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09/25/02 .....	WI	Madison .....	Dane County Regional Truax Field .....	2/0140	VOR/DME or Tacan Rwy 13, Orig.
09/25/02 .....	WI	Madison .....	Dane County Regional Truax Field .....	2/0141	VOR/DME or Tacan Rwy 31, Orig.
09/26/02 .....	MI	Grand Rapids .....	Gerald R. Ford Intl .....	2/0116	ILS Rwy 8R, Amdt 5C

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 1 and 39

RIN 2900-AJ77

#### Prohibition of Interment or Memorialization in National Cemeteries and Certain State Cemeteries Due to Commission of Capital Crimes

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Department of Veterans Affairs (VA) regulations governing eligibility for interment or memorialization in national cemeteries and in State cemeteries receiving State cemetery grants from VA. The final rule concerns statutory provisions designed to ensure that the remains of certain persons who committed Federal or State capital crimes are not interred in such cemeteries and that the memory of such persons is not memorialized in such cemeteries.

**DATES:** *Effective Date:* This final rule is effective November 7, 2002.

*Applicability Date.* The provisions of Public Law 105-116 were enacted on November 21, 1997, and subsequently codified at 38 U.S.C. 2408(d) and 2411. Consistent with the enabling legislation, the provisions to this regulation shall apply to requests for interment or memorialization made on or after November 21, 1997, and to State cemetery grants made on or after November 21, 1997.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Wright, Program Analyst, Office of Field Programs (401A2), National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, or Karen Barber, Program Analyst, Legislative and Regulatory Division (402B3), (202) 273-5307 or (202) 273-5183, respectively. (These are not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** On July 21, 2000, the National Cemetery Administration (NCA) published in the

**Federal Register** (65 FR 45332) a proposed rule which would implement the provisions of 38 U.S.C. 2408(d) and 2411. The final rule generally prohibits interment or memorialization in a VA national cemetery of a person who is convicted of a Federal capital crime and sentenced to death or life imprisonment, or is convicted of a State capital crime, and sentenced to death or life imprisonment without parole. The final rule, at 38 CFR 1.618, also addresses when Federal officials are authorized to deny burial in VA national cemeteries to persons who are shown by clear and convincing evidence to have committed a Federal or State capital crime but were not convicted of such crime because of flight to avoid prosecution or by death prior to trial. The Secretary is also authorized to provide aid to States for the establishment, expansion and/or improvement of State veterans cemeteries. Under 38 U.S.C. 2408(d)(1), State cemetery grants are conditioned on the application by the individual State of the prohibition against interment or memorialization of individuals convicted of Federal or State capital crimes, or found by clear and convincing evidence to have committed such crimes, without having been convicted of the crimes due to flight or death prior to trial. The final rule amends VA's regulation governing the State Cemetery Grants Program, 38 CFR 39.3(b), to note this requirement.

#### Comment on Proposed Rule

We provided a 60-day comment period that ended September 19, 2000. We received one written response by e-mail during this period. The response included three comments. First, it suggested improving the proposed rule by using a "delimiting" date to this regulation for consideration of veterans who were convicted prior to 1997. Congress specified that 38 U.S.C. 2411 would apply to applications for interment or memorialization made on or after November 21, 1997. Accordingly, our implementing regulations must reflect this date of applicability. The second comment suggested that, for those cases where a person avoided conviction due to either flight or death, the standard for determining whether a person committed a capital crime should be

beyond a reasonable doubt, not preponderance of the evidence. Congress specified that the standard of review for making decisions of this nature is "clear and convincing evidence" (38 U.S.C. 2411) and we have no authority to deviate from this standard of review.

The third comment asked whether there was a problem, in cemeteries where Native Americans and Prisoners of War (POWs) were interred, that might require individuals in these categories who had committed capital crimes to be disinterred. VA is not aware of any problems caused by the interment of Native Americans and POWs that relate to its implementation of the capital crimes prohibition. While such individuals are buried in certain VA national cemeteries, Public Law 105-116, which established the capital-crimes burial prohibition, is not retroactive to interment or memorialization requests predating November 21, 1997. Further, 38 CFR 1.621 provides that, interment in national cemeteries is considered "permanent and final," and sets forth stringent prerequisites for disinterment. Further, it provides that disinterment proceedings are matters that VA may not initiate.

For these reasons, we believe it is not necessary to revise the rule based on the views expressed by the commenter.

#### Revisions to the Inquiry and Proceedings Process Contained in the Proposed Rule

Since November 1997, NCA cemetery directors have dealt with several benefit cases in which the capital crime ban came into play. The majority of the cases involved situations in which an individual avoided conviction either due to flight or death. Because of lessons learned through experience, we are amending § 1.618. Those modifications, which are described below, are procedural as opposed to substantive in nature.

First, when a cemetery director receives a request for burial and there is reason to believe that a capital crime may have taken place, the cemetery director is required to initiate an inquiry seeking information in order to make an initial decision on the case. Once made aware of this requirement, families often

decide to bury at a location other than a VA national cemetery. Under the proposed rule, the cemetery director is required to continue the inquiry process even though the decedent has been buried elsewhere. In order to be sensitive to grieving families, NCA prefers to interpret private burial as a withdrawal of the request for national cemetery burial. Section 1.618(b) of the final rule has been modified so that if alternative burial arrangements are made during the inquiry all further VA action on the request for burial will cease.

Second, § 1.618(c)(2) as proposed included a provision on the number of days the family or other personal representative has to respond to a notice from the cemetery director stating that there appears to be clear and convincing evidence that a capital crime took place. This section has been revised to provide additional time for the family or other personal representative to respond. Upon receipt of the notice, the family or other personal representative will have 15 instead of 10 days to respond.

Third, the proposed version of § 1.618(c)(2) has been modified to include an additional option for the family or other personal representative. Initially, the family or other personal representative could: (1) Request a hearing on the matter, (2) submit a written statement, with or without supporting documentation, for inclusion in the record, or (3) waive these two options. There was no option for the family or other personal representative to end the process if so desired. Through experience, we have found that several families made alternate burial arrangements at a location other than a VA national cemetery. NCA did not receive any further communications regarding national cemetery burial from these families. This new option allows the family or other personal representative to end the benefit decision process at this point and avoid having a finding made by VA. Under the final rule, the family or other personal representative may notify the cemetery director that the request for interment or memorialization is withdrawn, thereby, ending the claim process. This provides the family a simple means of ending the inquiry process. Under the proposed rule, VA was required to complete the process even if the decedent were buried in a private cemetery.

Fourth, § 1.618(d), as proposed, authorized the cemetery director or his or her designee to act as the Hearing Official when the family or other personal representative requests a hearing. As it is not feasible for NCA to train all cemetery directors as Hearing

Officials (for potentially a limited number of cases), this section has been modified. Under the final rule, the Director, Memorial Services Network will conduct the hearing.

Fifth, § 1.618(h), as proposed, required that appellate rights be provided even if the burial request was granted. This section has been revised to make clear that appellate rights need only be furnished when a request for burial or interment is denied. Notice of appellate rights accompanying a decision granting a request for burial or interment is unnecessary and may be confusing to the recipient of the notice.

In addition, because the regulations are clear as to their scope, the information included in the Note to § 1.617 is unnecessary. Therefore, the Note following that section has been removed.

Over the past four years NCA staff has closely monitored the processing of cases where the capital crimes prohibition might apply. The above changes are based upon NCA experience gathered during this time. These minor procedural modifications will reduce the burden on grieving families, improve clarity, reduce processing time, and increase efficiency.

Based on the rational set forth in the proposed rule and in this document, we are adopting the provisions of the proposed rule as a final rule without change except that we are making nonsubstantive changes for purposes of clarity and are making the changes discussed above.

#### **Paperwork Reduction Act**

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

#### **Unfunded Mandates**

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any given year. This rule would have no consequential effect on State, local, or tribal governments.

#### **Regulatory Flexibility Act**

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The reason for this certification is that this amendment would not directly affect

any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance numbers for this rule are 64.201, 64.202, and 64.203.

#### **List of Subjects**

##### **38 CFR Part 1**

Administrative practice and procedure, Cemeteries, Claims, Crimes, Criminal offenses.

##### **38 CFR Part 39**

Cemeteries, Grant programs-veterans, Veterans.

Approved: September 25, 2002.

**Anthony J. Principi,**

*Secretary of Veterans Affairs.*

For the reasons set forth in the preamble, 38 CFR parts 1 and 39 are amended as follows:

#### **PART 1—GENERAL PROVISIONS**

1. The authority citation for part 1 continues to read as follows:

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

2. Section 1.600 is added to read as follows:

##### **§ 1.600 Definitions.**

(a) *[Reserved]*

(b) *Definitions.* For purposes of §§ 1.617 and 1.618:

*Appropriate State official* means a State attorney general or other official with statewide responsibility for law enforcement or penal functions.

*Clear and convincing evidence* means that degree of proof which produces in the mind of the fact-finder a firm belief regarding the question at issue.

*Convicted* means a finding of guilt by a judgment or verdict or based on a plea of guilty, by a Federal or State criminal court.

*Federal capital crime* means an offense under Federal law for which the death penalty or life imprisonment may be imposed.

*Interment* means the burial of casketed remains or the placement or scattering of cremated remains.

*Life imprisonment* means a sentence of a Federal or State criminal court directing confinement in a penal institution for life.

*Memorialization* means any action taken to honor the memory of a deceased individual.

*Personal representative* means a family member or other individual who

has identified himself or herself to the National Cemetery Administration cemetery director as the person responsible for making decisions concerning the interment of the remains of or memorialization of a deceased individual.

*State capital crime* means, under State law, the willful, deliberate, or premeditated unlawful killing of another human being for which the death penalty or life imprisonment without parole may be imposed.

(Authority: 38 U.S.C. 2408, 2411)

3. Section 1.617 is added to read as follows:

**§ 1.617 Prohibition of interment or memorialization of persons who have been convicted of Federal or State capital crimes.**

(a) *Prohibition.* The interment in a national cemetery under the control of the National Cemetery Administration of the remains, or the memorialization, of any of the following persons is prohibited:

(1) Any person identified to the Secretary of Veterans Affairs by the United States Attorney General, prior to approval of interment or memorialization, as an individual who has been convicted of a Federal capital crime and sentenced to death or life imprisonment as a result of such crime.

(2) Any person identified to the Secretary of Veterans Affairs by an appropriate State official, prior to approval of interment or memorialization, as an individual who has been convicted of a State capital crime and sentenced to death or life imprisonment without parole as a result of such crime.

(3) Any person found under procedures specified in § 1.618 to have committed a Federal or State capital crime but have avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution.

(b) *Notice.* The prohibition referred to in paragraph (a)(3) of this section is not contingent on receipt by the Secretary of Veterans Affairs or any other VA official of notice from any Federal or State official.

(c) *Receipt of notification.* The Under Secretary for Memorial Affairs is delegated authority to receive from the United States Attorney General and appropriate State officials on behalf of the Secretary of Veterans Affairs the notification of conviction of capital crimes referred to in paragraphs (a)(1) and (2) of this section.

(d) *Decision where notification previously received.* Upon receipt of a request for interment or

memorialization, where the Secretary of Veterans Affairs has received the notification referred to in paragraph (a)(1) or (2) of this section with regard to the deceased, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411.

(e) *Inquiry.* (1) Upon receipt of a request for interment or memorialization, where the Secretary of Veterans Affairs has not received the notification referred to in paragraph (a)(1) or (a)(2) of this section with regard to the deceased, but the cemetery director has reason to believe that the deceased may have been convicted of a Federal or State capital crime, the cemetery director will initiate an inquiry to either:

(i) The United States Attorney General, in the case of a Federal capital crime, requesting notification of whether the deceased has been convicted of a Federal capital crime for which the deceased was sentenced to death or life imprisonment; or

(ii) An appropriate State official, in the case of a State capital crime, requesting notification of whether the deceased has been convicted of a State capital crime for which the deceased was sentenced to death or life imprisonment without parole.

(2) The cemetery director will defer decision on whether to approve interment or memorialization until after a response is received from the Attorney General or appropriate State official.

(f) *Decision after inquiry.* Where an inquiry has been initiated under paragraph (e) of this section, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411 upon receipt of the notification requested under that paragraph, unless the cemetery director initiates an inquiry pursuant to § 1.618(a).

(g) *Notice of decision.* Written notice of a decision under paragraph (d) or (f) of this section will be provided by the cemetery director to the personal representative of the deceased, along with written notice of appellate rights in accordance with § 19.25 of this title. This notice of appellate rights will include notice of the opportunity to file a notice of disagreement with the decision of the cemetery director. Action following receipt of a notice of disagreement with a denial of eligibility for interment or memorialization under this section will be in accordance with §§ 19.26 through 19.38 of this title.

(Authority: 38 U.S.C. 512, 2411, 7105)

4. Section 1.618 is added to read as follows:

**§ 1.618 Findings concerning commission of a capital crime where a person has not been convicted due to death or flight to avoid prosecution.**

(a) *Inquiry.* With respect to a request for interment or memorialization, if a cemetery director has reason to believe that a deceased individual who is otherwise eligible for interment or memorialization may have committed a Federal or State capital crime, but avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution, the cemetery director, with the assistance of the VA regional counsel, as necessary, will initiate an inquiry seeking information from Federal, State, or local law enforcement officials, or other sources of potentially relevant information. After completion of this inquiry and any further measures required under paragraphs (c), (d), (e), and (f) of this section, the cemetery director will make a decision on the request for interment or memorialization in accordance with paragraph (b), (e), or (g) of this section.

(b) *Decision approving request without a proceeding or termination of a claim by personal representative without a proceeding.* (1) If, after conducting the inquiry described in paragraph (a) of this section, the cemetery director determines that there is no clear and convincing evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, and the deceased remains otherwise eligible, the cemetery director will make a decision approving the interment or memorialization.

(2) If the personal representative elects for burial at a location other than a VA national cemetery, or makes alternate arrangements for burial at a location other than a VA national cemetery, the request for interment or memorialization will be considered withdrawn and action on the request will be terminated.

(c) *Initiation of a proceeding.* (1) If, after conducting the inquiry described in paragraph (a) of this section, the cemetery director determines that there appears to be clear and convincing evidence that the deceased has committed a Federal or State capital crime of which he or she was not convicted by reason of unavailability for trial due to death or flight to avoid prosecution, the cemetery director will provide the personal representative of the deceased with a written summary of the evidence of record and a written notice of procedural options.

(2) The notice of procedural options will inform the personal representative

that he or she may, within 15 days of receipt of the notice:

- (i) Request a hearing on the matter;
- (ii) Submit a written statement, with or without supporting documentation, for inclusion in the record;
- (iii) Waive a hearing and submission of a written statement and have the matter forwarded immediately to the Under Secretary for Memorial Affairs for a finding; or

(iv) Notify the cemetery director that the personal representative is withdrawing the request for interment or memorialization, thereby, closing the claim.

(3) The notice of procedural options will also inform the personal representative that, if he or she does not exercise one or more of the stated options within the prescribed period, the matter will be forwarded to the Under Secretary for Memorial Affairs for a finding based on the existing record.

(d) *Hearing.* If a hearing is requested, the Director, Memorial Services Network will conduct the hearing. The purpose of the hearing is to permit the personal representative of the deceased to present evidence concerning whether the deceased committed a crime which would render the deceased ineligible for interment or memorialization in a national cemetery. Testimony at the hearing will be presented under oath, and the personal representative will have the right to representation by counsel and the right to call witnesses. The VA official conducting the hearing will have the authority to administer oaths. The hearing will be conducted in an informal manner and court rules of evidence will not apply. The hearing will be recorded on audiotape and, unless the personal representative waives transcription, a transcript of the hearing will be produced and included in the record.

(e) *Decision of approval or referral for a finding after a proceeding.* Following a hearing or the timely submission of a written statement, or in the event a hearing is waived or no hearing is requested and no written statement is submitted within the time specified:

(1) If the cemetery director determines that it has not been established by clear and convincing evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, and the deceased remains otherwise eligible, the cemetery director will make a decision approving interment or memorialization; or

(2) If the cemetery director believes that there is clear and convincing

evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, the cemetery director will forward a request for a finding on that issue, together with the cemetery director's recommendation and a copy of the record to the Under Secretary for Memorial Affairs.

(f) *Finding by the Under Secretary for Memorial Affairs.* Upon receipt of a request from the cemetery director under paragraph (e) of this section, the Under Secretary for Memorial Affairs will make a finding concerning whether the deceased committed a Federal or State capital crime of which he or she was not convicted by reason of unavailability for trial due to death or flight to avoid prosecution. The finding will be based on consideration of the cemetery director's recommendation and the record supplied by the cemetery director.

(1) A finding that the deceased committed a crime referred to in paragraph (f) of this section must be based on clear and convincing evidence.

(2) The cemetery director will be provided with written notification of the finding of the Under Secretary for Memorial Affairs.

(g) *Decision after finding.* Upon receipt of notification of the finding of the Under Secretary for Memorial Affairs, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411. In making that decision, the cemetery director will be bound by the finding of the Under Secretary for Memorial Affairs.

(h) *Notice of decision.* The cemetery director will provide written notice of the finding of the Under Secretary for Memorial Affairs and of a decision under paragraph (b), (e)(1), or (g) of this section. With notice of any decision denying a request for interment or memorialization, the cemetery director will provide written notice of appellate rights to the personal representative of the deceased, in accordance with § 19.25 of this title. This will include notice of the opportunity to file a notice of disagreement with the decision of the cemetery director and the finding of the Under Secretary for Memorial Affairs. Action following receipt of a notice of disagreement with a denial of eligibility for interment or memorialization under this section will be in accordance with §§ 19.26 through 19.38 of this title.

(Authority: 38 U.S.C. 512, 2411)

## PART 39—STATE CEMETERY GRANTS

5. The authority citation for part 39 continues to read as follows:

**Authority:** 38 U.S.C. 2408.

6. In § 39.2, a new paragraph (d) is added immediately following the authority citation at the end of paragraph (c) to read as follows:

### § 39.2 Scope of the State cemetery grants program.

\* \* \* \* \*

(d) Any grant under this part made on or after November 21, 1997, is made on the condition that after the date of receipt of the grant the State receiving the grant, subject to requirements for receipt of notice in 38 U.S.C. 2408 and 2411, will prohibit in the cemetery for which the grant is furnished the interment of the remains of or the memorialization of any person:

(1) Who has been convicted of a Federal capital crime for which the person was sentenced to death or life imprisonment;

(2) Who has been convicted of a State capital crime for which the person was sentenced to death or life without parole; or

(3) Who has been found by an appropriate State official, under procedures to be established by the State, to have committed a Federal or State capital crime but to have not been convicted of such crime by reason of unavailability for trial due to death or flight to avoid prosecution.

(Authority: 38 U.S.C. 2408, 2411).

7. In § 39.3, paragraph (b)(1) and the authority citation at the end of the section are revised to read as follows:

### § 39.3. Applications with respect to projects.

\* \* \* \* \*

(b) \* \* \*

(1) Any cemetery established, expanded, or improved through assistance of this program shall be used exclusively for the interment or memorialization of eligible persons, as set forth in §§ 39.1(h) and 39.2(a), whose interment or memorialization is not contrary to the conditions of the grant (see § 39.2(d) and 38 U.S.C. 2408 and 2411).

\* \* \* \* \*

(Authority: 38 U.S.C. 2408, 2411)

\* \* \* \* \*

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