UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NO. 2007-7037

JONATHAN L. HAAS
Claimant, Appellee

V.

R. JAMES NICHOLSON, Secretary of Veterans Affairs
Defendant - Appellant

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS 04-4091, JUDGE WILLIAM A. MOORMAN

AMICUS CURIAE BRIEF ON BEHALF OF PATRICIA MCCULLEY IN SUPPORT OF APPELLEE JONATHAN L. HAAS' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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CERTIFICATE OF INTEREST

NOW COMES BEFORE this Honorable Court, pursuant to Rule 47.6, attorney for amicus curiae, Patricia McCulley, John B. Wells Esquire, to file the required certificate of interest providing herein:

The represented party in this case is Patricia McCulley.

The real party in interest is Jonathan Haas.

The corporate disclosure statement require by Rule 26.1 does not apply.

The amicus curiae will be represented by the Law Office of John B. Wells, 769 Robert Blvd., Suite 201D, Slidell, LA 70458.

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John B. Wells

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IDENTITY OF THE AMICUS AND INTEREST IN THE CASE

As more fully explained in the Motion for Leave to File Amicus Curiae Brief, which is incorporated by reference herein, Ms. McCulley has a matter pending before the Department of Veterans Affairs that will be affected by the court's decision in this case. She filed an amicus brief before the panel.

STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court of the United States: *United States v. Louisiana* 394 U.S. 11 (1969); *Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906); *Manchester* v. *Massachusetts*, 139 U. S. 240 (1891); *United States v. State of California*, 332 U.S. 19, 34 (1947); *United States v. Alaska*, 521 U.S. 1, 35 (1997).

Based on my professional judgment, I believe that this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

1. Does the statutory term "served in the Republic of Vietnam," 38 U.S.C. § 1116(a)(1)(A), exclude service in the territorial seas of Vietnam?

2. As a matter of comity, the actions of the Australian government in recognizing that he agent orange dioxin entered the ship's potable water system.

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John B. Wells

ARGUMENT FOR PANEL OR EN BANC REHEARING

I. SERVICE WITHIN THE 12 NAUTICAL MILE LIMIT IS SERVICE IN THE REPUBLIC OF VIETNAM

Mr. Haas' ship, the *USS Mount Katmai*, was operated within the territorial waters of Vietnam. Territorial waters were historically defined as three nautical miles. Some nations claim a 12 mile territorial sea. United Nations Convention on the Law of the Sea Article 3. Since the ship operated close to shore, it was within the sovereignty of Vietnam.

Territorial or internal waters are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory. *United States v. Louisiana* 394 U.S. 11 (1969). Thus the territorial waters are an integral part of the sovereign nation. A coastal state, in this case Vietnam, has the same sovereignty over its territorial sea as it has over its land territory. *See*, 1958 Territorial Sea Convention Article 1-2; Law of the Seas Convention, Article 2. [1]

Appellee has alleged that the ship the *USS Katmai* had traveled within 100 yards of the coast of Vietnam. Accordingly, the ship was within the sovereignty of Vietnam and therefore its crew "served in the Republic of Vietnam." Under both national and international law, Haas served in the Republic of Vietnam.

Although this was presented in the amicus brief, the panel ignored the well

[1] The United States has not ratified the United Nations Convention on the Law of the Sea but has ratified the Territorial Sea Convention.

settled definition of sovereignty. Instead the court found ambiguity based on the analysis of the Veterans court's dicta. *Haas v. Nicholson*, 20 Vet.App. 257, 263 (Vet. App, 2006). The panel found that there were "other definitions" that were possibly relevant. *Haas v. Peake*, 525 F.3d 1168, 1184 (Fed. Cir. 2008). In relying upon the dicta of the Veterans court, the panel erroneously recognized their philosophical discussion as a contradiction within the law. The *Haas* panel presumably did not consider the controlling precedent of *Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906) which supports Haas position. *See, also Manchester* v. *Massachusetts*, 139 U. S. 240 (1891); *United States v. State of California*, 332 U.S. 19, 34 (1947); *United States v. Alaska*, 521 U.S. 1, 35 (1997). The principle of national sovereignty over territorial waters is binding upon the court by Supreme Court precedent and international treaty. The CIA web site cited by the Veterans court is not controlling. *Haas*, 20 Vet. App. at 263. The regulatory definitions cited by the Veterans court, *Haas*, 20 Vet. App. at 264-65, must also yield to binding precedent by the Supreme Court of the United States and an international treaty to which the United States is a signatory. Accordingly, the panel's decision is in contravention of the rulings of the Supreme Court.

II THE PANEL FAILED TO CONSIDER, AS A MATTER OF COMITY, THE ACTIONS OF THE AUSTRALIAN GOVERNMENT IN

RECOGNIZING THAT THE AGENT ORANGE DIOXIN ENTERED THE SHIP'S POTABLE WATER SYSTEM AND WAS ENHANCED BY THE SHIP'S DISTILLING PLANT

In adopting the Comprehensive Environmental Response Compensation and Liability Act, the Congress noted that the environment included the waters of the contiguous zone. 42 U.S.C § 9601. In the Clean Water Act Congress recognized that pollutants discharged from shore will contaminate the navigable waters, waters of the contiguous zone, and the oceans. 33 U.S.C. § 1251(a)(6). This happened repeatedly in the offshore waters of Vietnam.

A report by the National Research Centre for Environmental Toxicology in conjunction with the Queensland Health Scientific Services determined that sailors assigned to ships of the Royal Australian Navy were exposed to Agent Orange.[2] (hereinafter RAN Report). The study noted that ships in the near shore marine waters collected waters that were contaminated with the runoff from areas sprayed with Agent Orange. RAN Report at 10. The distilling plants aboard the ship, which converted the salt water into potable drinking water, actually enhanced the effect of the Agent Orange. RAN Report at 42. The study found that there was an elevation in cancer in veterans of the Royal Australian Navy which was higher

[2] National Research Centre for Environmental Toxicology and the Queensland Health Services, EXAMINATION OF THE POTENTIAL EXPOSURE OF ROYAL AUSTRALIAN NAVY (RAN) PERSONNEL TO POLYCHLORINATED DIBENZODIOXINS AND POLYCHLORINATED DIBENZOFURANS VIA DRINKING WATER, Brisbane Queensland, Australia (2002)

than that of the Australian Army and Royal Australian Air Force. RAN Report at 13. The report further found that oral ingestion can cause multi-site cancer in the human body. RAN Report at 58.

The Australian government has taken the lead in recognizing that Navy veterans were exposed to Agent Orange. Their Statement of Principles provide coverage when the claimant has been: (1) on land in Vietnam, or (2) at sea in Vietnamese waters, or (3) on board a vessel and consuming potable water supplied on that vessel, when the water supply had been produced by evaporative distillation of estuarine Vietnamese waters. While not binding on this court or on the Secretary, the actions of the Australians should be considered as a matter of comity. The Australian government has adopted the provisions of the RAN report. *See*, Department of Veterans Affairs, *The Third Australian Vietnam Veterans Mortality Study* (2005) at 9 and 203. http://www.dva.gov.au/media/publicat/2006/vietnam_health_studies/vvms/pdf/mortality_study_complete.pdf. (Last visited June 27, 2008), and incorporated it into their Statements of Principles.[3] *See*, www.dva.gov.au (last visited June 17, 2008).[4]

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[3] The Australian Statement of Principles is a rough equivalent of the American Code of Federal Regulations.

[4] *Statement of Principles concerning Malignant Neoplasm of the Lung*, NO. 17 OF 2006 FOR THE PURPOSES OF THE VETERANS' ENTITLEMENT ACT OF 1986 AND THE MILITARY REHABILITATION AND COMPENSATION ACT OF 2004 http://www.rma.gov.au/SOP/06/017.pdf

In *Hilton v. Guyot*, 159 U.S. 113, 164-65 (1895), the Supreme Court of the United States noted that comity is a" complex and elusive concept." *See, also*, *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir.1984). Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton*, 159 U.S. at 164. It is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id*. at 163-64.

The Australian Statement of Principles and its incorporation of the RAN report was raised in the amicus brief. The panel did not address the action of the Australian government or give due consideration to its actions. Instead, it relied upon a flawed Department of Veterans' Affairs (DVA) publication in the Federal Register that was submitted as supplemental authority. 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008). The DVA objections to the RAN report was: (1) It was not published or peer reviewed; (2) There was uncertainty among the authors regarding the amount of concentration of dioxins in the estuary waters noted in the

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Statement of Principles concerning Malignant Neoplasm of the Larynx, NO. 1 OF 2006 FOR THE PURPOSES OF THE VETERANS' ENTITLEMENT ACT OF 1986 AND THE MILITARY REHABILITATION AND COMPENSATION ACT OF 2004 http://www.rma.gov.au/SOP/06/001.pdf

Statement of Principles concerning Soft Tissue Sarcoma, NO. 13 OF 2006 FOR THE PURPOSES OF THE VETERANS' ENTITLEMENT ACT OF 1986 AND THE MILITARY REHABILITATION AND COMPENSATION ACT OF 2004 http://www.rma.gov.au/SOP/06/013.pdf

Australian report or whether it was comparable to the exposures found on land. (3) There was no evidence that Australian ships used the same distilling process. (4) That there had to be an assumption that the sailors only drank contaminated water for a lengthy period of time. The DVA's assumptions were incorrect and they either inadvertently or negligently mislead the panel.

The report was peer reviewed. It was presented to the 21st International Symposium on Halogenated Environmental Organic Pollutants and POPs in Gueongu Korea on 9-14 September 2001. It was published in Volume 52 of Organohalogen Compounds. *See*, http://espace.library.uq.edu.au/view/UQ:95837 (last visited June 13, 2008). The results of the study were also presented at the IXth International Congress of Toxicology; the abstract is published in: Mueller, J.F., Gaus, C., Bundred, K., Moore, M.R., Horsley, K., 2001. Water volatility of dioxins - exposure through consumption of distilled water. *Toxicology* volume 164, 157-158. http://espace.library.uq.edu.au/view/UQ:96008 (last visited June 27, 2008). The most important "peer review" was the acceptance of the report by the Australian DVA and its incorporation into their Statements of Principles.

As to the second objection, there was no uncertainty regarding the amount of concentration of dioxins in the estuary waters. The study noted that ships in the near shore marine waters collected waters that were contaminated with the runoff

from areas sprayed with Agent Orange. RAN Report at 10. This means that the contamination would have extended well past the gun line. As discussed *supra*, the distilling plants actually enhanced the effect of the Agent Orange. RAN Report at 42. The study found that there was an elevation in cancer in veterans of the Royal Australian Navy which was higher than that of the Australian Army and Royal Australian Air Force. RAN Report at 13. The DVA's statement that the exposure levels were not comparable to land soldiers is incorrect.

The problem referred to in the American DVA comment is associated with estimating the exposure level of Vietnam Veterans, not with the study's primary finding that exposure to dioxins was likely. The DVA highlights one finding out of context. While the exact level of contaminants is uncertain, due to the lack of data on contaminant levels in the source water during the Vietnam War, the attempt to estimate the level of exposure serves only as an indication that exposure may have been considerable. The study clearly shows that if source water is used in making potable water is contaminated, dioxins will co-distil with drinking water. RAN report at 6. While increasing suspended sediment loads in the source water decreases the co-distillation of dioxins, dioxins still co-distil with water at the highest level of suspended sediment in the water tested (i.e. at 1.44 g/L 38% of 2,3,7,8-TCDD co-distilled in the first 10% of source water). If only 10% of the

source water is distilled, TCDD would enrich in the drinking water by a factor of almost 4 compared to the source water. *Id*. This was confirmed by using water from tropical estuaries with high suspended sediment loading, where 48-60% of TCDD co-distilled with the first 10% of source water. *Id*.

The DVA Federal Register comment contained the curious statement that one had to assume that the sailors drank only the contaminated water and only for an extended period of time. That is a safe assumption. All Navy ships, in fact all ocean going ships of any size manufacture potable drinking water from sea water. http://www.bluewaternavy.org/distillation/Water%20treatment.pdf at 2-3. (last visited June 7, 2007). These ships did not have the capacity to carry potable water throughout the voyage without replenishment. The distillers are all similar and produce water for both the boilers and the ship's crew. *See*, *e.g.* Main Propulsion Plant DD-445 and 692 Classes and Converted Types, Operation Manual http://www.hnsa.org/doc/destroyer/steamsec10.htm (last visited April 4, 2006). This is the same process discussed in the RAN report. Many RAN ships were retired American ships or ships of the same class as the American Navy. The first RAN destroyers to deploy to Vietnam were the *Adams* class destroyers (DDG) *Hobart*, *Perth* and *Brisbane*. http://www.gunplot.net/vietnam/vietnamrani.htm (last visited June 26, 2008). These ships were all American designed and built as

exact replicas of USN ships. Australian built ships built on the British model used the same type of distilling process.[5]

The panel should have considered the reliance of the Australians on the RAN respot in reaching their decision and have given that reliance the deference required by principles of comity. The DVA statement is without merit.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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[5] For a complete analysis of the DVA reasoning see "Public Comments by John Wells, Esq, CDR, USN (Ret.)" http://bluewaternavy.org/Wellscomments.pdf (last visited June 26, 2008) which, in the interest of full disclosure, is the same person as undersigned counsel. Counsel was on active duty with the Navy from 1972-94 retiring as a Commander, Surface Warfare Officer. Counsel was not a JAG but served several tours in shipboard engineering and was recognized as a mechanical engineering subspecialist based on significant experience.

CERTIFICATE OF SERVICE

I, John B, Wells, do hereby certify that I have this date mailed by DHL Courier, prepaid, a true and exact copy of this brief to the court and to Todd Hughes Commercial Litigation Branch, Civil Division, Department of Justice 8th Floor, 1100 L Street NW, Washington DC 20530 and Louis J. George, National Veterans Legal Services Program, 1600 K Street, NW, Suite 500, Washington, D.C. 20006 this 30th day of June 2008.

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John B. Wells