



VETERANS AND MILITARY LAW SECTION

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Annual Meeting & Convention
2019: Tampa, FL

MESSAGE FROM THE CHAIR: HAIL AND FAREWELL

by Alan Goldsmith, Veterans and Military Law Section Chair

Since my last report to you, the Veterans and Military Law Section (VMLS) has been extremely active. We have sponsored or co-sponsored several activities and have made other significant contributions to the FBA.

The Section sponsored a two-day CLE program on March 20-21 at the University of Montana Law School on assisting veterans, and it was a huge success. The program coordinator (and my colleague on the VMLS Board) Hillary Wandler noted that we had nearly 100 participants. These were both lawyers and non-lawyer veterans service officers (VSO's), many of them serving native American populations. I am very proud to report that in addition to myself, four other members of our Board, Maura Clancy, John Wells, Carol Scott and, of course, Hillary, were among the presenters on the program. VMLS funded the attendance of seven participants, all VSO's, through \$150 scholarships.

My attendance at the Montana CLE also resulted in positive developments for the Section on another front. As you may recall, we sponsored a very successful program at last year's annual meeting in which the Court of Appeals for the Armed Forces held an oral argument at the federal courthouse in New York as part of its continuing



“Project Outreach.” I then envisioned our sponsorship of a similar program with the Court of Appeals for Veterans Claims. (CAVC). At the Montana CLE, one of the participants was the CAVC chief judge, Robert Davis. When I broached the idea of his court hearing a case in conjunction with the 2020 Annual Meeting and Convention in Charleston, SC, Chief Judge Davis was very enthusiastic about my idea (this year's convention in Tampa was not in play because CAVC held hearings there last Fall). In June, on behalf of his Court, Judge Davis accepted an invitation from the FBA to hold an oral argument in Charleston. The organizers of the 2020 annual meeting have also

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advised me that they have tentatively agreed with a local law school to host the CAVC event. All of this means that the Section will once again leave a major footprint at an FBA Annual Meeting.

In April, at the request of FBA Government Relations Counsel Bruce Moyer, the Section took action on two Issues Agenda Nominations. The Section first voted to endorse a nomination to oppose deregulation of the Forever GI Bill. The Section Board agreed that many veterans are signing up and paying for courses at non-profit institutions, and then get little or no benefit from the course of instruction. Accordingly, the Section opposed deregulation. Additionally, the Section favorably endorsed the nomination submitted by the Bankruptcy Law Section to amend the Bankruptcy Code by excluding veterans benefits from the Code's definition of "current monthly income," thus putting these benefits on the same footing as Social Security benefits. Acting on the suggestion of Section Board member and Third Circuit Vice President Frank McGovern, the Section also sponsored "Troop Tango," an event sponsored by a Philadelphia

private school which benefits the local Veterans Administration hospital and another treatment facility.

Since last Fall, Section Vice Chair Walter Kroptavich has worked hard to set up a co-sponsorship with the Young Lawyers Division (YLD) on a program pertaining to summer law clerks working for the federal government. Those efforts bore fruit and we co-sponsored a happy hour with the YLD in mid-July.

I want to apprise you of a CLE that some of you on the east coast might want to attend. The Section is partnering once again with the Federal Career Service Division to sponsor a three-credit CLE on Veterans Courts at the Administrative Office of Pennsylvania Courts on Friday September 20, 2019. Three panels (outreach coordinators, court commissioners and judges) will make the case for veterans' courts. The governor of Pennsylvania has also been invited to speak. This appears to be a very interesting CLE—if any member of the Section wishes to attend, send me an email at the address below and I will give you information about how to register for the program.

I want to return to a message I first

sent in my last report to you; the Section needs your participation. Our committees—Veterans Affairs, Military Justice, Communications, Membership and Continuing Legal Education could all use an influx of new members eager to do the vital work that undergirds the Section. Once again, I urge you to contact me at aeg44451@aol.com if you want to get involved in the work of the Section on one of these committees. We also need articles for the newsletter, so those of you who might wish to write for us should also contact me. Finally, I urge you to talk up membership in the Section to those of your colleagues who are FBA members and have an interest in the various areas of practice covered by the Section's work.

Alan Goldsmith

*Chair of Veterans and Military Law
Section of the Federal Bar Association
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Law Section at: www.fedbar.org/Veterans*

Progress on the Legislative Front

by Carol Wild Scott, Chair, Veterans Affairs Committee

The Veterans Affairs Committee is making progress on several issues on the legislative front. As an introductory note, the Department of Veterans Affairs has now terminated the monthly Veterans Health Administration VSO briefings meetings which were attended by nearly all of the VSOs and by other stakeholders such as our Section. There were Community Care Program briefings until the last month or so to explain the roll out of the Mission Act. They have also degenerated now into occasional e-mails. The Veterans Benefits Administration has entirely ceased the quarterly briefings for the entire VSO community. The information we receive is that the "Big Six" (VVA, DAV, AMVETS, VFW, PVA, LEGION) receive breakfast briefings with the Secretary and these are supplemented by webinar televised "reports on progress," which offer no opportunity for questions, and do include previously submitted questions from an unnamed source. So much for openness on the part of the Department.

There has been, in the last few months considerable progress with the issues of American Indian/Alaska Native (AI/AN) veterans' concerns. The now Democratic controlled House and the House and Senate Committees are turning attention to these issues and intend to find resolution to some of them as much as possible. Chairman Takano has graciously met with us to address particularly the issue of accreditation of Tribal Veterans Service Officers and the issue of veteran suicide on tribal lands.

Meetings with VHA officials made it clear that no one is identifying tribal veteran suicide as such and consequently no one is counting. Staff

in both Chambers, including that of the Senate Committee on Indian Affairs are working on this issue along with the HVAC subcommittees. This will be a slow process, but the attention on veteran suicide in general is providing an environment in which this issue can receive more attention.

S.524, an act which establishes The Department of Veterans Affairs Advisory Committee on Tribal and Indian Affairs, was re-introduced this term by Senators Tester, Murkowski and Sullivan. This initiative was at least partially the result of information provided by our Committee. It now has a companion bill introduced by Rep. Haaland (D NM), which is quickly co-sponsors. We have our fingers crossed on this one, as it is well structured to provide an informative flow of information directly from Indian Country to the Secretary, as well as oversight by the Veterans' Committees of both chambers.

S.785 addresses mental health care for all veterans, and for the first time, singles out AI/AN veterans for inclusion. Comments have been submitted on explicit inclusion in the provisions of the legislation pertinent to the needs for cultural competence on the part of AI/AN veterans, particularly in the areas of alternative therapies such as yoga, riding therapy, etc., to include Traditional Healing modalities with the others, and to increase recruitment of indigenous therapists, social workers and psychiatrists (there are currently 12 indigenous psychologists out of several thousand in VA employ). Currently there is not a companion bill in the House, but we have learned that one is forthcoming.

There are other issues being addressed for both all veterans and indigenous veterans, particularly at

the quarterly VSO Roundtable hosted by Speaker Pelosi and Chairman Takano, to which we are regular invitees and at which our views are heard, acknowledged and appreciated, which is gratifying.

Congress Guts Veterans Judicial Victory

by CDR John B. Wells (RET)

After dawdling for a decade, the Democrat led House of Representatives passed a bill purported to restore benefits stripped from the Blue Water Navy veterans in 2002. In a controversial regulation, the VA had interpreted the 1991 Agent Orange Act to cover only those veterans who set foot on land or served on the internal river system. For a decade, stakeholders Military-Veterans Advocacy and the Blue Water Navy Vietnam Veterans association begged Congress to correct this injustice. Despite widespread bi-partisan support, it never happened.

After years of frustration with Congress, the Blue Water Navy veterans, led by Military-Veterans Advocacy moved to the courts. In January they won a landmark court case, *Procopio v. Wilkie* before the Court of Appeals for the Federal Circuit sitting *en banc*. In a 9-2 decision, the Procopio Court ruled that ships operating in the territorial sea were covered by the Agent Orange Act.

The *Procopio* Court also opened a pathway beyond the territorial sea by recognizing a swath of water that extended beyond the territorial sea. Referring to VA regulations, the Court described this area as “waters offshore,” Confirming the majority view, Judge Lourie’s concurrence noted that the plain meaning of this regulation required the application of the presumption to ships in this area. While the court stopped short of defining the breadth of this area it opened the door for further expansion to cover additional veterans.

The new Chairman of the House Veterans Committee, Mark Takano (D CA) saw a chance to score a political coup by piggybacking on Procopio. He proposed a bill that accomplished nothing but narrowing Procopio. Takano used geographic points that mirrored

the territorial sea adopted by the *Procopio* court but insisted on defining them as “offshore.” By using the term “offshore” instead of “territorial sea” or other benign language, Takano slammed the door on the pathway opened by *Procopio* into waters offshore. The so-called Big-Six Veterans organizations supported the move which could cut off 55,000 veterans.

Takano’s failure to substitute benign language for the term “offshore” jeopardized the litigation strategy to include all Blue Water Navy veterans. Currently a court case is pending addressing a carrier sailor that operated just outside the territorial sea but in “waters offshore.” This may be a bell weather case on how the courts interpret the Congressional action. Lawyers for the veteran will argue that the Congressional bill, which does not take effect until January 1, 2020, is prospective not retroactive. Advocates are urging those who served outside the geographic line drawn by the legislation to ensure claims are submitted by the end of the year.

Despite the reasoned analysis of the *Procopio* litigation team, the Senate adopted the Takano language and passed the bill by unanimous consent. It is now being sent to the White House,

In the rush to pass a bill and take credit for “helping” Blue Water Navy veterans “get their benefits” the House and their supporters have actually injured them. The bill does not add one single veteran to the number protected by *w*. This legislation is an example of the oblivious devising an inauspicious solution to a nonexistent problem. There is no need for the geographic points in the Takano bill. They merely inject ambiguity into the process. Even if the House members and the land

centered veterans service organization do not know where the territorial sea is located. The treaties are clear, and Vietnam has published their territorial sea in accordance with those treaties.

If Congress was going to act, they could have done so any time during the last decade. Instead they and the “Big Six” sacrificed the interests of veterans, on the altar of political expediency, to make a last-minute grab for glory.

John B. Wells is a retired Navy Commander. After retirement he became an attorney practicing military and veterans law. He is Executive Director of the nonprofit Military-Veterans Advocacy, and the original drafter of the Blue Water Navy legislation. He was also the attorney for the veteran in Procopio v. Wilkie.

Editor’s Case Update Note: A Petition for the Plaintiffs to vacate the stay was filed in the Federal Circuit Court of Appeals on July 22, 2019. The Veterans and Military Law Section’s Board unanimously voted on July 25th to have an Amicus Brief drafted that could be filed in support of the Plaintiff’s petition.

2019 FBA ANNUAL MEETING & CONVENTION

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SEPTEMBER 5-7 • HILTON TAMPA DOWNTOWN



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The views expressed herein do not necessarily represent those of the FBA. Send all articles or other contributions to Raymond J. Toney at rjtoncy@militarylawpro.com. Yanissa Pérez de León, managing editor.

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