No. 2007-7037

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JONATHAN L. HAAS,

Claimant-Appellee,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,

Respondent-Appellant.

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

BRIEF FOR CLAIMANT-APPELLEE

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CERTIFICATE OF INTEREST

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

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

   Jonathon 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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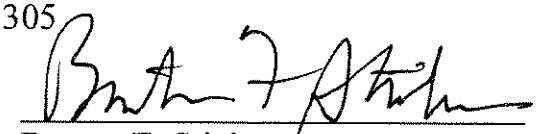

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for Claimant-Appellee states that he is unaware of any other appeal in or from this action that was previously before this Court or any other appellate court under the same or similar title. Claimant-Appellee's counsel is unaware of any other case pending in the Supreme Court, this Court, or any other circuit court of appeals that will be directly affected by this appeal. However, this appeal affects a significant number of cases pending before the Court of Appeals for Veterans Claims.

STATEMENT OF THE ISSUES

1. In enacting the Agent Orange Act of 1991, did Congress speak directly to the precise question whether veterans who served in the waters offshore the land mass of Vietnam "served in the Republic of Vietnam" within the meaning of 38 U.S.C. § 1116(a)(1)(A) and answer that question in the affirmative?

2. In the alternative that Congress did not address the precise question in this case, was the Secretary's use of the likelihood of a veteran's exposure to herbicides as a benchmark for assessing whether a veteran suffering from type 2 diabetes satisfies the § 1116(a)(1)(A) phrase "served in the Republic of Vietnam" a permissible construction of 38 U.S.C. § 1116(a)(1)(A)?

3. Assuming it is permissible to construe the § 1116(a)(1)(A) phrase "served in the Republic of Vietnam" based on the likelihood of a veteran's exposure to herbicides, is the Secretary's interpretation of the statute entitled to Chevron–style deference?

4. Is VA's unfavorable 2002 amendment to MANUAL M21-1 imposing a set-foot-on-land requirement void because it rescinded a previous favorable provision of MANUAL M21-1 and was promulgated without observance of the notice-and-comment rulemaking provision of 5 U.S.C. § 553(a) and 38 U.S.C. §501(d)?

5. Assuming it is permissible to construe the § 1116(a)(1)(A) phrase "served in the Republic of Vietnam" based on the likelihood of a veteran's exposure to herbicides, is VA's interpretation entitled to Skidmore deference and do the circumstances surrounding its adoption have persuasive power?

SUMMARY OF ARGUMENT

There are several independent reasons why the Court should reject the Secretary's arguments on appeal. First, under Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), the initial question a court must address in construing a statute is "whether Congress has spoken to the precise question at issue." 467 U.S. at 842. The precise question at issue in this case is whether active duty personnel who served on ships offshore the land mass of the Republic of Vietnam "served in the Republic of Vietnam" within the meaning of 38 U.S.C. § 1116(a)(1)(A).

Congress divided the diseases covered by § 1116(a) into two separate categories. The first category are those diseases specified in paragraph (2) of subsection (a) (hereinafter, a "paragraph (a)(2) disease"). The disease for which Mr. Haas sought disability benefits – type 2 diabetes – is one of the many diseases that Congress has included in paragraph (a)(2). Under § 1116(a), a veteran with a paragraph (a)(2) disease like Mr. Haas only needs

to have "served in the Republic of Vietnam during the Vietnam era" to be entitled to service connection.

The second category of diseases discussed in § 1116(a) are those "additional disease[s] (if any)" that the Secretary determines have "a positive association with exposure to an herbicide agent" (hereinafter, an "additional disease added by VA due to its association with Agent Orange"). The service connection criteria for an "additional disease added by VA due to its association with Agent Orange" differ in a critical respect from the criteria applicable to a "paragraph (a)(2) disease." To be entitled to service connection, a veteran suffering from an additional disease added by VA due to its association with Agent Orange not only needs to have "served in the Republic of Vietnam during the Vietnam era"; he must also, "while so serving," have been "exposed to an herbicide agent."

The Secretary bases his appeal entirely on the allegation that those who served in the waters offshore the land mass of Vietnam were unlikely to have been exposed to herbicide agents. But for the thousands of veterans like Mr. Haas who suffer from a paragraph (a)(2) disease, this allegation is irrelevant to the proper construction of the AOA.

Thus, the critical issue under step one of Chevron for veterans with a paragraph (a)(2) disease is whether Congress spoke directly to the precise

question whether active duty personnel who served on ships offshore the land mass of the Republic of Vietnam "served in the Republic of Vietnam" within the meaning of 38 U.S.C. § 1116(a)(1)(A). The answer to this precise question is yes.

Congress spoke to this precise question in selecting diseases for inclusion as a paragraph (a)(2) disease. Congress' express intent was to codify the regulation previously promulgated by the Secretary to provide presumptive service connection to veterans with service in Vietnam who developed non-Hodgkins lymphoma ("NHL"). The NHL regulation was based on the Secretary's finding that Vietnam veterans are at an increased relative risk of developing NHL due to excessive NHL among men who served on ships offshore Vietnam. The NHL regulation that Congress codified when it enacted § 1116(a)(1)(A) expressly included veterans who served in the waters offshore Vietnam within the definition of service in Vietnam, regardless whether they set foot on the land mass of Vietnam. Therefore, the § 1116(a)(1)(A) phrase "served in the Republic of Vietnam" includes those who served in the waters offshore.

In the alternative that the Court determines that Congress did not address the precise issue in this case, the next question under Chevron is "whether the agency's answer is based on a permissible construction of the

statute." 467 U.S. at 843. Even if the agency's current interpretation is entitled to Chevron-style deference, the agency's answer to the precise question at issue here is based entirely on a factual analysis of which veterans were likely to have been exposed to herbicides. This basis of construction is impermissible because Congress expressly provided in § 1116(a) that the thousands of veterans like Mr. Haas who suffer from a paragraph (a)(2) disease do not have to establish that they were exposed to herbicides in the first place.

Assuming, for the sake of argument, that that it is permissible to use the likelihood of exposure to herbicides as a benchmark for assessing the meaning of the phrase "service in the Republic of Vietnam" in § 1116(a), it is necessary to resolve the issue of the degree of judicial deference owed to the agency's interpretation. VA's interpretation of § 1116 is not entitled to Chevron deference for two reasons: (1) the interpretation is in conflict with VA's prior consistently held view and (2) the agency's change in interpretation was adopted informally, without following notice-and-comment rulemaking procedures.

Given that the agency's change in interpretation is not entitled to Chevron deference, there are two additional hurdles that VA's change in

interpretation must overcome in order to survive judicial scrutiny. The change in interpretation here fails both hurdles.

The first hurdle is procedural. As the Veterans Court correctly held, VA's unfavorable 2002 amendment to MANUAL M21-1 imposing a set-foot-on-land requirement is void because it rescinded the previous favorable provisions of the MANUAL M21-1 and was promulgated without observance of the notice-and-comment rulemaking provisions of 5 U.S.C. § 553(a) and 38 U.S.C. § 501(d).

Turning to the substantive hurdle, an agency interpretation that is not entitled to Chevron deference may nonetheless merit some deference under Skidmore v. Swift & Co. , 323 U.S. 134, 139 (1944). Whether such an agency interpretation is entitled to Skidmore deference depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all factors which give power to persuade. These factors lead inexorably to the conclusion that the agency's interpretation here lacks persuasive power and is not entitled to Skidmore deference.

ARGUMENT

I. CONGRESS SPOKE TO THE PRECISE QUESTION WHETHER VETERANS WHO SERVED IN THE WATERS OFFSHORE THE LAND MASS OF VIETNAM "SERVED IN THE REPUBLIC OF VIETNAM" AND ANSWERED THAT QUESTION IN THE AFFIRMATIVE

Under Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), the first question a court must address in construing a statute is "whether Congress has spoken to the precise question at issue." 467 U.S. at 842. Before the Veterans Court, Mr. Haas argued that the precise question at issue in this case was whether active duty personnel who served on ships offshore the land mass of the Republic of Vietnam "served in the Republic of Vietnam" within the meaning of 38 U.S.C. § 1116(a)(1)(A). Mr. Haas further argued that Congress spoke to this precise question and its clear intention was to include those who served on ships offshore within the statutory phrase "served in the Republic of Vietnam." (JA 624-629) (Mr. Haas' supplemental brief); (JA 681-684) (Mr. Haas' supplemental reply brief)).

The Veterans Court never addressed this § 1116(a)(1)(A) argument. Instead, the Veterans Court focused entirely on a different subsection of § 1116 – subsection (f) -- and concluded "that 38 U.S.C. § 1116(f) is not clear

on its face concerning the meaning of the phrase 'service in the Republic of Vietnam.'" (JA 2).

The fundamental flaw in the Veterans Court's analysis of Chevron step one is that it focused on a subsection of § 1116 that does not apply to Mr. Haas' disability claim for diabetes. As we demonstrate below in part I.A., the subsection of § 1116 that does apply to Mr. Haas' diabetes claim is subsection (a), and in enacting that subsection, Congress' clear intention was to include those who served on ships offshore the land mass of Vietnam within the subsection (a) phrase "served in the Republic of Vietnam."[1] Thereafter, we show in part I.B. that subsection (f) – the only subsection that the court below and the Secretary here rely upon – does not apply to Mr. Haas' diabetes claim.

A. Congress Spoke to the Precise Question Here in AOA Subsection (a)

We start with the statutory language. Section 2 of the Agent Orange Act of 1991 ("AOA"), Pub. L. No. 102-4, 105 Stat. 11, added § 316 (later

[1] This Court has jurisdiction over a "decision of the Court on a rule of law" within the meaning of 38 U.S.C. § 7292, even if that rule of law was not "relied upon" by the Veterans Court. See Morgan v. Principi, 327 F.3d 1357, 1363 (Fed. Cir. 2003); see also Wilson v. Principi, 391 F.3d 1203, 1209 (Fed. Cir. 2004). Moreover, this Court has jurisdiction over statutory interpretation issues "raised before the [Veterans Court] but not decided, if the decision would have been altered by adopting the position that was urged." Forshey v. Principi, 284 F.3d 1335, 1351 (Fed. Cir. 2002) (en banc). This Court reviews such legal issues under a de novo standard. Prenzler v. Derwinski, 928 F.2d 392, 393 (Fed. Cir. 1991).

renumbered as § 1116) to title 38 of the U.S. Code. Subsection (a)(1) of that new section provided, in pertinent part, that:

> (A) a disease specified in paragraph (2) of this subsection becoming manifest as specified in that paragraph in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era; and
>
> (B) any additional disease (if any) that (1) the Secretary determines in regulations prescribed under this section warrants a presumption of service-connection by reason of having a positive association with exposure to an herbicide agent, and (2) becomes manifest . . . . in a veteran who, during active military, naval or air service, served in the Republic of Vietnam during the Vietnam era and while so serving was exposed to that herbicide agent,
>
> shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service. [Emphasis added].

Thus, Congress divided the diseases covered by AOA subsection (a) into two separate categories. The first category are those diseases specified in paragraph (2) of subsection (a) (hereinafter, a "paragraph (a)(2) disease"). The disease for which Mr. Haas sought disability benefits – type 2 diabetes and its residuals – is one of the many diseases that Congress has included in paragraph (a)(2).[2] Under the AOA, a veteran with a paragraph (a)(2) disease

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[2] Since the AOA was enacted in 1991, Congress has amended paragraph (a)(2) of 38 U.S.C. §1116 many times to specify additional diseases. Both currently and at the time the Board of Veterans' Appeals denied Mr. Haas' type 2 diabetes claim, paragraph (a)(2) included the following diseases:

like Mr. Haas only needs to have "served in the Republic of Vietnam during the Vietnam era" to be entitled to service connection.

The second category of diseases discussed in AOA subsection (a) are those "additional disease[s] (if any)" that the Secretary determines have "a positive association with exposure to an herbicide agent" (hereinafter, an "additional disease added by VA due to its association with Agent Orange"). The service connection criteria for an "additional disease added by VA due to its association with Agent Orange" differ in a critical respect from the criteria applicable to a "paragraph (a)(2) disease." To be entitled to service connection, a veteran suffering from an additional disease added by VA due to its association with Agent Orange not only needs to have "served in the Republic of Vietnam during the Vietnam era"; he must also, "while so serving," have been "exposed to an herbicide agent."

Thus, the plain statutory language demonstrates that to qualify for service connection, a veteran with a paragraph (a)(2) disease like Mr. Haas does not need to establish exposure to an herbicide agent, whereas a veteran with an additional disease added by VA due to its association with Agent

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Non-Hodgkin's lymphoma, soft-tissue sarcomas, chloracne, Hodgkin's disease, porphyria cutanea tarda, respiratory cancers (cancer of the lung, bronchus, larynx, or trachea), multiple myeloma, and diabetes mellitus (Type 2).

Orange does need to establish herbicide exposure.[3] Subsection (a)(3) of the AOA as originally enacted underlines this critical distinction. That subsection, set forth in the margin below, makes clear that a veteran with a paragraph (a)(2) disease qualifies for service connection even if there is affirmative evidence that the veteran was not exposed to an herbicide agent during military service.[4]

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[3] On May 8, 2001, the Secretary published a final rule under the AOA service connecting type 2 diabetes due to its association with Agent Orange. See 66 Fed. Reg. 23166. On December 27, 2001, Congress amended section 1116(a)(2) to specify type 2 diabetes as a paragraph (a)(2) disease. See Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, § 201(b), 115 Stat. 976. Thus, for the seven-month period from May 8 to December 27, 2001, type 2 diabetes was an additional disease added by VA due to its association with Agent Orange, rather than a paragraph (a)(2) disease.

When Congress amended paragraph (a)(2) to add type 2 diabetes, that disease lost its statutory status as an "additional disease" added by VA due to its association with Agent Orange. The two categories of diseases described in subsection (a) are, by statutory definition, mutually exclusive. A paragraph (a)(2) disease cannot also be an "additional disease . . . that . . . the Secretary determines in regulations prescribed under this section warrants a presumption of service-connection by reason of having a positive association with exposure to an herbicide agent" within the meaning of section 1116(a)(1)(B) (emphasis added). The word "additional" means that once Congress places in paragraph (a)(2) a disease like type 2 diabetes that previously was determined by the Secretary to warrant a presumption of service connection due to its association with Agent Orange, the disease can no longer be an "additional disease" added by VA due to its association with Agent Orange.

[4] As originally enacted, subsection (a)(3) of the AOA provided:

The Secretary bases his appeal entirely on the allegation that those who served in the waters offshore the land mass of Vietnam were unlikely to have been exposed to herbicide agents. But for the thousands of veterans like Mr. Haas who suffer from a paragraph (a)(2) disease, this allegation is irrelevant to the proper construction of the AOA.

Thus, the critical issue under step one of Chevron for veterans with a paragraph (a)(2) disease – and an issue the Secretary never bothers to address -- is whether Congress spoke directly to the precise question whether active duty personnel who served in ships offshore the land mass of the

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> For the purpose of this subsection, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era and has a disease referred to in paragraph (1)(B) of this subsection shall be presumed to have been exposed during such service to an herbicide agent . . . . , unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. [emphasis added]

Since by its terms, subsection (a)(3) only applied to an additional Agent-Orange related disease added by VA ("a disease referred to in paragraph (1)(B)") – and not to a paragraph (a)(2) disease – a veteran with a paragraph (a)(2) disease who "served in the Republic of Vietnam" within the meaning of 38 U.S.C. § 1116(a)(1)(A) would qualify for service connection even if there were affirmative evidence that that the veteran was never exposed to a herbicide agent.

When Congress later reworded subsection (a)(3) and relocated it as subsection (f) of section 1116, it did not intend to change the fact that it does not apply to a paragraph (2) disease. See discussion infra in part I.B.

Republic of Vietnam "served in the Republic of Vietnam" within the meaning of 38 U.S.C. § 1116(a)(1)(A). The answer to this precise question is yes.

Congress spoke to this precise question in selecting non-Hodgkin's lymphoma ("NHL") for inclusion as a paragraph (a)(2) disease. The AOA as originally enacted included three diseases within paragraph (a)(2): NHL, soft tissue sarcomas ("STS") and chloracne. Congress' express intent was to codify decisions previously made by the Secretary of Veterans Affairs on each of these three diseases.[5]

The Secretary's prior decision to accord presumptive service connected status to NHL was based on a scientific study conducted by the Centers for Disease Control (CDC). See 55 Fed. Reg. 25339 (June 21, 1990) (proposed NHL rule) and 55 Fed. Reg. 43123 (Oct. 26, 1990) (final

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[5] As Rep. G.V. (Sonny) Montgomery, the Chairman of the House Committee on Veterans Affairs, stated on January 17, 1991, in introducing on the House floor the compromise bill (H.R. 556) that was enacted without amendment as the AOA shortly thereafter (on February 6, 1991), 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. E203 (daily ed. Jan. 17, 1991); see also, 137 CONG. REC. E390-03 (daily ed. Jan. 29, 1991) (statement of Rep. Burton); Statement of President George Bush Upon Signing H.R. 556 (Feb. 6, 1991), reprinted in 2 1991 U.S. Cong. & Admin. News 11 (stating that the AOA "will codify decisions previously made by my Administration with respect to presumptions of service connection . . .").

NHL rule) (both stating that the Secretary's decision to service connect NHL was "based on the results of a study of the association of selected cancers with service in the U.S. military in Vietnam by the . . . CDC"). This study "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. H724 (Jan. 29, 1991) (emphasis added); *Agent Orange Brief,* Department of Veterans Affairs (December 1997) (same) (J.A. 701).

The NHL regulation promulgated by the Secretary (38 C.F.R. § 3.313), entitled "Claims based on service in Vietnam," provided:

> (a) *Service in Vietnam.* "Service in Vietnam" includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.
>
> (b) *Service connection based on service in Vietnam.* Service in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease.

55 Fed. Reg. 43123 (Oct. 26, 1990) (underlines added). This regulation includes veterans who served in the waters offshore Vietnam, regardless whether they set foot on the land mass of Vietnam. The Secretary admits as much.[6] Indeed, to read the "service in Vietnam" provision of the NHL

[6] See Sec. Br. at 28; Secretary's Motion for a Stay of Proceedings filed on January 16, 2007 in Ribaudo v. Nicholson, U.S. Vet. App. No. 06-2762 at 5

regulation to exclude those who served in the waters offshore would turn the regulation on its head: the very same veterans who, according to the CDC study, experienced the greatest incidence of NHL, and prompted the Secretary to issue the NHL regulation would be barred from disability compensation by the very regulation that was issued as a direct result of their illnesses. This would be an absurd result.

Thus, when Congress provided that service connection must be awarded for NHL "in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam," it codified a regulation that spoke directly to the precise question whether veterans who served in the waters offshore are included, and it answered that question in the affirmative. Therefore, the phrase "served in the Republic of Vietnam" must include those who served in the waters offshore.

The 1991 AOA also codified the prior decisions of the Secretary to accord presumptive service connected status to STS and chloracne – decisions that were based on scientific studies showing a positive association between herbicide exposure and these two diseases. In defining the universe of veterans to whom the STS and chloracne presumptions would apply,

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("Section 3.313 was based on a [CDC] study that found an increased risk of NHL among Vietnam veterans, including those who served in offshore waters.") (emphasis added).

Congress decided the universe should be exactly the same as for NHL. It placed STS and chloracne after NHL in the paragraph (a)(2) list of diseases, and made their presumptions applicable to the defined universe that appears at the beginning of subsection (a): any "veteran who, during active military, naval, or air service, served in the Republic of Vietnam".[7]

Thus, Congress intended the defined universe to be the same for all three diseases.[8] Indeed, shortly after the AOA was enacted, the Secretary specifically interpreted the statutory phrase "served in the Republic of Vietnam" to mean the same for all three diseases.[9] The statutory phrase

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[7] If Congress believed that veterans who served in the waters offshore the land mass of Vietnam should not be entitled to service connection for STS and chloracne, it could easily have defined the universe of veterans entitled to presumptions for STS and chloracne in language that differed from the language used to define the universe of veterans entitled to the NHL presumption. This Congress did not do.

[8] This construction inexorably follows from the well-settled rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, __, 126 S. Ct. 1503, 1513 (2006) (emphasis added); IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005). Unlike a statute in which "identical words" are used "in different parts of the same act," the definition of the universe of veterans subject to the NHL, STS, and chloracne presumptions does not appear in different parts of the AOA. Rather, the AOA links each of these paragraph (a)(2) diseases directly to the universe language that appears in one part of the AOA -- at the beginning of subsection (a). A fortiori, the universe must be same for all three diseases.

[9] As discussed in part III.A., infra, nine months after the AOA, the Secretary amended MANUAL M21-1 to interpret the AOA. Paragraph 4.08(k)(1) of that amendment – quoted infra at 28 -- required the agency to use the same

"veteran who, during active military, naval, or air service, served in the Republic of Vietnam" in 38 U.S.C. § 1116(a)(1)(A) must therefore include a veteran who served in the waters offshore – a fact that Rep. Montgomery recognized when he introduced the compromise bill that was enacted into law without amendment two weeks later. See 137 CONG. REC. E203 (Jan. 17, 1991) (stating that the AOA "would codify the presumptions of service connection that have been administratively provided for . . . . veterans who served in theater[10] during the Vietnam war") (emphasis added).

During the 16 years that have expired since the AOA was enacted, Congress has added many other diseases to the list of paragraph (a)(2) diseases. See note 2, supra at 9. But Congress has never altered the defined universe of veterans entitled to the presumption of service connection for a

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definition of service in Vietnam for veterans suffering from NHL, STS, or chloracne.

[10] The word "theater" is defined as "a large geographical area in which military operations are coordinated." The American Heritage Dictionary of the English Language 1333-34 (New College Edition 1979); *see also* Blanche B. Armfield, Medical Department, United States Army in World War II, Organization and Administration 245 (Office of the Surgeon General, Department of the Army 1963), *available at* http://history.amedd.army.mil/booksdocs/wwii/orgadmin/org_admin_wwii_chpt7.htm (explaining that, based on War Department Field Manual 100-10, Field Service Regulations, Administration, 9 Dec. 1940, "[t]he term 'theater of operations' was defined in the field manuals as the land and sea areas to be invaded or defended, including areas necessary for administrative activities incident to the military operations ....").

connection for a paragraph (a)(2) disease. Accordingly, Congress has directly spoken to the precise question whether active duty personnel who served on ships offshore the land mass of the Republic of Vietnam are entitled to a presumption of service connection for all paragraph (a)(2) diseases. This conclusion dooms the Secretary's appeal.

The statutory language used by Congress to describe the universe of veterans covered by section 1116(a) reinforces the conclusion that Congress spoke directly to the precise issue whether active duty personnel who served on ships offshore the land mass are within this universe. The statutory language "served in the Republic of Vietnam" in section 1116(a) expressly refers to the sovereign nation of the Republic of Vietnam. All relevant definitions of the sovereign nation of the Republic of Vietnam include the territorial waters offshore the land mass of Vietnam.[11] Thus, the Court

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[11] See e.g., Presidential Proclamation 5928 of December 27, 1988, 54 Fed. Reg. 777 (Jan. 9, 1989) ("International law recognizes that coastal nations and jurisdictions may exercise jurisdiction over their territorial seas."); 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. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil."); see also United Nations Convention on the Law of the Sea, Participants, http://www.un.org/depts/los/reference_files/

should affirm the Veterans Court's decision based on the first step of Chevron for the reasons set forth above.

B. 38 U.S.C. § 1116(f) Does Not Apply to Mr. Haas' Diabetes Claim

The argument focusing on § 1116(a)(1)(A) in part I.A. above disposes of the Secretary's appeal. Although the Court need not reach the Secretary's misdirected argument regarding step one of Chevron and subsection (f) of the AOA, we demonstrate below that subsection (f) of § 1116 does not even apply to diabetes claims.

As originally enacted, § 1116 did not have a subsection (f). The predecessor to subsection (f) was 38 U.S.C. § 1116(a)(3), which was in effect from 1991 to 2001. During that 10-year period, § 1116(a)(3) provided:

> For the purpose of this subsection, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era and has a disease referred to in paragraph (1)(B) of this subsection shall be presumed to have been exposed during such service to an herbicide agent . . . . , unless there is affirmative evidence to establish that the veteran

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status2007.pdf (last visited June 4, 2007) (noting that the Republic of Vietnam ratified the Convention on July 25, 1994); cf. United Nations Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, Participants, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/ /partI/chapter XXI/treaty1.asp (last accessed June 30, 2006) (reporting that the United States signed this treaty on Sept.15, 1958, and ratified the treaty on Apr. 12, 1961, thus adopting the 12 nautical mile standard for its territorial seas, and the 200 nautical mile standard for its contiguous zone).

was not exposed to any such agent during that service. [emphasis added]

Thus, subsection (a)(3) created a presumption of exposure to herbicides, but only for application to veterans with an "additional disease" added by VA due to its association with Agent Orange ("a disease referred to in paragraph (1)(B)"). Excluding veterans with a paragraph (a)(2) disease from the presumption of exposure provisions makes perfect sense because § 1116 expressly exempts these veterans from the statutory obligation to establish herbicide exposure in the first place.

In 2001, Congress slightly modified the language of subsection (a)(3) and relocated it, as modified, into new subsection (f). See Pub. L. No. 107-103, § 201(c), 115 Stat. 976. New subsection (f) provides:

> For purposes of establishing service connection for a disability or death resulting from exposure to a herbicide agent, including a presumption of service-connection under this section, 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, shall be presumed to have been exposed during such service to an herbicide agent . . . . , unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

The 2001 amendment deleted the language linking the presumption of exposure to an "additional disease" added by VA due to its association with Agent Orange. The legislative history demonstrates that the sole purpose of this change in language was to benefit veterans by overruling the decision in

McCartt v. West, 12 Vet.App. 164 (1999). See 147 CONG. REC. S 13227, 13237-38 (Dec. 13, 2001) (Joint Explanatory Statement to the bill that became Pub. L. No. 107-103 prepared by House and Senate conferees in lieu of a conference report). McCartt held that the presumption of herbicide exposure in subsection (a)(3) does not apply to a claim for service connection based on the allegation that a veteran's exposure to herbicides caused a disease that is not an "additional disease" added by VA due to its association with Agent Orange. See 147 CONG. REC. at S 13237 (Dec. 13, 2001).

The language of this amendment overruling McCartt was taken from the Senate bill. Id. at S 13237-38. The Committee Report to the Senate bill explained that the bill

> would restore the VA practice, eliminated by the *McCartt* decision, to presume that veterans who served in Vietnam during the time specified in law were exposed to herbicides such as Agent Orange regardless of the disease the veteran seeks to have service connected.

Sen. Report 107-86 (Oct. 15, 2001) at 12.

The 2001 amendment did not alter the statutory language expressly exempting veterans with a paragraph (a)(2) disease from the need to establish that they were exposed to herbicides in the first place. Accordingly, both subsection (a)(3) as it was in effect from 1991-2001, and

the new subsection (f) which replaced it, do not apply and are irrelevant to claims for a paragraph (a)(2) disease like type 2 diabetes.

II. VA'S INTERPRETATION IS BASED ON AN IMPERMISSIBLE CONSRUCTION OF THE STATUTE

In the alternative that the Court determines that Congress did not address the precise issue in this case, the next question under Chevron is "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Since Chevron was decided, the Supreme Court has made clear that not all agency interpretations of a statute are entitled to Chevron-style deference. As discussed later, in part III of this brief, we demonstrate that the agency interpretation of the AOA advanced by the Secretary here is not entitled to Chevron-style deference. But it is not necessary for the Court to reach that part III issue because, as we discuss in the remainder of part II below, even if the agency's current interpretation is entitled to Chevron-style deference, the agency's answer to the precise question at issue here is not based on a permissible construction of the AOA.

The Secretary's brief makes clear that his interpretation of the statutory phrase "served in the Republic of Vietnam" is based entirely on a factual analysis of which veterans were likely to have been exposed to herbicide agents. This basis for assessing the meaning of the statutory phrase is impermissible.

Congress expressly provided in § 1116(a) that the thousands of veterans like Mr. Haas who suffer from a paragraph (a)(2) disease do not have to establish that they were exposed to an herbicide agent. See discussion in part I supra. Under the AOA, the likelihood of exposure to an herbicide agent is only relevant to veterans who suffer from an additional disease added by VA due to its association with Agent Orange. Id.

It inexorably follows from the fact that Congress expressly exempted veterans with a paragraph (a)(2) disease from the necessity of establishing exposure to an herbicide agent that it is impermissible and directly contrary to legislative intent for the Secretary to use that very factor – exposure to an herbicide agent – as a benchmark for assessing the meaning of the only criterion that a veteran with a paragraph (a)(2) disease must satisfy -- "service in the Republic of Vietnam."

III. VA'S INTERPRETATION OF THE AOA ADVANCED HERE IS NOT ENTITLED TO CHEVRON-STYLE DEFERENCE

Assuming, for the sake of argument, that that it is permissible to use the likelihood of exposure to herbicides as a benchmark for assessing the meaning of the phrase "service in the Republic of Vietnam" in § 1116(a), it is necessary to resolve the issue of the degree of judicial deference owed to the agency's answer to the precise statutory question at issue here. Since

Chevron was decided, the Supreme Court has made clear that not all agency interpretations of a statute are entitled to Chevron-style deference.

Two major factors that control whether an agency interpretation of a statute is entitled to Chevron-style deference are (1) whether the interpretation is in conflict with the agency's prior consistently held view and (2) whether the agency interpretation was adopted through formal notice-and-comment rulemaking procedures. As we demonstrate below, these two factors lead to the conclusion that the agency interpretation of the AOA advanced here is not entitled to Chevron-style deference.

A. The Secretary's Proffered Interpretation of the AOA Conflicts With the Agency's Prior Consistently Held View

An agency's interpretation of a statute "is entitled to considerably less deference" if it is "in conflict with its initial position." Watt v. Alaska, 451 U.S. 259, 273 (1981); see also, INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987). One of the many reasons that the Veterans Court did not defer to the Secretary's proffered interpretation of the AOA is that it "is inconsistent with prior, consistently held agency views." Haas, 20 Vet.App. at 270.

The Secretary contends that the Veterans Court's analysis is inaccurate because "VA has consistently interpreted" the AOA to "distinguish[ ] between veterans who were present within the geographic

land boundaries of Vietnam" who are included within the statutory phrase "served in the Republic of Vietnam" and "veterans who were not present within those land boundaries." Sec. Br. at 14 (emphasis added). The Secretary's allegation that his current view has been consistently held is simply untrue. We compare below the Secretary's version of history with what actually occurred.

1. The 1985 explanatory statement that appeared in the Federal Register

The Secretary begins his rendition of events with the explanatory statement published in the Federal Register in 1985 to accompany a proposed VA regulation. See Sec. Br. at 19 (stating that "service in Vietnam 'encompass[ed] service elsewhere if the person concerned actually was in the Republic of Vietnam, however briefly" (quoting 50 Fed. Reg. 15,848, 15,849 (Apr. 22, 1985)). Putting aside the fact that this statement did not appear in the 1985 regulation itself and preceded the AOA by six years, and putting aside the fact that there is no indication in the AOA that Congress intended to codify the 1985 regulation, the statement begs, rather than answers the precise question at issue in this case. It is completely silent on the question whether a veteran who served on a ship offshore the land mass of Vietnam "actually was in the Republic of Vietnam, however briefly."

2. VA ADJUDICATION PROCEDURES MANUAL M21-1, part III (Nov. 1991)

The AOA was enacted in February 1991. The agency's first post-enactment interpretation of the AOA that was discussed by the Veterans Court is the November 1991 amendment to VA ADJUDICATION PROCEDURES MANUAL M21-1 (hereinafter, "MANUAL M21-1"). See Sec. Br. at 33.

Before discussing the substance of this interpretation, it is necessary to correct two claims made by the Secretary about the circumstances surrounding this provision. First, for reasons that lie beyond our comprehension, the Secretary claims that the published regulation he relies upon – 38 C.F.R. § 3.307(a)(6) – was promulgated before this November 1991 amendment to MANUAL M21-1. See Sec. Br. at 41 (stating that the November 1991 MANUAL "M21-1 provision does not address policy concerns . . . [which] were made earlier, in the Federal Register rulemaking proceedings relevant to section 3.307(a)(6)(iii) and 3.313") (emphasis added).

Section 3.313 -- the NHL regulation which the AOA codified -- was promulgated in 1990, prior to both the AOA and the 1991 MANUAL M21-1 provision. But § 3.307(a)(6) was not promulgated until 1993 (see 58 Fed. Reg. 29107 (May 19, 1993)), two years after the AOA and the 1991 MANUAL M21-1 provision. Thus, there can be no doubt that the November

1991 amendment to MANUAL M21-1 was the agency's first post-enactment interpretation of the AOA.

Second, in an attempt to denigrate the legal effect of MANUAL M21-1, the Secretary claims that

> placement of the provision in the M21-1, which is not promulgated by the Secretary . . . . further suggests that VA did not intend to be bound by the provision. For example, the Board is not bound by the M21-1. See 38 U.S.C. § 7104 ("The Board shall be bound in its decision by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department").

Sec. Br. at 42 (emphasis added). This claim suffers from the embarrassment that the Solicitor General of the United States directly contradicted the claim when he informed the U.S. Supreme Court on behalf of the Secretary's predecessor that:

> [a]n even greater volume of [VA] policy pronouncements exists in manuals that amplify the rules set forth in the Code of Federal Regulations. These manuals constitute "instructions of the Administrator" that are binding on the Board of Veterans Appeals under 38 U.S.C. 4004 [later recodified as 38 U.S.C. § 7104] . . . . The VA Manual M21-1 . . . prescribes policies for disability adjudications [and] has 56 chapters.

Respondent's Brief at 20-21, Traynor v. Turnage, 485 U.S. 535 (1988) (Nos. 86-622, 86-737).

We now turn to the substance of the MANUAL M21-1 provision. Nine months after enactment of the AOA, the agency amended the MANUAL M21-1 to provide in paragraph 4.08(k)(1):

> It may be necessary to determine if a veteran had "service in Vietnam" in connection with claims for service connection for non-Hodgkins lymphoma, soft-tissue sarcoma, and chloracne . . . . In the absence of contradictory evidence, "service in Vietnam" will be conceded if the records shows [sic] that the veteran received the Vietnam Service Medal.

(JA 657) (quoted in Haas, 20 Vet.App. at 270-71) (emphasis added).

It is noteworthy for purposes of construing this provision that 832,000 veterans served on ships offshore the land mass of Vietnam during the Vietnam era (see Ribaudo v. Nicholson, __ Vet.App. __, 2007 U.S. App. Vet. Claims LEXIS 585 *21-22 (Apr. 13, 2007)) and the Vietnam Service Medal (VSM) was awarded to all veterans who served on ships in the waters offshore the land mass of Vietnam. (JA 654). Nonetheless, the Secretary argues that service on a ship offshore the land mass of Vietnam qualifies sub silencio under this provision as "contradictory evidence" that would override the presumption that receipt of the VSM proves "service in Vietnam." See Sec. Br. at 33-37.

It would certainly be odd for an agency to create a presumption that the VSM satisfies the "service in Vietnam" requirement, but to intend at the same time to exclude the 832,000 veterans who received the VSM from this

presumption solely through use of the phrase "contradictory evidence" -- without at least mentioning to the agency personnel charged with applying the provision that the offshore service of these 832,000 veterans constitutes "contradictory evidence." In apparent recognition of this shortcoming in his construction of paragraph 4.08(k)(1), the Secretary contends that he communicated this rule about the group of 832,000 in a separate directive – 38 U.S.C. § 3.307(a)(6)(iii).[12]

This contention is certainly inventive. But it fails a basic reality check. 38 U.S.C. § 3.307(a)(6)(iii) was not even in existence at the time of the 1991 MANUAL M21-1 provision. It was first promulgated two years later, in 1993. Thus, the contention that agency personnel were advised to use § 3.307(a)(6)(iii) as a guide in construing the 1991 MANUAL M21-1 provision is yet another inaccurate representation.

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[12] See Sec. Br. at 36 ("'contradictory evidence' . . . . would necessarily include evidence showing that the veteran did not meet the requirements of the applicable regulation, section 3.307(a)(6)(iii) . . . "); Sec. Br. at 36-37 ("Fairly viewed, the M21-1 provision thus instructs VA first-line adjudicators to treat the VSM as prima facie evidence of service in the Republic of Vietnam provided that there is no contrary evidence of record showing that the veteran did not meet the requirements of § 3.307(a)(6)"); Sec. Br. at 35 ("the [Veterans Court] implausibly concluded that the M21-1 provision interprets § 3.307(a)(6)(iii) in a manner that conflicts with every one of VA's publicly-stated interpretations of that regulation"); Sec. Br. at 33-34 (the "[p]aragraph 4.08(k)(1) . . . concession in no way precluded the operation of the actual text of the rebuttable presumption set forth in section 3.307(a)(6)(iii) . . .").

The next part of paragraph 4.08(k) of the 1991 MANUAL M21-1 provides:

> (2) If a veteran who did not receive the [VSM] claims service connection for [HHL], [STS] or chloracne and alleges service on a ship in the waters offshore Vietnam, review the record for evidence that the ship was in the vicinity of Vietnam for some significant period of time (i.e., more than just transit through the area). If the veteran cannot produce evidence that the ship was in the waters offshore Vietnam, contact the Compensation and Pension Service Projects Staff. Be prepared to furnish the name of the ship, the number of the ship, and the dates that it is alleged to have been in the waters offshore Vietnam. Central Office will attempt to obtain confirmation from the Department of Defense.

(JA 657) (quoted in Haas, 20 Vet.App. at 271). The Veterans Court concluded that the obvious implication of this provision's detailed requirement to develop evidence that the veteran served on a ship in the waters offshore Vietnam was that such service would evidence that the veteran "served in the Republic of Vietnam." Haas, 20 Vet.App. at 271.

The Secretary challenges this conclusion, stating that the agency's reason for requiring an "assessment of the ship's operating environment" was that this evidence could lead to other, different evidence and that different evidence would prove that the veteran "served in the Republic of Vietnam" within the meaning of the AOA. Sec. Br. at 34. But if the Secretary were correct, then the MANUAL M21-1 would also have expressly required development of that latter, dispositive evidence. Not even a

psychic could divine from a directive to "obtain confirmation from the Department of Defense" of evidence "that the ship was in the waters offshore Vietnam" that the Secretary's ultimate intention was to require military department confirmation that the veteran set foot on the land mass of Vietnam.

For the foregoing reasons, and the others advanced by the Veterans Court, it is plain that the 1991 MANUAL M21-1 provided that veterans who served in the waters offshore the land mass of Vietnam satisfy the statutory requirement of service in Vietnam.

3. 38 C.F.R. § 3.307(a)(6)(iii)

According to the Secretary, the last sentence of 38 C.F.R. § 3.307(a)(6)(iii) (2006) addresses the precise question at issue here. That sentence was first added to § 3.307(a)(6) in 1993[13] and reads: "'Service in the Republic of Vietnam' includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam."

This definition bears a strong resemblance to the definition of service in the Republic of Vietnam in 38 C.F.R. § 3.313 – the 1990 NHL regulation

[13] This sentence first appeared in section 3.307(a)(6) on May 19, 1993. See 58 Fed. Reg. 29107 (May 19, 1993). It was later relocated to the end of section 3.307(a)(6)(iii). See 59 Fed. Reg. 5106 (Feb. 3, 1994).

that Congress intended to codify when it enacted the AOA. There are only two differences between the two definitions: after the word "offshore," the § 3.307(a)(6)(iii) definition omits a comma and substitutes the word "and" for the word "or."

The Secretary appears to argue that these were deliberate alterations that were plainly intended to distinguish the § 3.307(a)(6)(iii) definition from the earlier § 3.313 definition that includes veterans who served on ships offshore the land mass of Vietnam. See Sec. Br. at 17-18. The process by which the Secretary adopted the § 3.307(a)(6)(iii) definition demonstrates otherwise.

When the Secretary first proposed and finalized the definition, no explanation of the definition or its intent was provided. See 57 Fed. Reg. 30707 (July 10, 1992) (proposed rule); 58 Fed. Reg. 29107 (May 19, 1993) (final rule). However, several months later, when the Secretary proposed to relocate the definition to the end of § 3.307(a)(6)(iii), he explained that the definition "incorporates the definition of the term 'service in the Republic of Vietnam' from 38 CFR 3.311a." 58 Fed. Reg. 50528 (Sept. 28, 1993).

The regulation to which the Secretary referred -- 38 C.F.R. § 3.311a -- was promulgated in 1985 pursuant to Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542 ("the 1984

Dioxin Act"). See 50 Fed. Reg. 34452 (Aug. 26, 1985). But by the time the Secretary acted to incorporate the § 3.311a definition, the underlying statutory authority for § 3.311a was a dead letter. In section 10 of the 1991 AOA, Congress repealed the 1984 Dioxin Act.[14] Thus, the Secretary decided in 1993 to incorporate a definition of service in the Republic of Vietnam contained in a defunct regulation that implemented a statute that had been repealed two years earlier.

Given that § 3.311a had lost its legal vitality years earlier and given the lack of any indication in the AOA that Congress intended to incorporate the § 3.311a definition of service in Vietnam, there was no rational basis for the Secretary to incorporate the § 3.311a definition in the first place.[15]

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[14] Section 10 of the AOA expressly cited the class action decision in Nehmer v. U.S. Veterans Administration, 712 F.Supp. 1404 (N.D. Cal. 1989) that invalidated part of § 3.311a and required the Secretary to adopt replacement regulations. AOA section 10 went on to repeal the Secretary's rulemaking obligations under the 1984 Dioxin Act, effective six months after enactment of the AOA (i.e., in August 1991).

The Secretary recognized that § 3.311a had already lost its legal vitality in the very same rulemaking in which he proposed to incorporate the definition of service in Vietnam contained in § 3.311a. He stated that "we propose to delete § 3.311a" because two years earlier, Section 10 of the AOA had repealed the underlying statutory authority for § 3.311a "and there is therefore no need for VA to maintain separate regulations . . . " 58 Fed. Reg. 50528, 50529 (Sept. 28, 1993).

[15] Although the Secretary stated that he incorporated the § 3.311a definition, the definition he actually promulgated differed from the § 3.311a definition.

Moreover, the agency never discussed the two differences between the definition of service in the Republic of Vietnam in the 1990 NHL regulation and the definition it was adopting in § 3.307(a)(6)(iii). Nor did the agency explicitly discuss an intention to exclude veterans who served on ships offshore the land mass of Vietnam.

The Secretary would have the Court believe that the § 3.307(a)(6)(iii) definition of "service in Vietnam" was based on a reasoned agency analysis of which soldiers were likely to have been exposed to Agent Orange. Yet, in the rulemaking process that led to § 3.307(a)(6)(iii), the likelihood of exposure to Agent Orange was not even mentioned. Moreover, in the 1985 rulemaking that resulted in the § 3.311a definition that was later incorporated in § 3.307(a)(6)(iii), the agency admitted that given "the many uncertainties associated with herbicide spraying . . . , it would be extremely difficult to determine with an acceptable degree of precision whether an individual veteran was exposed to dioxin." 50 Fed. Reg. 34452, 34454-55 (Aug. 25, 1985).

Section 3.307(a)(6)(iii) omits a comma that appeared after the word "locations" in the § 3.311a definition. This apparently inadvertent omission of a comma hardly inspires confidence in the validity of the Secretary's argument that it was intentional when the agency also omitted the comma that appeared after the word "offshore" in the § 3.313 definition in the 1990 NHL regulation.

The Secretary's argument that § 3.307(a)(6)(iii) established a set-foot-on-land rule suffers from two additional deficiencies. First, the agency never amended MANUAL M21-1 after § 3.307(a)(6)(iii) was adopted to remove the rule that service in the waters offshore satisfies the service in Vietnam requirement. The Veterans Court correctly found that this undercut the Secretary's construction. Haas, 20 Vet. App. at 272.

Second, the Secretary's construction of the regulation advanced in litigation is contradicted by the formal adjudications made by the agency after § 3.307(a)(6)(iii) was promulgated. As we show below, the agency repeatedly interpreted § 3.307(a)(6)(iii) to provide that service on ships offshore the land mass of Vietnam satisfies the "service in Vietnam" criterion.

4. Interpretations of the AOA and 38 C.F.R. § 3.307(a)(6)(iii) Arrived at in Formal Agency Adjudications

Courts owe Chevron-style deference to agency interpretations adopted through formal adjudications. See Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("*Chevron*-style deference" is owed to an agency interpretation "arrived at after . . . a formal adjudication or notice-and-comment rulemaking"); Nat'l Organization of Veterans' Advocates v. Secretary of Veterans Affairs, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (stating that "agency interpretations of statutes" that are "the product of formal

adjudication or notice-and-comment rulemaking" warrant Chevron deference). The Secretary's allegation that it consistently interpreted the AOA and 38 C.F.R. § 3.307(a)(6)(iii) to exclude veterans who served on ships offshore the land mass of Vietnam is directly contradicted by numerous formal adjudications made by the agency.

Formal adjudications on claims for VA benefits are made by a VA regional office ("VARO"), and, if the claimant appeals the VARO decision, by the Board of Veterans' Appeals. The formal adjudications of the Board of Veterans' Appeals (BVA) and the VAROs contradict the Secretary's allegation that the agency consistently interpreted the AOA and 38 C.F.R. § 3.307(a)(6)(iii) to exclude veterans who served on ships offshore the land mass of Vietnam.[16]

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[16] The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(2), requires the VA to "make available for public inspection and copying -- (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases . . . " In compliance with the FOIA, the VA makes all BVA decisions available for public inspection and copying through the internet.

The Court may take judicial notice of the BVA and VARO decisions cited below. See Furnari v. Warden, Allenwood Fed. Correctional Inst., 218 F.3d 250 (3rd Cir. 2000) ("it is proper for this Court to take judicial notice of decisions of an administrative agency"); Checkosky v. SEC, 139 F.3d 221, 227 (D.C. Cir. 1998) (taking judicial notice of administrative agency decision issued after the decision under review by the court). In Opaka v. INS, 94 F.3d 392, (7th Cir. 1996) ("This court . . . has the power, in fact the obligation, to take judicial notice of the relevant decisions of courts and administrative agencies, whether made before or after the decision under

BVA Adjudications

Among the BVA adjudications that directly contradict the Secretary's construction of the AOA and 38 C.F.R. § 3.307(a)(6)(iii) advanced here are the following. In an adjudication issued in 1998,[17] the Board considered a claim for service connected death benefits filed by a widow of a veteran who died in 1996 of lung cancer – a paragraph (a)(2) disease. The Board held that:

> [t]he regulations pertaining to Agent Orange , , , provide for a presumption of exposure to herbicide agents for veterans who served on active duty in Vietnam during the Vietnam War. Service in Vietnam includes service in the waters offshore. 38 C.F.R. § 3.307(a)(6) (1997).

In light of the fact that the veteran had served on the U.S.S. Markab, the Board remanded the claim to the regional office to "attempt to confirm whether the Markab was stationed in Vietnam or the waters offshore during a period in which the veteran was aboard." (emphasis added).

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review . . . . . Indeed, it is a well-settled principle that the decision of another court or agency, including the decision of an administrative law judge, is a proper subject of judicial notice").

[17] BVA decision, Docket Number 97-23 679 (June 8, 1998), available at http://www.va.gov/vetapp98/files2/9817641.txt.

In an adjudication issued in 1997,[18] the Board considered a claim for service connection for a skin condition due to exposure to herbicides. The veteran contended "that he was exposed to Agent Orange during his service off the coastal waters of Vietnam during the Vietnam era." After citing 38 C.F.R. § 3.307(a)(6)(iii), the Board stated that it "finds it is clear that the veteran either served in Vietnam or in the waters offshore Vietnam, and therefore is entitled to the presumption of Agent Orange exposure."

In an adjudication issued in 1999,[19] the Board considered a disability claim for service connection for a chronic skin disability due to exposure to Agent Orange. After citing 38 C.F.R. § 3.307(a)(6)(iii), the Board stated that "[a]s the veteran served with the Navy in or off the coast of the Republic of Vietnam, the Board acknowledges his probable exposure to Agent Orange and/or other herbicides." (emphasis added).

Finally, in an adjudication issued in 1997,[20] the Board considered a disability claim for service connection for a skin disorder affecting the veteran's arms and legs and for numbness of the lower extremities due to

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[18] BVA decision, Docket Number 96-20 610 (October 28, 1997), available at http://www.va.gov/vetapp97/files4/9736230.txt.

[19] BVA decision, Docket Number 97-10 050A (January 1, 1999), available at http://www.va.gov/vetapp99/files1/9902470.txt.

[20] BVA decision, Docket Number 96-04 716 (October 28, 1997), available at http://www.va.gov/vetapp97/files4/9736207.txt.

exposure to Agent Orange. The veteran contended "that he was exposed to Agent Orange during his service onboard the USS Princeton off the coast of Vietnam" and "indicated that he never went ashore in Vietnam . . . " After citing 38 C.F.R. § 3.307(a)(6)(iii), the Board concluded that:

> [g]iven his on deck duties as a signalman, the proximity to and length of time spent adjacent to Vietnam coastline, and the duties performed by the USS Princeton, the Board concludes that the veteran is entitled to the presumption of exposure to Agent Orange in service.

VARO Adjudications

Adjudications issued by the VAROs also directly contradict the Secretary's construction of the AOA and 38 C.F.R. § 3.307(a)(6)(iii) advanced here. For example, in a decision issued on December 1, 1997, the VARO granted service-connected death benefits to a survivor of a veteran who died of one of the Agent-Orange related diseases listed in 38 C.F.R. § 3.309 on the ground that the "veteran's . . . Certificate of Release or Discharge from Military Service . . . shows he received the Vietnam Service Medal (VSM) indicative of service performed in the Republic of Vietnam which [is] inclusive of service in the waters offshore." (JA 708).[21]

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[21] These rating decisions were appendices to Mr. Haas' supplemental reply brief. The Secretary filed a motion to exclude the rating decisions from the supplemental reply brief, and in an Order of December 16, 2005, the Court granted the motion. However, the Court's ruling is wrong as a matter of law based on the judicial notice principles set forth in footnote 16, supra.

Similarly, in a decision issued on September 26, 1995, another VARO granted service connection for an Agent-Orange related diseases listed in 38 C.F.R. § 3.309(e) on the ground that the veteran's Certificate of Release or Discharge from Military Service "shows that the veteran served in the waters of Vietnam while in the U.S. Navy." (JA 711-712).

Another example is the VARO decision issued on December 27, 1996. In that case, the veteran was granted service connection for prostate cancer due to herbicide exposure. The VARO held that the "[e]vidence of record shows the veteran served in the Republic of Vietnam, or waters adjacent thereto, consequently, exposure to herbicides is conceded." (JA 715).

Finally, on December 8, 1995, a VARO formally adjudicated a claim for service-connected death benefits filed by a survivor of a veteran who had died of a respiratory cancer (which is specified in paragraph (a)(2) of the AOA). (JA 720-721). The agency granted the claim on the ground that the "[e]vidence shows that the veteran served in Vietnam (in off-shore waters). Therefore, exposure to Agent Orange during this service period is conceded." Id. (emphasis added).

In summary, there can be no doubt that the Veterans Court was correct in concluding that the interpretation of the AOA advanced by the

Secretary in this litigation is in conflict with the agency's prior consistently held view. We turn next to the process used by the agency to change its prior consistently held view.

B. The Agency's Change in Interpretation of the Statutory Phrase "Served in the Republic of Vietnam" Was Adopted Informally

The Secretary refers to five occasions prior to this litigation in which an agency employee has expressed the belief that veterans who served in the waters offshore the land mass of Vietnam are not included in the phrase "served in the Republic of Vietnam":

Occasion #1

The first occasion occurred in September 1996, when the VA's Assistant General Counsel wrote a memorandum to the Acting Director of the VA's Compensation and Pension Service. See Sec. Br. at 20-21.

Occasion #2

In 1997, in the part of a Federal Register publication of a final rule[22] which discusses the agency's response to the public comments it had received, the agency made the statement quoted in the Secretary's brief at

[22] The final rule implemented section 421 of Public Law No. 104-204. See 62 Fed. Reg. 51274 (Sept. 30, 1997). That statute added a new chapter 18 to title 38, U.S. Code, authorizing the VA to provide certain benefits to children suffering from spina bifida who are the natural children of veterans who served in the Republic of Vietnam during the Vietnam era. The proposed and final rules implementing this statute defined "service in the Republic of Vietnam" using the same language used in § 3.307(a)(6)(iii).

19-20. That statement implies that veterans who served in the waters offshore are not included.

Occasion #3

The next occasion also involves the part of a Federal Register publication of a final rule which discusses the agency's response to the public comments it had received. In 2001, the agency noted that although the rule at issue only encompassed an amendment to 38 C.F.R. § 3.309(e) to add type 2 diabetes as a disease associated with Agent Orange exposure, a commentator had "urged VA to use this rulemaking to define service in the Republic of Vietnam to include service in Vietnam's inland waterways or its territorial waters." 66 Fed. Reg. 23166, 23166 (May 8, 2001). The agency responded by stating that "[w]e believe that it is commonly recognized that th[e] term 'in the Republic of Vietnam' includes the inland waterways." Id. But the agency declined to adopt the comment "with respect to offshore service." Id.

Occasion #4

In February 2002, the VA amended MANUAL M21-1 to provide that a "veteran must have actually served on land within the Republic of Vietnam (RVN) to qualify for the presumption of herbicide exposure." See Sec. Br. at 30-31. This amendment was not promulgated through notice-and-

comment rulemaking procedures, and it was not published in the Federal Register. No explanation for the set-foot-on-land rule accompanied the rule.

Occasion #5

In 2004, the VA proposed a compendium of new regulations as part of its omnibus regulation re-write project. One of the proposed rules would replace the § 3.307(a)(6)(iii) definition of service in Vietnam with a new definition to be codified at 38 C.F.R. § 5.262(a). The pertinent part of the proposed new definition is:

> "Service in the Republic of Vietnam" does not include active military service in the waters offshore and service in other locations, but does include service in which the veteran had duty or visited in the Republic of Vietnam, which includes service on inland waterways.

69 Fed. Reg. 44614, 44626 (July 27, 2004). The VA has not published a final rule on this matter. The agency has indicated that it expects to finalize no earlier than 2009 the regulations like proposed 38 C.F.R. § 5.262(a) that are part of the omnibus regulation re-write project. See Summary of C&P Regulation Rewrite Project (VA Office of Regulation Policy and Management), available at www1.va.gov/ORPM/page.cfm?page=6 (last accessed June 4, 2007).

The discussion above shows that the process by which the agency changed its interpretation of the statutory phrase "service in the Republic of

Vietnam" was exceedingly informal. The Supreme Court has held that Chevron deference does not apply to agency interpretations that are adopted with such informality. See Christensen v. Harris County, 529 U.S. 576, 587 (2000) (agency interpretations of statutes that are not the product of formal adjudication or notice-and-comment rulemaking "do not warrant Chevron-style deference"); United States v. Mead Corp., 533 U.S. 218, 226 (2000) ("administrative interpretation of a particular statutory provision qualifies for *Chevron* deference when . . . Congress delegated authority to the agency generally to make rules carrying the force and effect of law and that the agency interpretation claiming deference was promulgated in exercise of that authority").

Six years ago, after Christensen and Mead, this Court "remind[ed] the [VA] that if it wishes its interpretation of statutes to be afforded Chevron deference, its regulations should be promulgated using notice-and-comment procedures." National Organization of Veterans' Advocates, 260 F.3d at 1381. Despite this warning, the VA chose to adopt a set-foot-on-land rule informally, without using notice-and-comment rulemaking procedures. The net result is that the agency's interpretation of the statutory phrase "service in the Republic of Vietnam" advanced in this litigation is not entitled to

Chevron-style deference. This is especially true in light of the fact that this interpretation conflicts with the agency's prior consistently held view.

Given the fact that the statutory interpretation advanced by the agency here (1) was adopted without using notice-and-comment rulemaking procedures and (2) is not entitled to Chevron-style deference, the interpretation must survive two additional hurdles if it is to survive judicial scrutiny. As we show in parts IV and V, below, the interpretation does not survive either of these two hurdles.

IV. VA'S INTERPRETATION OF THE AOA IS UNLAWFUL BECAUSE IT WAS ADOPTED WITHOUT OBSERVANCE OF PROCEDURES REQUIRED BY LAW

The Veterans Court held that VA's unfavorable 2002 amendment to MANUAL M21-1 imposing a set-foot-on-land requirement is void because it rescinded the previous favorable provisions of the MANUAL M21-1 and was promulgated without observance of the notice-and-comment rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553(a), and 38 U.S.C. § 501(d). See Haas, 20 Vet. App. at 275-77. In his challenge to this ruling, the Secretary focuses on the 1991 MANUAL M21-1 provision, rather than the 2002 amendment. See Sec. Br. at 36-42. He contends that the Veterans Court improperly construed the 1991 provision, and, when

properly construed, that provision does not contain a substantive rule requiring notice-and-comment rulemaking. Id.

On the other hand, the Secretary concedes that

> [l]egislative rules generally are based on some degree of policy analysis . . . . [and] policy concerns about whether a veteran should or should not be presumed to have been exposed to herbicide or should be considered to have served in Vietnam . . . were made by VA . . . in the Federal Register rulemaking proceedings relevant to section 3.307(a)(6)(iii) and 3.313 . . .

Sec. Br. at 41. In other words, the Secretary has no quarrel with the proposition that a rule providing that service in the waters offshore Vietnam satisfies the service in Vietnam requirement for a claim based on NHL – as is contained in 38 C.F.R. § 3.313 -- is a substantive rule that must be promulgated using notice-and-comment rulemaking procedures. Nor does the Secretary quarrel with the proposition that a rule providing that service in the waters offshore Vietnam does not qualify for the presumption of herbicide exposure – as he argues, wrongly, is contained in 38 C.F.R. § 3.307(a)(6)(iii) -- is a substantive rule that must be promulgated using notice-and-comment rulemaking procedures.

Put another way, if the Secretary is correct that the AOA is ambiguous on the precise question whether veterans who served in the waters offshore Vietnam fits within the statutory phrase "served in the Republic of Vietnam," the agency's answer to this question is a "gap-filler" that is

substantive in nature and must be promulgated using notice-and-comment rulemaking procedures. Accordingly, the Secretary does not dispute the obvious – that the agency violated the notice-and-comment rulemaking provisions of 5 U.S.C. § 553(a) and 38 U.S.C. § 501(d) when he amended MANUAL M21-1 in 2002 to impose a set-foot-on-land requirement.

The only part of the Veterans Court's ruling that the Secretary seriously challenges is the holding that the 1991 MANUAL M21-1 provides that veterans who served in the waters offshore Vietnam satisfy the statutory requirement of service in Vietnam. As we demonstrated above in part III.A., this Veterans Court holding is correct. Accordingly, this case is on all fours with this Court's and the Veterans Court's decision in Fugere v. Derwinski, 1 Vet.App. 103 (1990), aff'd, 972 F.2d 331 (Fed. Cir. 1992). The holding in Fugere is that when VA amends MANUAL M21-1 without following notice-and-comment rulemaking procedures and thereby repeals a favorable substantive rule contained in the MANUAL M21-1, the amendment is void and the favorable substantive rule is judicially enforceable. Thus, an additional independent reason that the agency's change in interpretation of the AOA is unlawful is that it was adopted without observance of procedures required by law.

V. VA'S INTERPRETATION OF THE AOA IS NOT ENTITLED TO SKIDMORE DEFERENCE AND LACKS PERSUASIVE POWER

In addition to the fatal procedural defect in VA's change in interpretation of the AOA discussed above in part IV, the merits of the VA's interpretation suffer from another fatal deficiency. In part III above, we demonstrated that if it is permissible for the agency to construe AOA subsection (a) based on the likelihood of a veteran's exposure to herbicides, that interpretation is not entitled to Chevron deference. The next question becomes whether this agency interpretation is entitled to any deference.

The Supreme Court held in Mead that when an agency interpretation is not entitled to Chevron deference, "Chevron did nothing to eliminate Skidmore's holding that an agency's interpretation may merit some deference whatever its form." Mead, 529 U.S. at 234-35 (referencing Skidmore v. Swift & Co. , 323 U.S. 134, 139 (1944)) (emphasis added). Under Skidmore, whether such an agency interpretation is entitled to any deference "depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all factors which give power to persuade." Skidmore, 323 U.S. at 140; see also, Structural Industries Inc. v. United States, 356

F.3d 1366, 1370 (Fed. Cir. 2004); Rubie's Costume Co. v. United States, 337 F.3d 1350, 1355-56 (Fed. Cir. 2003).

There are numerous factors surrounding the agency's interpretation here that lead to the conclusion that it does not merit any judicial deference and it lacks persuasive power. We start with the "consistency" of the agency interpretation "with earlier . . . pronouncements." Skidmore, 323 U.S. at 140. As we demonstrated above in part III.A., the agency's interpretation fails the consistency test.

We turn next to the important factor of "the thoroughness evident in [the] consideration" given in arriving at the agency interpretation. Skidmore, 323 U.S. at 140. When the agency adopted a set-foot-on-land rule in 2002 by amending MANUAL M21-1, it gave no explanation whatsoever for its about face. In other words, there was no "thoroughness evident in its consideration." This is particularly damning because the amendment constituted a major change in interpretation. The Supreme Court has made clear that when an agency changes course, it has a heightened duty to evidence thoroughness in its consideration. See Motor Vehicle Mfrs. Assoc. v. State Farm Auto. Ins. Co., 463 U.S. 29, 48 (1983) (stating that when an agency acts in a manner inconsistent with prior conduct, it "must cogently explain why it has . . . reach[ed] that result . . . ");

Atchison T. & S.F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (stating that when an agency departs from "prior norms, . . . [the basis for the departure] must be clearly set forth . . .").

The agency did provide an explanation two years after it adopted the set-foot-on-land rule. The VA advanced in the Federal Register, as part of an omnibus set of proposed regulations the agency has yet to adopt, the following two-sentence explanation for why it decided to adopt a set-foot-on-land rule:

> We are not aware of any valid scientific evidence showing that individuals who served in the waters offshore of the Republic of Vietnam or in other locations were subject to the same risk of herbicide exposure as those who served within the geographic land boundaries of the Republic of Vietnam. Furthermore, we are not aware of any legislative history suggesting that offshore service or service in other locations are within the meaning of the statutory phrase, "Service in the Republic of Vietnam."

69 Fed. Reg. 44614, 44620 (July 27, 2004).

The second sentence quoted above betrays an alarming lack of agency awareness. As part I above demonstrates, the legislative history of the AOA demonstrates that Congress spoke to the precise question whether offshore service is within the statutory phrase "service in the Republic of Vietnam" and answered that question in the affirmative. The agency admission that it

is not even "aware" of this legislative history deprives the agency's interpretation of any power to persuade.

The first sentence quoted above also lacks persuasive power. The first sentence indicates that the agency based the set-foot-on-land rule on the factual finding that veterans "who served in the waters offshore the Republic of Vietnam . . . were not subject to the same risk of herbicide exposure as [veterans] who served within the geographic land boundaries of the Republic of Vietnam."

As the first sentence correctly indicates, to resolve this issue of fact requires consideration of "valid scientific evidence." Yet the agency did not, and has not cited a single piece of scientific evidence that supports the factual proposition that veterans "who served in the waters offshore the Republic of Vietnam . . . were not subject to the same risk of herbicide exposure as [veterans] who served within the geographic land boundaries of the Republic of Vietnam."

This stands in sharp contrast to the "thoroughness evident in" the agency's "consideration" of its regulations regarding which diseases have a positive association with herbicides. Each time the VA proposed and finalized rules regarding which diseases have a positive association with herbicides, the agency literally cited and discussed dozens of scientific

studies on this issue of fact. See 68 Fed. Reg. 14,567, 14,567-69 (Mar. 26, 2003) (chronic lymphocytic leukemia proposed rule); 66 Fed. Reg. 2,376, 2,377-79 (Jan. 11, 2001) (type II diabetes mellitus proposed rule); 61 Fed. Reg. 41,368, 41,368-70 (Aug. 8, 1996) (prostate cancer and peripheral neuropathy proposed rule); 59 Fed. Reg. 5,161, 5,162-63 (Feb. 3, 1994) (respiratory cancers and multiple myeloma proposed rule). But on the issue of fact concerning the relative risks of exposure to herbicides, the agency cites nothing.

The persuasive power of the agency's finding of fact is further undermined by an earlier agency conclusion. In 1985, the agency conceded that there are

> many uncertainties associated with herbicide spraying . . . which are further confounded by lack of precise data on troop movements at the time. While it may be possible to approximate areas where herbicides were sprayed, it would be extremely difficult to determine with an acceptable degree of precision whether an individual veteran was exposed to dioxin.

50 Fed. Reg. 34452, 34455 (Aug. 25, 1985). The critical agency finding of fact here involves a comparison of the risk of exposure to herbicides experienced by veterans who served within the geographic land boundaries of Vietnam with the risk of exposure to herbicides experienced by veterans who served in the waters offshore Vietnam. Given that the VA found it "extremely difficult to determine with an acceptable degree of precision

whether an individual veteran was exposed to dioxin," the following question obviously arises: how did the VA determine with an acceptable degree of precision what was the risk of exposure to herbicides for veterans who served within the geographic land boundaries of Vietnam and what was the risk of exposure to herbicides for veterans who served in the waters offshore Vietnam. The lack of any indication that the agency even considered, no less resolved this issue is yet another sign that there was no "thoroughness evident in [the agency's] consideration" of its interpretation of the AOA.

In apparent recognition of the lack of thought given to its critical finding of fact, the Secretary's lawyers attempt to come to the agency's rescue by advancing in the Secretary's appellate brief their own rationale for the factual finding. According to these lawyers,

> [b]ecause herbicides were used as defoliants, it can reasonably be concluded that they were dispersed overwhelmingly, if not exclusively, over land, and seldom, if at all, over areas off the coast of Vietnam. Consequently, herbicide exposure is far more likely to have occurred within the geographic land boundaries of Vietnam than in areas off the coast of Vietnam . . .

Sec. Br. at 14-15.

This post-hoc analysis appears to be based on the notion that exposure to herbicides derives from herbicide spray falling from above on the body of

a veteran stationed on land. But when Congress discussed exposure to herbicides in the AOA, it was obviously not referring to "exposure" in the simplistic sense of liquid touching body. Congress obviously referred to the type of exposure to herbicides that would cause adverse health effects in humans.

The Secretary's appellate lawyers cite no scientific evidence for the proposition that human skin exposure to herbicides causes adverse health effects in humans. Even if this were true, however, such a scientific fact would only begin the relevant inquiry. A rational decision-maker would also have to consider other ways by which a veteran could have been exposed to the toxic chemicals that are contained in herbicides so as to produce adverse health effects.

Although neither the agency nor the Secretary's appellate lawyers discuss it, there is a whole body of scientific evidence addressing this question. When pollutants and chemicals that are toxic in nature are located on land, they often drain underground (carried by rain) and then travel to nearby rivers, which then carry the pollutants or toxic chemicals out to sea. This process is called "non-point source pollution," or simply, "runoff." See Edward A. Laws, Aquatic Pollution: an Introductory Text 117-18 (3rd ed. 2000); National Ocean Service, Pollutants from Nonpoint Sources:

Pesticides and Toxic Chemicals, at http://www.oceanservice.noaa.gov/education/kits/pollution/012chemicals.html (last visited April 9, 2007); Environmental Protection Agency, Polluted brochure EPA-841-F-94-005 (1994), at http://www.epa.gov/owow/nps/qa.html (last visited April 9, 2007). Toxic chemicals on land may also be transported out to sea via the wind, by a process known as "spray drift." Michael S. Majewski and Paul D. Chapel, Pesticides in the Atmosphere: Distribution, Trends, and Governing Factors (1995); National Ocean Service, Pollutants from Nonpoint Sources: Pesticides and Toxic Chemicals, at http://www.oceanservice.noaa.gov/education/kits/pollution/012chemicals.html (last visited April 9, 2007); Mason Gaffney, Nonpoint Pollution: Tractable Solutions to Intractable Problems, 18-1,2 Journal of Business Administration 141 (1988). These toxic chemicals can often travel great distances via this process. J.B. Unsworth et. al., Significance of the Long Range Transport of Pesticides in the Atmosphere, 71-7 Pure Applied Chemistry 1359-83 (1999).

Beginning in the late 1980s, the U.S. Environmental Protection Agency began to study contaminants that would persist in the environment and could bioaccumulate up the food chain. See M. Lorber, Indirect

Exposure Assessment at the United States Environmental Protection Agency, Toxicology and Industrial Health 2001; 17: 145-156 ("Lorber"). The EPA ultimately found that "[a]n important class of compounds that posed a greater indirect than direct risk [of adverse health effects] were the dioxin-like compounds." Lorber at 145.

Dioxin is the toxic contaminant in Agent Orange. The EPA concluded that "dioxin-like compounds are essentially insoluble in water." Lorber at 151. Moreover, they

> enter water bodies primarily via direct deposition from the atmosphere or by surface runoff and erosion. From soils, these compounds reenter the atmosphere either as resuspended soil particles or as vapors. In water, they can be resuspended into the water column from sediments, volatilized out of the surface waters into the atmosphere or become buried in deeper sediments.

Id.

The EPA also concluded that dioxins accumulate in fish:

> [i]n the aquatic food chain, dioxins enter water systems via direct discharge or deposition and runoff/erosion from watersheds. Fish accumulate these compounds through their direct contact with water, suspended particles, bottom sediments, and through their consumption of aquatic organisms.

Id.

Yet another potential pathway for exposure to dioxin is by consumption of water. In 2001, the National Research Centre for

Environmental Toxicology published a study regarding Australian soldiers who served in the same waters offshore the Republic of Vietnam during the same period of time as American soldiers. The findings of that study "suggest that the personnel on board ships were exposed to biologically significant quantities of dioxins" by drinking water produced from evaporative distillation of surrounding waters, and the study observed that "evaporative distillation of water does not remove but rather enriches certain contaminants such as dioxins (Agent Orange) in drinking water."[23]

There is no evidence that the VA or its appellate lawyers considered these numerous additional pathways by which veterans who served on the land mass of Vietnam or the waters offshore could have been exposed to dioxin. Nor is there any way to know whether thorough consideration of these issues would lead the agency to conclude that the risk of exposure by these numerous additional pathways was greater among veterans who served in the waters offshore than for their counterparts who served on land, or vice versa.

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[23] Muller, J., Gaus, C., Alberts, V., Moore, M., Examination of the Potential Exposure of Royal Australian Navy (RAN) Personnel to Polychlorinated Dibenzodioxins and Polychlorinated Dibensofurans via Drinking Water, Canberra: National Research Centre for Environmental Toxicology, Department of Veterans' Affairs, 2002:75 (2001), *available at* http://www.dva.gov.au/adf/health_studies/dva_nrcet_final_report.pdf.

Given the failure of the agency to cite any scientific evidence in support of its critical finding of fact, and given the magnitude of relevant scientific evidence that the agency did not consider, the persuasive power of the agency's analysis is nil. For the foregoing reasons, the Court should conclude, as did the unanimous panel of the Veterans Court, that the VA's informally adopted change in rule regarding the 832,000 veterans who served in the waters offshore the land mass of Vietnam cannot survive the rigors of judicial review.

VI. THE COURT SHOULD INSTRUCT THE VETERANS COURT TO REMAND THIS CASE TO THE SECRETARY WITH INSTRUCTIONS TO GRANT SERVICE CONNECTION FOR DIABETES

In part I above, we demonstrated that the Veterans Court and the Secretary both wrongly believed that Mr. Haas' diabetes claim depended on his entitlement to the presumption of herbicide exposure set forth in 38 U.S.C. § 1116(f). Accordingly, the argument advanced by the Secretary in section IV of his brief focuses on an irrelevant issue.

The Board of Veterans' Appeals expressly entered the following two findings of fact in this case: Mr. Haas "served aboard the USS *Mount Katmai* in the waters off the coast of the Republic of Vietnam . . . " and Mr. Haas has "diagnosed type-II diabetes mellitus." (JA 38). These two

findings mandate the conclusion of law that Mr. Haas has satisfied all of the service connection requirements in 38 U.S.C. § 1116(a).

Because the Veterans Court wrongly believed that Mr. Haas' diabetes claim depended on the provisions applicable to an additional disease added by VA due to its association with Agent Orange, it believed that to be entitled to service connection, Mr. Haas was obligated to demonstrate that the disease has "become manifest to a degree of 10 percent or more at any time after service." Haas, 20 Vet. App. at 278. Since "there has not yet been a determination that" Mr. Haas' diabetes "is disabling to a compensable degree," the Veterans Court refused to order the Secretary to award service connection and remanded for the agency to address this degree of disability issue. Id.

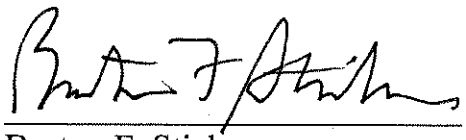
Under 38 U.S.C. § 1116(a), however, there is no requirement that type 2 diabetes manifest to a degree of 10 percent or more. Type 2 diabetes is a paragraph (a)(2) disease regardless whether it has become manifest to a degree of 10 percent or more. See 38 U.S.C. § 1116(a)(2)(H) (listing "Diabetes Mellitus (Type 2)" without a manifestation of 10 percent or more requirement). Thus, the remand instruction issued by the Veterans Court is erroneous. The appropriate relief here is to instruct the Veterans Court to

remand this case to the Secretary with instructions to grant service connection for type 2 diabetes.

CONCLUSION

For the foregoing reasons, the Court should hold that Mr. Haas has satisfied all of the requirements set forth in 38 U.S.C. § 1116(a) for service connection for type 2 diabetes and instruct the Veterans Court to remand this case to the Secretary with instructions to grant service connection for type 2 diabetes.

Respectfully submitted,



June 4, 2007

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CERTIFICATE OF SERVICE

I certify that two (2) true copies of the foregoing Brief for Claimant-Appellee were mailed, first class postage prepaid, on this 4th day of June 2007 to:

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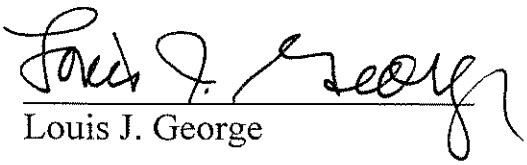


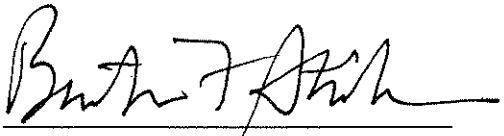
Louis J. George

FEDERAL RULE OF APPELLATE PROCEDURE RULE 32 COMPLIANCE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 32, counsel for Claimant-Appellee certifies as follows:

1. The brief for Claimant-Appellee uses Times New Roman, font 14.

2. The brief for Claimant-Appellee contains 13,878 words.



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