No. 2007-7037

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JONATHAN L. HAAS,

Claimant-Appellee,

v.

JAMES B. PEAKE, M.D.,
Secretary of Veterans Affairs,

Respondent-Appellant.

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

COMBINED PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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June 23, 2008

CERTIFICATE OF INTEREST

Pursuant to Fed. Cir. R. 47.4, counsel for Claimant-Appellant, Jonathan L. Haas, certifies the following:

1. The full name of every party or amicus represented by me is:

   Jonathan L. Haas.

2. The name of the real party in interest, if different than the above, is: Same.

3. The parent companies, subsidiaries, and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are: None.

4. The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court:

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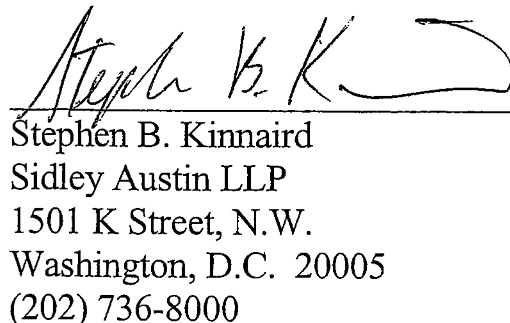

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STATEMENT OF COUNSEL

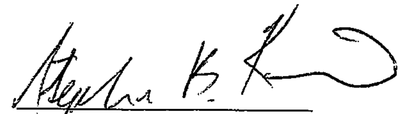
Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this Court: *Brown v. Gardner*, 513 U.S. 115 (1994); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *United States v. Mead Corp.*, 533 U.S. 218 (2000); *Boyer v. West*, 210 F.3d 1351 (Fed. Cir. 2000).

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. Does *Brown v. Gardner*, 513 U.S. 115 (1994), require application of the canon that statutory ambiguity is resolved in favor of the veteran *prior* to granting deference to the agency's interpretation?

3. Do *United States v. Mead Corp.*, 533 U.S. 218 (2000), and *Gonzales v. Oregon*, 546 U.S. 243 (2006), permit deference to an *ambiguous* agency regulation, based on later agency reinterpretations of the regulation and statute that lack the force and effect of law and that depart from the agency's original interpretation of the regulation and statute?



Stephen B. Kinnaird
Date: June 23, 2008

POINTS OF LAW OVERLOOKED BY THE PANEL

Points of law overlooked by the panel are set forth in sections I.1, I.2, and II.

ARGUMENT FOR PANEL OR EN BANC REHEARING

In the Agent Orange Act of 1991, as amended, Congress required a finding of service connection for specified diseases "manifest ... in a veteran 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." 38 U.S.C. § 1116(a)(1)(A) (emphasis added). In holding that a veteran "served in the Republic of Vietnam" only if he was present "at some point on the landmass or the inland waters of Vietnam," Op. 50, a divided panel of this Court disregarded the plain meaning of the term "Republic of Vietnam" as encompassing that nation's territorial seas; discounted express legislative history that Congress intended to codify a regulatory presumption of service connection for non-Hodgkins lymphoma ("NHL"), which was based on a finding of excess NHL among men who served on ships in the waters *offshore Vietnam*; failed to apply the canon requiring statutory ambiguity to be resolved in favor of the veteran; and improperly deferred to a changed DVA statutory interpretation that is not embodied in any order with the force and effect of law and that is starkly unreasonable. Because this statute is critically important – affecting benefits to many of the estimated 832,000 "blue water" Vietnam veterans (*see Ribaudo v. Nicholson*, 21 Vet.

App. 137, 144 (2007)) – and because the panel decision conflicts with precedent, this Court should grant rehearing or rehearing en banc.

I. The Plain Meaning Of "The Republic Of Vietnam" Refers To The Sovereign Nation Whose Boundaries Include The Territorial Seas.

No deference is ever paid to an agency interpretation if Congress has "directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). Congress has so spoken here.

1. The term "served in the Republic of Vietnam" in Section 1116(a)(1)(A) is plain. There is no dispute that the term "Republic of Vietnam" refers to the sovereign nation colloquially known as South Vietnam. Therefore, a veteran has "served in the Republic of Vietnam" if he served in the territory of that sovereign nation. In the 1991 Act, Congress clearly would have understood the Republic of Vietnam's territory to encompass its territorial seas.[1]

The panel nonetheless found that the statutory term was ambiguous because there were "competing methods" identified by the Court of Appeals for Veterans Claims (CAVC) that purportedly "define sovereign nations in different ways, ...

[1] *See e.g., Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906) (territorial seas are "the minimum limit of the territorial jurisdiction of a nation"); United Nations Convention on the Law of the Sea, Part II, Dec. 10, 1982, *at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last visited June 4, 2007) ("The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."); Presidential Proclamation 5928, 54 Fed. Reg. 777 (Jan. 9, 1989) (same).

including only the nation's landmass." Op. 26. With due respect to the panel and the CAVC, this is wrong. The only authority that the CAVC cited for the proposition that a sovereign nation's "boundaries can be defined solely by the mainland geographic area" is an online CIA factbook describing the "land boundaries" of the *current* Communist Republic of Vietnam as 4,639 km long. *Haas v. Nicholson*, 20 Vet. App. 257, 263-64 (2006) (citing CIA WORLD FACTBOOK, Vietnam, *available at* www.cia.gov/cia/publications/factbook/geos/vm.html).

Aside from the irrelevance of this source for divining Congress's intent in the 1991 Act regarding the now-defunct Republic of Vietnam, the CIA factbook does *not* purport to describe the boundaries of a sovereign nation as simply its landmass. The term "land boundaries" is a defined term referring only to a country's *internal* land borders with "contiguous border countries." CIA WORLD FACTBOOK (definitions), *available at* https://www.cia.gov/library/publications /the-world-factbook/docs/notesanddefs.html). The "land boundaries" of a country do not include "coastlines," which are separately reported, precisely because no one considers the coastline a "boundary" of a sovereign nation's territory.[2]

[2] *See id.* (Vietnam), *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html (last visited June 6, 2008) (reporting the "land boundaries" of Vietnam as "4639 km", consisting of "Cambodia 1,228 km, China 1,281 km, Laos 2,130 km," and separately reporting its coastline of 3,444 km); *see id.* (United States) (reporting the "land boundaries" of the United States as "12,034

In sum, there is not a *single* authority that defines a sovereign nation solely in terms of the perimeter of its landmass. Therefore, there is no ambiguity whatsoever as to whether the term "Republic of Vietnam" in Section 1116 includes its territorial seas.[3] See 137 Cong. Rec. 1849, 1851 (Jan. 17, 1991) (1991 Act "would codify the presumptions of service connection that have been administratively provided for . . . . veterans who served in theater during the Vietnam war").

2. The plain meaning of the term alone should have disposed of this appeal, but the panel's interpretation is also irreconcilable with the rest of Section 1116. For example, a veteran seeking benefits for chloracne or porphyria cutanea tarda must show disease manifestation in a specified period "after the last date on which the veteran performed active military, naval, or air service in the Republic of Vietnam." 38 U.S.C. § 1116(a)(2)(C), (E). The panel's "foot-on-land"

km," consisting of "Canada 8,893 km (including 2,477 km with Alaska), Mexico 3,141 km," and separately reporting its coastline of 19,224 km).

[3] The CAVC also surmised that the term "Republic of Vietnam" could refer to the 200 mile exclusive economic zone, but that is not a measure of a nation's actual territory. The CAVC also noted that Vietnam claims certain "surrounding islands … in the Hoang Sa and Truong Sa archipelagos." *Haas*, 20 Vet. App. at 263-64. But even if those islands were Vietnamese territory, that would only mean that the Republic of Vietnam would encompass the islands and their archipelagic seas *in addition* to the territorial seas off its mainland. *See supra* n.1. So, even if *arguendo* either of these alternatives were plausible interpretations of "Republic of Vietnam," the fundamental point is that each is inclusive of the territorial seas, and would create service-connection for veterans who served in those seas. No plausible construction of the term makes the statute ambiguous as to whether it excludes territorial seas and is limited to the geographic mainland.

interpretation puts the veteran to the often impossible task of proving not just when he last served in Vietnam, but when he was last on the mainland or traversing inland waters. Congress did not intend this absurdity.

The panel's interpretation also cannot be squared with Congress's usage of the identical phrase in other parts of the 1991 Act (which is presumed to have the same meaning, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006)). For example, section 6 of the 1991 Act directed the Secretary to collect VA exam data for use in determining "the association, if any, between the disabilities of veterans referred to in such section and exposure to dioxin or any other toxic substance referred to in such section *or* between such disabilities and active military, naval, or air service in the Republic of Vietnam during the Vietnam era." Pub. L. No. 102-4, § 6, 105 Stat. 11 (1991). Section 7 directed the Secretary to archive blood and tissue samples of veterans "who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era." *Id.* § 7. Section 8 directed the Secretary to investigate the feasibility of further scientific study separately of the "health hazards resulting from exposure to dioxin"; "health hazards resulting from exposure to other toxic agents in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era"; and "health hazards resulting from active military, naval, or air service in the Republic of Vietnam during the Vietnam era." *Id.* § 8. These

provisions collectively show that Congress did not link the concept of "served in the Republic of Vietnam" solely to dioxin exposure. They further underscore the absurdity of an interpretation requiring the Secretary to make individualized inquiries into whether the veteran set foot on land or traversed inland waters in Vietnam in collecting medical exam data, archiving tissues, or designing studies.

Finally, in 1996 Congress amended the general definition of the "Vietnam era" to adopt the same language of "served in the Republic of Vietnam" for the 1961 to 1964 period. *See* 38 U.S.C. § 101(29). This provision governs wartime pension benefits and eligibility for hospital, nursing, and domiciliary care. S. Rep. No. 104-371, at 19-20 (1996). The Senate Report expressly states that, as in Section 1116, Congress intended to cover "veterans who actually served within the borders of the Republic of Vietnam." *Id.* at 21. As noted above, Vietnam's coastal borders indisputably encompass the territorial seas. The panel, however, irrationally blessed an unreasoned DVA General Counsel Opinion denying all such benefits to the naval veterans who participated in the extensive coastal patrols, counterinfiltration, and minesweeping operations in that period.[4] *See* Op. 38-40.

3. The plain meaning of a statute is also determined by its historical context, and the legislative history must be analyzed in step 1 of *Chevron*. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Here, the legislative history demonstrates

[4] *See* II Edward J. Marolda & Oscar P. Fitzgerald, *The United States Navy and The Vietnam Conflict* 164-188, 219-63, 298-333 (1984).

congressional intent to codify existing VA regulations for all three of the original diseases for which the 1991 Act established service connection upon proof of service in the Republic of Vietnam.

In 1986, the Secretary had implemented prior dioxin legislation by promulgating a regulation that presumed service connection for chloracne. That regulation defined "Service in the Republic of Vietnam" to include "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. § 3.311a(a)(1) (1986). Prior to the 1991 Act, the DVA announced a proposal to amend § 3.311 to include soft-tissue sarcoma ("STS"). Op. 14.

In October 1990, the DVA had promulgated a separate regulation presuming service connection for NHL for Vietnam veterans. 38 C.F.R. § 3.313. The Secretary adopted this rule based on a Centers for Disease Control (CDC) study that "indicated that Vietnam veterans are at increased relative risk of developing [NHL]" and found that the "higher [NHL] ratio *was due to excessive [NHL] among men who served on ships offshore Vietnam*." 137 Cong. Rec. 2338, 2347 (1991) (emphasis added). The Secretary accepted the CDC's conclusion that NHL was correlated with Vietnam service and not with dioxin exposure. 55 Fed. Reg. 43,123, 43,124 (Oct. 26, 1990). The NHL regulation (3.313) defined "service in Vietnam" virtually identically to the chloracne regulation (3.311), as "includ[ing]

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.

The sponsor of the bill that became the 1991 Act declared that the bill "would codify the presumptions of service connection that have been administratively provided for chloracne, non-Hodgkin's lymphoma, and soft-tissue sarcomas . . ." 137 Cong. Rec. at 1851.[5] Thus, Congress clearly understood that there were no material differences between the service standards of regulations 3.311 and 3.313, and intended the same standard apply to each of the diseases in section 1116(a)(1)(A). Indeed, shortly after the 1991 Act, the Secretary interpreted the statutory phrase "served in the Republic of Vietnam" to be the same for each of the three diseases, amending the DVA manual to use the same rule for each (namely, accepting award of a Vietnam Service Medal as proof). JA 657.

The panel concluded otherwise, opining that the 1991 Congress may have (1) understood regulations 3.311 and 3.313 to have different service requirements; (2) understood 3.311 to embody a "foot-on-land" requirement, and (3) intended to adopt the "narrower" 3.311 standard, thus denying the statutory presumption of service connection to "blue water" Vietnam veterans with NHL, even though they

[5] *See also*, 137 Cong. Rec. 2338, 2352 (1991) (statement of Rep. Stump); 137 Cong. Rec. E390 (daily ed. Jan. 29, 1991) (statement of Rep. Burton); Statement of President George Bush Upon Signing H.R. 556 (Feb. 6, 1991), *reprinted in* 1991 U.S.C.C.A.N. 11 (stating that the AOA "will codify decisions previously made by my Administration with respect to presumptions of service connection . . .").

were covered under the Secretary's regulation, and even though they were the group that the CDC specifically found had the excess risk of developing NHL! Op. 15-18, 28-29.

The panel reached this conclusion based on different punctuation in 3.311 and 3.313. The panel claimed that the absence in 3.311 of "a comma separating the reference to 'service in the waters offshore' and 'service in other locations,' ... suggested that the requirement of visitation or duty in the Republic of Vietnam applied to both of those forms of extraterritorial service." Op. 16. But statutory analysis "based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). Certainly, the DVA placed no such weight on punctuation in the 1993 regulation implementing the 1991 Act: it omitted all commas in defining "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." 38 C.F.R. § 3.307(a)(6)(iii). If punctuation is to have sway, under the rule of the last antecedent, the phrase "if the conditions of service involved duty or visitation in the Republic of Vietnam" in the 1993 regulation modifies only "service in other locations," and not the phrase "service in the waters offshore." *Anhydrides & Chemicals, Inc. v. United States*, 130 F.3d 1481, 1483 (Fed. Cir. 1997).

In all events, punctuation cannot trump the direct legislative history, and the absurdity of imputing congressional intent to exclude from the NHL statutory presumption the very group (offshore Navy veterans) who were found to have excess NHL risk. The panel justified its position with the claim that "Congress included non-Hodgkin's lymphoma on the list of diseases specifically identified in the Agent Orange Act based on evidence that, contrary to the conclusion of the 1990 CDC study, non-Hodgkin's lymphoma was in fact associated with exposure to Agent Orange." Op. 17 n.1. That claim is baseless. The supposed evidence is a *May, 1990* report from Admiral Zumwalt to the Secretary evaluating epidemiological evidence.[6] But the panel ignores that the Secretary, in issuing 3.313 as a final rule in *October, 1990*, accepted the CDC's conclusion that NHL was correlated with Vietnam service but not dioxin exposure. 55 Fed. Reg. 43,123, 43,124 (Oct. 26, 1990); 56 Fed. Reg. 51,651, 51,651 (Oct. 15, 1991) (noting that "the bases for granting service connection are fundamentally different" for NHL and STS because NHL is linked to Vietnam service and STS to dioxin exposure). There is no evidence that Congress disagreed with that conclusion or

[6] *Report to the Secretary of Veterans Affairs on the Association Between Adverse Health Effects and Exposure to Agent Orange, reprinted in Links Between Agent Orange, Herbicides, and Rare Diseases: Hearing before the Human Resources and Intergovernmental Relations Subcomm. of the Comm. on Gov't Operations*, 101st Cong., 2d Sess. 22, 41 (1990) ("Zumwalt Report").

overruled the Secretary's determination in the Act. Rather, Congress codified the DVA's regulations as to all three diseases, including NHL. *Supra*, at 9-10.

II. The Panel's Failure To Apply The Pro-Veteran Canon Is Contrary To Precedents Of This Court And The U.S. Supreme Court.

The Supreme Court has instructed that, *before* applying *Chevron* deference, any interpretive ambiguity in the statute must be resolved in the veteran's favor. *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Congress is presumed to incorporate that rule, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n.9 (1991), so as to benefit "those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

This Court thus applies a "modif[ied]" rule of *Chevron* deference. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 691-92 (Fed. Cir. 2000). Ambiguity is resolved by the pro-veteran canon in Step 1, and the only question thereafter is whether the agency has complied with the statute. *Boyer v. West*, 210 F.3d 1351, 1355 (Fed. Cir. 2000). However, *Chevron* continues to apply when the DVA promulgates substantive gap-filling regulations (*i.e.*, when the agency is not merely interpreting the statute). *Terry v. Principi,* 340 F.3d 1378, 1383 (Fed. Cir. 2003); *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003).

Here, the issue is straightforward interpretation of the statutory text itself. The panel erroneously failed to apply the *Brown* canon to resolve ambiguity, instead moving directly to *Chevron* step 2 upon a finding of ambiguity. Op. 29.

Had the panel properly applied the *Brown* canon to resolve any ambiguity in the statutory term "Republic of Vietnam," it would have affirmed the judgment below. Rehearing is necessary to resolve this conflict with precedent.

III. The Panel Improperly Granted *Chevron* Deference To Interpretations Without The Force And Effect Of Law.

Chevron deference is warranted only when "Congress delegated authority to the agency generally to make rules carrying the force of law," and "the agency interpretation claiming deference was promulgated in the exercise of such authority." *United States v. Mead Corp.*, 533 U. S. 218, 226–227 (2001).

Here, the 1993 regulation to which the panel deferred does not itself set forth the "foot-on-land" interpretation that the panel blessed; its plain meaning is to the contrary, or at most it is ambiguous on that point. *Supra* at 10-11. Instead, the panel gave *Chevron* deference to interpretations in various agency pronouncements beginning in 1997 that lack the force and effect of law – namely, dicta in a general counsel opinion; dicta in the preambles of regulations addressing other provisions; a new 2002 Manual provision; and a proposed rule. *See* Op. 35-42. The panel's approach is irreconcilable with Supreme Court precedent. First, the panel's two-step analysis – (1) give substantial deference to any agency interpretation of an ambiguous notice-and-comment regulation under *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997), and (2) thereby give *Chevron* deference to an agency interpretation that lacks the force and effect of law – is directly contrary to *Mead.* Second, *Auer*

deference is unwarranted where the "current interpretation runs counter to the 'intent at the time of the regulation's promulgation.'" *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Here, it is undisputed that the Secretary at the time of the 1993 regulation interpreted the 1991 Act to cover blue-water veterans. *Supra.*[7]

Additionally, because the agency's interpretation was not officially adopted until 2002, *after* Mr. Haas filed for benefits, the DVA's new interpretation constitutes impermissible retroactive lawmaking. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349 (2007). *See Amicus Brief of American Legion et al.*

IV. The DVA's "Foot-On-Land" Interpretation Is Unreasonable.

As the CAVC ruled and the panel's dissenting judge agreed, the DVA's foot-on-land interpretation is also unreasonable under step 2 of *Chevron* because it is not informed by any scientific evidence of different exposure or any basis for believing Congress intended that distinction. Op. of Fogel, J., dissenting, at 3-4.

The panel nonetheless upheld the "foot-on-land" rule because line-drawing is always arbitrary. Op. 43. But this is precisely the point: Congress did not intend *any* lines to be drawn among Vietnam veterans because in 1991 there was not (and there is not today) either the scientific evidence to rule out certain classes of veterans as unexposed or the records of troop movements to allow for rational

[7] In *Long Island Care at Home, Ltd. v. Coke*, the Supreme Court gave *Auer* deference on the question of which of two regulations controlled, but the controlling agency interpretation of the statute was itself embodied in a notice-and-comment regulation. 127 S. Ct. 2339, 2349 (2007).

administration of such a rule. There is no reason why Congress would want a soldier to recover if he set foot on land in Vietnam for one day in 1975 (years after Agent Orange spraying had ended), but not naval veterans (like Mr. Haas) who were directly engulfed in drifting Agent Orange clouds.[8] Indeed, contrary to the DVA's unscientific claim that only inland service had a significant exposure risk, Admiral Zumwalt, the former Chief of Naval Operations in Vietnam whose report the panel otherwise credited, recommended that at a minimum service connection should be presumed for any veteran within 20 kilometers of a spray area (which would include veterans serving in the 12-mile territorial waters off the heavily sprayed coasts). Zumwalt Report 51. But Admiral Zumwalt also recommended an alternative of presuming service connection for all Vietnam veterans (as the Secretary had done for NHL), because while overinclusive "it is the only alternative that will not unfairly preclude receipt of benefits by a TCCD exposed Vietnam veteran." *Id.* at 52. That is the approach Congress chose.

CONCLUSION

The petition should be granted.

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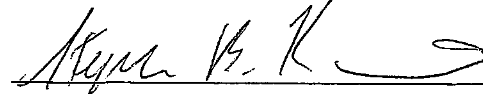
[8] Mr. Haas testified, "Our ship did go within 100 feet of the coast of Vietnam. And most of our rearming or replenishing of the ships was in the early morning hours and this was the same time that Agent Orange and other defoliants [were] sprayed on the coastal forest. You could see the large clouds of chemicals being dropped by the aircraft which they sprayed over the forest and these large clouds would drift out over the water because of the prevailing winds and they would engulf the ships, my ship in particular." ROA 562.

Respectfully submitted,



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June 23, 2008

CERTIFICATE OF SERVICE

I hereby certify a true copy of the foregoing Combined Petition For Panel Rehearing Or Rehearing En Banc of Claimant-Appellee was mailed, first class postage prepaid, on this 23rd day of June 2008 to:

Todd M. Hughes, Esq.
Assistant Director
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