2019-2211

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRUCE R. TAYLOR,

Claimant-Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Respondent-Appellee.

On appeal from the United States Court of Appeals for Veterans Claims in No. 17-2390, Judge Joseph L. Falvey, Jr., Judge William S. Greenberg, Judge Amanda L. Meredith

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RESPONDENT-APPELLEE'S *EN BANC* BRIEF

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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 unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

RESPONDENT-APPELLEE'S *EN BANC* BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2019-2211

BRUCE R. TAYLOR,
Claimant-Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Respondent-Appellee.

STATEMENT OF THE ISSUES

1. Whether the Appropriations Clause and the United States Supreme Court's decision in *Office of Personnel Management (OPM) v. Richmond*, 496 U.S. 414 (1990), preclude the courts from estopping the Department of Veterans (VA) from applying a veterans benefits statute, 38 U.S.C. § 5110(a), to a claim for an earlier effective date for veterans benefits.

2. If equitable estoppel is unavailable, whether Mr. Taylor has a claim for a denial of a constitutional right of access to the VA benefits system.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

Claimant-Appellant, Bruce R. Taylor, appeals the Veterans Court's opinion in *Taylor v. Wilkie (Taylor I)*, 31 Vet. App. 147 (2019), *see* Appx1-19, in which the Veterans Court affirmed a board decision that denied Mr. Taylor entitlement to an earlier effective date for the grant of benefits for post-traumatic stress disorder (PTSD) and a total disability rating based on individual unemployability (TDIU). A panel of this Court reversed and remanded. *Taylor v. McDonough (Taylor II)*, 3 F.4th 1351 (Fed. Cir. 2021). This Court *sua sponte* vacated the decision and ordered rehearing *en banc*. *Taylor v. McDonough (Taylor III)*, 4 F.4th 1381 (Fed. Cir. 2021).

I. Mr. Taylor's Military Service And Participation In The Edgewood Program

Mr. Taylor served on active duty in the United States Army from January 1969 to September 1971, including service in the Republic of Vietnam. Appx1; Appx28. During his service, he volunteered to participate in a Department of Defense (DOD) program in which he was exposed to chemical agents at a U.S. Army facility in Edgewood, MD (hereafter "the Edgewood Program"). Appx1-2; Appx31; Appx34. Participants in this program were required to sign an agreement prohibiting them from disclosing information about the program, subject to

punishment under the Uniform Code of Military Justice. Appx2.[1] These restrictions were in effect until DOD declassified certain details about the program in 2006. Appx2.

II. Mr. Taylor's Claim And Initial VA Proceedings

On June 30, 2006, VA sent letters to veterans who were involved in the Edgewood Program – including Mr. Taylor – advising them that they were free to discuss any health concerns related to the program with their medical providers. Appx32-33. Further, VA offered to provide those veterans with clinical evaluations if they so desired. *Id*.

Mr. Taylor subsequently filed a claim of entitlement to VA benefits for

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[1] Although the Veterans Court did not identify the document Mr. Taylor signed, the U.S. Senate Select Committee on Intelligence released text from a sample volunteer agreement in a 1976 report:

As part of this statement, potential subjects agreed that they would:

> . . . not divulge or make available any information related to U.S. Army Intelligence Center interest or participation in the Department of the Army Medical Research Volunteer Program to any individual, nation, organization, business, association, or other group or entity, not officially authorized to receive such information.
>
> I understand that any action contrary to the provisions of this statement will render me liable to punishment under the provisions of the Uniform Code of Military Justice.

S. Rep. No. 94-755, at 418.

PTSD on February 28, 2007, and underwent a VA psychological examination in June 2007. Appx38; Appx55-63. During that examination, Mr. Taylor detailed his participation in the Edgewood Program and noted that "[i]n later years when he sought treatment, he recall[ed] being turned away because the treating provider believed his story about being an experimental subject was a fabrication." Appx58. He also described witnessing the in-service fatal shooting of a fellow soldier while serving in Vietnam, an event to which he reacted "with shock and horror." Appx57-58. The examining psychologist, Dr. David Giffen, diagnosed Mr. Taylor with PTSD, concluding that Mr. Taylor was traumatized by his Edgewood Program experience and later re-traumatized in Vietnam. Appx61-62. Dr. Giffen further found that Mr. Taylor's "ability to engage in conventional competitive employment is unlikely" given the severity of his PTSD. Appx62.

In light of this report, the VA regional office granted Mr. Taylor's PTSD claim in July 2007, and granted him entitlement to TDIU in October 2007, both effective February 28, 2007, the date of his PTSD claim. Appx38; Appx64; Appx73. Mr. Taylor filed a notice of disagreement with this decision in which he asserted that he "felt constrained from filing for VA benefits" by the Edgewood Program agreement until VA reached out to him in September 2006. Appx77. He subsequently restated these concerns in an appeal to the board, which denied him an earlier effective date. Appx78; Appx86.

Mr. Taylor appealed to the Veterans Court, which remanded because the board failed to provide an adequate statement of reasons and bases for its determination. Appx117. On remand, the board again denied Mr. Taylor an earlier effective date, reasoning that his PTSD diagnosis was based on multiple stressor events, including ones unrelated to the Edgewood Program. Appx127. Further, the board rejected Mr. Taylor's assertion that the agreement he signed precluded him from filing a claim until 2007, finding that because he previously "divulged information subject to the oath of secrecy," he "cannot now claim that it prevented him from filing a claim for benefits." *Id*. Moreover, the board noted that 38 U.S.C. § 5110 was dispositive in that it prescribes when VA may assign effective dates, and does not allow for equitable tolling. Appx127.

III. <u>The Veterans Court's Decision</u>

On appeal, the Veterans Court affirmed the board's decision and, in a precedential opinion, rejected Mr. Taylor's appeal for three reasons. Appx1-9.[2]

First, the court rejected Mr. Taylor's argument that the Edgewood Program agreement prohibited him from filing a VA benefits claim, and that VA violated his procedural due process rights by failing to implement procedures that would allow similarly situated veterans to file benefits claims. Appx3-4; Appx5-6. The

[2] Judge Falvey joined Judge Meredith, who authored the majority opinion. Appx1-9. Judge Greenberg authored a dissenting opinion. Appx9-19.

Veterans Court explained that although this Court previously found that VA benefits applicants have a protected property interest in those benefits, the same rights do not extend to individuals who have not filed a benefits claim. Appx5 (citing *Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009)).

Second, the Veterans Court construed Mr. Taylor's appeal as a request that the court use its equitable powers to grant him an earlier effective date, but held that its equitable powers were not so broad. Appx6. The court relied on two recent cases in declining to extend its authority in such a way. It cited first this Court's decision in *Burris v. Wilkie*, which "distinguished the kind of equitable relief that the [c]ourt has authority to grant—relief provided by other statutes such as the All Writs Act and interlocutory, procedural relief—from the kind it does not have jurisdiction to grant—'substantive, monetary relief.'" Appx7 (citing 888 F.3d 1352, 1361 (Fed. Cir. 2018)). The court held that Mr. Taylor sought "substantive, monetary relief." *Id*. The court also cited its decision in *Burkhart v. Wilkie*, which relied on *Burris* in holding that "the Veterans Court cannot invoke equity to expand the scope of its statutory jurisdiction." Appx6-7 (citing 30 Vet. App. 414, 426 (2019)) (internal quotations omitted).

Third, the Veterans Court found no statutory relief available to Mr. Taylor. The court cited the United States Supreme Court's decision in *Office of Personnel Management v. Richmond*, noting that "a claimant cannot be paid benefits where

he or she does not meet the statutory eligibility requirements for those benefits and there is no other statutory authority under which to pay him or her." Appx7 (496 U.S. 414, 426 (1990)). The Veterans Court then quoted section 5110's requirement that an effective date for a claim "shall not be earlier than the date of receipt of application therefor." Appx7 (citing 38 U.S.C. § 5110(a)). After finding no clear error in the board's determination that Mr. Taylor's claim was filed on February 28, 2007, the Veterans Court explained that this Court previously rejected arguments applying equitable tolling to section 5110. Appx8 (citations omitted). Moreover, the Veterans Court noted that, at oral argument, Mr. Taylor conceded that there was no statutory authority for his position. Appx8-9.

The dissenting judge explained that he would have assigned an effective date of 1971 for Mr. Taylor's claim by equitably estopping VA from finding that Mr. Taylor submitted his claim in 2007. Appx17.

The Veterans Court entered judgment on April 30, 2019. Appx20. On June 28, 2019, Mr. Taylor filed a timely notice of appeal to this Court. Appx21.

IV. The Panel Decision And *En Banc* Order

On June 30, 2021, this Court reversed the Veterans Court, holding that the Government was equitably estopped from asserting 38 U.S.C. § 5110(a)(1) against Mr. Taylor's claim. *Taylor II*, 3 F.4th at 1374. On July 22, 2021, this Court *sua sponte* issued a rehearing *en banc* order, which vacated the panel decision and

reinstated the appeal. *See Taylor III*, 4 F.4th at 1381. The order instructed the parties to file new briefs addressing whether equitable estoppel may be applied to the VA under these circumstances and whether, if not, Mr. Taylor's has a constitutional claim for the denial of a right to access.

SUMMARY OF ARGUMENT

It is well established that VA is obligated to grant veterans "every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103(a). Here, the circumstances of Mr. Taylor's military service present a sympathetic case for the provision of an earlier effective date for benefits. However, Congress must authorize VA to pay appropriated funds, and under the circumstances of this case, it has not. Similarly, the courts must also stay their hand lest they create a separation of powers conflict.

OPM v. Richmond, the Appropriations Clause, and this Court's application of those sources of law in *McCay v. Brown*, 106 F.3d 1577 (Fed. Cir. 1997), answer the Court's first set of *en banc* questions. Applying this law establishes that the panel incorrectly estopped the Government from applying 38 U.S.C. § 5110(a)(1) in its adjudication of Mr. Taylor's claim for an earlier effective date. Specifically, granting Mr. Taylor's claim of entitlement to an earlier effective date under the doctrine of equitable estoppel is contrary to Congress's explicit, statutory restrictions on payment of appropriated funds and is thus barred by the

Appropriations Clause. In other words, Congress has not authorized the payment of appropriated funds for periods that predate a claimant's application for benefits, even for sympathetic claimants, and an order directing payment of such funds here based upon equitable estoppel would violate the separation of powers.

This same principle helps answer the Court's second set of questions. Mr. Taylor does not have a viable denial of access claim under *Christopher v. Harbury*, 536 U.S. 403 (2002). Under that case, a plaintiff alleging a denial of a right of access must identify an available remedy that may be awarded. Here, however, the award of an earlier effective date and concomitant benefits would cause a separation of powers conflict. Moreover, a plaintiff alleging denial of access also must establish that Government action caused them to be shut out of court, and the record here does not indicate that the secrecy oath entirely foreclosed Mr. Taylor from applying for benefits or rendered such a claim futile. Specifically, although there is no record of Mr. Taylor's secrecy oath, the sample oath can be construed as permitting a volunteer to discuss the Edgewood Program within the Government. Indeed, other veterans did so before declassification in 2006.[3]

[3] Application of the Ninth Circuit's "active interference" that is "undue" test in *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011), leads to the same result because the decision is consistent with *Christopher v. Harbury*.

In addition, the VA was sufficiently justified in not providing a mechanism for Mr. Taylor to file a claim earlier or otherwise communicating to Mr. Taylor that he could file a minimal claim before 2006. Contacting Mr. Taylor regarding his participation in the Edgewood Program would have required DOD to provide his name, along with the names of all other participants, to VA while the program was classified. Such a wholesale disclosure of the names of participants in a classified program defeats the point of classification.

In sum, although Mr. Taylor's appeal is sympathetic, neither the Executive nor Judicial branches can resolve Mr. Taylor's predicament because it involves the payment of appropriated funds not authorized by statute. Relief for Mr. Taylor thus lies only with Congress.

ARGUMENT

I. Standard Of Review

"This [C]ourt's jurisdiction to review decisions by the Veterans Court is limited." *Wanless v. Shinseki*, 618 F.3d 1333, 1336 (Fed. Cir. 2010). Pursuant to 38 U.S.C. § 7292(a), this Court may review a Veterans Court decision "with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation . . . or any interpretation thereof . . . that was relied on by the Court in making the decision." It may not, however, "review the Veterans Court's factual

findings or its application of law to facts absent a constitutional issue." *Singleton v. Shinseki*, 659 F.3d 1332, 1334 (Fed. Cir. 2011) (citing 38 U.S.C. § 7292).

In reviewing a Veterans Court decision, this Court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions," and set aside any interpretation thereof "other than a determination as to a factual matter" relied upon by the Veterans Court that it finds to be: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." 38 U.S.C. § 7292(d)(1). The Court reviews questions of statutory and regulatory interpretation *de novo*. *See Mayfield v. Nicholson*, 499 F.3d 1317, 1321 (Fed. Cir. 2007).

II. The Veterans Court Correctly Rejected Mr. Taylor's Request For Equitable Relief

In view of precedents such as *Richmond* and *McCay*, the panel incorrectly held that the doctrine of equitable estoppel precludes the Government from applying 38 U.S.C. § 5110(a)(1) in its adjudication of Mr. Taylor's claim for an earlier effective date. *Taylor III*, 4 F.4th at 1381 (question A(i)). Specifically, granting Mr. Taylor's claim of entitlement to an earlier effective date under the doctrine of equitable estoppel would be contrary to statutory appropriations and thus barred by the Appropriations Clause. *Id*. at 1382 (question A(ii)).

A. <u>Law Applicable To Mr. Taylor's Claim</u>

1. The Appropriations Clause Instructs That Congress Controls Public Money

Under the Appropriations Clause of the Constitution, only Congress is vested with power to allocate public monies: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" Constitution, Art. I, § 9, cl. 7. As the Supreme Court has explained, "[m]oney may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute." *Richmond*, 496 U.S. at 424. This clause checks the power of the Executive Branch by allowing it to expend funds only as specifically authorized. *See U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012). "The Appropriations Clause is thus a bulwark of the Constitution's separation of powers among the three branches of the National Government." *Id*. As the *Richmond* decision explains, the fundamental purpose of the Appropriations Clause is to ensure that Congress and only Congress makes the difficult judgments as to whom Federal funds should be paid:

> But the Clause has a more fundamental and comprehensive purpose, of direct relevance to the case before us. It is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants.

Richmond, 496 U.S. at 427-28.

Moreover, consistent with the Appropriations Clause, Congress enacted the Anti-Deficiency Act, which prohibits any officer or employee of a Federal agency from making or authorizing any expenditure or obligation exceeding the amount that Congress has appropriated. 31 U.S.C. § 1341(a)(1)(A). A violation of this restriction by any Federal officer or employee is punishable by up to two years in prison. 31 U.S.C. § 1350; *Richmond*, 496 U.S. at 430 ("It is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress.") (citing 31 U.S.C. §§ 1341, 1350).

2. The *Richmond* And *McCay* Decisions Are Premised Upon Separation Of Powers Concerns

Congressional control of the public fisc informed the Supreme Court's decision in *OPM v. Richmond*, which held that equitable relief was unavailable to grant a payment of money that Congress has not authorized or that a statute precludes a recipient from receiving. 496 U.S. at 415-16.

In *Richmond*, the respondent relied on erroneous advice from a Federal employee, which resulted in a loss of six months of disability annuity benefits. *Id.* at 416. Specifically, the respondent received outdated information related to eligibility limits on earnings, which caused him to earn money that exceeded the statutory eligibility limit under the Civil Service Retirement and Disability Fund. This Court held that provision of the outdated information was "affirmative

misconduct" that should estop the Government from denying respondent benefits in accordance with the statute. *Id*. at 419.

The Supreme Court reversed, addressing confusion regarding equitable estoppel in the circuit courts. The Court recognized that, when recently rejecting estoppel arguments, its dicta mentioning the possibility of applying estoppel against the Government because of some type of affirmative misconduct had taken a life of its own. *Id*. at 421. The Court continued that, "Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed." *Id*. at 422. The Supreme Court declined to rule upon whether estoppel could ever be applied against the Government. *Id*. at 423. But the Court explained that "[a] narrower ground of decision is sufficient to address the type of suit presented here, *a claim for payment of money from the Public Treasury contrary to a statutory appropriation*." *Id*. at 423-24 (emphasis added).

Specifically, the Court explained that for the issue before it, which involved "a claim for money from the Federal Treasury, the [Appropriations] Clause provides an explicit rule of decision." *Id*. at 424. The parties agreed that the award respondent sought would be in direct contravention of the Federal statute upon which his ultimate claim to the funds must rest, 5 U.S.C. § 8337. *Richmond*, 496

U.S. at 424. The Court concurred, interpreting the applicable statute as not appropriating the payment of the benefits that the respondent sought, and the Constitution as otherwise prohibiting that any money "be drawn from the Treasury" to pay them. *Id*.

The Court then explained that its decision to reject application of estoppel was "consistent with both the holdings and the rationale expressed in our estoppel precedents[,]" which "evince a most strict approach to estoppel claims involving public funds." *Id*. at 426. The Court explained that its estoppel jurisprudence is "animated" by the Appropriations Clause, which ensures that Congress and only Congress make the difficult judgments as to whom Federal funds should be paid. *Id*. at 428-29. The Court continued that, "[e]xtended to its logical conclusion, operation of estoppel against the Government in the context of payment of money from the Treasury could in fact render the Appropriations Clause a nullity." *Id*. at 428. The Court recognized that one may argue that a rule against estoppel might frustrate congressional intent to appropriate benefits, but the Court explained that Congress may always exercise its power to expand recoveries. *Id*.

The Court continued that it "would be most anomalous for a judicial order to require a Government official, such as the officers of OPM, to make an extrastatutory payment of federal funds." *Id*. at 430. If the executive officer had unilaterally decided that it was fair for the respondent to receive benefits despite

the statutory bar, the official would risk prosecution. *Id*. (citing 31 U.S.C. §§ 1341, 1350).

The Court also held the history and practice of claims against the United States was consistent with its decision. *Id*. The Court explained that despite the movement away from Congress deciding all claims itself to specific waivers of sovereign immunity for claims, Congress has always reserved resolution of claims that are based upon equity. *Id*. at 431 (citation omitted). The Court added that Congress continues to employ private legislation to provide remedies in individual cases of hardship. *Id*. The Court continued that "respondent asks [the Court] to create by judicial innovation an authority over funds that is assigned by the Constitution to Congress alone, and that Congress has not seen fit to delegate." *Id*.

Thus, the Court concluded that, for monetary claims, equitable estoppel was unavailable *because the courts cannot estop the Constitution*:

> Whether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury is a matter we need not address. As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds. *In this context there can be no estoppel, for courts cannot estop the Constitution.*

Id. at 434 (emphasis added).

This Court subsequently addressed *Richmond* in the context of veterans benefits in *McCay v. Bowen*, which held that the Appropriation Clause precluded

the payment of benefits when 38 U.S.C. § 5110(g) expressly foreclosed the payments. 106 F.3d at 1581.

In *McCay*, a veteran was diagnosed in 1987 with a disability that required surgery but, at the time, Mr. McCay's theory that Agent Orange had caused the disability was not an available route to service connection under VA regulations. *Id*. at 1579. Believing that it would be futile to seek benefits, Mr. McCay waited until 1990 to submit a claim. *Id*. The following year, Congress created a statutory presumption of service connection for Mr. McCay's disability. *Id*. VA granted Mr. McCay entitlement to disability benefits with an effective date of his 1990 claim. *Id*. Mr. McCay sought an earlier effective date of 1987, but the Veterans Court held that, pursuant to 38 U.S.C. § 5110(g), the effective date was one year before his application date (May 24, 1989). *McCay*, 106 F.3d at 1579.

Mr. McCay appealed, and this Court affirmed the Veterans Court's decision. This Court first explained that, typically, the effective date of an award of disability benefits can be no earlier than the date of application for those benefits, but that an exception exists under section 5110(g) when compensation is awarded based upon an act or administrative issue. *McCay*, 106 F.3d at 1579. Specifically, section 5110(g) limits a retroactive award to "more than one year from the date of application therefor or the date of administrative determination of entitlement, whichever is earlier." *McCay*, 106 F.3d at 1579 (citing 38 U.S.C. § 5110(g)

(1994)). The parties, however, disputed the meaning of the phrase "the date of administrative determination of entitlement[.]" *Id*. This Court interpreted it to mean the date upon which the agency determined entitlement. *Id*. at 1580-81.

This Court also rejected Mr. McCay's alternative argument that he was entitled to recover under either a theory of equitable estoppel or equitable tolling. *Id*. at 1581. Specifically, Mr. McCay argued that the Government's denial of any connection between exposure to Agent Orange and his injury rendered an earlier claim futile, and the Government should thus be estopped from applying section 5110(g). *Id*. This Court, citing *Richmond*, held that equitable relief was unavailable to grant a payment of money that Congress has not authorized or that a statute precludes a recipient from receiving:

> Although equitable estoppel is available against the government, it is not available to grant a money payment where Congress has not authorized such a payment or the recipient doesn't qualify for such a payment under applicable statutes.

McCay, 106 F.3d at 1581 (citing 496 U.S. at 426). This Court explained that the appellant sought "to use the theory of equitable estoppel to recover money the VA is not authorized to pay, namely benefits retroactive to a date more than one year before the date of his application." *Id*. The Court thus interpreted section 5110(g) as "expressly foreclos[ing] such payments[.]" *Id*.

B. Pursuant To *Richmond*, Mr. Taylor's Claim Of Entitlement To An Earlier Effective Date Would Be Contrary To Section 5110(a), And Thus Barred By The Appropriations Clause

Richmond and the Appropriations Clause answer the Court's estoppel questions: applying equitable estoppel here would be contrary to section 5110(a) and thus barred by the Appropriations Clause.

As we detail above, the Supreme Court in *Richmond* held that equitable estoppel is not available to grant a money payment where Congress has not authorized such a payment. 496 U.S. at 426. To hold otherwise would cause a separation of powers issue because it would vitiate the power of the purse that the Constitution vests solely in Congress. Simply put, the "courts cannot estop the Constitution." 496 U.S. at 434. Thus, although the Supreme Court has not addressed whether the Government could ever be equitably estopped, it has explicitly held that estoppel against the Government is unavailable to claimants seeking public funds that Congress has not authorized. *Id*.

Here, Mr. Taylor requests exactly that – he asks that the Court estop the Constitution by ignoring the appropriations restrictions in section 5110(a)(1). But absent certain enumerated exceptions, which are inapplicable to Mr. Taylor's claim, Congress has not authorized the payment of appropriated funds for veterans' benefits that predate a claimant's application.

Specifically, in accordance with the statute that governs the assignment of an effective date of an award of benefits, 38 U.S.C. § 5110, an effective date may not be earlier than the date of VA's receipt of a veteran's claim for benefits:

> [T]he effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, *but shall not be earlier than the date of receipt of application therefor*.

38 U.S.C. § 5110(a)(1) (effective to February 18, 2019) (emphasis added); *see also* 38 C.F.R. § 3.400 (implementing regulation providing that the effective date generally will be the date of receipt of the claim or the date entitlement arose, whichever is later); *McCay*, 106 F.3d at 1579. The language of section 5110(a)(1) is unambiguous – the effective date of benefits are established by the facts, but shall not be earlier than the date of receipt of application.

Accordingly, the plain language of section 5110(a) makes clear that Congress did not authorize VA to pay benefits earlier than the date of a benefits application, absent an enumerated section 5110 exception. *McEntee v. Merit Sys. Prot. Bd.*, 404 F.3d 1320, 1328 (Fed. Cir. 2005) ("Statutory interpretation begins with the language of the statute, the plain meaning of which we derive from its text and its structure."); *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 136 S. Ct. 1969, 1976 (2016) ("In statutory construction, we begin with the language of the statute.") (quotation omitted); *Myore v. Nicholson*, 489 F.3d 1207, 1211 (Fed.

Cir. 2007) ("If the statutory language is clear and unambiguous, the inquiry ends with the plain meaning.").

To the extent there is any doubt as to whether Congress intended section 5110 to limit the VA's authority to pay appropriated funds, Congress's appropriations for the VBA in Fiscal Year 2006 (the year in which Mr. Tayler was informed that he could seek benefits) resolves the matter. Specifically, when appropriating these funds, Congress explicitly stated that the money was to pay for compensation to veterans as authorized by veterans' benefits statutes, which includes section 5110 as part of Chapter 51:

> For the payment of compensation benefits to or on behalf of veterans . . . as authorized by law (38 U.S.C. 107, chapters 11, 13, 18, *51*, 53, 55, and 61)[.]

https://www.congress.gov/109/plaws/publ114/PLAW-109publ114.pdf (emphasis added).[4] Accordingly, Congress made clear that it appropriated money for veterans' benefits that comply with the requirements of section 5110.

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[4] The Fiscal Year 2006 budget was incorporated into the Fiscal Year 2007 budget through a series of continuing resolutions. *See* Pub. L. 109-289, div. B, §§ 101(a)(8), 106, 120 Stat. 1257, 1311-13 (2007) (continuing, in relevant part, VA's appropriations until no later than November 17, 2006); Pub. L. 109-369, 120 Stat. 2642 (2006) (extending appropriations to no later than December 8, 2006); Pub. L. 109-383, 120 Stat. 2678 (2006) (extending appropriations to no later than February 15, 2007); Pub. L. 110-5, § 2, 121 Stat. 8 (2007) (extending appropriations through fiscal year 2007).

Mr. Taylor, however, seeks an effective date that predates his application, which is in direct conflict with Congress's explicit restriction on the VA's payment of benefits.[5] Congress did not authorize the VA to pay funds inconsistent with section 5110(a), meaning that the Appropriations Clause *precludes* the VA from paying such benefits. 496 U.S. at 424 ("the payment of money from the Treasury must be authorized by statute"). Application of estoppel in this matter would thus estop the Appropriations Clause, creating the separation of powers conflict that the Supreme Court held must be avoided in *Richmond*.

This conclusion is consistent with *McCay*, in which this Court held that a request for payment that fell outside the bounds of section 5110(g) was a request for appropriated money not authorized by Congress. 106 F.3d at 1581. Much like in *McCay*, Mr. Taylor seeks payment of veterans' benefits that predate his application and that are not otherwise covered by an exception in section 5110. Section 5110(a)(1), like section (g) in *McCay*, "expressly foreclose[s] such payments[.]" 106 F.3d at 1581. Thus, "Congress has not authorized such a payment" to Mr. Taylor and he "doesn't qualify for such a payment under

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[5] To be clear, the assignment of an earlier effective date cannot be separated from the award of retroactive monetary benefits. *Leonard v. Nicholson*, 405 F.3d 1333, 1337 (Fed. Cir. 2005) ("Leonard's request for an earlier effective date is a claim for retroactive compensation. Indeed, Leonard is not seeking an earlier effective date merely to correct the administrative record; Leonard is seeking an earlier effective date to collect purportedly past-due compensation.").

applicable statutes." *McCay*, 106 F.3d at 1581. Equitable estoppel is unavailable for Mr. Taylor's claim.

In sum, the plain language of section 5110(a) establishes that Congress did not authorize VA to pay benefits earlier than the date of a benefits application. Because Congress did not authorize payment of appropriated funds in such a case, the Appropriations Clause precludes the VA from paying the benefits, and, under *Richmond*, the courts may not equitably estop the Government to require the payment of non-appropriated funds.

C. Mr. Taylor Misinterprets *Richmond*

In his opening brief, Mr. Taylor contends that *Richmond* permits the courts to estop the application of section 5110(a), resulting in payment of funds based upon an earlier effective date. This argument, however, is based upon a misinterpretation of *Richmond*.

1. *Richmond* Holds That Equitable Estoppel Is Unavailable For Claims Seeking Payment Of Treasury Funds

Mr. Taylor contends that the Veterans Court was empowered to equitably estop the VA's application of section 5110 to his earlier effective date claim. ECF No. 41 at 20-25. Mr. Taylor interprets *Richmond* as permitting equitable estoppel without any restriction, compares the facts of his appeal to other matters, and concludes that equitable relief was available because the Executive Branch created a "legal obstacle" to his ability to seek veterans' benefits. *Id*.

But Mr. Taylor ignores that under *Richmond*, equitable estoppel is *unavailable* for his claim because he seeks public funds that VA is not authorized to pay. As we detail above, the Supreme Court in *Richmond* declined to rule upon whether estoppel could ever be applied against the Government. 496 U.S. at 423, 434. The Court, however, explicitly held that for monetary claims, equitable estoppel is unavailable because it would require estopping the Constitution:

> As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds. In this context there can be no estoppel, for courts cannot estop the Constitution.

Id. at 434. Accordingly, *Richmond* controls Mr. Taylor's claim, and precludes application of equitable estoppel.

Mr. Taylor's argument otherwise misinterprets *Richmond*, recasting it as only a recognition "that courts can equitability estop the government." ECF No. 41 at 21 (citing 496 U.S. at 423). *Richmond* did not state this, but rather left open the *possibility* that the Government could be equitably estopped. 496 U.S. at 423, 434. Nevertheless, the Supreme Court's refusal to decide that equitable estoppel was strictly unavailable against the Government is irrelevant to Mr. Taylor's claim because the Court explicitly held that equitable estoppel is *unavailable for money claims* such as Mr. Taylor's appeal. As such, *Richmond* does not condone application of equitable estoppel in this appeal, but rather explicitly precludes it.

For the same reason, Mr. Taylor's comparison of his appeal to two court of appeals matters is inapt – neither appeal involved the application of equitable estoppel to a claim for public funds. *See* ECF No. 41 at 22-24 (citing *Watkins v. U.S. Army*, 875 F.2d 699, 708 (9th Cir. 1989); *Fano v. O'Neill*, 806 F.2d 1262, 1265–66 (5th Cir. 1987)). The first decision, *Watkins*, involved the estoppel of the Army's denial of a servicemember's reenlistment. 875 F.2d at 708. In the second, *Fano*, the court held that factual questions existed that precluded summary judgment on whether the Immigration and Naturalization Service was estopped from denying permanent resident alien status. 806 F.2d at 1265-66.[6] Thus, Mr. Taylor does not identify any case in which a court estopped the Government in a claim involving public money. In fact, as the Supreme Court stated in *Richmond*, it "has *never* upheld an assertion of estoppel against the Government by a claimant seeking public funds." 496 U.S. at 434 (emphasis added).

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[6] Mr. Taylor cites, without analysis, two other decisions as examples of Government estoppel. Neither decision involved estopping claims for the receipt of public funds. ECF No. 41 at 22. *Fredericks v. Commissioner off Internal Revenue* involved the estoppel of a tax assessment which the court held "cannot be deemed an intrusion into Congress' power to expend and allocate public funds." 126 F.3d 433, 449 (3d Cir. 1997). In *USA Petrol. Corp. v. United States*, this Court held that the Government's delay in notifying a contractor that there was a defect in contract documents could warrant estopping the Government's claim for restitution so long as the contractor established prejudice. 821 F.2d 622, 627 (Fed. Cir. 1987). As in *Fredericks*, therefore, *USA Petrol* did not involve the payment of public funds.

Moreover, even if Mr. Taylor's appeal did not involve public funds, both *Watkins* and *Fano* are distinguishable. Mr. Taylor relies upon the decisions as "two prototypical examples of affirmative misconduct" targeted at a certain party. ECF No. 41 at 22-23. Mr. Taylor continues that, here, "[t]he executive made … threats out of its self-interest – continued secrecy and avoidance of providing the care and compensation it promised." *Id*. at 24. He asserts that the Government conduct here is "far worse" than in *Watkins* and *Fano*. However, unlike in *Watkins* and *Fano*, the executive action here was not a direct response to a party's application to the Government, such as a reenlistment or a residency application. Nothing in the record suggests that, during the Edgewood Program, the executive issued the secrecy oath to *intentionally* deprive Mr. Taylor of veterans' benefits. Rather, the oath was most naturally intended to keep a classified program secret during the Cold War. Thus, although Mr. Taylor refrained from seeking benefits until 2007, his inaction was the consequence of, not the purpose of, the secrecy oath.

2. ***Richmond's* Application Is Not Limited To Claims Of Misrepresentation**

Mr. Taylor next misinterprets *Richmond* when asserting that it only precludes the use of equitable estoppel on claims that involve misrepresentations, rather than "affirmative misconduct." ECF No. 41 at 31. Mr. Taylor recognizes that the Supreme Court in *Richmond* identified a separation of powers issue but

appears to contend that the Court limited its holding to misrepresentation matters because the Court "repeatedly return[ed] to [its] focus on misrepresentations[.]" *Id*. at 31-32.

Richmond, however, is not limited to misrepresentation matters, and only "repeatedly returns" to misrepresentation errors because the facts of that matter involved a misrepresentation. The Supreme Court's holding, and its concern for separation of powers, is not contingent upon the existence of a misrepresentation. Rather, the crux of the *Richmond* decision is not the type of action undertaken by the Executive Branch, but instead whether estoppel would cause the payment of appropriated money not authorized by Congress, which would result in a separation of powers conflict.

The nature of Government conduct is irrelevant to the separation of powers conflict addressed in *Richmond*, which precludes the application of equitable estoppel to situations like Mr. Taylor's appeal. As the Supreme Court noted in *Richmond*, the "courts cannot estop the Constitution." 496 U.S. at 434. Although the Supreme Court left open the possibility that there may one day be "extreme circumstances" that warrant estopping the Government, the Court made clear that estoppel was not possible for claims involving payment of money from the Treasury. *Id*. ("Whether there are any extreme circumstances that might support estoppel *in a case not involving payment from the Treasury* is a matter we need not

address.") (emphasis added).

Moreover, although Mr. Taylor repeatedly refers to his secrecy oath in this matter as "affirmative misconduct" by the Executive Branch, there has been no corresponding finding of misconduct, and the record has not been developed for such a finding. To be clear, there is nothing in the record to indicate that the Government requested Mr. Taylor's agreement in order to intentionally deprive him of his veterans' benefits rather than to maintain the secrecy of a classified program during the Cold War.

We recognize, of course, that Mr. Taylor's case is very sympathetic. The consequence of the oath was that Mr. Taylor refrained from seeking benefits until 2007. But a finding that the oath was affirmative misconduct, especially given the context in which it was executed, is not supported by the record. Nevertheless, the Court need not determine the exact nature of the conduct here because separation of powers precludes estopping the application of section 5110(a), regardless of the type of Executive Branch conduct at issue.

3. Estopping Application Of Section 5110(a) Would Directly Conflict With Congress's Appropriations

Mr. Taylor next argues that *Richmond* is distinguishable because the application of equitable estoppel here would be consistent with Congress's appropriations. ECF No. 41 at 33-41. Specifically, Mr. Taylor asserts there is no conflict between his request for veterans' benefits and the overall purpose of the

veterans' benefits scheme, which provides compensation for veterans with service-connected disabilities. *Id*. at 34-35. Mr. Taylor is incorrect – the relief he seeks is in direct conflict with the plain language of 5110(a), which is a clear statement of the limitations that Congress placed on the payment of veterans' benefits.

First, in his *en banc* brief, Mr. Taylor eschews the plain language of 5110(a) in favor of the overall purpose of the veterans' benefits scheme. This approach is fundamentally flawed – the Court may not ignore the plain language of section 5110(a) to ascertain the intent of the statute. *See Kingdomware*, 136 S. Ct. at 1976; *McEntee*, 404 F.3d at 1328; *Myore*, 489 F.3d at 1211.

Moreover, in *Richmond*, when ascertaining whether the estoppel would conflict with appropriations, the Supreme Court looked not to the overall scheme, but rather the specific statute – 5 U.S.C. § 8337. 496 U.S. at 424. The Supreme Court noted that the benefits the respondent sought were "specifically denied" by that statute. *Id*. The Supreme Court thus concluded "that Congress has appropriated no money for the payment of the benefits respondent seeks, and the Constitution prohibits that any money 'be drawn from the Treasury' to pay them." *Id*. Although the Court recognized that one may argue that a rule against estoppel might frustrate congressional intent to appropriate benefits, the Court declined to apply equitable estoppel as a solution, and instead explained that Congress may always exercise its power to expand recoveries for such cases. *Id*. 429. Similarly,

in *McCay*, this Court looked not to the overall veterans' benefits scheme to determine whether Mr. McCay's request for relief conflicted with Congress's appropriations. Rather, this Court interpreted 38 U.S.C. § 5110(g) and held that it expressly foreclosed the payments at issue. 106 F.3d at 1581.

As we detail above, section 5110(a) plainly means that the effective date of a claim may not be earlier than the date of VA's receipt of a veteran's claim for benefits. 38 U.S.C. § 5110(a)(1). Mr. Taylor agrees with this interpretation of section 5110(a): he concedes that section 5110(a) "unequivocally precludes an effective date for award of VA benefits prior to the date of [the] claim." ECF No. 12 at 13. Accordingly, the parties appear to agree that section 5110(a)(1) restricts VA's authority to pay funds appropriated for veterans benefits. This is the end of the analysis mandated by *Richmond* – a statute (section 5110(a)(1)) prohibits the payment of the money Mr. Taylor seeks, and thus equitable estoppel is unavailable.

In a separate argument, Mr. Taylor asserts that "Congress's intent in § 5110 is [to] encourage[] veterans to file for benefits as soon as their claim ripened[.]" ECF No. 41 at 39. Mr. Taylor, however, confuses Congress's intent with the consequences of the statute. Although the consequence of section 5110(a)(1) may be that veterans file their applications as soon as possible, the intent of the statute is apparent from its plain language – creating a bright line for effective date claims, which is no "earlier than the date of receipt of application therefor[.]" *See* 38

U.S.C. § 5110(a)(1).

Second, for similar reasons, Mr. Taylor's contention that his relief "perfectly aligns with the federal scheme in question[,]" fails. ECF 41 at 35. Citing the Supreme Court's decision in *Salazar v. Ramah Navajo Chapter*, Mr. Taylor argues that the Appropriations Clause should not bar his recovery because he meets the substantive requirements for the receipt of benefits. ECF No. 41 at 35 (citing 567 U.S. 182, 198 n.9 (2012)). This is incorrect – although Mr. Taylor *currently* meets the requirements for receipt of benefits (and is receiving them), the record does not reflect that he meets the requirements *for an effective date* before the date of his 2007 application.[7] In other words, the question before this Court is not Mr. Taylor's entitlement to benefits but his entitlement to an earlier effective date, which is related but distinct from the question of whether he has any service-connected disability. Congress, in 38 U.S.C. § 5110, "Effective dates for awards[,]" established a requirement that a former servicemember submit an application for benefits in order to receive an earlier effective date. 38 U.S.C. § 5110(a)(1). As we explain above, this statute limits VA's authority to pay

[7] To receive benefits, a former servicemember must be a "veteran" under 38 U.S.C. § 101(2), and then establish direct service connection statute, which requires establishing: (1) a current disability; (2) an in-service incurrence/aggravation of a disability/disease/injury; and (3) a nexus between the claimed in-service disability/disease/injury and the present disease or injury. *See Shedden v. Principi*, 381 F.3d. 1163, 1166-67 (Fed. Cir. 2004).

appropriated funds to veterans. It is undisputed that Mr. Taylor did not submit an application before 2007, and thus it follows that Mr. Taylor does not meet the application requirement for an earlier effective date.

Moreover, Mr. Taylor's argument confuses Congress's appropriation of funds and the limitations that Congress has placed on the authority to pay appropriated funds. As we explain above, the Appropriation Clause requires that "the payment of money from the Treasury be authorized by statute." *Richmond*, 496 U.S. at 424. Thus, it is not enough that Congress generally appropriated money for veterans' benefits. If reference to such a broad purpose alone were enough, limitations on the authority to pay appropriated funds would be functionally non-existent. The Appropriations Clause also requires that Congress *authorized* the payment of the appropriated funds. Here, although Congress has appropriated funds for payment to veterans, it has not authorized unlimited payment to any and all veterans. Rather, Congress placed in section 5110(a) specific limitations on VA's authority to pay benefits.

Third, Mr. Taylor errs when contending that equitable relief would "vindicate[] and uphold[] the Constitution's separation of powers" in this matter. ECF No. 41 at 36. He argues that the secrecy agreement was an attempt by the Executive Branch to "trample on Congress's Appropriations power[,]" and that this Court should estop application of 5110(a) to address this alleged issue. *Id*. As an

initial matter, at best, Mr. Taylor advocates the illogical position that this Court should violate the separation of powers in order to correct the Executive Branch's alleged violation of the separation of powers. More fundamentally, Mr. Taylor's argument suffers from the same flaw discussed above – it ignores that Congress included within 5110(a)(1) a restriction on the payment of veterans' benefits. Application of the statute does not raise separation of powers questions.

Moreover, Mr. Taylor's argument incorrectly assumes that the secrecy oath was an "immoral" attempt to deprive Mr. Taylor of his veterans' benefits and to take Congress's appropriations power through "adverse possession." ECF No. 41 at 36, 38. There is nothing in the record that establishes that the secrecy oath was an attempt to deprive Mr. Taylor of veterans' benefits, as opposed to an oath undertaken in connection with a classified program. Although Mr. Taylor felt constrained by the secrecy oath, the conclusion that the oath was designed to harm him rather than protect the United States' classified program is not supported by the record.

D. Mr. Taylor Misinterprets *McCay* When Arguing It Is Distinguishable

Mr. Taylor's *en banc* brief also misinterprets *McCay* when arguing that the decision is distinguishable from the present appeal. As we detail above, this Court, in *McCay*, held that equitable relief was unavailable to grant a payment of money that Congress has not authorized or a statute precludes a recipient from receiving.

106 F.3d at 1581. Much like Mr. McCay, Mr. Taylor seeks payment of veterans' benefits that predates his application and that are not otherwise covered by an exception in section 5110. Equitable estoppel is thus unavailable for Mr. Taylor's claim, and his arguments otherwise are unavailing.

First, Mr. Taylor contends that *McCay* is distinguishable because Mr. McCay chose not to file for benefits "despite the fact that he was free to do so[.]" ECF No. 41 at 42. He argues that, under section 5110(g), Mr. McCay was not entitled to an earlier effective date under 5110(g), and *McCay* is consistent with *Richmond*. ECF No. 41 at 42-43. But Mr. McCay's choice is irrelevant to the *Richmond* analysis, which hinges entirely upon separation of powers concerns. Mr. Taylor's appeal suffers from the same defect as Mr. McCay's appeal – section 5110 specifically prohibits him from receiving an earlier effective date. Thus, much like in *McCay*, equitable estoppel "is not available to grant a money payment where Congress has not authorized such a payment or the recipient doesn't qualify for such a payment under applicable statutes." *McCay*, 106 F.3d at 1581.

For the same reason, there is no merit to Mr. Taylor's contention that *McCay* is distinguishable because "[u]nlike Mr. Taylor, [Mr.] McCay was always free to file for benefits." ECF No. 41 at 43. Mr. Taylor asserts that equitable estoppel would only have given Mr. McCay a second chance, while equitable estoppel for Mr. Taylor would be "*vindicat[ing]* Congress's intent." *Id*. at 44. Again, the

Richmond analysis hinges entirely upon a separation of powers issue, and not whether the claimant was legally or mechanically prohibited, as opposed to simply refraining from, undertaking the action at issue. In fact, the facts of *Richmond* conflict with Mr. Taylor's assertion otherwise. Mr. Richmond was not confronted with a "legal obstacle," *see* ECF No. 41 at 43, preventing him from earning less money and thus receiving more benefits. Rather, he relied upon a misrepresentation, just as Mr. McCay relied upon the representations in the VA regulations. Yet the Supreme Court held that equitable estoppel was unavailable for Mr. Richmond. Moreover, as we detail above, equitable estoppel would not vindicate Congress's intent in this matter – it would usurp Congress's power of the purse by awarding public funds in contravention to the plain language of a statute.

Second, Mr. Taylor errs when contending that *McCay* is distinguishable because this appeal involves "systemic misconduct[,]" rather than the misrepresentation in *McCay*. ECF No. 41 at 44-45. As we explained in response to Mr. Taylor's attempt to distinguish *Richmond*, *see* ECF No. 41 at 31, that decision is not limited to misrepresentation matters, but rather hinges upon the Supreme Court's identification of a separation of powers conflict. In other words, the crux of the *Richmond* and *McCay* decisions is not the type of action undertaken by the Executive Branch. Rather, the decisions hinge upon whether the estoppel would cause the payment of money not authorized by Congress, which would

result in a separation of powers conflict.

Third, there is no merit to Mr. Taylor's assertion that *McCay* is distinguishable because of the nature of the dispute and scope of litigation that would follow the application of equitable estoppel. ECF No. 41 at 45. Mr. Taylor argues that *McCay* involved service-connection like many other matters, while his appeal involves affirmative misconduct, which is rare. *Id*. But both matters involved the same claim – a request for an earlier effective date under section 5110. Nevertheless, Mr. Taylor appears to argue that equitably estopping VA in *McCay* would have led to more litigants requesting equitable estoppel than would result from equitably estopping the VA in his appeal. Even if accurate, this is unavailing. As we explained, equitably estopping the VA in this appeal would cause a separation of powers conflict. Such a conflict cannot be tolerated simply because it is unlikely to reoccur. Rather, the solution to resolving Mr. Taylor's predicament lies with Congress. *Richmond*, 496 U.S. at 429.

E. The Court Should Neither Overrule Nor Clarify *McCay*

As we detail above, the holding in *McCay* was required by *Richmond* decision. In *McCay*, this Court correctly cited *Richmond*, explaining that equitable relief was unavailable to grant a payment of money that Congress has not authorized or a statute precludes a recipient from receiving. *McCay*, 106 F.3d at 1581 (citing 496 U.S. at 426). Because Mr. McCay sought "to use the theory of

equitable estoppel to recover money the VA is not authorized to pay," this Court held that equitable estoppel was unavailable. *Id*. at 1581. *McCay* is thus consistent with *Richmond*, and cannot be overruled.

Mr. Taylor does not advocate for the overruling of *McCay*, but rather contends in the alternative that the Court should clarify *McCay*. His arguments are unavailing and ignore the holding of *Richmond*.

First, there is no merit to Mr. Taylor's assertion that *McCay* should be clarified because it "overreads *Richmond*" by "suggest[ing] the equitable estoppel can *never* lie against the government even in cases of affirmative misconduct[.]" ECF No. 41 at 46. *McCay* contains no such blanket prohibition on equitable estoppel, and specifically states that "equitable estoppel is available against the government[.]" 106 F.3d at 1581. *McCay*, however, correctly cited *Richmond* to conclude that equitable estoppel "is not available to grant a money payment where Congress has not authorized such a payment or the recipient doesn't qualify for such a payment under applicable statutes." 106 F.3d at 1581 (citing 496 U.S. at 426). Thus, the prohibition in *McCay* on the use of equitable estoppel is unrelated to whether "affirmative misconduct" has occurred, and instead pertains to whether there would be a separation of powers issue. This holding is required by *Richmond* and requires no clarification.

Second, there is no merit to Mr. Taylor's argument that *McCay* should be clarified because it conflicts with other decisions of this Circuit. ECF No. 41 at 46-47. Specifically, Mr. Taylor alleges that *McCay* "arriv[ed] at the correct result … but did so without fully grappling with the purpose behind [the] statutory framework." ECF No. 41 at 47. In other words, Mr. Taylor argues that the Court in *McCay* erred in analyzing the plain language of section 5110(g) to determine whether the relief Mr. McCay requested was inconsistent with a statute, in lieu of the entire statutory framework for VA benefits. However, nothing in *Richmond* instructs courts to look beyond the plain language of the statute to determine whether equitable estoppel would cause a separation of powers issue. In fact, when ascertaining whether estoppel would conflict with appropriations, the Supreme Court looked not to the overall scheme, but rather to the specific statute – 5 U.S.C. § 8337. *Richmond*, 496 U.S. at 424. Moreover, when addressing whether congressional intent to award benefits may be frustrated without application of equitable estoppel, the Supreme Court explained that, in such a case, Congress may always exercise its power to expand recoveries. *Id*. at 429. Similarly, here, Congress may amend section 5110 to provide earlier effective dates and retroactive benefits for veterans such as Mr. Taylor.

Further, it is unclear how *McCay* conflicts with the language in *Brush v. OPM* that Mr. Taylor identifies – *McCay* looked to the plain language of the

statute (section 5110(g)) to determine its intent, and in *Brush*, this Court "look[ed] to the purpose of the *statute*[,]" not the statutory framework. *Compare Brush v. OPM*, 982 F.2d 1554, 1562 (Fed. Cir. 1992) (emphasis added) *with McCay*, 106 F.3d at 1582. Thus, in the *Richmond* analyses in both decisions, this Court looked to the statute at issue, not the statutory framework. Nevertheless, to the extent that a conflict exists between *McCay* and *Brush*, it must be resolved in favor of *McCay* because the decision is required by and consistent with *Richmond*.

Even considering the statutory framework in lieu of the specific statute at issue counsels against application of estoppel because it would remove a fundamental aspect of veterans' benefits out of that framework – that the veteran suffers from a present disability. It would require the assumption without supporting medical evidence that, years ago, the veteran suffered from a compensable, service-connected disability. Further, given that the veterans' benefits system accounts for the gradual worsening of disabilities through a schedule of ratings, to include zero, estoppel again appears inconsistent with the statutory framework, not just section 5110(a)(1).

F. <u>The Pro-Veteran Canon Is Inapplicable To this Appeal</u>

Building off of his statutory framework argument, Mr. Taylor contends that the "executive's position violates the Veterans' Canon" because a prohibition on equitable estoppel is anti-veteran. ECF No. 41 at 47-48. This argument is outside

the scope of the Court's *en banc* order and, regardless, is inaccurate. The pro-veteran canon requires that, when construing ambiguous veterans' benefits statutes, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Here, Mr. Taylor alleges that a prohibition on equitable estoppel is anti-veteran, which is an allegation that does not involve the interpretation of an ambiguous statute. This case involves the application of Supreme Court precedent regarding separation of powers and Constitutional preservation of appropriations power for Congress. The pro-veteran canon cannot be used to bypass the Constitution's instruction that Congress controls appropriations.

Moreover, there is no merit to Mr. Taylor's assertion that "the [Veterans' Judicial Review Act of 1988 (VJRA)] grants the Veterans Court (and this Court) the power to use equitable estoppel in the circumstances of Mr. Taylor's case." ECF No. 41 at 48. The VJRA does not provide the Veterans Court power to disregard the Appropriations Clause or otherwise address Mr. Taylor's circumstance. Had it, this matter would have been resolved already. Instead, *Richmond* and the concerns of separation of powers within that decision control this matter.

To the extent that Mr. Taylor intends to argue that the Court should interpret section 5110(a)(1) in a manner that permits equitable estoppel in order to comply

with the pro-veteran canon, he ignores that the statute is unambiguous and does not argue to the contrary. The canon "cannot be invoked to 'override the clear meaning of a particular provision.'" *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1340 (Fed. Cir. 2003) (quoting *Boyer v. West*, 210 F.3d 1351, 1355 (Fed. Cir. 2000)); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 286 (1946) (declining to "read into" the statute a policy favorable to veterans when the text and interplay of the statutory sections would not bear that interpretation). Rather, it "only applies in the situation where the statute . . . at issue is ambiguous." *Kisor v. Wilkie*, 969 F.3d 1333, 1342 (Fed. Cir. 2020). As we detail above, section 5110(a)(1) is unambiguous – its plain language prohibits an effective date that predates the date of a claimant's application. *See* ECF No. 12 at 13 (Mr. Taylor concurring that the plain language of section 5110(a) "unequivocally precludes an effective date for award of VA benefits prior to the date of [the] claim").

G. Resolution Of Mr. Taylor's Predicament Lies Solely With Congress And Not The Executive Or Judicial Branch

In *Richmond*, the Supreme Court explained that the Appropriations Clause ensures that only Congress makes the difficult judgments as to whom Federal funds should be paid. 496 U.S. at 428-29. Moreover, the Court recognized that, in matters in which equity may counsel the payment of funds not authorized by statute, it is Congress, not the courts, that may exercise equitable power to assist

individuals in need. Here, neither the Executive nor Judicial branches can resolve Mr. Taylor's appeal for equity because it involves the payment of appropriated funds not authorized by statute. *Id*. at 426. Thus, only Congress may grant his request for equity and provide him with relief. *Id*. at 431 ("Congress continues to employ private legislation to provide remedies in individual cases of hardship.").

III. <u>Mr. Taylor Does Not Have A Viable Right Of Access Claim</u>

To date, Mr. Taylor has not filed a claim alleging the denial of constitutional right of access to VA processes for securing disability benefits in any court. Rather, Mr. Taylor has only filed an appeal of the VA's denial of his claim for an earlier effective date for service-connected PTSD and TDIU.

Nevertheless, Mr. Taylor does not have a viable denial of access claim. First, Mr. Taylor would be unable to demonstrate that the Government undertook action that precluded him from filing an application for benefits, or otherwise rendered an application futile, before 2006. Second, Mr. Taylor cannot identify an available remedy as required by *Christopher v. Harbury* – the award of an earlier effective date and concomitant benefits would cause the separation of powers conflict outlined above.

A. Right Of Access Claims

1. *Christopher v. Harbury* And The Two Types Of Right Of Access Claims

In *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000) (*Harbury I*), the D.C. Circuit recognized a constitutionally-protected right of access to the courts, and allowed the plaintiff to maintain a *Bivens* action against various Government officials based on allegations that they "affirmatively deceived her into believing that they were actively seeking information about her husband[.]" *Id*. at 608. On rehearing, however, the Court emphasized the limited nature of this right. *Harbury v. Deutch*, 244 F.3d 956, 957 (D.C. Cir. 2000) (*Harbury II*). Among other things, the Court stressed the "general requirement" that a "plaintiff must first press her underlying claims" and added that it had permitted the plaintiff's suit only because she had alleged that the defendants' actions "'completely foreclosed' one of her primary avenues of relief." *Id*. The Court thus did not express a view on the constitutionality of actions that do not render access to a court "futile." *Id*. "In addition, and most importantly," the Court explained that its prior "opinion explicitly and repeatedly limits its holding to situations where … defendants both affirmatively mislead plaintiffs and do so for the very purpose of protecting government officials from suit." *Id*. (emphasis in the original).

In *Christopher v. Harbury*, the Supreme Court reversed the D.C. Circuit's decision. 536 U.S. 403. The Court identified two flaws that prevented the plaintiff

from stating a claim. First, the plaintiff failed to identify an underlying cause of action that was compromised by the Government's conduct. *Id*. at 418-19. Second, the plaintiff could not identify a remedy that was foreclosed. *Id*. at 420-21.

In that decision, the Supreme Court recognized that "two categories" of denial of the right of access claims exist. 536 U.S. 403, 414–15 (2002). First are "forward-looking" claim. *Id*. at 414 n. 11. These claims allege "that systemic official action frustrates" a plaintiff's ability to file a suit at the present time. *Id*. at 413. "[T]he essence of the access claim is that official action is presently denying an opportunity to litigate" for a plaintiff. *Id*. But the plaintiff's claim "has not been lost for all time . . . but only in the short term[.]" *Id*. The object of this type of suit "is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed." *Id*.

Second are "backward-looking access claims[.]" *Id*. at 415. These claims cover matters "that cannot now be tried (or tried with all material evidence), no matter what official action may be in the future." *Id*. at 413-14. Such a claim may occur if the official action "caused the loss or inadequate settlement of a meritorious case," "the loss of an opportunity to sue," "or the loss of an opportunity to seek some particular order of relief." *Id*. at 414. Regardless of the official action involved, the ultimate object of these sorts of access claims is not a

judgment in a future lawsuit, but rather judgment in the present matter with the provision of relief that is not otherwise obtainable. *Id*.

The Supreme Court explained that to raise a viable claim in either right of access circumstance, "the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Id*. at 415. For example, in backward-looking claims, the plaintiff "must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought." *Id*.

2. The Test For Denial Of Access Claims After *Christopher v. Harbury*

The Supreme Court did not explicitly adopt or establish a test for the denial of a right to access. However, several important principles emerge from the discussion of access claims by both the D.C. Circuit and the Supreme Court in the *Harbury* matter that inform the appropriate test to use.

First, a viable right of access claim must describe the underlying claim on the merits allegedly frustrated by official action and must identify an available remedy that may be awarded in an access suit that is "not otherwise available in some suit that may yet be brought." *Christopher*, 536 U.S. at 415. *Second*, plaintiffs must establish that Government action caused the plaintiff to be "shut out of court." *Id*.; *see also Harbury II*, 244 F.3d at 957 (describing the claims as "completely foreclosed" or rendered "futile" by the Government action). *Third*,

denial of access claims are limited to situations where the Government undertook affirmative misconduct for "the very purpose of protecting the government officials from suit." *Id*. ("[D]efendants both affirmatively mislead plaintiffs and do so for the very purpose of protecting the government officials from suit."); *Christopher v. Harbury*, 536 U.S. at 414 (citing examples of backward-looking claims that involve Government cover-ups).

Following *Christopher v. Harbury*, other circuits have addressed denial of access claims using different language to describe the test they are applying. *See, e.g.*, *Silva*, 658 F.3d at 1103 ("active interference"); *Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004) ("undue interference"). These tests appear consistent with the *Harbury* decisions, which assessed whether the Government undertook an action that actively prevented the plaintiff from accessing a court, the Government action was intended to block the plaintiff's access to the court, and a remedy is now available for the plaintiff. As such, the "active interference" that is labeled "undue" test from *Silva* is consistent with *Christopher v. Harbury* and is an appropriate alternative test for right of access to the court claims.

Nevertheless, as Mr. Taylor states, it appears that the *Silva* test is not meaningfully different from the right of access test applied in other non-prisoner cases, *see* ECF No. 41 at 55, or, for that matter, other circuits. Accordingly, the *Silva* test is an appropriate test in Mr. Taylor's case, *see* ECF No. 37 at 3 (question

C), but use of an alternatively worded test would lead to the same result.[8]

B. Mr. Taylor Does Not Have A Viable Claim Under *Christopher v. Harbury* For Denial Of A Right Of Access To The VA Benefits System

The constitutional right of access may extend to the right to submit claims to an Executive Branch agency. In *California Motor Transp. Co. v. Trucking Unlimited*, the Supreme Court explained that the constitutional right to petition "extends to all departments of the Government[,]" and "[t]he right of access to the courts is indeed but one aspect of the right of petition." 404 U.S. 508, 510 (1972). Accordingly, a veteran such as Mr. Taylor could assert a constitutional right of access to the VA benefits system claim. Here, however, Mr. Taylor does not have a viable claim for a denial of access to the VA benefits system, whether this Court applies only *Christopher v. Harbury* or includes the *Silva* test in its analysis.

1. The Government Did Not Actively Interfere With Mr. Taylor's Access To The VA Benefits System (Question D(i))

Mr. Taylor cannot establish that the Government interfered with his constitutional right of access to the VA benefits system before 2006. As we detail above, the *Harbury* decisions instruct that plaintiffs must establish that were shut out of court, or, in other words, their underlying claims were either "completely

[8] The Secretary agrees with Mr. Taylor that because he is a veteran, not a prisoner, the lower standard applied in some right-of-access cases involving prison regulations does not apply here. Applnt. Br. 58 (citing *Turner v. Safley*, 482 U.S. 78, 89–90 (1987)).

foreclosed" or rendered "futile" by the Government action. *Christopher v. Harbury*, 536 U.S. at 415; *Harbury II*, 244 F.3d at 957. In *Silva*, the Ninth Circuit stated this requirement differently, requiring active interference from the Government. 658 F.3d at 1103.

Here, Mr. Taylor cannot establish that the secrecy oath completely foreclosed his ability to obtain veterans' benefits between 1972 and 2006 such that filing a benefits claim during that time would have been futile. Rather, Mr. Taylor had options before 2006 to claim VA benefits and to thereby obtain an effective date before 2006.

First, as the *en banc* order suggests, Mr. Taylor could have filed a minimal claim before 2006 without divulging classified information on the Edgewood Program. ECF No, 37 at 3. Although a minimal claim likely would have been insufficient for Mr. Taylor to obtain service connection, it is possible that the claim could have served as the basis for an earlier effective date. In 2006, VA amended 38 C.F.R. § 3.156(c) to allow for the assignment of an earlier effective date in certain previously adjudicated claims. *See* New and Material Evidence, 71 Fed. Reg. 52455 (Sep. 6, 2006). Under the amended rule, if VA receives relevant declassified records that could not be obtained (due to their classified status) at the time it decided a prior claim, VA will reconsider the claim and assign an effective date commensurate with when entitlement arose or when VA received the

previously decided claim, whichever is later. 38 C.F.R. § 3.156(c)(1)(iii) and (3). Had Mr. Taylor filed a minimal claim before 2006, it is conceivable that he could have received an earlier effective date for the grant of benefits.

Second, the record does not establish that the secrecy oath completely foreclosed Mr. Taylor's ability to apply for, and receive, benefits before 2006. Although his oath has not been located, the sample oath reviewed by the Veterans Court does not contain an explicit prohibition on discussing the Edgewood Program with Federal agencies such as the VA. *See* Appx10 (quoting S. Rep. No. 94-755, at 418).

In fact, other Edgewood Program volunteers filed claims before 2006. *See Hospedale v. Shulkin*, No. 16-3360, 2018 WL 794875, at *1 (Vet. App. Feb. 9, 2018) (appellant filed a claim of entitlement to VA benefits for a "nervous condition" in March 1979 that he claimed "was related to experiments in which he had participated in during his time as a volunteer for [Edgewood];" initially denied due to lack of in-service incurrence); *Forrest v. McDonald*, No. 14-1572, 2015 WL 3453892, at *1 (Vet. App. June 1, 2015) (a veteran who was a "medical research volunteer … at Maryland's Edgewood Arsenal" sought VA treatment in August 2004 for various medical problems that included a mental health condition, which was initially denied for lack of PTSD diagnosis); *DiAngelis v. McDonough*, No. 19-8769, 2021 WL 1901184, at *1 (Vet. App. May 12, 2021) ("In August 1999,

Mr. DiAngelis filed a claim for service connection for ‘flash backs, mood swings, [and] temper loss due to hallucinogenic drug testing given at Edgewood Arsenal, Maryland, Spring 1967;’” initially denied due to lack of diagnosis). Accordingly, although Mr. Taylor felt constrained to divulge information on the Edgewood Program to VA before 2006, the secrecy oath did not render pre-2006 attempts to obtain veterans’ benefits futile. All Mr. Taylor had to do to commence the claims process was identify a present disability and suggest a connection to service.

Nor has the secrecy oath precluded other veteran Edgewood Program participants from accessing the courts in other contexts. For example, in 1987, the Supreme Court, in *United States v. Stanley*, considered an Edgewood Program participant’s action against Government officials, which alleged the veteran sustained injuries in an Army experiment. 483 U.S. 669 (1987). Mr. Stanley alleged that, in 1958, he participated in the Edgewood Program experiments, and that the secret administration of drugs harmed him. *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1148-49 (5th Cir. 1981). Other veterans raised similar claims before 2006. *See e.g.*, *Bishop v. United States*, 574 F. Supp. 66, 66 (D.D.C. 1983) (“[Plaintiff] contends that he voluntarily participated in drug experiments conducted by the Army in 1963 at Edgewood Arsenal, Maryland. The experimentation involved the administration of various drugs[.]”); *Sweet v. United States*, 528 F. Supp. 1068, 1069–70 (D.C.D. 1981), *aff’d*, 687 F.2d 246 (8th Cir.

1982) (plaintiff alleged the Government negligently "fail[ed] to advise him that he was given lysergic acid diethylamide (LSD) as part of a chemical warfare experiment at Edgewood Arsenal, Maryland"). Moreover, public scrutiny of the Edgewood Program dates back to at least 1976. S. Rep. No. 94-755, at 418.

To be clear, the Secretary does not mean to suggest that a veteran should have to risk prosecution in order to apply for benefits. But here, the record does not indicate that the secrecy oath completely foreclosed Mr. Taylor from applying for benefits: there is no record of Mr. Taylor's secrecy oath and the sample oath can be construed as permitting a participant to discuss the Edgewood Program within the Government, as other veterans did before declassification in 2006. Moreover, the application for veterans' benefits would not have required details about the Edgewood Program.

Thus, the record shows that the Mr. Taylor was not shut out of the benefits system, and a pre-2006 claim for benefits was not futile. Stated another way, "[t]aken together, . . . the required promise of military secrecy, the threat of court martial, and the failure to provide a VA mechanism for the timely filing or adjudication of an adequate claim" does not "constitute an affirmative interference with a right of access" to the VA benefits system. *See* ECF No. 37 at 3 (Question D(i)); *Silva*, 658 F.3d at 1103. Although Mr. Taylor felt constrained by the secrecy oath, the avenues discussed above remained, and thus the Government did not

actively interfere with Mr. Taylor's ability to apply for benefits.

2. The VA Did Not Lack A Sufficient Justification (Question D(ii))

Mr. Taylor also cannot establish that the Government intended to deprive him of his disability benefits or that the Government's conduct was otherwise "undue." *Harbury II*, 244 F.3d at 957; *Christopher v. Harbury*, 536 U.S. at 415; *see also Silva*, 658 F.3d at 1103 (stating that the courts should evaluate whether the Government action was "undue").

First, the VA had a sufficient justification for not providing a mechanism for Mr. Taylor to file a benefits claim while also protecting classified information. ECF No. 37 at 4 (question D(ii)). As an initial matter, as we demonstrate above, Mr. Taylor had avenues for obtaining benefits (or preserving an earlier effective date) before 2006, rendering an alternative mechanism unnecessary.

Nevertheless, there was no alternative mechanism at the time of Mr. Taylor's separation from service – nor does there appear to be a mechanism currently – for the DOD to provide the names and contact information for veterans who participated in classified programs to the VA. Nor should there be a requirement for DOD to release the names of participants. Requiring DOD to make a wholesale disclosure of the names of everyone who participated in all classified program defeats the point of classification.

As the *en banc* order correctly identifies, the VA has established an

alternative mechanism in some circumstances. *Id*. (citing the historical *Adjudication Procedures Manual* M21-1, Pt. IV, subpt. Ii, ch. 1, sec. 1); *Adjudication Procedures Manual* M21-1, Pt. VIII, subpt. iv, ch. 9, sec. A.1.b) (2021).[9] These procedures permit the provision of information to support claims based upon Special Operations, which are small-scale covert or overt military operations. M21-1, VIII.iv.9.A.1.a. The procedures, however, do not envision VA *sua sponte* identifying veterans who have participated in Special Operations. Rather, the procedures establish steps for "obtain[ing] records and decid[ing] a claim when a *Veteran claims* that an injury or disability occurred during a Special Operations assignment." M21-1, VIII.iv.9.A.1.b (emphasis added). Thus, it is incumbent upon the veteran to first file a claim and identify participation in a Special Operation. This is consistent with the requirement that a veteran initiate a claim with VA in order to receive benefits. 38 U.S.C. § 5101(a)(1)(A); 38 U.S.C. § 5107 (establishing that it is the claimant's "responsibility to present and support a claim for benefits[,]" subject to the benefit of the doubt rule).

Second, for similar reasons, the VA was sufficiently justified in not communicating to Mr. Taylor that he could file a minimal claim. ECF No. 37 at 4 (question D(ii)). Contacting Mr. Taylor regarding his participation in the

[9] The Special Operations Incident provisions of the M21-1 manual no longer appear in Part IV, but rather in Part VIII, subpart. iv, chapter 9, section A.

Edgewood Program would have required DOD to provide his name, along with the names of all other participants, to VA. The names of project participants, however, was classified until 2006. VA does not have access to a list of all classified program participants, and to provide VA with such a list would defeat the purpose of classification.

Third, to the extent that Mr. Taylor alleges that the secrecy oath, rather than the VA, deprived him of access to the VA benefits system, his argument would still fail. Mr. Taylor cannot establish that the Government undertook the secrecy oath "for the very purpose of protecting the government . . . from suit." *Harbury II*, 244 F.3d at 957. As we detail above, nothing in the record suggests that, during the Edgewood Program, the Executive Branch issued the secrecy oaths to intentionally deprive participants like Mr. Taylor of future benefits. For the same reason, Mr. Taylor cannot establish that the oath was "undue" or not sufficiently justified – the oath was not designed to preclude Mr. Taylor from obtaining benefits, but rather to protect classified information.

3. There Is No Judicial Remedy Available To Mr. Taylor (Question E)

As we detail above, *Christopher v. Harbury* instructs that a plaintiff must identify a remedy that may be awarded in an access suit. *Christopher*, 536 U.S. at 415. To the extent that Mr. Taylor establishes that the Government affirmatively interfered with his ability to access the VA benefits system and that the

interference was not sufficiently justified, the unavailability of a remedy would remain a barrier to his constitutional claim. *See* ECF No. 37 at 4 (question E). Although Mr. Taylor may identify a benefit he has lost – an earlier effective date and concomitant disability benefits – he would be unable to establish that a court may award a benefit as a remedy.

In his brief, Mr. Taylor cites prisoner right of access claims, stating that the courts have remedied violations by enjoining the enforcement of prison regulations. ECF No. 41 at 62-63 (citations omitted). He then advocates for an order constraining the VA from applying section 5110(a), as well as an instruction that he must receive an "effective date of September 7, 1971," which is the day after his separation from the Army. ECF No. 41 at 65; Appx28.

The flaw in this argument is that Mr. Taylor's requested remedy is not the enjoining of a *state prison regulation*, but rather a *Federal statute that restricts the authority to pay appropriated funds*. As we detail above, awarding an earlier effective date that predates his application for veterans' benefits causes a separation of powers conflict by infringing upon Congress' control of public money. The remedy that Mr. Taylor would seek from the right of access claim is identical – an earlier effective date in contravention of section 5110(a) – and thus suffers from an identical separation of powers problem. Accordingly, just as in *Christopher v. Harbury*, Mr. Taylor cannot state a claim because he cannot identify

a remedy that a court may award.

4. Mr. Taylor's Arguments Lack Merit

In his brief, Mr. Taylor contends that under *Christopher v. Harbury* or *Silva*, the Government denied him access to the VA benefits system. Mr. Taylor's arguments are unavailing.

First, Mr. Taylor does not establish that he has a viable claim under *Christopher v. Harbury*. He contends that, although "Title 38 serves an important role[,]" it is unenforceable against him when its provisions "deny Mr. Taylor his fundamental right of access to" the VA benefits system. ECF No. 41 at 54. Mr. Taylor then pinpoints the constitutional violation as three-fold: (1) the Executive Branch previously prevented him from seeking benefits; (2) section 5110(a) now prevents him from obtaining an earlier effective date; and (3) the VA has not provided an alternative mechanism for provision of benefits. *Id.*[10]

However, as we demonstrate above, Mr. Taylor cannot establish that a pre-2006 claim for benefits was prohibited or futile. Nor can Mr. Taylor identify an alternative benefits filing mechanism that does not defeat the point of classification. Nor can he establish that the Government undertook any action to

[10] It is undisputed that Mr. Taylor successfully applied for benefits in 2007. Thus, although his brief argues that the Government denied him access to the benefits system for 35 years, *see* ECF No. 41 at 54, we do not interpret his brief as arguing that he may have a forward-looking right to access claim.

intentionally prevent him from filing a benefits claim. Nor is there an available remedy that does not violate the separation of powers. Accordingly, Mr. Taylor cannot identify a constitutional violation under *Christopher v. Harbury*.

Second, Mr. Taylor cannot establish that the Government violated his access to the VA benefits system under the *Silva* test. Mr. Taylor, relying on *Simkins v. Bruce*, contends that his claim satisfies the *Silva* test because "the official action here was intentional and systematic." Appnt. Br. 57 (citing 406 F.3d 1239, 1242 (10th Cir. 2005). The Tenth Circuit's analysis in *Simkins*, however, did not hinge on whether the Government's action was intentional and systematic, but rather on whether the action violated applicable regulations. The court found that prison officials withheld a prisoner's mail for a year in contravention of regulations requiring the mail to be forwarded. 406 F.3d at 1243 ("defendants' own evidence demonstrates that [the prison official] intentionally held plaintiff's mail for over a year in contravention of prison regulations"); *see also Jackson v. Procunier*, 789 F.2d 307, 312 (5th Cir. 1986) (holding that a prisoner stated a claim for denial of the right to access the courts by alleging that prison officials "flagrantly violated" a prison regulation regarding mail distribution). The official action thus affirmatively interfered with the prisoner's access to the courts, and was undue – a prison regulation forbade it. Mr. Taylor's situation is readily distinguishable – as we detail above, Mr. Taylor still had access to the VA benefits system and nothing

in the record indicates that the secrecy oath was undue.

Third, there is no merit to Mr. Taylor's assertion that the secrecy oath was undue because it prohibited him from discussing the Edgewood Program within the Government. ECF No. 41 at 59.

Mr. Taylor recognizes that the Government has an interest in maintaining the confidentiality of a classified Government program and does not argue that the Government was required to permit him to discuss the Edgewood Program with anyone. *Id.* He contends, instead, that the need for confidentiality could not bar him from discussing the program within the Government, and that the restrictions placed upon him were not sufficiently tailored. *Id.* He thus argues that VA should have created procedures to permit him to seek VA benefits while preserving the Government's classified information. *Id*. at 61.

Mr. Taylor fails to establish that such procedures were necessary or required. As we explain above, the sample oath reviewed by the Veterans Court does not contain an explicit prohibition on discussing the Edgewood Program with Federal agencies such as the VA, which is consistent with the fact that other Edgewood Program volunteers petitioned VA for, and received, benefits before the declassification of the participants' names in 2006.

In any event, the Government "has a compelling interest in protecting . . . the secrecy of information important to our national security[.]" *See Snepp v.*

United States, 444 U.S. 507, 509 n. 3 (1980). And as Justice Thomas stated in his concurring opinion in *Christopher v. Harbury*, there is "no basis in the Constitution for a 'right of access to courts' that effectively imposes an affirmative duty on Government officials either to disclose matters concerning national security or to provide information in response to informal requests." 496 U.S. at 422. For the reasons explained above, however, the Court need not resolve whether the Government's interest in national security sufficiently justified the lack of an alternative VA application process for Mr. Taylor.

CONCLUSION

For these reasons, we respectfully request that the Court affirm the Veterans Court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32 (a)

This brief complies with the type-volume limitation of Federal Rule of Federal Circuit Rule 32(a). According to the word-count calculated by the word processing system with which this brief was prepared, the brief contains a total of 13,941, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

/s/William J. Grimaldi