# The Blue Water Navy Saga

Agent Orange Benefits in the Wake of Procopio v. Wilkie

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# **Military-Veterans Advocacy**

Non-Profit 501(c)(3) corporation

- Litigate, Legislate and Educate on Behalf of Veterans.
- All Volunteer Organization.
- We are on Facebook at Military-Veterans Advocacy Inc.
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# Procopio v. Wilkie

913 F3d 1371 (Fed. Cir. 2019)

- En banc decision 9-2.
- Overruled decade old precedent.
- ► Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008).
- Holding of the Court:
  - Agent Orange Act applied to those who served in the territorial sea of the "Republic of Vietnam."
- Rocked the VA to its core.
- Major victory in a 17 year struggle.
  - ► Affects up to 80,000 veterans.
- Pathway for the future.

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# History of the Blue Water Navy Controversy

#### Operation Ranch Hand

- USAF sprayed 12 million + gallons of herbicide laced with dioxin throughout South Vietnam War.
- Herbicide was nicknamed Agent Orange due to orange stripe on the 55 gallon containers.
- Agent Orange and the other "rainbow herbicides" were used to defoliate areas providing cover to enemy forces.
- Spraying included coastal areas and the areas around rivers and streams that emptied into the South China Sea.

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# Legislative and Regulatory History of the Blue Water Navy Controversy

Dioxin Act

- Veterans' Dioxin and Radiation Exposure Compensation Standards Act.
  - ► Pub. L. No. 98-542, 98 Stat. 2725 (1984)(the "Dioxin Act").
- Directed the VA to "establish guidelines and (where appropriate) standards and criteria for the resolution of claims" based on dioxin exposure during service "in the Republic of Vietnam."

# Legislative and Regulatory History of the Blue Water Navy

38 CFR § 3.311

- Issued in 1985
  - ► 50 Fed. Reg. 34,454, 34,454-55 (Aug. 26, 1985).
- Established a presumption of exposure and service connection if the veteran served "in the Republic of Vietnam," which it defined 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."
- Language tracked the Dioxin Act.
- Did not purport to limit the presumption to veterans who set foot on the Vietnam landmass.

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# Legislative and Regulatory History of the Blue Water Navy

Non-Hodgkin Lymphoma

- Center for Disease Control found that Vietnam veterans had a 50% higher risk of Non-Hodgkin Lymphoma than non-Vietnam veterans.
- The Association of Selected Cancers with Service in the U.S. Military in Vietnam: Final Report 37, 40 (Sept. 1990).
- Study showed that Navy veterans serving offshore had higher risk than those ashore or in brown water.
  - Similar to the 2005 Australian Cancer Incidence study.
     which showed Navy vets cancers 22-26% above the norm compared with 11-13% above the norm for ground troops.

# Legislative and Regulatory History of the Blue Water Navy

38 CFR § 3.313

- Issued in 1991.
- Provided that "Service in Vietnam includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam."
- Did not purport to limit the presumption to veterans who set foot on the Vietnam landmass.

# Legislative and Regulatory History of the Blue Water Navy Controversy

Agent Orange Act of 1991

- Pub. L. No. 102-4, 105 Stat. 11.
- Codified the presumption of exposure and service connection for the three diseases covered by Regulations 311 and 313.
- ► non-Hodgkin's lymphoma.
- soft-tissue sarcomas.
- ▶ chloracne
- Manifested "in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era."
- Disease would be considered to have been incurred in or aggravated by such service.


# Legislative and Regulatory History of the Blue Water Navy Controversy

Agent Orange Act of 1991

- Required the VA to:
  - Identify any other disease shown over time to have a "positive association" with the "exposure of humans to an herbicide agent."
- "prescribe regulations providing that a presumption of service connection is warranted for that disease."
- Authorized VA Secretary to enter into agreement with the National Academy of Sciences to:
- ▶ Review/summarize scientific evidence.
- Assess the strength thereof concerning the association between herbicide exposure and each disease suspected to be associated with such exposure.

# Legislative and Regulatory History of the Blue Water Navy Controversy

VA Adjudication Procedures Manual M21-1 § 4.08(k)(1) (Nov. 8, 1991)

- "In the absence of contradictory evidence, 'service in Vietnam' will be conceded if the record shows that the veteran received the Vietnam Service Medal."
- Blue Water Navy veterans were at all relevant times:
  - ▶ Eligible for the Vietnam Service Medal.
  - ▶ Blue Water veterans thus qualified for benefits

# Legislative and Regulatory History of the Blue Water Navy Controversy

Presumptive Diseases -38 CFR § 38 C.F.R. § 3.309(e).

- AL amyloidosis
- Chloracne or other acneform disease
- Type 2 diabetes
- Ischemic heart disease
- All chronic B-cell leukemias
- Multiple myeloma
- Non-Hodgkin's lymphoma
- Parkinson's disease
- Early-onset peripheral neuropathy
- Porphyria cutanea tarda
- Prostate cancer
- Respiratory cancers
- Soft-tissue sarcoma

#### **The VA Changes Course**

Dep't of Veterans Affairs, Op. Gen. Counsel Prec. 27-97 (1997).

- Construed the phrase "served in the Republic of Vietnam" as used in § 101(29)(A) not to apply to service members whose service was on ships in the waters off Vietnam's coast.
- General Counsel suggested that the same term in the Agent Orange Act likewise did not cover offshore service.
- VA's response to comments in rule making about spina bifida and diabetes stated that service in the "Republic of Vietnam" was limited to service on land or in inland waterways.
- 66 Fed. Reg. 23,166, 23,166 (May 8, 2001)
- ► 62 Fed. Reg. 51,274, 51,274-75 (Sept. 30, 1997).

# **The VA Changes Course**

M21-1, Pt. III, ¶ 4.24(e)(1) (Feb. 27, 2002)

- In early 2002, the VA abandoned the Vietnam Service Medal test.
- Construed 38 C.F.R. § 3.307(a)(6) as requiring a veteran to show that he "actually served on land within the Republic of Vietnam."
- Boots on the ground policy.

#### The Australian Factor

Australian VA takes the lead

- Dioxin 98 Conference Stockholm Sweden.
- Reported higher cancer incidence among RAN personnel.
  - ▶ 22-26% above the norm for Navy.
  - ▶ 11-15% above the norm for ground forces.
- University of Queensland National Research Centre for Environmental Toxicology ("NRCET") report issued in 2002.

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## The Australian Factor

NRCET Report

- Ships in the estuarine waters collected water contaminated with the runoff from areas sprayed with Agent Orange.
- ► Estuarine water is area where salt water from ocean and fresh water from rivers mix.
- ► Can run several hundred kilometers from shore.
- Evaporation distillation process caused dioxin to co-distill.
- Process enriched dioxin.
  - ► Henry's Law.

## The Australian Factor

NRCET Report

- Attacked by VA.
- ▶ Claimed it was not peer reviewed It was!
- Claimed USN used different systems They didn't!
- Claimed USN did not make portable water in bays harbors or 12 mile limit - They did!
- Validated by two Committees of the Institute of Medicine.
  - ► Institute of Medicine, Blue Water Navy Vietnam Veterans and Agent Orange Exposure (2011).
  - ► Institute of Medicine, Veterans and Agent Orange Update 2008 (2009).

## The Australian Factor

Results of Studies

- Australian government issued Statements of Principles.
  - ► Similar to our Code of Federal Regulations.
- Provided the presumption of exposure for ships with 185 km (approx 100 nautical miles) who were:
  - ► on land in Vietnam, or
  - ▶ at sea in Vietnamese waters, or
  - on board a vessel and consuming potable water supplied on that vessel, when the water supply had been produced by evaporative distillation of estuarine Vietnamese waters, for a cumulative period of at least thirty days.

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## Institute of Medicine

Update 2008

- Published in 2009.
- Validated the NRCET study.
- ► Based on Henry's Law.
- Given the available evidence, the committee recommends that members of the Blue Water Navy should not be excluded from the set of Vietnam-era veterans with presumed herbicide exposure.
- Not the end of the story.
  - ▶ Sec Shinseki orders another study.

## **Institute of Medicine**

Blue Water Navy Vietnam Veterans and Agent Orange Exposure (2011) VA Perspective

- The committee concludes that, qualitatively, ground troops and Brown Water Navy personnel had more pathways of exposure to Agent Orange—associated TCDD than did Blue Water Navy personnel.
- Thus, the committee was unable to state with certainty whether Blue Water Navy personnel were or were not exposed to Agent Orange and its associated TCDD.

#### **Institute of Medicine**

Blue Water Navy Vietnam Veterans and Agent Orange Exposure (2011) The Rest of the Story

- One exposure mechanism is specific to BWN ships: possible TCDD contamination of potable water from shipboard distillation plants.
- Lack of information makes it impossible to quantify exposures for Blue Water & Brown Water Navy sailors and, so far, for ground troops as well.
- Committee concluded 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.

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# **Institute of Medicine**

Follow On Reports

- It is generally acknowledged that estuarine waters became contaminated with herbicides and dioxin as a result of shoreline spraying and runoff from spraying on land.
  - ► 2010 update
- It is generally acknowledged that estuarine waters became contaminated with herbicides and dioxin as a result of shoreline spraying and runoff from spraying on land
  - ► 2012 update
- it is generally acknowledged that estuarine waters became contaminated with herbicides and dioxin as a result of shoreline spraying and runoff from spraying on land.
  - ► 2014 update

# **Congress Takes Their Turn**

2008-2010

- HR 6562 2008
  - Waters offshore and airspace above
  - ▶ 18 D 10 R co-sponsors.
- HR 2254 2009-10.
  - (1) served on Johnston Island during the period beginning on April 1, 1972, and ending on September 30, 1977; or
  - (2) received the Vietnam Service Medal or the Vietnam Campaign Medal.
- ▶ 190 D 71 R co-sponsors.
- Pay As You Go Act of 2010 (PAYGO).
  - ► Pub. L. 111-139.
- ► Required CBO evaluation.
- Corresponding offset for any spending increase.

# **Congress Takes Their Turn**

2011-2019

- HR 1629/S 1629 2011-12
  - ► Territorial sea.
  - ► 75 D, 51 R/12 D, 1 R, 1 I.
- HR 543 2013-14.
  - Territorial sea.
  - ► 162 D, 96 R.
- HR 969/S681 2015-16.
  - Territorial sea.
  - ► D 176, R 159/30 D,15 R, 1 I.
- HR 299/S 422 2017-18.
- ► Territorial sea
- ► Passed House 382-0.
- ▶ Blocked in Senate by Senators Enzi & Lee.
  - Sen Enzi is now onboard.
- HR 299 2019..


# **VA Support**

Spotty at best

- Meeting with Chief of Staff John Gingrich.
  - 2012
  - Very concerned and seemed supportive.
  - ▶ 11 months later rejected any change.
- Meeting with Deputy Secretary Sloan Gibson
- ► 2015 (2 meetings).
- ▶ "We are leaning closely to your views!"
- ➤ Rejected any change in Feb 2016 by doubling down in a change to their M21-1 Adjudication Manual.
- Meeting with Secretary McDonald.
  - ► Dec 2016.
  - Waste of time.
- Meeting with Secretary Shulkin.
  - **2017**.
- · Completely supportive.

# **VA Support**

Enter the Real Villain

- OMB Office of Management and Budget.
- Changes to regulations require OMB review.
- OMB shot down changes in 2015/2016.
  - ► Secretary McDonald confirmed.
- OMB shot down Shulkin's effort to change regulations.
  - ▶ OMB Director Mulvaney confirmed.

# **VA Support**

The Big Switch

- Secretary Wilkie takes office July 30, 2018.
- Under Secretary Lawrence trashes the bill with inaccurate information on August 1st.
- Senator Isakson holds the bill for 6 weeks.
- VSOs complain about previously approved offset delaying bill for another 10 weeks.
- CBO rescores HR 299 above offset based on bad data from the VA leading to Sen Enzi hold.
  - ▶ Added \$1.3 billion to score.
- Dec 3 meeting with Sec Wilkie.
  - Agreed no further opposition.


# **VA Support**

The Switch Back

- Then came *Procopio*.
- Oral argument December 7, 2018 before *en banc* court.
- Favorable 9-2 decision on January 29, 2019.
- Secretary Wilkie not inclined to file petition for certiorari.
- ▶ Informed me on February 27.
- ► Separately testified to that effect before HVAC.
- ► Confirmed to me on March 12.

# **Judicial Action**

Haas v. Peake 525 F3d 1168 reh'g denied 544 F.3d 1306 (2008)

- Overruled Court of Appeals for Veterans Claims.
  - ► 2-1 decision.
- Found phrase "service in the Republic of Vietnam to be ambiguous.
- Used *Chevron* deference to find the VA position reasonable.
- Rejected idea that territorial sea was not included within the definition of the Republic of Vietnam.
- Criticized application of the 1958 Convention on the Territorial Sea and the Contiguous Zone as inapplicable.
- Did not apply the pro-claimant (veteran) canon of construction.
- Successfully used to defeat Blue Water claims.

#### **Judicial Action**

Gray v. McDonald 27 Vet.App. 313

- First crack in the VA armor
- Distinguished from *Haas* 
  - ► Haas was open ocean
  - Gray covered a harbor surrounded on 3 sides by
- Centered on VA's definition of "inland waterways"


## **Judicial Action**

Da Nang Harbor



## **Judicial Action**

Gray v. McDonald 27 Vet.App. 313

- Rejected applicability of the 1958 Convention on the Territorial Sea and Contiguous Zone.
  - Bays and harbors are considered inland or internal waters under the treaty.
  - ► Did not address plain language of standard.
- Confirmed applicability of *Chevron* deference.
  - Defer to an agency's interpretation of its own ambiguous regulation when interpretation is not inconsistent with the language of the regulation or otherwise plainly erroneous and represents the agency's considered view on the matter
- Court sustained ambiguity and moved to Chevron step two.

## **Judicial Action**

Gray v. McDonald 27 Vet.App. 313

- VA's exclusion of Da Nang harbor from definition of inland waters was arbitrary and capricious
  - ► Based on depth and ease of entry by vessels, not probability of exposure
  - Did not account for mixture of contaminated river water with tidal action from the South China Sea
- Remanded to VA Secretary
  - Reevaluate definition and exercise fair and considered judgment consistent with on probability of exposure

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## **Judicial Action**

Procopio v. Wilkie 913 F3d 1371 (Fed. Cir. 2019)

- Rejected ambiguity argument.
- Applied plain meaning canon to find service in the Republic of Vietnam included the territorial sea.
- Applied international law.
- ► 1958 Convention on the Territorial Sea and the Contiguous Zone.
- ▶ United Nations Convention on the Law of the Sea.
- Applied Charming Betsy canon that Congress does not legislation contrary to international law.
- Murray v. Schooner Charming Betsy, 6 U.S. 2 Cranch 64, 2 L.Ed. 208 (1804).
- Weakens treaty "self-executing" doctrine

# **Judicial Action**

Procopio v. Wilkie 913 F3d 1371 (Fed. Cir. 2019)

- Phrase served in the "Republic of Vietnam," applied to those who served in the territorial sea
  - ► Congress used formal name of the country
  - ► This invoked notion of territorial boundaries that included its territorial sea
- Court rejected VA argument that regulations enacted prior to Agent Orange Act which may have created "foot on land" requirement survived subsequently enacted Agent Orange Act.

#### **Judicial Action**

Procopio v. Wilkie 913 F3d 1371 (Fed. Cir. 2019)

- Did not clearly define the territorial sea.
  - ► Incorporated the baseline provisions of Article 3 of UNCOLS.
  - Confirm the limit of the territorial sea was 12 nautical miles.
- Left open the question of airspace coverage.
- Did not address applicability of the pro-claimant (veteran) canon of construction, instead relying on the plain meaning rule.
  - ► Judge O'Malley's concurrence
- Judge Chen's dissent joined by Judge Dyk
  - ► Court was doing Congress' job
  - ► Weakened stare decisis


## What is the Territorial Sea

United Nations Convention on the Law of the Sea

#### ■ Article 3

 Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

#### ■ Article 4

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

# What is the Territorial Sea

United Nations Convention on the Law of the Sea

#### ■ Article 5 Normal baseline.

- ► Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.
- Article 7 Straight baseline.
  - In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

## What is the Territorial Sea

Vietnam's Claim




# Where was Procopio Based on Deck Logs of Uss Intrepid Procopio v Wilkie 29 Jan 2019 Utility Interpid Ch5-11 loading furnished to be out. The 12ther territorial sea begins at the red basefice and in 12th seawed. Prepared by 15 Blad COS to Research Makey Versions Procopy Coyng 12 Did All rights reserved wave militaryets are about 2 of CVS-111 30Jul 66 2000 CVS-111 30Jul 66 2000 CVS-111 30Jul 66 2000 CVS-111 30Jul 66 3310 CVS-111 30Jul 66 3310

# **VA Implementation**

What They May Do

- Try to limit territorial sea to bays, harbors and 12 nautical miles from coastline
- May allow 12 nautical miles from island
- Will try to limit the exposure to the smallest possible area

# **What's Next**

Pro-Claimant (Veteran) Canon

- Recognized by the Supreme Court in World War II.
  - ► Boone v. Lightner, 319 U.S. 561, 575 (1943)
- ► Special consideration for those who have "been obliged to drop their own affairs and take up the burdens of the nation.
- Reaffirmed by SCOTUS in 2011
  - Henderson v. Shinseki, 562 U.S. 428, 131 S. Ct. 1197, 179 L. Ed. 2d 159, (2011).
  - Addressed by Judge O'Malley in her Procopio concurrence.


## What's Next

Pro-Claimant (Veteran) Canon

- Procopio Court ordered issue briefed.
- ► Did not reach the question because it relied upon plain meaning canon.
- At what point does it apply in *Chevron* analysis?
  - ► Epic Sys. Corp. v. Lewis, U.S. , 138 S. Ct. 1612 (2018).
    - Canons of construction apply at step 1 of Chevron.
  - ► Tertiary issue in Kisor v. Wilkie pending before Supreme Court docket #18-15.

# What's Next

Judicial Review Requirement

- Codified in 38 U.S.C. § 502.
- ► Applies to 5 USC §§ 552(a)(1) and 553.
- Does not apply to the M21-1 Manual.
  - ► Gray v. Wilkie, 875 F.3d 1102 (Fed. Cir. 2016).

  - Another Blue Water Navy case.Sought review of the Feb 2016 M21-1 Manual.
  - ► Certiorari granted but removed from oral argument docket as a result of Procopio.
- VA has been using the M21-1 to avoid the notice and comment procedures of §553.

#### **Bottom Line**

Impact of Procopio

- Will burden the archaic VA appeals and benefits system.
- Has opened the door to further veterans benefits
- Death knell of "Delay, Deny Until They Die."
- Has set up a weakening of Chevron
- Shows the advantage of multi-faceted approach to VA benefits.

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