UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

17-1821

ALFRED PROCOPIO, JR.,
Claimant-Appellant

v.

DAVID J. SHULKIN, MD,
Secretary of Veterans Affairs,
Respondent.-Appellee

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, 15-4082, JUDGE PIETSCH

ORIGINAL REPLY BRIEF OF APPELLANT ALFRED PROCOPIO

ATTORNEY FOR APPELLANT

John B. Wells
Military-Veterans Advocacy
LA Bar #23970
P. O. Box 5235
Slidell, LA 70469-5235
769 Robert Blvd, Suite 201D
Slidell, LA 70458
985-641-1855
JohnLawEsq@msn.com

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Statement of the Case

The parties generally agree on the Statement of the Case with the following exceptions.

On page 5 of the opposition the Secretary incorrectly contends that "[t]he General Counsel explained, however, that the phrase "served in the Republic of Vietnam" applies to veterans who served on land and in Vietnam's inland waterways, but does not to apply to veterans who served on deep-water vessels off the Vietnam coast and who were never physically present on Vietnamese soil." In actuality, what the General Counsel said was "we conclude that service on a deep-water vessel in waters off the shores of Vietnam may not be considered service in the Republic of Vietnam for purposes of the definition of "Vietnam era" in 38 U.S.C. § 101(29) as amended by section 505 of the VBIA." Prec. Op. 27-97, *Service in the Republic of Vietnam for Purposes of Definition of Vietnam Era – 38 U.S.C. § 101(29)(A)* (July 23, 1997) ¶6. The General Counsel then when on to conclude as follows:

> In any event, the regulatory definition in 38 C.F.R. § 3.307(a)(6)(iii), which permits certain personnel not actually stationed within the borders of the Republic of Vietnam to be considered to have served in that Republic, requires that an individual actually have been present within the boundaries of the Republic to be considered to have served there, through inclusion of the requirement for duty or visitation in the Republic.

Id. at ¶8. Nowhere in the opinion did the General Counsel say that a veteran must touch on land or enter the "inland waterways." Instead the conclusion was that the veteran must have served within the boundaries of the Republic [of South Vietnam] which would include the territorial seas.

In a footnote on page 7 (note 4) the Secretary contends that veterans can receive compensation by satisfying the requirements of direct exposure. In fact, the VA refuses to grant compensation under direct exposure without direct and actual conclusive evidence of such exposure. Direct exposure compensations are few and far between.[1]

On page 13 the Secretary argues, in reference to the *Veterans and Agent Orange Update 2008* (Update 2008). that "The 2008 update did not, however, contain a detailed discussion of the scientific evidence related to exposure of veterans serving offshore." Actually it did, but the discussion appeared on a different page cited by the Secretary. The Committee noted:

> With respect to the Blue Water Navy issue, the AFHS [Air Force Health System] data documented that herbicide spraying did not occur solely in Vietnam and did not affect only those deployed to Vietnam. Serum TCDD results from the AFHS demonstrate that the Ranch Hands in general were, indeed, more highly exposed than the SEA veterans, but the SEA [South East Asia] veterans had serum

[1] One exception to this was Jonathan Haas of *Haas v. Peake* fame. Evidence shows that his ship was enveloped by a cloud that drifted from shore to his ship.

> TCDD concentrations that tended to exceed background values in the US population.

Id. at 120.

The Committee went on to note:

> Having reviewed the Australian report (NRCET, 2002) on the fate of TCDD when seawater is distilled to produce drinking water, the committee is convinced that this use of seawater would provide a feasible route of exposure of personnel in the Blue Water Navy, which might have been supplemented by drift from herbicide spraying.

Id. at 655. The Committee went on to note that based on studies by the Center for Disease Control found that the highest incidence and most significant risks for Agent Orange related Non-Hodgkins Lymphoma, was among the Blue Water Navy veterans. *Id.* This is consistent with the cancer incidence study completed by the Australian Department of Veterans Affairs which found a cancer increase of 22-26% above the norm for Australian shipboard veterans compared with an 11-13% increase above the norm for ground force personnel. Appx122.

Additionally, the Committee engaged an expert environmental chemist, Dr. Stephen Hawthorne, to review the matter. Hawthorne concluded that the Australian studies were correct, noting Henry's law of thermodynamics. *Id* at. 55. Appx93.

On page 14 of his opposition, the Secretary also provides an incomplete

quote from the report *Blue Water Navy Vietnam Veterans and Agent Orange Exposure*, Institute of Medicine (The National Academies Press, 2011) (2011 IOM Report). While the report did say that the Committee "was unable to state with certainty that Blue Water Navy personnel *were or were not* exposed to Agent Orange and its associated [Tetrachlorodibenzodioxin or TCDD]," this comment is taken out of context. The Committee also found that adequate exposure information was unavailable for brown water and land based forces as well as blue water sailors. The Committee noted:

> Furthermore, the committee concludes that because of the small number of studies and their limitations, there is no consistent evidence to suggest that Blue Water Navy Vietnam veterans were at higher or lower risk for cancer or other long-term adverse health effects associated with Agent Orange exposure than shore-based veterans, Brown Water Navy veterans, or Vietnam veterans in other branches of service.

Id. at 14. This is consistent with the Committee's conclusion that "it could not state with certainty that exposures to Blue Water Navy personnel, taken as a group, were qualitatively different from their Brown Water Navy and ground troop counterparts." In other words, the chances of exposure were equal.

In their opposition at 14, the Secretary states that the Committee found more plausible pathways of exposure for ground troops than Navy veterans. While technically true it is also irrelevant since only one pathway is necessary. The

Committee went further however and noted: "One exposure mechanism is specific to Blue Water Navy ships: possible TCDD contamination of potable water from shipboard distillation plants." *Id.* at 133.

Notably the Secretary did not contest, and presumably accepts the information provided in the opening brief demonstrating the dioxin's infiltration into the South China Sea and the hydrological evidence showing contamination of the territorial seas. Nor did they contest the findings of the Australians and two separate committees of the Institute of Medicine that the distillation process enriched the Agent Orange dioxin. 2011 IOM Report at 131-133. *See, also,* Appx83.

Summary of the Argument

The Secretary's brief ignored and failed to discuss the body of scientific evidence cited in the opening brief. Ignoring the laws of science and common sense, the VA merely tries to debunk the issues by relying on esoteric points of law, cherry picking their way through the IOM reports and confabulating the positions of those who support compensation and medical relief of 90,000 sick and dying veterans.

The Secretary further tries to use the *Haas v. Peake* decision, to bootstrap a non-existent precedent that applies to the territorial seas. While scientific

evidence shows that the dioxin entered the open ocean, the possibilities for dissipation were greater than the in the harbors. However the territorial seas generally follow the 30 fathom curve. Maritime operations in this shallow water would consistently churn the seabed causing any emulsified dioxin to rise to the service. Additionally, off the Mekong River, where the *Intrepid* entered the territorial seas, the discharge plume, or estuary as it is also known, would extend for hundreds of kilometers.

The Secretary ignored the fact that the IOM found no more or less evidence to support exposure among the blue water sailors than among the brown water seamen or ground troops. This effectively gives rise to the question of how the exclusion of those sea service members who did not have "boots on the ground" is anything but irrational. While Navy personnel serving in the bays and harbors of Vietnam do not give rise to a protected class for Equal Protection purposes, their exclusion certainly meets the arbitrary and capricious standard. This is especially true given the scientific studies by the Australian government and the Center for Disease Control showing a greater risk of Agent Orange related diseases among naval personnel who did not set foot on shore.

The bottom line is that the plight of the 90,000[2] uncovered veterans is not an issue of science. It never was. It is a policy issue adopted by the Secretary almost two decades ago. This policy was an incorrect reading of the statute by the Secretary, who ignored binding precedent and international law to impose an irrational limitation on Vietnamese sovereignty. *Haas* is not at play here since it addressed the Vietnam Service Medal demarcation line which extended farther than the territorial seas.[3] Appx94.

Argument

Standard of Review

The parties generally agree on the stand of review except as discussed herein.

Argument

I. The Federal Circuit Decision in *Haas v. Peake,* 525 F.3d 1168 (Fed. Cir. 2008) *reh'g denied Haas v. Peake*, 544 F.3d 1306, 1310 (Fed. Cir 2008) Was Wrongly Decided and Should Be Overruled.

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[2] The Congressional Research Service found that 174,000 Naval veterans deployed on ships to the territorial seas of South Vietnam. Through the use of deck logs, veterans were able to prove that 84,000 of these veterans touched land or entered the internal river system. The Congressional Budget Office (CBO) in estimating the ten year cost of coverage as $1.1 billion for the bays, harbors and territorial seas agreed with these numbers.

[3] The outboard bold line is the Vietnam Service Medal Area. The inboard line reflects the baseline and the territorial seas, not clearly visible, is 12 nautical miles outboard of the baseline.

A. The Holding in *Haas* is Undermined By Additional Information Not Available to that Court.

Here the Secretary relies on technical and procedural rules to support his position that *Haas v. Peake,* 525 F.3d 1168 (Fed. Cir. 2008) *reh'g denied Haas v. Peake*, 544 F.3d 1306, 1310 (Fed. Cir 2008) should not be overruled. They cite to Fed. Cir. Rule 35 for the proposition that *en banc* consideration is appropriate only when the issue is contrary to Supreme Court or Federal Circuit decisions and/or asks one or more precedent-setting questions of exceptional importance. In this case, both tests are met.

Veteran Procopio has carefully explained that *Haas* is in conflict with *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct. 1197, 1206 (2011), *United States. v. Alaska*, 521 U.S. 1 (1997), *United States v. California,* 381 U.S. 139 (1965) and *United States v. Louisiana*, 394 U.S. 11 (1968). Specifically, as explained in the opening brief, *Haas* was not decided pursuant to the pro-veterans canon re-affirmed by *Henderson*. Despite the government's attempt to dodge the issue, the *Haas* court itself confirmed that the pro-veteran protocol was not followed. *Haas v. Peake*, 544 F.3d at 1309. Additionally, the holding in *Haas* flies in the face of the maritime boundary disputes decided by the Supreme Court.

It is hard to understand how the issues in this case could not be a matter of

exceptional importance. Many of the 90,000 veterans exposed to Agent Orange are sick and dying. They, along with their families, have had their claims for medical attention and compensation denied or discouraged because of *Haas*. They consider this to be of exceptional importance.

The Secretary denigrates the new evidence that has been discovered since *Haas* was decided and argued that new evidence is not a sufficient basis to overrule *Haas*. Apparently the Secretary is arguing that this Court should preserve an injustice in the face of evidence which proves the original decision incorrect. That argument is preposterous. There is nothing to prevent this or any other court from reconsidering precedent when there is new evidence that the original decision was wrong.

Here proof that the VA concerns about the Australian distillations studies were without merit coupled with evidence of dioxin infiltration into the territorial seas and in the path of the *Intrepid* is certainly a compelling reason to overrule precedent. *Stare decisis* is an important part of our law but it is not absolute. As the Supreme Court of the United States has said:

> *Stare decisis* is instead a "principle of policy." When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions decided against the importance of having them *decided right*. As Justice Jackson explained, this requires a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of

> practical effects of one against the other."
>
> In conducting this balancing, we must keep in mind that *stare decisis* is not an end in itself. It is instead "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." Its greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 378, 130 S. Ct. 876, 920–21 (2010). (Citations omitted - emphasis in original).

Although later claiming that the VA "explanation" in the Federal Register proposed rule could not be attacked, the Secretary quotes it with approval in his brief at 28. The fact remains, that proposed rule never became final and should not have been relied upon. Of equal importance the proposed rule was widely debunked. Appx53-73. The notice was not only null it was erroneous. While *Haas* embraced the Federal Register notice they did not have the benefit of its criticism nor new evidence not available to the VA at the time the proposed rule was drafted.[4] *See generally, Haas,* 525 F.3d at 1194, 73 Fed. Reg. at 20,568 (Apr. 16, 2008)).

The Secretary goes on to argue that *Haas* should not be disturbed due to the

[4] As noted in the opening brief at note 6, the VA has since conceded the scientific reliability of the Australian distillation study.

"simple but undisputed fact – that spraying was done on land, not over the water." Appellee brief at 28. The problem with the Secretary's analysis is that the facts are neither simple nor undisputed. Spraying was done over water. Appx91. Additionally, the dioxin infiltrated into the bays, harbors and the South China Sea. Appx87-90, Appx93, Appx95-98. The findings of the Institute of Medicine confirm this proposition.

> [I]t seems likely that vessels with such distillation processes that traveled near land or even at some distance from river deltas would periodically collect water that contained dioxin. Thus, a presumption of exposure of military personnel serving on those vessels is not unreasonable.

Appx93. The conclusions of Dr. Robinson Hordoir, a noted hydrologist who performed studies on the Vietnamese rivers are even more telling.

> Ships anchored or operating off the coast and in the territorial seas of southern Vietnam would have been within the plume of the Mekong and other rivers. The phenomena would be greatest off the Mekong Delta due to the force of the river discharge and the length of the plume.

Appx96. Notably, the deck logs show that at the point the *Intrepid* entered the territorial seas of the Republic of Vietnam, the ship was off the Mekong River. Appx32, Appx49-52.

Nor should the Secretary's "cherry-picked" statements of the 2011 IOM report be considered without context. As discussed *supra*., the same IOM report

found that there was no more or less evidence to support Blue Water Navy veterans than those who served ashore or in the river system. The fact that there were fewer pathways of exposure for Blue Water Navy veterans is irrelevant. This is especially true in light of the IOM's findings that there was a unique pathway via infiltration from the river systems and wind drift. *See* 2011 IOM report at 13-14 and 133.

Curiously, the Secretary claims without authority that Mr. Procopio did not serve in the esturaine waters and that, accordingly, the various studies by the Australians and the Institute of Medicine do not apply. Appellee brief at 27, 44 (n. 16) and 54. This assertion only proves that, along with many other nautical concepts, the Secretary has no idea what he is talking about. He obviously does not understand the concept of estuarine waters. An estuary is not measured by distance from land. The term estuary is defined by statute as follows:

> The term "estuary" means a part of a river or stream or other body of water that has an unimpaired connection with the open sea and where the sea water is measurably diluted with fresh water derived from land drainage.

33 U.S.C. § 2902

The statutory definition describes the discharge plume area where Mr. Procopio was exposed. Dr. Hoirdoir noted that the phenomena was greatest off the Mekong where Mir. Procopio served. Appx96 at ¶6. Dr. Hoirdoir opined that

the territorial seas off the Mekong Delta were heavily influenced by the Mekong's freshwater outflow. Appx96-97 ¶9. He went on to note that half to three quarters of the territorial seas off the Mekong Delta was water from the Mekong River. Appx97 at ¶10. In other words, when the *Intrepid* entered the territorial seas, she was in an estuary.

Dr. Hoirdoir is supported by other studies. Appx102-109. The Mekong's plume or estuary, extended for hundreds of kilometers into the South China Sea. Appx107. Dioxin traveled along this and other estuaries for miles. Another study revealed that Agent Orange dioxin, which was dumped into the Passaic River, was found in seafood 150 nautical miles from shore. Appx110. If, as the Secretary implies, dioxin exposure should be presumed in esturaine waters, then he has conceded Mr. Procopio's case.

The Secretary would have the Court adopt a mechanical policy of affirming *Haas* in the face of compelling evidence that it was wrongly decided. As the Supreme Court said in *Citizens United*, the important principle is not to sustain precedent but to ensure it was "decided right." The *Haas* court did not have all of the facts or evidence before them. They also relied, as did the Board of Veterans Appeals, on an erroneous proposed rule that was never formally enacted. Accordingly, *Haas* cannot and should not stand.

B. The *Haas* Court Did Not Correctly Apply the Law of the Sea to the Definition of "Service In the Republic of Vietnam.

Although the Secretary argues in his brief at 29, that the prevailing methods of determining sovereignty do not undermine the critical holding of *Haas,* they are not correct. Despite their protestations to the contrary, *Haas* did not conclusively hold that the law of the sea should not define what constitutes "service in the Republic of Vietnam." To the extent that it might be read as such, this Court should clarify the applicability.

In actuality, the General Counsel's opinion that started this tragedy was somewhat misread by the Secretary. Nothing in that opinion limited the presumption to those who touched land. In that respect, the "boots on the ground" nickname is completely fallacious. The General Counsel's opinion, the statute and the Code of Federal Regulations merely stated that a veteran had to serve within the boundaries of the Republic [of Vietnam]. Prec. Op. 27-97 ¶8. So the pertinent question, not decided by *Haas*, is what constituted the boundaries of the Republic of Vietnam.

Here the Secretary relies upon *dicta* rather than a holding to try to circumvent established national and international law. In denying the request for rehearing, *Haas* did not formally reject the fact that the territorial seas were included within the territory of Vietnam. They questioned but did not invalidate

its applicability. *Haas*, 544 F.3d 1306, 1309 (Fed. Cir. 2008). With a proper reading of the General Counsel's opinion along with the recognition of Vietnamese sovereignty over their territorial seas in the 1954 Geneva Accords and the 1973 Paris Peace Treaty, there can be no argument that the statute encompasses those who served in the territorial seas.[5] Despite the Secretary's assertion to the contrary, (See Appellee Brief at 29) these factors combined with the Convention on the Territorial Sea and Contiguous Zone, [1958] 15 U.S.T. 1607, T.I.A.S. No. 5639 are not additional factors for defining sovereignty. They, in consonance with, *United States. v. Alaska*, 521 U.S. 1 (1997), *United States v. California,* 381 U.S. 139 (1965) and *United States v. Louisiana*, 394 U.S. 11 (1968) are the only factors for determining the reach of a sovereign nation.

In their brief at 29, Appellee also argues that there was nothing to indicate that "Congress intended to designate one of the competing methods of defining the reaches of a sovereign nation." This argument is without merit. First of all, there are no "competing" methods of defining sovereignly. This is well established in national and international law. Congress is presumed to know the existing law and to incorporate it into new law. *Cannon v. University of Chicago,* 441 U.S.

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[5] The applicability of the Geneva Accords and the Paris Peace Treaty as well as the Joint interpretation of the boundary twelve miles off the baseline, discussed in the opening brief, were not presented to or argued before the *Haas* court.

677, 696–699 (1979), *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 554 (1995); *Washington Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994). Thus there is no requirement to specify any departure from existing and accepted law.

Nor does the Secretary's claim that the proper definition of the scope of the presumption should rest with the Congress or the Courts instead of the VA have any merit. (Appellee brief at 30). Certainly the question of the boundaries is not just relevant but determinative given the General Counsel's assertion that Congress intended for the presumption to apply to those who served within the boundaries of the Republic of Vietnam. Prec. Op. 27-97 ¶8.

Nor can it fairly be said that the VA demarcation line is reasonable. *Haas* never drew the line. It never addressed the bays and harbors. Nor did it address territorial seas or estuarine waters. It addressed the VA's decision to eliminate the presumption for the entire Vietnam Service Medal area.[6]

Appellee further tries to marginalize the impact of *Gray v. McDonald*, 27

[6] The original Vietnam Service Medal area is shown by the bold line in Appx94. The territorial seas is a much narrower area. The northern part of that area was properly excluded as it was not within the boundary of the Republic of Vietnam. Additionally, hydrologists have not been able to say with certainty that other than the area off the Mekong River, the deeper waters outboard of the territorial seas were contaminated.

Vet. App. 313 (2015) on the instant case. The Secretary is correct that *Gray* does not affect the territorial seas. Unfortunately they are misreading the purpose of the citation. *Gray* is cited for two reasons: (1) to show that the VA line drawing did not consider the probability of exposure but was an arbitrary line drawn at the whim of a bureaucrat and (2) that the fresh water from the rivers and the salt water from the sea mix in what is known as a discharge plume or otherwise described as esturaine waters.

In other words, both *Gray* and *Haas* stand for the presumption that the correct line of demarcation is somewhere between the coastline and the Vietnam Service Medal area. Scientifically, legally and morally that line should be drawn at the border of the territorial seas.

II. The Federal Circuit Decision in *Haas v. Peake,* 525 F.3d 1168 (Fed. Cir. 2008) *reh'g denied Haas v. Peake*, 544 F.3d 1306, 1310 (Fed. Cir 2008) is Not Controlling.

A. *Haas* Must Be Limited to its Facts Because it Was Not Decided in Accordance with the Accepted Canons of Construction for Veteran's Cases Pursuant to *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct. 1197, 1206 (2011).

The Secretary correctly states that this Court should adopt a post-*Henderson* rule that reaffirms the requirement that VA actions need to be viewed through the pro-veteran canon. This is in keeping with *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1965). Additionally, the Secretary correctly noted

that Mr. Procopio does not believe excessive deference is required when, as here, the action is unreasonable. This does not violate *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) as the Supreme Court noted that a court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency. *Id*. at 844. (Emphasis added).

After restating the state of the law, which favors Appellant, the Secretary tries to argue that the Court should not apply that precedent. In his brief at 34, the Secretary misrepresents the *Haas* holding claiming that the court specifically held that the pro-claimant doctrine did not conflict with the "boots on the ground" rule. What *Haas* actually said was that the Appellant in that case waived the argument since it was not raised in the court below. *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008). As discussed in the opening brief, Appellant has carefully protected that argument.

The Secretary's argument that the VA interpreted the statute in a pro claimant manner by allowing coverage for anyone who set foot on land, even for a short period of time, is simply preposterous. As a threshold matter, until the revised M-21 Manual was issued in 2002 the VA granted the presumption to everyone who entered the Vietnam Service Medal area. So they actually restricted

eligibility. More importantly, unreasonably restricting a benefit because they could have restricted it even more is not a pro-claimant action. The fact is that the intent of Congress, as noted by the Veterans Court in *Gray*, was to extend the presumption based on the likelihood of exposure. Arbitrarily and unreasonably drawing a line rather than using reasoned judgment is not the type of pro-claimant action envisioned by Congress or the Supreme Court.

While the *Haas* court did theorize that extending the presumption could cause processing difficulties, that was mere dicta. The deck logs of the ships are available from the National Archives. Some are actually on line. These logs show the position of the ships and the VA, through their duty to assist, can furnish the logs to the claimant. As indicated herein, some ships, such as the *Intrepid*, clearly log it when they enter the territorial seas. Appx49-52. The time a ship enters or leaves a harbor is always logged. In the remaining cases, the ship's location can be easily plotted on a navigational chart. This is not a case such as *Sears v. Principi*, 349 F.3d 1326, 1330 (Fed. Cir. 2003) in which the statutory framework can be judged solely by whether it is pro-claimant. In the instant case, all available evidence supports the fact that any ship operating in the territorial seas operated in the estuary or the discharge plume of a river in waters that were polluted by the dioxin. Consequently, contaminated water was constantly ingested

into the shipboard distillation system.[7]

Henderson did not specifically overrule *Sears*, but then *Sears* was not before the Court. What *Henderson* did was reaffirm a standard that had been somewhat abandoned by *Sears*. Many of the decisions cited by the Secretary took place pre-*Henderson.* One post-*Henderson* case, merely states that "we must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case." *Veterans Justice Grp., LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1352 (Fed. Cir. 2016). This case did not address *Henderson*, or call its reaffirmation of the canons into question.

In *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 809 F.3d 1359, 1363 (Fed. Cir. 2016), this Court also reaffirmed *Sears* in addressing reasonable regulations. The key term is reasonable and certainly less deference should be accorded when the VA regulations are less than reasonable. Notably the Court in that case did not address *Henderson* or its reaffirmation of the canons.

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[7] *Intrepid* and most other ships used during the Vietnam Ware were steam powered. Water usage was always a problem and sufficient reserves were critical to maintain the ship's propulsion, electrical and auxiliary systems as well as to provide services for the crew. In warmer climates, such as the ocean off Vietnam, the distillation process and the steam generators were less efficient. Shipboard distillers operate around the clock to maintain a steady reserve of both potable and boiler feed water.

Here, the record shows that the Secretary's determination is unreasonable. So despite the Secretary's concern, *Henderson* is quite muscular and is easily strong enough to bear the weight of *Sears* and other cases cited by the government.

While Appellant appreciates the attempt at nautical wittiness in the Secretary's brief at 37, *Henderson* has dredged a safe channel through the rocky shoals of *Sears*. Now this court can help future veterans navigate this channel by erecting a light house at Point Procopio.

B The *Haas* Affirmance of the VA's Decision to Rescind the Previous Presumption Policy Based on the Issuance of the Vietnam Service Medal Should Not Apply to the Narrower Definition of the Territorial Seas.

The Secretary objects to the Appellant's argument that this Court can draw a line of demarcation at the territorial seas. For reasons discussed *supra*, this is an action that just makes sense.

The Secretary, however, merely regurgitates already debunked claims (1) that *Haas* held that the line must be drawn at the land mass and (2) herbicides were used on land but not at sea. Both of those arguments have been addressed *supra*., and are not worthy of further comment.

The Secretary struggles with the concept of an overbroad regulation as it

relates to a precedent. Appellee brief at 47. As discussed *supra*., the concept of *stare decisis* calls for the continuation of decisions that were rightly decided - not the continuation of bad decisions. More on point, the whole issue before *Haas* was whether the VA's revocation of their earlier policy to grant the presumption to everyone entering the Vietnam Service Medal area was correct. The territorial seas is a much narrower interpretation and supported by legal and scientific principles. As discussed *supra*., additional evidence, not available at the time *Haas* was decided, shows that the "boots on the ground" policy is not only unreasonable but irrational.

The Secretary again revisits his *Chevron*, deference argument. The core element that is missing from that analysis is the reasonableness of the decision. The Secretary has yet to show why the dioxin infiltration into the territorial seas did not cause contamination of the 24/7 distillation system. Neither do they submit scientific studies showing that the dioxin did not enter the plume and that the plume did not contaminate the territorial seas where the *Intrepid* performed her mission. They do not contest the effect of the distillation system on the dioxin or contest that it was enriched by the process.

Both *Haas* and the Secretary argue that granting this presumption might also open the matter to aviation vehicles. Since most military aircraft that flew

over the territorial seas of Vietnam landed in country that would seem to be an irrelevant point. Guam based B-52 aircraft that struck North Vietnam would not have flown over the territorial seas of South Vietnam. Nor did any aircraft dip water from the sea and use an evaporation distillation system to purify it. Irrespective, that is a question for another day and not germane to this matter.

III. The Court Below's Reliance upon 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)] in Reaching Their Decision Was Clear Error since That Notice Misstates the Facts of Naval Operations off of Vietnam and Has Been Repeatedly Debunked.

Appellee argues that Mr. Procopio cannot ask this Court to find the Board's consideration of the debunked preliminary rule delineated in 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008). The Secretary is wrong on two counts.

First of all, as the Secretary conceded, this rule was withdrawn before it became final. Appellee brief at 10 n. 6. It is well settled that the withdrawal of a pending rule from publication deprives it of force and effect of law. *Wilkinson v. Legal Servs. Corp*., 27 F. Supp. 2d 32, 61 (D.D.C. 1998).

Secondly, as discussed in the opening brief, this Court can find error when a factual finding is clearly erroneous. *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948). Additionally, as further explained in the opening brief, factual matters can be considered in determining whether a decision is incorrect legally

within the scope of 38 U.S.C. § 7292(d)(1).

The opening brief described why this Federal Register article, even if it had not been withdrawn, should have been given no deference. *See*, Appx56-73.

Appellee asserts that Mr. Procopio claimed that the Board should have found his evidence of herbicide exposure sufficient to establish service connection because it would be "too much" to expect the ship he served on to have collected samples of Agent Orange. Appellee brief at 43. The Appellant's argument was a little more detailed indicating that there was no requirement to take seawater or potable water samples to test for the dioxin. Additionally, the type of sophisticated equipment required to conduct such a test did not exist on the *Intrepid*. Mr. Procopio is not challenging how the Board weighed the evidence because there was no evidence in the record to counter his assertions. The BVA cannot just make up an evidentiary requirement but that is what they did.

The Secretary dismissed circumstantial evidence but in the instant case that evidence is compelling. Absent any countervailing evidence circumstantial evidence should prevail and certainly can be decisive. *Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1219 (Fed. Cir. 2006).

IV. The Court Failed to Properly Consider the Issue of Direct Exposure

Based on the Presence of Agent Orange in the Waters, Including the Territorial Sea, Off the Mekong River, Through Which the Veteran's Ship Transited.

Appellee did not directly address this issue. Relevant discourse concerning this matter has been discussed *supra*. The most important concern is the lack of the Secretary's understanding of estuarine waters also known as the discharge plume. The bottom line is that the dioxin traveled far out to sea as part of the plume. That plume constituted the estuary. Ships moving through that plume ingested the dioxin and that dioxin was enriched prior to being discharged to the potable water system.

V. In Light of *Gray v. McDonald*, 27 Vet. App. 313 (2015), the Court's Interpretation That the Territorial Seas of the Republic of Vietnam Was Excluded from Regulatory Definition of Inland Waterways That Would Give Rise to Presumption That Navy Veteran Seeking Disability Benefits Was Exposed to Herbicide, Was Clearly Erroneous.

The application of *Gray* has also been discussed *supra*.

Conclusion

For the reasons delineated herein, the court should reverse the court below and find for the veteran.

Respectfully Submitted:

Military-Veterans Advocacy
//s// John B. Wells
John B. Wells
LA Bar #23970
P. O. Box 5235
Slidell, LA 70469-5235 (mail)
769 Robert Blvd. Suite 201D
Slidell, LA 70458 (physical)
Phone: (985) 641-1855
Email: JohnLawEsq@msn.com

Certificate of Service

The undersigned certifies that the within was served on counsel for the Secretary and the court via the CM/ECF filing system this 27st day of October, 2017.

//s// John B. Wells
John B. Wells

CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6014 by computer word count, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a monospaced typeface using Wordperfect 8.0 with 14-point proportionally spaced face.

/s/ John B. Wells
John B. Wells