2017-1821

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ALFRED PROCOPIO, JR.,
Claimant-Appellant,

v.

ROBERT WILKIE,
Secretary of Veterans Affairs,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in No. 15-4082, Judge Coral W. Pietsch

EN BANC BRIEF FOR RESPONDENT-APPELLEE

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STATEMENT OF COUNSEL

Pursuant to Rule 47.5, respondent-appellee's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Respondent-appellee's counsel is aware of the following cases that may directly affect or be affected by this Court's decision in this appeal:

Taina v. Wilkie, No. 17-1829 (Fed. Cir.)
Lawson v. Wilkie, No. 17-2387 (Fed. Cir.)
Procopio v. Wilkie, No. 17-537 (Vet. Ct.)
Shaffer v. Wilkie, No. 18-2679 (Vet. Ct.)
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INTRODUCTION

Ten years ago, in *Haas v. Peake*, 525 F.3d 1168, 1173-74 (Fed. Cir. 2008), a panel of this Court correctly concluded that Congress did not unambiguously intend "served in the Republic of Vietnam" in the Agent Orange Act to include service in the Republic of Vietnam's offshore waters. The passage of time has not further illuminated Congress's intent, and Mr. Procopio's arguments – mirroring those presented in *Haas* – are no more meritorious than when this Court rejected them ten years ago.

Likewise, the pro-claimant or veteran canon provides no reason to depart from the panel decision in *Haas.* The principle that interpretive doubt is to be resolved in favor of the veteran provides no insight into Congress's intent because it only applies to ambiguous statutes. In light of deference principles enshrined in *Chevron* and the well-established presumption that Congress intends the agency authorized to administer a statute to interpret its ambiguous language, the Court should not employ the veteran canon to preclude deference to the VA's interpretation of the Agent Orange Act.

STATEMENT OF THE ISSUES

1. Does the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 unambiguously include service in offshore waters within the legally

recognized territorial limits of the Republic of Vietnam, regardless of whether such service included presence on or within the landmass of the Republic of Vietnam?

2. What role, if any, does the pro-claimant canon play in this analysis?

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Background To The Presumption Of Service Connection For Diseases Associated With Herbicide Exposure

To receive disability compensation, a veteran must show that his or her disability is service connected, which means that it was "incurred or aggravated in line of duty in the active military, naval, or air service." 38 U.S.C. § 101(16). Establishing service connection generally requires: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service – the so-called nexus requirement." *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (citation and internal quotations omitted). "Except as otherwise provided by law, a claimant has the responsibility to present and support" his or her claim for service connection. 38 U.S.C. § 5107(a).

In establishing rules for entitlement to service connection, the VA or Congress (or both) have in several instances provided presumptive service connection when veterans faced exposure to toxins during service, but where establishing the "nexus" requirement would be difficult or impossible. This appeal

concerns the scope of one such presumption created by the VA pursuant to its delegated authority and later codified in the Agent Orange Act for veterans with qualifying service in the Republic of Vietnam and diseases associated with exposure to contaminated herbicides sprayed on land during the Vietnam War.

A. 1962-1971: The United States Sprays Herbicides, Including Agent Orange, Over The Republic Of Vietnam

Between 1962 and 1971, the United States military sprayed over 74 million liters of tactical herbicides on land and along river banks in the Republic of Vietnam (South Vietnam) mainly to reduce cover for enemy forces by defoliating forests. *See* Institute of Medicine (IOM), *Blue Water Navy Vietnam Veterans and Agent Orange Exposure* (2011) (2011 IOM Report), at 7, 36-37, 49.[1] Some of those herbicides, including Agent Orange, which accounted for about 60 percent of the herbicides used, were contaminated with a highly toxic chemical, 2,3,7,8-Tetrachlorodibenzo-p-dioxin, known as TCDD. *Id.* at 15.

B. 1979-1990: Congress Directs The VA To Investigate Exposure To Contaminated Herbicides And Establish A Framework For Providing Presumptive Service Connection To Veterans Likely Exposed

In 1979, responding to concerns about the possible adverse effects to veterans exposed to contaminated herbicides during the war, Congress directed the Veterans Administration (as it was then known) to "design a protocol for and

[1] *Available at* <https://www.nap.edu/read/13026/chapter/1#xiv> (last visited Oct. 29, 2018).

conduct an epidemiological study of persons who, while serving in the Armed Forces of the United States during the period of the Vietnam conflict, were exposed to" herbicides containing dioxin. Veterans Health Programs Extension and Improvements Act of 1979, Pub. L. No. 96-151, § 307, 93 Stat. 1092, 1097-98 (1979). At Congress's direction, the Centers for Disease Control (CDC) assumed control of the study in 1982. *See* H. Rep. No. 98-592, at 5 (1984).

While the CDC study was ongoing, Congress enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (the 1984 Dioxin Act), which directed the VA to establish a framework for granting claims on a presumptive basis for diseases shown by "sound scientific or medical evidence" to be associated with herbicide exposure. *Id.* at § 5(b)(2)(B). The VA was to "establish guidelines and (where appropriate) standards and criteria for the resolution of claims for benefits under laws administered by the Veterans' Administration . . . based on a veteran's exposure during service in the Republic of Vietnam during the Vietnam era to a herbicide containing dioxin." *Id.* § 5(a)(1). In doing so, the VA was to create regulatory presumptions for claimants with diseases associated with herbicide exposure "if the information in the veteran's service records and other records of the Department of Defense is not inconsistent with the claim that the veteran was present where and when the claimed exposure occurred." *Id.* § 5(b)(3)(B). To the

extent the VA determined that a disease was positively associated with herbicide exposure, the act directed the VA to set forth that determination in its regulations along "with any specification (relating to exposure or other relevant matter) of limitations on the circumstances under which service connection shall be granted, and [to] implement such determination in accordance with such regulations." *Id.* § 5(b)(2)(A)(i).

In 1985, the VA promulgated 38 C.F.R. § 3.311a to implement the 1984 Dioxin Act. The rulemaking explained that herbicides "were used during the Vietnam conflict to defoliate trees, remove ground cover, and destroy crops[,]" and noted that many veterans "were deployed in or near locations where Agent Orange was sprayed[.]" 50 Fed. Reg. 15,848, 15,849 (Apr. 22, 1985). Further, because "some military personnel stationed elsewhere may have been present in the Republic of Vietnam, 'service in the Republic of Vietnam' will encompass service elsewhere if the person concerned actually was in the Republic of Vietnam, however briefly." *Id.* Thus, pursuant to § 3.311a, the VA presumed that veterans who served in the Republic of Vietnam during the Vietnam era were exposed to dioxins, eliminating the need to establish exposure by evidence. Pursuant to section five of the 1984 Dioxin Act, the regulatory presumption covered "service in the waters offshore and service in other locations, if the conditions involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.311a(b) (1986).

Section 3.311a as promulgated provided presumptive service connection only for chloracne, a skin condition. *Id.* at § 3.311a(c). In 1989, a Federal court invalidated the portion of § 3.311a providing that no disease other than chloracne was associated with dioxin exposure. *See Nehmer v. United States Veterans Admin.*, 712 F. Supp. 1404, 1420 (N.D. Cal. 1989). The district court concluded that the VA had applied a too stringent standard for determining whether a disease was positively associated with Agent Orange exposure under the 1984 Dioxin Act. *Id.* *Nehmer* did not address the geographical basis for application of the presumption.

In March 1990, a CDC study found a statistically significant association between non-Hodgkin's lymphoma (NHL) and service in Vietnam. *See* 55 Fed. Reg. 25,339 (June 21, 1990) (proposed rule); 55 Fed. Reg. 43,123 (Oct. 26, 1990) (final rule). In October 1990, the VA promulgated 38 C.F.R. § 3.313, providing service connection for NHL based not on herbicide exposure, but on service during the Vietnam War, specifically including offshore service because "the CDC study on which [§ 3.313] was based noted an increased risk of developing NHL based on service in Vietnam during the Vietnam Era, rather than exposure to herbicides containing dioxin." 55 Fed. Reg. at 43,124; *see* CDC, *The Association of Selected Cancers with Service in the U.S. Military in Vietnam: Final Study* (1990), at 2 ("We found no evidence that the increased risk of NHL might be related to

exposure to Agent Orange in Vietnam."). Thus, unlike the presumption for herbicide exposure in § 3.311a, § 3.313 was not based on exposure and did not contain a limitation requiring qualifying service on land in Vietnam. *See* VA Office of Gen. Counsel Prec. Op. 7-93 (Aug. 12, 1993) (explaining that § 3.313 covers servicemembers who served in the offshore waters of Vietnam but not those whose service was limited to high-altitude missions in Vietnamese airspace).

In reaction to *Nehmer*, the Secretary proposed an amendment to § 3.311a to include a presumption for soft tissue sarcomas. *See* 56 Fed. Reg. 7,632 (Feb. 25, 1991) (proposed rule approved by Secretary on January 11, 1991). Because this new presumption was based on exposure, the VA added it to § 3.311a, which required service on land where herbicides were used. *See* 56 Fed. Reg. 51,651 (Oct. 15, 1991).

C. 1991-2008: Congress Establishes A New Mechanism For Adding Presumptions Based On Herbicide Exposure

In February 1991, Congress enacted the Agent Orange Act of 1991, Pub. L. No. 102-4, § 2, 105 Stat. 11 (1991) (AOA), which established 38 U.S.C. § 1116, the statutory provision at issue in this appeal. The AOA established statutory presumptions of service connection for veterans who "served in the Republic of Vietnam" and were diagnosed with NHL (recognized as a presumptive disease under § 3.313), chloracne (recognized as a presumptive disease under § 3.311a), or soft tissue sarcoma (which the VA had announced would be treated as a

presumptive disease under § 3.311a). The AOA was expressly understood as codifying the VA's existing and announced regulatory presumptions. *See* 137 Cong. Rec. H719, H726 (1991) (joint explanatory statement); 1991 U.S.C.C.A.N. 11, statement by President George Bush on signing H.R. 556 (Feb. 6, 1991).

The AOA directed the Secretary to determine, in conjunction with the National Academy of Sciences and based on "sound medical and scientific evidence," whether additional diseases "warrant[] a presumption of service-connection by reason of having positive association with exposure to an herbicide agent." 38 U.S.C. §§ 1116(a)(1)(B), 1116(b)(1). The Secretary was instructed to find a positive association "if the credible evidence for the association is equal to or outweighs the credible evidence against the association." *Id.* at § 1116(b)(3). Congress defined one term in the AOA – "herbicide agent" – as "a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." *Id.* at § 1116(a)(3). Congress did not define "served in the Republic of Vietnam."

The VA promulgated regulations in 1993 to implement the AOA. 58 Fed. Reg. 29,107 (May 19, 1993). Consistent with § 1116(a), the regulation conditioned application of the presumption on the claimant having "served in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6) (1993). Later that year the VA

proposed deleting § 3.311a and moving its regulatory definitions to § 3.307(a)(6) so that all Agent Orange rules would be located in one section and the new regulation would "incorporate[] the definition of the term 'service in the Republic of Vietnam'" from § 3.311a. 58 Fed. Reg. 50,528, 50,529 (Sept. 29, 1993) (proposed rule). The VA thus defined "service in the Republic of Vietnam" in § 3.307(a)(6)(iii) as "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam."

In 1994, Congress enacted the Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 505, 108 Stat. 4645, 4685 (1994), which amended 38 U.S.C. § 1116(a)(2) to codify regulatory presumptions of service connection for four additional diseases based on herbicide exposure (Hodgkin's disease, porphyria cutanea tarda, respiratory cancers, and multiple myeloma). *See* 140 Cong. Rec. S15005, S15016 (1994) (joint explanatory statement).

In 1996, Congress amended the statutory definition of the Vietnam era. *See* Veterans' Benefits Improvement Act of 1996, Pub. L. No. 104-275, 110 Stat. 3322, 3342 (1996). In 38 U.S.C. § 101(29), for general purposes, the definition was broadened to cover the period from February 28, 1961 to May 7, 1975. But Congress recognized that "[h]erbicides and defoliants were not in use throughout the 'Vietnam era' as that term would be newly defined" and "such materials were not introduced into the Republic of Vietnam until January 9, 1962." S. Rep. No.

104-371, at 21 (1996). Therefore, "for purposes of sections 1116 and 1710 of title 38 – provisions of law which specify benefits based on presumptive exposure to herbicides and defoliants – the term 'Vietnam era' would be limited to the period between January 9, 1962, and May 7, 1975." *Id.*

In 1997, VA's General Counsel issued a precedential opinion regarding whether service on a naval vessel in offshore waters constituted service in the Republic of Vietnam for purposes of 38 U.S.C. § 101(29)(A), which defined the term "Vietnam era" for general VA benefit purposes. VA Office of Gen. Counsel, Prec. Op. 27-97 (July 23, 1997).[2] The General Counsel recognized that "[t]he term 'in the Republic of Vietnam' is to some degree inherently ambiguous in that it may be subject to differing interpretations regarding whether it refers only to areas within the land borders of the Republic or also encompasses, for example, Vietnamese air space or territorial waters." *Id.* at ¶ 3. The General Counsel concluded, however, that the phrase "served in the Republic of Vietnam" was better read as applying to veterans who served on land or inland waterways, and not to veterans who served on deep-water vessels off the Vietnam coast and who were never physically present on Vietnamese soil. *Id.* at ¶¶ 5-6. As the opinion explained, the legislative history of Congress's 1996 amendment to § 101(29)

[2] *Available at* <https://www.va.gov/ogc/docs/1997/Prc27-97.doc> (last visited Oct. 29, 2018).

demonstrated that Congress was focused on veterans who served within the borders of the Republic, and on ground forces in particular. *Id.* The General Counsel noted that this interpretation of § 101(29) was not inconsistent with § 3.307(a)(6)(iii) (or its predecessor, § 3.311a), which "requires that an individual actually have been present within the boundaries of the Republic to be considered to have served there." *Id.* at ¶ 8. A summary of the opinion was published in the Federal Register. *See* 62 Fed. Reg. 63,603 (Dec. 1, 1997).

Also in 1997, the VA proposed to use the definition of "service in the Republic of Vietnam" from § 3.307(a)(6)(iii) in a new regulation regarding spina bifida among the children of veterans who served in the Republic of Vietnam. *See* 62 Fed. Reg. 23,724, 23,725 (May 1, 1997). In response to a comment suggesting that the VA eliminate the phrase "if the conditions of service involved duty or visitation in the Republic of Vietnam" from the rule, the VA explained that its definition of the phrase "service in the Republic of Vietnam" appropriately limited application of the presumption to veterans who may have been in areas where herbicides were used "[b]ecause herbicides were not applied in waters off the shore of Vietnam[.]" 62 Fed. Reg. 51,274 (Sept. 30, 1997).

In January 2001, the VA proposed adding type 2 diabetes to the list of diseases presumptively service connected based on exposure. 66 Fed. Reg. 2,376 (Jan. 11, 2001). In the notice of final rulemaking, the VA explained that the rule

covered only veterans who served on land because § 3.307(a)(6)(iii) covered only those veterans. 66 Fed. Reg. 23,166 (May 8, 2001). In response to a comment requesting that service in the Republic of Vietnam's "territorial waters" be included in the presumption's coverage, the VA explained that even before the AOA, its position was that qualifying service required visitation in the Republic, and that offshore service did not qualify. *Id.* The VA further noted that there was no basis to conclude that "individuals who served in the waters offshore of the Republic of Vietnam were subject to the same risk of herbicide exposure as those who served within the geographic boundaries of the Republic of Vietnam," or for concluding that offshore service was within the meaning of the statutory phrase "service in the Republic of Vietnam." *Id.*[3] In December 2001, Congress codified that presumption in 38 U.S.C. § 1116(a)(2). *See* Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, § 201(b), 115 Stat. 976, 988 (2001).

[3] Consistent with this guidance, the VA amended its Adjudication Procedures Manual M21-1 (M21-1 Manual) in 2002 to instruct its claims adjudicators to require evidence of service on land in the Republic of Vietnam for claimants to qualify for presumptive service connection based on exposure to herbicides under the AOA. Manual M21-1, part III, para. 4.24(e)(1)-(2), change 88 (Feb. 27, 2002). The revision clarified that veterans must have served "on land," and that receipt of the Vietnam Service Medal was no longer sufficient proof of such service. *Id.*; *see* 72 Fed. Reg. 66,218 (Nov. 27, 2007) (discussing the changes to the M21-1 Manual).

D. *Haas v. Peake:* The Court Concludes That "Served In The Republic Of Vietnam" In The AOA Is Ambiguous

In 2001, a veteran who served aboard a naval vessel off the coast of Vietnam but was never present on land challenged the VA's definition of "service in the Republic of Vietnam." The veteran, Jonathan Haas, unsuccessfully sought presumptive service connection for type 2 diabetes based on purported exposure to herbicides. Mr. Haas appealed the VA's denial of his claim to the Veterans Court, which analyzed the statute and the VA's interpretation of "served in the Republic of Vietnam." *Haas v. Nicholson*, 20 Vet. App. 257, 263-75 (2006).

Mr. Haas argued that the Veterans Court should presume Congress was aware of the "'widely accepted territorial definition of a sovereign country,' and that by using the phrase 'in the Republic of Vietnam,' it intended to adopt that definition." *Id.* at 264. The VA argued that Congress intended to adopt the VA's then-existing definition of "service in the Republic of Vietnam" from § 3.311a because Congress is presumed to have been aware of that definition when it enacted the AOA. *Id.* The court disagreed with both sides, concluding that the statute was ambiguous. The court found the legislative histories of the 1984 Dioxin Act and AOA "silent concerning what constitutes 'service in the Republic of Vietnam.'" *Id.* at 268.[4] The court could "[]not conclude that the intent of

[4] With respect to the "Republic of Vietnam," the Veterans Court noted as a factual matter that between 1954 and 1975, South Vietnam was known as the

Congress is so clear as to require either an interpretation that 'service in the Republic of Vietnam' is limited solely to Vietnam's mainland, or that such service necessary includes service in Vietnam's territorial seas." *Id.* Rather, the legislative history revealed only "Congress's intent to ensure that a fair and independent system was established to determine the relationship between herbicide exposure and the manifestation of certain diseases." *Id.* Moving to the VA's statutory interpretation, the court concluded that 38 C.F.R. § 3.307(a)(6)(iii) was "permissible" under *Chevron* but was itself ambiguous. *Id.* at 279. The court reversed and remanded upon concluding that the VA's interpretation of § 3.307(a)(6)(iii) was unreasonable and not entitled to deference. *Id.* at 273-75.

In response to the Veterans Court's decision, the VA issued a proposed amendment to 38 C.F.R. § 3.307(a)(6)(iii) in 2008. In the notice of proposed rulemaking, the VA defended its interpretation of § 1116(a): "[it] accords with what is known about the use of herbicides during Vietnam. Although exposure data is largely absent, review of military records demonstrate[s] that virtually all herbicide spraying in Vietnam, which was for the purpose of eliminating plant cover for the enemy, took place over land." 73 Fed. Reg. 20,566, 20,568-69 (Apr. 16, 2008). In comparison, "Blue water Navy service members and other personnel

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"Republic of Vietnam" and North Vietnam was known as the "Democratic Republic of Vietnam." *Id.* at n.3.

who operated off shore were away from herbicide spray flight paths, and therefore were not likely to have incurred a risk of exposure to herbicide agents comparable to those who served in foliated areas where herbicides were applied." *Id.* And, because the "legislative and regulatory history indicates that the purpose of the presumption of exposure was to provide a remedy for persons who may have been exposed to herbicides because they were stationed in areas where herbicides were used, but whose exposure could not actually be documented due to inadequate records concerning the movement of ground troops[,]" the VA concluded that it was reasonable to presume those veterans were likely exposed. *Id.* There was no similar basis, however, for presuming exposure for "veterans who served solely in the waters offshore[.]" *Id.*[5]

The VA appealed the Veterans Court's decision in *Haas v. Nicholson* to this Court. In *Haas*, this Court analyzed the AOA as required by *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 87 (1984). At the first step, the Court reviewed the "complex" history of the "legislative and regulatory measures directed to the issue of herbicide exposure in Vietnam." *Id.* at 1174. The Court agreed with the Veterans Court that the statutory phrase "served in the Republic of Vietnam" was ambiguous: "[n]either the language of the statute nor its legislative

[5] VA withdrew this proposed rule following this Court's decision in *Haas*. *See* 74 Fed. Reg. 48,689 (Sept. 24, 2009).

history indicates that Congress intended to designate one of the competing methods of defining the reaches of a sovereign nation." *Id.* at 1184. The Court rejected Mr. Haas's textual arguments, which sought to define "served in the Republic of Vietnam" without regard to herbicide exposure: "[t]he entire predicate for the Agent Orange Act and its regulations was exposure to herbicides in general and Agent Orange in particular." *Id.* at 1185. The Court also found that, as opposed to § 3.313, the legislative history suggested the AOA more closely tracked the "narrower chloracne/soft tissue sarcoma regulation [§ 3.311a], which defined 'service in the Republic of Vietnam' to apply to those who served in the waters offshore only if their service included 'duty or visitation in the Republic of Vietnam.'" *Id.* at 1185-86.

Moving to *Chevron* step two, the Court disagreed with the Veterans Court, and held that it was not unreasonable for the VA to "limit the presumptions of exposure and service connection to service members who have served, for some period at least, on land," and that the VA's interpretation of § 3.307(a)(6)(iii) "did not rise to the level of being 'plainly erroneous or inconsistent with the regulation.'" *Haas*, 525 F.3d at 1193 (quoting *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945), and *Smith v. Nicholson*, 451 F.3d 1344, 1349-51 (Fed. Cir. 2006)). The Court recounted the VA's historical policies concerning "service in the Republic of Vietnam," and concluded that its interpretation of

§ 3.307(a)(6)(iii) was entitled to substantial deference. *Id.* at 1186-1191. "[I]n the absence of evidence that the line drawn by DVA is irrational," the Court declined "to substitute [its] judgment for that of the agency and impose a different line." *Id.* at 1193.

The Court subsequently denied Mr. Haas's petition for rehearing or rehearing *en banc*. *Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008). The Court disagreed with Mr. Haas that application of the veteran canon required "in the Republic of Vietnam" to be defined to include service in "the territorial seas adjacent to the Vietnamese mainland[.]" *Id.* at 1308-09. The Court noted that the VA had already interpreted § 1116(a) in a veteran friendly manner by extending the regulatory presumption to "any veteran who set foot on land, even if only for a short period of time." *Id.* at 1309. Further, interpreting § 1116(a) as Mr. Haas suggested "would raise new questions of interpretation and present new difficulties in application[,]" including whether service in the airspace above Vietnam was covered by the act. *Id.* The Court also rejected Mr. Haas's contention that § 1116(a) unambiguously included Vietnam's territorial sea based on the statute's reference to the Republic of Vietnam. *Id.* at 1309-1310. The Court highlighted numerous "statutory references to presence 'in' a country" that "have been understood not to include presence in the airspace or in the territorial waters

surrounding the country." *Id.* The Supreme Court denied Mr. Haas's petition for writ of certiorari. *Haas v. Peake*, 129 S. Ct. 1002 (Jan. 21, 2009).

E. 2008-2018: The VA Continues To Investigate Adding Presumptions For Diseases Associated With Herbicide Exposure, Including For Blue Water Navy Veterans

Following *Haas*, the IOM issued *Veterans and Agent Orange Update 2008* (2009) (Update 2008).[6] In it, the IOM suggested that limiting the AOA's presumption to veterans who set foot in the Republic of Vietnam "seem[ed] inappropriate" because "there is little reason to believe that exposure of US military personnel to the herbicides sprayed in Vietnam was limited to those who actually set foot in the Republic of Vietnam." Update 2008 at 655. To address this statement, the VA asked the IOM "to study whether the Vietnam veterans in the Blue Water Navy experienced exposures to herbicides and their contaminants

[6] The AOA required the Secretary "to enter into an agreement with the National Academy of Science (the Academy or NAS), an independent non-profit, non-governmental scientific organization, under which the Academy would 'review and summarize the scientific evidence and assess the strength thereof, concerning the association between exposure to an herbicide used in support of military operations in Vietnam,' and 'each disease suspected to be associated with such exposure." *LeFevre v. Sec'y Dep't of Veterans Affairs*, 66 F.3d 1191, 1193 (Fed. Cir. 1995) (quoting 38 U.S.C. § 1116, Note, § 3(c)). Pursuant to the agreement, the Academy, through the IOM, provides the Secretary with periodic reports as to whether presumptive service connection is warranted for diseases discussed in the report. *See* 38 U.S.C. § 1116, Note, § 3(c). Update 2008 is *available at* <https://www.nap.edu/read/12662/chapter/1> (last visited Oct. 30, 2018).

comparable with those of the Brown Water Navy Vietnam veterans and those on the ground in Vietnam." 2011 IOM Report at 2.[7]

In 2011, the IOM Committee on Blue Water Navy Vietnam Veterans and Agent Orange Exposure, Board on the Health of Select Populations, issued a detailed report in which it "was unable to state with certainty that Blue Water Navy personnel were or were not exposed to Agent Orange and its associated [TCDD]." 2011 IOM Report at 13. Further, "without information on the TCDD concentrations in the marine feed water," the IOM concluded "it is impossible to determine whether Blue Water Navy personnel were exposed to Agent Orange-associated TCDD via ingestion, dermal contact, or inhalation of potable water." *Id.* In contrast, the IOM concluded that "qualitatively, ground troops and Brown Water Navy veterans had more plausible pathways of exposure (that is, there was a greater number of plausible exposure mechanisms) to Agent Orange–associated TCDD than did Blue Water Navy veterans." *Id.*

On December 28, 2012, the VA summarized the IOM's report in the Federal Register and notified the public that the VA would not extend the presumptions in § 3.307(a)(6)(iii) to Vietnam veterans who served only in offshore waters. 77 Fed. Reg. 76,170 (Dec. 26, 2012).

[7] "Brown Water Navy" refers to veterans who served on the inland waters of Vietnam. 2011 IOM Report at ix.

II. Statement Of Facts And Course Of Proceedings Below[8]

Mr. Procopio served on active duty in the U.S. Navy from September 1963 to August 1967, including service aboard the aircraft carrier U.S.S. *Intrepid* from November 1964 to July 1967. Appx5, Appx20. The *Intrepid* was deployed off the coast of the Republic of Vietnam during Mr. Procopio's service, but he did not set foot on the landmass or enter the inland waters of the Republic during his service. Appx5, Appx21, Appx31. Mr. Procopio filed claims for compensation for diabetes in October 2006 and prostate cancer in October 2007. Appx5. He reported spending time in the Gulf of Tonkin and on the southern coast of Vietnam aboard the *Intrepid* and alleged that his conditions were due to exposure to Agent Orange, which he claimed to have handled and digested. Appx5-6.

A VA regional office denied Mr. Procopio's claims in April 2009. Appx6. The Board of Veterans Appeals (board) ultimately agreed with the denial in July 2015. Appx9, Appx19-39. The board found Mr. Procopio's assertions of herbicide exposure at sea were outweighed by evidence from the National Personnel Records Center and the deck logs from the *Intrepid* "showing no exposure to tactical herbicides, including Agent Orange." Appx35. The board found Mr. Procopio's evidence "too general in nature to provide, alone, the

[8] Our panel brief contains a complete statement of facts and course of proceedings below. This brief contains an abbreviated version of those facts.

necessary evidence to show that [he] was exposed to Agent Orange while onboard the U.S.S. Intrepid." Appx35. Despite Mr. Procopio's arguments regarding herbicide exposure for Blue Water Navy veterans, the board concluded that "the law as to 'Blue Water' veterans is clear as delineated by the Federal Circuit in *Haas*." Appx36.

The Veterans Court affirmed, holding that the board correctly applied § 3.307(a)(6)(iii) as upheld in *Haas* to Mr. Procopio's claim. Appx4-15. The court rejected the contention that the VA's exclusion of Vietnam's territorial sea from the definition of "inland waterway" was arbitrary and capricious in light of a 2015 Veterans Court decision, *Gray v. McDonald*, 27 Vet. App. 313 (2015). Appx10. The court explained that *Gray*, in which the Veterans Court found the VA's definition of "inland waterway" as applied to the bays and harbors of the Republic of Vietnam was arbitrary and capricious, was not applicable to Mr. Procopio's claims because he never alleged that his ship entered or anchored in a bay or harbor in Vietnam. Appx10-11. The court cited footnote six in *Gray*, which reiterated that *Haas* continues to apply where a veteran "never entered a harbor or port" and "served exclusively on the open ocean." Appx11 (citing *Gray*, 27 Vet. App. at 320 n.6.).

The Veterans Court also refused to limit *Haas* to its facts or not apply it because, notwithstanding Mr. Procopio's claim that it "'was not decided in

accordance with the accepted canons of construction for [v]eteran's cases[,]'" *Haas* was controlling precedent. Appx11 (quoting Mr. Procopio's brief). Finally, the court affirmed the board's denial of service connection on a direct basis, rejecting Mr. Procopio's reliance on the IOM's 2008 report. Appx12. The court observed that the issue was not whether it was scientifically possible that herbicides entered Vietnam's coastal waters, but whether Mr. Procopio was directly exposed. Appx13-14. The court determined that Mr. Procopio failed to support his theory of exposure through water contamination with any empirical evidence that the *Intrepid* actually entered a discharge plume containing Agent Orange or that Agent Orange was pulled into the ship's distillation system and converted into potable water. Appx14. The court found that the board reasonably weighed the probative value of the evidence, and affirmed. Appx14.

On appeal, this Court initially denied Mr. Procopio's request for *en banc* consideration before panel consideration. *See* ECF Nos. 10, 19, and 20. Following oral argument, the panel ordered the parties to submit supplemental briefing to address "the impact of the pro-claimant canon on step one of the *Chevron* analysis in this case, assuming that *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), *reh'g denied*, 544 F.3d 1306 (Fed. Cir. 2008), did not consider its impact[.]" ECF No. 50. After receiving the parties' briefs, *see* ECF Nos. 56 and 57, the Court *sua*

sponte ordered an *en banc* hearing and the parties to submit new briefs addressing the two issues in the order. ECF No. 64.

SUMMARY OF THE ARGUMENT

On the Court's first question, as a panel of this Court has already correctly concluded, the phrase "served in the Republic of Vietnam" in the AOA is ambiguous. Although Congress did not define the phrase in the text of the act, Mr. Procopio and his amici ask the Court to read their preferred definition into the act by presuming Congress used "Republic of Vietnam" like a term of art defined by international law to include the territorial sea. This strained reading of the AOA is incorrect. Even if there was support for the notion that a country name is a term of art – and Mr. Procopio has not cited any – his proposed definition, based on one definition of the Republic of Vietnam's sovereign border, does not fit the statutory context. The AOA is a benefits statute that ensures veterans likely exposed to herbicides during the Vietnam War can obtain disability compensation for diseases associated with those herbicides. Whether a veteran served in the Republic of Vietnam's zone of exclusive sovereignty has nothing to do with whether they were likely exposed to herbicides used on land during the war. The Court in *Haas* rejected defining "served in the Republic of Vietnam" without regard for the AOA's focus on herbicide exposure; so too should the *en banc* Court.

Mr. Procopio also contends that the AOA's regulatory and legislative history confirm that it covered service at sea. He reaches this conclusion, however, by misstating the act's regulatory and legislative history. The AOA codified two sets of regulatory presumptions – one that required service on land and one that did not – and there is nothing in the act's history to indicate which standard Congress intended to codify. The AOA's history thus tells only a conflicting story, further cementing the statutory ambiguity this Court and the Veterans Court found ten years ago.

On the Court's second question, the Court should only employ the veteran canon if interpretive doubt remains in a veterans' benefits statute after other tools of statutory construction, including deference principles, have failed to resolve the ambiguity. As compared to "clear statement" canons, which enforce a requirement that Congress express its intent clearly, the veteran canon applies only when there is interpretive doubt. Because of this, the canon tells us nothing about Congress's intent and cannot resolve statutory ambiguity at step one of *Chevron*. Applying the veteran canon this way reflects Congress's express delegations of authority to the VA to administer the veterans' benefits scheme in general and the herbicide exposure presumptions in particular, which unambiguously express Congress's intent for the VA, not the courts, to interpret ambiguous veterans' benefits statutes, including the AOA.

ARGUMENT

I. Standard Of Review

Pursuant to 38 U.S.C. § 7292(a), this Court may review "the validity of a decision of the [Veterans] Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the [Veterans] Court in making the decision." The Veterans Court's statutory interpretations are reviewed *de novo*. *Sursely v. Peake*, 551 F.3d 1351, 1354 (Fed. Cir. 2009).

II. The Phrase "Served In The Republic Of Vietnam" Is Ambiguous

There is no indication in the text, structure, history, or purpose of the AOA that Congress unambiguously intended to provide presumptive service connection to veterans who served only in the Republic of Vietnam's territorial waters. To the extent any congressional intent is expressed in the statutory scheme governing presumptive service connection claims for Vietnam veterans due to herbicide exposure, it is that the VA should establish the parameters of the framework in which presumptive claims from veterans who served where herbicides were used during the war would be adjudicated. The 1984 Dioxin Act delegated to the VA authority (i) to establish a framework for adjudicating presumptive exposure claims and (ii) for determining based on "sound medical and scientific evidence" whether diseases are associated with herbicides "in the case of a veteran who was

exposed to that herbicide during such veteran's service in the Republic of Vietnam during the Vietnam era." 1984 Dioxin Act at §§ 5(a)(1), 5(b)(2)(A)(i), 5(b)(2)(B)(i). Evidence of exposure would not be required only "if the information in the veteran's service records and other records of the Department of Defense is not inconsistent with the claim that the veteran was present where and when the claimed exposure occurred." *Id.* at § 5(b)(3)(B). Congress thus expressly delegated to the VA the power to determine "any specification (relating to exposure or other relevant matter) of limitations on the circumstances under which service connection shall be granted[.]" *Id.* at § 5(a)(2)(A)(i). The VA did so in 38 C.F.R. § 3.311a (1986).

When Congress enacted the AOA, it did not repeal its previous delegation to the VA, but instead codified § 3.311a and established a new mechanism for the VA to add diseases to the presumptive list. If that had been the extent of the statute, the AOA would have unambiguously *excluded* the Republic of Vietnam's territorial waters.[9] However, because Congress also codified the VA's regulatory

[9] Although Congress has amended the AOA numerous times since 1991, it has never revised or repealed the VA's interpretation of "served in the Republic of Vietnam." "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 866, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)).

presumption for NHL, 38 C.F.R. § 3.313, which did not require service on land (because it was not based on herbicide exposure), and Congress did not expressly define "served in the Republic of Vietnam" in the text of the act, the AOA is ambiguous. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

A. The Text Of The AOA Contains No Unambiguous Indication Of Congress's Intent To Define "Served In The Republic Of Vietnam" To Include Service In Offshore Waters Within The Republic Of Vietnam's Territorial Limits

Congress did not define "served in the Republic of Vietnam" in the AOA, much less define it to include service in offshore waters within the Republic's territorial limits. 38 U.S.C. § 1116(a)(1)(A); *compare with id.* § 1116(a)(3) (defining the term "herbicide agent"); *see Haas*, 525 F.3d at 1183-86; *Haas*, Vet App. at 263-269. Mr. Procopio's arguments to the contrary are unavailing.

1. The AOA's Reference To The "Republic Of Vietnam" Does Not Manifest Congress's Unambiguous Intent To Include Its Territorial Waters

To start, the plain meaning of the phrase "Republic of Vietnam" suggests only that Congress intended the AOA to apply to veterans who served during the war in areas on the Vietnam peninsula where herbicides were sprayed. *See Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) ("[T]he plain . . . meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and

powerful intellect would discover." (citation omitted)); *Campbell v. Merit Sys. Prot. Bd.*, 27 F.3d 1560, 1567-68 (Fed. Cir. 1994) (favoring the "ordinary dictionary definition" over the proposed term of art definition as the embodiment of "the intent of the drafters of public law."). This reading is consistent with the statutory context and purpose of the AOA, which provides presumptive service connection for diseases associated with exposure to herbicides used only in the Republic of Vietnam.[10]

Mr. Procopio eschews a plain reading and asks the Court to treat "Republic of Vietnam" like a term of art defined by international law to include landmass, territorial sea, and air space. App. Br. 31-36. He has not, however, cited any decisions in which courts have treated a statutory reference to a country like a term of art, much less a term of art defined by international law. And for good reason – when Congress intends to include a country's territorial sea or other adjacent waters within the ambit of legislation, it has done so expressly. In 1980, for example, Congress referred to Vietnam's landmass as well as its waters in defining which Vietnam veterans were eligible for certain VA benefits: "veterans who

[10] If anything, Congress's definition of the term "herbicide agent" indicates that Congress intended the phrase "the Republic of Vietnam" to be understood conterminously with the location where the United States and allied military operations used chemical herbicides, *i.e.*, on the land, where such herbicides were used. *See* 38 U.S.C. § 1116(a)(3).

during the Vietnam era served in Vietnam, in air missions over Vietnam, or in naval missions in the waters adjacent to Vietnam shall be considered to be veterans who served in the Vietnam theatre of operations." Veterans' Rehabilitation Education Amendments of 1980, Pub. L. No. 96-466, § 513(b), 94 Stat. 2171 (1980).[11] Likewise, in the benefits statute defining veterans who served during the Mexican Border War, 38 U.S.C. § 101(3), Congress's reference to Mexico did not inherently include offshore service. Rather, Congress specifically referred to veterans who "served in Mexico, on the borders thereof, or in the waters adjacent thereto." *Id.*

Congress also frequently distinguishes between United States territory and territorial waters rather than simply assuming that a reference to the "United States" automatically includes the territorial sea. In 1996, Congress amended the Immigration and Nationality Act to provide that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section . . . ." Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-

[11] The act also differentiated veterans who served "during the Vietnam era" from those who served "in the Vietnam theatre of operations." *Id.* at § 513(a); *see* 38 U.S.C. § 4107 (notes).

208, § 604, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1158(a)(1)). "The term 'United States,' except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. § 1158(a)(38). The term "United States" does not, however, include aliens interdicted in territorial waters. *Immigration Consequences Of Undocumented Aliens' Arrival In United States Territorial Wates*, 17 Op. Off. Legal Counsel 77, 85 (1993). Similarly, in the Tax Reform Act of 1986, for purposes of allocating income derived from transportation services between the United States and foreign countries, the House Conference Report clarified that "income attributable to services performed in the United States or in the U.S. territorial waters is U.S. source." H. Rep. No. 99-841, at 599 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 4075, 4687.

Congress's treatment of territories as distinct from territorial waters holds true in other statutory contexts too. *See* 16 U.S.C. § 2402(8) (defining "import" to mean "to land on, bring into, or introduce into, or attempt to land on, bring into or introduce into, any place subject to the jurisdiction of the United States, including the 12-mile territorial sea of the United Sates"); 18 U.S.C. § 2280(b)(1)(A)(ii) (criminalizing certain acts if committed "in the United States, including the territorial seas"). Congress has also distinguished between territory and territorial waters in different sections of the same title. *Compare* 26 U.S.C. § 638 ("United

States" includes "subsoil of those submarine areas which are adjacent to the territorial waters of the United States") *with id.* at § 7701(a)(9) ("United States" includes only the States and the District of Columbia"). Finally, Congress has even distinguished between territories and territorial waters in legislation that already expressly applied to the "navigable waters" or "waters under the jurisdiction" of the United States. *See, e.g.*, 46 U.S.C. § 4701(3) ("'navigable waters of the United States' means waters of the United States, including the territorial sea"); 33 U.S.C. § 1203 (explaining that the statute applies to "vessels, dredges, and floating plants upon the navigable waters of the United States, which includes all waters of the territorial sea of the United States[.]"); 16 U.S.C. § 1362(15)(A) (defining "waters under the jurisdiction of the United States" to mean "the territorial seas of the United States"); 46 U.S.C. §§ 2301, 4301 (defining "waters subject to the jurisdiction of the United States" as "including the territorial seas of the United States[.]").

As these statutes demonstrate, it is not reasonable to presume Congress intended to adopt one particular boundary by simply referencing a country in legislation. To the contrary, Congress understands that a statutory reference to being "in" a country does not intrinsically include being in its territorial or adjacent waters, and had Congress clearly intended for § 1116(a) to include service in the Republic of Vietnam's territorial waters, it would have so stated. Thus, without

any evidence that Congress intended the phrase "Republic of Vietnam" to be treated like a term of art, the Court should not do so.

Mr. Procopio suggests that statutory distinctions between territory and territorial waters in other statutes are irrelevant because they arise in "a completely different context." App. Br. 54-56. Yet, statutory examples of Congress treating territories and territorial waters differently are plainly relevant to deciding whether it is appropriate to presume Congress means to implicitly refer to both when it only uses a country's name. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 (1991) (relying upon textual differences between statutory provisions to determine the meaning of a statute). Moreover, the international law of the sea upon which Mr. Procopio stakes his argument does not arise in the veterans' benefits context. We agree, therefore, with Mr. Procopio in as much as he suggests the Court should not look far afield from the AOA or title 38 to determine Congress's intent.

Mr. Procopio also suggests that statutes with "colloquial" country names are irrelevant because only "formal" country names are terms of art. App. Br. 57. No one apparently told Congress. In 2003, Congress directed the Secretaries of the Army, Navy, and Air Force to issue a "Korea Defense Service Medal" "to each person who while a member of the [military] served in the *Republic of Korea or the waters adjacent thereto*[.]" 10 U.S.C. §§ 3756 (Army), 6258 (Navy), 8759 (Air Force) (emphasis added). "Republic of Korea" is the formal name for South

Korea, yet Congress expressly included service in "the waters adjacent thereto."[12] Mr. Procopio's argument cannot be squared with this legislation.

Finally, Mr. Procopio's citation to President Johnson's 1965 designation concerning "Vietnam and Waters Adjacent Thereto" as suggesting that the phrase "waters adjacent to" is not the same as territorial sea actually undermines his position. App. Br. 58 (citing Exec. Order No. 11216, Designation of Vietnam and Waters Adjacent Thereto as a Combat Zone for the Purposes of Section 112 of the Internal Revenue Code of 1954, 30 Fed. Reg. 5817 (1965)). The fact that President Johnson felt compelled to define whether, and to what extent, Vietnam's territorial waters were included within the scope of the designation belies the notion that lawmakers may be reasonably presumed to intend one specific meaning when referring to a country.

2. The International Law Of The Sea Does Not Help Reveal Congress's Unambiguous Intent

A fundamental canon of statutory construction requires the Court to read the AOA's terms "in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569

[12] Central Intelligence Agency, *The World Factbook: South Korea*, *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html> (last visited Oct. 30, 2018).

(1995)). Mr. Procopio focuses (at 31-35) on establishing that nations have historically exercised exclusive sovereignty over their territorial sea to argue that "Republic of Vietnam" in the AOA should be read to include the Republic's territorial sea, but his argument ignores the statutory context and scheme. Whether a veteran set foot within the sovereign limits of the Republic of Vietnam, no matter how defined, has nothing to do with whether they were likely exposed to herbicides that were used on land during the war, or whether they are entitled to presumptive service connection. Mr. Procopio has simply chosen one of the many ways to define the boundaries of a country that best supports his desired interpretation of the statute, but provides no direct evidence that Congress intended to select the definition of his choosing. At most, he suggests that Congress should be presumed to have incorporated international law because "of the hotly contested disputes over the territory of Vietnam." App. Br. 35. But again, the AOA did not relate to disputes over the boundaries of Vietnam or the United States' previous respect for the Republic's territorial sea as part of a "Defensive Sea Area" during the war. *See id.* As a result, the Court should reject Mr. Procopio's attempt to give the "Republic of Vietnam" a meaning that simply does not fit. *See Johnson v.*

United States, 559 U.S. 133, 139 (2010) (courts do not "assume that a statutory word is used as a term of art where that meaning does not fit.").

The context and statutory scheme within which the terms of the Submerged Lands Act (SLA) were interpreted by the Supreme Court presents a useful comparison to the AOA. The SLA determined state title and ownership of lands beneath navigable waters within the boundaries of the states, and used maritime terms also found in international law, but left it to the Supreme Court to define those terms. *United States v. California*, 381 U.S. 139, 165 (1965). The Court chose to define those terms consistently with customary international law to "give the SLA a 'definiteness and stability.'" *Id.* at 166-67. Doing so made sense because the SLA and international law of the sea both determined how and where to limit sovereign rights in territorial waters. The same cannot be said of the AOA.

The *Charming Betsy* canon does not alter this conclusion. *See* App. Br. 36. As an initial matter, the *Charming Betsy* canon does not help determine congressional intent, but provides a rule for construing ambiguous statutory language. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains"). Courts employing the canon "ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd. v. Empagran*

S.A., 542 U.S. 155, 163 (2004). The AOA does not define the boundaries of the Republic of Vietnam's sovereignty, nor could it interfere with the Republic's sovereign authority – the "Republic of Vietnam" referenced in the AOA ceased to exist at the latest in 1976 when South and North Vietnam "merged to form the Socialist Republic of Vietnam." *See* App. Br. 5.

Finally, even if the Court looks to international law, the law that Mr. Procopio relies upon recognizes multiple ways to define the boundaries of a country. The 1982 United Nations Convention on the Law of the Sea (UNCLOS III) describes various maritime zones that could be described as "offshore waters within the legally recognized territorial limits of the Republic of Vietnam," including a 12 nautical mile territorial sea and 24 nautical mile contiguous zone where states may exercise varying levels of sovereignty. *See* UNCLOS III, Dec. 10, 1982, art. 3 & 33, 1833 U.N.T.S. 397, 400, 409; Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 24, 15 U.S.T. 1606, 1612 (1958 Convention). Coastal states also have certain rights in their exclusive economic zone (up to 200 nautical miles from land) and continental shelf (up to 350 nautical miles from land). *See* UNCLOS III, Art. 76 & 77. Although Mr. Procopio chooses to define the AOA by reference to the zone of exclusive sovereignty in the

territorial sea, this choice, unmoored from the AOA's focus on herbicide exposure, is as arbitrary as if he had chosen the 200-mile exclusive economic zone.

Further, international law as it relates to territorial seas is not as settled as Mr. Procopio maintains. Nations have not historically claimed a uniform territorial sea. The 1958 Convention did not define the permissible boundaries of territorial seas, and established only a 12-mile limit on the contiguous zone. *See* 1958 Convention at art. 24. Without a settled limit on the territorial sea before UNCLOS III became effective in 1994, countries claimed territorial seas ranging from three to 200 nautical miles. *See The United Nations Conventions on the Law of the Sea (A historical perspective)* (1998).[13] As Mr. Procopio recounts in his principal brief, the United States recognized the Republic of Vietnam's territorial sea as encompassing three miles offshore during most of the Vietnam War. App. Br. 24 (ECF No. 22).[14] Likewise, until December 1988, the United States only claimed a three-mile territorial sea. *See* Presidential Proclamation No. 5,928 (Dec. 27, 1988). And, although the Socialist Republic of Vietnam (SRV) claims a 12-mile territorial sea, the United States and the SRV do not agree on how to draw the

[13] *Available at* <http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm> (last visited Oct. 30, 2018).

[14] The "Defensive Sea Area" decreed by the Republic in April 1965 only extended three nautical miles. *See* Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea* at 49 (1998).

baselines that define that limit. *See generally* United States Dept. of State, Bureau of Intelligence and Research, Limits in the Seas, Straight Baselines: Vietnam (Vol. 99, 1983). Against this contested backdrop, it is implausible that Congress intended to establish or even recognize the Republic's sovereign control over its territorial sea under the guise of providing presumptive service connection to veterans exposed to herbicides during the war.

B. The Context, History, And Purpose Of The AOA Do Not Show That Congress Unambiguously Intended "Served In The Republic Of Vietnam" To Include The Republic Of Vietnam's Territorial Waters

Beyond the text of the statute, Mr. Procopio contends that other language in the AOA, as well as its regulatory history, legislative history, and purpose make clear that Congress unambiguously intended "served in the Republic of Vietnam" to include the Republic's territorial waters. App. Br. 36-44. We disagree.

Other statutory language. The AOA's reference to "active military, naval or air service . . . in the Republic of Vietnam" does not prove that Congress intended the act to include naval service offshore. App. Br. 37 (citing 38 U.S.C. § 1116(a)(1), (f)). This reference contains the same ambiguous phrase "served in the Republic of Vietnam," and the fact that it references "military, naval or air service" simply emphasizes that all veterans who served, regardless of which branch of the armed forces, are entitled to the presumption as long as they served at some point in the Republic of Vietnam. *See Haas*, 544 F.3d at 1308-09. In

other words, a navy veteran who set foot in Vietnam would not be excluded merely by virtue of being a sailor as opposed to serving in an infantry unit. The VA's Agent Orange regulation is consistent with this understanding. *See* 38 C.F.R. § 3.307(a)(6)(iii).

Regulatory history. Likewise, the AOA's regulatory history does not reveal unambiguous congressional intent. Rather, the differing history and purpose of the regulatory presumptions for chloracne/soft-tissue sarcomas (38 C.F.R. § 3.311a) and NHL (38 C.F.R. § 3.313) codified in the AOA demonstrate the statute's ambiguity. Section 3.311a resulted from the 1984 Dioxin Act, which delegated authority to the VA to establish when presumptive service connection would be granted due to herbicide exposure. That regulatory language is now found in § 3.307(a)(6)(iii), and requires claimants to have been present on the landmass of the Republic of Vietnam to claim presumptive service connection. *Haas*, 525 F.3d at 1185-86. In contrast, the NHL presumption, which extends to veterans regardless of whether they set foot in the Republic of Vietnam, was based on a CDC study that found a statistically higher rate of NHL in Vietnam era veterans, and an even higher rate among sailors. That study rejected exposure to herbicides as a cause for the increased NHL rates. *See* 55 Fed. Reg. at 43,124. Congress's codification of the existing regulatory presumptions thus tells, at best, a conflicting

story as to whether Congress intended to require presence on land in the Republic of Vietnam.

Legislative history. The legislative history is no less ambiguous. Mr. Procopio argues that it shows Congress was adopting a "uniform standard" for presumptive claims that "includes service in the territorial sea of the Republic of Vietnam." App. Br. 41. To reach this conclusion, however, he purposely omits Congress's repeated recognition of the fact that it was codifying *both* of the VA's regulatory presumptions – the NHL presumption in § 3.313 (which covered service at sea) and chloracne/soft-tissue sarcoma presumptions in § 3.311a (which did not cover service at sea). Mr. Procopio alters the language from the 1991 House joint explanatory statement to suggest that Congress was only codifying one regulatory presumption for NHL. *See* App. Br. 39 (replacing "and soft-tissue sarcoma" with ellipses and "codify the decisions" with "codify [the] decision[]" in 137 Cong. Rec. 2341, 2349 (Jan. 29, 1991); *see also id.* at 40 (replacing the reference to presumptions for NHL *and* soft-tissue sarcoma with "[non-Hodgkin's lymphoma]"). Without these alterations, the legislative history does not indicate which of the regulatory presumptions suggests the meaning of "served in the Republic of Vietnam" that Congress intended. If anything, the fact that the chloracne/soft-tissue sarcoma presumptions and the AOA are based on herbicide exposure while the NHL presumption has nothing to do with herbicide exposure

suggests that the codification of § 3.311a provides more insight into Congress's intent.

The *Haas* Court helpfully summarized the problems with Mr. Procopio's regulatory and legislative history arguments:

> The problem with this argument is that the references to the regulatory presumptions in the legislative history did not distinguish between the broader definition of "service in Vietnam" provided in the non-Hodgkin's lymphoma regulation (section 3.313) and the narrower definition of "service in the Republic of Vietnam" (section 3.311a). In the absence of any clearer statement in the legislative record . . . the remarks about the existing regulations do not support the construction of the statutory phrase that [Mr. Haas] advocates. If anything, the different circumstances that prompted the issuance of the two regulations and the fact that only the chloracne/soft tissue sarcoma regulation used the precise phrase that was later incorporated into the statute – "service in the Republic of Vietnam" (section 3.311a) rather than "service in Vietnam" (section 3.13) – suggests the contrary conclusion. The chloracne/soft tissue sarcoma regulation was based on scientific evidence linking those diseases to dioxin exposure. The Agent Orange Act was similarly designed to provide compensation for exposure to Agent Orange. The non-Hodgkin's lymphoma regulation, by contrast, was not predicated on exposure, but instead was based on evidence of an association between non-Hodgkin's lymphoma and service in the Vietnam theater, including service aboard ships. Thus, the Agent Orange Act closely tracked the narrower chloracne/soft tissue sarcoma regulation, which defined "service in the Republic of Vietnam" to apply to those who served in the waters offshore only if their

> service included "duty or visitation in the Republic of Vietnam."

Haas, 525 F.3d at 1185-86.

Although Mr. Procopio contends (at 41) that he has identified the "clearer statement in the legislative record" missing in *Haas*, these "new" statements do not shed any further light on Congress's intent. The 1991 joint explanatory statement that Mr. Procopio altered recognized that Congress was codifying two sets of regulatory presumptions. *See* 137 Cong. Rec. at H726. The same is true for the House Report, H. Rep. No. 101-857 (1990), and Senate Report, S. Rep. No. 101-379 (1990), for the 1990 bill. This legislative history confirms the ambiguity suggested by the statute's regulatory history.

Mr. Procopio argues separately (at 41-44) that the legislative history shows that the purpose of the AOA was to alleviate scientific and evidentiary uncertainty that affected Blue Water Navy veterans, as well as veterans who served on land. But, as the Veterans Court correctly concluded, the legislative history indicates only "Congress's intent to ensure that a fair and independent system was established to determine the relationship between herbicide exposure and the manifestation of certain diseases." *Haas*, 20 Vet. App. at 267. Moreover, although these general statements concerning scientific uncertainty are not directed toward any subset of Vietnam War veterans, when considered in conjunction with the purpose of the 1984 Dioxin Act and AOA, these statements reveal only that

Congress was focused on easing the claims process for veterans who were likely exposed to contaminated herbicides and who contracted diseases associated with those herbicides, regardless of their branch of the military. *See Johnson*, 559 U.S. at 139 ("Ultimately, context determines meaning."). Given that the vast majority, if not all of the herbicides used during the war were sprayed over land, this legislative history does not unambiguously indicate Congress intended service at sea to qualify for the presumption. *See Haas*, 525 F.3d at 1185 ("The fact that Congress presumed exposure for veterans who served in Vietnam does not by any means suggest . . . that veterans in other areas therefore do not have to prove exposure.").

Finally, Mr. Procopio argues that the legislative history of subsequent legislation shows Congress believed (after the fact) that the AOA covered the Republic of Vietnam's territorial sea. App. Br. 44. This is incorrect. To the extent legisla-tive statements concerning subsequent legislation are relevant, the statements Mr. Procopio identifies are no more indicative of an intent to include the territorial sea than the history of the AOA. After explaining in 1996 that the proposed amendment to 38 U.S.C. § 101(29) would account for military personnel who were "serving within the borders of the Republic of Vietnam prior to August 5, 1964," the Senate Committee clarified that the new definition of "Vietnam era" would not apply to § 1116 because herbicides were not used until January 9, 1962.

S. Rep. No. 104-371, at 21 (1996). If anything, therefore, this statement again shows that Congress has not historically enacted veterans' benefits legislation with a single definition of the "Republic of Vietnam" in mind.

In the end, the indications of Congress's intent are simply too conflicted to provide an unambiguous answer to the Court's first *en banc* question. As in *Haas*, therefore, the *en banc* Court should find "served in the Republic of Vietnam" in the AOA ambiguous.

III. The Veteran Canon Does Not Preclude The Court From Deferring Under *Chevron* To The VA's Interpretation Of An Ambiguous Statute

Under *Chevron*, if "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. Where Congress has not expressed unambiguous intent, however, a reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844; *see INS v. Cardozo-Fonesea*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring). As the Supreme Court has explained, "*Chevron* established a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S.

967, 982 (2005) (citation omitted). A court accordingly "must defer to the agency's interpretation if it is reasonable." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *see Chevron*, 467 at 843; *see also Cathedral Candle Co. v. U.S. Intern. Trade Comm'n*, 400 F.3d 1352, 1363 (Fed. Cir. 2005) (requiring deference to an administrative agency's construction where "Congress has authorized" that agency "to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2002)).

In determining Congress's intent, courts may employ "traditional tools of statutory construction and examine 'the text, structure, and legislative history, and apply the relevant canons of interpretation.'" *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012) (quoting *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000)); *see also City of Arlington v. FCC*, 569 U.S. 290, 309 (2013) (Breyer, J., concurring) (collecting cases). If those tools enable a court to "ascertain[] that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

Under this approach, all traditional canons of statutory construction that legitimately aid in discerning Congress's intent, *see Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018), come into play in the *Chevron* analysis. But not all canons are equally helpful in resolving congressional ambiguity at step

one. Aside from linguistic canons that apply rules of syntax to statutes, the most decisive canons take the form of "clear statement rules," which "ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." *Sossamon v. Texas*, 563 U.S. 277, 291 (2011) (citations omitted). Those canons, which require Congress to speak unambiguously to enact certain results, will typically resolve the *Chevron* inquiry at step one because they have the effect of rendering a statutory provision unambiguous. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) ("Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve."); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (canon against reading conflicts into statutes); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Trades Council*, 484 U.S. 568, 575 (1988) (constitutional avoidance); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985) (Indian tribes exempt from state taxes).

The veteran canon, which directs only that ambiguity that cannot otherwise be resolved be construed in a veteran's favor, is different from these clear-statement rules. *See King*, 502 U.S. 220 n.9. Unlike those rules, the veteran canon does not render a statutory provision unambiguous by establishing a default rule that courts apply unless Congress displaces it with a clear statement. Instead, the

veteran canon applies to situations where interpretive doubt lingers even after a court has used all other interpretive tools at its disposal, including principles of deference.[15] *See Nielson v. Shinseki*, 607 F.3d 802, 808 n.4 (Fed. Cir. 2010) (holding that the veteran canon "is only applicable after other interpretive guidelines have been exhausted, including *Chevron*."); *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003); *Terry v. Principi*, 340 F.3d 1378, 1383-84 (Fed. Cir. 2003); *cf. Little Six, Inc. v. United States*, 229 F.3d 1383, 1384 (Fed. Cir. 2000) (Dyk, J., dissenting from denial of rehearing en banc) (". . . the panel should not have invoked the Indian canon of construction so quickly. Instead, it should have utilized all available tools of statutory construction before declaring the statute ambiguous and resorting to a default rule designed for exceptional cases where, despite the court's best efforts, an ambiguity in the statute remains."). Because the canon applies only when a statute remains ambiguous after the court has applied those other interpretive tools, it does not help determine whether "Congress has spoken to the precise question at issue." *Cf. Chevron*, 467 U.S. at 842; *see Heino*, 683 F.3d at 1379 n.8 ("we will not hold a statute unambiguous by resorting to a tool of statutory construction used to analyze ambiguous statutes."). In this respect, the veteran canon is much like the rule of lenity, which applies only

[15] Mr. Procopio appears to recognize a difference between the "ambiguity" "necessary to trigger *Chevron* deference" and the "interpretive doubt" "that must be resolved in the veteran's favor" under the veteran canon. App. Br. 70.

to "those situations in which a reasonable doubt persists about a statute's intended scope even after resort" to other tools of construction. *Moskal v. United States*, 498 U.S. 103, 108 (1990).

This distinction explains why cases addressing the veteran canon typically do so only following lengthy analysis that resolves the ambiguity through other means. *E.g., Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (concluding that 38 U.S.C. § 7266(a) is facially non-jurisdictional); *Kirkendall v. Dep't of the Army*, 479 F.3d 830, 843-44, 846 (Fed. Cir. 2007). It also explains why (i) the canon does not preclude the VA from resolving statutory ambiguities in a manner that is averse to certain veterans as long as its interpretation is reasonable, *see Sears*, 349 F.3d at 1331-32, and (ii) this Court typically applies the canon only after considering agency deference, *e.g, Gallegos v. Principi*, 283 F.3d 1309, 1313 (Fed. Cir. 2002), or where there is no agency interpretation to defer to, *e.g., Sursely*, 551 F.3d at 1351, 1355-57 & n.5.

Using the canon to resolve lingering doubt in this way reflects the basic premise of *Chevron* "that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme." *Encino Motorcars*, 136 S. Ct. at 2125 (citing *Mead*, 533 U.S. at 229-30); *see also Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 982. Congress delegated broad

authority to the VA to prescribe rules and regulations to carry out title 38, including "regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits[.]" 38 U.S.C. § 501(a)(1). Presumptions, such as the presumptions of service connection the VA adopted here, are ways to set the "nature and extent of proof and evidence" required to establish service connection. *See* Black's Law Dictionary (8th ed. 2004) ("presumptions" are "rules of evidence calling for a certain result in a given case"). Congress also provided specific delegation to the VA in the 1984 Dioxin Act to establish the circumstances under which presumptive service connection would be given to veterans likely exposed to herbicides. 1984 Dioxin Act at § 5(b)(2)(A)(i).[16] These delegations, both the general and the specific, amply demonstrate that Congress intended the VA, not courts, to interpret ambiguous veterans' benefits statutes, including the AOA. *See City of Arlington*, 569 U.S. at 323-24 ("A general delegation to the agency to administer the statute will often suffice to satisfy the court that Congress has delegated interpretive authority over the ambiguity at issue."); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (presuming that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the

[16] The AOA did not repeal this delegation of authority. *See Epic Sys.*, 138 S. Ct. 1612 at 1624 (holding that repeals by implication are strongly disfavored).

implementing agency."); App. Br. 71 (conceding that the veteran canon "cannot erase an express delegation of gap-filling authority to the VA." (citing *Veterans Justice Grp., LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1350 (Fed. Cir. 2016)).

In response to the Court's second *en banc* question, Mr. Procopio and his amici have provided a disjointed and conflicting picture as to when and to what extent the Court should, if ever, respect Congress's delegation of interpretive authority to the VA. Mr. Procopio suggests the VA's interpretation will receive deference only when a statute has no "particular pro-veteran reading" or "different tools of construction point in different directions and leave uncertainty about Congress's intent." App. Br. 69-70. Disabled American Veterans (DAV) and the National Organization of Veterans' Advocates (NOVA) repackage this formulation and argue that deference is due "only if, after considering the relevant tools of construction, including the pro-veteran canon, [the Court] concludes either that Congress had no intent or that its intent is unclear." ECF No. 102 at 11; *see* ECF No. 86 at 15-16. The American Legion, in contrast, contends that the VA should receive no deference when it interprets statutes establishing entitlement to benefits, but should receive appropriate deference for its procedural rules. ECF No. 113 at 12. In further contrast, another Blue Water Navy veteran, Joseph Taina, contends that the Court should simply never defer to the VA because the veteran canon is

the only means by which courts should interpret veterans' benefits statutes. *See* ECF No. 85. These formulations are unified only by their insistence that agency deference must generally take a back seat when veterans are involved, but there is no support for adopting this approach.

Mr. Procopio identifies (at 65-68) decisions from this Court that he contends support interpreting ambiguous veterans' benefits statutes without regard to the VA's interpretation, but those decisions did not apply the canon this way. *See McGee v. Peake,* 511 F.3d 1352, 1356-58 (Fed. Cir. 2008) (holding that the Veterans Court's statutory interpretation conflicted with the plain meaning of the statute); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2011) (reviewing an informal VA interpretation not entitled to *Chevron* deference); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 694 (Fed. Cir. 2000) (considering the canon after applying deference principles); *Boyer v. West*, 210 F.3d 1351, 1355-57 (Fed. Cir. 2010) (finding Congress's intent clear from the statutory text without expressing judgment on the VA's regulation); *cf Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017) (deferring to the VA's interpretation of ambiguous regulatory language under *Auer v. Robbins*, 519 U.S. 452 (1997)). Similarly, the Court in *Kirkendall* interpreted 5 U.S.C. § 3330a by using the act's text, scheme, and purpose to determine Congress's unambiguous intent. 479 F.3d at 837-41. Although the decision noted that the canon would

compel an interpretation in the veteran's favor if it "was a close case, which it is not," this dicta is not inconsistent with applying the canon where lingering doubt remains after employing other tools of construction. *Id.* Notably, no case since *Kirkendall* has read it as establishing the primacy of the veteran canon over agency deference.

Likewise, the Supreme Court has never endorsed using the veteran canon to resolve ambiguity where an administrative agency has already reasonably done so. The Court in *Brown v. Gardner* struck down a VA regulation because it contravened the plain language of the controlling statute. *See* 513 U.S. at 116-18. Although the Court noted in passing that interpretive doubt should be resolved in favor of veterans, *id.* at 118, it did not hold that the veteran canon negates *Chevron* deference. More recently, in *Henderson* the Court noted that its textual analysis of 38 U.S.C. § 7266(a) was consistent with the veteran canon. 562 U.S. at 460. But the Court did not rely on the veteran canon to resolve the statutory ambiguity, much less address *Chevron* deference because there was no VA regulation interpreting § 7266(a).

The Supreme Court's older precedent is similarly unhelpful for Mr. Procopio and his amici. The cases that announced the veteran canon predate *Chevron* and did not apply the veteran canon in lieu of deferring to an agency interpretation worthy of deference. *See Boone v. Lightner*, 319 U.S. 561, 575 (1943) (no agency

interpretation); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (noting that contrary rulings from the agency authorized to administer the statute were "not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making inter partes decisions."); *Coffy v. Republic of Steel Corp.*, 447 U.S. 191, 196 (1980) (no agency interpretation). And in *King*, where the Court again referenced the veteran canon in dicta, there was no agency interpretation of the statute. 502 U.S. at 221.

Amici's arguments fare no better. The American Legion's tiered approach to deference is based on the faulty contention that 38 U.S.C. § 501(a) does not delegate authority to interpret so-called "substantive laws." ECF No. 113 at 6. The AOA concerns presumptions, which as explained above, are nothing more than a way to set the "nature and extent of proof and evidence" required to establish service connection, for which Congress delegated authority to the VA. *See* 38 U.S.C. § 501(a)(1). By its express terms, therefore, § 501(a) delegates authority to the VA to interpret the AOA.

Moreover, even accepting that there is a meaningful distinction between substantive and procedural veterans' benefits laws, the American Legion's attempt to read an unstated exception into § 501(a) is inconsistent with Supreme Court

precedent.[17] In *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), the Court considered the scope of the general rulemaking authority of the National Labor Relations Board. *See id.* at 609 (explaining that the NLRB had express statutory "authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions" of the National Labor Relations Act) (quoting 29 U.S.C. § 156). A party in *American Hospital Association* contended that the statutory delegation did not permit the NLRB to use its rulemaking authority to issue industry-wide rules. *Id.* at 611. The Supreme Court squarely rejected that argument, explaining that "[a]s a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted" by 29 U.S.C. § 156, the Court "would have expected [Congress] to do so in language expressly describing an exception" from that provision, "or at least referring specifically to that section." 499 U.S. at 613; *see also City of Arlington,* 569 U.S. at 306 (remarking that there is not "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field."). Likewise here, nothing in § 501(a)

[17] The American Legion's argument also overlooks the specific delegations of authority to establish limitations on the availability of presumptive service connection due to herbicide exposure set forth in the 1984 Dioxin Act.

demonstrates Congress's unambiguous intent to exempt "substantive laws" from the scope of the VA's delegated authority.[18] *Cf. Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 669 F.3d 1340, 1343 (Fed. Cir. 2012) (holding that § 501(a) provides the Secretary with authority to establish requirements to qualify for service-connected PTSD injuries).

DAV relies on cases addressing the Indian canon to argue that the veteran canon should likewise trump *Chevron* deference. ECF No. 102 at 16-17. But courts have not uniformly held that the Indian canon precludes *Chevron* deference. *See, e.g., Haynes v. United States*, 891 F.2d 235, 239 (9th Cir. 1989). And, although the Supreme Court has not decided whether courts should employ the Indian canon before or after considering *Chevron* deference, it has rejected the notion that the Indian canon is "inevitably stronger" than other applicable canons of construction. *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001).

Further, the Indian canon is unique among substantive canons. It arose in

[18] To the extent the scope of the VA's delegated authority is ambiguous, the VA's interpretation of § 501(a) would be entitled to *Chevron* deference. *See City of Arlington*, 569 U.S. at 297-98. The VA long ago concluded that it is authorized by § 501(a) to establish regulatory presumptions of service connection where no governing statute expressly provides them. *See* VA Office of Gen. Counsel Prec. Op. 69-91 (Sept. 27, 1991); *e.g.*, 38 C.F.R. §§ 3.307(a)(7) and (f) (establishing presumptions for diseases associated with exposure to contaminated water at Camp Lejeune), 3.313 (NHL for veterans who served during the Vietnam Era), 3.316 (illnesses associated with exposure to certain vesicant agents), 3.318 (amyotrophic lateral sclerosis). Although the American Legion appears to suggest such regulatory presumptions are *ultra vires*, this is incorrect.

the early 1800s as "a strong, albeit implicit, presumption against reading any particular treaty provision to effectuate an abandonment of tribal sovereignty." Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 397 (1993); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 151-52 (2010) (discussing the historical development of the Indian canon). The Indian canon thus "grew out of the trust obligation that Congress owes to Indian tribes," and requires that statutory ambiguities be resolved "generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982)). This explains why, unlike the veteran canon, the Indian canon is frequently articulated and applied as a clear statement rule. *E.g., Montana*, 471 U.S. at 765. The Indian canon, and cases addressing it, are therefore of little utility in deciding what role the veteran canon should play in the Court's *Chevron* analysis. *Cf. Chickasaw Nation*, 534 U.S. at 95 (noting that past decisions are "too individualized, involving too many different kinds of legal circumstances" to determine the relative strength of the Indian canon

vis-à-vis other interpretive canons).

NOVA argues that the veteran canon should trump deference principles because the VA's claims process is not "equipped to effectively resolve questions of statutory interpretation." ECF No. 86 at 7-10. Many of the VA interpretations to which the Court should defer under *Chevron* do not, however, arise from the claims adjudication process, but from notice-and-comment rulemaking. *E.g.*, 38 C.F.R. § 3.307(a)(6)(iii). Further, regardless of NOVA's policy rationale for divesting the VA of authority to interpret veterans' benefits statutes, § 501(a) plainly delegates that authority to the VA. Even the American Legion concedes that some measure of deference is required by this delegation. ECF No. 113 at 16. The Court cannot therefore simply disregard Congress's will even if it believes doing so will inure to the benefit of certain veterans. *See SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, 967 (2017) (explaining that courts "cannot overrule Congress's judgment based on [their] own views").

Finally, Veterans of Foreign Wars contends that the VA's "current interpretation" of § 1116(a) "cannot be squared with the pro-veterans canon." ECF No. 101 at 25. This is a *Chevron* step two argument, however, because it questions

whether VA's regulation is reasonable.[19] The argument is also incorrect. The panel in *Haas* correctly noted in denying rehearing that the VA had adopted a "pro-veteran" construction of the statute by including *all* service in the presumption as long as it included the veteran's physical presence inside the land border of the Republic Vietnam at some point, even if the veteran was not stationed in the Republic (*e.g.*, by serving in an infantry unit). *Haas*, 544 F.3d at 1308-09. Extending the presumption in this manner was not required on the face of § 1116, and it would have been a plausible interpretation of the statute for the VA to require a veteran to have been stationed in the Republic of Vietnam to qualify for the presumption. Consistent with the statutory focus on exposure however, the VA did not limit the statute's reach this way. The VA's interpretation is thus easily squared with the veteran canon.

CONCLUSION

The Court should affirm the judgment of the Veterans Court.

[19] Likewise, when the National Law School Veterans Clinic Consortium challenges the VA's interpretation of § 1116 as "not scientifically supportable" based on evidence that post-dates the AOA, it is mounting a *Chevron* step two challenge. ECF No. 111 at 7-18.

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October 31, 2018

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 31st day of October, 2018, a copy of the foregoing "EN BANC BRIEF FOR RESPONDENT-APPELLEE" was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Eric P. Bruskin

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, respondent-appellee's counsel certifies that this brief complies with the Court's type-volume limitation rules. According the word count calculated by the word processing system with which this brief was prepared, the brief contains a total of 13,980 words.

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