

Blue Water Navy and Agent Orange

The effort to get the VA to acknowledge that those who served on ships off the coast of Vietnam also were exposed to Agent Orange has been one of the longest battles in the history of veterans' benefits. Unfortunately, for every small win achieved by veterans, other roadblocks have appeared. In January, MOAA and other organizations challenged one of those roadblocks in court.

An estimated 90,000 Vietnam veterans served off the coast of Vietnam. Based on ship logs, military weapons, and logistics technology at the time, a majority likely were in harbors at some point. But despite scientific evidence of aerial spraying and the presence of Agent Orange in drinking water, the VA refuses to recognize service on ships in bays and harbors as service within the territory of Vietnam for the purposes of presuming exposure by Agent Orange.

In 2015, the U.S. Court of Appeals for Veterans Claims, in *Gray v. McDonald*, determined the VA's exclusion of the bays and harbors was an unsupported legal fiction, saying it was "devoid of any indication that VA made a fact-based assessment of the probability of exposure." It ordered the VA to go back and reevaluate its definition of inland waterways as it applied to bays and harbors. The VA did so and decided to continue to exclude bays and harbors. It revised its internal manual, directing VA



Sailors aboard **USS Constellation** (CV-64, above, in 1966) and other carrier groups likely were exposed to Agent Orange in bays and harbors of Vietnam.

claims adjudicators to exclude service in bays and harbors from the Agent Orange presumption.

The case went back to court, this time with a challenge to the VA's internal manual instructions. The VA argued that because this was merely an internal manual provision, the courts had no authority to review it. In 2017, the U.S. Court of Appeals for the Federal Circuit agreed with the VA and refused to review the internal manual provisions. This left 90,000 Vietnam veterans with little to no recourse to challenge the VA's determination, which was no less "devoid of indication that VA made a fact-based assessment of the probability of exposure" in 2017 than it had been in 2015 — just this time shielded from judicial review through the VA's own actions.

In late January, MOAA joined other veterans' advocacy groups in asking the court to reconsider

that decision, pointing out the "VA, in adopting this new approach of ensconcing massive substantive policy changes in the manual, thereby steering the adjudication process into the shadows, for the sake of its own convenience, is both anti-veteran and menacing to the productivity of the system." MOAA asked for immediate action by the court because "a number of these veterans will die appealing the VA's flawed policy."

The case is *Gray v. Secretary of Veterans Affairs*, No. 16-1782, in the U.S. Court of Appeals for the Federal Circuit. It's uncertain when the court will decide whether a rehearing is warranted, but MOAA will keep you updated on any developments.

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