
Written Statement to the Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs

Submitted for the Hearing: "Toxic Exposures: Examining Airborne Hazards in the Southwest Asia Theater of Military Operations"

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To Chairwoman Luria, Ranking Member Bost, and the Distinguished Members of the Disability Assistance & Memorial Affairs Subcommittee:

Thank you for inviting me to submit testimony on this important hearing examining airborne hazards in the Southwest Asia theater of military operations. I am a Professor of the Practice at William & Mary Law School, where I co-direct the Lewis B. Puller, Jr. Veterans Benefits Clinic.¹ The Puller Clinic is a non-profit organization whose mission is to ensure that former military service members have access to the disability benefits they earned while training tomorrow's lawyers to become zealous advocates. The Puller Clinic is part of the National Law School Veterans Clinic Consortium: a collaborative effort led by the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans. I litigate issues daily at the Regional Benefits Offices, the Board of Veterans' Appeals, and the Court of Appeals for Veterans Claims. Under my close supervision and guidance, the students in the classes I teach at William & Mary learn how to do the same.

I testify to provide historical context, background information, and real-world examples regarding other presumptive service-connected conditions in the veterans' disability compensation system; specifically, maladies related to Agent Orange and Camp Lejeune water contamination. Congress should keep some of the lessons learned from those issues when determining what actions it should take to combat this current problem. Specifically, I have two major points to make. First, the creation of presumptions related to service-connection is a desirable and favorable outcome for veterans. Second, Congress must take a more active and dictatorial role in establishing those presumptions to speed up the process.

¹ In accordance with our past practice regarding Congressional testimony, these remarks are made in my individual capacity.

To start, Agent Orange was an herbicide sprayed in Vietnam from 1962 into the early 1970s. Although returning veterans made health complaints, the Department of Defense (DOD) initially maintained that only small numbers of U.S. military personnel, like crews of aircraft used to spray herbicide, could be positively identified as having been exposed. The DOD only changed that position after a 1979 report from what is now the Government Accountability Office, which stated that ground troops had also been exposed to these harmful chemicals.² Congress then passed the Dioxin and Radiation Exposure Compensation Standards Act of 1984, which directed the VA to develop regulations for disability compensation to Vietnam veterans exposed to Agent Orange. In response, the VA created a regulation asserting that chloracne was the only disease scientifically related to Agent Orange exposure. To this point, the VA had consistently taken the position that, because the effects of long-term exposure to Agent Orange was unclear, and because of scientific uncertainty of the evidence linking Agent Orange to specific illnesses, it could not compensate veterans who alleged that exposure to Agent Orange had caused their diseases.³

This policy led to *Nehmer v. U.S. Department of Veterans Affairs*⁴, a 1986 class-action lawsuit challenging the list of presumptive diseases, which was finally resolved by a 1991 consent decree requiring the VA to re-adjudicate many decisions that had previously denied benefits to veterans. That same year, Congress passed the Agent Orange Act (P.L. 102-4), establishing a presumption of service connection for other diseases associated with herbicide exposure. That Act also required the Institute of Medicine to issue regular reports on Agent Orange's health impacts. Even with these positive developments, Agent Orange cases continued to work through the Court system to fix gaps in VA's coverage, and Agent Orange issues were—and are—far from settled. In 1999, a second *Nehmer* lawsuit⁵ forced the VA to abandon its policy of only reissuing decisions when a veteran had explicitly alleged that Agent Orange caused his or her disease. Conditions continued to be added to the presumptive list—most recently, ischemic heart disease, Parkinson's disease, and B-cell leukemia in 2010. Yet some diseases with “limited” evidence “suggestive” of a statistically significant association, according to the National Academy of Sciences, are covered while some are not. The latter category includes stroke and hypertension.⁶

² VETERANS EXPOSED TO AGENT ORANGE: LEGISLATIVE HISTORY, LITIGATION, AND CURRENT ISSUES at 2-3, Sidath Viranga Panangala & Daniel T. Shedd, Congressional Research Service (2014).

³ *Id.*

⁴ 712 F. Supp. 1404 (N.D. Cal. 1989).

⁵ 494 F.3d 846 (9th Cir. 2007).

⁶ VETERANS AND AGENT ORANGE: UPDATE 2012 at 7, Institute of Medicine Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides.

In recent years, “Blue Water Navy” Veterans have finally achieved the same benefits given to their fellow-servicemembers who had stepped foot onto Vietnamese soil. But here too, the favorable result was only achieved through litigation—the *Procopio v. Wilkie* decision of 2019—which was blessed after the fact by Congress in its Blue Water Navy Vietnam Veterans Act of 2019 (P.L. 116-23). In other words, for Blue Water Navy Veterans, one could legitimately state that it took 50 years to achieve some manner of justice.

The Camp Lejeune Water Contamination problem is also instructive when deciding how to handle the burn pit question. There, warnings of the base’s contaminated drinking water problems first surfaced in 1980, and as many as one million individuals were exposed.⁷ In 1988, the Department of the Navy asked the Agency for Toxic Substances and Disease Registry (ATSDR) to assess the health effects. ATSDR started its report in 1991 and issued its final version of that report in 1997. ATSDR would later retract that report because it was based on a record that was missing critical documents from the Marine Corps. Congress then mandated in the National Defense Authorization Act for Fiscal Year 2007 (P.L. 109-364) that the National Academy of Sciences issue a report. Even with all of this activity, as late as 2010, the Marine Corps asserted that the existing studies had “not shown any causal link between exposure to contaminated water at Camp Lejeune and illnesses.”⁸ The Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012 (P.L. 112-154) mandated that the VA provide free health care to qualifying veterans suffering from fifteen conditions.⁹ But it was not until 2017 that the VA implemented rules to provide presumptive service connection for only eight of them.¹⁰ In other words, for Camp Lejeune Marines, it took 37 years after the government first knew about the contaminated water to achieve some manner of justice.

In many respects, it seems that burn pits are playing out the same way and that we are merely at an earlier mile on the march. Veterans with post-9/11 service in Iraq or Afghanistan have filed nearly 100,000 claims that have been identified as related to “environmental hazard[s] in [the] Gulf War,” as well as 250,000 disability claims related to respiratory illnesses alone.¹¹ That does not include health problems like cancers, immune-

⁷ “Camp Lejeune: Contamination and Compensation, Looking Back, Moving Forward,” Hearing Charter for the U.S. House of Representatives Committee on Science & Technology Subcommittee on Investigations & Oversight, Sept. 16, 2010, *available at* https://republicans-science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/091610_charter.pdf.

⁸ *Id.*

⁹ The conditions: Esophageal cancer, Breast cancer, Kidney cancer, Multiple myeloma, Renal toxicity, Female infertility, Scleroderma, Non-Hodgkin's lymphoma, Lung cancer, Bladder cancer, Leukemia, Myelodysplastic syndromes, Hepatic steatosis, Miscarriage, and Neurobehavioral effects.

¹⁰ See 38 C.F.R. § 3.309(f).

¹¹ LOBBY GUIDE, PRESUMPTIVE BENEFITS FOR WAR FIGHTERS EXPOSED TO BURN PITS AND OTHER TOXINS ACT OF 2020, Burn Pits 360, *available at* https://secureservercdn.net/166.62.107.20/j17.009.myftpupload.com/wp-content/uploads/2020/09/BurnPits360-2020-Lobby-Guide_FINAL-9.13.20_V2.pdf.

related disorders, or neurological conditions that could be related to burn pits.¹² The stories told by these veterans about their illnesses are often horrific, and those veterans must be heard throughout this undertaking.¹³

I believe that history provides two significant lessons. First, presumptions related to service-connection is a desirable and favorable outcome for veterans. Second, Congress must take a more active and dictatorial role in establishing those presumptions to speed up the process.

As a clarification on this first point, there are two presumptions related to service-connection in the disability compensation system. The first is a presumption that a qualifying veteran has been exposed to a hazard. The second is a presumption that certain medical conditions are related to that hazard. One presumption is not useful without the other. For the present matter, a veteran who receives the presumption of exposure to burn pits does not profit if the VA will not acknowledge that his or her chronic bronchitis—diagnosed years after service—is connected to that exposure. While the VA may provide a free examination for disability compensation purposes, VA compensation & pension examinations are often rife with problems. Further, in recent years, third-party contractors more frequently perform them. In FY2018, over 1.4 million veterans received VA C&P exams, and contractors completed about 60% of them.¹⁴ Disputing problems with these examinations is a frequent task for my students and me. Because of the current state of VA examinations, in my experience, a veteran in the situation I described will likely need to provide a private medical opinion linking the condition to military service to have any chance of obtaining compensation.

For my second point, history demonstrates that Congress should take the lead in establishing these presumptions, not leave the issue for the VA or the court systems. Otherwise, especially considering the nature of the report discussed at this hearing, it seems clear that we are many years away from any sensible resolution. That would be disastrous for our nation's veterans, with some of the veterans I represent being among them. For existing presumptions, I think of my elderly Marine client with Multiple Myeloma. If he had not made it to 2017, when the VA instituted presumptive service connection for water contamination, he would not have been compensated for his condition. His wife would have no chance of receiving survivors' benefits if he had succumbed to his disease.

¹² *Id.*

¹³ Indeed, many fine service organizations are advocating zealously for their veterans on these issues. Of particular note is the excellent work done by Burn Pits 360 in this arena.

¹⁴ OPPORTUNITIES REMAIN TO IMPROVE OVERSIGHT OF CONTRACTED EXAMINERS, United States Government Accountability Office (2018).

I also think of a widow of a Blue Water Navy veteran that we represented before his death from type II diabetes. He served close to the coast of Vietnam on a destroyer, and he stated that he went on shore for mail runs. The VA granted service-connection for his diabetes in 2002 on that basis, then revoked that benefit a year later when it decided that it no longer believed that testimony. He fought that decision until he died in 2013. We then assumed representation for his widow. To summarize, we only got her survivors' benefits in 2020 because the presumption of exposure to Agent Orange was finally expanded to Blue Water Navy Veterans, allowing us to prove to the VA's satisfaction that his death was service-connected. I am happy that his widow can find some measure of closure, but I am saddened that our destitute client died without compensation because of the egregious length of the process.

For just one example relating directly to the topic of this hearing, I have represented an Army veteran who ran ultramarathons before enlisting in the Army. He experienced a lot of environmental hazards in Afghanistan and slept right next to a burn pit. After returning from Afghanistan, he could not even walk up the stairs due to shortness of breath. His Constrictive Bronchiolitis forced him to retire from military service. He has lost two jobs in recent years in large part because of these health challenges, and the VA has rated him as totally disabled because of them. Under the current scheme, this is only possible because he was diagnosed while still on active duty. If there had been a gap between the manifestation of his symptoms and his discharge, it is unlikely that he would have received compensation without significant and extended litigation. That is the situation that some of my other clients find themselves in.

In closing, let me state that I believe that the VA is doing its best to serve our veterans, as is our Congress. After all, veterans' issues are one of the final bastions of bipartisanship in this country, and everyone in this sphere is working toward the same goal. At its core, Congress created the disability compensation system to be friendly to veterans and give them the "benefit of the doubt."¹⁵ I will not pretend to be a scientist, and I know that the literature and process involved in making any decisions regarding these issues are incredibly complicated. That said, we all have undoubtedly heard the phrase "delay, deny, and hope I die" from veterans who believe that these matters are decided with one eye on the actuarial tables and the other on the public purse. With swift and aggressive action, burn pit legislation is an opportunity to provide a counterpoint to that view.

Madame Chairwoman, this concludes my testimony. I would be happy to answer any questions from you or other members of the Subcommittee.

¹⁵ See, e.g., 38 U.S.C. § 5107; *Brown v. Gardner*, 513 U.S. 115, 118 (1994).