No. 20-2086

IN THE
United States Court of Appeals for the Federal Circuit

MILITARY-VETERANS ADVOCACY INC.,

Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Review Pursuant to 38 U.S.C. § 502

CORRECTED BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE U.S. NAVY SUPPORTING PETITIONER

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-2086

Short Case Caption Military-Veterans Advocacy v. Secretary of Veterans Affairs

Filing Party/Entity Association of the United States Navy

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 04/26/2021

Signature: /s/ Sasha S. Rao

Name: Sasha S. Rao

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Association of the United States Navy		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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INTEREST OF *AMICUS CURIAE*[1]

The Association of the U.S. Navy (AUSN) is a non-profit organization advocating for Naval active-duty service members, veterans, reservists, retirees, and their families. Established after World War I as the Naval Reserve Officers Association, AUSN now advocates for a strong Navy, which includes legislative action regarding disability claims administered by the U.S. Department of Veterans Affairs (VA). AUSN's legislative priorities include "legislation surrounding the exposure of certain Navy Veterans who served near the Republic of Vietnam and investigation of what constitutes territorial seas for purposes of the presumption of service connection for diseases associated with exposure by Veterans to certain herbicide agents." SAppx251.

As advocates for the Navy and its sailors, AUSN takes an interest in its veterans' eligibility for compensation for diseases and disabilities resulting from their service. The statutory presumption of herbicide exposure was motivated by the unfairness to veterans found ineligible for benefits due to factors beyond their control: the slow development of their disability, lack of adequate contemporaneous record-keeping by the military, and the lack of a scientific

[1] The parties have consented to the filing of this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. FED. R. APP. P. 29(a)(2) and 29(a)(4)(E).

consensus around Agent Orange that would coalesce only years later. The evidentiary obstacles facing veterans has not been limited to those who served in Vietnam itself. That service members were exposed to Agent Orange outside of Vietnam is not contested by the VA and is recognized in other statutes and regulations.

Obtaining benefits to which these veterans are entitled should not itself be a battle. Yet, these veterans face numerous obstacles in obtaining compensation. First, the VA has not made eligibility criteria clear. For example, the GAO has noted that the "DOD's official list of herbicide testing and storage locations outside of Vietnam that is posted on the Department of Veterans Affairs' (VA) website is inaccurate and incomplete." Appx2165. "[T]he list lacks clarity in descriptive information and omits both testing and storage locations and additional time periods covered by testing events." *Id.* Until 2019, "the list ha[d] not been updated in over a decade, though DOD and VA ha[d] obtained reports on its shortcomings since 2006." *Id.*; Appx2267. Even then, it is unclear if the VA used an improved methodology to address the earlier deficiencies; indeed, Guam remains missing from the list. *Id.* Despite this, if a veteran determines that he or she falls within a qualifying group, that veteran must undertake the task of gathering evidence that is decades old. The rapid pullout from Vietnam and

surrounding areas and the recognized dearth of documentation makes a sufficient evidentiary showing difficult for an individual.

The rule making sought by Petitioner Military-Veterans Advocacy (MVA) removes some of the obstacles facing veterans for whom AUSN advocates. These veterans have already served this country, and it should not be incumbent on them to serve the VA by providing evidence that is difficult to show on an individual level but clearly demonstrates exposure in the aggregate. That is, they should be on equal footing and entitled to the same statutory presumption that their compatriots from Vietnam receive.

QUESTIONS PRESENTED

1. Was the Secretary's denial of MVA's petition contrary to law, where it was premised on an interpretation of the Agent Orange Act that is contrary to the statute's text, purpose, and history, as well as VA's own regulation?

2. Was the Secretary's denial of MVA's petition arbitrary and capricious, where it lacked a factual basis in the record and baselessly discounted veterans' eyewitness accounts?

SUMMARY OF THE ARGUMENT

The use and storage of Agent Orange on Guam and Johnston Island are well documented, and the Board of Veterans Appeals has repeatedly found a service connection for those who have served there. Yet, the Secretary has overlooked the volume of facts in the record and decisions made by the Board. The Secretary's characterization of these locations also minimizes their role in the greater war effort and, commensurately, their use of Agent Orange in support of the United States and allied military operations in Vietnam between 1962 and 1975.

While the Secretary overlooked key information in its rule making, the Secretary, in other instances, cites evidence that is improper to consider. Specifically, the Secretary relies on: (i) the Board's evidentiary standard itself as a reason to disregard their decisions and underlying facts; (ii) a civilian-military distinction that controlling precedent indicates supports greater access to benefits, not less; and (iii) unsupported hypothetical concerns regarding the expansion of coverage.

ARGUMENT

I. THE SECRETARY IGNORED EVIDENCE OF VETERAN EXPOSURE TO AGENT ORANGE IN GUAM AND JOHNSTON ISLAND PREVIOUSLY RECOGNIZED BY THE VA.

The current presumption of herbicide exposure for veterans' claims arising from the use of toxic herbicides in Vietnam omits veterans who played key roles in the combat missions of the Vietnam War but who undertook these efforts from Guam. The current presumption also excludes veterans stationed on Johnston Island where Agent Orange from Vietnam was stored after the U.S. government realized its health dangers. The Secretary suggests that MVA failed to establish Agent Orange's presence or use at these locations or exposure to any veterans. The history of Agent Orange use at these two locations and the VA's prior decisions finding service connection there bring into doubt whether the Secretary engaged in reasoned decision-making when rejecting MVA's proposed expansion of the presumption of herbicide exposure.

A. Guam played a key role in combat operations in Vietnam while also storing and using Agent Orange.

During the Vietnam War, Anderson Air Force Base, located in Guam, was "an important forward-based logistics support center for forces deploying throughout Southeast Asia." SAppx239 Beginning in 1964, the U.S. Air Force assigned bombers and refueling aircraft to Anderson Air Force Base to support

combat operations in Vietnam. SAppx239. At its peak in 1972, the base had more than 150 B-52 bombers and over 15,000 military personnel. SAppx239.

There is substantial evidence that Agent Orange was stored on Guam. A GAO investigation reported that "[a]vailable records show that DOD stored and used commercial herbicides on Guam, possibly including those containing n-butyl 2,4,5-T, during the 1960s and 1970s." Appx2201. Further, "draft environmental assessments written in 1999 and 2009 by Naval Facilities Engineering Command, Pacific, indicate that commercial herbicides containing [2,4-dichlorophenoxyacetic acid] were present on Guam, and that commercial herbicides containing [2,4,5-trichlorophenoxyacetic acid], which included the contaminant [2,3,7,8-tetrachlo-rodibenzo-para-dioxin],[2] had been used for weed control along power lines and substations through 1980." *Id.* The use of Agent Orange in Guam to maintain the military installation at Anderson Air Force Base undoubtedly is a use "in support of the United States and allied military operations in the Republic of Vietnam" under the current presumption statute. 38 U.S.C. § 1116(a)(3). *See also* 38 C.F.R. § 3.307(a)(6)(iii).

[2] The compound 2,3,7,8-tetrachlo-rodibenzo-para-dioxin—also known as "TCDD" or "dioxin"—is an unwanted byproduct of herbicide production and is present in Agent Orange. *Public Health: Agent Orange active ingredients and characteristics*, U.S. Dept. of Veterans Affairs (https://www.publichealth.va.gov/exposures/agentorange/basics.asp) (last visited April 22, 2021); S. REP. NO. 100-439, at 64 (1988). It is also "the most toxic of the dioxins." *Id.*

Further, the Dow Chemical Company, which had manufactured Agent Orange during the conflict, reported that "TCDD contamination as a result of Agent Orange handling has been measured at up to 1900 ppm in some areas of Anderson Air Force Base on Guam." Appx277. In comparison, "[s]afe levels of TCDD have been placed at below 1 ppb by the EPA and even lower by many state regulatory agencies (toxic effects have been measured at parts per trillion)." *Id.* The volume of TCDD found in Guam indicates significantly more than "trace levels" of Agent Orange as suggested by the Secretary. And these levels exist despite the federal government ordering a cleanup of the site after an environmental study showed "a significant amount of dioxin contamination in the soil" at the base. [Title Redacted by Agency], No. 02-11 819, Bd. Vet. App. 0527748, 2005 WL 3973369, at *2 (Oct. 13, 2005).

Further, the GAO recently noted that the "DOD and the U.S. and Guam Environmental Protection Agencies are testing for the acid form of the components of Agent Orange at Andersen Air Force Base on Guam." Appx2165. Such work would be a curious exercise should the presence of Agent Orange there really be limited to trace amounts as the Secretary suggests.

The Secretary's position that there is insufficient evidence of Agent Orange exposure by veterans who served in Guam is also at odds with the findings of the Board of Veterans Appeals, which considered many of the same documents to

establish service connections for claimants serving in Guam. *See e.g.,* [Title Redacted by Agency], No. 02-11 819, Bd. Vet. App. 0527748, 2005 WL 3973369 (Oct. 13, 2005) (finding service connection for veteran who had served in Guam, primarily in an air field often sprayed with chemicals and had "submitted copies of articles indicating that Agent Orange may have been stored and/or used on Guam from 1955 to the late 1960s" which "reflect that in the 1990s, the [EPA] listed Anderson Air Force base as a toxic site with dioxin contaminated soil and ordered clean up of the site"); [Title Redacted by Agency], Bd. Vet. App. 1311032, 2013 WL 2899313 (Apr. 3, 2013) (finding service connection for veteran who submitted the Dow Report as evidence of the presence of Agent Orange on Guam); [Title Redacted by Agency], No. 04-07 278, Bd. Vet. App. 1334753, 2013 WL 6575790 (October 30, 2013) (finding service connection for veteran who presented Dow Report and EPA reports, among others).

While not all of these Board decisions or their underlying facts were directly before the Secretary during the rule-making decision, they were constructively part of the administrative record pursuant to the constructive possession doctrine as recently clarified by this Court. *See Euzebio v. McDonough*, 989 F.3d 1305, 1319 (Fed. Cir. 2021) ("The constructive possession doctrine provides that evidence that is 'within the Secretary's control' and 'could reasonably be expected to be a part of the record 'before the Secretary and the Board,'' is constructively part of the

administrative record."). The Secretary's disregard of the findings of the Board of Veterans Appeals was improper.

B. Johnston Island housed a significant volume of Agent Orange with a history of leakage and veteran exposure.

In 1969, the Department of Defense began restricting the use of Agent Orange in Vietnam as the health effects of the herbicide became known. Appx2190-91. In 1971, the DOD ordered the termination of all crop destruction missions by U.S. forces in Vietnam. *Id.* at Appx2191. After the U.S. government restricted its use, approximately 2.3 million gallons of Agent Orange remained unused. *Id*.

In 1971, the U.S. Air Force launched Operation PACER IVY and, in 1972, began moving approximately 1.37 million gallons of Agent Orange from South Vietnam to storage on Johnston Island—an atoll located in the central Pacific Ocean. SAppx9-29. In June 1977, the DOD also shipped its remaining stocks of Agent Orange—approximately 860,000 gallons—within the continental United States to Johnston Island. Appx2178.

Due to environmental sea conditions, the steel drums storing the Agent Orange soon began to corrode and leak. Appx2186. On this island less than two miles long and less than a half mile wide, "[a]pproximately 113,400 kg of Agent Orange accidentally spilled" during redrumming in 1972 alone, and an additional "49,000 gallons per year of Agent Orange are estimated to have leaked from drums

at the Johnston Island storage site." SAppx169 (prepared statement of the Reserve Officers Association of the United States and Reserve Enlisted Association of the United States).

Appx2186 at Fig. 4.

The photo above was taken in May 1975 of drums of Agent Orange stored on Johnston Island. It is clear from this photo that these drums were open to the harsh environmental elements of the island, which resulted in their visible corrosion. *Id.*

From July 15 to September 3, 1977, after testing various forms of disposal, the U.S. Air Force decided on incineration. SAppx17-18. Named Operation PACER HO, Johnston Island's Agent Orange was loaded onto the M/T *Vulcanus*, incinerated, and disposed of just southwest of the island. *Id.*; Appx2283. However,

it took until February 1989 for the Air Force to complete a final site cleanup at Johnston Island by destroying all remaining 2,3,7,8-TCDD-contaminated soil. Appx2186.

The Secretary's position that there is insufficient evidence of Agent Orange exposure by veterans who served on Johnston Island is also at odds with the findings of the Board of Veterans Appeals, which found that veterans stationed on Johnston Island were exposed to Agent Orange while it was stored there. *See, e.g.,* [Title Redacted by Agency], No. 06-30 191, Bd. Vet. App. 0806141, 2008 WL 4319161 (Feb. 22, 2008). Significantly, the Board has held that, even if a veteran cannot establish that they were personally exposed, "there is sufficient evidence to imply that the [veteran] was at least in the vicinity of the Agent Orange herbicide" based on factual findings that "there were at least residuals of Agent Orange on Johnston Island and/or Agent Orange was stored on the island." *Id. See also* [Title Redacted by Agency], No. 09-41 467, Bd. Vet. App. 1415854, 2014 WL 2755783 (Apr. 10, 2014). For the reasons previously explained, while this Board decision and its underlying facts were not directly before the Secretary during its rule-making decision, it was constructively part of the administrative record, pursuant to the constructive possession doctrine, and merited consideration in the Secretary's analysis. *Euzebio*, 989 F.3d at 1319.

II. THE SECRETARY RELIED ON IMPROPER EVIDENCE IN ITS ANALYSIS.

This Court reviews the VA's decisions to ensure that the agency "has adequately explained the facts and policy concerns it relied on," to "satisfy ourselves that those facts have some basis in the record," and to "see whether the agency employed reasoned decisionmaking [*sic*] in rejecting the petition." *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1353–54 (Fed. Cir. 2011) (*quoting WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981) *and Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008)). The Secretary's reliance on improper evidence—i.e., an evidentiary standard in place of facts in the record, a meaningless distinction between civilian contractors and military personnel, and a resource rationale that lacks a legal or factual basis—indicates that the agency did not engage in reasoned decision making when rejecting the rule-making petition.

A. The Secretary may not use the "Benefit of the Doubt" rule as a sword against Veterans.

MVA presented the Secretary with four veteran affidavits, *inter alia*, as evidence of Agent Orange use on Guam. The Secretary dismissed one of these affidavits based on a Board of Veterans Appeals decision whose facts concerned the subject matter of the affidavit. The Secretary discounted the affidavit because the Board relied on the "benefit of the doubt" rule under 38 U.S.C. § 5107(b) to

award a direct service connection and "premised [its decision] on the 'vacuum of evidence from the government regarding herbicide usage in Guam.'" Appx5 (*citing* [Title Redacted by Agency], No. 12-05 588, Bd. Vet. App. 1420993, 2014 WL 3515272 (May 9, 2014)). This not only misrepresents the decision of the Board but also improperly uses the benefit of the doubt evidentiary standard as a sword against veterans.

As an initial matter, the Secretary misrepresents the Board's decision. First, the veteran's exposure to Agent Orange was not one of the findings of fact found to be in equipoise—so there was no need for the Board to rely on the benefit of the doubt rule. [Title Redacted by Agency], No, 12-05 588, Bd. Vet. App. 1420993, 2014 WL 3515272, at *1–2 (May 9, 2014). Second, the Board's reference to the "vacuum of evidence from the government" was simply a precursor to its conclusion that "the Veteran's competent and credible evidence describing its usage is the only probative evidence of record addressing the issue of herbicide exposure during active service." *Id.* at *4. The Board also added that the government stated "that there was no evidence of [herbicide's] usage, not that they were not used." *Id.* Indeed, the Secretary omits the Board's finding that the affiant's testimony regarding his work with Agent Orange in Guam was "both competent and credible." *Id.* The Secretary provides no reasoning for why he disagrees with the Board's assessment of the facts alleged in the affidavit itself.

Indeed, the Board's assessment enhances, not diminishes, the evidentiary value of MVA's proffered affidavit, and MVA was entitled to an analysis of the facts contained therein.

Even if the veteran's exposure to Agent Orange was a fact found to be in equipoise, the Secretary's use of the benefit of the doubt standard in its rulemaking analysis is improper. The benefit of the doubt rule refers to a statutory provision that provides that "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b). The benefit of the doubt rule sets forth an "equality of the evidence" standard as to persuasive weight. *Skoczen v. Shinseki*, 564 F.3d 1319, 1324 (Fed. Cir. 2009). Like the "preponderance of the evidence" and "clear and convincing" standards before it, this statute provides another point along a spectrum of evidentiary standards. It provides a means by which to weigh facts; it is not itself a fact in the record that may serve as a basis for reasoned decision-making.

When the Secretary construes the Board's use of the benefit of the doubt rule as proof that the evidence presented was not more favorable to the claimant, he reads in a different evidentiary standard than the one created by statute and one that is directly at odds with its intent. *See Jackson v. Wilkie*, No. 18-6287, 2020 WL 1518270, at *3 (Vet. App. Mar. 31, 2020) (finding the Board erred by

applying an "unclear evidentiary standard" where "the Board specifically found that the EPA and HHS reports [claimant] submitted were not 'conclus[ive]' evidence that he was directly exposed to herbicides, including Agent Orange."). "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990) (*quoting Santosky v. Kramer*, 455 U.S. 745, 754–55 (1982)). In creating the benefit of the doubt rule, "society has through legislation taken upon itself the risk of error when, in determining whether a veteran is entitled to benefits." *Gilbert*, 1 Vet. App. at 54 ("This unique standard of proof is in keeping with the high esteem in which our nation holds those who have served in the Armed Services"). The Secretary's use of the Board's application of the benefit of the doubt rule in a decision otherwise favorable to the veteran as proof of the insufficiency of the evidence proffered by that veteran flips this legislative intent on its head.

Further, an evidentiary standard does not substitute for the Secretary's own obligation to engage in "reasoned decision making" and to rely on facts that "have some basis in the record." *Preminger*, 632 F.3d at 1353-54. Here, the Secretary has spun the positive outcome for the affiant in the cited Board decision into a negative one for MVA by focusing on the evidentiary standard rather than the underlying

facts. The Board's precedent requires it to consider the underlying facts of prior decisions cited by the claimant, and there is no principled reason for why the Secretary can disregard this well-founded practice during rulemaking. *See Malinowski v. Gibson*, No. 13-0016, 2014 WL 2768851, at *5 (Vet. App. June 19, 2014) (the Board must provide adequate explanation for why it will not consider a prior Board decision cited by the claimant and consider the facts of that decision). Whether a prior Board decision implicates the benefit of the doubt rule does not absolve the Secretary from considering that decision's underlying facts, particularly when those facts had been deemed "competent and credible" by the Board.

Finally, ignoring the *disposition* of a prior proceeding because it relied on a particular evidentiary standard is also improper. As other areas of law show, a different evidentiary standard does not silo the factual findings of one proceeding from another when the same issues and evidence are involved. *See, e.g., XY, LLC v. Trans Ova Genetics,* 890 F.3d 1282, 1294 (Fed. Cir. 2018) ("an affirmance of an invalidity finding, whether from a district court or the [PTAB], has a collateral estoppel effect on all pending or co-pending actions."); *Fresenius USA, Inc. v. Baxter Int'l, Inc*., 721 F.3d 1330, 1344 (Fed. Circ. 2013) (rejecting the notion "that because different standards apply in a PTO reexamination and a validity proceeding before the district court, the patent's invalidation in a reexamination

does not have collateral estoppel effect"). While not all Board decisions are precedential, the Board's own cases requires that a decision not to consider a related decision be "adequately explained." *See Malinowski*, 2014 WL 2768851 at *5. The Secretary's failure to do so is inconsistent with his agency's practice.

B. Civilian contractor control does not obviate facts showing veteran exposure to Agent Orange on Johnston Island.

The Secretary does not disagree that Agent Orange was stored on Johnston Island from 1972 to 1977. Appx7; Bl. Br. at 11–14. Nor does he disagree that "[d]rum leakage did occur, due to degradation of the metal drums under the environmental conditions of the island." *Id.* However, the Secretary argues that one reason the VA will not extend a presumption of herbicide exposure to veterans who served on Johnston Island is that "[c]ivilian contractors, not military personnel, were responsible for site monitoring and re-drumming/de-drumming activities." *Id.* at 12–14. The Secretary errs in this argument.

First, civilian contractor handling of Agent Orange was not unique to Johnston Island. In South Vietnam, "[m]ost of the personnel involved in the actual handling of herbicide drums were Vietnamese." SAppx17. The civilian-military dichotomy does not provide a meaningful distinction for the locations at issue in the rule-making petition.

Second, even if only civilian contractors were involved in site monitoring and re-drumming activities, it does not follow that only civilian contractors were

exposed to Agent Orange. The Secretary offers that "[i]f evidence shows that a particular Veteran was directly involved with the storage site or other activities directly associated with Agent Orange on Johnston Island, *exposure to Agent Orange may be conceded*." Appx9 (emphasis added). The findings of the Board of Veterans Appeals in several instances satisfies this challenge. *See e.g.,* [Title Redacted by Agency], No. 02-11 819, Bd. Vet. App. 0527748, 2005 WL 3973369 (Oct. 13, 2005) (noting "significant amount of dioxin contamination in the soil" of Anderson Air Force base and finding service connection for a veteran who claimed to work in the air field, which was frequently sprayed with chemicals); [Title Redacted by Agency], No. 04-07 278, Bd. Vet. App. 1334753, 2013 WL 6575790, at *4 (October 30, 2013) (finding service connection for a veteran whose job required him "to go into the drum lot where the herbicides were stored to count them periodically"). Given the island's heavy involvement in storing Agent Orange, there is no logical reason for the Secretary to not extend this concession more broadly.

Third, to the extent that the Secretary's civilian-military distinction suggests that civilian management of Agent Orange on Johnston Island absolved the VA from compensating veterans under the Veteran's Benefit Act, that conclusion is contrary to established law. The government's immunity from service member's tortious injury claims and from third-party contractor indemnity claims is founded

upon the availability of compensation through the Veterans' Benefits Act. *Stencel Aero Engineering Corp v. United States*, 431 U.S. 666, 671 (1977) ("the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government."); *United States v. Johnson*, 481 U.S. 681, 689–90 (1987). That is, the Supreme Court closed off recovery of damages through a tort action brought by service members against the federal government because of the ostensible availability of compensation for such injury through the Veterans' Benefits Act. Nor can veterans seek compensation from civilian contractors themselves without overcoming the Government contractor defense. *Hercules Inc. v. United States*, 516 U.S. 417, 421-22 (1996) (the Government contractor defense "shields contractors from tort liability for products manufactured for the Government in accordance with Government specifications, if the contractor warned the United States about any hazards known to the contractor but not to the Government."). Thus, "the statutory veterans' benefits 'provid[e] an upper limit of liability for the Government as to service-connected injuries.'" *Johnson*, 481 U.S. at 690.

The Secretary argues that these service members could simply file an individual claim without the benefit of the presumption. Appx9. However, the Secretary's rule-making decision unduly elevates the hill a veteran must climb to

recover for tortious actions by the government or a civilian contractor on its behalf. In 2010, the Secretary testified before Congress that some of the motivations behind the statutory presumptions are that "evidence at that time did not clearly link Agent Orange to any specific illness" and "condition manifests at a time remote from service." SAppx67 (statement of Eric K. Shinseki, Secretary of Veterans Affairs). In addition, "[a]rmy troop records from the Vietnamese conflict were neither complete nor well-organized because of the Army's rapid pullout from Vietnam." SAppx4. Further, "[r]eliable estimates of the magnitude and duration of such exposures are not possible in most cases, given the lack of contemporaneous chemical measurements, the lack of a full understanding of the movement and behavior of the defoliants in the environment, and the lack of records of individual behaviors and locations." SAppx217. These difficulties are not limited to service in Vietnam and are what the veteran faces to establish a service connection without the benefit of the presumption that MVA seeks.

C. The slippery slope argument raised by the Secretary is improper and lacks a rational basis in the facts.

The Secretary argues that "[e]xpanding the regulation as [MVA] urge[s] would leave no principled reason why all military personnel throughout the United States and the world whose bases engaged in standard vegetation and weed control or contained trace amounts of dioxin would not qualify for a presumption." Appx4.

But it is unclear that any real harm awaits at the bottom of this supposed slippery slope.

The VA now agrees that accidents of geography should not determine whether the presumption of Agent Orange exposure applies. For purposes of this presumption, the regulations define "Service in the Republic of Vietnam" to include "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(e)(6)(iii). Further, during the notice-and-comment period for a proposed amendment to the adjudication regulations concerning the presumptive service connection for certain diseases, the VA commented that the agency "wish[ed] to make clear that the presumptions of service connection provided by this rule will apply to any veteran who was exposed during service to the herbicides used in Vietnam, *even if exposure occurred outside of Vietnam*." SAppx33 (emphasis added). That is, if veterans show exposure to an herbicide used in Vietnam (e.g., Agent Orange), the VA's stated position was that those veterans would be entitled to the presumption of service connection even if exposure occurred outside of Vietnam.

If the end of the slippery slope of which the Secretary warns is a lack of VA resources to compensate veterans eligible under the new rules, such a consideration is improper. The VA, as acknowledged by the Secretary before Congress, "does

not . . . weigh the potential economic impact of [the Secretary's] decision to establish a presumption under [the Agent Orange Act]."SAppx69 (statement of Eric K. Shinseki, Secretary of Veterans Affairs).

And, even if costs associated with a new presumption were an appropriate consideration, the Secretary fails to articulate a factual basis for his fears of expanding the presumption to encompass "all military personnel throughout the United States and the world whose bases engaged in standard vegetation and weed control or contained trace amounts of dioxin." Appx4. It is not enough to simply warn of an increased number without providing a measure of that increase. It is unsurprising that the Secretary does not quantify this increase given the difficulty of the task. "Reliable estimates of the magnitude and duration of such exposures are not possible in most cases, given the lack of contemporaneous chemical measurements, the lack of a full understanding of the movement and behavior of the defoliants in the environment, and the lack of records of individual behaviors and locations." SAppx217. Yet, these are the same difficulties faced by veterans in the absence of the expanded presumption sought by MVA. The Secretary's fears are undefined and cannot constitute a sound factual basis for reasoned rule making.

Nevertheless, those records that do exist indicate only a marginal increase in the number of claimants resulting from the proposed presumption expansion. Agent Orange exposure in Vietnam provides such an example. From 1962 to 1971,

the U.S. Air Force sprayed 11 million gallons of Agent Orange in Vietnam. In comparison, only 1.6 million gallons of herbicide "was applied to base perimeters, roadways, and communication lines by helicopter and surface sprayings from riverboats, trucks, or backpacks." SAppx174, SAppx214. Other studies of the use of Agent Orange provide an even lower number. The GAO has reported that only two percent of the Agent Orange in Vietnam was used around base perimeters, cache sites, waterways, and communication lines. SAppx1-8.

The Secretary also specifically singles out the potential eligibility of veterans who served in the United States during the war in Vietnam. On its website, the VA lists locations where Agent Orange was tested, disposed of, or stored in the U.S. *See* "Herbicide Tests and Storage in the U.S.," U.S. Dept. of Veterans Affairs, https://www.publichealth.va.gov/exposures/agentorange/locations/tests-storage/usa.asp (last accessed April 22, 2021). From this information, a rough estimate of total potential domestic Agent Orange exposure can be derived. The averages of U.S. Census population data from 1960 and 1970 were pulled for the population centers that encompass or are closest to these locations. *See* Fig.1, Census Data for Relevant Locations**,** *infra* p. 27. To be conservative, the data admittedly over-counts the number of veterans in those areas, and therefore significantly overestimates the number of veterans exposed to Agent Orange. Even

with that generosity, the total population potentially exposed between 1960 and 1970 amounts to only approximately 270,330 people. *Id.*

Fig. 1: Census Data for Relevant Locations

Location	Use/Storage Years	closest town or city	1960 census town/metro area	1970 census town/metro area
US Army Gulf Outport, Port of Mobile, AL	1965-1968	Prichard	47,371	41,578
Fort Chaffee, AR	1967	Fort Smith/ Fayetteville	52,991	62,802
Avon Park Air Force Range*, FL	1967	Avon Park	6712	6073
Eglin AFB, FL	1962-1966, 1968-1969	Eglin/ Valparaiso City*	0/5975	7769/6504
National Forest, FL	1967	Apalachiocola City	3102	3099
Fort Gordon, GA	1967-1968	Grovetown	3169	1396
Aberdeen Proving Ground, MD	1963, 1965, 1969	Aberdeen Proving Ground/ Aberdeen*	0/9,679	7,403/12,375
Fort Detrick, MD	1960-1963, 1967-1970	Frederick City	21,744	23,641
Fort Meade, MD	1963-1964	Fort Meade/ Annapolis City*	0/23,385	16699/29592
Naval Construction Battalion Center, Gulfport, MS	1968-1977	Gulfport	40,791	30,204
Kelly AFB, TX	1970	Southwest Bexar division (of San Antonio)	34137	71973
Dugway Proving Ground, UT	1964	Dugway**	0	2357
		TOTAL (avg. of 1960 & 1970 data):		**270330**

*closest town/city that had population data

** no other cities or towns near the location of this base

Sources: census reports found at:
https://www.census.gov/prod/www/decennial.html#y1960;
https://www.census.gov/prod/www/decennial.html#y1970

In contrast, the number of pending veteran benefits claims as of April 17, 2021 is 471,111. Veterans Benefits Administration Reports, U.S. Dept. of Veterans Affairs, https://www.benefits.va.gov/reports/detailed_claims_data.asp (last accessed April 22, 2021). Further, "VBA currently serves nearly 5.2 million Veterans and survivors who receive either compensation or pension benefits." *Id.* Relative to the numbers of claims the VA already handles, the increase in claims feared by the Secretary is nominal, even with the most inclusive estimate.

CONCLUSION

AUSN respectfully requests that this Court grant MVA's petition, set aside the Secretary's denial, and remand for rulemaking.

Dated: April 26, 2021

Respectfully Submitted,

/s/ Sasha S. Rao

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FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 20-2086

Short Case Caption: Military-Veterans Advocacy v. Secretary of Veterans Affairs

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