

LAW REVIEW¹ 16017

March 2016

Agent Orange Exposure among “Blue Water” Sailors—Part 2

By Captain Morgan Little, USN (Ret.)² &
Captain Samuel F. Wright, JAGC, USN (Ret.)³

11.0—Veterans’ claims

This article is a follow-up to our Law Review 16010 (February 2016), titled “Agent Orange VA Claims—Don’t Forget the ‘Blue Water’ Sailors.”

In the 114th Congress (2015-16), Representative Chris Gibson⁴ has introduced HR 979, and Senator Kirsten Gillibrand has introduced a companion bill, S 1939, in the Senate. These bills will explicitly restore the presumption of Agent Orange exposure to include “blue water” sailors

¹I invite the reader’s attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BS University of Arizona 1964, MS University of Arizona 1966, MBA Rider University 1978. Captain Little served in the Navy and Navy Reserve as a Surface Warfare Officer and retired in 1998. He is a life member of the Reserve Officers Association (ROA) and has served in ROA offices at the chapter, department, and national levels, including service as the National Vice President for Naval Services (2007-08).

³BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

⁴Representative Gibson represents the 19th District of New York. He is a retired Army Colonel and is part of the ever-shrinking minority of Congress who have served our country in uniform. He is a member of the House Armed Services Committee, among other committees.

who served in the Pacific Ocean near the coast of the Republic of Vietnam (South Vietnam) during the Vietnam War. We urge each reader to contact your two United States Senators and your United States Representative to support these bills.

We also believe that these new bills are, in a larger sense, unnecessary, because (as we explained in Law Review 16010) the Agent Orange Act of 1991 already explicitly requires the Department of Veterans Affairs (VA) to apply the presumption of Agent Orange exposure and the presumption of service connection of the designated diseases and conditions (including prostate cancer) to persons who served in the Navy (as well as the Army, Air Force, Marine Corps, or Coast Guard) “in the Republic of Vietnam.” The Republic of Vietnam included not only the land area and inland waterways of South Vietnam—it also included that nation’s territorial sea, within 12 nautical miles of the shoreline. We believe that under the law as already enacted the VA has a legal obligation to pay the Agent Orange claims of “blue water” sailors who served within the territorial waters off the coast of South Vietnam.

One of the most important responsibilities of the Congressional Budget Office (CBO) is to “score” the likely cost of bills introduced in the House or Senate, so that Senators and Representatives can make informed judgments when deciding to support or oppose bills. The CBO has not yet provided an “official” score on HR 969 and S 681, but the CBO has provided an “unofficial” opinion that the cost would likely be \$930 million over ten years or \$93 million per year.⁵

We believe that the \$93 million per year estimate is overstated somewhat. We believe that this estimate includes the cost of paying Agent Orange claims of “brown water” sailors (those who served on Navy and Coast Guard vessels plying the Mekong River and other inland waterways of South Vietnam) and “blue water” sailors who made even brief visits to the territory of the Republic of Vietnam. As we explained in Law Review 16010, these sailors *are already being paid by the VA under its current misinterpretation of the Agent Orange Act.*

On July 15, 2010, the Honorable Matthew Palmer⁶ testified before the Subcommittee on Asia, the Pacific, and Global Environment of the House Foreign Affairs Committee. His prepared testimony included the following paragraphs:

The United States also recognizes the importance of remediation of [Agent Orange] “hotspots,” the former airbases where dioxin contamination exceeds international safety standards. Building on past containment efforts, we now are collaborating to eliminate the potential for dioxin exposure at the Danang airport. Our activities complement the efforts of a broad coalition: the Government of Vietnam, the United Nations Development Program (UNDP), the Ford Foundation, and others are committing substantial resources to dioxin remediation throughout the country [Vietnam]. UNDP and the Government of Vietnam have just signed an agreement for \$5 million to support

⁵This estimate was provided to us by Mr. Michael Little, the Legislative Director of the Association for the United States Navy. We believe that Mr. Little obtained this estimate informally from the CBO.

⁶Under Secretary of State for Political Affairs.

dioxin remediation at dioxin hotspots, with an initial focus at Bien Hoa—a project specifically promoted by UNDP to complement U.S. efforts.

As requested by the Government of Vietnam and as reviewed scientifically by the bilateral, multi-agency Joint Advisory Committee on Agent Orange, the United States is focusing its remediation efforts on Danang airport. Though we share the desire to implement remediation as soon as possible, our over-riding goal is to complete dioxin destruction that ensures worker safety, permanently removes potential exposure to Danang residents, and fully complies with U.S. and Vietnamese law. We are moving as fast as possible to do this, but want to make sure that we pay attention to the details and get this right.

Last year we reported to this committee on the beginning stages of a remediation project the U.S. planned for Danang. I am pleased to note that we have made great progress towards our remediation goals. Working with the Ford Foundation, the EPA and the Vietnam Academy of Science and Technology [we] are jointly piloting innovative bioremediation technology at Danang airport. At the same time, close consultation with the Government of Vietnam and consistent with U.S. and Vietnamese legal requirements, a USAID contractor is finalizing an environmental assessment for dioxin remediation at Danang and expects to begin developing engineering and design plans for the technology selected through the assessment process in August of this year [2010].

Vietnamese efforts to expand the Danang airport highlight the need to move as quickly as feasible. Ongoing construction has already displaced contaminated soil and sediment, posing risks to human health in the surrounding area. In consultation with central authorities and airport officials, we have developed a remediation plan that USAID estimates can be shovel-ready in early 2011, consistent with airport expansion plans, and could be completed by 2013, subject to availability of resources. The complete and permanent elimination of dioxin contamination from Danang due to Agent Orange would represent the most significant action we can take to alleviate the environmental concerns and possible health impacts at Danang and offer resolution to one of the Government of Vietnam's high priority concerns. It may also provide a model for moving ahead with remediation at other dioxin hotspots.

USAID estimates at least \$34 million in project costs is required to complete this remediation. The State Department and USAID have identified approximately \$4.9 million for this project from the FY [Fiscal Year] 2010 appropriation: \$3 million in Economic Support Funds, and \$1.9 million in Development Assistance funds. Additionally, the FY 2011 budget request also includes some resources for these activities.

Over the last several years, the United States has worked with Vietnam to ensure that our Agent Orange activities align with Vietnamese health and environmental objectives. This cooperation has brought us closer than ever to the permanent elimination of dioxin

at Danang airport due to Agent Orange and has allowed us to provide much-needed assistance to vulnerable populations. Agent Orange has long been a sensitive topic in U.S.-Vietnam relations, and we have had some past challenges reaching agreement on how and where to cooperate, but we are now transforming dialogue into tangible improvements in the environment and health of the people of Vietnam. The United States Government has demonstrated a firm commitment on working to find a resolution to this lingering concern and to ensuring the continued improvement of U.S.-Vietnam relations.⁷

Also in July 2010, Secretary of State Hillary Rodham Clinton visited Vietnam, and while there she stated:

The minister [of foreign affairs of Vietnam] and I discussed the concern that both Vietnam and the United States have about Agent Orange and the consequences that it produced in the people here [Vietnam]. As you know, we have been working with Vietnam for about nine years to try to remedy the effects of Agent Orange and I told the minister that I would work to increase our cooperation and make even greater progress together.⁸

We believe that the July 2010 statement of Secretary Clinton and the testimony of Under Secretary Palmer are relevant to the Agent Orange VA claims of “blue water” sailors for two reasons. First, the statement and the testimony demonstrate that the serious adverse human health effects of Agent Orange are persistent over time and distance, and this demonstrates the likelihood that the 21st Century VA claims of the “blue water” sailors are meritorious. Second, the statement and the testimony demonstrate that even today the United States Government is making major payments to the Communist dictatorship in Hanoi, at a time when it claims that it “cannot afford” to pay sick veterans who are suffering from the adverse effects of Agent Orange exposure in military service.

Update – June 2022

In 2019, the Federal Circuit decided *Propocio v. Wilkie*.⁹ The Federal Circuit held that language of 38 U.S.C. 1116 is “unambiguous,” thus entitling Propocio to a presumption of service connection for his prostate cancer and diabetes mellitus.¹⁰ Now, the Navy and Coast Guard veterans who establish they served within the 12-mile “territorial sea” of the Republic of Vietnam during the war are entitled to two Agent Orange presumptions, just like veterans who served on the ground in South Vietnam.

⁷Hearing Report, Subcommittee on Asia, the Pacific, and Global Environment, House Foreign Affairs Committee, United States House of Representatives, July 15, 2010.

⁸Statement of Secretary of State Hillary Rodham Clinton on July 22, 2010, at the Government Guest House in Hanoi, Vietnam.

⁹913 F.3d 1371 (Fed. Cir. 2019).

¹⁰*Id.* at 1373

For more information on *Propocio v. Wilkie* please see the ROA Law Review article titled *Blue Water Sailors Who Were Exposed to Agent Orange during the Vietnam War and later Suffered from Designated Diseases Must Now Receive VA Compensation*.¹¹

Please join or support ROA

This article is one of 1800-plus “Law Review” articles available at www.roa.org/page/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002

¹¹Samuel F. Wright, Law Review 19050 (June 2019).