

Military-Veterans Advocacy

Statement for the Record in Support of:
S. 657, S. 927, S. 952, and other bills

Submitted to the United States Senate Veterans Affairs Committee,
April 28, 2021



Commander John B. Wells, USN (Ret)
Chairman

Introduction

Distinguished Chairman Jon Tester Ranking Member Jerry Moran and other members of the Committee, thank you for the opportunity to present Military-Veterans Advocacy's views on S. 657, S. 927, S. 952 and other bills.

About Military-Veterans Advocacy

Military-Veterans Advocacy Inc. (MVA) is a tax-exempt IRC 501[c][3] organization based in Slidell, Louisiana that works for the benefit of the armed forces and military veterans. Through litigation, legislation, and education, MVA seeks to obtain benefits for those who are serving or have served in the military. In support of this goal, MVA provides support for various legislation on the State and Federal levels as well as engaging in targeted litigation to assist those who have served. We currently have over 1500 proud members and our volunteer board of directors litigates, legislates, and educates in support of veterans. MVA analyzes and supports/opposes legislation, assists Congressional staffs with the drafting of legislation and initiates rulemaking requests to the Department of Veterans Affairs. MVA also files suits under the Administrative Procedures Act to obtain judicial review of veterans' legislation and regulations as well as *amicus curiae* briefs in the Courts of Appeal and the Supreme Court of the United States. MVA is also certified as a Continuing Legal Education provider by the State of Louisiana to train attorneys in veterans' law.

MVA is composed of five sections: Blue Water Navy, Agent Orange Survivors of Guam, Veterans of Southeast Asia, Veterans of the Panama Canal Zone and Veterans of Okinawa. We are a member of the TEAMS Coalition and the Radiation Exposure Compensation Act Working Group. MVA works closely with Veterans Service Organizations including the United States Submarine Veterans, Inc., the National Association of Atomic Veterans, the Association of the United States Navy, Veterans Warriors, and other groups working to secure benefits for veterans.

**Military-Veterans Advocacy's Chairman, Commander John B. Wells
USN (Ret.)**

MVA's Chairman, Commander John B. Wells, USN (Retired) has long been viewed as a technical expert on herbicide exposure. A 22-year veteran of the Navy, Commander Wells served as a Surface Warfare Officer on six different ships, with over ten years at sea. He possessed a mechanical engineering subspecialty, was qualified as a Navigator and for command at sea and served as the Chief Engineer on several Navy ships.

Since retirement, Commander Wells has become a practicing attorney with an emphasis on military and veteran's law. He is counsel on several pending cases concerning herbicide and other toxic exposures. Commander Wells was the attorney on the *Procopio v. Wilkie* case that extended the presumption of herbicide exposure to the territorial sea of the Republic of Vietnam, which laid the groundwork for the Blue Water Navy Vietnam Veterans Act. He has initiated lawsuits on behalf of MVA to further extend the presumption and to cover veterans in Thailand, Guam, American Samoa, and Johnston Island. He also initiated judicial review of the Appeals Modernization Act which is pending at the Court of Appeals for the Federal Circuit. Since 2010 he has visited virtually every Congressional and Senatorial office to discuss the importance of enacting veterans' benefits legislation. With the onset of covid, Commander Wells has conducted virtual briefings for new Members of Congress and their staffs.

S. 657 A bill to modify the presumption of service connection for veterans who were exposed to herbicide agents while serving in the Armed Forces in Thailand during the Vietnam era, and for other purposes.

MVA has worked with Senator Boozman's office to draft S 657. The bill originated with MVA's Veterans of Southeast Asia Section and is designed to overcome the extremely narrow VA regulation limiting the presumption of herbicide exposure to those veterans with duties on the perimeter.

S 657 extends the cut-off date for the presumption until June 30, 1976 from the arbitrary May 7, 1975 date which marked the evacuation of United States personnel from the Republic of Vietnam. Military personnel remained in Thailand for an additional fourteen months and exposure continued until at least June 30, 1976. The Comptroller General's Report to Congress estimated that as many as 250 military personnel remained in Thailand as of July 20, 1976. See, Withdrawal of U.S. Forces From Thailand: Ways To Improve Future Withdrawal Operations, November of 1977_ at pg. 1. [LCD-77-446 Withdrawal of U.S. Forces from Thailand: Ways to Improve Future Withdrawal Operations \(gao.gov\)](#). See also, New York Times, March 21, 1976. [THAILAND ORDERS LAST U.S. FORCES TO LEAVE BY JULY - The New York Times \(nytimes.com\)](#). These troops remained to administer the Military Assistance program. The remainder of the military presence left by the end of June 1976.

The VA's M21-1 Manual extends "a special consideration of herbicide exposure on a factual basis" to veterans "whose duties placed them on or near the perimeters of Thailand military bases." (M21-1 Manual § IV.ii.1.H.4.a). In particular, the Manual instructs adjudicators to concede "herbicide exposure on a direct/facts-found basis" to specific categories of veterans, including security personnel, military police, and those whose duties are "otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence." (M21-1 Manual § IV.ii.1.H.4.b). But it denies the same automatic concession to veterans whose sleeping quarters, mess and recreation halls, or other regular activities outside their regular "duties" occurred on or near the perimeter of the same bases. *Id.* (requiring specific factual review).

By limiting the presumption of service connection conceded by VA to only those veterans with *duties* on the perimeter of the base, the rules require VA's front-line adjudicators to make distinctions between veterans with no basis in fact. Veterans who merely ate, slept, exercised, or played near the perimeters of the Thailand military bases were exposed to herbicides no less than security forces and military police who *worked* near the same perimeter.

VA was of course correct to extend a presumption of herbicide exposure to veterans whose duties took them to the perimeter of military bases in Thailand. The Contemporary Historical Examination of Current Operations Report for Base Defense in Thailand ("CHECO Report"), prepared in 1973, documented numerous practices in use at the relevant bases in Southeast Asia during the Vietnam era.

Among other security measures, the CHECO Report confirms that the military employed herbicides at the perimeters of its bases in Thailand to assist with vegetation control, improve visibility, and deny enemy forces cover and concealment. As a recent GAO report notes, many if not most of the herbicides in use in Southeast Asia, even if not formally designated as Agent Orange, “contained the form of n-butyl 2,4,5-T found in Agent Orange and thus its associated contaminant, 2,3,7,8-TCDD.” *Agent Orange, Actions Needed to Improve Accuracy and Communication of Information on Testing and Storage Locations* at 11, GAO 19-24 (Nov. 2018), available at <https://www.gao.gov/assets/gao-19-24.pdf>; see also 38 CFR § 3.307(a)(6)(i) (defining “herbicide agent” to include “2,4-D; 2,4,5-T and its contaminant TCDD”).

But while extending the presumption of herbicide exposure to veterans with duties on the perimeter is correct, denying that same presumption to other servicemembers stationed on the same base, at the same time, defies logic and common sense.

Herbicides do not politely confine themselves to landing on the precise plants the military wishes to eliminate. As early as December 1971, the Army Field Manual 3-3: Tactical Employment of Herbicides (“Field Manual”) acknowledged that ground-spraying methods were only partly effective in reducing wind drift. The Army Field Manual recommended a 500-meter buffer distance “to avoid damage to desirable vegetation near the target [of the spraying].” In other words, the evidence shows that surfaces within five football fields of the perimeter of Thailand bases would be contaminated with toxins whenever herbicides were deployed at the base perimeter by any available method.

One MVA member, Jay Cole had sleeping quarters within 60 meters of the perimeter of U-Tapao Air Force Base in Thailand. He also crossed the base perimeter, though admittedly not as part of his duties. It is not hard to see that Mr. Cole would regularly contact doorknobs, windows, and other exterior surfaces exposed to drifting herbicide droplets. Military bunks were hardly airtight. Interior surfaces, clothing, and personal possessions likely were exposed as well. All this would add up to exposure at least comparable to the security forces and military police afforded the presumption of exposure under the M21-1 Manual — consider whether one’s exposure is more likely when one’s desk or one’s toothbrush is a few dozen yards from clouds of herbicide sprayed along the fences.

But because Mr. Cole's duties on the flight line were away from the perimeter, VA did not presume exposure to herbicide and denied his claim.

Other contamination vectors beyond wind drift would have spread herbicide throughout each of the Thailand bases, and that herbicide was used in the interior itself. As a result, the presumption of herbicide exposure should extend to all veterans stationed at Thailand bases during the Vietnam era, regardless of where on the base they were located.

As noted in the Field Manual, Agent Orange was mixed with diesel fuel in a 1:10 ratio before spraying, to help the herbicide adhere to the plants and deliver its toxic payload. But that same mixture adheres well to soil, clothing, shoes, containers, equipment, and vehicles within the spray zone or the down-wind drift zone. As a result, the herbicide-diesel mixture would have attached itself to the personnel near the perimeter of the base, or even those merely crossing through the perimeter, and followed them to all areas of the base. The same personnel, and any vehicles crossing through the perimeter area, would have tracked soil and mud coated in the herbicide-diesel mixture into barracks, garages, mess halls, latrines, showers, laundries, offices, and various other facilities, even deep in the interior of the base. And because many if not all these facilities were shared by a number of veterans, even those who rarely if ever, visited the perimeter would have been exposed to the toxins.

In addition, it is likely that the same herbicides used at the perimeter of the base were used elsewhere in the interior as well. For example, the CHECO Report notes that the U.S. Embassy's Rules of Engagement approved herbicides for use "on areas within the perimeter"—not only *at* the perimeter. The CHECO Report also describes, for example, use of herbicides at the Korat Air Force Base in 1972. There, "[v]egetation control was a serious problem" not only at "many sectors of the concertina wire *on the perimeter*" but also "at the critical RTAF area near the end of the runway" and "in the area contiguous to the unrevetted KC-135 parking ramp." CHECO Rpt at 68. To combat the problem, the base had received permission to use herbicides and begun spraying the affected areas. Similarly, at Nakhon Phanom Air Force Base, "heavy use of herbicides kept [vegetation] growth under control *in the fenced areas*." CHECO Rpt at 69. (emphasis added). And at U-Tapao, where Mr. Cole was stationed, "[v]egetation control was all but impossible *over the entire reservation*" in part because the base was unable to get herbicides during the first half of 1972. CHECO Rpt. At 75. The inescapable

conclusion is that the military made regular use of herbicides well within the interior of the Thailand bases, at least when it could get its hands on them.

Thus, the evidence shows that herbicides would have been present in all areas of the base, whether because they were tracked throughout the facility on the clothing and shoes of those personnel with duties on the perimeter, because they clung to the vehicles transitioning in and out of the base, or because the military directly sprayed in the interior itself. Yet the VA rules nevertheless afford a presumption of herbicide exposure only to those veterans with duties on the base perimeter.

Although VA promised in 2017 to account for these disparate treatments of veterans, the M21-1 corrects none of the known flaws. VA was not ignorant of the flaws in its adjudication of claims for herbicide exposure in Thailand. The VA also agreed to grant MVA's petition for rulemaking. [Microsoft Word - Thailand response letter 3.17.20.docx \(militaryveteransadvocacy.org\)](#) But no Notice of a Proposed Rule has been issued in the Federal Register. Consequently, MVA has filed suit against the Secretary under 38 U.S.C. § 502 to force the VA to conduct rulemaking. Congressional action through S. 657 will help to hasten that action and ensure that veterans are provided their earned benefits.

MVA supports the passage of S. 657 and thanks Senator Boozman for his leadership in this area.

S. 927 TEAM Bill
S. 952 Warfighters Bill

MVA consolidates their comments for both S. 927 and S. 952 because they are both solutions to an important problem – that of burn pits. While the bills somewhat overlap, there are strengths to each bill that require passage of both bills – or the merger of the two.

Although the bills address all toxic exposures, they are primarily brought to the forefront because of Open-Air Burn Pits. These burn pits were endemic throughout the Iraq/Afghanistan theaters but were also used in other areas including the Continental United States.

The MVA Chairman represents the estate of a burn pit victim, LCDR

Celeste Santana, who was an Environmental Health Officer at Camp Leatherneck Afghanistan in 2009. She took daily air samples at the rim of the burn pit and reported to the Base Commander and the Marine Corps General Officer that harmful levels of toxins were being discharged into the air. Cashiered for her repeated protestations, she eventually developed multiple myeloma and passed away in 2018.

Petty Officer Lauren Price, the founder of MVA partner Veteran Warriors, served in Iraq. Mobilized as part of Operation Enduring Freedom she was also exposed to burn pits and was medically retired from the Navy. She developed cancer and after a decade long struggle and succumbed to this toxic wound in March of 2021.

These two brave women are examples of the tens of thousands of veterans who have sickened and sometimes died as a result of exposure to open air burn pits. Although combat operations have ended in both areas we have still not recognized the self-inflicted wounds caused by burn pits. As with Agent Orange, sick and dying veterans now come a decade later to beg for their earned benefits.

In 2010, the Government Accountability Office reported to Congress that: “the military has relied heavily on open pit burning in both conflicts, and operators of burn pits have not always followed relevant guidance to protect servicemembers from exposure to harmful emissions.” GAO Report 11-63, *DOD Should Improve Adherence to Its Guidance on Open Pit Burning and Solid Waste Management* (2010) (Report Highlights). The report went on to note that each soldier generated 10 pounds of solid waste per day and that much of this, including toxic plastics, were burned in the open-air burn pits. Despite this finding, the Institute of Medicine failed to find enough evidence to connect burn pits and lung diseases. IOM (Institute of Medicine). 2011. *Long-term health consequences of exposure to burn pits in Iraq and Afghanistan*. Washington, DC: The National Academies Press. The reason for this curious finding became readily apparent during the testimony of Dr. Steve Coughlin before the House Veterans Affairs Committee. [Dr. Steven S. Coughlin | House Committee on Veterans Affairs](#) Dr. Coughlin revealed that while working for the Department of Veterans Affairs, he was ordered to suppress any evidence showing a causal connection between burn pits and breathing disorders.

Notably, the Special Inspector General for Afghanistan Reconstruction (hereinafter SIGAR) revealed that: “[a]lthough DOD knew about the risks associated with open-air burn pits long before contingency operations began in Afghanistan, it was not until 2009 that U.S. Central Command (CENTCOM) developed policies and procedures to guide solid waste management, including requirements for operating, monitoring, and minimizing the use of open-air burn pits.” SIGAR, *Final Assessment: What We Have Learned From Our Inspections of Incinerators and Use of Burn Pits in Afghanistan* (February 2015) at 1. The SIGAR Report went on to confirm the service member complaints of a connection between health risks and burn pits, noting that: “Recent health studies have raised concerns that the particulate matter and toxic smoke contaminated with lead, mercury, dioxins, and irritant gases generated by open-air burn pits could negatively affect an individual’s organs and body systems, such as the adrenal glands, lungs, liver, and stomach.” *Id.* Often called the Agent Orange of the 21st Century, the damage to American and Allied service members by this toxic waste pollution is still being assessed. Unfortunately, while it is being assessed, people are dying.

S. 927, in an effort to stem the bleeding, provides medical coverage to victims of toxic exposure. One strength of this bill is does not have a beginning date/ S. 952 on the other hand only covers veterans who served after August 2, 1990. S. 927, like S. 952, covers all toxic exposures including radiation, PFAS, asbestos, depleted uranium, and herbicide. The legislative history should reflect that this does not apply just to burn pits but to all forms of toxic exposure.

MVA also welcomes the requirement that the Secretary respond within 60 days to the recommendations of the National Academy of Sciences, Engineering and Medicine (NASEM) to add diseases to the presumptive coverage list. As the Committee knows, the VA has taken the approach of stonewalling these recommendations. That led to the inclusion of three herbicide presumptive diseases in the 2021 National Defense Authorization Act (NDAA) and the need to cover an additional presumptive as evidenced by Senator Tester’s S. 810, which MVA also supports.

Including a Toxic Exposure Research Committee along with its annual report to Congress, is an important provision of this bill. MVA has proposed similar legislation with broader scope in the past, however we believe that this Commission is an important step towards reaching the goal of identifying toxic

exposure in its early stages and implementing preventative measures. This approach will save lives and be more economical than the current “catch-up” we are playing now. MVA does suggest DOD involvement as necessary to ensure that problems associated with toxic exposure are detected and corrected.

The weakness of S. 927 is that it only provides for medical care and not compensation. S. 952 corrects this deficiency by also provided for disability compensation and survivor benefits. This is necessary since veteran victims are often forced to leave the work force decades before the average American. Often spouses are also required to quit employment to act as caregivers. This results in a lower standard of living for the veteran victim and his family. Compensation will help alleviate this predicament.

One of the strengths of S. 952 is the use of deployment awards to define eligibility to toxic exposure. This successfully narrows the focus to those who served in areas where toxic exposure was prevalent. The bill also provides a wider list of diseases than S. 927, but more important, allows for an expanded ability to make changes. While S. 927 requires the Secretary to respond to recommendations form NASEM, S. 952 expands the list of “interested parties” to include veterans’ service organizations, other veterans’ groups, collective bargaining agents, medical associations or state and local governments. This expansion just makes sense as does the requirement that the Secretary respond to Congress and in the Federal Register.

S. 952 also strengthens the relationship and codifies requirements for cooperation between the Secretary and NASEM. The relationship between the two worked well under the original Agent Orange Act and S. 952’s provisions work to restore that relationship for more recent toxic exposure issues.

Our allies in Australia have often taken a proactive approach to toxic exposure. It was the Australians who detected the exposure of Blue Water Navy to herbicides by tracking the health of all their veterans and thereby discovering clusters of diseases and disabilities quickly. At best, the United States has been reactive, not proactive when it comes to the identification of victims of military toxic exposure. This needs to change. These two bills are important first steps in making that change and they have the wholehearted support of MVA and our members.

This should not be a case of choosing one bill over the other. They complement each other well. MVA urges the Committee to merge these two bills into one emphasizing the strengths of each.

MVA thanks Senators Gillibrand and Tillis for introducing these two bills.

S. 89 Ensuring Survivor Benefits During COVID-19 Act of 2021

MVA supports S 89. This bill will require the Secretary of Veterans Affairs to secure medical opinions for veterans with service-connected disabilities who die from Covid-19 to determine whether their service-connected disabilities were the principal or contributory causes of death. This is especially important since many of the underlying medical conditions are service connected. In analyzing these deaths for purposes of Dependent's Indemnity Compensation, it is important to review the entire picture and the totality of the circumstances.

S. 189 Veterans' Disability Compensation Automatic COLA Act of 2021

This bill will provide for annual cost-of-living adjustments to be made automatically by law each year in the rates of disability compensation for veterans with service-connection disabilities and the rates of dependency and indemnity compensation for survivors of certain service-connected disabled veterans. Enacting annual legislation to codify a cost-of-living increase is a waste of legislative resources. Tying these increases to Title II of the Social Security Act just makes good sense and we support this common sense legislation.

S. 219 Aid and Attendance Support Act of 2021

MVA lacks sufficient information to take a position on this bill.

S. 437 Veterans Burn Pits Exposure Recognition Act of 2021

MVA supports this legislation however notes that it could be merged with S. 927/S. 952. This bill will concede exposure to airborne hazards and toxins from burn pits under certain circumstances. It has long been said that burn pits are the Agent Orange of the 21st Century. Unfortunately, our combat forces put expediency over safety and utilized burn pits even when environmentally friendly incinerators were available. Today we see the best of our youth who willingly

served in Iraq and Afghanistan wracked with cancers and lung disorders as a direct result of burn pits. We cannot undo the damage, but we can take care of our heroes, both medially and financially. We believe S 437 is a step in the right direction.

S. 444 AUTO for Veterans Act

This bill will authorize the Secretary of Veterans Affairs to provide or assist in providing an additional vehicle adapted for operation by disabled individuals to certain eligible persons. Automobiles, like all machines, will wear out over time. The ten-year period included in the bill is most reasonable and within the scope of the need. There is a limited class of persons eligible for these vehicles, and the cost should not be prohibitive. This bill is long overdue and MVA supports it.

S. 454 K2 Veterans Care Act of 2021

This bill will provide health care and benefits to veterans who were exposed to toxic substances while serving as members of the Armed Forces at Karshi Khanabad Air Base, Uzbekistan. Troops stationed at "K2" were exposed to high levels of radiation from yellowcake uranium residue at the Uzbek base. It is estimated that the radiation levels were 7-9 times the times the normal background radiation. We estimate that 10,000 military members were exposed - many of whom have developed rare cancers associated with radiation exposure. MVA supports this legislation but notes that it could be merged with the S. 927/S. 952.

S. 458 Veterans Claim Transparency Act of 2021

MV takes no position on this bill, however there is some concern that this may lengthen the appeals process without a corresponding increase in accuracy.

S. 565 Mark Takai Atomic Veterans Healthcare Parity Act of 2021

This bill will provide for the treatment of veterans who participated in the cleanup of Agnatic Atoll as radiation-exposed veterans for purposes of the presumption of service-connection of certain disabilities by the Secretary of Veterans Affairs. It is time to move this bill off dead center and provide these veterans their earned benefits while they are still alive. MVA supports this bill.

S. 731 Department of Veterans Affairs Information Technology Reform Act

MVA lacks sufficient information to take a position on this bill.

S. 810 Fair Care for Vietnam Veterans

MVA strongly supports this bill. This bill will expand the list of diseases associated with exposure to certain herbicide agents for which there is a presumption of service connection for veterans who served in the Republic of Vietnam to include hypertension. Hypertension has been identified by the National Academy of Science, Engineering and Medicine (NASEM) as associated with exposure to Agent Orange and other herbicides. It is certainly epidemic throughout the veteran's community. It is time to force the VA to comply with the science as confirmed by NASEM

S. 894 Hire Veteran Health Heroes Act of 2021

MVA supports this common sense legislation.

S. 976 Caring for Survivors Act of 2021.

MVA supports S 976. Too often we forget about the survivors of disabled veterans who dies from service-connected illnesses. This bill is a good first step in reversing that trend.

S. 1031 A bill to require the Comptroller General of the United States to conduct a Study on disparities associated with race and ethnicity with respect to certain benefits administered by the Secretary of Veterans Affairs, and for other purposes.

MVA lacks sufficient information to take a position on this bill.

S. 1039 A bill to amend title 38, United States Code, to improve compensation for disabilities occurring in Persian Gulf War veterans, and for other purposes.

MVA lacks sufficient information to take a position on this bill. MVA cannot take a position until the bill language is provided.

S. 1071 A bill to authorize the Secretary of Veterans Affairs to carry out a pilot program to provide pension claim enhancement assistance to individuals submitting claims for pension from the Department of Veterans Affairs, and for other purposes.

MVA lacks sufficient information to take a position on this bill. MVA cannot take a position until the bill language is provided.

S. 1093 A bill to amend title 38, United States Code, to establish in the Department the Veterans Economic Opportunity and Transition Administration, and for other purposes.

MVA lacks sufficient information to take a position on this bill. MVA cannot take a position until the bill language is provided.

S. 1095 A bill to amend title 38, United States Code, to provide for the disapproval by the Secretary of Veterans Affairs of courses of education offered by public institutions of higher learning that do not charge veterans the in-State tuition rate for purposes of Survivors' and Dependents' Educational Assistance Program, and for other purposes.

MVA lacks sufficient information to take a position on this bill. MVA cannot take a position until the bill language is provided.

S. 1096 A bill to amend title 38, United States Code, to expand eligibility for the Marine Gunnery Sergeant John David Fry Scholarship to include spouses and children of individuals who die from a service-connected disability within 120 days of serving in the Armed Forces, and for other purposes.

MVA lacks sufficient information to take a position on this bill. MVA cannot take a position until the bill language is provided.

S. 1188 A bill to direct the Secretary of Veterans Affairs to notify Congress regularly of reported cases of burn pit exposure by veterans, and for other

purposes (SFC Heath Robinson Burn Pit Transparency Act)

MVA lacks sufficient information to take a position on this bill. MVA cannot take a position until the bill language is provided.

Conclusion

MVA is impressed by the wide range of bills pending before the Committee. On behalf of our membership, we would like to extend our thanks to the Chairman, Ranking Member, and remaining Committee members for the opportunity to comment on this legislation.

A handwritten signature in black ink, reading "John B. Wells". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

John B. Wells
Commander USN (retired)
Chairman