

**BUSINESS MEETING TO CONSIDER S. 1094,
THE DEPARTMENT OF VETERANS AFFAIRS
ACCOUNTABILITY AND WHISTLEBLOWER
PROTECTION ACT OF 2017**

WEDNESDAY, MAY 24, 2017

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

The Committee met, pursuant to notice, at 2:29 p.m., in room 418, Russell Senate Office Building, Hon. Johnny Isakson (Chairman of the Committee), presiding.

Present: Senators Isakson, Moran, Boozman, Heller, Rounds, Tillis, Sullivan, Tester, Murray, Sanders, Brown, Blumenthal, and Hirono.

**OPENING STATEMENT OF HON. JOHNNY ISAKSON, CHAIRMAN,
U.S. SENATOR FROM GEORGIA**

Chairman ISAKSON. Let me call to order this meeting of the Senate Committee on Veterans' Affairs.

We have pending before us legislation today for which there have been 12 amendments that were offered—actually 13, 1 out of order, 12 in order. Ranking Member Tester and I have discussed it. I will open the floor in a minute for anyone who has an amendment they want to offer, to be able to talk to that amendment. When we have a quorum present, we will go to a vote because we have a vote at three o'clock on the floor and we want to try to finish before that.

A quorum for the Committee is eight, at least one of whom must be a member of the minority party. We are at seven, including one with the minority party. So, we have one more member to get here and we will be in good shape.

Where is John? We have got Jerry, we have got John, we have got Mike; that is three, four, five, six. We need two more.

We have got a guard out there watching for you, Sen. Boozman. [Laughter.]

While we are waiting on the two other Members to come, as I said, there were 12 amendments that were filed in a timely fashion by Senators Murray, Brown and Blumenthal. One amendment was

filed after time allowed, which was Senator Sanders. That amendment is out of order.

I will open the floor for anyone who wishes to talk about an amendment they wish to offer or if they want to just talk about the amendment and not offer it, either one is in order.

Does anyone seek recognition?

Senator TESTER. I have an opening statement, if I might.

Chairman ISAKSON. I will recognize the Ranking Member for an opening statement.

**OPENING STATEMENT OF HON. JON TESTER, RANKING
MEMBER, U.S. SENATOR FROM MONTANA**

Senator TESTER. Thank you, Mr. Chairman.

I am happy that we are moving forward today.

I think this bill responds to an outcry that we have heard from veterans and VSOs about a lack of accountability within the VA. The vast majority of VA employees are good; some of the most hard-working people in the world. But, they, too, are frustrated by poor performance and misconduct of a few bad apples.

So, we have worked together, you and I, Mr. Chairman, to address a problem by making modifications to a House bill that needed modifications when it came over.

The end result is a compromise in which none of us got everything we wanted, but a better bill that allows the VA to hold the bad actors accountable while ensuring employee protections and rights to appeals are protected.

I want to thank you again, Mr. Chairman, and I look forward to addressing the amendments and hopefully moving this bill to the floor.

Chairman ISAKSON. Senator Tester, I appreciate your diligence and hard work, and I wanted you to speak first for one specific reason: I have had a wonderful time working with Senator Tester over the last 2 years. This bill has been a 2-year effort. We made it to the starting gate last year, but never got out. We got out this year, we finished the bill. Nobody got everything they wanted, but everybody that had a chance to participate participated. We had a lot of participation. Every Member of the Committee, Democrat and Republican alike, had a significant amount of input. That is a credit to the Ranking Member and it is a credit to the philosophy of this Committee and our commitment, which is first not to a party but always to our veterans.

With that said, we now have a quorum present, I believe, with Senator Tillis having arrived.

If anyone has an amendment that they wish to call up to discuss and/or call up to have voted on, they are recognized at this time.

Senator Murray.

Senator MURRAY. Can I make an opening statement?

Chairman ISAKSON. Yes, ma'am.

**OPENING STATEMENT OF HON. PATTY MURRAY,
U.S. SENATOR FROM WASHINGTON**

Senator MURRAY. Thank you, Mr. Chairman.

Before I start, I wanted to just thank you for having this markup. This is a very important issue. We have a number of other important pieces of legislation that need to move, including my caregivers bill which you know I have spoken about many times. I know you agree, and I appreciate the collaboration on that.

I really hope we have another markup very soon where we can advance some of those bills that we have been working on together for a very long time to bring those services to our veterans.

Mr. Chairman, I do want to thank you and Ranking Member Tester for how hard you have worked to arrive at this compromise. I know it is not easy. VA unquestionably needs reform and needs to improve its performance and I am deeply concerned that on many issues, such as mental health care, the Department seems virtually incapable of reform.

We have also seen some truly reprehensible behavior like executives gaming the system to give themselves massive bonuses and hospitals keeping secret waitlists to hide true wait times, and even reports of sexual abuse at the Kansas VA.

Those are real problems for the VA and they have got to get them under control. We do expect the highest level of care and service for our veterans and there is no tolerance for those who do wrong by them.

That said, I want you to know I still have some concerns about the bill and without some important changes at this time I cannot support it. It does not strike the right balance between institutional reforms, firing, and protection for hardworking employees. I think we did have that balance right in the compromise this Committee reached in the Veterans First Act, and I believe those provisions could be passed by UC today.

Frankly, I have significant concerns about giving this new power to this Administration. President Trump seems to have no problem subjecting hardworking career civil servants to unprecedented accountability standards, but refuses to ask even the smallest amount of integrity in competence or accountability from his inner circle. In fact, just yesterday Trump attempted to burry work by the Office of Government Ethics to disclose how many former lobbyists have been given waivers by the Administration to join the Government and have control over agencies and regulations they

have lobbied on. That is a brazen conflict of interest, giving those people a chance to change national policy in order to make money for themselves and their friends. Trump's attempt to cover that up is, frankly, repulsive to me.

In other cases, we have seen the Administration demand loyalty oaths, threaten and intimidate whistleblowers, and conduct witch hunts to find and retaliate against employees who have committed the high offense of just trying to do their jobs, simply because the President did not agree with their policy decision.

They still refuse to release information about their financial interests in foreign countries, raising serious questions.

If this President and his team are not going to be subject to those standards, I do not believe we should be imposing them on VA employees. So, I remain deeply concerned by this and I, unfortunately, do not believe this bill carries those right balances at this time.

Chairman ISAKSON. Thank you, Senator Murray.

I made a commitment to all who offered amendments, as well as every Member of the Committee, that they would have time to speak about the issues they want to talk about. But, we cannot all speak if we take up all the time and use it up.

So, I would appreciate it if anybody has opening statements or statements of purpose, to submit those for the record. If anybody has an amendment they want to bring up, please call it up at this time.

Senator MURRAY. I would be happy to call up an amendment.

Chairman ISAKSON. Yes, ma'am. You are recognized.

Senator MURRAY. Mr. Chairman, this amendment, Amendment Number 7, which you have is very simple. It would substitute the text of the bill for the related language from your Veterans First Act from the last Congress. That was a good bill. It was another hard-won compromise. It has broad support from Democrats and Republicans and balanced accountability with fair protections for innocent employees.

I believe a bill with the provisions from Veterans First could pass by UC today and be enacted into law. I understand the House has their bill, but we should start by passing what the Senate had agreed on and then work out the differences between the two approaches.

So, I offer this amendment.

Chairman ISAKSON. Do you want to offer the amendment at this time?

Senator MURRAY. Sure, happy to do so.

Chairman ISAKSON. Senator Murray is offering her amendment, is it number 7? Is that the right number?

Senator MURRAY. Number 8.

Chairman ISAKSON. All those in favor, say aye.

[Chorus of ayes.]

Chairman ISAKSON. Opposed say no.

[Chorus of nays.]

Chairman ISAKSON. The amendment fails.

Is there any other amendment to be offered?

Senator BROWN.

Senator BROWN. Chairman, thank you. I will shorten my comments prior to offering the amendment, but I do want to offer my amendment based on your request.

Mr. Chairman, I want to thank Senator Murray. I think her comments were exactly right, pointing out the hypocrisy in this Administration sitting next to—when you look at their behavior, then you look at the efforts in this legislation.

So, it seems to be in this Congress, and certainly in this Administration, that if you are high enough ranked, you get special treatment. If you are a worker, if you are middle class, if you are working class, if you aspire to be middle class, you are forgotten about or attacked. Yes, I think that Senator Murray's comments are exactly right.

A couple of things, Mr. Chairman, before I call up the amendment. I ask that in the next business meeting you include a bill that Senator Tillis and I have been working on, the Veterans Priority Enrollment Act of 2017. Ohio State schools already extend priority registration to veterans. We should make sure that process is expanded to all colleges and universities.

Then, Senator Tillis, Senator Cassidy, and I have also a bill to expand the Yellow Ribbon program. An earlier version of the bill was included in last year's Veterans First. We hope it will move quickly.

Chairman ISAKSON. As I always have, I will try my best to accommodate the gentleman from the Buckeye State.

Senator BROWN. Which you always have. I thank you, Mr. Chairman.

Chairman ISAKSON. Let me say, talking out of order, I am so delighted to see Ms. Hirono.

Senator HIRONO. Thank you.

Senator BROWN. Me, too.

Chairman ISAKSON. Welcome to the Committee. You are in our thoughts and prayers every day and your beauty just makes this Committee a whole lot better every day.

Senator HIRONO. Thank you very much.

Senator BROWN. Strong and resilient, too, Mr. Chairman.

Chairman ISAKSON. Can you beat that?

Senator BROWN. I cannot beat that.

Chairman ISAKSON. You are recognized.

Senator BROWN. I may not even offer my amendment.

Chairman ISAKSON. That is why I offered it.

Senator BROWN. But I still am, sorry. Almost, I almost decided not to.

I call up Amendment 6 and ask unanimous consent to add Senator Sanders as a sponsor to the amendment.

Chairman ISAKSON. Without objection.

Senator BROWN. Thank you, Mr. Chairman.

I share the concerns about this bill's impact on the workforce, many of whom are veterans themselves. We cannot lose sight of the fact that it is our veterans interest to have high-performing, long-serving VA employees. But a provision in this bill will make it easier to fire VA rank and file workers without proper justification. This will lead to higher turnover at a time when we need stability and accountability at the Agency.

That is why I am offering Amendment Number 6. This amendment strikes the language in the bill that lowers the evidentiary standard for allegations of misconduct against rank and file VA employees. The bill allows employees to be fired if there is "substantial evidence of misconduct." In other words, an employee can be fired if 30 percent of the evidence points to the employee having committed the act of misconduct, ignoring the fact that 70 percent may point to no misconduct at all. So, 30 percent misconduct, 70 percent of the evidence point to no misconduct at all.

Substantial sounds like a high bar, but it has been interpreted by the courts to mean "more than a mere scintilla" of evidence. My amendment would ensure that a preponderance, 50 percent, of the evidence remains the standard for termination for misconduct.

In combination with the much shorter timelines included in the bill, this lower evidentiary standard can result in the firing of VA employees who might be doing a good job but are disliked by a manager or are being punished for speaking out against a policy with which they do not agree.

That is critical for a good, high-functioning agency. We would not have known about patient safety or mismanagement concerns at the Cincinnati VA without staff taking a risk to speak out. With this language, as in the underlying bill, if it applied to Cincinnati, we could very well not have made the progress that the VA and the union and our office, working with them, have made.

We should not allow workers' livelihood and ability to support a family to be taken away when there is a 70 percent chance she did nothing wrong. We should preserve the 50 percent standard under current law.

That is what my amendment does. It strikes the right balance between accountability and due process for VA rank and file employees who provide critical services to our veterans and who, as we know, are often veterans themselves. It ensures efforts to improve accountability at VA, they are not used as a justification to attack Federal workers who are doing a good job.

I ask support for the amendment.

Chairman ISAKSON. The question is on the Amendment Number 6 offered by Senator Brown from Ohio and, I think, we added Senator Sanders from Vermont.

All those in favor, say aye.

[Chorus of ayes.]

Chairman ISAKSON. Any opposed, no.

[Chorus of nays.]

Chairman ISAKSON. Nos have it. Nos have it, the amendment fails.

Senator Blumenthal, do you have an amendment you wanted to offer?

Senator BLUMENTHAL. I do, thank you. Thank you, Mr. Chairman.

I have an amendment that I believe is a friendly amendment, at least it is meant in the spirit of friendship because it reflects a bipartisan piece of legislation that is led by my friend and colleague, Senator Moran.

This amendment would improve essentially a provision in S. 1094 that relates to pension clawback language. It improves it in a number of respects by making more specific the reference to crimes connected to the offense causing the pension revocation. In other words, the offense has to be related to some official duty for it to trigger the clawback, which is unclear in the present language that is in the bill.

It also, I think, enhances the deterrent effect by making this provision more enforceable. It clarifies that provision that says the crime has to be influenced by official duties. It also makes sure that several other provisions to increase the accountability of managers at the Department of Veterans Affairs are related to their duties.

So, I respectfully submit, Mr. Chairman, that we can approve this bill, S. 12 which we have offered on the floor, and I think otherwise I would be committed to proceed with on the floor. And, I want to thank Senator Moran for his support of this provision, which I think makes it more enforceable and more constitutional.

Chairman ISAKSON. It is Blumenthal Number 1, is that right?

Senator BLUMENTHAL. Number 3.

Chairman ISAKSON. Number 3. Any other questions or comment?

[No response.]

Chairman ISAKSON. The question is on the amendment offered by the gentleman from Connecticut, Amendment Number 3.

All those in favor, say aye.

[Chorus of ayes.]

Chairman ISAKSON. Opposed, no.

[Chorus of nays.]

Chairman ISAKSON. The nos appear to have it. The nos have it, the amendment has failed.

Is there any other comment or any other amendment?

Senator Murray.

Senator MURRAY. Mr. Chairman, I would like to offer Amendment Number 7 on the misconduct panel.

This is an amendment that is an attempt to find a workable middle ground. There are serious concerns about changing the evidentiary standard to such a low and arbitrary level that makes it easier to abuse the disciplinary process and retaliate against employees unjustly. However, we should be able to quickly remove those who have committed the worst offenses.

This amendment would create a working group that would agree on what types of misconduct are the most serious and those offenses would be subject to the lower evidentiary standard and the restrictions on reducing penalties at the MSPB.

Other lesser misconduct would still be handled through the new disciplinary process, just at the higher appropriate evidentiary standard, and allow the MSPB to ensure that the penalty is fair.

I hope that the Committee can adopt this amendment.

Chairman ISAKSON. Senator Murray.

Senator MURRAY. I can talk more if you would like.

Chairman ISAKSON. No, I am sorry. I was being talked to in both ears at the same time.

Senator MURRAY. Then you heard my compelling arguments.

Chairman ISAKSON. You always make a compelling argument.

The question is on Amendment Number 1 offered by the Senator from Washington, Senator Murray.

Senator MURRAY. Number 7.

Chairman ISAKSON. Number 7, I am sorry.

All those in favor, say aye.

[Chorus of ayes.]

Chairman ISAKSON. Opposed, no.

[Chorus of nays.]

Chairman ISAKSON. Nos have it, the nos appear to have it, the nos do have it.

Any other amendment to come before the Committee?

Senator Blumenthal.

Senator BLUMENTHAL. Mr. Chairman, one more amendment, Blumenthal Number 4.

Chairman ISAKSON. I had promised your good buddy sitting to my left here that was going to be the last one, so you better make it quick.

Senator MORAN. Senator Blumenthal and I are to be Chairing and Ranking Member in a committee that is meeting right now.

Senator BLUMENTHAL. I will be particularly quick here.

Chairman ISAKSON. And you cannot go if we lose a quorum, so....

Senator BLUMENTHAL. The bill strips away right now not only the ability of the Merit Systems Protection Board to mitigate a penalty imposed by VA, but to even consider the reasonableness of a penalty in making its decision.

I think we can increase the due process features and perhaps avoid a Constitutional challenge if we adopt this amendment, which would restore that ability on the part of the MSPB.

Chairman ISAKSON. The question is on the amendment offered by the Senator from Connecticut, Senator Blumenthal.

All those in favor, say aye.

[Chorus of ayes.]

Chairman ISAKSON. Opposed, say no.

[Chorus of nays.]

Chairman ISAKSON. The nos appear to have it. The nos do have it. The amendment is not adopted.

Is there any other amendment?

[No response.]

Chairman ISAKSON. Hearing none, the question will become on reporting favorably from the Committee the Veterans Affairs Accountability and Whistleblower Protection Act of 2017.

All those in favor, say aye.

[Chorus of ayes.]

Chairman ISAKSON. Opposed, no.

[Chorus of nays.]

Chairman ISAKSON. The ayes have it. The ayes appear to have it. The ayes do have it. The bill will be favorably reported to the floor.

I want to thank the Members for being here in such a timely fashion.

Any other business to come before the Committee?

[No response.]

Let me thank you for the hours of work that have gone into this legislation and the cooperation that has been shown. I wanted to thank everybody before they left. It is a great Committee. They have done great work. Hopefully we will be on the floor soon.

I want to thank the Ranking Member for his steadfast work and, once again, recognize Ms. Hirono for being back. We are glad to have you back, Ms. Hirono.

Senator HIRONO. Thank you so much.

Chairman ISAKSON. I ask unanimous consent that in preparing the agenda item for reporting, Committee staff be authorized to make any required technical and clerical conforming changes, including changes necessary to conform to the Budget Act.

All in favor of that, say aye.

[Chorus of ayes.]

Chairman ISAKSON. Any other questions? Any other motion?

[No response.]

Chairman ISAKSON. We will favorably report S. 1094 to the floor. This Committee is adjourned.

[Whereupon, at 2:48 p.m., the Committee was adjourned.]