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07-7037

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

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**JONATHAN L. HAAS,**
**Claimant-Appellee,**
**v.**
**JAMES B. PEAKE, M.D., Secretary of Veterans Affairs,**
**Respondent-Appellant.**

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**Appeal From The United States Court of Appeals For Veterans Claims**
**In 04-4091, Judge William A. Moorman**

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# RESPONDENT-APPELLANT'S OPPOSITION TO COMBINED PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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Respondent-Appellant, James B. Peake, M.D., the Secretary of Veterans Affairs, respectfully submits this opposition to the combined petition for panel rehearing or rehearing en banc. Rehearing en banc is only warranted when the Panel's decision conflicts with precedent from this Court or the Supreme Court or presents a precedent-setting question of exceptional importance. Fed. R. App. P. 35. The Panel applied well-established principles of deference to conclude that the Secretary had reasonably interpreted the statutory requirement "service in the Republic of Vietnam," to require service on the land mass. Because the Panel's decision correctly applied precedent and did not involve a precedent-setting question of exceptional importance, the petition should be denied.

## I. The Panel Properly Concluded That The Statutory Requirement Of "Service In The Republic of Vietnam" Was Ambiguous

The Agent Orange Act of 1991 provides a statutory presumption that veterans who served "in the Republic of Vietnam" were exposed to herbicides. See 38 U.S.C. 1116. The presumption eliminates the obligation to demonstrate actual exposure and entitles veterans to service connection for a delineated set of conditions or diseases. Id. After an exhaustive analysis of the statutory and legislative history, the Panel properly concluded that the phrase "service in the Republic of Vietnam" was not plainly defined by Congress and, thus, was appropriate for reasonable interpretation by the Department of Veterans Affairs.

Haas v. Peake, 525 F.3d 1168, 1184-85 (Fed. Cir. 2008).

### A. "Service In Vietnam" Does Not Have A Single, Plain Meaning

Mr. Haas's primary argument for rehearing is that the Panel erred in finding the statutory phrase "service in the Republic of Vietnam" ambiguous. According to Mr. Haas, when Congress refers to a sovereign nation it necessarily intends to include its territorial waters. Pet. 3. This argument is incorrect. There is no "one size fits all" definition for what Congress intends when it refers to a country – there are multiple possible meanings. The statutory context and purpose must be examined in order to determine congressional intent. In this case, the Panel properly concluded that Congress' intent was ambiguous.

The extent of a nation's boundary or jurisdiction depends entirely upon the issue presented for resolution. The territory under a nation's jurisdiction may include that nation's landmass, its internal waters, territorial sea, archipelagic waters, contiguous zone, continental shelf, and exclusive economic zone. See, e.g., I. E.D. Brown, Sea-Bed Energy and Mineral Resources and the Law of the Sea: The Areas within National Jurisdiction I.1 3 (1984). Thus, depending upon the context, the definitional boundary can be limited to the landmass or it can encompass far greater areas of land, sea or airspace.

Congress routinely makes distinctions between a nation's territory and its territorial waters. At least one statute directly related to Vietnam veterans specifically referred to the country's land mass as well as its waters in defining such a veteran. Section 513 of Public Law No. 96-466 stated: "veterans who served . . . in Vietnam, in air missions over Vietnam, or in naval missions in the waters adjacent to Vietnam shall be considered to be veterans who served in the Vietnam theatre of operations."[1] Likewise, in the statute defining veterans who served during the Mexican Border War, 38 U.S.C. § 101(3), the reference to Mexico did not intrinsically include service in the territorial waters. Rather, Congress specifically referred to veterans who "served in Mexico, on the borders thereof, or in the waters adjacent thereto." These references indicate Congress' understanding that a statutory reference to being "in" a country does not inherently include being in the adjacent waters and that when Congress intends to include veterans who served in the territorial waters, it has done so explicitly. Moreover, although these references involve different contexts and different purposes than the presumption of herbicide exposure, they emphasize that in determining the

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[1] Pub. L. No. 96-466 amended what is now 38 U.S.C. § 4107 to provide expanded rehabilitation and educational benefits. Section 513 is set forth in the notes following 38 U.S.C. § 4107, and relates to a requirement to publish labor market statistics regarding the employment of Vietnam veterans.

boundaries of a country for purposes of a particular statute, the purposes underlying that statute must be taken into account and that no single uniform definition exists.

Similarly, geographical distinctions between United States territory and United States territorial waters have historically been prevalent in immigration policy. Courts had differing definitions over what geographical lines should be considered borders for the purposes of immigration law. In Taylor v. United States, 207 U.S. 120, 125 (1907), the Supreme Court held that to "land" in the United States, immigrants must depart from their vessels and come ashore onto United States soil. Id. The United States Court of Appeals for the Second Circuit also concluded that an alien does not enter the United States until he or she has touched the soil. Zhang v. Slattery, 55 F.3d 732, 754 (2d Cir. 1995). In contrast, the Fourth Circuit held that Baltimore's port and harbor constitutes United States territory for the purposes of determining unlawful entry into the United States: "The port and harbor of Baltimore is territory of the United States. Entry into that territory even in a vessel amounted to a violation . . . ." Lazarescu v. United States, 199 F.2d 898, 900-01 (4th Cir. 1952).

In 1996, Congress amended the Immigration and Nationality Act "(INA"). Illegal Immigration Reform and Immigrant Responsibility Act. Pub. L. No. 104-

208, Div. C, 110 Stat. 3009-546. The INA provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section . . . . " 8 U.S.C. §1158(a)(1). "The term 'United States,' except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. § 1101(a)(38). The term "United States," however, does not include aliens interdicted in territorial waters. Immigration Consequences Of Undocumented Aliens' Arrival In United States Territorial Waters, 17 Op. Off. Legal Counsel 77, 85 (1993).

Similar distinctions arise in other parts of the United States Code. For instance, the Rules of Construction in the General Provisions for the United States Code provide that, "[w]herever, in the statutes of the United States or in the rulings, regulations, or interpretations of various administrative bureaus and agencies of the United States there appears or may appear the term 'products of American fisheries' said term shall not include [fish products] produced in a foreign country or its territorial waters . . . . 1 U.S.C. § 6 (emphasis added).

Likewise, tax legislation makes a similar distinction. Under the Tax Reform Act of 1986, for purposes of allocating income derived from transportation services between the United States and foreign countries, the House Conference Report clarified that "income attributable to services performed in the United States or in U.S. territorial waters is U.S. source." H. Conf. Rep. No.99-841, 1986 WL 31988 (Leg.Hist.) *4687. The above distinctions between a nation's landmass and its territorial waters indicates that Congress often has found it necessary to separately identify a nation's land mass from the waters adjacent thereto in order to ensure that activity in such waters is covered by the legislation.

Mr. Haas's proposed definition no more plainly interprets the statutory language than the Secretary's interpretation. A sovereign nation in the jurisdictional and territorial sense to which Mr. Haas refers usually includes that nation's airspace as well, but even Mr. Haas has made no suggestion that Congress intended to extend the presumption to pilots who may have entered Vietnam's airspace but did not serve in any area in which herbicides were ever used. Rather than positing one plain and exclusive definition of the Republic of Vietnam, Mr. Haas simply selectively chooses the one which best supports his case. However, without any direct evidence to demonstrate that Congress intended to select the definition of his choosing, the task of interpreting an ambiguous statutory term

was properly left to the Department of Veterans Affairs.

### B. The Context And History Of The Agent Orange Act Does Not Plainly Suggest That "Service In The Republic Of Vietnam" Includes Territorial Waters

Mr. Haas also contends that the larger statutory text, its legislative history, and the preceding regulatory history render the meaning of the phrase "service in the Republic of Vietnam" plain. In particular, he points to other parts of the statute which reference "active military, naval or air service in the Republic of Vietnam." Pet. 6. But this reference does not support Mr. Haas's proposed definition any more than it unequivocally supports the reasonable interpretation of the Secretary. It contains the same ambiguous phrase "service in the Republic of Vietnam," and the fact that it references military, naval or air service simply emphasizes that all veterans who served, regardless of which branch of the armed forces, are entitled to the presumption. The Secretary's reasonable interpretation, to which the Panel properly deferred, likewise includes all veterans – soldiers, sailors and pilots – if they set foot on land.

Mr. Haas's reliance on the regulatory history and context, Pet. at 7-8, is equally unavailing. Indeed, to the extent the regulatory history preceding the enactment of the Agent Orange Act is instructive it supports the Secretary's interpretation. In particular, the differing history and purpose of the regulatory

presumptions for chloracne (38 C.F.R. 3.311a) and non-Hodgkins lymphoma ("NHL") (38 C.F.R. 3.313), upon which Mr. Haas heavily relies, demonstrate the reasonableness of the Secretary's interpretation of the presumption. Section 3.311a resulted from the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-543, 98 Stat. 2725 (1984), which directed the VA to establish standards for resolving whether certain diseases, such as chloracne, should be granted service connection based upon herbicide exposure. That regulatory language is now found at 3.307(a)(6)(iii) and forms the basis for the Secretary's regulatory presumption of herbicide exposure. The NHL presumption, which extends to sailors regardless of whether they set foot in Vietnam, was based upon a particular study from the Centers for Disease Control which found a statistically higher rate of NHL in Vietnam era veterans, and an even higher rate among sailors. That study was not based upon herbicide exposure and, furthermore, rejects such exposure as a cause. See 55 Fed. Reg. 43,123, 43,124 (Oct. 26 1990). Despite Mr. Haas's insistence, the regulatory presumption for NHL does nothing to inform a proper interpretation of what Congress intended by 38 U.S.C. §1116(a)(1)(A) since the NHL regulation has nothing to do with herbicide exposure. Rather, as the Panel found, the Secretary's interpretation of its regulatory presumption based on herbicide exposure is the most "natural

reading of the language of the regulation." 525 F.3d at 1186. As such, to the extent the regulatory history supports any "plain language" interpretation, it would support the Secretary's interpretation. At the very least, the differing regulatory history supports the Panel's conclusion that the statute is ambiguous.

## II. The Panel Properly Applied Well-Established Principles Of Deference To Defer To The Secretary's Reasonable Interpretation

Having correctly found the statute ambiguous, the Panel properly applied well-established principles of deference and deferred to the Secretary's reasonable interpretation. The Panel's application of these principles of deference is consistent with precedent and does not warrant rehearing.

### A. Chevron And Other Principles Of Deference Apply To Interpretations By The Secretary

Mr. Haas initially contends that the pro-veteran canon of statutory interpretation trumps Chevron and therefore the Panel was not free to defer to the Secretary's reasonable interpretation. Pet. 12. That is not the law. This Court has repeatedly recognized that when faced with an ambiguous statute, even in the veterans context, it must defer to the agency's reasonable construction. See, e.g., Terry v. Principi, 340 F.3d 1378, 1383 (Fed. Cir. 2003); National Organization of Veterans' Advocates v. Secretary of Veterans Affairs, 260 F.3d 1365, 1378 (Fed.

Cir. 2001) ("NOVA"). In NOVA, this Court specifically noted that "where applications of the usual canons of statutory construction [legislative history and the pro-veterans canon] push in opposite directions [the Court] would resort to the Chevron principle, which mandates that [the Court] defer to an agency's reasonable interpretation of an ambiguous statute." Neither the Supreme Court's decision in Brown v. Gardner, 513 U.S. 115 (1994), nor any of this Court's precedent support Mr. Haas's position that the Secretary's reasonable interpretation can be disregarded.

### B. The Panel Properly Concluded That The Secretary's Interpretation Was Reasonable

The Panel properly applied traditional principles of deference to conclude that the Secretary's interpretation was reasonable. First, the Panel concluded that the statute was ambiguous. 525 F.3d at 1185-86. Second, the Panel found that the Secretary had formally interpreted the ambiguous statutory language by promulgating 38 C.F.R 3.307(a)(6)(iii) which further defined "'service in the Republic of Vietnam" to mean "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.'" Id. at 1186-87. Although "agree[ing] with the Government that 'duty or visitation in the Republic of Vietnam seems to contemplate actual presence on

the landmass of the country," the Panel found the regulation "sufficiently ambiguous" such that it could not "resolve the issue with certainty." Id. at 1186. Third, the Panel properly turned to the final level of deference, namely, the agency's interpretation of its own regulation, which is "'controlling unless plainly erroneous or inconsistent with the regulations being interpreted.'" Id. (quoting Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2346 (2007)). Because the Secretary's "foot-on-the-land" requirement is not inconsistent with the regulation or plainly erroneous, the Panel properly deferred to the Secretary's interpretation. Id. at 1186-87.

Mr. Haas's objections to the Panel's application of those well-established principles of deference are unavailing. First, he contends that the Panel erred by giving Chevron deference to an agency interpretation that lacked "the force and effect of law" because it was announced in a general counsel opinion, in various rulemaking procedures, and in a revised 2002 VA Manual M-21 provision. Pet. 13. However, he either misunderstands the Panel's opinion or he misunderstands the law. The Panel did not give Chevron deference to the agency's interpretive regulation, which it found ambiguous. Rather, it gave deference to the agency's interpretation of its own regulation, as found in various other interpretive pronouncements, which interpretation is not required to be announced through

formal rule-making. "[S]uch deference is afforded to an agency's interpretation of its own regulations even when that interpretation is offered in informal rulings such as in a litigating document." Smith v. Nicholson, 451 F.3d 1344, 1350 (Fed. Cir. 2006).

Second, Mr. Haas contends that the Panel improperly deferred because the Secretary's interpretation was not formally adopted until after Mr. Haas filed his claim. Pet. 14. But as the Panel properly found, application of deference pursuant to Long Island Care does not require a formal interpretation – if so, the question would no longer be interpretation of an ambiguous agency regulation but Chevron step two deference of whether the formal interpretation reasonably interprets the statute. As the Panel noted, "the agency's position has been consistent for more than a decade, and there is 'no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." 525 F.3d at 1190 (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)). Likewise, the agency interpreted its own regulation to require presence on the landmass well before Mr. Haas filed his claim. Id.

Lastly, Mr. Haas contends that the Secretary's interpretation is unreasonable because it is unsupported by scientific evidence and unreasonably draws lines where Congress intended none to be drawn. Pet. 14. However, the law governing

whether an interpretation is reasonable does not require scientific evidence, and Mr. Haas cites no such requirement. In a case such as this, where it is undeniable that the vast majority of – if not all – herbicides were sprayed over land, common sense and practicality support drawing a line at the edge of the land mass for a presumption of exposure to such sprays. Mr. Haas contends that Congress did not intend for the Secretary to draw that line. By referring to Vietnam by name, however, rather than identifying specific geographic borders, Congress referenced an ambiguous area. Indeed, as demonstrated above, a legislative reference to a country by name does not inherently include reference to its waters. By using an ambiguous term, Congress delegated the need for clarification to the Secretary. See 38 U.S.C. § 501(a)

### III. The Panel Properly Declined To Consider The Australian Study

The amicus, Patricia McCulley, renews the argument she made in an amicus brief submitted to the Panel that the Court should rely upon a study conducted by the Australian government to conclude that sailors who served offshore were also routinely exposed to herbicides. The Panel properly declined to consider the Australian study because it was not part of the record and was not considered by the Secretary in his rulemaking. "Judgments as to the validity of such evidence and its application to the particular problem of exposure to herbicides in Vietnam

are properly left to Congress and the DVA in the first instance; this court is not the proper forum for an initial analysis of such evidence and its implications for DVA's policies." 525 F.3d 1194. The Panel's reasoning was sound and the amicus presents no compelling argument to re-address the issue. Indeed, there is even less of a reason for the Court to consider the Australian study now because it can be and has been submitted to the DVA for consideration during the rulemaking on the proposal to amend the very regulation that is at issue in this appeal. That rulemaking procedure is the proper forum for the DVA to consider this evidence and provide its sound determination of whether the evidence is reliable and warrants a change in the regulatory presumption.

* * *

Let us be clear. This appeal is not about determining whether only veterans who served on land are Vietnam War veterans. That category is far larger and encompasses a multitude of men and women, who, like Mr. Haas, honorably served their country offshore, in the air, and in other areas of the Vietnam theater. This appeal is also not about establishing an absolute rule that veterans who served offshore can never be entitled to prove exposure to herbicides and obtain the benefit of the established presumptions of service connection based upon such exposure; Mr. Haas and others similarly situated are free to present evidence and

testimony that they did, in fact, come into contact with herbicides. The issue in this appeal is a narrow one: whether the Secretary has reasonably interpreted an ambiguous statutory term to require service on land to obtain the presumption of exposure and consequently service connection provided by section 1116. Because the Panel properly concluded that the statute was ambiguous and that the agency's interpretation of its own interpretive regulation was not plainly erroneous or inconsistent with the regulation, it properly deferred to the Secretary. The petition for rehearing should be denied.

Respectfully submitted,

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September 12, 2008

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## CERTIFICATE OF SERVICE

I certify that on this 12TH day of SEPTEMBER 2008, I caused to be served by United States mail (first class mail, postage prepaid) copies of "Respondent-Appellant's Opposition To Combined Petition For Panel Rehearing Or Rehearing En Banc" addressed as follows:

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