

**LEGISLATIVE HEARING ON: H.R. 105; H.R. 299;
H.R. 1328; H.R. 1329; H.R. 1390; H.R. 1564; AND
A DRAFT BILL ENTITLED “QUICKER VETERANS
BENEFITS DELIVERY ACT OF 2017.”**

HEARING

BEFORE THE

**SUBCOMMITTEE ON DISABILITY
ASSISTANCE AND MEMORIAL AFFAIRS**

OF THE

COMMITTEE ON VETERANS’ AFFAIRS

U.S. HOUSE OF REPRESENTATIVES

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**LEGISLATIVE HEARING ON: H.R. 105; H.R. 299;
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U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS' AFFAIRS,
SUBCOMMITTEE ON DISABILITY ASSISTANCE
AND MEMORIAL AFFAIRS,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:30 a.m., in Room 334, Cannon House Office Building, Hon. Mike Bost [Chairman of the Subcommittee] presiding.

Present: Representatives Bost, Coffman, Radewagen, Bergman, Banks, Esty, Brownley, Takano, and Sablan.

**OPENING STATEMENT OF HONORABLE MIKE BOST,
CHAIRMAN**

Mr. BOST. Good morning, everyone.

The hearing will come to order. Before we begin, I would like to ask unanimous consent that Chairman Roe be allowed to sit at the dais and make a statement and ask questions. He is not here right now, but he will arrive soon.

Hearing no objections, so ordered.

Thank you all for joining us today to discuss legislation before the Subcommittee. The seven bills we will talk about today address issues that are very important to veterans and their families. These bills would include and involve issues, things that ensure Veterans Benefits keeps pace with inflation; require VA to accept private medical evidence; extend benefits to the Blue Water Navy veterans; protect vulnerable veterans from fraud; give families more choice to decide where to lay their loved ones to rest; and clarify that VA may use mandatory funds to pay the cost of traveling to contract disability examinations.

We have a full agenda today, so to ensure that we get through it all, I am going to ask everyone to keep themselves to five minutes. I heard another Chairman say the other day that we will refer to that as the bull-riding rule. So, we will let you go and the buzzer rings at the five-minute mark, you have eight seconds and then we are going to throw you off.

So, at any rate, I would like to start today with the two bills that I am proud to have introduced, H.R. 1328, The American Heroes

COLA Act of 2017 and H.R. 1329, The Veterans' Compensation Cost-of-Living Adjustment Act of 2017.

I also want to thank Ranking Member Esty for being an original co-sponsor on both of these bills.

H.R. 1329 would give a cost-of-living adjustment to veterans. This increase would be the same as Social Security recipients get, and would help veterans keep up with inflation; of course, H.R. 1329 has my full support, as it should.

I have also introduced H.R. 1328 to ensure that veterans will receive a COLA every time Social Security recipients get one. Veterans have earned these benefits and should have the peace of mind of knowing that they will receive a COLA every year without having to wait for Congress to act.

I know many of my colleagues here today have worked hard on these proposals and I look forward to having a constructive conversation.

I also want to thank our witnesses for testifying on these important bills. I am going to turn it over to my colleague, Ranking Member Esty, for her opening statements.

**OPENING STATEMENT OF HONORABLE ELIZABETH ESTY,
RANKING MEMBER**

Ms. ESTY. Thank you very much, Mr. Chairman, for holding today's hearing on behalf of our Nation's veterans.

Today we are examining seven bills that are of vital importance to our veterans and their families. I support them all and am proud to have worked with the Chairman to introduce, as he has just noted, H.R. 1328 and H.R. 1329, The American Heroes COLA Act of 2017 and The Veterans' Compensation COLA Adjustment Act. These are bills that ensure that we are keeping faith with our veterans and keeping economic pace with the reality of what things cost in America today, so I urge my colleagues to listen attentively to our witnesses and to support these important bills, which will make sure that our veterans with service-connected disabilities and surviving spouses of veterans, receive dependency and indemnity compensation that is appropriate. It is simply the right thing to do.

We are also considering H.R. 1725, the Quicker Veterans Benefits Delivery Act and it is the important part of today's agenda. This bill, which is introduced by Full Committee Ranking Member Walz, speeds up the benefits delivery process by allowing local physicians to conduct disability medical examinations for veterans.

I am sure everyone on this panel and everyone in this room has heard extensively about this issue from the veterans we are honored to represent; specifically, the bill provides that when a claimant submits private medical evidence that is competent, credible, probative, and, otherwise, adequate for rating purposes, the secretary will not request a VA medical examination.

Also on today's agenda is H.R. 105, the Protect Veterans from Financial Fraud Act introduced by our colleague on the Subcommittee, Julia Brownley. It protects veterans from the misuse of their money by a fiduciary by expanding the secretary's authority to pay recompense to a beneficiary that has been a victim of fraud.

H.R. 299, the Blue Water Veterans—Navy Vietnam Veterans Act is brought forward by Representative Valadao, who I see has al-

ready joined us and is on the first panel. This bill enjoys broad bipartisan support from this Congress and I will say I am strongly supportive. I have many veterans in my district who have spoken to me repeatedly about this issue.

It expands the compensation and health care benefits to veterans who served off the coast of Vietnam during the Vietnam War and who have manifested the statutorily defined diseases resulted—related to exposure to herbicides used in Vietnam, such as Agent Orange.

As all of us know, currently, only veterans who have served on land are eligible for the presumptive connection to herbicide exposure.

As this group avails and moves forward toward the Subcommittee markup, I want to thank all the Members for their thoughtful legislation and I want to thank all of our witnesses for joining us today, as well as for your work with us on these bills. I look forward to hearing your testimony. Thank you, and I yield back.

Mr. BOST. I want to thank the Ranking Member. I look forward to working with her on these issues as we move forward.

And I want to let you know that I am honored to be joined with—this morning, by several of my colleagues who are going to testify about the bills on our agenda that they have sponsored. I appreciate all of you taking the time out of your morning to be here with us, for sponsoring legislation to help the veterans.

With us this morning, we have Representative Jim Banks from Indiana, Representative Jack Bergman from Michigan, and Representative David Valadao from Florida. We believe that we will have Representative—from California. Sorry. It is all right; Bob Dole did that. Representative Julie Brown—Julia Brownley will be joining us later, also.

I also understand that Ranking Member Walz wanted to be here today, but had a scheduled conflict. I am asking unanimous consent that his written statement on his bill, which was noticed for this hearing as a draft bill, H.R. 1725, the Quicker Veterans Benefits Delivery Act of 2017, would be admitted in the record.

Hearing no objection, so ordered.

Mr. BOST. Mr. Banks, first off, you are recognized for five minutes to discuss your bill.

OPENING STATEMENT OF HONORABLE JIM BANKS

Mr. BANKS. Thank you very much, Mr. Chairman.

In addition to ensuring that our veterans receive the benefits that they have earned, this Subcommittee is also tasked with ensuring that our Nation's heroes are treated with reverence after they pass. Currently, the VA only covers the cost of transporting a veteran's remains to a national cemetery, but does not pay burial transportation costs to a state or tribal veterans cemetery.

H.R. 1390 would correct this problem and allow the VA to pay the transportation costs, regardless of whether the veteran is buried in a national, state, or tribal veterans cemetery. By doing so, this bill would provide more options for families who are deciding where to lay their loved one to rest. A family may prefer to bury a veteran in a state or tribal veterans cemetery because it is closer

to home, which would allow the family and friends to visit the grave and pay their respects. The bill would remove the financial penalty if a family chooses to inter their relative in a state or tribal veterans cemetery, instead of a national cemetery.

It is incumbent that our Nation never forget the sacrifices that our veterans and their families make each and every day. One way we can honor their service is to ease the burden of a grieving family deciding where to lay their loved one to rest, by offering them more choices.

I ask my colleagues to join me in supporting H.R. 1390, and I yield back.

Mr. BOST. Thank you, Mr. Banks.

I would like to recognize Ms. Brownley for five minutes on her bill. Welcome.

OPENING STATEMENT OF HONORABLE JULIA BROWNLEY

Ms. BROWNLEY. Thank you for considering my legislation, the Protect Veterans from Financial Fraud Act, which will ensure that our veterans receive the benefits they have earned and deserved.

As many of you may recall, my bill passed the Subcommittee in the 114th Congress, but was not brought to the floor for a vote. I am hoping that we can get a home run this year and appreciate that the Subcommittee is holding a hearing on the bill.

As you know, the VA's Fiduciary Program was established to protect veterans and other beneficiaries who, due to injury, disease, or old age, are no longer able to manage their financial affairs. Many veterans who participate in the Fiduciary Program depend on their VA benefits, truly, to make ends meet. In fact, in 2016, the Fiduciary Program served more than 230,000 veterans' survivors and dependents.

My bill would protect veterans and the Fiduciary Program from financial fraud by ensuring that every veteran in the program can recover their benefits in cases when the appointed fiduciary misuses or steals a veteran's benefits.

Under current law, if a VA-appointed fiduciary misuses or steals a veteran's benefits, the VA has the power to remove the fiduciary and we know this is a serious concern. In 2016, the VA conducted nearly 1,500 misuse investigations, of which 764 fiduciaries were removed based upon a finding of misuse of benefits.

However, in many cases, VA can't reissue the benefits to the veterans, who, through no fault of their own, may have been swindled by a VA-appointed fiduciary. This is because the VA can only reissue the lost benefits to the veteran if their fiduciary manages VA benefits for at least nine other veterans. This arbitrary ten-or-more rule means that veterans cannot be made whole, even if the veteran has been taken advantage of by unscrupulous individuals, often those closest to them, who were entrusted with management of a veteran's finances.

My bill will ensure that all veterans who have VA-appointed fiduciaries are treated equally by eliminating the ten-or-more rule, and my bill will ensure that all veterans who have their benefits stolen, can recoup the lost benefits.

I am pleased to see from the testimony that the VSOs here today are supportive of this change and I am glad to hear that the VA

also believes that Congress needs to fix the statutory problem and allow the agency to make all veterans whole.

The VA and our VSOs agree that the existing law is arbitrary because it forces VA to treat two beneficiaries differently and does not provide the same financial protections to all veterans. My bill will correct this in justice. Every veteran participating in the VA Fiduciary Program should be fully protected from fraud and abuse.

I urge my colleagues to support this simple common sense fix and am happy to answer any questions.

Mr. BOST. Thank you, Ms. Brownley.

Representative Bergman, you are recognized for five minutes.

OPENING STATEMENT OF HONORABLE JACK BERGMAN

Mr. BERGMAN. Thank you, Mr. Chairman.

My bill is very simple. It will clarify that the VA has the authority to use mandatory funds to pay for the cost of veterans travel to contract disability examinations.

As you know, a veteran who files a claim for disability benefits may be required to undergo a VA medical examination; however, VA does not have enough examiners to schedule these evaluations in a timely manner. It can be especially challenging for VA to arrange for disability exams if the veteran needs to see a specialist, such as a cardiologist. Furthermore, veterans who live in rural areas often have to travel long distances to get to VA facilities to see an examiner.

To address this issue, Congress gave the Department the authority to contract with non-VA physicians to perform disability examinations. This policy also allows VA physicians to devote more time to care for our wounded heroes, rather than spending time conducting disability exams.

Additionally, using contract examiners has the added benefit of helping VA to schedule disability evaluations closer to the veteran's home. For more than 20 years, VA has been paying for beneficiary travel, regardless of whether veterans who needed disability evaluations used VA facilities or contractor facilities.

This bill would simply codify VA's longstanding practice of using mandatory funds to pay beneficiary travel for contract exams. H.R. 1564 does not add to the deficit, because this money is already included in the baseline.

This legislation will help veterans receive the benefits to which they are entitled by allowing VA to pay beneficiary travel to contract disability examinations.

I ask my colleagues to join me in supporting H.R. 1564 and I yield back.

Mr. BOST. Thank you, Mr. Bergman.

Our colleague, Mr. Valadao, from California is at the witness table. First off, thank you for being here and to discuss H.R. 299, the Blue Water Navy Vietnam Veterans Act of 2017.

Mr. Valadao, you are recognized for five minutes.

OPENING STATEMENT OF HONORABLE DAVID G. VALADAO

Mr. VALADAO. Thank you, Chairman.

Chairman Bost, Ranking Member Esty, Members of the Subcommittee, thank you for allowing me here today to offer testimony

on my legislation, H.R. 299, the Blue Water Navy Vietnam Veterans Act.

Since coming to Congress, I have been a proud supporter of our Nation's veterans and I am excited to sponsor this critical legislation today. The Members of this distinguished Subcommittee have a comprehensive understanding of the harmful effects of the herbicide Agent Orange and the lasting impact it has had on U.S. servicemembers who sacrificed so much for our country during the Vietnam War.

Our government must now ensure that those who were exposed to Agent Orange during wartime are provided for when they return home. In the aftermath of the Vietnam War, the United States Government linked the chemical dioxin in Agent Orange to many harmful and serious medical conditions, affecting those who served in or around Vietnam.

While the Federal government has provided for those who served on Vietnam's soil during the war, those who served in territorial seas of the Republic of Vietnam lack the compensation and treatment they deserve.

In 2002, the Department of Veterans Affairs reinterpreted the language of Agent Orange Act of 1991 to apply only to veterans who actually set foot in the Republic of Vietnam or who served in the inland, round waterways. As a result, the veterans who served off the coast in blue water must now provide service-connection and exposure to Agent Orange, which can often prove a long and burdensome process.

The VA continues to deny claims for blue water Navy veterans, despite studies that show higher rates of cancer and non-Hodgkin's lymphoma among shipboard veterans. While it may be difficult to definitely prove that blue water Navy veterans were exposed to Agent Orange, their higher rates of diseases associated with exposure to the herbicide are cause for alarm. This, combined with studies to show a plausible pathway for the herbicide to have entered the South China Sea are evidence enough that these brave servicemembers were exposed to the herbicide.

Even more alarming, studies also show the distillation process to convert saltwater to drinking water enriched the chemical dioxin in Agent Orange's potency and contaminated the shipboard water system.

My legislation, H.R. 299, the Blue Water Navy Vietnam Veterans Act, would restore the presumptive—the presumption of service-connection for blue water Navy veterans that existed prior to 2002 VA decision. Lifting the burden of proving service-connection from the individual veteran is vitally important, as it places blue water Navy veterans on the same playing field as those who served on land.

These brave men and women of our Nation's Armed Forces have sacrificed their health and often times, their lives, in service to our great country. Providing for them when they return home is the least we can do to show our unwavering commitment to our veterans and appreciation for their service.

Along with myself and my colleague, Ranking Member Tim Walz, this legislation has the support of over 250 Members of Congress and counting, including 16 Members of the Veterans' Affairs Com-

mittee. It is important for Congress to ensure our blue water Navy Vietnam veterans receive the support and care they need.

I thank the Subcommittee on Disability Assistance and Memorial Affairs, and the Veterans' Affairs Committee as a whole, for their consideration of this critical legislation, and I hope that we can work together to provide for our Nation's heroes. Thank you.

Mr. BOST. Thank you, Mr. Valadao.

And we will forego any rounds of questions for Mr. Valadao and any questions that anyone may have for our colleague, may submit them to the record.

I now want to invite the second panel to the table. We are joined today by Ms. Beth Murphy, the director of compensation services at the Veterans Benefits Administration; she's accompanied by Ms. Patricia Watts, the director of legislative and regulatory services for the National Cemetery Administration and Mr. Ralph Erickson, the chief consultant for post-deployment health services at VHA.

Thank you for being here, and Ms. Murphy, you are recognized for five minutes.

STATEMENT OF BETH MURPHY

Ms. MURPHY. Good morning Chairman Bost, Ranking Member Esty and Members of the Committee. We appreciate the opportunity to be here this morning to present views on several bills that would affect VA programs and services.

The first bill I will address is H.R. 105, Protect Veterans from Financial Fraud Act of 2007. This bill would remove restrictions on VA's authority to reissue benefits in cases of fiduciary misuse. Also, it would codify current policy that mental competence determinations are appealable to a Board of Veterans' Appeals and U.S. Court of Appeals for Veterans Claims.

VA supports this bill to ensure equal treatment of all fiduciary misuse victims and allow VA to promptly reissue benefits, thereby minimizing financial hardship to beneficiaries.

H.R. 299 Blue Water Navy Vietnam Veterans Act of 2017 would extend the presumption of Agent Orange exposure to all veterans who served on ships in the territorial seas of the Republic of Vietnam.

VA has concerns with H.R. 299 and cannot support the bill at this time. The bill does not clearly define the terms "territorial seas." VA is also concerned with the September 25th, 1985, effective date of the bill, which would potentially result in many cases with retroactive awards of more than 30 years.

Re-adjudicating old claims and establishing large retroactive awards would be complex and labor-intensive and divert resources from other disability claims.

Lastly, there is continued scientific uncertainty surrounding this issue. At VA's request, Institute of Medicine reviewed all scientific evidence and could not state with certainty that blue water Navy personnel were or were not exposed to Agent Orange. VA continues to review and monitor available scientific evidence on this issue.

H.R. 1328, American Heroes COLA Act of 2017 would permanently authorize VA to implement cost-of-living increases to rates of disability compensation and dependency and indemnity compensation or DIC. VA supports this bill and this is consistent with

the longstanding practice of Congress to enact regular cost-of-living increases and would eliminate the need for additional legislation to implement such future annual increases.

H.R. 1329, Veterans Compensation Cost-of-Living Adjustment Act 2017 would require VA to increase rates of disability commencing in DIC by the same percentage as any increase to Social Security benefits, effective December 1st, 2017. VA strongly supports this bill to ensure the value of benefits keeps pace with the increase in consumer prices.

H.R. 1390, Transportation of Deceased Veterans to Veterans Cemeteries, would increase burial location options, for which VA may make transportation costs for eligible veterans remains.

VA supports H.R. 1390, because in addition to national cemeteries, VA would also pay transportation to veterans cemeteries owned by state or tribal organizations.

Next, H.R. 1564, VA Beneficiary Travel Act of 2017, would direct the use of funding from the mandatory compensation and pension appropriations to pay for travel and incidental expenses associated with contract disability examinations.

VA strongly supports the bill that would codify, clearly authorizing VA to fund a nationwide contract exam pilot program from a single source.

Finally, H.R. 1725, Quicker Veterans Benefits Delivery Act of 2017 would prohibit VA from requesting a C & P examination when a claimant submits medical evidence adequate for rating purposes and would require VA to report on the progress of VA's Acceptable Clinical Evidence or ACE initiative, and submit data for each VA Regional Office, unused by claimants of private medical evidence in support of C & P claims.

The VA does not support this bill, but appreciates the intent to more expeditiously provide benefits to veterans; however, VA currently has a policy of adjudicating claims without a C & P exam if a claimant submits evidence adequate for rating purposes, even from private providers. This practice is grounded in existing statute and VA regulation.

VA is especially concerned with the reporting requirements of the bill. VA tracks the number of ACE exams, but does not track when evidence is supplemented with a telephone interview or when private medical evidence is or isn't sufficient for rating purposes, as this is not a formal determination.

If a C & P exam is requested after receiving and reviewing private medical evidence, VA has determined in its claims adjudication process that the evidence is insufficient for rating purposes.

This concludes my remarks. I would be happy to answer any questions you may have. Thank you.

[THE PREPARED STATEMENT OF BETH MURPHY APPEARS IN THE APPENDIX]

Mr. BOST. Thank you, Ms. Murphy, and thank you for testifying before us today.

I am going to go ahead and go to questions and I will have the first five minutes. Ms. Murphy, can you elaborate, please, on the importance that Congress pass House Resolution 1329; that is the

Veterans Compensation Cost-of-Living Adjustment, and why you think that may be necessary and you are in support of it.

Ms. MURPHY. Mr. Chairman, thank you. This—this is—makes good business sense. It is great for veterans. It makes sure that we keep pace with the economy and make sure that their benefits maintain viability with consumer pricing.

Also, I would tell you behind the scenes, there is some work that has to be done to make those adjustments in our systems every year and when we're waiting up to the minute sometimes for that thumbs-up, it gets a little challenging. So this would just make sure that that cost-of-living adjustment was in place and ensure veterans with confidence that we want to make sure that their benefits remain viable.

Mr. BOST. Well, the next question is similar, but going to the next bill, what do you think of when House Resolution—H.R. 1328—forgive me for the House Resolution—that is my Illinois side that keeps coming back on that, instead H.R. 1328—would provide veterans some peace of mind and to having that COLA so that they know that it is going to occur. What is your reaction, and then the reaction that you think we would get from veterans.

Ms. MURPHY. I think it is a win-win. We would certainly support it. It is something that we anticipate every year and plan for that, but just making—knowing that it will be in place and that that it is not something we have to wonder and guess about, provides confidence for us, provides confidence for veterans and it honors their service, to make sure that they understand that their benefits are important to them and they are important to us, as well, and we want to make sure that they keep pace with economic pricing.

Mr. BOST. My next question is for Dr. Erickson. Dr. Erickson, in the past, VA has stated that one of the reasons it has been so hard to determine whether an Agent Orange presumption should apply to blue water Navy veterans is lack of measures taken at the time of potential exposure.

What efforts has the Department put in place now, to maybe adjust that?

Mr. ERICKSON. Thank you, Mr. Chairman.

Just by way of introduction, I am a veteran as well; I served for 32 years of active duty as an Army doctor. My last assignment was as the commander of the Walter Reed Army Institute of Research. I have been with VA for now, three years.

We recognize that short of inventing a time machine to go back and get those measurements that we don't have in this case, we are being prospective, and so we are actually partnering with the Department of Defense to create something called the Individual Longitudinal Exposure Record, the Individual Longitudinal Exposure Record, or the ILER, for short. This is a fairly large task that we are undertaking that will allow the Department of Defense to actually collect realtime exposure measurements on servicemembers during their time of service.

And this would be information that would be available, then, to health care providers while that servicemember is still on duty and afterwards, to providers who are within the VA system. We think this will take us a long way forward and will correct a major gap right now that we have to deal with. Mr. *Bost.* So, what you just

said is you do have the research available to go back and actually identify those blue water Navy veterans and truly see. And the studies have been done?

Mr. ERICKSON. No, sir. We do not have the ability—the DoD does not have the exposure information. VA does not have the exposure information for blue water Navy, but from today into the future, for future servicemembers, we are actually trying to correct this; realizing that, you know, we didn't do this on a corporate level within DoD or VA for past cohorts of servicemembers, but from here on out, we are working with the Department of Defense to make sure that happens.

Mr. BOST. Okay. Ms. Murphy, one more question for you. Can you please expand on why the VA extended the presumption of exposure of the Agent Orange to brown water Navy veterans, but not blue water Navy veterans.

Ms. MURPHY. So, I will ask Dr. Erickson to supplement any science on this—

Mr. BOST. Okay.

Ms. MURPHY [continued]. —but, essentially, those that had boots on the ground in Vietnam and those in inland waterways share commonality in the types of exposure, extent of exposure that they would have been experiencing, which is differentiation from the amount of types of exposure that they would have had out in the blue water.

Dr. Erickson, can you supplement with the science behind that?

Mr. ERICKSON. Certainly. I think it was based upon the fact that we knew that spraying had occurred along the coasts, in fact, included spraying by riveting vessels that would be going in and out of the rivers and the openings for those rivers. And so there was a fairly strong basis that, in fact, the Agent Orange had been sprayed at those locations.

Mr. BOST. My time has expired. I would like to turn the questioning now over to the Ranking Member, Ms. Esty.

Ms. ESTY. Thank you, Mr. Chairman.

If I could follow up, Dr. Erickson or Ms. Murphy, would it be helpful for us to be more specific on territorial seas? Certainly, there was some discussion, and I am hearing from veterans who I represent, and the mechanisms, maybe, Dr. Erickson, for you about the concentration, the desalination, and do we really know how much exposure there was? Because that is what I am hearing. I have to tell you, frankly, that is what I am hearing a lot about and I am not sure that there has been sufficient attention paid to what that exposure might have been.

Ms. MURPHY. So, Congresswoman, yes, there is some uncertainty in what the definition of “territorial seas” is; it is one of several factors that I mentioned that causes concern with the bill.

Ms. ESTY. Would more specificity help? Because we are facing situations in which we have veterans now, and as you point out, 30 years on, well, it is hard to prove retroactively, but let's be very clear; we sent them into harm's way and they are now experiencing exactly the same symptoms and problems that their colleagues, men and women in arms, were facing on land.

And you can understand our frustration and theirs in saying, like, we don't know enough yet; it is 30 years. You can understand,

there might be a little bit of cynicism about, maybe, we will decide at a point when it is no longer possible to help anybody.

Ms. MURPHY. I can absolutely understand the frustration. I have committed my whole career to serving veterans and finding ways to pay benefits and to do that, we have relied on the fact that there needs to be a rational basis for additional benefits and litigation that we—or regulations that we add in to pay benefits. And we have been searching for that and with blue water Navy veterans and broader-types of veterans to find benefits when there is no rational basis or no science behind it that we can put our finger on.

So, it is something that we continue to look at. We have not had full opportunity to discuss this with the secretary. He is new and he is a physician and understands these issues and has a different perspective possibly, so this will continue—

Ms. ESTY. Okay. Great. I have some other questions.

Ms. MURPHY. Yes.

Ms. ESTY. So, Dr. Erickson, can you speak to a little bit to the desalination issue.

Mr. ERICKSON. Certainly. Ranking Member Esty, you have asked, perhaps, the central question, and we mentioned in our written testimony that there is uncertainty and there is tremendous uncertainty.

We very much respect our Australian partners who have gone to war with us so many times. We respect the scientist who, in fact, did a key study, which a number of us have read and have discussed, in which a laboratory setting involved adding different amounts of various contaminants to include dioxins to a mixture of water. They would then see if, in fact, during the distillation process, if, in fact, it was removed or if it would be co-distilled; it would stay with the water. Not only was it co-distilled, in fact, it was concentrated.

That in itself, provides the conceptual framework for how, in fact, onboard the Australian ships, there could be Agent Orange, and the contaminate of dioxin. And was mentioned by the authors in the article, they had regularly brought in estuarine water, that is water near the shore, so as to have less of a salt content to deal with. And for them, it made sense that that laboratory simulation would represent what occurred aboard the Australian vessels.

As it would relate to the U.S. Navy, I understand from our DoD partners that as a practice, by their standard operating procedures, they would have drawn in water for their distillation from 12 miles out. And so it makes it a little bit harder for this conceptual framework to apply to the U.S. Navy, but as I mentioned at the beginning—

Ms. ESTY. The NVA processing, if you knew for a fact that there were going to be COLA adjustments every year, would that allow us to get more benefits in the hands of—

Mr. BOST. Thank you. And Mr. Bergman, you are recognized for five minutes.

Mr. BERGMAN. Thank you, Mr. Chairman.

Listening to your questions and the responses, we would all likely agree that life is complex and as we try to combine science with what we know to be historical facts or times and place, it is a chal-

lenge. And so I thank everyone for their engagement in combining all the different factors to come up with a different solution.

Dr. Erickson, is the VA working with DoD to conduct a comprehensive review to determine exactly which ships operated in inland waterways of Vietnam?

Mr. ERICKSON. Congressman, General, I very much appreciate this question, and Ms. Murphy could answer this as well. We have a ships list which, in fact, has been collected over, I believe, several decades now. Now, the ships list has over 300 ships listed. This has been an ongoing partnership with the Department of Defense, with the Department of the Navy to look at their records to where their ships transited; when did they come into port, when did they anchor, where were they. And the goal, there, being to actually lower the threshold for veterans.

If, in fact, Navy veterans would be able to demonstrate that they were on a given ship that came into shore, that in itself would bolster their claims.

And please forgive me if I am stepping on your BBA side, here.

Ms. MURPHY. Not at all.

I would say that everybody is passionate about this and this is the business that we should be in; is hearing from advocates, doing research, talking to the experts, talking to our DoD partners, talking to our congressional partners, and really getting as much evidence information and evidence on this topic and other similar topics that are of interest and passionate to veterans, because we want to find ways to pay them benefits, but historically, we have to say no to some folks when there is not a rational basis or the evidence is not there.

So, we continue to look. We want it to continue to be an issue for discussion so that we can get as much information and evidence on this as possible.

Mr. BERGMAN. Okay. But, in placing ships at a certain place at a certain time, is that—you can—is there a chart that shows which ships were in those inland waterways—

Ms. MURPHY. Yes, we maintain a ships list—

Mr. BERGMAN. So, you have an exact list, so then we know, exactly, given our rosters, who was aboard those ships and at what time. So, as the veterans come in and have a certain set of conditions, you can immediately go out to a list and say you were aboard the USS Okinawa LPH3 during the 19—so, therefore, if we all of a sudden have a certain number of people at a certain point in time who have a certain set of symptoms or conditions, it should make—you know, it is not an exhaustive list; it is a finite list, right?

Ms. MURPHY. Congressman, yes, we have a ships list. There are several hundred ships, different categories of ships. We have gathered evidence and research in supporting putting those ships on the list.

And we review it quarterly. We get information from DoD and recently I think we added 10 or 15 ships to that list.

So—and by certain date ranges is applicable and if a veteran comes in and we can identify—you know, we can connect the dots and say, this ship is on the list, we can place that veteran on that ship during that timeframe that is applicable, then we extend that presumption to them, yes.

Mr. BERGMAN. Okay. And I am glad that you used the term “connect the dots” because that is a lot of what we do in so many different ways here is to connect the dots. And if we do it with data, which it seems like we have, then we are going to get the best results.

Mr. Chairman, I yield back.

Ms. MURPHY. Thank you.

Mr. BOST. Thank you, ma’am.

Let me put on the microphone. Mr. Sablan, you are recognized for five minutes.

Mr. SABLAN. Thank you very much, Mr. Chairman, and Ranking Member Esty for holding today’s hearing and good morning, everyone.

I just have a few questions and maybe this one would go to Ms. Watts first, if you don’t mind. Ms. Watts, under H.R. 1390, regarding the transportation of certain deceased veterans—and I really don’t know the answer, which is why—would 1390 include the territories under definition of states, because it says states or tribal cemeteries.

In my jurisdiction, we have one VA cemetery, but it is—it belongs to the commonwealth of the territory that I am from.

Ms. WATTS. Thank you, Congressman.

I believe that there are territories that do have state—what we consider state veteran cemeteries.

Mr. SABLAN. So, under state, territories are included.

Ms. WATTS. They fall in the definition of the state.

Mr. SABLAN. And Northern Mariana would be included under H.R. 1390?

Ms. WATTS. Potentially, yes. And we would—there are certain state veterans—state and tribal cemeteries that we provide grants—the VA provides grants to allow them to maintain those cemeteries.

Now, that doesn’t mean—I’m sorry.

Mr. SABLAN. Not for the Northern Mariana. Yeah, you don’t even provide—

Ms. WATTS. Not every state or territory has such a granted cemetery; that is correct.

Mr. SABLAN [continued]. So, would it be asking too much to maybe sit down with us and consider including the territories or in particular, if all the territories, except the Northern Mariana are included, would it be—

Ms. WATTS. We would be more than happy to have any discussion that you would like to have.

Mr. SABLAN. Well, thank you. I appreciate that.

Ms. Murphy or Dr. Erickson, would you please—would H.R. 1564, the VA Beneficiary Travel Act, would the transportation costs be authorized if the veteran were required to travel by sea or by air? I mean you can’t drive around in, for example, for disability exams.

You know, if a patient from—I come from a place where there are 14 islands; three are inhabited primarily, so there is always a requirement for two of those islands, at least, to travel either by sea or by air to come and see a doctor.

Ms. MURPHY. So, Congressman, as far as the beneficiary travel, we have been working with contract vendors to establish locations around the country and around the world for examinations. The contract—where the contract vendors are located, we are paying for beneficiary travel to go to those contract vendors, but if that is not a location that is accessible to a veteran or it is not some place that we would send them, then we would be relying on VHA to provide that examination and then we would have to turn to VHA to look to its beneficiary travel rules for that.

I will say, also, that we do have our disability benefit questionnaires that we do accept from private providers. So, if someone were to take a DBQ to their private local provider and it were to be filled out by a licensed clinician, we would certainly accept that, as well.

Mr. SABLAN. All right. I am actually putting together a story, sort of—cases, different situations that I would like to work with the Veterans Administration to get some answers if possible. But thank you for that answer.

Ms. MURPHY. We would be happy to work with you and talk with you more about that.

Mr. SABLAN. I appreciate that thank you.

I have just one more question, again, Ms. Murphy or Dr. Erickson. In a jurisdiction—and this is on H.R. 1725—in a jurisdiction where there are no VA health centers or VA clinics, wouldn't it be reasonable to allow medical or private practitioners' opinions to be sufficient for rating purposes and not require veteran to travel by sea or by air for an examination to see a VA doctor; otherwise, you have to send him to Honolulu and, of course, sometimes they have to—there are many instances that I am aware of, where they put up their own money to go a center, for example, or try and see a doctor in Guam, if they can.

And I don't have the time, but—

Ms. MURPHY. Congressman, that is absolutely an opportunity they have. We accept private medical evidence and if it is sufficiently comprehensive and answers all the questions that we need for rating purposes, we use that.

Mr. SABLAN. I understand. Okay. Thank you.

Thank you, Mr. Chairman, I yield back.

Mr. BOST. Thank you.

There is no one else on the dais seeking to ask questions. We want to thank this panel for being here today, Ms. Murphy and everybody involved. Thank you so much.

And we want to invite up the third panel.

I want to thank you as a panel for being with us. Mr. Zachary Hearn is with us, the Department of—I'm sorry—the Deputy Director for Claims of Veterans Affairs and Rehabilitation Division of The American Legion; Mr. Rick Weidman, the Executive Director of Policy and Government Affairs for the Vietnam Veterans of America; Mr. Patrick Murray, the Associate Director of National Legislative Services for Veterans of Foreign Wars; and Mr. Leroy Acosta, the Assistant National Legislative Director of the Disabled American Veterans; and also, Mr. John B. Wells, the Executive Director of Military Veterans Advocacy, Inc.

First off, I want to thank you all for being here and for working—for the work you and your organizations do every day to improve the lives of our veterans. We want to thank you for that.

Mr. Hearn, we will begin with you and you are recognized for five minutes.

STATEMENT OF ZACHARY HEARN

Mr. HEARN. Good morning. The simple fact is, serving in our Nation's Armed Forces is inherently dangerous. Medical conditions may manifest due to service and we, as a society, have an obligation to compensate for medical conditions related to service.

Many of these veterans depend upon these benefits and for this reason, it is imperative that we ensure these deserving veterans and their family members receive the highest level of consideration.

Good morning, Chairman Bost, Ranking Member Esty, and Members of the Subcommittee. On behalf of National Commander Charles E. Schmidt, and the Nation's largest veteran's service organization, we welcome the opportunity to testify regarding pending legislation.

The American Legion supports the passage of H.R. 105, designed to protect veterans from the unscrupulous acts of fiduciaries. Veterans requiring fiduciaries are some of the most vulnerable veterans. Half of these veterans are over 80 years old. All of them are unable to manage their financial affairs.

Veterans who have been impacted by poor-acting fiduciaries do not have the ability to recoup their lost funds from VA unless the fiduciary represents 10 or greater beneficiaries. This bill would now permit VA to provide the lost funds to the veteran, regardless of the amount of beneficiaries represent by a fiduciary.

H.R. 299 corrects a wrong that has played the blue water Navy veteran community and affords the veterans the benefits—the benefit of doubt to herbicide exposure.

Over 800,000 blue water Navy personnel served in Vietnam's territorial waters between 1962 and 1975. VA has repeatedly stated that there is no conclusive evidence that supports presumptive herbicide exposure.

The Institute of Medicine's Committee on Veterans and Agent Orange stated that there were no environmental studies conducted during the Vietnam War, and due to that fact, it cannot determine the occurrence of herbicide exposure.

In short, VA cannot prove blue water Navy veterans were exposed to Agent Orange and it appears they never will. Blue water Navy veterans, for years, have pointed to the 2002 Australian study that found that distilling of sea water not only failed to eliminate the toxic chemicals, but it enhanced it is impact. For a blue water Navy veteran to gain service-connection due to herbicide exposure, proof has to be provided that exposure occurred.

VA is essentially directing veterans to provide proof of exposure to a chemical that few knew of its impact half a century after the incident. As you can imagine, this is a near-impossible task. The American Legion has long believed that these veterans of the blue water Navy deserve to be treated as presumptively exposed and supports this bill.

H.R. 1328 provides an automatic annual cost-of-living adjustment for veteran's disability benefits. While this bill would prove efficient in the administration of COLA, it would also come as a significant cost to the veteran, as it uses the chain CPI as its foundation.

The current CCPI COLA formula suggests a 30-year-old veteran with no children and one hundred percent disabled, would likely lose about \$100,000 in disability compensation by the time that the veteran reaches 75 years of age. This is the equivalent of years of benefits lost, due to this bill.

The American Legion opposes this bill and any legislative efforts to automatically index COLA to the COLA-authorized for Social Security recipients, nonservice-connected disability recipients, and death benefits.

H.R. 1329 increases the rate of compensation as of December 1, 2017, for veterans with service-connected disabilities and surviving spouse benefits. When inflation impacts the cost-of-living, it is natural to adjust benefits according to the increases. The American Legion supports this bill.

H.R. 1390 authorizes VA to pay costs associated with transporting deceased veterans to state- or tribal-owned veterans cemeteries. VA currently pays transportation costs only for national cemeteries. This bill will expand options for veterans' families and The American Legion supports this bill.

H.R. 1564 specifies the funding source for travel related to examinations by medical professionals, not employed by VA for compensation and pension examinations. This bill properly designates where VA draws funds for veterans to receive payments for travel to C & P exams and does not impose additional funding requirements. We support this bill.

H.R. 1725 improves the treatment of medical evidence provided by non-VA medical professionals supporting disability compensation claims. It is unfortunate that a bill has to be passed to force VA to do what it already has the authority to do.

The American Legion regularly reviews VA adjudications and frequently, VA schedules exams, despite having the necessary evidence available to decide a claim. This second exam comes at a cost to VA and delays an adjudication.

Additionally, this process is often frustrated by raters' near-whole dependence upon its evaluation builder tool, it doesn't allow for the weighing of evidence. This bill allows for a streamlining of adjudications through rating based upon Acceptable Clinical Evidence and The American Legion supports the bill.

Again, on behalf of National Commander Charles E. Schmidt and the 2.2 million members of The American Legion, we appreciate the opportunity to speak this morning on today's bills. I will be happy to respond to any questions provided by the Committee. Thank you.

[THE PREPARED STATEMENT OF ZACHARY HEARN APPEARS IN THE APPENDIX]

Mr. BOST. Thank you, Mr. Hearn.

Mr. Weidman, you are recognized for five minutes.

STATEMENT OF RICK WEIDMAN

Mr. WEIDMAN. Thank you, Chairman Bost. I look forward to getting to know you particularly in this new role.

And Ranking Member Esty, I hear such great things about you from Linda Schwartz and our folks in Connecticut. They think you can walk the entire length of the reflecting pool in front of the Lincoln Memorial without getting wet, so I look forward to getting to know you.

I will comment just on two bills today. And we favor most of, actually, all of the bills that are on the docket for various reasons. First, I will touch on the Protect Veterans from Financial Fraud Act.

The fiduciaries at VA have been a scandal for as long as I can remember and VA already has the statutory authority to investigate and to bring charges against those that are stealing from veterans that are not able to defend themselves, but they have not done it. And while we favor this particular act, what is really necessary is oversight hearings that demand that they follow the statute and the regulations pursuant to the statute to safeguard those individuals, most vulnerable of our veterans.

So, I just want to say that as a start, and that you are going to accomplish, I believe, much more in passing the legislation—we have no problem with that—but I encourage you, Mr. Chairman and Madam Ranking Member that you pursue some oversight hearings on this.

The Blue Water Navy Vietnam Veterans Act, Institute of Medicine, in every review they have done since—without evidence, the VA said no more blue water Navy. And to show you how absurd their definition is, they draw an imaginary line across Denang Harbor and if, in fact, you are here in the water, you are not exposed, and if you are here in the water, two feet away, you are exposed. It is preposterous; it is not scientific evidence. It is simply wanting to say no.

Vietnam veterans generally believe that the policy of the VA, when it comes to any kind of toxic exposure, but particularly Agent Orange, is delay, deny, and wait for us to die. And, frankly, there is very little to controvert that.

Almost everything in the environmental hazards and public health section of VA, may be really nice people who are good to their family, but by God, they are not proper arbiters of science and they just simply aren't.

The Institute of Medicine study that was done, they were—in the charge, was to find out whether or not it was plausible and they did find out that it was plausible. They did replicate the experiment of the concentration of the dioxin and found out it was correct.

That is the first time that IOM, as part of one of their reviews that I know of, where they have actually gone and done original scientific experiment in order to see for, themselves, what is the deal. The—when the report came out, they said, yes, it is, in fact, plausible and, in fact, we believe it happened.

As you may know, and everybody should understand, Agent Orange, Agent Pink, and the other defoliants were mixed with a mixture of kerosene and JP4. And what does that do when it hits

water? It floats near the surface. It floats near the surface way the heck out to sea where it would then be picked up.

Although Agent Orange is not water-soluble, in fact, it is water dispensable, and that is what happened, because it was wrapped in the envelope of those petroleum products that did, in fact, keep it near the surface.

Coming back to the IOM study, they were charged with finding out whether there was a mechanism whereby people could be exposed. And they showed that that was the case, under pressure from VA. Then turned around and said, well, we can't really make any recommendation on this because we have no idea how much folks were exposed.

And we said, so what? You have no idea how much I was exposed in Icor, northern part of the Republic of Vietnam, otherwise known as South Vietnam versus my colleague, who served in For Cor with the Ninth Infantry Division down in the southern part of Vietnam. And VA decided with the assistance, shall we say, of the Congress in 1991 to say, this is absurd, we are never going to figure out who was exposed and not. Let's look at the effects of this thing.

And the VA, since the blue water Navy, they have tens of thousands of Navy vets who used VA services; it is very easy to find out who has a Southeast—or Vietnam service medal and who does not. And if those who do not who served on a similar vessel in the Atlantic or the Mediterranean, compare their health to those who have a Vietnam service ribbon. This is not a hard thing to do. It is not an expensive thing to do, but they haven't even requested that it be done.

And we are with the National Academy of Medicine in recommending that they be restored. We know, as valuable and as important and as righteous as bill is, because of offsets, it probably won't be able to bring it to the floor.

But all of you on this Committee, on a bipartisan way, should pressure the secretary to say, this is absurd; include these veterans back in. They—Congress in 1991 intended for them to be in.

So, I am over time. I thank you for your indulgence of the extra one minute and four seconds sir.

[THE PREPARED STATEMENT OF RICK WEIDMAN APPEARS IN THE APPENDIX]

Mr. BOST. Thank you, Mr. Weidman. And with that we will recognize Mr. Murray.

STATEMENT OF PATRICK MURRAY

Mr. MURRAY. Chairman Bost, Ranking Member Esty and the Members of the Subcommittee, on behalf of the men and women of the Veterans of Foreign Wars of the United States and our auxiliary, thank you for the opportunity to provide our remarks on legislation pending before the Committee.

The VFW supports Blue Water Navy Vietnam Veterans Act, which would require the Department of Veteran Affairs to include territorial seas as part of the Republic of Vietnam, extending presumptive service-connection and health care for Agent Orange related illness to Blue Water Navy Veterans. Currently VA relies on what the Court of Appeals for Veterans Claims has called arbitrary

and capricious interpretation of inland waterways which unjustly denies veterans who served aboard ships in the coastal waters of Vietnam the benefits they deserve. The VFW believes that Blue Water Navy Veterans were potentially exposed to significant level of toxins and should be granted the same presumption of service-connection as their counterparts who served in the inland waterways of Vietnam.

The VFW strongly supports the American Heroes COLA Act and the Veterans Compensation Cost of Living Adjustment Act, which will increase VA compensation for veterans and survivors and adjust other benefits by providing a cost of living adjustment. The VFW is pleased to support any bill increasing COLA for our veterans. However, we would prefer to make COLA increases permanent and automatic. Disabled veterans, along with their surviving spouses and children, depend on their disability compensation plus dependency and indemnity compensation to bridge the gap of lost earnings caused by the veteran's disabilities. Each year veterans wait anxiously to find out if they will receive a cost of living adjustment. There is no automatic trigger that increases these forms of compensation for veterans and their dependents. Annually veterans wait for a separate act of Congress to provide the same adjustments that is automatically granted to Social Security beneficiaries.

The VFW supports the Protect Veterans From Financial Fraud Act, which provides the ability of veterans assigned fiduciaries to be compensated for having their money mishandled or misused. We see this bill as a common sense method to protect some of our most vulnerable veterans. If a veterans assigned a fiduciary for whatever reason, they need help and financial protection. And individuals who mistreat or prey upon their clients should be held accountable and compensation must be made to those affected. To go further, the VFW supports adding legislation that installs criminal penalties for those found to be intentionally preying upon veterans for any other financial gain. We would like to see this expanded to any attorneys or claims specialists that charge a fee to process initial claims. Abusing the health and financial welfare of veterans in need should be punishable by law.

The VFW strongly supports the Quicker Veterans Benefits Delivery Act in order to help diminish the workload within VA. The VFW recognizes that the VA should still be the primary driver in taking care of patient's examinations. But we also realize that using third party medical evidence that the VA—I am sorry—to help is necessary to reduce the workload. Until the backlogged files begin to diminish within the VA, they should continue to utilize private physician's evidence to help shrink the number of claims and appeals. Veterans should not have to see another VA doctor in order to review and confirm private outside doctors' findings. This only adds to more confusion and clogs up the system. The VA needs to allow acceptable clinical evidence from competent credible physicians and not force veterans to seek a second opinion from a VA physician.

While the VFW supports this bill, we do not feel it covers one of the most important medical issues facing veterans today, which is mental health. If the VA allows third-party physicians to examine

veterans for almost all physical conditions, they should also utilize the appropriate medical professionals to examine mental health. Mental health examinations are increasing every day. And the VA insisting on patients seeing only VA doctors for initial examinations is increasing the burden on their own system. Initial mental health examinations should be added to the type of evidence accepted by VA examiners.

Mr. Chairman, this concludes my testimony and I'm prepared to take any questions you may have.

[THE PREPARED STATEMENT OF PATRICK MURRAY APPEARS IN THE APPENDIX]

Mr. BOST. Thank you, Mr. Murray. With that, we will go to Mr. Acosta.

STATEMENT OF LEROY ACOSTA

Mr. ACOSTA. Thank you, Chairman Bost, Ranking Member Esty and Members of the Subcommittee. Thank you for inviting DAV to testify at this legislative hearing of the Subcommittee on Disability Assistance and Memorial Affairs. As you know, DAV, a non-profit veteran's service organization comprised of 1.3 million wartime services able veterans is dedicated to a single purpose, empowering veterans to lead high quality lives with respect and dignity. I am pleased to be here to present DAV's views on the bills under consideration by the Subcommittee.

H.R. 105, Protect Veterans From Financial Fraud Act of 2017 would require the VA to repay veterans those benefits that were misused by fiduciaries and establishes an appeals process for determinations of veterans mental capacity. DAV does not have a resolution specific to this issue. However, we would not oppose passage of this legislation.

H.R. 299, the Blue Water Navy Vietnam Veterans Act of 2017 would expand the definition of the Republic of Vietnam to include its territorial seas for the purposes of the presumption of service-connection for diseases associated with herbicide exposure. The benefits under this bill would be retroactive to September 25th, 1985. DAV supports H.R. 299 based on DAV Resolution Number 18, which calls for the addition of the territorial waters of Vietnam to be included in the presumption of exposure to service-connection for herbicide related disabilities.

Mr. Chairman, DAV Resolution Number 13 calls on Congress to support legislation to provide a realistic increase in disability compensation. DAV supports the provision in H.R. 1328 and H.R. 1329, which would increase veterans' disability compensation, survivor benefits and clothing allowances by the same percentage as Social Security benefit increases. However, DAV is concerned about the automatic adjustment provision in H.R. 1328. This may adversely affect congressional oversight meant to protect against the erosion of these critical benefits, particularly in years where there are no COLA increases, such as in 2015, or minimal increases, such as in 2017.

H.R. 1390 would permit the VA to cover the costs associated with the transportation of deceased veterans not only to national cemeteries, but also to other recognized veteran cemeteries. DAV does

not have a resolution specific to H.R. 1390. However, we would not oppose its passage. This legislation would benefit veteran survivors by helping to offset the cost of transporting the veteran to their final resting place.

H.R. 1564, VA Beneficiary Travel Act of 2017, would amend Section 504 of the Veterans Benefits Improvement Act of 1996 to specify the funding source for travel related to examinations by physicians not employed by the VA regarding medical disabilities of applicants for VA benefits. DAV does not have a resolution. However, we would not oppose passage of this legislation.

The Quicker Veterans Benefits Delivery Act of 2017 would amend Title 38 U.S.C. to improve the treatment of medical evidence provided by non-VA medical professionals in support of veterans' claims for disability compensation. Mr. Chairman, DAV is pleased to provide our support of this bill, consistent with DAV Resolution Number 230, which seeks the enactment of legislation that would require VA to consider private medical evidence supplied by licensed private health care providers in private practices. This bill would give due deference to private medical evidence that is competent, credible, probative and otherwise adequate for rating purposes.

Mr. Chairman, this concludes my testimony. And I'd be pleased to address any questions related to the bills discussed today.

[THE PREPARED STATEMENT OF LEROY ACOSTA APPEARS IN THE APPENDIX]

Mr. BOST. Thank you, Mr. Acosta. Then we want to move on to Mr. Wells. You are recognized for five minutes.

STATEMENT OF JOHN B. WELLS

Mr. WELLS. Thank you, Mr. Chairman, Ranking Member Esty. My name is Commander John Wells, USN retired. And I appreciate the opportunity to testify. We are going to talk mostly about Blue Water Navy Vietnam Veterans Act. I talk a little fast, especially since I'm going to try to go over some of the questions and red herrings given by the VA in their testimony to provide some real answers.

First of all, I know that they are interested in the definition of territorial seas. That is set by treaty, 1958 Convention on Territorial Seas in the Contiguous Zone, which has been ratified by the United States Senate. And ratified treaties become part of domestic law. We also recognized the territorial seas and Vietnamese sovereignty over them in the 1954 Geneva accords and the 1973 Paris peace treaties. And court decisions of the Fifth Circuit and the Supreme Court of the United States specify that we will follow the definition of territorial seas.

To make it easy, in Attachment One to my testimony we have shown you where the territorial seas is. It's the dashed line in there. So we would ask that that be made part of the legislative history of this so the VA won't define territorial seas as some lake in the middle of Hanoi.

The 1985 date was picked because of the effective namer. You won't be adjudicating cases back to 1985. But if there are new diseases which come about, we would get the same benefit of namer

as our army and brown water brothers would. In effect, these rights were stripped away from us by the VA in 2002. So you won't be looking at anymore claims until—2002 would be the earliest date. And many of those claims have expired, and unfortunately many of the veterans have expired as well.

As far as the time to adjudicate these claims and so on a so forth, Mr. Chairman, Ranking Member Esty, Members of the Subcommittee, we are the backlog. We have kept those going. Okay. And if you pass this bill and give the presumption there is going to be a whole lot of the cases in the appellate backlog and in the individual claims backlog that can be immediately adjudicated and corrected. So and that is the truth of the matter.

The VA talked about cost. They threw out a 900 and some million dollar figure I think for the first year. No, that is not the case. And Attachment Five to our testimony gives the CBO estimate of 1.104 billion. And I have seen them give up costs of 20 billion. I have seen them given costs of 4.4 billion is what they told the Senate in the last Congress. Let's look at what the CBO says, 1.104 billion. I have met with the CBO. If anything, and they will agree with this, it is probably a little high at this time because of the ships added to the ships' list.

And by the way, the DoD and the VA are not working together on that. That is input coming from organizations such as the Blue Water Navy Vietnam Veterans Association and some other organizations that do it. There is one guy in Cleveland, Jim Sampel, who does it part time. So, General, in answer to your question, no, they are not doing what they should, is going out and saying, hey, Navy, where were the positions of these ships vis-a-vis Vietnam. We did have a bill that passed the House twice. It would have done that two congresses ago. We haven't brought it back up again. We would sure like to see it brought up again because that would help us identify some more ships that had gone in the river.

Ms. Murray talked, I am sorry I am talking fast, Ms. Murray talked about, Murphy, excuse me, talked about rationality and there has to be a rational basis. We agree with that, we certainly do. But what she didn't mention was the Court of Appeals of veterans' claims in a case called *Gray v. McDonald* came out and said that the exclusion of the bays and the harbors are just simply irrational and, as somebody mentioned, arbitrary and capricious.

Now, they say there is no evidence that the Agent Orange got there. Mr. Chairman, I have shown you and probably half the people sitting up there Exhibit Two to our testimony, which shows where the bottom sediment samples were taken in Naktong Harbor, and Exhibit Three, which shows the toxicity levels 20 years after the war. So they can't say it is not there. They don't mention the water barges, which were taking water from Da Nong Harbor's Monkey Mountain, this area up here that looks like it is low land, it is actually jungle. Was sprayed throughout the war. There is a reservoir there. That water was taken on and your staff has all this information. And they took it around to the ships.

And by the way, let's talk about another fallacy. They say that the Australian study was invalid because U.S. Navy ships did not make potable water within 12 miles of shore. That is not true. There was a manual in the medicine depart—publication which

suggested it. But I know for a fact, and I was a chief engineer on a number of these ships, water was my business, that they did make water, even potable water, in some of the harbors and certainly close to shore. They had to, to keep the water tanks going. More importantly they always made feed water for the boilers. And guess what, it is the same distillation system down to the final discharge valve. And we have told the VA this before, they know it. Okay. So that even if they were only making water for the boilers, it would still have been contaminated water. Okay.

And I am sorry, I am starting to pull a Rick Weidman here and go over time. But just a couple other quickies. As far as studies go, the Australian Cancer Incident Studies shows a much higher rate of cancer incidents among those that were in the Navy as against those that went to shore. And the CDC's Non-Hodgkin's Lymphoma Study says the same thing.

And by the way, the Institute of Medicine, the VA will always misquote this. In the sentence that they say is they can't say definitely that there was no Agent Orange exposure. The very next sentence says "There is no more or less evidence to show exposure of Blue Water Navy than there was the brown water or the people ashore." This was never about science. It was about a bad general counsel's opinion. And when we called him on it, they circled the wagons and they still do.

I do have a meeting coming up with Secretary Shulkin on April 21st and we have oral argument on a court suit coming up on May 5th. So we are pursuing all matters. I understand I am over time. Shows I can talk longer than Rick. But the problem is there is so much to cover. But, you know, Mr. Chairman, we have plenty of money to send those guys to war. We should be able to pay for them when they get back. I put some ideas in my written testimony. The Senate has shot us down on a couple. But frankly, we don't care how you pay for it, but you need to pay for it. These guys are dying and their families are being left destitute because of medical bills. We owe them better than that. Thank you, Mr. Chairman.

[THE PREPARED STATEMENT OF JOHN B. WELLS APPEARS IN THE APPENDIX]

Mr. BOST. Thank you, Mr. Wells.

I'm going to go to questioning now and I will yield myself five minutes.

First question is for the panel as a whole. Okay. And before we get to a lot bigger subject, but this is just real quick. This question is for all witnesses, as I said. How would veterans and their families benefit assuming they received a COLA next year? Mr. Hearn, we will start with you.

Mr. HEARN. They would certainly benefit by adjusting for the cost of inflation. I guess I am kind of confused as to where you are going with the question. I mean if the cost of living goes up, it is only natural that Congress responds accordingly and provides that compensation increase.

Mr. BOST. Okay. Maybe I should expand on—I think in your testimony, the concern you had was that you feel that Congress needs to make an every year?

Mr. HEARN. Correct. As far as the—the concern that we have is dealing with the chain CPI. And if you project that going out over decades, the amount of money that is lost, and the one sample that we used was it would be roughly about \$100,000 over a 30 or 40 year span. I pulled up the average income for one of your residents in your district. Okay. That's roughly \$30,000 I think, somewhere in that area. That would be three years' worth of salary for your average constituent. So that is a sizeable amount of income. I mean obviously it would vary between the Ranking Member and yours, but—

Mr. BOST. Of course.

Mr. HEARN [continued]. But nonetheless it would still be a costly endeavor over decades.

Mr. BOST. Let me ask this. And you know that I am going to do everything I can for the veterans. It is just—

Mr. HEARN. Yes. Oh, I know.

Mr. BOST [continued]. —trying to do the thing that is right. My concern that I have when you say, okay, don't do this, is then you are just depending on Congress to make a decision, rather than setting something in place that actually guarantees and gives some sense of that there is going to be that COLA. And it is the same thing with Social Security. I was a little concerned in your testimony when you said that you—

Mr. HEARN. Well, I mean, and the American Legion's position is pretty simple. It is that the veterans didn't provide a diluted service to their country. And that this would provide a diluted benefit if you are talking about that over decades. And I understand what you are—where you are going with this. But I also know that \$100,000 is a sizable amount of income. And I agree, we are relying upon Congress and sometimes Congress doesn't get along very well. But over time that we also don't want our veterans to be harmed just in the need of efficiency. If 30 or 40 years we look back at this testimony today and said we harmed our veterans, I don't think any of us in this room would feel good.

Mr. BOST. And then I want to go down the panel with the same question. But the only thing I would say is, is one thing that we are known for, and that is the big fear, is that if we do nothing, nothing will be done.

Mr. HEARN. Right.

Mr. WEIDMAN. VVA favors the automatic. We do, however, think that really should take a hard look at the basic level, particularly at the 80—70, 80, 90 percent level and as well as 100 percent. It is—if in fact somebody is 100 percent in a metropolitan area like Washington, what you are doing is guaranteeing people will be below the poverty line for the rest of their life. And that is just not right.

Mr. BOST. Right.

Mr. MURRAY. The VFW simply supports the automatic increase in COLA. We think it is easier on the recipients, it is easier on Congress, so we don't need to be sitting here every year doing this.

Mr. ACOSTA. Many service-connected disabled veterans rely on their disability compensation for their livelihood and to take care of bills, apart from their civilian counterparts. It is important that

we get a realistic increase in those benefits so they can realize life in the country that they served.

Mr. BOST. Mr. Wells?

Mr. WELLS. Automatic is good. That way we don't have to fool with it. You don't have to fool with it. And it gives you all more time to kind of concentrate on some other things. So we support it.

Mr. BOST. Yeah. Okay. I'm running short on time. I know now it is going to run over. And then I don't want to be thrown off like the Chairman said. But let me tell you that this is an important question to ask. And all of us I think are fighting for the same goal, but we have got to ask it. Last Congress CBO estimated that the legislation for the Blue Water Navy would be a \$1.1 billion offset in mandatory funds. To avoid adding to the deficit and then we fall under the existing rules that we have here. Though many of us, probably all of us on this panel would want to make sure that would happen. The question that I have is, and I know that, Mr. Wells, you said you didn't care where it come from. We have to care where it comes from. And even though I love my veterans more than anybody else I fight for and will continue to do that, we have to have that answer. So, what, any, suggestions do you any Member of the panel have? Mr. Weidman?

Mr. WEIDMAN. We went to war on a credit card. The war in Iraq and Afghanistan is the first time in American history where we have had a tax cut, in fact two, during wartime. So we didn't make the commitment to pay for the darn wars. Instead we took it out of OCO, which is nothing but an unsecured credit account. If you can go to war without having to find an offset, then, by God, you ought to be able to pay for those torn up in that war without an offset.

Mr. BOST. Okay. Maybe the follow up question to the rest of you as well, and I know I am out of time, but I am going to be like the two on the panel. The question is, is there something we can work on in the bill that would actually be something that we could argue that would bring the cost in paperwork down? You understand what I am saying? So that the estimated cost, if we don't agree with the estimated cost, maybe we think that, okay, well, the assumptions are a little bit high or something like that, so that we can come back and deal with the argument on what the costs are. And like I said, I want to, if they do it, I want to be paying for them.

Mr. WELLS. Mr. Chairman, there are several things. First off, you know, I do have the meeting with Secretary Shulkin. It is possible that he would just restore the benefits, in which case it become under appropriations and the cost of the bill would go to zero. Secondly, we do have our pending oral argument in the Court of Appeals for the Federal Circuit. If we win that case, then the bays and the harbors would be covered. We would estimate that about 90 percent of the ships would be covered. And our estimate of the ten-year cost would then fall down to about between 100 and 150 million over ten years, but assuming we cover everybody that went in the harbors.

But here is the kicker. And, yes, you have to understand it is hard for me to go back and talk to my veterans and say, you know, and explain the Paygo Act to them.

Mr. BOST. I understand that.

Mr. WELLS. Because they're the ones that are dying. I understand Paygo. Okay. I think it's done a great job in a lot of ways. But now this is something that we really have to look at because there is not a lot of mandatory spending left in the VA budget. There was some in the home loan. We suggested that and it got sucked up into the Choice Act. There are going to be some automatic offsets, which I'm not sure CBO has applied.

First of all, people that are now eligible for non—for a veterans pension, okay, if they served in time of war and make I think it's less than about \$14,000 a year, they get a veterans pension. That would be offset by the benefits. And so there would be a dollar for dollar recovery there. Secondly, anybody who has retired and is getting a retirement pension if their disability is 40 percent or less, there would be the VA waiver, which would be a dollar for dollar offset. We don't know what those numbers are because VA won't give us the figures. But there's other things that we need to look at.

A number of people went ashore. Now, they have problems proving that, and VA will want, you know, 20,000 affidavits and a video to show they were ashore. But probably about any one time, about ten percent of the fleet went ashore. They had to go see the doctor, the dentist, the lawyer, the chaplain, call home. They got transferred on and off. They made a mail run into the harbor. You got boat crews. You got helicopter crews, you know, go pick up some supplies, whatever. There's a number of those people. And there's no way to determine those numbers.

Mr. BOST. Right.

Mr. WELLS. But, you know, our estimate is about, based on facts, is about ten percent, okay, that those are going to be offset.

Now, the other thing is if some of these folks are picked up under the VA system there was a CBO report that came out in December of 2015. I realize this is—I may have the year wrong, it may have been 2014, but I realize this is discretionary spending, not mandatory, but says it is about 21 percent cheaper to send somebody through the VA system than it is to do Medicare reimbursement, which makes some sense. I mean if you've got Tricare for life as your secondary, it is probably even more than 21 percent. Those are old numbers, it was before Choice. But, you know, it is still a factor. Okay. All that being said—

Mr. BOST. Mr. Wells—

Mr. WELLS [continued]. Right. Can I make the bill self-pay for itself? No.

Mr. BOST. Let me go ahead and use—switch over to Ms. Esty because I almost went five minutes over on my time; I said I wouldn't do that. But just I think it is vitally important. So, Ms. Esty, it is your turn.

Ms. ESTY. Thank you, Mr. Chairman. We will pick up with this. And Mr. Weidman, I definitely cannot walk on water, guaranteed. But Linda Schwartz is awesome and we are happy to have her back in Connecticut and are going to be using her as a resource for this Committee. And her passion and commitment around Agent Orange is in part what inspires me and helps me work every day on this.

So we are going to pick back up, Mr. Wells, with figuring out how we are going to pay for this because one of the things I think is important to note, and all of you have referenced this, is this cost of the system of trying to determine who is in and who is out. And that is part of the reason for presumptive. And I am not sure that the CBO scoring is really looking at that. And again, you are all right, everyone is happy to be there when we send our troops to war. And we need a solemn commitment to take care of them when they come home. That is part of the reason we need to be all over them right now I think on burn pits to not repeat with the current veterans what has happened with this delay, delay, deny for Vietnam vets. So if you pick back up—

Mr. WELLS. Yeah, thank you, Ranking Member Esty. You know, one of the things is the Blue Water Navy is the tip of the spear. There is plenty of other Agent Orange exposures which we can go through at length. There is burn pits, there is Fort McClellan, there is all kinds of toxic exposures. In our written testimony we present—we recommended a brand new funding source we think to cover all toxic exposure research, kind of a follow on to what was passed last year, and toxic exposure benefits for burn pits, Fort McClellan and so on so forth. It is probably going to be north of \$20 billion a year.

We recommended a \$10 fee for everybody that turned—puts in a tax return. Okay. And you could make it voluntary and you are probably not going to get that much, but it would still be some. If you make it mandatory, we are talking about everybody who files a tax return, and there is 250 million filed every year, okay, in this country, to pay what we called a freedom fee. Okay. And that will generate not only money to pay for the Blue Water Navy, but the other Agent Orange exposures, Guam, Panama, wherever, Fort McClellan, burn pits and so on and so forth. The fact is there is just not enough mandatory spending left around to—left there to go around. I think we need a new funding source. That seemed to be a fair way to do it.

Ms. ESTY. Thank you. Anyone else who didn't get a chance to do that? All right. Mr. Weidman, you do not speak as quickly as Commander Wells. Anything else you would like to add to your testimony?

Mr. WEIDMAN. The VA never should have taken the Blue Water Navy's sailors out of the group that was eligible for presumption in the first place. All of the evidence since is that they belong and it should be restored and that poor decision should be reversed. What wasn't said by our friends from VA was that the first thing they said was our desalinization units didn't work the same way. We used a different theory. And then it was pointed out that not only did we do it the same way, but the desalinization units on the Australian ships and the American ships were both came from WD Burrows and Sons and were installed by the American company on the Australian and the American ships. So now they have moved to you can't tell how much anybody got.

Well, you know, we finally in that—when I mentioned the IOM report and the Chair trying to convince association of the United States Navy and the Fleet Reserve and the Legion representative and me that somehow this meant that nobody should be granted

presumption. So we said, so, why, because you can't measure how much dioxin? She said yes. And so we asked the question what dose of dioxin is safe? And she, with all due respect to the lady and who is no doubt a good scientist, her eyes got as big as not saucers, big as great big dinner plates. And she said well, there is no safe does of dioxin. Admitting that once you have got biological plausibility and you could replicate this experiment about how far out at sea, it then reveals that the whole process inside VA veterans' benefits and inside the environmental hazards and public health section frankly is not science, it is sophistry. We should have public servants there who we can rely on to be neutral arbiters of science. And we would suggest that they are not.

Ms. ESTY. Thank you very much. And you are correct, it is zero level of safe exposure to dioxin. We all know that. That is the basis of EPA regulations all across America on this issue. And it is doubly true for those that were sent in harm's way to defend freedom. And if you would, please make sure that we get entered into the record the full relevant reports which you have referenced from the National Academy of Sciences and Institute of Medicine, which I'd like to make sure that those full records are included with the relevant discussions about the comparative difference between the certainty that there exists and the certainty that there exists for blue water versus brown water and territorial. Thank you very much.

Mr. BOST. Thank you.
And Mr. Bergman?

Mr. BERGMAN. Thanks, Mr. Chairman. Thank all of you for your testimony this morning. It makes a difference. Mr. Hearn, please explain why you believe it is important to codify a veteran's right to appeal VA's decision to appoint a fiduciary?

Mr. HEARN. The American—I mean if VA assigns a fiduciary, there have been times where the physician will ask the veteran do you manage your financial affairs at home or does your wife pay the bills? In my own house, my wife pays a good portion of the bills. And using their logic, I suppose I should have a fiduciary. Please don't. But that is the reason. I mean, people make mistakes, that is human. So I think that some of the reason why, that is one of the bigger reasons why we should be appealing, why those issues should be appealed.

Mr. BERGMAN. Okay. So you are trying to provide a little extra assistance for that veteran?

Mr. HEARN. Well, I mean if the veteran does not deserve—if the veteran feels that he or she does not deserve a fiduciary and has been misunderstood during an examination, I don't think you would want to have those rights taken away from you. Other times there are issues dealing with Second Amendment issues that pop up because if you have been assigned a fiduciary sometimes they say we need to pull your weapons from you. And that is certainly something that the American Legion is against, just because it is the two don't necessarily correlate.

Mr. BERGMAN. Okay. Thank you. Mr. Hearn, based on your experience working with veterans' claims, does the VA routinely accept competent medical evidence from qualified private physicians when evaluating claims?

Mr. HEARN. I wouldn't say routinely. The biggest problem that we have noticed has dealt with this evaluation tool builder. Imagine being a GS-11 or 12 out of some regional office making adjudications and the evaluation builder says this. But it does not have any measure or any way to weigh evidence. It doesn't allow for lay testimony to be included. It doesn't include continuity of symptoms. This is a failure. This is a big failure on VA's part. And it is a failure that even the regional offices are noticing while we are doing these regional office reviews. And it really raises questions about the quality of adjudications when you have got a tool that the employees are feeling compelled to use, even though they recognize at times that it doesn't consider all of the evidence that is of record.

Mr. BERGMAN. Okay. Any other Members of the panel care to comment on that question?

Mr. WEIDMAN. The reason why they, even if there is adequate clinical evidence in the file, that they request an exam is CYA, sir. Simple as that.

Mr. BERGMAN. Okay. Anybody else? No. Thank you. Mr. Chairman, I yield back.

Mr. BOST. Thank you.

Mr. Sablan

Mr. SABLAN. Yeah. Thank you very much, Mr. Chairman. And thank you gentlemen for joining us today. When I—in the beginning of this term in Congress I asked if I could receive a waiver to be in this Committee because I noticed an increasing number of casework from the northern—from my district for our veterans. And I will be very—truth be told I didn't know there were so many veteran service organizations.

I am aware of the presence of Veterans of Foreign Wars out there because there are times when we have a burial for veteran and it is a member of the VFW who plays the Taps. Sometimes the Army Reserves are given orders to perform—to give the gun salute. But nowadays I think they need an order to it. Even if they voluntarily want to do it they can't without orders.

And, but I am just getting such an education. I didn't know about this dioxins. You know, I know about Agent Orange, but I didn't know about this color of rainbow basically, a lot of just different things. The Vietnam War I was a young pers—young. But I don't know if you guys were—you guys went to war. I don't know why we went to war. I became an American in 1986. We became a part of the United States in 1978. And so last November, Veterans Day I took the liberty of presenting a tribute to Vietnam veterans. And I didn't know it meant so much. So many of them came up to me and said thank you. This gentleman who I know came up to me in tears and said thank you because all I did was say welcome home from a very I think unpopular war was what it was called.

But thank you for what you do. I don't know if we have DAVs or, you know, but I will continue to work with this Committee. This Committee have been very helpful to me. And with, of course, the Veterans Administration. And in Northern Mariana we have a doctor that when I got in there was no medical services. So I think that the contract was negotiated, but it was somebody filed it somewhere. And I think the file got lost somewhere. So they found it

and we got a physician on contract. And she can only take so many, so I think they got another one. But we are so far removed that we were forgotten. So we do have a VHA staff now.

The individual suffering from PTSD see a—get a counseling through a television screen. It is just incredibly unfair to someone who has put on a uniform and gone to Afghanistan and come back and can't see a doctor because they won't give him a counselor, psychologist or psychiatrist. They instead tell them that you have to come and sit down in front this table and there is a TV screen there and someone at the other end will talk to you.

We did a test of the resource provided to our—the mili—or the VA's major contractors. We found out that some people on the list didn't know they were contractors. Some of the people on the list no longer—they moved away. But we got a new list and we checked and some of them are now okay. The emergency crisis line works, but it gets referred to Hawaii, and the time zone is, you know, different.

But I am here because I do want to try as much as I can to help those veterans who have served our country. They put on a uniform. These people were whole when they left home. When they came back many of them were broken. Some of their wounds we can't see. But thank you everyone. I am truly getting an education from all of you. And Mr. Chairman and the Ranking, thank you for holding today's hearing. I appreciate it. I yield back.

Mr. BOST. Thank you. And I do want to go ahead and go around one more time if anybody that might want to. But I want to limit it to three minutes because I think we are into this enough. I know there is other hearings going on, but this is vitally important. And for those that didn't answer, I want to have the chance to respond. I understand neither one of us were around when the rule for the offset was written. Okay. But it is something that we have to do when we move forward with our colleagues. So anyone that didn't have the opportunity to have an input for possible offsets, if you have suggestions right now, if you come up with them later. But I would open it to anyone that would want to respond for possible offsets. That is kind of the response I have been getting too.

So let me say this and that was the main question. One thing I do want to ask, Mr. Wells, you talked about the \$10 fee. Okay.

Mr. WELLS. Yes, sir.

Mr. BOST. The \$10 fee is basically a tax increase because basically it is everybody who fills out a form will then pay a \$10 fee. So it is a tax increase. But I am not—

Mr. WELLS. Certainly.

Mr. BOST [continued]. —arguing against it. I am just wanting input. Have you raised any of these ideas with other Committees that are present here in Congress, Ways and Means staff or any other congressional staff? Because as they move forward with the different ideas for—we are talking about tax reform.

Mr. WELLS. I was—

Mr. BOST. That would mean—

Mr. WELLS [continued]. I did raise the issue with Ways and Means and we tried to get an appointment with the staff down there. I finally got a call from somebody there, it was a gentleman. And, I'm sorry, I don't remember his name off the top of my head.

Who basically said, eh, mark it up, we will look at it. So that was the response.

Mr. BOST. All right. Well, any response you do get back I would like to know about.

Mr. WELLS. I am going to, when I am coming back here in May, I am going to try to get back to Ways and Means and to Appropriations and see, you know, and try to run all the traps on that.

Mr. BOST. Okay.

Mr. WELLS. And Mr. Chairman, you know, it may not be the best idea in the world. Maybe something that is—

Mr. BOST. It is an idea.

Mr. WELLS [continued]. But it is a place to start. And one of the things that we proposed in our written testimony is it be dedicated. We will take a presidential finding of necessity and two-thirds concurrence of both House and Congress to use it for anything else. Unless we have an alien invasion I don't think we will get two-thirds of the Congress to agree on too much.

Mr. BOST. That is true.

Mr. WELLS. So, but I do appreciate it. If I can just beg your indulgence for ten more seconds. Congresswoman Stefanik did introduce a bill or a resolution rather to show the sense at Congress that the original Agent Orange Act would have encompassed the bays, harbors, and territorial seas. Senator Grassley who was on that bill originally when he was in the House put out a press release saying basically that is what we thought it was. So when the VA says they are confused, they shouldn't be. Thank you.

Mr. BOST. All right. Thank you. Did you—

Mr. WEIDMAN. The tax cut that—and several after that first tax cut in the early aughts, if you will, upset many of us because it had never happened before in wartime. And to send the American people to the mall while our military went to war was setting up almost what happened to us as Vietnam vets, is it wasn't the whole Nation pulling together to go to the war. In fact, the seeds of all of our fiscal problems of our Federal government were laid in 1966 with the Federal Unified Consolidated Budget Act where they took the trust out of the trust, Highway Trust, FUTA, et cetera, and then started appropriating it out in order to paper balance the budget. So the guns and budget decision was that particular piece of legislation which has affected everything since because of the deficit and because of the scrambling. That is why people call it smoke and mirrors.

What—and I couldn't get anybody to introduce it, that you could keep the tax cut if you had a veteran who served on active duty in your immediate family. Otherwise you couldn't have the tax cut. And that would distribute at least somewhat the pain because it is the same, I am convinced, the same thousand, two thousand families that have fought every doggone war we have ever had. And that is certainly those in the combat MOSs.

Mr. BOST. Yeah. I would like to turn it over to Ms. Esty.

Ms. ESTY. Thank you very much. And I just want to say thank you to all of you for your service. Urge you to continue to work with us. I think we all have good intent here, but to figure out how to do this and the challenge meaning time, we really are going to need to work together. So finding where we can get those offsets,

finding where we can get savings, finding where we can more rapid in determination. And I want to thank the VA for staying. I know in our last hearing folks were not able to stay. It is really important that we all be at the table together, that everyone listen to what everyone else is saying. And I want to thank you for staying because we really do need all of us to be partners in this endeavor to do right by those who have served this country. So again, I want to thank you all very much. I have kept mine under three minutes. The only—

Mr. BOST. That is great. Mr. Sablan?

Mr. SABLAN. I am done.

Mr. BOST. Okay. That being said, we want to go ahead and release the third and final panel. And I want to thank everyone for joining us here today and sharing your views with the Subcommittee. Your testimony provides us with important insight into the possibilities as we move forward through this legislation process.

I ask unanimous consent that written statements provided by the Paralyzed Veterans of America and the Fleet Reserve Association be placed into the hearing record. Without objection, so ordered. Finally, I ask unanimous consent for all Members have five legislative days to revise and extend their remarks and include extraneous material on any or all of the bills under consideration this afternoon. And without objection, so ordered. This hearing is now adjourned.

[Whereupon, at 12:16 p.m., the Subcommittee was adjourned.]

A P P E N D I X

Prepared Statement of Beth Murphy

Good morning, Chairman Bost, Ranking Member Etsy, and Members of the Committee. Thank you for inviting us here today to present our views on several bills that would affect VA programs and services. Joining me today are Dr. Ralph L. Erickson, Chief Consultant for Post Deployment Health Services and Ms. Patricia Watts, Director, Legislative and Regulatory Service, National Cemetery Administration.

H.R. 105 - "Protect Veterans from Financial Fraud Act of 2017"

Section 2 of H.R. 105 would amend 38 U.S.C. § 6107(b) by removing restrictions on VA's authority to reissue benefits in cases of fiduciary misuse. Currently, VA is authorized to reissue benefits under this subsection only in cases of negligent supervision by VA, or where the fiduciary is not an individual, or the fiduciary is an individual who serves 10 or more beneficiaries for any month during a period when misuse occurs.

Section 3 of H.R. 105 would amend 38 U.S.C. § 5501A to add a new subsection stating that mental competence determinations may be appealed to the Board of Veterans' Appeals (BVA) and the U.S. Court of Appeals for Veterans Claims (CAVC).

VA supports this bill. Section 2 of the bill would ensure the equal treatment of all fiduciary misuse victims. VA would no longer be required to make distinctions in these cases based on the nature and scope of the fiduciary's business, or on the fiduciary's status. This bill would allow VA to promptly reissue benefits that have been misused, thereby minimizing financial hardship to beneficiaries caused by the misuse, delays in obtaining restitution, or VA determinations regarding negligence.

We note that by broadening the cases in which the Secretary shall pay an amount equal to misused benefits to "any case not covered by subsection (a)" and eliminating the requirements currently found in section 6107(b)(2) that currently attach to non-negligence cases, this bill effectively allows the Secretary to reissue benefits in all cases of misuse. While VA supports the bill as written, it is questionable whether there is any utility in maintaining the distinction between negligence cases covered by subsection (a) and all other cases if this bill were to become law. Further, current subsection (b)(3), which this bill would move to subsection (b)(2), directs VA to pay to a beneficiary or a successor fiduciary any recouped benefits "[i]n any other case in which the Secretary obtains recoupment from a fiduciary who has misused benefits." Insofar as subsections (a) and (b)(1) of section 6107 would apply to all cases in which a fiduciary misused benefits, there would not appear to be any "other" instances of misuse to which renumbered subsection (b)(2) would apply.

The cost of this bill is associated with section 2. VA estimates these costs would be \$2 million in FY 2018, \$10 million over 5 years, and \$20 million over 10 years. There would be no costs associated with section 3 of the bill because determinations of mental competence are already appealable to BVA and the CAVC under existing law.

H.R. 299 - "Blue Water Navy Vietnam Veterans Act of 2017"

H.R. 299 would extend the presumption of Agent Orange exposure to all Veterans who served on ships in the "territorial seas" of the Republic of Vietnam. It would do so by amending subsections (a)(1) and (f) of 38 U.S.C. § 1116, and subsection (e)(4) of 38 U.S.C. § 1710, by inserting the phrase "including the territorial seas of such Republic" after "served in the Republic of Vietnam" each place it appears.

VA has a number of concerns with H.R. 299 and cannot support the bill at this time. The bill does not clearly define what constitutes "the territorial seas" of the Republic of Vietnam. While international treaties prescribe general standards governing nations' territorial seas, it is unclear whether this bill is intended to follow those treaty definitions and, if so, whether it is intended to follow the treaty defini-

tions extant during the Vietnam War or those extant today. Without a clear definition, VA could not determine which Veterans are eligible to receive benefits under the expanded presumption based on their military service. VA is also concerned with the September 25, 1985, effective date of the bill, which would potentially result in retroactive awards of more than 30 years in many cases. In enacting provisions extending benefits to other groups of Veterans, Congress generally has not extended those benefits retroactively, much less for such a significant time period. VA is concerned about the apparent inequity of this disparate treatment of different groups of Veterans. Further, re-adjudicating old claims and establishing awards covering large retroactive periods would be complex and labor-intensive tasks that would divert resources from other claim adjudications. As will be discussed in greater detail, VA estimates that the retroactive benefits payments in FY 2018, alone, would total no less than \$967 million.

Additionally, there is continued scientific uncertainty surrounding the issue of Blue Water Navy Veterans' exposure to Agent Orange. At VA's request, the Institute of Medicine (now National Academy of Medicine) reviewed all available scientific evidence concluding that they were "unable to state with certainty that Blue Water Navy personnel were or were not exposed to Agent Orange and its associated TCDD" (ref: Blue Water Navy Vietnam Veterans and Agent Orange Exposure, 2011). For this reason VA continues to review and monitor the peer-reviewed scientific / medical literature and is collaborating with Veterans Service Organizations (including VFW and the Blue Water Navy Vietnam Veterans Association) to gather more information. A new study of Vietnam Veterans which includes the collection of data on Blue Water Navy Veterans is currently ongoing with early results expected to be available by December 2017. Secretary Shulkin is committed to examining all available evidence on this issue and gathering input from stakeholders in order to make well-informed, scientific evidence-based decisions for our Nation's Veterans.

VA's cost estimate for the bill is broken down into four categories: benefits, general operating expenses, information technology (IT), and health care expenditures. VA estimates the total benefits cost of this bill would be \$1.4 billion during FY 2018, \$3.0 billion over 5 years, and \$5.5 billion over 10 years.

In addition to benefits costs, VA estimates the General Operating Expenses (GOE) costs for the first year would be \$90.7 million and include salary, benefits, rent, training, supplies, other service, and equipment. Five-year costs are estimated to be \$213.5 million and 10-year costs are estimated to be \$339.0 million. VA further estimates that the IT cost for the first year would be \$2.9 million, \$4.5 million over 5 years, and \$5.9 million over 10 years. This cost would include the IT equipment for full-time equivalent employees, installation, maintenance, and IT support.

Regarding health care expenditures, VA estimates the costs of the bill would be \$36.5 million in FY 2018, \$268.0 million over 5 years, and \$618.2 million over 10 years.

H.R. 1328 - American Heroes COLA Act of 2017

H.R. 1328 would permanently authorize the Secretary to implement cost-of-living increases to the rates of disability compensation for service-disabled Veterans and the rates of Dependency and Indemnity Compensation (DIC) for Survivors of Veterans. This bill would direct the Secretary to increase the rates of those benefits whenever a cost-of-living increase is made to benefits administered under title II of the Social Security Act. These rates would be increased by a percentage identical to increases to Social Security benefits.

The Department of Veterans Affairs (VA) supports this bill because it would be consistent with Congress' long-standing practice of enacting regular cost-of-living increases for compensation and DIC benefits in order to maintain the value of these important benefits. Additionally, the bill would eliminate the need for additional legislation to implement such increases in the future. It would also be consistent with current law that requires any cost-of-living increases to disability compensation and DIC to be made at a uniform percentage that does not exceed the percentage increase to Social Security benefits.

VA estimates the cost of this bill would be \$1.3 billion in fiscal year (FY) 2018, \$24.8 billion over 5 years, and \$103.6 billion over 10 years. However, the cost of these increases is included in VA's baseline budget because VA assumes that Congress will enact a cost-of-living adjustment each year. Therefore, enactment of H.R. 1329 would not result in additional costs, beyond what is included in VA's baseline budget.

H.R. 1329 - Veterans' Compensation Cost-of-Living Adjustment Act of 2017

H.R. 1329 would require the Secretary to increase the rates of disability compensation and DIC by the same percentage as any increase to Social Security benefits effective on December 1, 2017. The bill would also require VA to publish these increased rates in the Federal Register.

VA strongly supports this bill because it would express, in a tangible way, this Nation's gratitude for the sacrifices made by our service-disabled Veterans and their surviving spouses and children. The bill would also ensure that the value of these benefits keeps pace with increases in consumer prices.

VA estimates the cost of this bill to be \$1.3 billion in FY 2018, \$8.1 billion over 5 years, and \$17.5 billion over 10 years. However, the cost of these increases is included in VA's baseline budget because VA assumes that Congress will enact a cost-of-living adjustment each year. Therefore, enactment of H.R. 1329 would not result in additional costs, beyond what is included in VA's baseline budget.

H.R. 1390 - Transportation of Deceased Veterans to Veterans' Cemeteries

H.R. 1390 would amend 38 U.S.C. § 2308 to allow payment of the monetary allowance currently payable for transportation of eligible Veterans' remains for burial in a national cemetery to be paid for transportation to a "covered veterans' cemetery." The bill would define a "covered veterans' cemetery" as a Veterans' cemetery owned by a State or Tribal organization in which a deceased Veteran is eligible to be buried. The bill would increase the options of burial locations for eligible Veterans.

VA supports the intent of H.R. 1390; however, VA is concerned with the administrative burden associated with this bill. VA currently reimburses actual transportation costs based on receipts submitted by claimants. This bill would require VA to pay no more than the cost of transportation to the national cemetery nearest the Veteran's last place of residence in which burial space is available. Calculating these payments would require VA to check availability at national cemeteries, determine the equivalent transportation cost to a national cemetery, and then compare that cost to the claimant's receipts for transportation to the State or Tribal cemetery. VA would welcome the opportunity to work with the Subcommittee to address this issue.

VA estimates the benefits cost of the bill would be \$1.2 million in the first year, \$6.7 million over 5 years, and \$15.2 million over 10 years. Discretionary costs for this bill would be insignificant.

H.R. 1564 "VA Beneficiary Travel Act of 2017"

H.R. 1564 would amend subsection (d) of section 504 of the Veterans' Benefits Improvement Act of 1996 (Public Law 104-275, as amended by Public Law 114-315; 38 United States Code (U.S.C.) § 5101 note), to direct the use of funding from the mandatory compensation and pension (C&P) appropriation to pay for travel and incidental expenses associated with contract disability examinations already funded by the same appropriation in FY 2017 and subsequent years. The bill would codify subsection (d) as 38 U.S.C. § 5109C ("Pilot program for use of contract physicians for disability examinations").

The Veterans Benefits Administration (VBA) pays for certain contract C&P examinations with funding from the mandatory C&P appropriation. Congress granted VBA this authority under section 504, which enabled VBA to conduct a "pilot program" to have contractors complete C&P examinations for Veterans applying for benefits administered by VBA. The pilot was initially limited to no more than 10 VA regional offices, and the source of funding for such contracts was the C&P appropriation. In FY 2017, VBA's authority for the pilot was expanded to all 56 regional offices.

VA strongly supports legislation to codify VA's current practice and clearly authorize VA to fund Veteran participation in the pilot program from a single source, rather than in part from the C&P appropriation and in part from funds available for the pre-existing beneficiary travel program under 38 U.S.C. § 111.

This proposal would not require any additional funding or administrative changes within VA. VBA planned to use the C&P account to fund beneficiary travel to and from pilot program examinations, as well as other incidental expenses of the pilot program, in FY 2017 and subsequent years. In addition, this proposal would not change the funding source for any other VA beneficiary travel.

H.R. 1725 - "Quicker Veterans Benefits Delivery Act of 2017"

This bill would revise statutes pertaining to adjudication of disability benefit claims.

Section 2 of this bill would prohibit VA from requesting a medical examination when the claimant submits medical evidence or an opinion from a non-VA provider that is competent, credible, probative, and adequate for rating purposes. Sections 3

and 4 would require VA to report to Congress on the progress of VA's Acceptable Clinical Evidence (ACE) initiative and, for each VA regional office, data on the use by claimants of private medical evidence in support of compensation and pension claims.

VA does not support this bill. VA appreciates the intent of the bill, which seeks to provide benefits to Veterans more expeditiously. However, as written, the bill is, in some respects, unnecessary and unclear and would be problematic to implement.

Section 2 of the bill is unnecessary given current legal standards. This section would prohibit VA from requesting a medical examination when evidence that is submitted is adequate for rating purposes. Section 5103A(d)(2) of title 38, U.S.C., notes that an examination or opinion is only required when the record does not contain sufficient medical evidence to make a decision. Furthermore, section 5125 of title 38, U.S.C., explicitly notes that private medical examinations may be sufficient, without conducting additional VA examinations, for adjudicating claims. VA regulations are consistent with these statutory requirements. Therefore, this section is unnecessary and duplicative. At present, VA may adjudicate a claim without an examination if the claimant provides evidence that is adequate for rating purposes. There would be no costs associated with section 2.

VA does not support section 3 or 4. VA maintains data concerning the number of examinations in which ACE is used, but VA does not track when the evidence is supplemented with a telephone interview, data that VA would be required to report under the bill. In addition, VA does not track when private medical evidence is sufficient or insufficient for rating purposes, as this is not a formal determination. This determination depends on the receipt and evaluation of each piece of evidence and may change at any time in the process. When a VA examination is requested after the submission and review of private medical evidence, VA has made a determination that the evidence is insufficient for rating purposes, as it is VA policy to evaluate a condition without an examination when the evidence of record is adequate to decide the claim. GOE costs associated with sections 3 and 4 would be insignificant.

This concludes my remarks. I would be happy to answer any questions that you may have. Thank you.

Prepared Statement of Zachary Hearn

Chairman Bost, Ranking Member Esty and distinguished members of the Subcommittee on Disability Assistance and Memorial Affairs, on behalf of National Commander Charles E. Schmidt and The American Legion, the country's largest patriotic wartime service organization for veterans, comprising over 2.2 million members and serving every man and woman who has worn the uniform for this country, we thank you for the opportunity to testify on behalf of The American Legion's positions on the following pending legislation.

H.R. 105: Protect Veterans from Financial Fraud Act of 2017

To amend title 38, United States Code, to ensure that the Secretary of Veterans Affairs repays the misused benefits of veterans with fiduciaries, to establish an appeals process for determinations by the Secretary of Veterans Affairs of veterans' mental capacity, and for other purposes.

VA's Fiduciary Program is designed to protect the most vulnerable beneficiaries determined to be unable to manage their financial affairs. A fiduciary is authorized to directly receive a beneficiary's benefits and act in the best interest of the beneficiary by making payments to creditors and providing assurances for the financial well-being of the beneficiary. VA's 2017 Congressional Submission VBA-219 states, "Fiduciary Program beneficiaries are represented in all VA benefit categories with the majority of its beneficiaries in receipt of benefits." Additionally, over 50 percent of beneficiaries in the Fiduciary Program are 80 years old or older.¹

Sadly, not all fiduciaries act in the best interest of beneficiaries (by stealing, wasting money, or otherwise acting inappropriately) and in many instances beneficiaries are unable to recover their lost benefits. The VA is already authorized to reissue benefits to a beneficiary if an individual fiduciary manages 10 or more beneficiaries; however, if the fiduciaries represents less than 10 beneficiaries, the veteran is unable to recoup the lost benefits.

¹2017 Congressional Submission VBA-219

Fortunately, H.R. 105 addresses this disparity. All veterans injured by VA fiduciaries should be able to collect on lost funds due to a betrayal of trust.²

The American Legion supports H.R. 105.

H.R. 299: Blue Water Navy Vietnam Veterans Act of 2017

To amend title 38, United States Code, to clarify presumptions relating to the exposure of certain veterans who served in the vicinity of the Republic of Vietnam, and for other purposes.

Veterans who served on open sea ships off the shore of Vietnam during the Vietnam War are called “Blue Water Veterans.” Currently, Blue Water Veterans must have actually stepped foot on the land of Vietnam or served on its inland waterways anytime between January 9, 1962 and May 7, 1975 to be presumed to have been exposed to herbicides when claiming service-connection for diseases related to Agent Orange exposure.

Blue Water Veterans who did not set foot in Vietnam or serve aboard ships that operated on the inland waterways of Vietnam must show on a factual basis that they were exposed to herbicides during military service in order to receive disability compensation for diseases related to Agent Orange exposure. These claims are decided on a case-by-case basis.

We are aware that VA previously asked the National Academy of Sciences’ Institute of Medicine (IOM) to review the medical and scientific evidence regarding Blue Water Veterans’ possible exposure to Agent Orange and other herbicides. IOM’s report “Blue Water Navy Vietnam Veterans and Agent Orange Exposure” was released in May 2011. The report concluded that “there was not enough information for the IOM to determine whether Blue Water Navy personnel were or were not exposed to Agent Orange.”

However, Vietnam veterans who served on land and sea now have health problems commonly associated with herbicide exposure. Just as those who served on land were afforded the presumption because it would have placed an impossible burden on them to prove exposure, Congress should understand the injustice of placing the same burden on those who served offshore. Clearly, all the toxic wind-blown, waterborne, and contamination transfer stemming from aircraft, vehicle, and troop transfer makes it impossible to conclude that Agent Orange-dioxin somehow stopped at the coast line.

The American Legion strongly supports legislation to expand the presumption of Agent Orange exposure to any military personnel who served on any vessel during the Vietnam War that came within 12 nautical miles of the coastlines of Vietnam.³

The American Legion supports H.R. 299.

H.R. 1328: American Heroes COLA Act of 2017

To amend title 38, United States Code, to 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-connected disabilities and the rates of dependency and indemnity compensation for survivors of certain service-connected disabled veterans, and for other purposes.

In recent years, Congress has been attempting to establish an automatic mechanism to provide an annual increase in veterans’ disability benefits. The American Legion understands and appreciates the efforts to remove the veteran community from the political debate in determining appropriate annual adjustments to Cost-Of-Living Adjustment (COLA) amounts for disability benefits. Unfortunately, while this bill would likely promote efficiency, it could also come with a significant cost to our nation’s veterans.

The current COLA formula already understates the true cost-of-living increases faced by seniors and people with disabilities. According to one calculations “a 30-year-old veteran of the Iraq or Afghanistan war who has no children and is 100 percent disabled would likely lose about \$100,000 in disability compensation by age 75 (calculated in today’s dollars), compared with benefits under the current cost-of-living formula. Over a 10-year period, 23 million veterans would lose \$17 billion in compensation and pension benefits.”⁴

The American Legion opposes “any legislative efforts to automatically index such cost-of-living adjustments to the cost-of-living adjustment authorized for Social Security recipients, non-service-connected disability recipients and death pension bene-

²American Legion Resolution No. 13 (September 2016): Fiduciary Responsibility

³American Legion Resolution No. 246 (Sept. 2016): Blue Water Navy Vietnam Veterans

⁴AARP Bulletin (March 2013): Chained CPI Change Could Hit Veterans’ Benefits

ficiaries.”⁵ The reasoning behind this objection is that veterans sometimes have needs and expenses which should be considered on their own merits, rather than being simply lumped in with Social Security for simple expediency.

Additionally, The American Legion “expresses strong opposition to using any Consumer Price Index that would reduce the annual cost-of-living adjustment for military retirees, veterans receiving Social Security benefits or Department of Veterans Affairs beneficiaries.”⁶

The American Legion OPPOSES H.R. 1328.

H.R. 1329: Veterans Compensation Cost-of-Living Adjustment Act of 2017

To increase, effective as of December 1, 2017, the rates of compensation for veterans with service-connected disabilities and the rates of dependency and indemnity compensation for the survivors of certain disabled veterans, to amend title 38, United States Code, to improve the United States Court of Appeals for Veterans Claims, to improve the processing of claims by the Secretary of Veterans Affairs, and for other purposes.

H.R.1329 would provide a Cost-of-Living Allowance (COLA) effective December 1, 2017. Disability compensation and pension benefits awarded by the Department of Veterans Affairs (VA) are designed to compensate veterans for medical conditions incurred through service, or who earn below an income threshold. When the cost of living increases due to inflation, it is only appropriate that veterans’ benefits increase commensurate with those increases.

For nearly 100 years, The American Legion has advocated on behalf of our nation’s veterans, to include the awarding of disability benefits associated with chronic medical conditions that manifest related to selfless service to this nation. Annually, veterans and their family members are subjects in the debate regarding the annual COLA for these disability benefits. For these veterans and their family members, COLA is not simply an acronym or a minor adjustment in benefits; instead, it is a tangible benefit that meets the needs of the increasing costs of living in a nation that they bravely defended.

H.R. 1329 is designed to allow for a COLA for VA disability and other monetary benefits. The American Legion supports legislation “to provide a periodic cost-of-living adjustment increase and to increase the monthly rates of disability compensation.”⁷

The American Legion supports H.R. 1329.

H.R. 1390

To amend title 38, United States Code, to authorize the Secretary of Veterans Affairs to pay costs relating to the transportation of certain deceased veterans to veterans’ cemeteries owned by a State or tribal organization.

The VA will pay transportation costs for an eligible deceased veteran for burial in a national cemetery. This legislation would expand this benefit to include state or tribal cemeteries. The American Legion supports the transporting of remains to the place of burial determined by the family.⁸ Because this legislation expands options for the family, we support this bill.

The American Legion supports H.R. 1390.

H.R. 1564: VA Beneficiary Travel Act of 2017

To amend section 504 of the Veterans’ Benefits Improvements Act of 1996 to specify the funding source for travel related to examinations by physicians not employed by the Department of Veterans Affairs regarding medical disabilities of applicants for benefits under title 38, United States Code, to codify section 504 of the Veterans’ Benefits Improvements Act of 1996, and for other purposes.

On October 9, 1996, Congress passed and the President signed into law, Public Law 104–275, the Veterans’ Benefits Improvements Act of 1996. This bill would amend section 504 of the law to specify the funding source for veterans travel related to examinations by physicians not employed by the Department of Veterans Affairs regarding medical disabilities of applicants for benefits under title 38, United States Code.

⁵American Legion Resolution No. 187 (Sept. 2016): Department of Veterans Affairs Disability Compensation

⁶American Legion Resolution No. 164 (Sept. 2016): Oppose Lowering of Cost-of-Living Adjustments

⁷American Legion Resolution No. 164 (Sept. 2016): Oppose Lowering of Cost-of-Living Adjustments

⁸American Legion Resolution No. 181 (Sept. 2016): National Cemetery Administration

Since the authority is already law, and the bill aims to clean up and properly designate where the VA would draw these resources and would not impose any additional funding requirements, The American Legion has no objections to H.R. 1564.

The American Legion supports H.R. 1564.

H.R. 1725: Quicker Benefits Delivery Act of 2017

To amend title 38, United States Code, to improve the treatment of medical evidence provided by non-Department of Veterans Affairs medical professionals in support of claims for disability compensation under the laws administered by the Secretary of Veterans Affairs, and for other purposes.

Many veterans submit private medical evidence to support their claims for disability benefits. For veterans that require additional medical review or do not provide a statement from a medical professional linking the medical condition to military service, VA provides compensation and pension (C&P) examinations to determine the link or severity of medical conditions.

Over the past 20 years The American Legion has reviewed tens of thousands of claims in regional offices around the country through our Regional Office Action Review (ROAR) program. The American Legion has testified to Congress that VA schedules unnecessary and duplicative examinations despite already having the evidence necessary to grant the claim. This adds further complication to an already complicated process.

The American Legion understands that there are occasions where a veteran would need a second examination after submitting a medical nexus statement. If a private medical provider did not use a VA disability medical questionnaire, then it stands to reason that the provider may not have conducted the necessary tests to accurately rate the veteran.

Unfortunately, these instances did not get noticed solely during ROAR visits. They are noticed far too frequently by American Legion representatives at the Board of Veterans' Appeals. There have been occasions where veterans have been seeking total disability based on individual unemployability (TDIU) benefits. Meanwhile, the veteran had previously been granted Social Security disability benefits for a condition incurred in service and service-connected by VA. Despite enduring medical examinations for Social Security purposes and having the benefit granted by the agency, VA would conduct their own examinations to determine the veteran's employability. Some in the veteran community refer to this needless development of disability claims as "developing to deny".

This bill will compel VA to release data that establishes acceptable clinical evidence and increase transparency for claims development and adjudication. With congressional and VA focus on how private medical evidence is treated, The American Legion believes that the treatment of the evidence received from private medical providers will receive higher consideration. This will expedite adjudications and increase claims processing transparency.⁹

The American Legion supports H.R. 1725.

Conclusion

As always, The American Legion thanks this subcommittee for the opportunity to explain the position of the over 2.2 million veteran members of this organization. For additional information regarding this testimony, please contact Mr. Warren J. Goldstein at The American Legion's Legislative Division at (202) 861-2700 or wgoldstein@legion.org.

Prepared Statement of Patrick Murray

WITH RESPECT TO

H.R. 105, H.R. 299, H.R. 1328, H.R. 1329, H.R. 1390, H.R. 1564, AND H.R. 1725

Chairman Bost, Ranking Member Esty and members of the Subcommittee, on behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and its Auxiliary, thank you for the opportunity to provide our remarks on legislation pending before the subcommittee.

H.R. 105, Protect Veterans from Financial Fraud Act of 2017

⁹American Legion Resolution No. 123 (Sept. 2016): Increase the Transparency of the Veterans Benefits Administration's Claim Processing

The VFW supports this legislation, which would authorize veterans assigned fiduciaries to be compensated when fiduciaries mishandle or misuse their money. This is a common sense bill to protect some of our most vulnerable veterans. Veterans assigned a fiduciary need help and financial protection, and any individual who mistreats or preys upon them must be held accountable, and restitution must be made to those affected.

To further protect vulnerable veterans, the VFW supports expanding this legislation to install criminal and financial penalties for those found to maliciously prey on veterans for any financial gain, not just fiduciary fraud. Abusing the health and financial welfare of veterans in need must be punishable by law.

There have been numerous attempts to draft legislation instituting criminal penalties for those who illegally charge veterans for services like assistance in filing an initial claim for VA benefits, but those attempts to pass legislation have fallen flat. The VFW supports legislation that protects all veterans from any individual who commits financial malfeasance, sets substantial penalties for doing so, and ensures veterans receive any owed compensation as a result of the crime.

H.R. 299, Blue Water Navy Vietnam Veterans Act of 2017

The VFW strongly supports this legislation, which would require the Department of Veterans Affairs (VA) to include territorial seas as part of the Republic of Vietnam, extending presumptive service connection and health care for Agent Orange-related illnesses to Blue Water Navy veterans.

Currently, VA relies on what the Court of Appeals for Veterans Claims has called an “arbitrary and capricious” interpretation of inland waterways, which unjustly denies veterans who served aboard ships in the coastal waters of Vietnam the benefits they deserve. The VFW believes that Blue Water Navy veterans were potentially exposed to significant levels of toxins, and should be granted the same presumption of service connection as their counterparts who served in the inland waterways of Vietnam.

H.R. 1390, to authorize the Secretary of Veterans Affairs to pay costs relating to the transportation of certain deceased veterans to veterans’ cemeteries owned by a State or tribal organization

The VFW supports this legislation, which expands burial benefits to veterans interred in a State or tribal cemetery.

For more than 150 years, our nation has purchased and maintained cemeteries to offer our veterans a final resting place that honors their brave military service. Currently, VA maintains 133 national cemeteries; only 75 of them, however, are able to accept new interments. To ensure veterans have burial options within 75 miles to their home, VA uses agreements and grants with states, United States territories, and federally recognized tribal organizations to establish, expand, or improve veterans’ cemeteries in areas where the National Cemetery Administration has no plans to build or maintain a national cemetery.

While VA covers all the transportation expenses for veterans who are interred in the nearest national cemetery, VA is not authorized to reimburse the next of kin of a veteran who is interred in a State or tribal cemetery because the nearest VA national cemetery is not accepting new interments or the veteran does not have a national cemetery near their home. This bill rightfully expands VA’s authority to cover the cost of transporting a veteran’s remains to their final resting place in a State or tribal cemetery.

H.R. 1328, American Heroes COLA Act of 2017 & H.R. 1329, Veterans’ Compensation Cost-of-Living Adjustment Act of 2017

The VFW supports this legislation which would increase VA compensation for veterans and survivors, and adjust other benefits by providing a cost-of-living adjustment (COLA). The VFW is pleased to support any bill increasing COLA for our veterans, however, we would prefer to make COLA increases permanent and automatic.

Disabled veterans, along with their surviving spouses and children, depend on their disability compensation, plus dependency and indemnity compensation to bridge the gap of lost earnings caused by the veteran’s disability. Each year veterans wait anxiously to find out if they will receive a COLA. There is no automatic trigger that increases these forms of compensation for veterans and their dependents. Annually, veterans wait for a separate act of Congress to provide the same adjustment that is automatically granted to Social Security beneficiaries.

H.R. 1564, VA Beneficiary Travel Act of 2017

The VFW supports this legislation, which would clarify and codify VA's authority to carry out contracted compensation and pension exams and reimburse veterans for travel to such exams.

The VA uses third party examinations in order to speed up the process of either an initial claim or an appeal to ensure veterans receive timely decisions on their claims. Travel is a significant barrier to access for low income veterans. Clarifying that veterans may receive beneficiary travel when attending a contracted compensation and pension exam would ensure veterans are able to complete this important step in the claims process.

While the VFW supports this bill, we are concerned that it does not apply to initial mental health claims. If VA sees the need to contract third party physicians to examine veterans for any and all physical conditions, then it should also utilize appropriate medical professionals to examine mental health conditions. Mental health examinations are increasing every day, and VA insisting on patients seeing only VA doctors for these examinations is increasing the burden on their own system. Mental health examinations for initial claims should be added to the type of services offered in VA's contracting physicians' portfolio.

H.R. 1725, Quicker Veterans Benefits Delivery Act of 2017

The VFW strongly supports this legislation which would require VA to accept competent, creditable, probative, and relevant private medical evidence in support of a disability compensation claim.

The VFW supports using outside physicians' findings in order to speed up the review and judgement of claims. Veterans should not have to see another VA doctor in order to validate their private sector doctors' findings. Requiring redundant examinations only adds to more confusion and clogs up the system. VA must accept evidence from competent, credible physicians and not force veterans to seek a second opinion from a VA physician.

Veterans submitting initial claims have likely been receiving care from non-VA doctors for their claimed conditions, meaning there is likely already a sufficient evidentiary record of the disability. Eliminating redundant exams would speed up the claims process.

While the VFW vehemently supports this bill, we must once again reiterate our concerns related to mental health. Currently, all veterans who claim mental health conditions are sent for a VA exam regardless of the evidence of record. This is onerous and bad medical practice for patients who suffer from mental health conditions. VA should begin accepting private medical evidence for mental health conditions from third party mental health professionals to avoid redundant exams and overburdening veterans.

Mr. Chairman, this concludes my testimony. I am prepared to take any questions you or the subcommittee members may have.

Prepared Statement of Leroy Acosta

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to testify at this legislative hearing of the Subcommittee on Disability Assistance and Memorial Affairs. As you know, DAV is a non-profit veterans' service organization comprised of 1.3 million wartime service-disabled veterans that is dedicated to a single purpose: empowering veterans to lead high-quality lives with respect and dignity. DAV is pleased to present our views on the bills under consideration by the Subcommittee, and we appreciate your invitation.

H.R. 105, Protect Veterans from Financial Fraud Act of 2017

H.R. 105 would require the Secretary of Veterans Affairs to repay the misused benefits of veterans by fiduciaries and establish an appeals process for determinations made by the Secretary of a veteran's mental capacity.

While DAV does not have a resolution specific to this issue, we would not oppose passage of this legislation.

H.R. 299, Blue Water Navy Vietnam Veterans Act of 2017

H.R. 299 would amend title 38, United States Code, to expand the definition of the Republic of Vietnam to include its territorial seas for the purposes of the pre-

sumption of service connection for diseases associated with exposure by veterans to certain herbicide agents while in Vietnam such as herbicides containing dioxin, including Agent Orange, during the Vietnam War.

This legislation would provide Blue Water Navy Vietnam veterans the disability and health care benefits they earned as a result of exposure to Agent Orange. Eligibility for VA benefits under this legislation would be retroactive to September 25, 1985, the date VA began providing disability compensation to veterans with medical disorders related to Agent Orange.

During the Vietnam War, the U.S. military sprayed Agent Orange in Vietnam to eradicate jungle vegetation. This toxic chemical had chronic and debilitating health effects on millions of veterans who served in Vietnam and aboard ships operating in the territorial waters of Vietnam.

The Agent Orange Act of 1991 required the Department of Veterans Affairs (VA) to provide presumptive service connection to Vietnam veterans with illnesses that the National Academy of Sciences directly linked to Agent Orange exposure. Yet, in 2002, the VA decided to only cover veterans who could prove that they had “boots on the ground” during the Vietnam War. Because of this decision, thousands of Vietnam veterans were excluded from receiving benefits although these Blue Water Navy veterans had significant Agent Orange exposure from drinking and bathing in contaminated water just offshore.

Veterans who served on ships no more distant from the spraying of herbicides than many who served on land are arbitrarily and unjustly denied benefits of the presumption of exposure, and thereby are ineligible for presumption of service connection for herbicide-related disabilities.

DAV supports H.R. 299 based on DAV Resolution No. 018, supporting legislation to expressly provide that the phrase “served in the Republic of Vietnam” includes service in the territorial waters offshore.

H.R. 1328, American Heroes COLA Act of 2017

H.R. 1328 would provide automatic annual cost-of-living adjustments (COLA) in the rates of disability compensation for veterans with service-connected disabilities and in the rates of additional compensation for dependents, clothing allowance, and in dependency and indemnity compensation for survivors of certain service-connected disabled veterans.

H.R. 1328 also proposes to permanently index future COLA rate adjustments to Social Security rate adjustments. The method used to determine the level of the COLA is tied to the United States economy on a very broad basis. The formula to calculate COLAs is prescribed by law and determined by the Social Security Administration, utilizing Department of Labor statistical information. The calculation of COLAs has been linked directly to the Consumer Price Index since 1975.

In general, a COLA is equal to the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W), from the third quarter of one year to the third quarter of the next. If there is no increase in the index, there is no COLA. In these cases, ill and injured veterans are denied necessary increases in disability compensation due to a formula that has little to do with the real costs they bear.

It has become customary for Congress to determine COLAs in parity with Social Security recipients, but it is important to note there have been years in which there were no COLA increases, or such as in 2017, the COLA increase was quite small, only 0.3 percent. While we do not oppose the automatic adjustment, this permanent coupling does subject VA beneficiaries to the same rate adjustments of Social Security beneficiaries, which can adversely impact veterans and their families as in the case when there is no increase, or when the increase is minuscule, especially for those veterans and their dependents who heavily rely on disability compensation as their sole source of income.

DAV supports legislation that provides veterans with a COLA increase in accordance with DAV Resolution No. 013, and recommends the COLA calculation to provide a realistic cost-of-living allowance for our nation’s disabled veterans, their dependents and survivors.

We do not oppose the automatic adjustment; however, DAV has concerns with permanently indexing COLA increases to the Social Security Administration. Further, annual consideration by Congress of a COLA bill provides the oversight needed to ensure compensation rates continue to bring the standard of living in line with that which ill and injured veterans would have enjoyed had they not suffered their service-connected disabilities. In the event of a zero percent COLA, the automatic

index would not provide these veterans, their dependents and survivors the benefits to maintain their standard of living.

H.R. 1329, Veterans' Compensation Cost-of-Living Adjustment Act of 2017

H.R. 1329 would also provide for increased compensation rates for wounded, injured and ill veterans, their dependents and survivors commensurate to that provided to Social Security recipients effective December 1, 2017. Unlike H.R. 1328, mentioned above, H.R. 1329 does not propose automatic adjustments to COLAs.

As discussed above, DAV calls on Congress to support legislation to provide a realistic increase in disability compensation. Injured and ill veterans, their dependents and survivors rely on their compensation benefits to maintain their standard of living. Compensation rates must bring the standard of living in line with that which they would have enjoyed had they not suffered their service-connected disabilities.

DAV supports H.R. 1329 in accordance with DAV Resolution No. 013 and recommends the COLA calculation provide a realistic cost-of-living allowance for our nation's disabled veterans, their dependents and survivors.

H.R. 1390

This bill would permit the Secretary to cover the costs associated with the transportation of deceased veterans, not only to national cemeteries, but also to other recognized veterans' cemeteries. H.R. 1390 defines "covered veterans cemeteries" as a veterans' cemetery owned by a state or tribal organization in which the deceased veteran is eligible to be buried, consistent with the definition currently codified in section 3765 (4), of title 38, United States Code. The payment for transportation may not exceed the cost of transportation to the nearest national cemetery from the deceased veteran's last place of residence in which burial space is available.

H.R. 1390 would benefit veterans' survivors by helping to offset the cost transporting the veteran to their final resting place. DAV does not have a resolution specific to this bill; however, we would not oppose passage of this legislation.

H.R. 1564, VA Beneficiary Travel Act of 2017

H.R. 1564 would amend section 504 of the Veterans' Benefits Improvements Act of 1996 to specify the funding source for travel related to examinations by physicians not employed by the Department of Veterans Affairs regarding medical disabilities of applicants for benefits under title 38, United States Code. This legislation codifies section 504 of the Veterans' Benefits Improvements Act of 1996 by transferring Section 504 to title 38, United States Code, subsection 5109C, and provides clerical amendments.

DAV does not have a resolution specific to this bill; however, we would not oppose passage of this legislation.

Draft Bill, Quicker Veterans Benefits Delivery Act of 2017

This draft bill would amend title 38, United States Code, section 5125, to improve the treatment of medical evidence provided by non-Department of Veterans Affairs (VA) medical professionals in support of veterans' claims for disability compensation.

The bill would eliminate the VA practice of ordering unnecessary compensation and pension examinations. Unnecessary examinations lead to delays in delivery of benefits, tie up VA resources and add to the frustration of veterans who in many cases have provided sufficient medical evidence to support their claim. Requesting a VA examination when acceptable private medical evidence has already been provided, indicates that the private medical evidence is of less weight than evidence provided by a VA clinician.

DAV continues to press for changes to improve and streamline the veterans' benefits claims processing system. This legislation would give due deference to private medical evidence that is competent, credible, probative, and otherwise adequate for rating purposes. Currently acceptance of private medical examinations is not standardized across the VA. This draft legislation moves toward a more efficient, less redundant disability claims process.

For these reasons, DAV is pleased to support this bill, consistent with DAV Resolution No. 230, which seeks the enactment of legislation that would require VA to consider private medical evidence supplied by licensed private health care providers to include, but not be limited to, reports from nurse practitioners and physician assistants in private practices.

Mr. Chairman, this concludes DAV's testimony. Thank you for inviting DAV to testify at today's hearing. I would be pleased to address any questions related to the bills being discussed in my testimony.

Statements For The Record

PARALYZED VETERANS OF AMERICA (PVA)

Chairman Bost, Ranking Member Esty, and members of the Subcommittee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to provide our views on pending legislation before the Subcommittee.

H.R. 105, the "Protect Veterans from Financial Fraud Act of 2017"

PVA supports this legislation. Under current law, the Department of Veterans Affairs (VA) is limited in its authority to reissue benefits. If the fiduciary that misused benefits is an institution or an individual serving ten (10) or more individuals who are beneficiaries under title 38, VA is permitted to reissue benefits and make the veteran whole again. If the fiduciary does not meet those criteria, VA may only reissue benefits to the extent that it recoups the misused funds from the fiduciary. The basis of the current rule is that it is more likely that VA will recoup the funds from an institution or an individual serving in a sophisticated or professional capacity on behalf of numerous veterans. This is an unjust result for veterans who choose not to engage the services of a professional fiduciary. H.R. 105 would remedy this unfortunate circumstance and place all veterans on equal footing after malicious or incompetent fiduciaries misuse their benefits.

H.R. 299, the "Blue Water Navy Vietnam Veterans Act of 2017"

PVA supports H.R. 299, the "Blue Water Navy Vietnam Veterans Act of 2017," which would amend title 38 and expand the presumption for service connection related to the exposure of herbicides containing dioxin, including Agent Orange. As more information becomes available about these types of exposures, it will be imperative for Congress to take appropriate steps to ensure that these veterans receive just consideration for health care and benefits eligibility.

H.R. 1328, the "American Heroes COLA Act of 2017"

PVA supports H.R. 1328, the "American Heroes COLA Act of 2017," which would increase, effective as of December 1, 2017, the rates of compensation for veterans with service-connected disabilities and the rates of dependency and indemnity compensation (DIC) for the survivors of certain disabled veterans. This would include increases in wartime disability compensation, additional compensation for dependents, clothing allowance, and dependency and indemnity compensation for children.

H.R. 1329

Historically, the annual COLA bill has been important legislation that must pass each year. During times of particularly contentious relations in Congress, this critical legislation has been used as a vehicle to pass other important veterans legislation. PVA does not object, however, to making the COLA adjustment automatic going forward, as it would add a level of certainty for veterans expecting annual increases equal to those provided under title II of the Social Security Act.

H.R. 1390

PVA continues to support legislation expanding VA's authority to pay for transportation of a deceased veteran's remains to not only national cemeteries, but also

cemeteries owned by States or tribal organizations. While this bill expands options for veterans wishing to be buried in a state or tribal cemetery instead of a national cemetery, it avoids any additional costs to the current program by capping the reimbursement at the amount needed to transport the veteran's remains to the nearest national cemetery. This bill, however, does not extend the same option for veterans without next of kin or sufficient resources to cover their burial. We think it would be appropriate to build in an exception allowing VA to transport the remains of such a veteran to a state or tribal cemetery if VA has information suggesting that this was the veteran's desire, and if it can be accomplished at or below the cost of transporting the veteran to a national cemetery. Doing so under these conditions would impose no additional costs.

H.R. 1564

PVA has no position on this legislation.

H.R. 1725, the "Quicker Veterans Benefits Delivery Act of 2017"

We strongly support H.R. 1725, the "Quicker Veterans Benefits Delivery Act of 2017." Those veterans with catastrophic disabilities have the greatest need for health care services and this legislation will ensure that they are not forced into delays because the VA will not accept medical evidence from non-VA medical professionals. This bill is a high priority for our members.

PVA has consistently recommended that VA accept valid medical evidence from non-Department medical professionals. The continuing actions of VA to require medical examinations by its own physicians does nothing to further efforts to reduce the claims backlog and may actually cause the backlog to increase in addition to delaying vital benefits for disabled veterans. We applaud Mr. Walz's efforts to both define what constitutes "sufficiently complete" as well as institute reporting requirements to ensure VA is avoiding unacceptable delays due to duplicative medical exams.

VA has suggested in the past on similar legislation that the Department already has the necessary legal authority to address this concern. Furthermore, VA believes this change would inadvertently restrict the Department's ability to help the veteran get a proper exam if needed. First, we agree the VA has the legal authority. The point of this legislation, though, is to address the fact that VA does not use it properly. In fact, VA uses it to the detriment of veterans in some cases, either by unnecessarily delaying claims or "developing to deny" claims. If, as VA claims, the Department is already making determinations based on whether the report contains competent, credible, probative or such information as may be required to make a decision, then this law adds no new burden on the administrative process. Second, there is nothing in the language here that restricts VA's ability to procure an additional exam when needed. If the claim is not sufficiently complete, then a follow-on exam is warranted. If the claim is sufficiently complete, then VA should be prohibited from requiring further scrutiny.

PVA would also like to see VA better adhere to its own "reasonable doubt" provision when adjudicating claims that involve non-VA medical evidence. We still see too many VA decisions where this veteran-friendly rule was not properly applied. 38 CFR §3.102 states that "[w]hen, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant." Too often it appears VA raters exercise arbitrary prerogative to avoid ruling in favor of the claimant, continually adding obstacles to a claimant's path without adequate justification for doing so. While due diligence in gathering evidence is absolutely necessary, it often seems that VA is working to avoid a fair and legally acceptable ruling for the veteran that happens to be favorable. Both the failure to accept, and tendency to devalue, non-VA medical evidence are symptoms of this attitude.

Mr. Chairman and members of the Subcommittee, we appreciate your commitment to ensuring that veterans receive the best benefits and care available. We also appreciate the fact that this Subcommittee has functioned in a generally bipartisan manner over the last few years. We look forward to working with the Subcommittee as we continue to provide the best care for our veterans.

MILITARY-VETERANS ADVOCACY

WRITTEN TESTIMONY FOR THE RECORD IN SUPPORT OF: H.R. 299; H.R. 1328; H.R. 1329; H.R. 1390; H.R. 1564 AND, A DRAFT BILL ENTITLED "QUICKER VETERANS BENEFITS DELIVERY ACT OF 2017"

AND IN OPPOSITION TO: H.R. 105,

COMMANDER JOHN B. WELLS, USN (RETIRED), EXECUTIVE DIRECTOR

INTRODUCTION

Distinguished Sub-Committee Chairman Mike Bost, Ranking Member Elizabeth Esty and other members of the Sub-Committee; thank you for the opportunity to present the Association's views on H.R. 105; H.R. 299; H.R. 1328; H.R. 1329; H.R. 1390; H.R. 1564; and, a draft bill entitled "Quicker Veterans Benefits Delivery Act of 2017." This testimony will provide commentary on all of the proposed legislation, but will concentrate on HR 299.

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 works to advance benefits for those who are serving or have served in the military. In support of this, 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.

Along with the Blue Water Navy Vietnam Veterans Association, Inc. (BWNVVA) MVA has been the driving force behind the Blue Water Navy Vietnam Veterans Act (HR 299).

Working with Members of Congress and United States Senators from across the political spectrum, MVA and BWNVVA provided technical information and support to sponsors who have worked tirelessly to partially restore the benefits stripped from the Blue Water Navy veterans fifteen years ago. Currently HR 299 has 238 co-sponsors.¹ A previous version, with identical language, in the 114th Congress had 335 co-sponsors.

Military-Veterans Advocacy's Executive Director Commander John B. Wells USN (Ret.)

MVA's Executive Director, Commander John B. Wells, USN (Retired) has long been viewed as the technical expert on HR 299. 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. As Chief Engineer, he was directly responsible for the water distillation and distribution system. He is well versed in the science surrounding this bill and is familiar with all aspects of surface ship operations. This includes the hydrological effect of wind, tides and currents.

Since retirement, Commander Wells has become a practicing attorney with an emphasis on military and veterans law. He is counsel on several pending cases concerning the Blue Water Navy and has filed amicus curiae briefs in other cases. He has tried cases in state, federal, military and veterans courts as well as other federal administrative tribunals. Since 2010 he has visited virtually every Congressional and Senatorial office to discuss the importance of enacting a bill to partially restore benefits to those veterans who served in the bays, harbors and territorial seas of the Republic of Vietnam. He is also recognized in the veterans community as the subject matter expert on this matter.

Historical Background Surrounding H.R. 299

In the 1960's and the first part of the 1970's the United States sprayed over 12,000,000 gallons of a chemical laced with 2,3,7,8-Tetrachlorodibenzodioxin

¹The 238 co-sponsors is as of March 19, 2017. An updated number will be provided during oral testimony.

(TCDD) and nicknamed Agent Orange over southern Vietnam. This program, code named Operation Ranch Hand, was designed to defoliate areas providing cover to enemy forces. Spraying included coastal areas and the areas around rivers and streams that emptied into the South China Sea. By 1967, studies initiated by the United States government proved that Agent Orange caused cancer and birth defects. Similar incidence of cancer development and birth defects have been documented in members of the United States and Allied armed forces who served in and near Vietnam.

Throughout the war, the United States Navy provided support for combat operations ashore. This included air strikes and close air support, naval gunfire support, electronic intelligence, interdiction of enemy vessels and the insertion of supplies and troops ashore. Almost every such operation was conducted within the territorial seas.

The South China Sea is a shallow body of water and the thirty-fathom curve (a fathom is six feet) extends through much of the territorial seas. The gun ships would operate as close to shore as possible. The maximum effective range of the guns required most operations to occur within the territorial seas as documented in the attachment.² Often ships would operate in harbors or within the ten-fathom curve to maximize their field of fire. The maximum range on shipboard guns (except the Battleship 16 inch turrets) required the ship to operate within the territorial seas in order to support forces ashore.

It was common practice for the ships to anchor while providing gunfire support. Digital computers were not yet in use and the fire control systems used analog computers. By anchoring, the ship's crew was able to achieve a more stable fire control solution, since there was no need to factor in their own ship's course and speed. It was also common for ships to steam up and down the coast at high speeds to respond to call for fire missions, interdict enemy sampans and other operational requirements.

Small boat transfers were conducted quite close to land. Many replenishments via helicopter took place within the territorial seas. Often these helicopters landed in country for refueling, to disembark passengers or to pick up mail. Small boat or assault craft landings of Marine forces always took place within the territorial seas. Many of these Marines re-embarked, bringing Agent Orange back aboard on themselves and their equipment. Additionally mail, equipment and supplies staged in harbor areas were often sprayed before being transferred to the outlying ships. Embarking personnel would take boats or helicopters to ships operating in the territorial seas. The Agent Orange would adhere to their shoes and clothing as well as to mail bags and other containers. It would then be tracked throughout the ship on the shoes of embarking personnel and the clothing of those handling mail and other supplies brought aboard. Their clothing was washed in a common laundry, contaminating the laundry equipment and the clothing of other sailors.

Flight operations from aircraft carriers often occurred outside of the territorial seas. As an example, Yankee station was outside of the territorial seas of the Republic of Vietnam. Dixie Station, however, was on the border of the territorial seas. Some carriers, especially in the South, entered the territorial seas while launching or recovering aircraft, conducting search and rescue operations and racing to meet disabled planes returning from combat. Aircraft carriers also entered the territorial seas for other operational reasons. Many times these planes flew through clouds of Agent Orange while conducting close air support missions. These planes were then washed down on the flight deck, exposing the flight deck crew to Agent Orange.

Agent Orange Act of 1991.

In 1991, the Congress passed and President George H. W. Bush signed, the Agent Orange Act of 1991, Pub.L. 102-4, Feb. 6, 1991, 105 Stat. 11. This federal law required VA to award benefits to a veteran who manifests a specified disease and who "during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975."

The Agent Orange Act of 1991 further required the Secretary to "take into account reports received by the Secretary from the National Academy of Sciences and

²The red line on the attached chart, Exhibit 1, is known as the base line. Vietnam uses the straight baseline method which intersects the outermost coastal islands. The dashed line is twelve nautical miles from the baseline and represents the territorial seas. The bold line marks the demarcation line for eligibility for the Vietnam Service Medal. Prior to 2002, the VA granted the presumption of exposure to any ship that crossed the bold line. H.R. 299 will restore the presumption only to a ship that crosses the dashed line.

all other sound medical and scientific information and analyses available to the Secretary.” The Secretary is further required to consider whether the results are statistically significant, are capable of replication, and withstand peer review. The responsibility to prepare a biennial report concerning the health effects of herbicide exposure in Vietnam veterans was delegated to the Institute of Medicine (IOM), a non-profit organization which is chartered by the National Academy of Sciences.

The Agent Orange Act required the Secretary to conduct blood tests on those veterans exposed to Agent Orange. The VA generally ignored this requirement and few blood tests were taken. Unfortunately, the half-life deterioration of the dioxin is now below the detection threshold and cannot be identified. While the dioxin has deteriorated, its effects have not. Many of these effects manifested themselves 20–30 years after exposure.

The Department of Veterans Affairs (hereinafter VA) drafted regulations to implement the Agent Orange Act of 1991 and defined “service in the Republic of Vietnam” as “service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.” 38 C.F.R. § 3.307(a)(6)(iii) (1994). This was in contrast to a previous definition which defined “service in Vietnam” as “service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.” 38 C.F.R. § 3.313 (1991). These regulations allowed the presumption of exposure throughout the Vietnam Service Medal area, the dark solid line marked on Exhibit 1. Under this definition, a ballistic missile submarine was covered as were the aircraft carriers on Yankee Station and submarines conducting operations in the Gulf of Tonkin in an area off the coast where no Agent Orange was sprayed. These ships would not be covered under H.R. 299.

In 1997 the VA General Counsel issued a precedential opinion excluding service members who served offshore but not within the land borders of Vietnam. The opinion construed the phrase “served in the Republic of Vietnam” as defined in 38 U.S.C. § 101(29)(A) not to apply to service members whose service was on ships and who did not serve within the borders of the Republic of Vietnam during a portion of the “Vietnam era.” The opinion stated that the definition of the phrase “service in the Republic of Vietnam” in the Agent Orange regulation, 38 C.F.R. § 3.307(a)(6)(iii), “requires that an individual actually have been present within the boundaries of the Republic to be considered to have served there,” and that for purposes of both the Agent Orange regulation and section 101(29)(A), service “in the Republic of Vietnam” does not include service on ships that traversed the waters offshore of Vietnam absent the service member’s presence at some point on the landmass of Vietnam.”³

After lying dormant for a few years, this General Counsel’s opinion was incorporated into a policy change that was published in the Federal Register during the last days of the Clinton Administration.⁴ The final rule was adopted in Federal Register in May of that year.⁵ The VA recognized the exposure presumption for the “in-land” waterways but not for offshore waters or other locations.

Historically the VA’s Adjudication guidance, the M21-1 Manual, allowed the exposure presumption to be extended to all veterans who had received the Vietnam service medal, in the absence of “contradictory evidence.” In a February 2002 revision to the M21-1 Manual, the VA incorporated the VA General Counsel Opinion and the May 2001 final rule and required a showing that the veteran has set foot on the land or entered an internal river or stream. This “boots on the ground” requirement is in effect today.

One exception to this rule deals with Non-Hodgkin’s Lymphoma (NHL). A punctuation difference in the regulation requires the inclusion of Blue Water Navy veterans. The VA General Counsel has ruled that all persons in the Center for Disease Control’s (CDC) Selected Cancers Study, including Blue Water Navy (BWN) veterans, were presumed to be included in the definition of “duty or visitation in Vietnam.”⁶ The Secretary has never explained why Agent Orange exposure caused NHL in BWN veterans but that it did not cause the other diseases associated with the dioxin. This selective application is inexplicable.

³ VA Op. Gen. Counsel Pree. 27–97 (1997).

⁴ 66 Fed. Reg. 2376 (January 11, 2001).

⁵ 66 Fed. Reg. 23166.

⁶ VAOPGCPREC 7–93, 1993.

Hydrological Effect

The Agent Orange spray was mixed with petroleum. The mixture washed into the rivers and streams and discharged into the South China Sea. The riverbanks were sprayed continuously resulting in direct contamination of the rivers. The dirt and silt that washed into the river was clearly seen exiting the rivers and entering the sea. This is called a discharge “plume” and in the Mekong River it is considerable. Although the Mekong has a smaller drainage area than other large rivers, it has approximately 85% of the sediment load of the Mississippi. In two weeks, the fresh water of the Mekong will travel several hundred kilometers.⁷ Notably, Agent Orange dioxin dumped in the Passaic River in New Jersey made its way off the east coast of the United States and was found in fish over one hundred nautical miles from shore.⁸

By coincidence, the baseline and territorial seas extend further from the mainland off the Mekong River. At its widest point off the Mekong, the territorial seas extend to 90 nautical miles from the mainland. This was due to the location of the barrier islands owned by Vietnam. Given the more pronounced effect of the Mekong plume, however, the broader area off the Mekong Delta is appropriate. The force of the water in this area is greater than the river discharge in other parts of the country.

Eventually, the Agent Orange/petroleum mixture would emulsify and fall to the seabed. Evidence of Agent Orange impingement was found in the sea bed and coral of Nha Trang Harbor. This was determined by a study of coral deterioration in the harbor.⁹ Here the Vietnamese government contracted with Dr. Pavlov¹⁰ and his team to ascertain why the coral in the Nha Trang area was dying. Their conclusion was that the coral was dying from the effect of Agent Orange. The presence of the dioxin was confirmed

Table 1 from this report (reproduced herein as Exhibit 2) shows the stations where the damage was verified in the coral as well as the stations where bottom sediment samples revealed the presence of the dioxin. The cross hatched section in the upper left hand quadrant shows the limit of Agent Orange spraying, encompassing part of the Kay River. The first station, station 50, is located in the Kay River seaward of the sprayed area. Bottom sediment samples, as reflected in Table 2 (reproduced as Exhibit 3) show a significant toxic effect in the column entitled 1-TEQ, ng/kg. The stations in a direct path from Transects Band C, as shown in Table 1, have more significant toxic effect than other areas. Transects A and D are in the discharge paths of rivers that did not receive direct spraying. While the stations along these Transects do show lower levels of toxic exposure. This is more appropriate for rainwater runoff from sprayed areas rather than discharge from the Kay River which received direct spraying. While all four Transects showed definite Agent Orange infiltration, the exposure was greater along the discharge plume of the Kay River.

The Pavlov study confirms the premise advanced by Military-Veterans Advocacy and hydrologists familiar with the Vietnamese River systems that the Agent Orange, which was mixed with petroleum, floated out to the harbors and the South China Sea from areas that were directly sprayed as well as rain water runoff into the inland waterways.

Notably, the harbors and bays of Vietnam were not “deep water” ports, as depicted by the VA, but shallow water areas. Da Nang Harbor currently has a depth at the anchorage of 31–35 feet (<http://www.worldportsource.com/ports/portCall/VNM—Da—Nang—Port—1457.php> (last visited August 16, 2015), although anecdotal information indicates it was dredged to 42 feet during the Vietnam War. The deepest point of Nha Trang Harbor is 32.7 meters or 107 feet. Most of the area is shallower. Destroyer sized ships normally drew 15–18 feet (depending on loadout) and could safely anchor up to a depth of 180–200 feet. These ships would churn up the seabed when entering and leaving the harbor and again when anchoring or weighing anchor. The emulsified Agent Orange would continue to be stirred up and would rise to the surface.

⁷Chen, Liu et. al, Signature of the Mekong River plume in the western South China, Sea revealed by radium isotopes, *JOURNAL OF GEOPHYSICAL RESEARCH*, Vol. 115, (Dec. 2010).

⁸Belton, et. al, 2,3,7,8-Tetrachlorodibenzo-p-Dioxin (TCDD) and 2,3,7,8-Tetrachlorodibenzo-p-Furan (TCDF), In Blue Crabs and American Lobsters from the New York Bight, New Jersey Department of Environmental Protection (November 12, 1988).

⁹Pavlov, et. al, Present-Day State of Coral Reefs of Nha Trang Bay (Southern Vietnam) and Possible Reasons for the Disturbance of Habitats of Scleractinian Corals, *RUSSIAN JOURNAL OF MARINE BIOLOGY*, Vol. 30, No. 1 (2004).

¹⁰Dr. Pavlov was affiliated with the Institute of Ecology and Problems of Evolution, Russian Academy of Sciences, Biological Department, Moscow State University and Russian-Vietnamese Tropical Center, Hanoi, Vietnam.

During the Vietnam War, the coastline, especially in the harbors and within the thirty-fathom curve, was a busy place with military and civilian shipping constantly entering and leaving the area in support of the war effort. Whenever ships anchored, the anchoring evolution would disturb the shallow seabed and churn up the bottom. Weighing anchor actually pulled up a small portion of the bottom. The propeller cavitation from ships traveling at high speeds, especially within the ten-fathom curve, impinged on the sea bottom. The wakes left by small boats traveling from ships to the shore would also churn up the sea bottom. This caused the Agent Orange to constantly rise to the surface. The contaminated water was ingested into the ship's evaporation distillation system which was used to produce water for the boilers and potable drinking water. Navy ships within the South China Sea were constantly steaming through a sea of Agent Orange molecules.

The Australian Factor and the Distillation Process

In August of 1998 Dr. Keith Horsley of the Australian Department of Veterans Affairs met Dr. Jochen Mueller of the University of Queensland's National Research Centre for Environmental Toxicology (hereinafter NRCET) in Stockholm at the "Dioxin 1998" conference. Horsley shared a disturbing trend with Mueller. Australian VA studies showed a significant increase in Agent Orange related cancer incidence for sailors serving offshore over those who fought ashore. Based on that meeting, the Australian Department of Veterans Affairs commissioned NRCET to determine the cause of the elevated cancer incidence in Navy veterans.

In 2002, as the American Department of Veterans Affairs (VA) was beginning to deny the presumption of exposure to the United States Navy veterans, NRCET published the result of their study.¹¹ Their report noted that ships in the near shore marine waters collected water that was contaminated with the runoff from areas sprayed with Agent Orange. The evaporation distillation plants aboard the ships codistilled the dioxin and actually enriched its effects. As a result of this study, the Australian government began granting benefits to those who had served in an area within 185.2 kilometers (roughly 100 nautical miles) from the mainland of Vietnam.

Institute of Medicine (IOM) Reports

In June of 2008, Blue Water Navy representatives presented to the IOM's Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides (Seventh Biennial Update) in San Antonio, Texas. That Committee report¹² accepted the proposition that veterans who served on ships off the coast of the Republic of Vietnam were exposed to Agent Orange and recommended that they **not be excluded** from the presumption of exposure. The Committee reviewed the Australian distillation report and confirmed its findings based on Henry's Law. The VA did not accept these recommendations. Instead then Secretary Shinseki ordered another IOM study. On May 3, 2010, Blue Water Navy representatives testified before the Institute of Medicine's Board on the Health of Special Populations in relation to the project "Blue Water Navy Vietnam Veterans and Agent Orange Exposure."¹³ They concluded: (1) There was a plausible pathway for some amount of Agent Orange to have reached the South China Sea through drainage from the rivers and streams of South Vietnam as well as wind drift, (2) The distillation plants aboard ships at the time which converted salt water to potable water did not remove the Agent Orange dioxin in the distillation process and enriched it by a factor of ten, (3) Based on the lack of firm scientific data and the four decade passage of time, they could not specifically state that Agent Orange was present in the South China sea in the 1960's and 1970's, (4) There was no more or less evidence to support its presence off the coast than there was to support its presence on land or in the internal waterways and (5) Regarding the decision to extend the presumption of exposure "given the lack of measurements taken during the war and the almost 40 years since the war, this will never be a matter of science but instead a matter of policy." Notably this report did not contradict the findings of the Seventh Biennial report that the

¹¹ Mueller, J; Gaus, C, et. al. Examination of The Potential Exposure of Royal Australian Navy (RAN) Personnel to Polychlorinated Dibenzodioxins And Polychlorinated Dibenzofurans Via Drinking Water (2002).

¹² IOM (Institute of Medicine). 2009. Veterans and Agent Orange: Update 2008. Washington, DC: The National Academies Press.

¹³ IOM (Institute of Medicine). 2011. Blue Water Navy Vietnam Veterans and Agent Orange Exposure. Washington, DC: The National Academies Press.

Blue Water Navy personnel should not be excluded from the presumption of exposure.

The IOM's Eighth Biennial Update recognized that "it is generally acknowledged that estuarine waters became contaminated with herbicides and dioxin as a result of shoreline spraying and runoff from spraying on land."¹⁴ The Ninth Biennial Update stated that "it is generally acknowledged that estuarine waters became contaminated with herbicides and dioxin as a result of shoreline spraying and runoff from spraying on land, particularly in heavily sprayed areas that experienced frequent flooding."¹⁵

Harbor Water Barges

In April of 2016, Military-Veteran Advocacy brought to the attention of former Chairman Jeff Miller the use of water barges in Vietnamese harbors, specifically Da Nang. These water barges furnished potable water, contaminated with the Agent Orange dioxin, to ships at anchor.

Most Navy ships had limited potable water reserves. The potable water was used for drinking, laundry, cooking, cleaning and hygiene for the crew and other embarked personnel. When anchored in the harbors, ships tended to distill mainly to reserve feed water, used for the boilers,¹⁶ because of sanitation issues. Solid waste permeated the harbor both from the ships themselves, the shore establishment and indigenous residents of the area. Accordingly, distillation to potable water was discouraged. As a result, reserve potable water levels often fell below acceptable limits. This required periodic replenishment from military and commercial potable water barges.

At least three self-propelled water barges YW 101, 126 and 128 were deployed to Vietnam.¹⁷ These barges were used frequently in Qui Nhon and Da Nang harbors. Their efforts were supplemented by commercial water barges.

In their monthly report, Commander Naval Forces Vietnam noted millions of gallons of potable water being delivered to anchored ships in any given month. These reports are available from the Naval Historical command.¹⁸ This water was obtained from an open-air reservoir on "Monkey Mountain" which overlooked Da Nang Harbor. The use of water from Monkey Mountain has been verified by Mary Ellen McCarthy, the former staff director of the Senate Veterans Committee. Notably this water was not only provided to anchored ships, but to ships moored to the piers.

The entire area was frequently sprayed with Agent Orange because there was a communications facility and artillery spotters located on the mountain. The intent was to deny cover to enemy forces who might attack those facilities or use the mountain as a mortar location.

Law of the Sea

Despite VA protestations to the contrary, the exclusion of the Blue Water Navy veterans from the presumption of exposure was never about science. The decision stems from an irrational, arbitrary and capricious finding of an incompetent General Counsel's office. The basis behind this deadly determination was an improper statutory interpretation, made in defiance of accepted principles concerning the law of the sea as well as international treaties signed and ratified by the United States. In defense of the General Counsel's office, Military-Veterans Advocacy believes the initial action was taken because of ignorance rather than maliciousness. Their unconscionable defense of a bad decision, however, has been nothing sort of abhorrent. The fact that an agency of the United States government would condemn tens of thousands of veterans to an early death to cover-up their error is despicable.

¹⁴IOM (Institute of Medicine). 2012. Veterans and Agent Orange: Update 2010. Washington, DC: The National Academies Press.

¹⁵IOM (Institute of Medicine). 2014. Veterans and Agent Orange: Update 2012. Washington, DC: The National Academies Press.

¹⁶Since the same intake distillation and discharge system was used for reserve feed and potable water distillation, the entire system was contaminated by Agent Orange dioxin discharged into the harbors via the rivers. Emulsified Agent Orange that sank to the seabed was disturbed and rose to the surface by the cavitation effects of ships entering and leaving the harbor and by the anchoring evolutions.

¹⁷See: <http://www.navsource.org/archives/14/17idx.htm>

¹⁸See: <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA953613> and [http://www.history.navy.mil/content/dam/nhhc/research/archives/commander-naval-forces-Vietnam/monthly-summaries-1967/July 1967.pdf](http://www.history.navy.mil/content/dam/nhhc/research/archives/commander-naval-forces-Vietnam/monthly-summaries-1967/July%201967.pdf)

The Agent Orange Act of 1991 provides that:

... [A] veteran who, during active military, naval, or air service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, and has ...[an enumerated disease] shall be presumed to have been exposed during such service to an herbicide agent containing dioxin ... unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during service.

38 U.S.C. § 1116(a)(3). (Emphasis added).

Vietnam claims a 12-mile territorial sea. The United States has consistently recognized Vietnamese sovereignty over the territorial seas of Vietnam. This recognition was expressly incorporated into the 1954 Geneva Accords Art. 4 which established the Republic of Vietnam.¹⁹ It was confirmed again in Art. 1 of the 1973 Paris Peace Treaty which ended the Vietnam War.²⁰ During the war, the United States recognized the Vietnamese 12 limit.²¹

Vietnam claims as internal or inland waters the seas landward side of the baseline.²² Additionally, bays such as Da Nang Harbor are considered part of inland waters and under international law are the sovereign territory of the nation.²³

The Secretary has recognized the presumption of exposure for those who served onboard ships who were in “inland” waters. The VA definition only includes inland rivers and does not cover the bays and harbors. Recently the Court of Appeals for Veterans Claims has rejected the VA’s exclusion of Da Nang Harbor from the definition of inland waters as irrational and not entitled to deference²⁴ in this case, the Court reviewed the case of a veteran whose ship was anchored in Da Nang Harbor but who did not set foot on land. As shown in Exhibit 4, Da Nang Harbor is surrounded on three sides by land and is considered inland waters under international law. The court required the VA to rationally specify what they consider to be inland waters. Instead in February of 2016 they doubled down on the exclusion without explanation. Military- Veterans Advocacy filed suit under the Administrative Procedures Act and 38 U.S.C. § 502 to invalidate that regulation. Briefing is complete and the parties are scheduled for oral argument on May 5, 2017.

Attempt to Search for Dioxin Residue on Inactive Ships

The staff of this sub-committee has sought to have the Navy investigate and test for the dioxin on ships that formerly served in Vietnamese waters. In May of 2016, Military-Veterans Advocacy contacted former Chairman Miller to discuss this matter. A follow up meeting in September of 2016 discussed the futility of this attempt.

There is very little likelihood that any residue is present aboard any inactive ship. This is very different from the C-123 aircraft that were stored in the dry heat environment of the Arizona desert. Ships remain in the water which is very susceptible to temperature changes. These temperature changes cause condensation inside of the hull, especially in the engineering spaces which are located below the waterline. The humidity caused by this environment will have a completely different effect than the dry arid environment had on the tanks in the C-123.

More importantly, the water distribution system, steam system and auxiliaries would have been continuously flushed after leaving Vietnamese waters. Ships continued to distill water for months, years and sometimes decades before they were decommissioned. The constant flow of water would have eventually removed the dioxin. Additionally, the internals of the distillation plant were removed on an annual basis for descaling and in later years sand blasting. The internal shell of the evaporator distillation equipment would be hand scraped to remove the scale that accumulated during operations. Boiler tubes were mechanically cleaned every 1800 hours of operation and in later years were water jetted with several thousand pounds of pressure. This was critical to maintaining purity and efficiency as the

¹⁹ <https://www.mtholyoke.edu/acad/intrel/genevacc.htm> (last visited June 6, 2014).

²⁰ <http://www.upa.pdx.edu/IMS/currentprojects/TAHv3/Content/PDFs/Paris—Peace— Accord— 1973.pdf> (last visited June 6, 2014).

²¹ The Joint Chiefs of Staff and the War in Vietnam 1960–1968, Part II which can be found at dtic.mil/doctrine/.../jcsvietnam—pt2.pdf at 358.

²² United States Department of State Bureau of Intelligence and Research, Limits in the Seas No. 99 Straight Baselines: Vietnam, (1983).

²³ Convention on the Territorial Sea and Contiguous Zone, [1958] 15 U.S.T. 1607, T.I.A.S. No. 5639.

²⁴ Gray v. McDonald, No. 13 3339, 2015 WL 1843053, (Vet. App. Apr. 23, 2015).

scale affected heat transfer. In boilers, the scale buildup could lead to catastrophe boiler tube failure.

These ships were on a five-year overhaul cycle. The water distribution piping was located in the bilges and often suffered corrosion damage due to immersion in water, including salt water. It was normally inspected and if necessary replaced during the overhaul cycle. Distillation pumps were inspected quarterly and often refurbished on an annual basis. The water tanks were drained and cleaned to remove moisture. The tanks were inspected and if necessary the interiors were repainted. Most major equipment would be refurbished during that overhaul.

Even more important, the Committee staff has not been able to assure Military-Veterans Advocacy that the ships under consideration, three aircraft carriers, even served in the territorial seas. If they did not, the relevance of this test is below any threshold of reason. Nor were these ships inactivated immediately after return. They appear to have had subsequent operations and deployments prior to decommissioning.

A better study would be to take bottom sediment samples in the various Vietnamese harbors and in the territorial seas out to the 30-fathom curve. That would of course require diplomatic clearances and it might spur a request for significant reparations from the Vietnamese government. It would also call into question the safety of Vietnamese seafood imported into the United States. Unlike the ship test, the bottom sediment examination would reveal tangible proof of the presence of dioxin.

The ship test is an attempt to prove a negative. As a naval engineer with a mechanical engineering subspecialty, I can confirm that under these circumstances no residue will be found. This is an exercise in futility and a waste of governmental resources. It will have a predictable negative result which could be used by the VA or other opponents of this bill as a basis to question the proven science.

Cost of HR 299

In October of 2012, the Congressional Budget Office provided a preliminary estimate that the Blue Water Navy Vietnam Veterans Act would cost \$2.74 billion over ten years. After meeting with Military-Veterans Advocacy, CBO re-scored the bill at \$1.104 billion over ten years. (See preliminary score attached as Exhibit 5). Military-Veterans Advocacy estimates that approximately 90,000 veterans would be affected by this bill.

Due to several unknowns, the CBO really cannot accurately score this bill and their estimate appears to be significantly higher than the actual cost. As a threshold matter, additional ships have been confirmed to have entered the Vietnamese river system. Once a ship's position in a river has been substantiated, everyone onboard on that date is covered by the presumption of exposure. MVA estimates another 10% of the crews actually set foot in Vietnam. This includes crew members who went ashore for conferences, to pick up supplies, equipment or mail and those who piloted and crewed the boats and/or the helicopters that operated between the ships and shore. Additionally, some personnel went ashore to see the doctor, the dentist, the chaplain or the lawyer. They called home. They shopped at the PX and departed on emergency leave or permanent change of station orders. Additionally, men reporting to the ship would often transit through Vietnam. Finally, a number of ships that were at anchorage would send a portion of the crew ashore for beach parties or liberty. All of those veterans are covered under existing law if they can prove that they actually set foot in Vietnam.

Some Blue Water Navy veterans, especially those who served for 20–30 years, manifested symptoms while on active duty. They are automatically service-connected for those diseases and should not be considered in computing the cost of the bill.

There will be a dollar for dollar offset for Navy veterans currently receiving a non-service connected pension. Additionally, under concurrent receipt laws, some veterans who are also military retirees will have a dollar for dollar offset due to waiver of their Title 10 pension (less federal tax liability).

Additionally, the CBO preliminary estimate shows a slow up-ramp in dollars after the third year. Due to the accelerated death rate among Agent Orange victims, the number of veterans covered will be decreasing at a rate that outstrips inflation. While some money will have to be paid to survivors under the Dependent's Indemnity Compensation program, that is a mere 40% of the veteran's benefit.

Additionally, as most Blue Water Navy veterans are in their 60's they are Medicare eligible or will become Medicare eligible during the ten-year cost cycle. In a previous report, the CBO has compared the cost of Medicare treatment with treat-

ment at a VA facility.²⁵ One of the key findings of this report was that private sector Medicare services would have cost about 21 percent more than services at a VA facility. When dealing with retirees, the cost would be greater since Medicare only provides coverage for 80% of the cost. Tricare for Life provides an additional 20% coverage for military retirees. Notably this estimate was issued prior to the Choice program so the savings may be less dramatic. Additionally, CBO admits that they made their decision based on old data because the VA failed to provide updated information. Still some savings in discretionary spending should be realized if HR 299 is adopted.

While HR 299 will require an expenditure of funds, many of the costs will be recoverable. The Blue Water Navy Vietnam Veteran Association analysis indicates a probable ten-year cost of \$800 million. MVA concurs with that estimate.

It is possible that the cost picture will change dramatically. I have a meeting with Secretary Shulkin on April 21 concerning a rulemaking request to include both Da Nang and Nha Trang harbors. We also have our pending court case concerning the exclusion of all bays and harbors. If Secretary Shulkin grants our request or the court finds in our favor, tens of thousands of additional veterans would be covered under existing law. That will require the score to be revised downward. MVA estimates a ten-year cost of between \$100 and \$150 million if all of the bays and harbors are covered.

MVA has proposed offsets in the past. We identified excessive mandatory spending in the VA Home loan program during the 113th Congress. Unfortunately, that money was used to partially fund the Veterans Access, Choice and Accountability Act. In the 114th Congress, MVA proposed the use of “round downs” to fund the bill. Our information was that “round downs” would generate \$1.8 billion over ten years. Senator Sanders refused to go along with the “round downs.” Then we worked with the sponsors and the Senate Judiciary Committee to propose an increase in student visa fees. Senator Leahy chose to put the interests of foreign students ahead of veterans and withheld his consent.

We believe offsets are a Congressional responsibility rather than a proponent’s responsibility, but we have tried to do our part to work within the rules. We are at a loss to find an offset acceptable to all 100 Senators. While a favorable decision from Secretary Shulkin or the federal court will reduce the problem, the requirement to produce an offset for mandatory benefits, earned as a result of wartime service, should be exempt from the offset requirements of the Pay As You Go Act of 2010 (PAYGO).

The Blue Water Navy is not alone in being sacrificed on the altar of PAYGO. Other Agent Orange exposures have taken place in Guam, Thailand, Laos, Cambodia, Korea, Panama, Okinawa and other areas. Additionally, other toxic exposures have been identified including PCBs, mustard gas, asbestos, radiation, burn pits, Fort McClellan, depleted uranium and others have been negatively affected the health of veterans who were exposed while on active duty. Military-Veterans Advocacy estimates that the cost of benefits for all toxic exposures would be \$20–25 billion over ten years. On May 20, 2017, victims of toxic exposure will gather on the National Mall to call attention to their plight in “Operation Stand Together.” We hope that the Sub-Committee will send a representative.

In today’s budgetary world, Congress must decide whether they are willing to pay for service connected toxic exposure. One of the reasons why service connected benefits are necessary is that military personnel are not allowed to sue the government or its contractors for injuries caused by negligence that are incident to service.²⁶ One of the basis for the adoption of this policy, known as the Feres doctrine, was the promise of generous disability benefits available to veterans for their service connected illnesses and disability. A failure to address these toxic exposures may result in a request for a judicial reconsideration of the Feres doctrine.

President Trump has stated repeatedly that he wants to address the needs of the veterans community. In order to achieve this praiseworthy goal, a funding source must be identified. Congress has been stymied in adopting piecemeal approaches to offsets. In the case of the VA, there are no significant mandatory spending funds available without cutting benefits. Military-Veterans Advocacy proposes the establishment of a \$10.00 annual “Freedom Fee” for all personal and cooperate tax returns except for those tax exempt entities organized under § 501 (c)(3) of the Internal Revenue Code. This should generate \$2.5 billion per year for ten years. The fund must be dedicated to fund benefits for veterans exposed to toxic substances and to conduct research into the effect of those exposures. We recommend that the diver-

²⁵ Congressional Budget Office, Comparing the Costs of the Veterans’ Health Care System With Private-Sector Costs (December 2014)

²⁶ Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. (1950).

sion of any funds raised by the "Freedom Fee" be prohibited absent a Presidential finding of necessity and the 2/3 vote of both Houses of Congress.

Partial Coverage

Military-Veterans Advocacy is aware of some movement to provide partial relief. The suggestion often heard is to provide medical care but not compensation. While we understand that there may be a need for segmented coverage we recommend a different approach. Providing medical coverage only would cost \$217 million of discretionary spending. It will not address the mandatory spending. While this would certainly provide some minor relief, it would be somewhat illusionary. Most of our Blue Water Navy veterans are Medicare eligible. While it is true Medicare only covers 80% of the costs, many veterans have supplemental plans.

Additionally, as stated earlier, CBO has also estimated a higher cost for Medicare reimbursement than treatment at the VA hospitals. Perhaps more important, many of our veterans are below the income threshold for nonservice connected treatment. They are receiving the treatment already, albeit at a lower priority.

More importantly, the Blue Water Navy veterans have been treated as second class veterans for the past fifteen years. While any assistance is appreciated, Military-Veterans Advocacy urges the Congress to recognize these veterans as deserving the same level of respect as their ground force and brown water brothers and sisters.

Although Military-Veterans Advocacy does not support the concept of partial coverage, if financial constraints require such a segmented approach, we recommend it be done on a geographical basis. Nha Trang Harbor should be the first area covered since we know that toxic levels of Agent Orange were present there 20 years after the war ended. The next priority would be ships anchored in harbors when a water barge using contaminated water can be confirmed to have come alongside. The third priority should be the remainder of ships anchored in Da Nang Harbor because of the dumping by the C-123s as they approached the airfield and the numerous canals and ditches that ran from the airport into the harbor. The fourth priority should be the remaining bays and harbors. The next priority should be the remainder of the territorial seas.

Any decision on partial coverage should be held in abeyance until such time as Secretary Shulkin acts on our rulemaking request and the court has ruled on our pending court action. Either or both of these activities could significantly affect the scope of the coverage and its associated cost.

Common VA Misrepresentations

The VA has consistently opposed the expansion of the presumption of exposure. Whether it is a reluctance to admit an error or other bureaucratic arrogance is unknown, but they have invariably misrepresented the facts surrounding this issue. They have even come before Congress and fabricated their testimony. As a result, tens of thousands of veterans have died without the compensation and care that they have earned. Additionally, the spouses of veterans were forced to leave the work force early to nurse sick husbands suffering from the ravages of Agent Orange. Many of these survivors have been left destitute. Since it may not be possible to address all of the VA disingenuous confabulations, I have repeated some of their most common fallacies.

Some common misrepresentations are as follows:

Misrepresentation: The Australian distillation study was never peer reviewed.

MVA Comment: The report was presented for review at the 21st International Symposium on Halogenated Environmental Organic Pollutants and POPs and is published in the associated peer reviewed conference proceedings: Muller, J.F., Gaus, C., Bundred, K., Alberts, V., Moore, M.R., Horsley, K., 2001. It was also reviewed and confirmed by two separate committees of the IOM. Its findings were accepted by the Australian government.

Misrepresentation: There is no evidence that the evaporation distillation process used by the Australians was the same as used on United States ships.

MVA Comment: All steam ships used a similar system which remained in place until the 1990's. In addition, many of the Australian gun ships were the United States Charles F. Adams class and were built in the United States. Both the MVA Executive Director and another experienced Navy Chief Engineer have reviewed the

Australian report. They concluded the distillation systems therein were the same as used by U.S. ships.

Misrepresentation: There is no evidence that Navy ships distilled potable water.

MVA Comment: Ships carried a reserve of potable water but it was normally replenished by distillation daily or every other day. A Destroyer sized ship carried less than 20,000 gallons for a crew size between 275 and 300 men. The water was used for cooking, cleaning, laundry, showering and drinking. As Vietnam is in the tropics, significant hydration was necessary. In addition, the warmer sea injection temperature below the 17th parallel resulted in less efficient water production. Water hours, where showers were limited or banned, was common during tropical deployments. Water was constantly being distilled to meet the requirements for boiler feed water and potable water.

Misrepresentation: The Australian study monitored the reverse osmosis system rather than the evaporation distillation system used on U. S. ships.

MVA Comment: The only time that the reverse osmosis system was used in the Australian study was to purify the baseline sample prior to adding the solids and sediments consistent with the estuarine waters of Vietnam. The actual distillation process, as confirmed above, was the same distillation system used by U. S. Ships.

Misrepresentation: The IOM found more pathways of Agent Orange exposure for land based veterans than those at sea.

MVA Comment: Technically this is true but irrelevant. The IOM noted that discharges from rivers and streams was a pathway unique to the Blue Water Navy and that it was one of the plausible pathways of exposure. The number of possible pathways is not determinative. What is conclusive is that pathways of exposure existed.

Misrepresentation: The IOM could not quantify any Agent Orange in the water.

MVA Comment: This again is a red herring. Any amount of exposure can do damage to the human body. The IOM also found that the evaporation distillation process enriched the dioxin by a factor of ten. This is consistent with Australian studies showing a higher cancer incidence among Navy veterans and a Center for Disease Control study showing a higher incidence of Non-Hodgkin's Lymphoma among Navy veterans. Additionally, measurements of the dioxin found in Nha Trang Harbor have been repeatedly provided to the VA. The VA has ignored this evidence.

Misrepresentation: Ships operating hundreds of miles off shore who were not exposed will be given the presumption of exposure.

MVA Comment: Not true. This bill applies only to the territorial seas which at their widest point off the Mekong extends out to 90 nautical miles from the mainland. In the central and northern part of the Republic of Vietnam, the territorial seas would only extend 20–30 nautical miles from the mainland.

Misrepresentation: Submarines would come into the area to obtain the Vietnam Service Medal for their crews and would be eligible for the presumption.

MVA Comment: One ballistic missile submarine the USS Tecumseh, SSBN 628 did enter the VSM area for that purpose but there is no indication that they entered the territorial seas. Submarines operating off of Haiphong or near Hainan Island would not have been within the territorial seas and are not covered by H.R. 299.

Misrepresentation: No Agent Orange was sprayed over water.

MVA Comment: Not true. MVA is in possession of statements from witnesses that ships anchored in Da Nang Harbor were inadvertently sprayed as the "Ranch Hand" planes made their approach to the airfield. Additionally, there are anecdotal reports of defective spray nozzles resulting in spray over the ships at anchor or operating in the South China Sea. Finally, the IOM recognized that the offsetting winds would blow some spray intended for the landmass over water.

Misrepresentation: Navy regulations prevented ships from distilling water within ten miles of land.

MVA Comment: This statement was taken out of context from a preventive medicine manual and was not a firm requirement. Ships were encouraged to not distill potable water near land because of the possibility of bacteriological contamination. Commanding Officers could allow potable water to be distilled close to land and often delegated that authority to the Chief Engineer. The IOM noted that the recommendation contained in the manual was widely ignored. More importantly, the recommendations in the manual did not apply to the distillation of feed water for use in the boilers. Since the same equipment was used for potable water, distillation to feed water would contaminate the entire system down to the final discharge manifold. Additionally, feed water used in auxiliary systems was discharged to the

bilges via low pressure drains. Crew members would also be exposed to Agent Orange residue while cleaning and inspecting the watersides of boilers and the steam sides of condensers as well as other equipment.

Additionally, when potable water was not distilled, water barges were used to furnish contaminated water to anchored ships.

Misrepresentation: The IOM confirmed that there was no likelihood of exposure to herbicides in Da Nang Harbor.

MVA Comment: The court in *Gray v. McDonald*, took the VA to task for this statement noting that this was not the conclusion of the IOM.

Misrepresentation: There is no evidence that the dioxin entered the bays, harbors and territorial seas.

MVA Comment: This is simply not true. Toxic levels were found in Nha Trang Harbor. Additionally, numerous drainage ditches and canals ran from the Da Nang airfield, where the planes were washed down and the spray tanks washed out, to the river and harbor.

There are also anecdotal stories of the C-123s dumping excess spray as they approached the air field. That flight path often came over the harbor. Given the offsetting winds, it is probable that some portion of the spray was blown out to the harbor and the seas beyond.

Conclusion concerning HR 299

MVA urges the adoption of HR 299. It will restore the earned benefits to tens of thousands of Navy veterans that were taken from them over a decade ago. This bill is supported by virtually all veterans organizations including the American Legion, The Military Coalition, Veterans of Foreign Wars, Vietnam Veterans of America, Reserve Officers Association, Fleet Reserve Association, Military Officers Association of America, Association of the U.S. Navy and other groups. Enactment of this legislation is overdue and Military-Veterans Advocacy most strongly supports its passage.

H.R. 105

While Military-Veterans Advocacy supports the concept, that veterans should be reimbursed for financial fraud on the part of a fiduciary, we do not believe HR 105 is the proper avenue. This bill would effectively make the Department an insurer for the fiduciaries. While the pertinent statute does call for recoupment, such an effort may be ineffective and result in an unnecessary burden on the Secretary. Collection will require the allocation of money and the expenditure of significant employee time to collect what may be a small debt.

A better approach is to require the fiduciary to obtain a bond in the amount of benefits to be awarded annually. The Secretary can promulgate a listing of approved bond companies and update that listing periodically. The Secretary can also pay the cost of the bond from the fee claimed by each fiduciary. This bond should also apply to cases where the Secretary was negligent in investigating allegations of fraud. The application of the bond to the latter situation will recover money that would otherwise be expended pursuant to 38 U.S.C. § 6107.

H.R. 1328

Military-Veterans Advocacy supports H.R. 1328. This bill will allow an automatic increase in COLA based on the Social Security Act. Enactment of this bill will streamline the process and eliminate the need for a separate bill each year.

H.R. 1329

Military-Veterans Advocacy concurs with the cost of living increase.

H.R. 1390

Military-Veterans Advocacy supports this bill. The cost is minimal and is outweighed by assuming the financial burden that would otherwise be placed on the veteran's survivors.

H.R. 1564

Military-Veterans Advocacy supports this bill.

Quicker Veterans Benefits Delivery Act of 2017

Military-Veterans Advocacy supports this bill. This bill makes good sense. There is no need to duplicate the efforts of qualified medical professionals. In many cases, the VA doctors performing Compensation and Pension examinations are not board certified in the pertinent specialty. The evidence of qualified non-VA doctors should be accepted into evidence. There is no need to duplicate the evidence.

Thank you for allowing Military-Veterans Advocacy to testify on this matter.

John B. Wells
Commander, USN (Retired)
Executive Director

