecksville Road, Brecksville, OH. For more information contact: Carolyn Amy, Cleveland/RMEC, Brecksville, OH, FTS 290-6630.

April 6 The Spring Institute for Medical District 6 Chaplains is sponsoring a seminar on ethical issues. It is being hosted by the VAMC, Martinsburg, W. VA, all VA employees are welcome to attend. For further information contact: Chaplain Chester Johnston, VAMC, Martinsburg, W.VA, FTS 940-3300.

April 7 The Mercy College Institute for the Study of Ethics will sponsor a Teaching of Ethics Conference. The conference will address theory and methods with workshops devoted to practical applications in the classroom. For more information contact: Dr. Nancy Benson, Mercy College, Dobbs Ferry, NY; (914) 693-4500.

April 14-16 The 1989 annual conference of the Association for Death Education and Counseling on Death in the Public Scene: Facing the 1990's, will be held at the

Veterans Administration Northeast Regional

Center for Clinical Ethics

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CRUZAN v. HARMON:

The Projected Impact of Pending Supreme Court Litigation on Withdrawal of Life-Sustaining Treatment

by William F. Tuerk, J.D.

I. Introduction

Recent commentary in the popular press, and even in professional journals, misperceives the fundamental issue at stake in *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), *cert. granted*, 109 S.Ct. 3240, 106 L.Ed.2d 587 (1989). In *Cruzan*, the Missouri Supreme Court refused to permit the withdrawal of nutrition and hydration from a patient who is in a "persistent vegetative state, " and who, in the Missouri Supreme Court's estimation, did not leave "clear and convincing evidence" of her personal treatment wishes prior to lapsing irreversibly into incapacity. Commentators have argued that *Cruzan* defies precedents established in other States (except New York), and that it represents an "unenlightened" view of the privacy and self-determination rights of incapacitated patients. Both assertions are correct. At this stage, however, such arguments are almost entirely academic since the issue before the U.S. Supreme Court is not whether *Cruzan* is "good" law, or whether it reflects sound moral, ethical, social, medical, or resource allocation policy. The issue before the Supreme Court is whether Missouri has the *power* to limit surrogate decisionmaking as it has. The U.S. Supreme Court may conclude that Missouri lacks that power *only* if it finds that the U.S. Constitution *compels* such a ruling. It is highly unlikely that the Court will so rule. Much more likely, the U.S. Supreme Court will defer to the States. Such deference to State power, however, would not mean that the States, or VA, would be required to adopt Missouri's limitations. To the contrary, a deferential ruling would signal that the States, and VA, are free to adopt different rules, including those which would allow nutrition and hydration to be withdrawn in cases like Nancy Cruzan's.

II. Medical Background

Nancy Cruzan is a 32 year old woman who is under the care of a State institution in Missouri and who, due to respiratory arrest sustained as a consequence of an automobile accident in 1983, suffered a loss of oxygen to the brain (hypoxia-ischemia) for a time which can now, retrospectively, be fixed at period of six to twenty minutes. Paramedics revived Ms. Cruzan at the scene of the accident, and she continues to this day to breathe spontaneously—i.e., without the assistance of a respirator. She has, however, never regained consciousness, and is diagnosed as being in a "persistent vegetative state" (PVS).

The nature of PVS is best understood when one appreciates the functions of the "upper" and "lower" parts of the brain, and the ability of cells in those parts of the brain to survive an interruption in oxygen flow. Cells in the cerebral hemispheres, the "upper" area of the brain which controls conscious functioning (thought, emotion, sensation, etc.), are irretrievably lost if they are deprived of oxygen for more than approximately six minutes. By contrast, cells in the brain stem, the "lower" area of the brain which controls unconscious "vegetative" activity (breathing, heartbeat, kidney function, etc.), can survive oxygen loss for 15-20 minutes. Persons who are deprived of oxygen for, e.g., 30 minutes irretrievably lose all brain function; they are dead. However, persons who suffer hypoxia-ischemia for, e.g., 15 minutes will have permanently lost all cerebral functioning, but if they are revived, they may regain the ability to maintain "vegetative" functions controlled by the brain stem, even without mechanical support.

Such persons are either comatose (a sleep-like state) or in a "persistent vegetative state" depending on the degree of brain stem damage. PVS and comatose

patients both lack consciousness and the ability, e.g., to experience pain, due to the loss of cerebral functioning. As distinguished from comatose patients, however, PVS patients may *appear* to be conscious—they may experience sleeping/awake cycles, their eyes may move about the room, and they may respond, though only reflexively, to environmental stimuli. While there is no realistic possibility that PVS patients will ever regain consciousness, they can survive for years *if* they are "tube-fed," given antibiotics to ward off infection, etc. Thus, PVS patients are not "terminal."

Nancy Cruzan is in a persistent vegetative state. She could live for as long as 30 years in her current condition. There is, however, no reasonable prospect that she will regain consciousness or that her condition will otherwise ever improve.

III. Legal Background

Nancy Cruzan's court-appointed guardians (her parents) have requested that nutrition and hydration provided via a gastrostomy tube be withdrawn from their daughter, and that she be allowed to die. The State facility where she is being treated, however, has refused to honor that request absent court authorization. Ms. Cruzan's parents/guardians, therefore, sought, *and were granted*, such authorization. However, the State of Missouri, through its Attorney General, appealed to the Missouri Supreme Court. That court ruled, in summary, that non-"burdensome" treatment may *not* be withdrawn in Missouri from non-terminal, incompetent patients absent "clear and convincing evidence" (e.g., a specific writing or reliable oral directive) which demonstrates that the *patient* would direct the withdrawal of such treatment. The Court noted that Nancy Cruzan had stated that she would not wish to live if she were a "vegetable" and could not live "halfway normally," but that she had never stated specifically that she would decline nutrition and hydration in the event of PVS. The Court therefore ruled that its "clear and convincing evidence" standard had not been met, and that nutrition and hydration could, therefore, not be withdrawn. *Cruzan v. Harmon, supra. Accord In re O'Connor*, 534 N.Y.S.2d 886, 531 N.E. 2d 607 (1988). *But see*, e.g., *In re Conroy*, 486 A. 2d 1209 (N.J. 1985). *See*, also, *In re Longeway*, 549 N.E. 2d 322 (Ill. 1989) for a recent and relatively lengthy discussion of case law concerning the withholding and withdrawal of nutrition and hydration. The parents have appealed to the U.S. Supreme Court and, as this article goes to publication, that appeal is pending. Briefing is completed, and oral arguments were heard on December 6, 1989.

IV. Discussion

A. The Scope of Supreme Court Review

As is noted above, much commentary on *Cruzan* betrays misunderstanding of the role of the Supreme Court in constitutional litigation. The question before the Court is *not* whether the Justices agree with the substance of the Missouri Supreme Court's decision in *Cruzan*. To put it another way, the issue is not whether the Justices would have ruled similarly, or differently, had they been members of the Missouri Supreme Court. The issue before the Supreme Court in *Cruzan*, as in *all* constitutional litigation, is whether the U.S. Constitution *requires* that the Missouri Supreme Court's presumptively valid construction of Missouri law be overturned. *See*, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 13 (1978) ("[The Supreme Court] must not confuse what is 'good' [or] 'desirable' . . . with what is constitutionally commanded . . . .") For *Cruzan* to be overturned, the U.S. Supreme Court must find that the U.S. Constitution *compels* reversal.

B. The Parties' Arguments

Cognizant of the fact that they must identify a constitutional basis supporting their request that nutrition and hydration be withdrawn, Nancy Cruzan's parents argue that competent patients have a constitutional right to decline medical treatment even if death will ensue. Building on that premise, they assert that *incompetent* patients must have the same constitutional right, and that the task before the Supreme Court is merely to identify *how* that right will be put into effect. Ms. Cruzan's parents concede that it is certainly preferable for incompetent patients to "speak for themselves" through a living will, Durable Power of Attorney, or specific prior oral directive. They note correctly, however, that people do not always so speak. In such cases, the parents argue, *some* "surrogate" must speak for the patient. When family is available, and is not "disqualified" by questionable motive, it is they—and not the State—who are in the best position to know the patient's personal wishes, and it is they, therefore, who should make all treatment decisions.

The State of Missouri apparently concedes that *competent* patients have a personal right to decline (and order the withdrawal of) at least some forms of medical treatment. However, States have the power, Missouri argues, to regulate and limit a guardian's (and family's) "surrogate" decisionmaking options—at least in cases where the non-terminal incompetent patient's life is at stake; there is no "clear and convincing evidence" of the patient's own wishes; and the medical treatment in question (if nutrition and hydration may even be termed "medical treatment") is not "burdensome" to the patient.

C. The United States as Amicus Curiae

The U.S. supports the State of Missouri's position on grounds of federalism—i.e., the requirement that the national government defer to State authority absent a constitutional imperative which compels "interference." The U.S. argues that while the competent patient's personal right to determine the course of medical care *is* constitutionally protected, the authority of surrogates to speak for incompetent patients, while lawful, is not so entrenched in the common law to rise to the level of a *fundamental* (and, thus, constitutionally-protected) right which the States may not limit except under compelling circumstances. The U.S. argues that the States, therefore, should be permitted to limit surrogate decisionmaking power *reasonably*, and that the Missouri limitations are reasonable. Significantly, the United States does not argue that Missouri's limitations *must* be adopted; it states that Missouri's rules—and other rules, including those which would allow nutrition and hydration to be withdrawn from patients in Nancy Cruzan's circumstances—may reasonably be adopted by the States *and by Federal entities, such as the VA, which operate hospitals.*

D. Projection of Outcome

Projecting the outcome of Supreme Court litigation can be dicey business, particularly in "first impression" cases, like *Cruzan*, which are not preceded by anticipatory rulings. (The U.S. Supreme Court has never had occasion to rule, for example, on whether *competent, terminal* patients have a constitutional right to a "natural death.") Thus, it is conceivable—though it is not likely—that the Court could rule that the withdrawal of nutrition and hydration is suicide (when it is ordered by the patient), and homicide (when it is ordered by a surrogate). More likely, the Court *could* rule that *all* patients have constitutional self-determination and privacy rights which preclude the States from limiting patient, *and surrogate*, decisionmaking power. More likely yet, the Court could defer to the States, as urged by the United States.

Recent Supreme Court rulings unmistakably signal that the Court is highly reluctant to recognize "new" constitutional rights—i.e., rights which do not have an explicit basis in the text of the Constitution, or a lengthy legal tradition. Patient self-determination and "next of kin" decisionmaking have an historical (though not a textual) basis, but the issue of surrogate decisionmaking in the "natural death" context, particularly where nutrition and hydration are at issue, is of relatively recent vintage. Further, surrogate decisionmaking affects areas of law traditionally reserved to *State* regulation—i.e., informed consent, the regulation of legal guardians and medical practice, and the *parens patriae* role of the States in protecting incapacitated persons from harm. These factors strongly suggest that the Court will uphold the Missouri Supreme Court's ruling in *Cruzan* under the theory that the States have the power to regulate (and limit) surrogate decisionmaking, at least in cases where "clear and convincing evidence" of the patient's wishes is unavailable, the patient is not terminal, and the treatment is relatively nonaggressive.

It merits emphasis that the projected ruling in *Cruzan* would not *compel* the States, or federal hospitals, to adopt Missouri's current limitations. (Indeed, the Missouri Attorney General, who has opposed the withdrawal of nutrition and hydration from Nancy Cruzan under *current* Missouri law, has reportedly endorsed proposed legislation to permit the withdrawal of such treatment in the future.) The U.S., as *amicus*, specifically argues that the States, *and VA*, should have precisely such policymaking latitude.

V. Potential Impact on VA Policy

A. Current VA Policy

Current VA policy directs that, except with respect to DNR orders (which are governed by "system-wide" policies set forth in M-2, Part I, Chapter 30), VA Medical Centers will defer to State law on the withholding or withdrawal of "life-sustaining procedures." VHS&RA Circular 10-87-74. Under the projected outcome of *Cruzan*—one by which the Supreme Court defers to the States and grants them wide policymaking latitude—VA policy, as it is currently constituted, would not change. VA would continue to follow State law which, to the extent that it can be identified, varies from

State to State. VA's major "problem," then, would continue to be the one under which it now labors: defining what is allowed, and precluded, by State law. If, however, the Supreme Court rules that the U.S. Constitution *compels* Missouri's limitations or, conversely, the position espoused by Nancy Cruzan's parents, the States and VA will be required to accede. Under either of these less likely scenarios, the States (and VA) would be well advised, in addition, to adopt standards which are implied (but not specifically required) by the Supreme Court's ruling.

B. Proposed Policy:

The projected outcome of *Cruzan* would affirm that VA may elect to—but it is not required to—follow State "natural death" law. *See*, e.g., *Tune v. Walter Reed Army Medical Center*, 602 F. Supp. 1452 (D.D.C. 1985). Thus, the way would be further cleared for VA's adoption of "system-wide" policies on the withholding or withdrawal of life-sustaining medical procedures. A policy *draft* has been *proposed* which would specify that:

- *all* VA patients have the right to consent to (or to withhold or withdraw consent to) *all* forms of medical treatment (including, optionally, the "artificial" provision of nutrition and hydration);
- *all* VA patients could direct the course of care via a written "advance directive," which would be recognized on a system-wide basis in the event of incapacity;
- in those cases where the irreversibly incompetent patient had not executed such a writing, surrogate decisionmaking would be recognized;
- surrogates (typically, next of kin) would generally be authorized to make treatment decisions—i.e., to select from, or to decline, medically indicated treatment options—on the basis of available indicators of the patient's subjective wishes; and
- in cases where compelling evidence of the patient's subjective wishes is lacking, decisionmaking would be based on evidence which is available and/or an assessment of the patient's best interests by the surrogate and the attending physician.

Such rules are, at minimum, justified by the overwhelming consensus of philosophical and jurisprudential thought. They do, however, "go beyond" limitations currently in force in Missouri and New York with respect to one issue. They would, as a last resort, authorize "best interests" decisionmaking in the absence of "clear and convincing evidence" of the patient's subjective treatment wishes.

VI. Conclusion

Trepidation concerning the outcome of *Cruzan* has been offered as justification for three forms of inaction: declining to honor patient (or surrogate) instructions when to do so is clearly mandated by State law; declining to attempt to discern what State law authorizes, or mandates, in States where the law is unclear; and delaying the adoption of system-wide VA standards due to perceived legal "instability" pending *Cruzan*. Inaction on all three fronts is unwarranted.

Apprehension concerning the continuing validity of State law (whether it be known or still uncertain) is premised in the belief that the U.S. Supreme Court will proclaim substantive rules governing the withdrawal of nutrition and hydration from Nancy Cruzan and, by implication, supercede standards previously developed by the States. Such concern is unwarranted; the Supreme Court will not likely "federalize" this area of law. Rather, it will likely rule that the States have broad policymaking latitude. Similarly, delay in the adoption of VA standards is premised in the belief that the Supreme Court may prescribe substantive rules on the withholding or withdrawal of life-sustaining medical procedures. That concern is unwarranted; the Supreme Court will most likely limit its consideration to the procedural issue of State authority to regulate medical practices within State jurisdiction. A ruling that the States have wide policymaking latitude in this area would be a "green light"—not a "roadblock"—to VA policymaking.

Mr. Tuerk is an attorney in the Office of General Counsel, VA Central Office. The views expressed are solely his.

ANNOUNCEMENTS

March 31 The Mendel Club of Boston College will hold its 13th Annual Undergraduate Conference on Bioethics. College undergraduates are invited to submit papers on any aspect of bioethics for presentation at this meeting. For further information contact: Guy Angella, Mendel Club, Higgins 611, Boston College, Chestnut Hill, MA 02167; (617)552-3545.

April 5-6 The American College of Physicians, The

Veterans Administration Northeast Regional

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VA PATIENTS' SELF-DETERMINATION RIGHTS: IMPACT OF THE CRUZAN DECISION ON VA POLICY OPTIONS

by William F. Tuerk, J.D.

OVERVIEW

VA is required by statute to provide medical care "only with the full and informed consent of the patient . . . or, in appropriate cases, a representative thereof." 38 U.S.C. § 4131 (emphasis added). Thus, all VA patients — those who are competent and are able to speak for themselves and those who lack decisionmaking capacity and must, therefore, rely on "representatives" to speak for them — have fundamental informed consent rights which are explicitly recognized by statute. Two necessary corollaries of this right to informed consent — the right to decline treatment and the right to withdraw consent previously given — appear to now be universally accepted.

VA regulations and policy issuances recognize these rights in the context of treatment generally. See 38 C.F.R. § 17.34; VA Policy Manual M-2, Part I, Chapter 23. In addition, VA policy recognizes the existence of these rights in the context of "terminal care" specifically. See VA Policy Manual M-2, Part I, Chapter 30 (specifying system-wide policies on "Do Not Resuscitate" Orders). Unfortunately, VA has not yet extended the principles expressed in its system-wide DNR order policies to situations involving the withholding or withdrawal of forms of treatment other than resuscitation rendered after spontaneous arrest. Rather, VA has elected instead to defer to State law on such issues. See VHS&RA Circular 10-87-74.

VA deference to State law on this sensitive issue was, perhaps, understandable in the past. For the truly "landmark" judicial decisions in this area — those which extended long-standing principles of patient autonomy to "natural death" situations involving the incapacitated — emerged from State courts, starting with the landmark Quinlan and Saikewicz cases 1/. As has been outlined previously in this journal 2/, however, Federal case law has now evolved to the point that VA need no longer look to State courts for legal and policy guidance on "natural death" issues. The U.S. Supreme Court's recent decision in Cruzan v. Director, Missouri Dept. of Health, _U.S._, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990), continues this evolution in Federal law.

Cruzan affirms principles of patient autonomy which had previously been expressed in prior decisions by lower Federal courts. Thus, Cruzan can be read to direct VA to adopt some "patients' rights" policies — i.e., those which affect rights which the Court recognizes, though only in dictum, as having Constitutional stature. Far more importantly, Cruzan empowers VA to exercise policy discretion in the one policy area which, according to the Court, is not governed by principles of Constitutional law: the area of "best interests" decisionmaking on behalf of incapacitated patients who have left no clear instructions concerning their treatment wishes.

The time has arrived for VA to assume the policymaking responsibility which Cruzan authorizes. That is, VA must promulgate policies which recognize, on a system-wide basis, the rights of all patients to determine, through a "surrogate" if necessary, the course of care — even if care-providers do not agree with the decision, and even if death will result. Such policies should direct, as Cruzan authorizes, that decisionmaking will be based on an assessment of the patient's best interests in cases where the patient is irreversibly incapacitated and he or she has not left treatment instructions.

BACKGROUND

As is discussed below, there is controversy among the States on the narrow issue of "best interests" decision-

making. Unfortunately, disagreement among the States on this relatively narrow issue seems, at times, to cause people to lose sight of an important fact. The States agree on the following principles which govern treatment decisionmaking in situations other than those where "best interests" analysis might be appropriate:

- Competent patients have the right to decline any form of medical treatment, even if death will ensue, so long as innocent third parties (e.g., dependent children) are not injured;
- Incapacity does not cause patients to lose the right to decline therapy;
- If the incapacitated patient's wishes concerning treatment decisionmaking are known — e.g., through a "living will" or, equally, through thoughtful discussions with kin or other persons — those wishes, generally, must be honored;
- The above principles apply whether the patient is "terminal" or not; and
- The above principles apply to all forms of medical treatment including, e.g., the provision of nutrition and hydration "by tube."

Significantly, Federal case law has adopted these principles which have achieved State consensus. See Tune v. Walter Reed Army Medical Center, 602 F. Supp. 1452 (D.D.C. 1985) (competent, terminal patients may order the withdrawal of respirators even if death may ensue); Deel v. Syracuse VA Medical Center, 729 F. Supp. 231 (N.D.N.Y. 1990) (applying the Tune rule to VA specifically); Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988) (ruling, as a matter of Federal law, that non-terminal patients have the right to decline, or order the cessation of, "g-tube" nutrition and hydration, and that when such patients are incapacitated, they may order the withdrawal of such treatment through a surrogate to whom they had previously issued clear instructions.)

The States have not, however, arrived at a consensus on the issue which is not reached by the above Federal cases: what is to be done in cases involving irreversibly incapacitated patients who have left no clear instructions concerning their actual treatment wishes. A majority of the States which have taken up the question authorize the withholding or withdrawal of medical treatment (including relatively "non-burdensome" treatment such as nutrition and hydration) despite the absence of "clear and convincing evidence" of the patient's own personal wishes. These "permissive" States rule, generally, that decisions will be premised, where possible, on the evidence of patient wishes which is available. See, e.g., Quinlan, supra. In the absence of such evidence, these States have adopted one of two approaches which lead, in practice, to the same result. Under one approach, treatment may be withdrawn if the surrogate decisionmaker concludes that the individual patient would so order were he or she able, for an instant, to conceptualize the situation and articulate a decision. See Saikewicz, supra. Under the more commonly accepted approach, treatment may be withdrawn if to do so would be in the patient's "best interests." See, e.g., In re Conroy, 486 A.2d 1209 (N.J. 1985); Barber v. Superior Court, 195 Cal.Rptr. 484 (1983).

However, the courts in two "restrictive" States — New York and Missouri — have ruled that in the absence of "clear and convincing evidence" that the patient would decline at least relatively "non-burdensome" forms of treatment, e.g., nutrition and hydration, such treatment may never be withdrawn. See In re O'Connor, 534 N.Y.S.2d 886, 531 N.E.2d 607 (1988); Cruzan v. Harmon, 760 S.W.2d 408, (Mo. 1988), on appeal Cruzan v. Director, supra. It was the next of kin's appeal of the Missouri Supreme Court's refusal to authorize the withdrawal of nutrition and hydration from Ms. Nancy Cruzan which brought to the attention of the U.S. Supreme Court the broad issue of "natural death" generally, and the narrower issue of what is to be done when there is questionable evidence of the patient's actual treatment wishes.

THE CRUZAN RULING

Factual and Legal Background

Nancy Cruzan is in the care of a State institution in Missouri. Due to respiratory arrest sustained as a consequence of a automobile accident in 1983, Ms. Cruzan is now in a persistent vegetative state — a condition within which, in the words of the Supreme Court, "a person exhibits motor reflexes but evinces no indications of significant cognitive function." Cruzan, 111 L.Ed.2d at 234. There is no genuine controversy

concerning the accuracy of the diagnosis, or the futility of her prognosis — Ms. Cruzan is in a persistent vegetative state from which she will never recover. Id. at 235 ("Nancy Cruzan ha[s] virtually no chance of regaining her mental faculties . . . .") She is now in her mid-30's, and could live in the current state for 30 or more years.

Ms. Cruzan's court-appointed guardians (her parents) requested that the State facility within which their daughter was being treated withdraw nutrition and hydration provided via a gastrostomy tube. The State refused, insisting that it would not withdraw such therapy absent court authorization. Ms. Cruzan's parents, therefore, sought — and were granted — such authorization.

The State of Missouri, however, appealed the authorization which had been granted by the Missouri probate court to the Missouri Supreme Court. That Supreme Court overturned the authorization which had been granted by the probate court and held that, in Missouri, nutrition and hydration may not be withdrawn from non-terminal, incompetent patients absent "clear and convincing evidence" demonstrating that the patient would direct the withdrawal of such treatment.

Ms. Cruzan's parents requested that the U.S. Supreme Court overturn the Missouri Supreme Court's ruling. They argued, in summary, that competent patients have the constitutional right to decline medical treatment, including nutrition and hydration; that incapacitated patients should have the same right; that next of kin should be able to act on behalf of the incapacitated patient, and make any decision the patient could make for herself, so long as there is no evidence of bad faith; and that they, therefore, should be authorized to order the withdrawal of nutrition and hydration on the basis of their belief that their daughter would so order were she able to speak.

The State of Missouri opposed the Cruzans, contending that while competent patients may have the personal right to refuse medical treatment, States may limit guardians' power to make such decisions for others — at least when death will result; the patient is not terminal; the treatment is not burdensome; and there is no clear evidence that the patient would decline the treatment.

The medical and nursing professions have generally supported the parents' position. The United States, however, filed an amicus brief opposing the Cruzans. The Federal government's position, however, was not premised on agreement with the substance of the Missouri Supreme Court's ruling. To the contrary, the U.S. brief signals disagreement with that decision. The U.S. argued, however, that the Constitution does not touch on the precise issues of the Cruzan case — i.e., the Constitution does not speak to surrogate decisionmaking on behalf of incapacitated patients who have left no clear instructions concerning their treatment wishes — and that the U.S. Supreme Court, therefore, could not rule that the Missouri ruling was unconstitutional.

The Supreme Court's Ruling

The Supreme Court's holding in Cruzan adopted the position argued by the United States as amicus. In the crucial passage of the Court's opinion from the standpoint of outcome, Chief Justice Rehnquist wrote as follows:

> Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.

111 L.Ed.2d at 243 (emphasis added). See, also, W. Tuerk, "Cruzan v. Harmon: The Projected Impact of Pending Supreme Court Litigation on Withdrawal of Life-Sustaining Treatment," supra at 2. ("The issue before the Supreme Court in Cruzan . . . is whether the U.S. Constitution requires that the Missouri Supreme Court's . . .[decision] be overturned . . . For Cruzan to be overturned, the U.S. Supreme Court must find that the U.S. Constitution compels reversal.") (citations omitted) (emphasis in original). Further driving home the

essential point, the Court repeatedly states that it will permit Missouri's rule to stand. See, e.g., 111 L.Ed.2d at 243 ("Missouri may legitimately seek to safeguard the personal element of this choice") (emphasis added); Id. at 245 ("We believe that Missouri may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment") (emphasis added); Id. at 245 - 6 ("[A] State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state") (emphasis added). But the Court never says that a State must adopt such a rule. To the contrary, the Chief Justice's opinion "assumes that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition," Id. at 242 (emphasis added), and outlines without objection precedents from other States which build on that assumption and which allow, in direct contravention of the Missouri rule, the withdrawal of nutrition and hydration in the absence of "clear and convincing evidence."

The clear import of the Supreme Court's decision is this: States may adopt the "restrictive" Missouri rule to govern cases like Nancy Cruzan's. Equally, however, they may adopt a "permissive" rule which is diametrically opposed to Missouri's should they so choose.

SIGNIFICANCE OF CRUZAN TO VA

As is noted above, prior to Cruzan, Federal courts had already ruled that when "clear and convincing evidence" of the patient's treatment wishes is available, health care providers must generally accede to those wishes. See Tune v. Walter Reed Army Medical Center, supra; Deel v. Syracuse VA Medical Center, supra; Gray v. Romeo, supra. Thus, even before Cruzan, VA had been required, as a matter of Federal law, to apply the consensus principles which are outlined above. Only one previously unanswered question could be resolved for VA by Cruzan: is VA required to adopt a "restrictive" rule like Missouri's to govern cases like Cruzan? Or may VA adopt a "permissive" rule? Cruzan indicates that VA has the latitude to choose either course.

CONCLUSION

Prior to Cruzan, some had believed that prudence dictated a delay in VA policymaking pending the publication of the Supreme Court's views in Cruzan. Whatever might have been the validity of that view, no cause for further delay exists. VA may now adopt system-wide policies on the withholding or withdrawal of "life-sustaining" therapy. And VA may adopt policies to be applied when "clear and convincing evidence" of the patient's wishes is — and is not — available.

In accordance with Deel, supra, VA must honor the treatment wishes of competent patients. With respect to incapacitated patients who have left clear indications of their treatment preferences, Gray, supra, dictates that VA honor those preferences. With respect to other incapacitated patients — i.e., those who have not left "clear and convincing evidence" to guide medical decisionmaking — Cruzan indicates that VA may adopt either a "permissive" or "restrictive" rule.

In the author's view, VA should adopt a "permissive" rule to govern situations where "clear and convincing evidence" is absent. But that opinion is the topic of a different paper. Suffice it to say here that Cruzan affirms that VA has maximum policy discretion in this sensitive area.

REFERENCES

1/ In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), cert. denied sub nom. Garger v. New Jersey, 429 U.S. 922 (1976); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

2/ W. Tuerk, "Evolving Federal Law on the 'Right to Die'," 2 Center for Clinical Ethics Quarterly No. 1. See, also, W. Tuerk, "Cruzan v. Harmon: The Projected Impact of Pending Supreme Court Litigation on the Withdrawal of Life-Sustaining Treatment," 3 Center for Clinical Ethics Quarterly No. 1.

Mr. Tuerk is an attorney in the Office of General Counsel, VA Central Office. The views expressed in this article are solely his.

Please write or call us with comments or items of interest.

ATTACHMENT B

POLITICAL AFFILIATIONS AND ACTIVITIES

Activities (since 1995):

- Reelection Campaign Spokesman/Veterans Organization Outreach, Citizens for Specter '04.
- Surrogate Speaker, Veterans for Bush 2004.
- Lawyers for Bush 2000.
- Veterans for Dole 1996/Lawyers for Dole 1996.

Donations (since 1995):

2005:

- Republican National Committee: 100.00
- Friends of George Allen: 50.00

2004:

- Bush-Cheney '04: 500.00
- Republican National Lawyers' Association: 50.00

2003:

- Republican National Senatorial Committee: 120.00
- Bush-Cheney '04: 500.00
- Republican National Committee: 100.00

2002:

- Republican National Lawyers' Association: 50.00

2001:

- Republican National Lawyers' Association: 50.00
- Republican National Committee: 100.00
- Friends of Mark Earley: 50.00

2000:

- Republican National Committee: 100.00
- Bush for President, Inc.: 250.00
- Republican National Lawyers' Association: 35.00
- Republican National Committee: 100.00
- Friends of George Allen: 100.00

1999:

- George W. Bush Exploratory Committee: 200.00

1998:

- Republican National Committee: 100.00

1997:

- Gilmore for Governor '99: 100.00
- Republican National Committee: 100.00

1996:

- Republican National Committee: 50.00

1995:

- Specter for President: 100.00

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LARRY E. CRAIG TO WILLIAM F. TUERK

Question 1. Last week we held a hearing on a sensitive topic, that is, whether capital offenders should be honored in America's national cemeteries. The difficulty we are now confronted with is essentially this: What post-service actions are so heinous that they render a person unfit to be buried alongside America's honored dead? Do you have a sense of where that line should be drawn for purposes of VA burial?

Answer. My personal sense is that the current provisions of law that give rise to disqualification for burial in the Nation's veterans' cemeteries need to be reconsidered.

Under current law, the following persons are barred from burial in the national cemeteries: (1) Individuals convicted of the "subversive activity" offenses listed in 38 U.S.C. § 6105(b); and (2) Persons who: (a) have been convicted of a Federal capital crime for which the person was sentenced to death or life imprisonment; (b) have been convicted of a State capital crime for which the person was sentenced to death or life imprisonment without parole; or (c) are found, as specified by statute, to have committed a Federal capital crime or State capital crime, but have not been convicted of such crime by reason of such persons not being available for trial due to death or flight to avoid prosecution. See 38 U.S.C. § 2411.

First, I have no sense that the "subversive activity" disqualifying statute needs modification. My view is that the conviction of offenses against the Nation—the essence of the offenses outlined in 38 U.S.C. § 6105(b)—ought to disqualify a veteran from repose among those who have defended the Nation. Persons who, in effect, attack this Nation should forfeit—and, to my way of thinking, have by their very acts forfeited—any right they might otherwise have earned to lie in a place of honor.

As for the second disqualifying statute—the "first degree murder" disqualifier—my sense is that the distinctions drawn between Federal and State offenders merit review. To me, it makes no policy sense to, for example, bar a deceased veteran who was sentenced by a Federal court to life imprisonment and yet permit burial to a State-convicted veteran who might technically be eligible for parole at a future date far outside his expected, and actual, life expectancy. Similarly, it makes no policy sense to me to bar a veteran who was sentenced by a Federal court to life imprisonment and yet permit burial to a veteran who, though not technically sentenced to life imprisonment, was sentenced to consecutive terms of imprisonment that, in the aggregate, far exceed the veteran's expected, and actual, life expectancy.

As an attorney, I understand the difficulty in crafting statutory language that disqualifies all who are sentenced to prison terms that, in practical terms, amount to—but technically are not—life sentences under the laws of the various States. As a person who, in the military, was charged with maintaining the custody and control of prisoners, I appreciate the value of the possibility of parole, however remote, in maintaining order in a prison environment. Finally, as an individual who believes that nearly any criminal is capable of reform to the point that parole might become a correctional possibility, I think no person is utterly incapable of redemption. Even so, however, I believe that some crimes are so heinous that they ought to give rise to disqualification.

In my view, conviction of a homicide offense of a degree of severity and aggravation that it can be punished by the maximum sentence that can be meted under State law (whether that sentence be death or life imprisonment, with or without the possibility of parole) should give rise to disqualification even if the court, in its discretion, elects to sentence below that maximum penalty. Further, I believe that conviction of a homicide offense or offenses by a Federal or a State court that yields a sentence that, in practical terms, precludes release during the felon's lifetime—even though that felon is, technically, not given a "life sentence"—should also give rise to disqualification.

Finally, I note that the Congress has made a policy decision that reflects the view that some criminal offenses that are not directed against the State are sufficiently repugnant to give rise to disqualification from eligibility for veterans' burial benefits. The Congress has, to date, identified only one crime—aggravated homicide—that it concludes is sufficiently repugnant. In my personal view and, I believe, in the view of most persons, there are other crimes—e.g., aggravated sexual molestation or torture of a child—that are at least as repugnant as homicide and, by the reasoning already adopted by Congress, should also give rise to disqualification. I would leave it to the peoples' representatives, the Congress, to gauge and express the citizenry's outrage by identifying such crimes and adding them to the statutory disqualifying list. Of course, as Under Secretary for Memorial Affairs, I would enforce whatever prohibition from eligibility for burial that the Congress chooses to enact.

Question 2. If confirmed, you will be responsible for ensuring that the burial prohibition law is enforced. What are your thoughts about the current enforcement efforts by the National Cemetery Administration? Do you yet have a sense of whether those efforts can be improved?

Answer. It is my impression that the National Cemetery Administration (NCA) goes to considerable lengths to ensure that the statutory ban on the burial of some otherwise-eligible veterans is enforced. VA has promulgated detailed regulations setting forth procedures that will be followed by both field, and Central Office, officials in enforcing the burial prohibition law codified at 38 U.S.C. § 2411. See 38 CFR §§ 38.617, § 38.618. Unlike the practices which, I am informed, have been adopted by Arlington National Cemetery (ANC) officials, VA does not passively await notification by Federal or State officials that an individual who seeks burial in a national cemetery has been convicted of a disqualifying offense and assume, in the absence of such notification, that every and all persons seeking burial must be provided burial benefits. Rather, NCA cemetery directors are not merely authorized to—they are required to—initiate an inquiry whenever they have "reason to believe that they, the deceased, may have been convicted of a Federal or State capital crime. . . ." See 38 CFR § 38.617(e)(1). By contrast, ANC officials have adopted a narrower—in my opinion, an unduly narrow—interpretation of the 38 U.S.C. § 2411 disqualification statute to the effect that information concerning a decedent's potential ineligibility for burial will be—and, as a matter of law, must be—disregarded unless requisite notice of such information is received from the United States Attorney General or an appropriate State official. See Statement by Thurman Higganbotham before the Senate Committee on Veterans' Affairs, September 22, 2005. ANC's approach surely eases administrative burden on cemetery officials by shifting all fact-finding and conclusion-drawing tasks to other officials. To my way of thinking, NCA's approach is the one that puts into force the policies that I believe the Congress intended to advance in enacting section 2411. I believe that NCA's adoption of that policy despite the administrative burdens imposed speaks positively about the degree of enforcement effort NCA is willing to expend.

A further example of NCA's efforts to enforce the letter and, in my view, the spirit of the disqualification statute can be found in the relatively elaborate procedures adopted by NCA for the enforcement of the difficult provisions of law set forth in the 38 U.S.C. § 2411(b)(3). Those provisions bar burial to those who are found to have committed a Federal capital crime or State capital crime but have not been convicted of such crime by reason of death or flight to avoid prosecution. In this lawyer's view, such a finding pivots on a series of questions—Was the crime in question a "capital" crime? Did the person seeking burial commit it? Would he or she have been convicted of any crime had there been a trial? Would he or she have been convicted of that crime?—that are not easily answered by one trained in the law. Clearly, they are not simple matters to be resolved by cemetery managers. Yet NCA has promulgated regulations which attempt to systematize and give fundamental fairness to the decision making process. Again, I think these efforts to do as the Congress has directed speak well of NCA's enforcement efforts.

Because I am, at this point, still uninformed on the practical issues faced by cemetery directors in the acceptance of remains for interment, I am hesitant to offer less-than-fully informed suggestions on how NCA might improve its section 2411 enforcement efforts. It does occur to me that NCA officials who deal directly with funeral directors in the acceptance of remains for interment might consider a practice of routinely asking funeral directors whether they have reason to believe that section 2411 might be applicable; funeral directors, after all, would likely know the place of death and, therefore, might have reason to know whether the deceased had been incarcerated at death. I do not know that NCA officials do not already do that. Accordingly, I would request the opportunity to study the issue after confirmation, if I am confirmed, before voicing further views on how NCA enforcement might be improved.

Question 3. You have spent a considerable amount of time in leadership positions in the Senate. What can you take from your experience here in the Senate and apply to your new position, if confirmed?

Answer. During my employment at the Senate Committee on Veterans' Affairs—and during my employment at VA prior to coming to the Committee—I have had occasion to become familiar with a considerable body of law and policy that affect veterans and their survivors. I trust that that background will be useful in my new role, should I be confirmed. Further, I will take to the position—if I am confirmed—a lawyer's more traditional understanding of substantive law and legal procedure and a former private practitioner's sense of the practicalities of commercial dispute resolution. These elements of my background will, I trust, be useful at the helm of an enterprise that spends, for example, over $80 million per year in major and

minor construction and $70 million per year in the procurement of headstones, markers and graveliners.

As I attempted to emphasize in my prepared statement, the more valuable elements of my experience in the Senate will be those which are less tangible. Here, I have learned that policy disputes over veterans' issues rarely turn on partisan or ideological considerations. More often, they are resolved on the basis of the power of one's policy arguments and the quality of one's preparation and, more subtly, on one's personal relationships with both potential policy allies and foes. I have learned the value of the "human dimension" that lubricates personal interaction and facilitates the advancing of one's management and policy goals. I have learned that allies may be found in unexpected places, and that they must always be sought out and, once found, not taken for granted. I have learned that opportunity sometimes presents at unexpected and even awkward moments and that one must be prepared to capitalize at unanticipated or inconvenient times. I have learned the practical value of openness and the necessity of consultation with potentially affected persons and organizations. And most importantly, I have learned the value of identifying staff who possess the personal qualities essential to success and, once having found them, trusting them to do their jobs. These and other "lessons learned" in the course of my employment at the Senate will, I think, be directly transferable to the job of Under Secretary for Memorial Affairs. The degree to which I retain them will, I expect, greatly determine whether I will succeed or fail.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO WILLIAM F. TUERK

Question 1. Oftentimes, the only contact that a veteran and/or his family will have with VA is through the National Cemetery Administration. What will you do to make certain that this contact continues to be appropriate and positive?

Answer. I concur that, in many cases, the sole contact a veteran's family will have with VA will be through National Cemetery Administration (NCA) staff during a time of great personal stress and sorrow. I also concur in the premise of the question that such contact is now appropriate and positive—customer satisfaction scores attest to that—and that the challenge I face will be assuring that such positive contact is continued through my tenure, should I be confirmed. In my view, employee attitudes that lead to positive and sympathetic interaction with the public cannot be "disciplined in." Nor can they be acquired simply via training regimens and "sensitivity" seminars, though, as discussed below, there clearly is a place for such activity. I believe that, ultimately, NCA employees who deal directly with bereaved family members will display appropriate decorum if and when they themselves are rewarded with the respect that I think all humans seek. I believe that if "wage-grade" employees are treated as if they are less worthy of respect than salaried staff, and that they are "only here to dig a hole or sweep up," they will live down to that expectation and treat the public accordingly. Conversely, I believe that if managers remind such employees—both explicitly and by the manner in which they are treated—that they, as front line staff, are integral, vital members of the service-providing enterprise, those employees will live up to that expectation and treat the public accordingly. I believe, therefore, that training needs to focus not just on how staff should treat the public—but also on how supervisors must treat those in their charge.

This is not to suggest that NCA managers are not fully aware of these principles. Were they not aware of them, NCA would not have achieved the customer satisfaction scores that it has. That being the case, I expect that complacency may be the danger ahead. My first activity to attack that complacency will be extensive travel to the field to meet with staff at all levels to assure them that senior VA management—and the Congress—are fully aware of the quality of work they perform and that they greatly appreciate that work. Beyond that, I will seek the advice of internal human resources staff and outside consultants, resources permitting, on developing programs to get across the message that: (1) NCA's success is in the hands of "front line" employees and (2) "front line" employees will be recognized for attention to the unique needs of NCA's grieving customers. Finally, I will maintain in force the highly successful quality assurance tools already in place at NCA: performance standards that signal high expectations, self-assessment tools, customer satisfaction surveys, etc.

Question 2. I understand that annual veteran deaths will peak around 2008 to 115,000 a year. Are you confident that NCA can cope with the projected 24 percent increase in internments?

Answer 2. I am aware that veteran death statistics will peak in 2008 and that—at least after the "shadow effect" of burials of WWII/Korea veterans' spouses is worked through—that demand for burial space will slowly drift downward. I am not fully confident, however, that NCA is as prepared that it ought to be—or that it would like to be—to fully meet that peak demand since planned new cemeteries will likely not yet be fully in operation in 2008. Nor will the needs of veterans in smaller—but not inconsequential—communities that have no plans to provide for burial options now "on the drawing board" be met in 2008. Necessary lead times would, I expect, preclude readiness even if plans could be developed immediately.

As I said in my oral testimony to the Committee, the timely achieving of NCA's current goal of providing a burial option to 90 percent of the Nation's veterans is vital. I will not be satisfied simply with meeting that goal. Once—and before—that key goal is met, NCA must, in my view, turn its attention to other non-served areas not addressed in current new-cemetery construction plans. I hope to find opportunities to enhance the attractiveness and speed of the State Cemetery Grant Program to meet these unmet—and unplanned for—needs.

The above observations having been made, I am advised by NCA that, in addition to the 11 new national cemeteries now under construction, two new State cemeteries (in California and Texas) will be opened before the end of 2005, and that 20 additional new State cemeteries will open before the end of the decade. I am assured, as well, that NCA continues to seek innovations (like pre-placed crypts) that will add to the productivity of existing cemetery acreage.

Chairman CRAIG. Bill, thank you very much.

Now let us turn to Robert Henke. Robert, thank you.

STATEMENT OF ROBERT J. HENKE, NOMINEE TO BE ASSISTANT SECRETARY FOR MANAGEMENT, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. HENKE. Mr. Chairman, thank you, sir. Senator Akaka and Members of the Committee, Senator Burr, Senator Obama, thank you for the invitation to appear here today. It is truly an honor and a pleasure for me to be here.

I would like to express my gratitude first, Mr. Chairman, to you and the committee for the expeditious consideration of my nomination, and those of my colleagues seated beside me. Having received several of these nominations as recently as this very month, the committee is now turning its attention to the matter in remarkably short order. I think that is a testament both to this committee and to the absolute importance of the work that the committee undertakes on behalf of our Nation's veterans. Thank you, Mr. Chairman.

I am both honored and humbled to be President Bush's nominee to be the Assistant Secretary for Management. I owe a tremendous debt of gratitude to Secretary Jim Nicholson, Deputy Secretary Gordon Mansfield, and Chief of Staff Mick Kicklighter for their faith and confidence in me. These gentlemen are inspired leaders, absolutely dedicated to our Nation's veterans, and I could not ask to work for finer public servants, and I am energized at the prospect of joining their team.

The Department of Veterans Affairs has, in my view, the very noblest of missions, and that is to honor the service and sacrifice of those who have done so much for all of us, and to gratefully, to thankfully keep our country's promises to them.

Like many in the room today, I have had the privilege of wearing the Nation's uniform, and my service in the Navy was one of the defining chapters in my life. This experience has instilled in me the deepest respect for America's Armed Forces and their unwavering and selfless commitment to mission, to integrity, and to service.

Should I have the privilege of confirmation, I will draw upon this profound respect, and it will provide me with energy and focus and direction.

As a nominee, I recognize that I have much to learn about the Department of Veterans Affairs, its important responsibilities, and the issues of critical importance to veterans. If confirmed, I assure you that I will become fully immersed and tirelessly engaged in these pressing issues, and I will take a proactive, pro-veteran approach in advising the Secretary and the Deputy Secretary and in carrying out my duties.

Mr. Chairman, I am joined today by my wife, Jennifer, and our two wonderful boys Ryan and Owen. Jen has been my——

[Applause.]

Chairman CRAIG. As long as we don't wake the other one up.

[Laughter.]

Mr. HENKE. Yes, sir.

Chairman CRAIG. Don't ask him to stand, please.

Mr. HENKE. Jen has been my partner and my best friend and my foundation for almost 16 years, and simply, without her love I would not be here today. She knows that public service is both a privilege and a responsibility, and she fully understands the many sacrifices of this and your profession, and she encourages me with her whole heart at every step of the way.

Mr. Chairman, our oldest son, Ryan, started Cub Scouts this past weekend. We had a Cub Scout overnight camp-out, and it was a very great time, except for about two dozen daddy long-legs spiders in the tent. Ryan is quite enamored of his new status as a Tiger Cub, a status that may even beat becoming a big brother earlier this year. Mr. Chairman, I should warn you, however, that Ryan has his Tiger Cub Handbook here, and after the hearing, he may ask you to sign off item number 49, which is, of course, "Visit a Government Office."

[Laughter.]

Mr. HENKE. I hope you will not mind, Mr. Chairman.

Chairman CRAIG. Ryan, I will do that on one condition, and that is that you strive to become the top Scout in the country. Okay? We got a deal.

RYAN HENKE (audience). Yes, sir.

Mr. HENKE. Mr. Chairman, with our Nation at war, this is a critical time and there is much important work to do. I have met many of the impressive, talented professionals in VA's Office of Management, and I look forward to working with them and leading them. I am excited at the prospect of joining a team of VA professionals who have dedicated themselves to one goal: serving veterans. I would tell them, and I will tell this Committee: If I am fortunate to be confirmed, I will do my best. Veterans have done and always will do their best for us, and I owe them nothing less in return.

Thank you, Mr. Chairman and Members of the Committee. I appreciate the opportunity to be here today. I look forward to your questions, and hopefully what will be the first of many opportunities to work with you on important issues.

Thank you, sir.

[The prepared statement of Mr. Henke follows:]

PREPARED STATEMENT OF ROBERT J. HENKE, NOMINEE TO BE ASSISTANT SECRETARY FOR MANAGEMENT, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. Chairman, Senator Akaka, and Members of the Committee, good morning and thank you for the invitation to appear today. It is truly an honor and a pleasure to be here. This is indeed a very special occasion for me and for my family.

I want to express my gratitude, Mr. Chairman, to you and the Committee for the expeditious consideration of my nomination, and those of my colleagues seated beside me. Having received several of these nominations as recently as this very month, the Committee is now turning its attention to the matter in remarkably short order. I think this is a testament to this Committee and to the absolute importance of the work that the Committee undertakes on behalf of our Nation's veterans.

Over the past several weeks, Members, Committee staff, and personal staff have been more than kind with their time and with their insights into the issues of importance to the Committee. Having served on the Senate staff, I know how precious your time is and how many important issues are on the Senate's agenda. I thank you.

I am both honored and humbled to be President Bush's nominee to be the Assistant Secretary of Veterans Affairs for Management, and for the opportunity to testify here today. I owe a tremendous debt of gratitude to Secretary Jim Nicholson, Deputy Secretary Gordon Mansfield and Chief of Staff Mick Kicklighter for their faith and confidence in me. These gentlemen are inspired leaders, absolutely dedicated to our Nation's veterans. I could not ask to work with finer public servants, and I am energized at the prospect of joining their team.

The Department of Veterans Affairs has, in my view, the most noble of missions: to honor the service and the sacrifice of those who have done so much for all Americans, and to gratefully keep our country's promises to them.

I have had the privilege of wearing the Nation's uniform. My service in the Navy, whether in combat during Operation DESERT STORM, or as a Reservist mobilized for Operation ENDURING FREEDOM, is one of the defining chapters in my life. This experience has instilled in me the deepest respect for America's Armed Forces and their unwavering and selfless commitment to mission, to integrity and to service. They are America's best. They are patriots, in the very finest sense of the word. Should I have the privilege of confirmation, I will draw upon this profound respect, and it will provide me with energy, focus and direction.

I believe that I bring valuable skills, experience and perspective to this new and challenging position. I have both private sector and public sector experience with financial management. After leaving active duty, I was with General Electric for three years and completed their rigorous Financial Management Program. I studied public policy and public administration at Syracuse University's Maxwell School of Citizenship and Public Affairs. In the public sector, I have experience with Federal resource management processes in both the legislative branch and the executive branch. I served for six years on the staff of the U.S. Senate Committee on Appropriations. Currently, I serve as the Principal Deputy Under Secretary of Defense (Comptroller) at the Department of Defense, where I have been fortunate to lead a team of over 190 financial management professionals.

As a nominee, I recognize that I have much to learn about the Department of Veterans Affairs, its important responsibilities and the issues that are of critical concern to veterans. If confirmed, I assure you that I will become fully immersed and tirelessly engaged in these pressing issues, and I will take a proactive, pro-veteran approach in advising the Secretary and Deputy Secretary and in carrying out my duties.

I do not undertake the prospect of these new duties lightly. Secretary Nicholson outlined a philosophy in his confirmation hearing and, if the Senate allows me to serve in this new capacity, I absolutely commit to those very same principles:

- veterans should have access to the best available health care in the most appropriate clinical settings, delivered in a timely manner by caring, compassionate clinicians; and
- veterans, their eligible dependents, and survivors are entitled to prompt, accurate, equitable and understandable decisions on their claims for benefits; and
- veterans should be appropriately honored in death for their service and sacrifices on behalf of a grateful Nation.

I am joined today by my wife Jennifer, and our two wonderful boys, Ryan and Owen. Jen has been my partner, my best friend, and my foundation for almost 16 years. Without her love and support, I simply would not be here today. She knows that public service is both privilege and a responsibility, and fully understands the many sacrifices of this profession, and she encourages me with whole heart at every step of the way.

I would be remissed if I did not acknowledge my parents. While they could not be here today, they taught me, by the power of their example, about the importance of integrity, of faith, and of family. They imbued in me a respect and a love for this country that knows no bounds.

With our Nation at war, this is a critical time and there is much important work to do. I have met many of the impressive, talented professionals in VA's Office of Management, and look forward to working with them and leading them. I am excited at the prospect of joining a team of VA professionals who have dedicated themselves to one goal: serving veterans. I would tell them, and I will tell the Committee this: if I am fortunate to be confirmed, I will do my best. Veterans have done and always will do their best for us; I owe them nothing less in return.

Thank you, Mr. Chairman and Members of the Committee, for your courtesy and for the opportunity to be here. I look forward to your questions, and what I hope will be the first of many opportunities to work together on issues important to veterans.

QUESTIONAIRE FOR PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

1. Name: HENKE (LAST) ROBERT (FIRST) J. (OTHER)

2. Present Address: 6275 Walkers Croft Way, Alexandria VA 22315-5236 (CITY) (STATE) (ZIP CODE)

3. Position to which nominated: Asst Secretary of VA (Management)

4. Date of nomination: July 29, 2005

5. Date of birth: May 19, 1966 (DAY) (MONTH) (YEAR)

6. Place of birth: Chicago, IL

7. Marital Status: Married

8. Full name of spouse: Jennifer H. Henke

9. Names and ages of children

Ryan R. Henke (6 yrs)

Owen E. Henke (2 mos)

10: Education:

Institution (including city and State)	Dates attended	Degrees received	Dates of degrees
Syracuse University Syracuse, NY	June 1996-Sept 1997	MPA	Sept 1997
University of Notre Dame Notre Dame, IN	Sept 1984-May 1988	BA	May 1988
St. Norbert College DePere, WI	Sept 1983-May 1984	n/a	n/a

11. Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Syracuse University, Maxwell School Graduate Assistant Scholarship

University of Notre Dame, Navy ROTC Scholarship

Navy & Marine Corps Commendation Medal (5 awards)

Navy & Marine Corps Achievement Medal (3 awards)

Various military campaign and unit awards

Authorized to wear Surface Warfare Officer and Command Ashore devices

12. Memberships List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable, and other organizations for the last 5 years and any other prior memberships or offices you consider relevant

Organization	Office held (if any)	Dates
American Association of Budget and Program Analysis	VP, Symposia	2002-present (VP 2003-2004)
American Society of Military Comptrollers	n/a	1999-present
Reserve Officers Association	n/a	1992-present
Naval Reserve Association	n/a	1992-present
Veterans of Foreign Wars	n/a	2002-present
The American Legion	n/a	2002-present

13. Employment record: List below all employment (except military service) since your twenty-first birthday, including the title or description of job, name of employer, location of work, and inclusive dates of employment.

Aug 2004-present, Principal Deputy Under Secretary of Defense

(Comptroller), Department of Defense, The Pentagon

Jan 1999-July 2004, US Senate Committee on Appropriations,

Subcommittee on Defense, Dirksen Senate Office Building

The Pentagon

Sept 1997-Jan 1999, Dept of the Navy, Presidential Management Intern

Cincinnati, OH

June 1993-June 1996, General Electric Co., Financial Mgmt Program

14. Military service: List below all military service (including reserve components and National Guard or Air National Guard), with inclusive dates of service, rank, permanent duty stations and units of assignment, titles, descriptions of assignments, and type of discharge.

Reserve: Commander, US Navy Reserve, various unit assignments

1992-2005, served as Commanding Officer, Inshore Boat Unit TWO

FIVE from 2000 to 2002, mobilized for OPERATION ENDURING

FREEDOM, served as Deputy Commander, Task Group 53.8, UAE.

Active: Lieutenant, US Navy, USS PHILIPPINE SEA (CG 58), 1988-1992,

served as Engineering and Operations Division Officer, qualified Surface

Warfare Officer, deployed for and served in combat during OPERATIONS

DESERT SHIELD and DESERT STORM. Honorable Discharge.

15. Government record: List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments other than those listed above.

NONE

16. Published writings: List the titles, publishers, and dates of books, articles, reports, or other published materials you have written.

NONE

17. Political affiliations and activities: (a) List all memberships and offices held in and financial contributions and services rendered to any political party or election committee during the last 10 years.

Member, Fairfax County Virginia Republican Party.

Various contributions (generally less than $50) made to national, state and local Republican parties and candidates.

(b) List all elective public offices for which you have been a candidate and the month and year of each election involved.

NONE

18. Future employment relationships:

(a) State whether you will sever all connections with your present employer, business firm, association, or organization if you are confirmed by the Senate.

YES (except for continued service with DoD in the Navy Reserve).

(b) State whether you have any plans after completing Government service to resume employment, affiliation, or practice with your previous employer, business firm, association, or organization.

I HAVE NO SUCH PLANS.

(c) What commitments, if any, have been made to you for employment after you leave Federal service?

NONE

(d) (If appointed for a term of specified duration) Do you intend to serve the full term for which you have been appointed?

n/a

(e) (If appointed for an indefinite period) Do you intend to serve until the next Presidential election?

YES

19. Potential conflicts of interest:

(a) Describe any financial arrangements, deferred compensation agreements, or other continuing financial, business, or professional dealings which you have with business associates, clients, or customers who will be affected by policies which you will influence in the position to which you have been nominated.

NONE

See August 5, 2005 Office of Government Ethics letter to me (copy attached).

(b) List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

NONE

See August 5, 2005 Office of Government Ethics letter to me (copy attached).

(c) Describe any business relationship, dealing, or financial transaction which you have had during the last 5 years, whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

NONE

See August 5, 2005 Office of Government Ethics letter to me (copy attached).

(d) Describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any Federal legislation or for the purpose of affecting the administration and execution of Federal law or policy.

NONE

See August 5, 2005 Office of Government Ethics letter to me (copy attached).

(e) Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements involved.)

n/a

20. Testifying before the Congress:

(a) Do you agree to appear and testify before any duly constituted committee of the Congress upon the request of such committee?

YES

(b) Do you agree to provide such information as is requested by such a committee?

YES

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LARRY E. CRAIG TO ROBERT J. HENKE

Question 1. Last week, I sent a letter to the Secretary expressing my concerns about the accounting of funds VA is spending to aid veterans and others affected by Hurricane Katrina. If you are confirmed, what measures will you take to track reimbursable expenditures and ensure that reimbursement claims are submitted to FEMA in a timely manner?

Answer. VA has a process in place to ensure that disaster-associated expenditures are properly documented and that reimbursement requests are accurately and promptly submitted to FEMA. If confirmed as the Assistant Secretary for Management and Chief Financial Officer (CFO), I will be personally involved in ensuring that VA is proactive in documenting expenses and submitting reimbursements requests to FEMA. I know that, among other efforts, VA has deployed many medical professionals in support of community needs. VA has provided area emergency managers to certain States, operates mobile dental clinics, and has activated VA Federal Coordinating Centers as requested by FEMA. I share VA's pride in being an integral part of helping disaster victims. I also share your concern that VA quickly receives appropriate reimbursement for these laudable efforts.

Within VA, the first responsibility for coordination of assignments and proper accounting is within VHA's office of Emergency Management Strategic Health Care Group. The Department's Offices of Budget and Finance (under the Assistant Secretary for Management) are actively involved in monitoring these efforts, and I will be apprised of progress in this area and will ensure it is appropriate. The Office of Finance will, upon certification, execute the inter-agency fund transfer from FEMA to VA, ensuring VA receives the funds and credits the appropriate accounts.

Please be assured I understand how important it is to account for and have available to VA resources critical to providing timely, quality care for our veterans. If confirmed, I will be proactively engaged to ensure that FEMA appropriately reimburses the Department for expenses incurred in disaster relief efforts.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO ROBERT J. HENKE

Question 1. The Department of Veterans Affairs acknowledged a budget shortfall of at least $1.5 billion this spring. I find this deeply disturbing, especially since the Department sent earlier letters stating that there was adequate funding. VA officials blamed poor models and unexpected costs of the Iraq war. This is not a sufficient explanation in my view. It is particularly disturbing that the shortfall included $475 million more in long-term care costs which should be more predictable. What will you do to evaluate and improve the models used, and to regularly update budget estimates? How will you work to ensure that the growing demands for long term care within our aging VA population will be accurately assessed?

Answer. As I understand the long-term care shortfall issue, it had to do with the correct estimate of savings associated with policy initiatives in the fiscal year 2006 budget request and was an implementation timing issue, not a modeling issue. Nevertheless, if confirmed as the Assistant Secretary for Management and Chief Financial Officer (CFO), I will do everything in my power to ensure careful analysis and coordination of these estimates so that a similar error does not occur again.

I understand that the Department is making strong efforts to improve the actuarial forecasting methodology and its budget formulation, execution and monitoring processes so VA can expeditiously adjust for time lag in data used to develop these estimates. VA intends to continue to improve its overall financial and accounting management practices to preclude any repeat of this past year's experience. If confirmed, my staff and I will play a very proactive role in these estimating and reporting improvements, and I will work to ensure that funding is made available to support the VA's long-term care policies for veterans.

Question 2. For more than a decade, I have been very concerned about the long-term health affects of veterans who served in the first Persian Gulf War, and those serving today. VA has proposed a multi-year research commitment regarding Gulf War Illness, and this investment is critical in my view. What will you do in your budgetary role to ensure that long-term commitments to vital research are fulfilled?

Answer. I understand that research commitments and priorities are established by the Secretary and the Under Secretary for Health. If confirmed as the Assistant Secretary for Management and Chief Financial Officer (CFO), I will ensure that funds appropriated by Congress for VA research purposes, including Gulf War Illness research, are made available to the Veterans Health Administration in a timely

manner. I will also ensure that requests for future Gulf War Illness research funding are highlighted in the Department's budgetary discussions for future years.

Question 3. The CARES Commission did not make a recommendation for the long-term strategy plan for VA's long term care and mental health care policies because the Commission said it lacked the time and necessary data. How will you work to develop the information on long term care and mental health care needed for effective strategic planning, and how will you work to integrate this into the budget and ongoing strategy plan for VA?

Answer. I understand that the Department is developing a strategic plan for long-term care and mental health care. If confirmed as the Assistant Secretary for Management and Chief Financial Officer (CFO), I will follow the direction of the Secretary, with input from the Under Secretary for Health, in formulating future budgets that implement this strategic plan.

Question 4. By reports and press accounts, VA is doing a truly admirable job of helping veterans and others in the disaster areas. This is part of VA's mission and I am very proud of its work. But, how is VA tracking the costs of such care and distribution of prescription drugs, and what are the current cost estimates? Will VA be reimbursed by FEMA or will VA need additional funding from Congress in order to avoid future funding shortfalls?

Answer. VA has a process in place to ensure that disaster-associated expenditures are properly documented and that reimbursement requests are accurately and promptly submitted to FEMA. If confirmed, as the Assistant Secretary for Management and Chief Financial Officer (CFO), I will be personally involved in ensuring that VA is proactive in documenting expenses and submitting reimbursements requests to FEMA. This process is dynamic and on-going, and VA does not yet have cost estimates that have been validated and approved. When these cost estimates are validated and approved, VA will be happy to provide the Committee with that information.

I know that, among other efforts, VA has deployed many medical professionals in support of community needs. VA has provided area emergency managers to certain States, operates mobile dental clinics, and has activated VA Federal Coordinating Centers as requested by FEMA. I share VA's pride in being an integral part of helping disaster victims. I also share your concern that VA quickly receives appropriate reimbursement for these laudable efforts.

Within VA, the first responsibility for coordination of assignments and proper accounting is within VHA's office of Emergency Management Strategic Health Care Group. The Department's Offices of Budget and Finance (under the Assistant Secretary for Management) are actively involved in monitoring these efforts, and I will be apprised of progress in this area and will ensure it is appropriate. The Office of Finance will, upon certification, execute the inter-agency fund transfer from FEMA to VA, ensuring VA receives the funds and credits the appropriate accounts.

Please be assured I understand how important it is to account for and have available to VA resources critical to providing timely, quality care for our veterans. If confirmed, I will be proactively engaged to ensure that FEMA appropriately reimburses the Department for expenses incurred in disaster relief efforts.

Chairman CRAIG. Thank you very much. Now we will turn to John Molino.

John.

STATEMENT OF JOHN M. MOLINO, NOMINEE TO BE ASSISTANT SECRETARY FOR POLICY, PLANNING, AND PREPAREDNESS, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. MOLINO. Thank you, Mr. Chairman, Senator Akaka, Senator Burr, Senator Obama. Thank you to the committee for considering my nomination and those of my colleagues for positions within the Department of Veterans Affairs. I appreciate the confidence that the President has expressed by nominating me in the leadership of the Department as well. I am humbled by the nomination, I am grateful for your consideration, and if confirmed, I would be privileged to serve as an Assistant Secretary at VA.

Joining me today is my wife, Eileen, who has been my steadfast supporter for my 20 years on active duty and the 10 years since my retirement from the Army. With her are two of our three sons:

our oldest, Bill, and our youngest, Matthew, both a long time past their days in Tiger Cubs and Cub Scouts. I would ask them to please stand.

[Applause.]

Mr. MOLINO. We started very young, Mr. Chairman.

Not joining us today is our second son, Christopher, who is a captain in the Army and is currently serving with his Ranger unit in Iraq.

[Applause.]

Mr. MOLINO. The responsibilities of this position span a broad spectrum. They go from the coordination of all policies being considered by the Secretary to ensure that they have been thoroughly vetted, fully coordinated, and that there are no unintended consequences when they are, in fact, implemented throughout the Department. They also stretch, the responsibilities do, to planning and preparedness for unforeseen circumstances and situations that the Department may have to face in the future.

The work of the Department of Veterans Affairs is noble work because it is through this Department that the Nation expresses its gratitude to the men and women who have served in uniform in defense of freedom. Truly, we would not be living in the land of the free if this were not also the home of the brave.

I ask this committee, therefore, for its support of my nomination. I ask the Senate for its confirmation. I promise you that my tenure at the Department of Veterans Affairs will have as its benchmark a tireless commitment to our military veterans and their families.

Senator, I would be happy to entertain your questions.

[The prepared statement of Mr. Molino follows:]

PREPARED STATEMENT OF JOHN M. MOLINO, NOMINEE TO BE ASSISTANT SECRETARY FOR POLICY, PLANNING, AND PREPAREDNESS, U.S. DEPARTMENT OF VETERANS AFFAIRS

Chairman Craig, Senator Akaka, Members of the Committee, thank you for your consideration of my nomination to serve as an assistant secretary in the Department of Veterans Affairs. I am grateful to President Bush for the confidence he has placed in me by nominating me for this position. I am humbled by the nomination, honored by your consideration, and I would be privileged, if confirmed, to serve as the Assistant Secretary for Policy and Planning.

My earliest memories include value and respect for selfless service. My father served as a soldier during World War II. He later joined the Veterans of Foreign Wars and rose through the progression of positions, serving at post and county levels. He was especially proud of his volunteer service at the VA hospital (not far from my boyhood home in Brooklyn, New York), where he amassed literally thousands of volunteer hours. He would have been very proud had he lived to see his youngest son serve as a Deputy Under Secretary of Defense and to receive the President's nomination to be an Assistant Secretary of Veterans Affairs.

My parents had three sons. Each of us was a career Army officer, serving a combined total of nearly 75 years on active duty.

I would be remiss if I did not thank my wife, Eileen, for her steadfast support and the positive influence she has been on each of our three sons. Eileen joins me today, along with our eldest son, Bill, and our youngest son, Matt. Bill is a graduate of the College of William and Mary and is employed by Northrup-Grumman. He has focused his service in our church community. Several years ago, he founded a summer theatre program for high school-aged youth that has become a mainstay in our community. It has grown in popularity annually, providing a wholesome, summer activity for many young people. Matt is a senior at George Mason University. He will graduate in January and will begin his active service as a lieutenant in the U.S. Army at that time. Chris, our second son, could not be with us today; he is a captain in the Army and is currently serving with his Ranger unit in Iraq.

Upon confirmation, I will become thoroughly familiar with the issues facing the Department and will do my best to ensure we are a Department competent & capable today and fully prepared for the challenges of tomorrow. The Assistant Secretary for Policy and Planning is charged with the responsibility of ensuring that decisions made by the Secretary and his Deputy are made with full consideration of their impact throughout the department. The cross-cutting nature of this position makes it vital to the current and future well-being of the Department and the lives of this nation's veterans. I promise you that my tenure will have as its benchmark a total commitment to America's veterans and their families.

I am acutely aware how fortunate we are to live in this country, how blessed we are by God, and how grateful we should be to those who have served and to those who serve today to protect our way of life. We are wise to remember that this would not be the land of the free, were it not also the home of the brave.

I am committed to be of service to those brave Americans who have served our nation in uniform.

QUESTIONAIRE FOR PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

1. Name: MOLINO (LAST) JOHN (FIRST) MICHAEL (OTHER)

2. Present Address: 7810 Lobelia Lane Springfield, (CITY) VA (STATE) 22152 (ZIP CODE)

3. Position to which nominated: Assistant Secretary (Policy & Planning)

4. Date of nomination: Sep 6, 05

5. Date of birth: 8 (DAY) 7 (MONTH) 1952 (YEAR)

6. Place of birth: Brooklyn, NY

7. Marital Status: Married

8. Full name of spouse: Eileen M. Molino

9. Names and ages of children

William Molino – 28

Christopher Molino – 26

Matthew Molino - 22

10: Education:

Institution (including city and State)	Dates attended	Degrees received	Dates of degrees
St. Peter's College	1970 – 1974	BA – History	May 1974
Webster College (Now Webster University)	1980 – 1981	MA – Human Relations	May 1981

11. Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

ROTC Scholarship 3 years – 1971 – 1974. Pershing Rifles – 1970 -1974. Society Of the Crossed Keys (college honors) -1973 – 1974. Who's Who in American Colleges & Universities – 1974. Military Awards: Defense Superior Service Medal. Legion of Merit. Defense Meritorious Service Medal. Army Meritorious Service Medal. Army Commendation Medal.

12. Memberships List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable, and other organizations for the last 5 years and any other prior memberships or offices you consider relevant

Organization	Office held (if any)	Dates
Assn of the US Army		1991-Present

13. Employment record: List below all employment (except military service) since your twenty-first birthday, including the title or description of job, name of employer, location of work, and inclusive dates of employment.

1974 – 1995 – Active duty, US Army (See below)

1995 – 1996 – Asst. Director, Gov't Affairs; Assn of the US Army; Arlington, VA;

1996 – 1997 – Legislative Assistant to Senator Dan Coats; US Senate

1997 – 2001 – Director, Gov't Affairs; Assn of the US Army; Arlington, VA

2001 – Present – Deputy Under Secretary of Defense; The Pentagon

14. Military service: List below all military service (including reserve components and National Guard or Air National Guard), with inclusive dates of service, rank, permanent duty stations and units of assignment, titles, descriptions of assignments, and type of discharge.

See attached sheet.

John M. Molino. Summary of Military Service.
Senate Veterans Affairs Committee Questionnaire for Nominees
Question 14 – Military Service

Jul 92 – Dec 94	Legislative Assistant for Personnel and Reserve Affairs, Office of the Secretary of Defense; The Pentagon.
Jan 90 – Jul 92	Legislative Assistant for Personnel, Reserves, and Health Affairs, Office of the Secretary of the Army; The Pentagon.
Jun 88 – Jan 90	Assistant Executive and Chief of Administrative Services, Office of the Chief of Legislative Liaison; The Pentagon.
Aug 86 – Jan 88	Chief of Military Personnel; The Joint Staff; The Pentagon.
May 85 – Aug 86	Personnel Management Officer for US Army Europe; Headquarters, Department of the Army; Alexandria, Virginia.
Jun 84 – May 85	Management Consultant; Army Personnel Management Assistance Team, Headquarters, Department of the Army; Arlington, Virginia.
1974 – 1984	Successive assignments with increasing leadership and management responsibility: **1981 – 1984** – Personnel Management Officer, 25th Infantry Division, Schofield Barracks, Hawaii **1978 – 1981** – Adjutant; Reserve Component Personnel & Administration Center; St. Louis, Missouri **1974 – 1978** – Training Officer, Executive Officer, Operations Officer, and Assistant Secretary of the General Staff/Chief of Protocol; Fort Knox, Kentucky Military Schools: **1974** – US Army Armor School; Armor Officer Basic Course; Fort Knox, Kentucky **!978** – Adjutant General's Corps Advanced Course; Fort Benjamin Harrison, Indiana **1988** – Armed Forces Staff College; Norfolk, Virginia

15. Government record: List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments other than those listed above.

Served on the Healthcare Quality Initiatives Review Panel, a Federal Advisory Committee chartered by Congress in PL 105-174. The panel began its work in Sep 99 and ended in Jan 01.

16. Published writings: List the titles, publishers, and dates of books, articles, reports, or other published materials you have written.

During my tenure at the Association of the US Army, I wrote a column each month for the association's newspaper.

17. Political affiliations and activities: (a) List all memberships and offices held in and financial contributions and services rendered to any political party or election committee during the last 10 years.

Bush – Cheney - $500 – May 2003

Bush – Cheney - $500 – October 2003

(b) List all elective public offices for which you have been a candidate and the month and year of each election involved.

None

18. Future employment relationships:

(a) State whether you will sever all connections with your present employer, business firm, association, or organization if you are confirmed by the Senate.

Yes

(b) State whether you have any plans after completing Government service to resume employment, affiliation, or practice with your previous employer, business firm, association, or organization.

I have no such plans.

(c) What commitments, if any, have been made to you for employment after you leave Federal service?

None

(d) (If appointed for a term of specified duration) Do you intend to serve the full term for which you have been appointed?

Not Applicable

(e) (If appointed for an indefinite period) Do you intend to serve until the next Presidential election?

Yes, at the pleasure of the President.

19. Potential conflicts of interest:

(a) Describe any financial arrangements, deferred compensation agreements, or other continuing financial, business, or professional dealings which you have with business associates, clients, or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None

(b) List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

None

(c) Describe any business relationship, dealing, or financial transaction which you have had during the last 5 years, whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

None

(d) Describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any Federal legislation or for the purpose of affecting the administration and execution of Federal law or policy.

While employed by the Association of the US Army, after my retirement from active duty, I lobbied for the association's members for initiatives aiding the well-being of soldiers, Army families, and retirees.

(e) Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements involved.)

I will take action necessary to satisfy the Committee's concerns. Failing that, I will ask the President to withdraw my nomination.

20. Testifying before the Congress:

(a) Do you agree to appear and testify before any duly constituted committee of the Congress upon the request of such committee?

Yes

(b) Do you agree to provide such information as is requested by such a committee?

Yes

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LARRY E. CRAIG TO JOHN M. MOLINO

Question 1. I understand that the Assistant Secretary for Policy, Planning, and Preparedness has a wide array of responsibilities. Can you describe for us some of the key responsibilities of that position and how you plan to fulfill them?

Answer. Yes, this office certainly has a wide array of responsibilities. I am confident my experience together with the team already in place in the office will effect an organization that will successfully fulfill its mission and provide the highest quality support to the Secretary, the Congress and the Administration.

The Office of Policy, Planning, and Preparedness serves a diverse set of needs for the executive leadership of VA, the Congress, and other organizations. One of the primary elements of this organization is the Office of Policy. This office provides the Secretary and VA executive management with independent analysis and data on policies that impact veterans. One of the challenges taken on by this office (at the direction of Congress) is to assess current VA outreach efforts and recommend improvements in VA's current outreach programs. As you know, as Deputy Under Secretary of Defense for Military Community and Family Policy, I was directly involved in the development and execution of outreach efforts. VA, like DoD, faces the challenge of coordinating outreach concerning a complex set of benefits and services. I believe my experience will add value to this outreach improvement initiative.

Along those same lines, the Assistant Secretary for Policy, Planning, and Preparedness is responsible for Department-wide strategic planning. The strategic plan for VA addresses the provision and delivery of a vast array of benefits and services provided through individual administrations. As, it is my responsibility to develop a single, comprehensive strategic plan that crosses internal organizational lines and ensures that all administrations (Veterans Benefits Administration, Veterans Health Administration, and National Cemetery Administration) are working in concert toward the ultimate goal of serving our Nation's veterans. In support of this, the Office manages program evaluations for the Department. These evaluations, conducted by independent parties, assess if programs are meeting their legislated intent and provide recommendations for improvements. My experience will be useful in successfully integrating the results from program evaluations into policies that benefit veterans.

I look forward to becoming engaged in the preparedness aspect of the office, as well. As I understand it, VA played a large and successful role in recent emergency response activities, including assistance in evacuations and protection of infrastructure and ensuring patient safety under adverse conditions. VA assets are an important part of the emergency support functions in the National Response Plan. I believe that my experience in the Department of Defense in working with VA and other agencies can be helpful in further developing agency to agency relationships that are so critical to the success of integrated emergency preparedness planning and execution.

Question 2. One strategic goal of the Office of Policy, Planning, and Preparedness is to "improve the Nation's preparedness for response to war, terrorism, national emergencies, and natural disasters." The events surrounding hurricanes Katrina and Rita will undoubtedly provide a vast amount of information as to how well that goal is being accomplished. Do you yet have a sense of what went well in dealing with these hurricanes and whether they there are any lessons to be learned from how VA responded?

Answer. There are always lessons to be learned. I understand the VA's Crisis Response Team has begun the process of compiling the lessons learned from recent disaster events.

Secretary Nicholson has already stated that among the lessons already learned are the importance of realistic emergency drills, the need to ensure that families of VA health care workers are safe, and most of all, the need to empower employees to "do the right thing."

I have learned there are two essential elements to successful response to emergencies. First is to have adequate plans in place. I understand that VA was among the best prepared and most efficient agencies involved in the Federal response. I was impressed by the level of preparedness at VA hospitals, particularly in the affected areas. But drills and regulations and plans cannot work without the second essential element—a dedicated workforce willing to put in the time and energy to do what needs to be done. VA should be proud, as I am, of the workforce. As for preparedness for war, VA's role is to back up DoD in the provision of health care to active duty. In the case of national emergency, VA may be asked to provide health care to the general public.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO JOHN M. MOLINO

Question 1. In the aftermath of Hurricane Katrina, Secretary Nicholson and others briefed the Committee on VA's role in disaster relief. The Secretary commented that VA will come to Congress in the near future and request additional funding for money spent on disaster relief. I hope you will support the Secretary to do this in a timely manner.

The recent natural disasters in the Gulf Coast region have highlighted VA's role in emergency response. Do you think that VA should be reimbursed for expenses incurred? I believe VA should be reimbursed for funds expended for emergency response consistent with Administration policies and the Stafford Act. As you know, VA health care is funded through a fixed, appropriated, annual budget. Although we do not yet know the extent of VA resources spent over the past few weeks for emergency relief, unanticipated spending could adversely affect planned budgets and possibly interfere with the provision of care to veterans. The Department has already drafted a process describing how VA will manage such reimbursements.

Question 2. Mr. Molino, what are your top priorities for the office you will oversee and what can Congress do to assist you in your new role?

Senator I have outlined in my answer to Senator Craig, some of the more important functions in the Office of Assistant Secretary for Policy, Planning, and Preparedness. My top priority will be to support the Secretary in his mission to provide the highest quality benefits and services to our Nation's veterans. I will do this through effective management of Policy, Planning, and Preparedness staff, active participation in senior leadership forums, building strong relationships within the Department and strengthening existing relationships with the Department of Defense.

I do not know yet how best Congress can assist me in this role, however, I very much look forward to and appreciate your support.

Chairman CRAIG. John, thank you very much.

Now let us turn to Lisette Mondello.

STATEMENT OF LISETTE M. MONDELLO, NOMINEE TO BE ASSISTANT SECRETARY FOR PUBLIC AND INTERGOVERNMENTAL AFFAIRS, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mrs. MONDELLO. Thank you, Mr. Chairman and Members of the Committee, for the opportunity to appear before you today. It is a great honor to be nominated by President Bush to be Assistant Secretary for Public and Intergovernmental Affairs at the VA. I am also most grateful to Secretary Nicholson for his confidence in my ability to do this job and to do it well for our veterans.

It was a privilege to have been introduced by my friend and my mentor, Senator Hutchison. She is a tireless advocate for our Nation's veterans.

When I was growing up in Texas, I grew up with veterans. My dad and my uncle would show me pictures of when they were young men and they served in the Army, and they told me about their days in the service. My dad served in the Pacific during World War II, and when he came back, he was able to graduate from college because of the GI bill. My uncle served in France during World War I. I later had the privilege of working with Sam Johnson, a veteran of Korea and Vietnam, who spent nearly 7 years in a North Vietnamese prison camp, half of that time in solitary confinement. Through him, I met many of his fellow POWs, and I remain today awed by their courage and their love of country.

There is a country song—I don't know if anybody is a country and western fan—called "My Heroes Have Always Been Cowboys."

I think today I could say, "My Heroes Have Always Been Veterans."

Without the dedication of the millions of men and women who served in our Armed Forces, we wouldn't enjoy the freedom we have today. I consider it a privilege to be able to serve those who served our Nation and defended the cause of freedom here and throughout the world.

I have spent my professional life both in the public and private sectors, practicing the art of effective communication and how it can serve a mission's priorities. I have seen how constituents and constituencies are better served when they have clear and accurate information available to them. I have worked both in small offices and organizations as well as in large bureaucracies and actually seen both operate quite well.

I spent nearly a decade in the Senate on the staffs of two highly effective Senators—both Senator Hutchison and prior to that Senator Al D'Amato of New York. I have also served most recently as senior advisor at the Department of Education under two very dedicated Secretaries during a time of sweeping national education reform. If confirmed to this position, I am looking forward to working with the staff at the Department to ensure that veterans receive the information they need to access their benefits and VA's other services.

Within the Office of Public and Intergovernmental Affairs, we are charged with communicating services and programs to veterans, to their families, to service organizations, to State and local governments and communities.

Information that is presented in an unclear and confusing manner is frustrating to our veterans; it is frustrating to those who work with them and to their families, and it is unfair. If the website, for example, is difficult to navigate or if information is scattered and hard to find, we must find ways to improve. For veterans like my father from World War II who would not necessarily turn to the Internet as their first avenue of gathering information, we must continue to look at all avenues of communication to reach them.

There are more than 230,000 professionals at the Department of Veterans Affairs. They serve our veterans every day. They provide world-class health services. There is cutting-edge medical research going on. They do much more in providing benefits and services for our veterans.

If confirmed, I will look for ways to constantly improve our communications efforts, both externally and internally. If confirmed, I will reach out to the State and local governments, to veterans, to community organizations, as well as to Congress, to explore ways we can work together to better communicate information about VA's programs and services to our veterans and to their families.

Mr. Chairman, I would also like to thank my family and friends, many of whom are here today, for their support. My husband, Joe Mondello, who is also a Senate staff alum of many years, has provided me with unwavering support, and my son, Matthew, a first grader—who thinks today is a holiday because he is missing school.

[Laughter and applause.]

Mrs. MONDELLO. We are going to our first Cub Scout meeting tonight. My parents, Rosemary and Pete Elizondo, who couldn't be here today—they are in Dallas—they have always supported me in every endeavor I have ever tried, and I know they are sitting actually waiting to hear how it goes.

Again, Mr. Chairman and Members, thank you so much for this opportunity, and I look forward to any questions.

[The prepared statement of Mrs. Mondello follows:]

PREPARED STATEMENT OF LISETTE M. MONDELLO, NOMINEE TO BE ASSISTANT SECRETARY FOR PUBLIC AND INTERGOVERNMENTAL AFFAIRS, U.S. DEPARTMENT OF VETERANS AFFAIRS

Thank you, Mr. Chairman and Members of the Committee for the opportunity to appear before you today. It is a great honor to be nominated by President Bush to serve as Assistant Secretary for Public and Intergovernmental Affairs at the Department of Veterans Affairs. I am also most grateful to Secretary Jim Nicholson for his confidence in my abilities

It is a privilege to be introduced by my mentor, Senator Kay Bailey Hutchison from my home state of Texas. Senator Hutchison is a tireless advocate and supporter of our nation's veterans. Thank you, Senator, for your friendship and support.

When I was growing up in Texas, my dad and uncle would show me pictures and tell me stories of their days in the service. My dad served in the Pacific during World War II. My uncle served in France during World War I. Later, I worked with Sam Johnson, a Korea and Vietnam veteran who spent nearly seven years in a North Vietnamese prison camp. I met many of his fellow POWs and remain awed by their courage and love of country.

There is a country and western song entitled: "My Heroes Have Always Been Cowboys." I would say rather "My Heroes Have Always Been Veterans." I have chosen my heroes well.

Without the millions of men and women whose love of country and dedication to duty, we wouldn't enjoy the freedom we have today. I consider it a privilege to be able to serve those who have served our nation and defended the cause of freedom and liberty here and throughout the world.

I have spent my professional life both in the public and private sectors, learning the art of effective communication and how it can serve mission priorities. I have seen how constituents and constituencies are better served when they have clear and accurate information available to them. I have worked in small offices and large bureaucracies and seen both operate most effectively.

I served nearly a decade in the Senate on the staffs of two highly effective Senators—Sen. Hutchison and Sen. Al D'Amato of New York. I have also served, most recently as a Senior Advisor in the Department of Education under two dedicated Secretaries (Rod Paige and Margaret Spellings) during a time of sweeping reform of our public education system. If confirmed to this position, I am looking forward to working with the dedicated staff at the Department of Veterans Affairs to support their objectives, initiatives and programs as we ensure that veterans receive the information they need to access their benefits and VA's services. I am also committed to building strong alliances and partnerships with state and local governments as we work together to assist our veterans.

Mr. Chairman, we have a duty at the Department of Veterans Affairs—a duty to honor and serve our nation's veterans. Within the Office of Public and Intergovernmental Affairs, we are charged with communicating services and programs to veterans, their families, service organizations and State and local governments. It is imperative that we do our job well.

Information presented in an unclear and confusing manner is frustrating to our veterans, their families and those who serve them. If the website is difficult to navigate or if information is scattered and difficult to find, we must find ways to improve. For veterans like my father, who would not turn to the web for information, we must look at all avenues of communication to reach them. Our veterans deserve our very best efforts.

More than 200,000 professionals at the Department serve our veterans—every day they provide world class care, cutting edge research, and other benefits and services. It is our job in Public and Intergovernmental Affairs to reach out to our veterans, their families and those who work with them, to ensure that they have the information they need to make informed decisions about the benefits, services and programs that are available to them.

I will look for ways to constantly improve our communications efforts both externally and internally. If confirmed, I will reach out to State and local governments, to veterans and community organizations, as well as to Congress to explore ways to better communicate information about the VA's programs and services to our veterans and their families.

Mr. Chairman, I would also like to thank my family and friends, many of whom are here today, for their support. My husband Joe Mondello, who is also a Senate staff alum and has provided me with unwavering support, and my son Matthew, who is very excited that Mommy is going to help our soldiers when they come home. And my parents, Rosemary and Pete Elizondo of Dallas, who have always supported me in all my endeavors.

Thank you again, Mr. Chairman and Members of the Committee, for your consideration of my nomination. I would be happy to answer any questions you may have.

QUESTIONAIRE FOR PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

1. Name: Mondello (LAST) Lisette (FIRST) McSoud (OTHER)

2. Present Address: 2707 S. Grove Street Arlington (CITY) VA (STATE) 22202 (ZIP CODE)

3. Position to which nominated: Assistant Secretary for Public & Intergovernmental Affairs

4. Date of nomination: September 6, 2005

5. Date of birth: 26 (DAY) August (MONTH) 1956 (YEAR)

6. Place of birth: Beirut, Lebanon

7. Marital Status: Married

8. Full name of spouse: Joseph N. Mondello

9. Names and ages of children

Matthew Peter, 6

10: Education:

Institution (including city and State)	Dates attended	Degrees received	Dates of degrees
Trinity University San Antonio, Texas	1974-1978	BA	1978

11. Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Trinity University: President's Scholar (1974), University Scholar (1974)

12. Memberships List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable, and other organizations for the last 5 years and any other prior memberships or offices you consider relevant

Organization	Office held (if any)	Dates
Texas State Society		present
Trinity University Alumni Association		present
Junior League of Washington, DC		present
Arlington Traditional School PTA		present

13. Employment record: List below all employment (except military service) since your twenty-first birthday, including the title or description of job, name of employer, location of work, and inclusive dates of employment.

Press Secretary, U.S. Rep. (TX-3), Washington, DC, 1978-1981

Press Secretary, Collins for Senate, Dallas and Austin, Texas, 1982

Account Representative, Zachry & Associates, Abilene, Texas, 1983

Communications Director, 1983-86; Executive Director, 1986-88, Texas Foundation for Conservative Studies, Dallas, Texas

Senior Vice President, Spaeth Communications, Dallas, Texas 1989-94

Director of Communications, U.S. Senator Alfonse D'Amato (NY), Washington, DC, 1995-98

Director of Communications, U.S. Senator Kay Bailey Hutchison (TX), Washington, DC, 1999-2003

Senior Advisor to the Secretary, U.S. Department of Education, Washington, DC, 2003-2005

14. Military service: List below all military service (including reserve components and National Guard or Air National Guard), with inclusive dates of service, rank, permanent duty stations and units of assignment, titles, descriptions of assignments, and type of discharge.

15. Government record: List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments other than those listed above.

16. Published writings: List the titles, publishers, and dates of books, articles, reports, or other published materials you have written.

17. Political affiliations and activities: (a) List all memberships and offices held in and financial contributions and services rendered to any political party or election committee during the last 10 years.

Kay Bailey Hutchison for Senate -- 2005

Jim Hyland for Delegate -- 2005

Volunteer – Republican National Committee -- 2004

(b) List all elective public offices for which you have been a candidate and the month and year of each election involved.

None

18. Future employment relationships: (a) State whether you will sever all connections with your present employer, business firm, association, or organization if you are confirmed by the Senate.
Yes

(b) State whether you have any plans after completing Government service to resume employment, affiliation, or practice with your previous employer, business firm, association, or organization.
No

(c) What commitments, if any, have been made to you for employment after you leave Federal service?
None

(d) (If appointed for a term of specified duration) Do you intend to serve the full term for which you have been appointed?
Yes

(e) (If appointed for an indefinite period) Do you intend to serve until the next Presidential election?
Yes

19. Potential conflicts of interest:

(a) Describe any financial arrangements, deferred compensation agreements, or other continuing financial, business, or professional dealings which you have with business associates, clients, or customers who will be affected by policies which you will influence in the position to which you have been nominated.
None

(b) List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.
None

(c) Describe any business relationship, dealing, or financial transaction which you have had during the last 5 years, whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.
None

(d) Describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any Federal legislation or for the purpose of affecting the administration and execution of Federal law or policy.
None

(e) Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements involved.)

I have entered into an Ethics Agreement stating that I will recuse myself from any matter that may affect or involve my husband's employer (The Loeffler Group, LLP) before the Department. (attached)

20. Testifying before the Congress:

(a) Do you agree to appear and testify before any duly constituted committee of the Congress upon the request of such committee?

Yes

(b) Do you agree to provide such information as is requested by such a committee?

Yes

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LARRY E. CRAIG TO LISETTE M. MONDELLO

Question 1. It is my understanding that the Assistant Secretary for Public and Intergovernmental Affairs is responsible for managing and directing a number of programs, including international, consumer affairs and faith-based community initiatives programs. How would your experience help you assume those responsibilities?

Answer. The management of the diverse programs in the Office of Public and Intergovernmental Affairs will be one of my highest priorities. Watchful stewardship ensures that the programs are working well for those they are intended to serve. It is a responsibility I take most seriously.

Throughout my career, I have worked with a variety of national, State and local groups on a wide variety of issues. Although a significant part of my portfolio was media or public affairs, I also had strategic and implementation management responsibility on a number of key issues that required working with constituents, constituencies and government officials. Whether it was education, law enforcement, senior concerns, or consumer affairs, the issues covered a diverse range of topics of interest to a variety of groups and communities. For example, the implementation of electronic delivery of Federal benefits (EFT 99) was a major issue for senior and consumer organizations as well as to the Federal Government and the banking community. When working on the issue of Nazi gold in Swiss banks, the Holocaust survivor organizations and the international community were integral parts of process. In education, parents, teachers, national, State and local officials and organizations, all play integral roles. In addition, I worked closely on issues that affected State and local governments as well as community associations who desired or received Federal grants and programs.

Question 2. One of VA's objectives is to be "recognized as a leader in the provision of specialized health care services." In recent years, VA has done a remarkable job in transforming into one of the nation's best health care systems. Do you yet have a sense of what measures can be taken to foster VA's well-deserved reputation as a leader in health care services?

Answer. Increasing the recognition of the leadership role of VA health care services is a key mission for the public affairs office and this mission's success brings with it significant benefits for the program. Recognition can bring not only enhanced reputation but also raised credibility among the veteran population and raised internal morale. I would recommend a multi-pronged approach to communicating the VA information. This plan would include increasing our outreach to national media, as well as increasing our emphasis on local, regional and specialized media. I would also promote the many health care specialists to the media for expert comments. I would also recommend coordinating with other offices at VA to ensure that local media opportunities are part of travel itineraries.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO LISETTE M. MONDELLO

Question 1. When we met earlier this week in my office, we talked about the various means of communicating with different generations of veterans and their families. Can you give me some examples of how VA can meet the varying communication needs of its constituency?

Answer. The diverse age demographics of today's veterans require a communications plan that provides information in a variety of ways to ensure that we reach the maximum number of veterans as possible. Younger veterans will primarily get their information from the intranet. I believe the VA website can be more "user-friendly" and would work to make the site easier to navigate and the information more clearly presented. For many of our older or economically disadvantaged veterans, the intranet will not be their primary information vehicle. For them, we would work to increase the access to VA information through local, regional and specialized media. It is my understanding that the public affairs office has just come to an agreement with ABC Radio Network, American Country Countdown and Salem Radio Network to produce and air a series of PSAs (public service announcements) at no charge to the Department on health care and benefits available to veterans. These radio networks have more than 5000 affiliate stations total nationwide. I also believe that national and local groups and associations, as well as their publications, are excellent ways to communicate to veterans.

Question 2. Mrs. Mondello, in your opening statement, you point to a wealth of prior work experience you have in communicating information to various constituencies. As you know, my home state of Hawaii has some isolated veteran commu-

nities on the smaller islands. What new strategies would you implement to ensure fast effective communication to this Nation's rural and isolated veterans communities?

Answer. Reaching our veterans who live in rural or otherwise isolated communities requires what I would describe as a "cooperative" communications strategy. While we would work to increase information on VA's services and benefits on a national media level, there needs to be an increased focus on small, local media such as weekly or community newspapers to small radio stations to "non-traditional" media outlets. We would work closely with State Veterans Directors and personnel, as well as with local and community officials, to identify and inform local media and community groups that reach or serve our rural veterans. We would also look for ways to keep these officials and groups informed and supplied with up-to-date information on VA benefits and services available in their areas for dissemination to veterans and those who serve them.

Chairman CRAIG. Lisette, thank you very much. Matthew, I will be happy to sign your excuse slip.

[Laughter.]

Chairman CRAIG. George Opfer. George, welcome to the committee.

STATEMENT OF GEORGE J. OPFER, NOMINEE TO BE INSPECTOR GENERAL, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. OPFER. Thank you, Mr. Chairman, Senator Akaka, Senator Burr, Senator Obama. It really is an honor for me and my family to be here today, having been nominated for the position of Inspector General by the President. I am fortunate to be accompanied today by my beautiful and supportive family. Betty and I will be celebrating our 32nd wedding anniversary soon, and two of my three children—Tom, the oldest, is a teacher in Fairfax at Paul VI High School, and Chris is a recent graduate of the University of Miami Law School, so I am starting to see a little light at the end of debtor's prison. Allison, my youngest, couldn't be here today. She is on a basketball scholarship at the University of Indianapolis, and the coaches are tough. They wouldn't even allow her to come for her dad's confirmation hearing. But Betty and I, are very fortunate to be here.

Chairman CRAIG. Please stand so we can recognize you. Thank you.

[Applause.]

Mr. OPFER. The VA's mission to serve, honor, and recognize the veterans for their service to our Nation is the noblest of callings. As in past wars, Afghanistan and Iraq bring to our attention and remind us of the incredible sacrifices that the men and women in uniform are making to preserve our freedom and protect our democracy. The Department's sacred mission, "to care for him who shall have borne the battle and for his widow and his orphan," is the legacy passed on from President Abraham Lincoln. Today the Veterans Affairs has to carry that mission out to approximately over 25 million living veterans and their families.

While I know every position has a learning curve, I do believe by the reason of my previous experience and background that I will be able to fulfill the position of Inspector General. I have worked for almost 36 years in the Federal Government—25 years with the U.S. Secret Service, and 11 years in the Inspector General community both at the Federal Emergency Management Agency and the

Department of Labor. I am intimately familiar with the role and responsibilities and functions of the Office of the Inspector General.

I firmly believe that the Inspector General Act, enacted 25 years ago, is as important today as it was then. It provides the Inspector General unique responsibilities and authorities to independently conduct oversight and reviews of the agency programs. It also requires the Inspector General to keep the Congress and the Secretary duly informed of any deficiencies in those programs. As Inspector General, I will use that authority to ensure an independent and objective review of the facts, whether the work consists of allegations of impropriety, whether it is audits of financial systems, program and evaluations, or in the case where it is criminal investigations conducted by the Office of Inspector General. I will aggressively pursue any criminal activity to the fullest extent of the law.

In conclusion, Mr. Chairman, I am honored to be considered for this position, and I pledge, if I am confirmed, that I will work with you and the other Members of the Committee to make sure that you are duly informed of any issue that we all can address, critical issues facing the Department of Veterans Affairs so that they can make efficient and effective and economical delivery of benefits to our Nation's veterans.

Thank you for the opportunity to appear today, sir.

[The prepared statement of Mr. Opfer follows:]

PREPARED STATEMENT OF GEORGE J. OPFER, NOMINEE TO BE INSPECTOR GENERAL, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. Chairman and distinguished Members of the Committee, I am honored to be here today, having been nominated by President Bush to lead the Office of Inspector General (OIG), Department of Veterans Affairs (VA). VA's mission to serve, honor, and recognize veterans for their service to our nation is the noblest of callings. As in wars past, Afghanistan and Iraq continue to remind us of the incredible sacrifices our men and women in uniform make to defend our freedom and protect us from terrorism. The Department's sacred mission, "to care for him who shall have borne the battle and for his widow and his orphan," is the legacy of President Abraham Lincoln. This legacy extends to an estimated 25 million living veterans and their families.

VA is the second largest agency in the Federal Government, with about 230,000 employees and an annual budget of approximately $70 billion. In serving America's veterans, VA provides health care, income and re-adjustment benefits, and memorial and burial services. VA maintains facilities in every State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Philippines. Providing these services presents VA with constant challenges.

The OIG has the formidable task of staying abreast of these challenges, and focusing its resources in areas that will maximize the impact it has on helping the VA accomplish its mission. Key issue areas currently being addressed by the OIG include:

- Access to high-quality and safe health care.
- Accurate and timely benefits processing.
- Reliable financial management systems.
- Efficient and economical procurement practices.
- Effective and secure information management technologies.

In addressing these issues, the OIG is resolved to ensure that VA programs and operations are efficiently and effectively managed, and free of violations of law, waste, and abuse. The OIG is also committed to aggressively investigating, arresting, and prosecuting persons perpetrating crimes affecting VA.

While every position involves a learning curve, by reason of my experience and my commitment to service to our Country, I believe that I am qualified to fill this position. My 35-year Federal career has been dedicated to law enforcement and oversight of Federal programs. My work in the inspector general community, at the Federal Emergency Management Agency (FEMA) and the Department of Labor

(DOL), and with the Secret Service has provided me with the necessary experience and knowledge to fulfill the responsibilities of this position in accordance with the mandate of the IG Act. I am intimately familiar with the role, function, operations, and challenges of leading an Office of Inspector General.

I have worked on numerous issues that are systemic to government-wide operations. Financial management, information management, procurement, performance, and accountability are not unique to any one agency. As the Inspector General for FEMA and as the Deputy Inspector General for DOL, I have managed and directed a wide variety of audits and investigations of agency programs and individuals. I have in-depth knowledge of government auditing standards, which focus on opportunities to improve the economy, efficiency, and effectiveness of programs. I also have extensive experience in the conduct and management of criminal, civil, and administrative investigations, including a long association in working successfully with Assistant U.S. Attorneys to prosecute cases on behalf of the Federal Government.

The IG Act is as relevant today as it was over 25 years ago when it was first enacted. It provides the Inspector General with the authority and responsibility to independently conduct oversight into all programs and activities within the Department. It also requires the Inspector General to keep the Congress and the Secretary fully informed about problems and deficiencies and the need for corrective action. As Inspector General, I will use this authority to ensure an independent and objective review of the facts, whether the work involves allegations of impropriety, inspections for compliance with regulations and policy, or audits of financial systems. I will not hesitate to review and report on any issue of fraud, waste, abuse, or mismanagement brought to my attention. I will also aggressively pursue criminal activity and work to get founded cases prosecuted to the fullest extent of the law.

VA OIG has an outstanding reputation in the inspector general community and within the Department. This reputation has been earned through the hard work and dedication of its staff. I look forward to becoming part of the VA OIG team and carrying on the legacy of working with Congress and the Department to help ensure our Nation's veterans receive the benefits they have earned through service to their country. My goal is to be an agent for positive change and help VA become the best-managed service delivery organization in Government.

As Inspector General, I will continue to recruit, develop, and retain a diverse and motivated workforce. OIG training programs and facilities must provide staff with the necessary skills and tools to excel at their jobs. Overseeing an agency as multifaceted and complex as VA requires OIG personnel to be able to respond to ever-changing challenges. I will remain devoted to ensuring that the OIG team remains ready to fulfill their mission in an independent, objective, thorough, and timely manner.

In conclusion, I am honored to be considered for this position. If confirmed, I will assume the duties of Inspector General with enthusiasm and a commitment to uphold the public trust. Mr. Chairman, I pledge to work collaboratively with you and all the Members of the Committee to address the many critical issues impacting the efficient, effective, and economical delivery of benefits to our Nation's veterans.

Mr. Chairman, thank you for the opportunity to provide this statement. I would welcome any questions that you or other members might have.

QUESTIONNAIRE FOR PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

1. Name: OPFER (LAST) GEORGE (FIRST) _____ (OTHER)

2. Present Address: 13138 ROUNDING RUN CIRCLE, HERNDON, VA 20171-3907 (CITY) (STATE) (ZIP CODE)

3. Position to which nominated: INSPECTOR GENERAL – DEPT OF VETERANS AFFAIRS

4. Date of nomination: 9-6-05

5. Date of birth: 12 (DAY) 05 (MONTH) 1947 (YEAR)

6. Place of birth: NEW YORK, NEW YORK

7. Marital Status: MARRIED

8. Full name of spouse: ELIZABETH AMELIA OPFER

9. Names and ages of children			
	Thomas G. Opfer - 27		
	Christopher R. Opfer - 25		
	Allison M. Opfer - 20		

10: Education:	Institution (including city and State)	Dates attended	Degrees received	Dates of degrees
	St. John's University New York, New York	09/65 to 06/69	B.S.	06/69
	Cardinal Hayes High School Bronx, New York	09/61 to 06/65	H.S. Diploma	06/65

11. Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognition for outstanding service or achievement.

PRESIDENTIAL SENIOR EXECUTIVE SERVICE - RANK

OF MERITORIOUS EXECUTIVE

NUMEROUS LETTERS FROM FEDERAL, STATE AND

LOCAL LAW ENFORCEMENT AGENCIES

12. Memberships	List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable, and other organizations for the last 5 years and any other prior memberships or offices you consider relevant		
	Organization	Office held (if any)	Dates
	Knights of Columbus	Catholic Charitable Org.	1965 to Present

13. Employment record:

List below all employment (except military service) since your twenty-first birthday, including the title or description of job, name of employer, location of work, and inclusive dates of employment.

12/02/02 to Present – Deputy Inspector General –Dept. of Labor – Washington,DC

11/06/94 to 11/30/02 – Inspector General Federal Emergency Management Agency – Washington, DC

10/20/69 to 10/29/94 – U.S. Secret Service – Washington, DC Appointed as Special Agent on 10/20/69 in New York, Retired 10/29/94 – Assistant. Director, Office of Investigations

14. Military service:

List below all military service (including reserve components and National Guard or Air National Guard), with inclusive dates of service, rank, permanent duty stations and units of assignment, titles, descriptions of assignments, and type of discharge.

None

15. Government record:

List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments other than those listed above.

None

16. Published writings:

List the titles, publishers, and dates of books, articles, reports, or other published materials you have written.

None

17. Political affiliations and activities:

(a) List all memberships and offices held in and financial contributions and services rendered to any political party or election committee during the last 10 years.

None

(b) List all elective public offices for which you have been a candidate and the month and year of each election involved.

None

18. Future employment relationships:

(a) State whether you will sever all connections with your present employer, business firm, association, or organization if the Senate confirms you.

Yes

(b) State whether you have any plans after completing Government service to resume employment, affiliation, or practice with your previous employer, business firm, association, or organization.

No

(c) What commitments, if any, have been made to you for employment after you leave Federal service?

None

(d) (If appointed for a term of specified duration) Do you intend to serve the full term for which you have been appointed?

N/A

(e) (If appointed for an indefinite period) Do you intend to serve until the next Presidential election?

Yes

19. Potential conflicts of interest:

(a) Describe any financial arrangements, deferred compensation agreements, or other continuing financial, business, or professional dealings which you have with business associates, clients, or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None

(b) List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

None

(c) Describe any business relationship, dealing, or financial transaction which you have had during the last 5 years, whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

None

(d) Describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any Federal legislation or for the purpose of affecting the administration and execution of Federal law or policy.

None

(e) Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements involved.)

I AM NOT AWARE OF ANY POTENTIAL CONFLICT OF INTEREST ISSUES

20. Testifying before the Congress:

(a) Do you agree to appear and testify before any duly constituted committee of the Congress upon the request of such committee?

Yes

(b) Do you agree to provide such information as is requested by such a committee?

Yes

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LARRY E. CRAIG TO GEORGE OPFER

Question 1. You have a great deal of experience in investigative roles and as an Inspector General. What can you take from your previous experience and apply to your new position, if confirmed?

Answer. My entire Federal career has been dedicated to law enforcement and oversight of Federal programs. My work in the inspector general community, at the Federal Emergency Management Agency (FEMA) and Department of Labor (DOL), and with the Secret Service has provided me with the necessary experience and knowledge to fulfill the responsibilities of this position in accordance with the mandate of the IG Act. I am intimately familiar with the role, function, operations, and challenges of leading an Office of Inspector General.

As a current member of the inspector general community I have worked on numerous issues that are systemic to government-wide operations. At both FEMA and DOL, I have managed and directed audits and investigations of agency programs and individuals. I have in-depth knowledge of government auditing standards, which focus on opportunities to improve the economy, efficiency, and effectiveness of programs. I also have extensive experience in the conduct and management of both criminal and administrative investigations, including a long association in working successfully with Assistant U.S. Attorneys to prosecute cases on behalf of the Federal Government.

Question 2. Concerns have been expressed to the Committee staff about the VA Inspector General's office focusing heavily on monetary recovery actions. It is my understanding that some of these actions are being taken against firms that are generally good actors and partners in government procurement and that the firms may be paying monetary penalties to the government without admitting any wrongdoing largely—in their view—to avoid lengthy and costly public proceedings that could undermine the confidence in their companies. Do you believe that any such policy could be against the interest of the government, especially if it discourages quality companies from doing business with the government? And, do you believe that government officials must be closely monitored in the area of financial penalties to ensure that they adhere to a high standard of objectivity and integrity?

Answer. I believe one role of the VA Inspector General is to ensure VA and contractors adhere to all applicable laws, rules, and regulations, and that both parties comply with all contractual terms and conditions. The Office of Inspector General (OIG) has a responsibility to review contracts to identify overcharges and other damages to the Federal Government related to non-compliance with contract terms and conditions. All work performed by the OIG must be conducted with objectivity and integrity, and be based on an independent and thorough review of the facts. Monetary recoveries and penalties can result from post-award audits and in response to complaints filed under the qui tam provisions of the False Claims Act.

It is my understanding that post-award audits are conducted at the request of VA contracting officers or in response to contractors' voluntary disclosures. The purpose of these audits is to ensure that VA receives fair and reasonable prices that are based on accurate information provided by the contractor. When the OIG determines that the Federal Government did not receive the price required under the terms of the contract and there is no evidence of fraud, the OIG makes a recommendation to VA to collect the overcharges.

Of the 238 post-award audits conducted in the past 12 years, 107 were conducted in response to contractor's voluntarily disclosing they overcharged the government. These contractors collectively offered to pay $37.5 million in overcharges. However, post-award audits of data submitted by the contractors determined that the overcharges were actually $113 million. The Department negotiated recovery of the funds. The Inspector General is required under the IG Act to report all criminal violations to the Department of Justice (DOJ). Of the 107 voluntary disclosures, 5 were referred to DOJ for a determination as to whether there was a violation of criminal law and to pursue any monetary restitution and penalties prescribed by law.

The OIG is also required to investigate allegations of contract irregularities in response to Hotline allegations or qui tams received from DOJ. These cases involve a wide variety of issues related to VA contracts such as defective pricing, overcharging, product substitution, Buy American Act violations, violations of Medicare/Medicaid laws, and off-label marketing of pharmaceuticals. In these cases, the OIG conducts a review to determine if fraud has been committed and the extent of the damages. The OIG provides the results of these reviews to DOJ, which is responsible for negotiating monetary settlements with the contractors, to include recovering damages and determining monetary penalties as prescribed by law. If con-

firmed, I will review this process to ensure a high standard of objectivity and integrity.

Question 3. The President's Management Agenda places an important emphasis on small business participation in government procurement awards. Yet, concern has been expressed to the Committee staff that staff from the Inspector general's office have made recommendations and taken actions recently that may severely hamper VA's ability to contract with any small or local businesses and instead leave VA little choice than to nationalize all procurements and contracts with big suppliers. Do you believe that the Inspector General has a responsibility to be cognizant of the President's Management Goals and Congressional procurement policies when making recommendations to VA on changes in its procurement policies?

Answer. I do believe that the Inspector General has a responsibility to be fully aware of the goals of the President's Management Agenda and all applicable procurement related laws, rules, and regulations when performing oversight and recommending improvements in procurement processes. As explained to me the OIG conducts pre-award reviews of proposals submitted by contractors seeking VA Federal Supply Schedule (FSS) contracts, at the request of VA contracting officers. The scope of these audits is defined by GSA regulations pertaining to the FSS, which do not distinguish between small and large businesses. As a result, pre-award audit recommendations do not differentiate between small and large contractors.

In addition to pre-award audits, the OIG reviews purchasing activities at VA facilities on a cyclical basis to ensure compliance with VA policies and procedures. These reviews have identified numerous open market purchases when the same products were available at a lower price on a FSS contract. In these cases, we recommended that VA comply with VA's policy mandating the use of national contracts, including FSS contracts. Compliance with these recommendations may impact some small and local businesses, as well as large businesses.

The FSS program allows all vendors the opportunity to obtain a contract to provide goods and services to VA and other Federal agencies. This program is particularly beneficial to small businesses because they can be awarded a contract without competition with large suppliers. VA data shows that 72 percent of the current VA FSS contracts are awarded to small businesses.

If confirmed, I will ensure that all recommendations made by the OIG are consistent with the overarching charge to protect the integrity of government, improve program efficiency and effectiveness, and prevent and detect fraud, waste, and abuse in Federal agencies.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO GEORGE OPFER

Question 1. The Office of Inspector General has an important role within VA. Staffing levels at VA is a major concern of mine. Given the responsibility that this office has, I would hope that staffing would never become a problem. Should there be a time where you need additional staff, will you fight within the Administration to increase your staffing level so that the Office of Inspector General can do its job?

Answer. I intend to be a strong advocate for the resources needed to provide objective, independent oversight of VA programs and operations. I understand that each year the Office of Inspector General develops its resource request during the VA internal budget formulation process, and that the Inspector General always has had an opportunity to present and justify resource needs to the VA Secretary, who has a record of supporting OIG oversight initiatives. Additionally, the Office of Management and Budget has given the Inspector General its own budget hearings to discuss oversight needs as the Administration prepares its submission to Congress, and I intend to take full advantage of all such opportunities. The Inspector General has also responded to questions freely from oversight committees on resource needs and staffing levels. I will request funding levels that enable the OIG to carry out its statutory work of audits, investigations, and inspections—and in doing so—to help VA and Congress ensure veterans and their dependents receive the care, support, and recognition earned through service to their country.

Question 2. Inspector General investigations are initiated by a variety of means. Will you be responsive to requests from Congress to initiate investigations?

Answer. If confirmed, I will be responsive to oversight requests from Congress and make them a priority. In doing so I will utilize audit and investigative resources to ensure financial and administrative operations associated with the delivery of benefits to veterans are efficient, economical, and free from criminal activity. The Inspector General has a responsibility to receive allegations of fraud, waste, and abuse from many sources, including Congress. The VA OIG has one of most active

Hotlines in the inspector general community, with over 15,000 contacts a year. I will direct OIG resources to conduct investigations, audits, and health care inspections to ensure the integrity of VA programs and operations—carrying out both reactive and proactive efforts. I will not hesitate to review and report on any issues of fraud, waste, abuse, or mismanagement brought to my attention. My goal will be to establish a priority for the detection, deterrence, and prosecution of fraud in VA programs and operations, using all available oversight and investigative tools including computer matching and data mining initiatives.

The IG Act provides the Inspector General with independent authority and responsibility to conduct oversight into all programs and operations within the Department. At the same time, the IG Act requires the Inspector General to keep the Congress fully informed about problems and deficiencies and the need for corrective action. If confirmed as Inspector General, I will use this authority to ensure an independent and objective review of the facts, whether the work involves allegations of impropriety, health care inspections for compliance with regulations and policy, or audits of financial systems.

Chairman CRAIG. George, thank you very much.

We will now move to a round of questions. We will use the 5-minute rule so that certainly each of us can get an opportunity. We have been asked to be on the floor before the vote starts. It is a seated vote in recognition of the obvious position involved with the Chief Justice of the Supreme Court. We will follow in that manner, and then if there are any questions left unasked, we will submit them to all of you in writing. I would not in any way—we would expect obviously prompt and timely responses, but we will also move very expeditiously to get you before the Senate for confirmation.

With that, Bill, you have talked of your knowledge and understanding and of the importance of VA's responsibility in establishing national cemeteries and sustaining them and maintaining them in areas where no burial option exists within, say, 75 miles or where the veterans population exceeds 170,000. VA's criteria, it would seem, leaves little chance for sparsely populated States—I know; we have struggled with that in my State of Idaho—to have a national cemetery established within their boundaries, even though the service rendered by veterans residing in those States was, of course, national in character.

Do you believe there should be a periodic re-examination of the criteria? Or do you believe there are other criteria that we might consider in determining location for national cemeteries?

Mr. TUERK. Mr. Chairman, I do believe the criteria need to be and ought to be reviewed periodically. The standard that VA has set for prioritizing where national cemeteries will be created, as you cited, is that 90 percent of veterans will be within 75 miles of a burial option.

It is not my belief and it would not be my position that that is the final criterion that will be established for making site selection decisions for national cemeteries; rather, it was, I think, a goal that was set by the NCA back at a time when only 75 percent of veterans had a burial option available to them.

I think it was entirely appropriate for the National Cemetery Administration to set a goal that could be achieved—to hit the 90-percent number—because it gave them something to shoot for and it gave the Congress something to measure their success against. As I stated in my statement, there are 11 cemeteries in various stages of development that need to be opened and will be opened during my tenure in order to achieve that target.

That goal, I think, is a station along the way. When I take over as Under Secretary, if I am confirmed by the Senate, I intend to review where we will go from there, having accomplished that goal. There are many communities, as you cite, in less urban areas that don't have a burial option available to their veterans. There are many substantial cities—Buffalo, New York; Omaha, Nebraska—that don't have a burial site available to them. Boise fell into that category until very recently when last year a State cemetery was open there.

Cities like these, intermediate-size cities, and more rural areas, the veterans there, of course, deserve the same honor as any veteran anyplace. I will work hard, Mr. Chairman, to make sure burial options are made available to more than 90 percent of veterans by opening the issue of how we site future national cemeteries, once the 11 that are on-stream are built, by trying to make the State Cemetery Grant Program more effective, and one thing that is often overlooked, assuring that cemeteries that are reaching their capacity are expanded so that they can continue to offer services to veterans in the communities they serve.

Chairman CRAIG. Bill, thank you.

Robert, during hearings earlier this year on VA's budget shortfall, the Secretary pledged that VA will provide me and the committee with updates throughout the year on the status of VA's financial condition. As the Assistant Secretary for Management, you will be responsible for collecting that information and assuring its accuracy. If you are confirmed, what measures will you take to ensure that the Secretary's pledge is fulfilled and that I and the committee are provided with the useful information that we must have in a timely fashion?

Mr. HENKE. Mr. Chairman, if I am confirmed, it would be my first priority to fully understand VA's budget inside and out and to understand the models that are used to build that budget. I am going to become very familiar with those budget models to assure myself that they predict resource requirements accurately and completely.

Quite simply, I will do everything in my ability to ensure that the situation will not happen again, and, sir, I am aware that the Secretary has committed to providing regular budget updates, and if confirmed, I would fully expect that I would be closely involved in preparing those updates for him.

I absolutely respect and understand the role of Congress in terms of oversight, and specifically this Committee, and I would expect to work closely with you and your staff on a range of issues.

Chairman CRAIG. Well, we look forward to having you before the committee for all the right reasons.

Mr. HENKE. Yes, sir.

Chairman CRAIG. Great.

Senator Akaka.

Senator AKAKA. Thank you very much, Mr. Chairman.

Bill, how do you plan to adapt your managerial style as you shift from the legislative branch to the executive branch?

Mr. TUERK. I think, Senator Akaka, that I—well, I think your use of the word "adapt" is appropriate. I don't think I am going to change my management style, but I think I am going to have to

adapt it. I now am privileged—or I was recently privileged—to lead a relatively small staff. It is a much larger staff that I will be responsible for down at the National Cemetery Administration, about 1,500 employees, and I will have a budget of some $320 million. Obviously, it is a different order of magnitude altogether.

As I said, though, in my opening statement, I think the lessons learned here are adaptable to leadership in the executive branch and in the National Cemetery Administration. In fact, the situations, I think, are more similar than it might appear at first glance.

First and foremost, I am leaving one quality organization for another, and I think that calls for a similar management style. As I said in my opening statement, I am not going down there to change a culture. I am going down there to try to adapt—not adapt the culture, but to steer the culture and the quality of the employees down there to meet new challenges. I think the approach will be the same. I will go down there with the idea of coming in to give a respectful and a considered review of operations. I am going to hit the road. I am going to learn from field managers what they need from central office, not what they can do to help central office. I am going to look for intermediate middle managers who prove that they are ready for growth—the same sort of things that I have tried to do here in terms of developing staff, empowering staff, and then trusting staff to execute, and, of course, making sure that staff is accountable for their activities.

Senator AKAKA. Thank you.

Mr. Henke, every year we deal with budgets, and we go through the same battles to get VA health care the money it needs. This year Congress had to add an additional $1.5 billion in emergency funding to address the funding crisis in VA health care. Many of us in Congress had been pressing for more money for VA health care since the early part of the year.

What can we do to assure veterans that the budget shortfall that came to light earlier this year does not happen again?

Mr. HENKE. Senator Akaka, thank you for that question. Sir, if confirmed, I assure you I am going to ask tough questions and work tirelessly to ensure the soundness and the validity of VA's budget. As you know well, sir, as the Chief Financial Officer, my job would be to ensure that the Secretary has an accurate, sound, defensible budget; also to ensure that during the budget execution process during the year, that he has timely, relevant, and reliable information on which he can make important decisions.

Sir, I would simply say that I want to ensure that the budget and the resources that are entrusted to us by the American people and by this body are executed properly and fully. I will work hard to ensure that the Department's budget provides appropriate resources for VA's priorities.

Senator AKAKA. Robert, in your opening statement, you pledged to adopt Secretary Nicholson's philosophy that he outlined during his confirmation hearing. The first point in this philosophy is that, "Veterans should have access to the best available health care in the most appropriate clinical settings."

I wholeheartedly agree with this point as it reflects an understanding that different areas of the country require different methods of delivery for health care services. I think that my Neighbor

Islands Health Care bill epitomizes this philosophy. We had a hearing on this legislation in June. To date, we have not received VA's views. I hope you and others at VA will look at it closely.

Mr. Chairman, my time has expired. Thank you.

Chairman CRAIG. Danny, thank you very much.

Senator Obama.

Senator OBAMA. Thank you very much.

All of you are to be congratulated for terrific professional experience. I think our questions are sort of geared to trying to figure out how you take excellent experience in your previous jobs and whether and how they apply to the current job. That is what I am going to focus on.

Let me start with you, Mr. Molino. I know that you are aware that Secretary Nicholson briefed this committee on the work the VA has done in the wake of Hurricane Katrina. The VA is really to be congratulated on its effective evacuation process. That, unfortunately, was not the case in all the institutions down there. As we know, tragically, nursing home residents and others got caught in that tragedy.

You have been nominated to be Assistant Secretary for Policy, Planning, and Preparedness, and one of the questions that I have is: In your current job in the Department of Defense, do you have any emergency preparedness experience? If not, that does not mean you cannot learn it, but I would be curious about how you are thinking about that process or procedure, because conceivably these are unfortunately the kinds of issues that could arise again in the future.

Mr. MOLINO. Certainly, Senator. Thank you for the question.

My current position does not afford me the opportunity to exercise any authority over emergency preparedness or reaction to hurricanes or any kind of natural or manmade disasters. It is a complex organization over which I apply management with a fairly substantial budget. It requires the building and the maintaining of coalitions with organizations within and outside of the Department, which I think, from the briefings I have received thus far, was key to the success that the VA enjoyed in the area struck by the hurricanes. The pre-existing agreements that were executed properly was fundamental. It was not so much the management of the actual disaster, much like the Director of FEMA, but it was the execution of pre-existing arrangements and execution of plans.

In that light, my 20-year career on active-duty lends well to this job and that part of the job, because planning, executions of plans, long-range, short-term planning, the ability to coordinate within the organization and among organizations is also important. I think I would rely more on the experience I garnered in uniform with the 20 years on active duty to give me experience in this regard.

The other thing that I would say that you alluded to is the VA is getting very good grades for how it performed in this area, and what I would be interested in doing is not crowing about it just yet, asking all the hard questions and making sure that this was not a fluke. That this, in fact, was the product of a good process, and then I would share best practices with other organizations. We can

get better, for sure, but if they can learn from our good planning, we would like to do that as well.

Senator OBAMA. I thank you and your family, by the way, for your service, and we hope your son gets home safely soon.

Mr. MOLINO. Thank you. I join you in that hope.

Senator OBAMA. Absolutely.

Mrs. Mondello, your son looks very fine in his suit.

[Laughter.]

Senator OBAMA. Looking very spiffy for mom today.

Mrs. MONDELLO. He looks like a Senator.

Senator OBAMA. He does. He doesn't live in Illinois, does he? I just want to make sure.

[Laughter.]

Senator OBAMA. You have extraordinary experience, I think, on the communications side of the ledger, and so I won't focus on that. It just strikes me that you are extremely well prepared for a substantial part of your portfolio.

I did notice—and, you know, it raises some interesting questions organizationally—about the fact that you also have programs in your portfolio, as I understand it, for homeless veterans. That is a very serious problem, particularly in the city of Chicago and other urban areas. You see huge rates of homelessness and a constant concern is whether we are caring for them effectively, helping them to find more stable living situations, jobs, transitions. Some of them are suffering from substance abuse so there are interactions with the VA health care system.

Can you just tell me a little bit about—I won't try to put you on the spot and ask you, you know, have you done all kinds of work on homeless programs. I am interested in figuring out how on things like international initiatives or homeless programs, how you anticipate getting up to speed, and organizationally how you think about devoting those resources. Maybe you compensate for your lack of experience in those areas in terms of staffing. If you could just talk about that a little bit?

Mrs. MONDELLO. Yes, sir. I think first I would like to say that in my time at the department and here in the Senate as communications director. I wasn't necessarily confined to work with just press and the media.

Senator OBAMA. I understand. My communications director would insist that he is the most important person in my office.

[Laughter.]

Mrs. MONDELLO. I would probably agree with that statement of your staff. I was part of the strategic planning and decision-making process throughout the organization, and that included working with a variety of constituents, constituent organizations, national organizations, State organizations, and both the State and local government. As part of the portfolio of this office, as you mentioned, it falls under intergovernmental.

I think there is a lot of experience that I can bring, leadership-wise, management-wise, and in particular, I would just like anecdotally to mention some of my work at the Department of Education. I didn't do press per se. I actually looked at all the program offices, what services they provided, how they did it, how they executed, and did somewhat of—I don't like to use these words around

these folks, but, you know, audit and was somewhat of an ombudsman, lower case. It gave me great insight into the variety of issues as well as some learning the intricacies of those issues, and also how you can execute and carry out those particular missions well.

The issue of homelessness, we also have faith-based and community initiatives; we also work with all the national organizations, and State and local governments.

If confirmed and I go over to VA, it is a top priority of mine to see exactly how they are carrying out their particular missions. For example, the Office of Consumer Affairs is under Intergovernmental Affairs, and I have asked for a briefing on that because I want to know not just the mechanics of what they do, but what are the results? What is the satisfaction from our customers, from the consumers themselves? Are we actually doing the job? Are we doing it appropriately?

What I have discovered a lot of times in an agency is that that follow-up gets left behind, and we need to ensure, particularly—the same thing with our homeless program. I have not met the staff. I haven't been over to VA yet. I want to actually meet the staff that works with the homeless program. I think that is critical.

I will be very happy to share those initial results and findings with you and your staff.

Senator OBAMA. Well, my time is up. I appreciate your response. I congratulate all of you. I know that we are short on time because we have to be seated for the Judge Roberts nomination.

If you can just indulge me, Mr. Chairman, and just let me make a statement on the homeless situation, it is a shameful thing that the rates of homelessness among veterans are by several multiples higher than the general population. It is shameful. When I walk or drive through the Nation's capital and I see the number of homeless individuals in our capital, a substantial percentage of whom are veterans, it is embarrassing.

I would just urge you, Mrs. Mondello, to consider this particular aspect of your job extremely important, and I am happy to see any kind of innovation that works. I recognize it is not the VA's responsibility alone. You have to work with other local and State agencies to make it work. This is something that really I think has to be dealt with.

Mrs. MONDELLO. I agree, Senator.

Senator OBAMA. Thank you.

Chairman CRAIG. Thank you, Senator Obama.

George, one of VA's strategic goals is to restore veterans with disabilities to the greatest extent possible. Yet according to a May 2005 Inspector General's report, there is a tendency for veterans to decrease or cease medical health treatment once they have attained a 100-percent disability rating for post-traumatic stress disorder.

Do you yet have any sense of whether that finding would warrant follow-up studies by the Inspector General or how we get our hands around a figure like that—that is really very troubling to me? You are cared for until you are classified.

Mr. OPFER. I am somewhat familiar with that report, having read it and spoken to some of the staff in the Office of Inspector General. I do believe that it is going to require additional work by

the Office of Inspector General to follow up on some of those issues which came from that report.

There were a number of recommendations that have been accepted by the Department. If I am confirmed, I would personally get involved in how those recommendations are being implemented and what effects it would have on the issues which are raised by the IG report.

I do understand that the IG's office now is currently reviewing other options, Mr. Chairman, of what additional work should be done by the IG's office in bringing some of the issues relating to this very serious problem. If I am confirmed, I would get involved with that. I would like to meet with yourself, the Committee Chair, and other Committee Members and staff as well as the Secretary and senior members of the Department, to try and come up with where should the IG's office focus its resources in trying to bring some independent, objective reviews of this issue so that policymakers can make the appropriate decisions.

I think there is a lot more work that the IG's office can do, valuable work to at least bring issues to the policymakers to make those decisions. If I am confirmed, I pledge that we will put adequate resources to try and come up with some additional reports in that area.

Chairman CRAIG. Okay. During the past year, concerns have been expressed to my staff about some actions taken by VA's Office of Inspector General. For example, some private sector suppliers have noticed that VA's Inspector General auditors are increasing their involvement in routine contract negotiations on behalf of the Government, an action that goes beyond their traditional role of pre-award advice.

Do you believe those activities are outside the proper role of the Inspector General's office? Do you believe that practice should be re-examined?

Mr. OPFER. I am aware that the IG's office has what they call a contract audit group that has been performing this type of pre-awarding of contracts for approximately 15 years. They don't actually negotiate the contract. They provide assistance to the contracting officers in the Department, and the IG's role has been reviewing that to see if they are complying with the Federal acquisition requirements.

It is my understanding that these pre-contract awards and reviews have recovered over $1 billion in the 15 years that they have been doing this, and that GAO has looked at specifically the VA IG's office and it is listed as one of the best practices in doing that type of work. If I am confirmed, I would look at it to make sure that we are staying within the mandate of the IG Act in performing that type of function.

Chairman CRAIG. Well, it has come to our attention, and I think you are right in suggesting it would certainly warrant your attention for review purposes.

Well, there are other questions I have to ask. We are all but out of time. They have asked us to be to the floor.

Danny, do you have any other questions?

Senator AKAKA. Mr. Chairman, I do. I will submit them for the record.

Chairman CRAIG. Okay.

Senator AKAKA. Thank you.

Chairman CRAIG. I have a few more we will submit.

Senator AKAKA. Mr. Chairman, also may I add that I would urge the committee to move quickly to discharge these nominees to the Senate floor for final action.

Chairman CRAIG. I thank you very much for that sensitivity of time, and when I think of all of you here before us who should be down there working at this moment, that sensitivity pushes us on. Bill clearly understands, and some of you who have staffed before may understand. This committee may convene in a small room off the floor of the Senate at some time next week for those purposes. We are going to take a look at that because of tight schedules and because of the shortness of next week. It is my hope that we can move you very, very quickly because I know the Secretary needs you down there, the Department needs you, and we will get you there.

Let me again thank you all very much for your willingness to serve and, again, I congratulate you on your nomination and the demeanor that you have brought before the committee. I am confident you will bring honor to the Department. We would expect nothing less.

Thank you all very much, and the committee will stand adjourned.

[Whereupon, at 11:19 a.m., the committee was adjourned.]

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