

Impact of pending Court action in *BWNVVA v. MacDonald* on Blue Water Navy claims

Procedural History. Military-Veterans Advocacy and the Blue Water Navy Vietnam Veterans Association filed suit against the Secretary of Veterans Affairs in the federal district court in Washington DC under the Administrative Procedures Act and the Declaratory Judgment Act seeking to have the VA's "boots on the ground" policy overturned. The government argued that the federal district court did not have jurisdiction. The court agreed and dismissed the case. A timely appeal was filed in the U. S. Court of Appeals for the DC Circuit. Oral argument is scheduled for March 10, 2016.

What is at Stake? A favorable decision will allow the federal district court to move forward with the action and adjudicate the case on its merits. The Washington DC federal courts are generally viewed as the most knowledgeable courts on the Administrative Procedures Act and the district Judge has already indicated that she would be sympathetic to the case of the veterans.

Crux of the Argument. The veterans contend that neither the Veteran's Judicial Reform Act nor any other provision of law provides an avenue for relief in the circumstances arising out of this particular controversy. The Court of Appeals for Veterans Claims only has jurisdiction to review decisions of the Board of Veterans Appeal, which considers only the claims of individual veterans. The Federal Circuit Court jurisdiction (under 38 U.S.C. § 502) does not include General Counsel Opinions or interpretive regulations, which are the basis of the "boots on the ground" regulation. Federal Circuit jurisprudence has specifically found that the M-21-1 manual provision at issue is an interpretive rather than substantive regulation. *Haas v. Peake* 525 F.3d 1168, 1196 (Fed. Cir. 2008).

Lacking any jurisdiction under veterans' law, the Administrative Procedures Act provides a safety net when no other course of action is available. The VA wants to shred that safety net, leaving veteran's organizations with no remedy for a bad interpretive regulation that has already been criticized in *Gray v. McDonald*. This Court of Veteran's Claims decision, rendered on April 23, 2015, held that the VA's exclusion of bays and harbors from their definition of inland waters was irrational. The fact that nothing has changed despite the court's decision in *Gray* underlines the inability of the Court of Appeals for Veterans Claims to bring relief to an entire class of veterans. Under the Veteran's Judicial Reform Act, the validity of interpretive regulations must be decided on a case by case basis. This unnecessarily prolongs the efforts of veterans and continues to clog a system that is already hopelessly backlogged. Additionally, neither the Court of Appeals for Veterans Claims nor the Court of Appeals for the Federal Circuit have original jurisdiction for this type of case under the Declaratory Judgment Act.

Plans Moving Forward.

BWNVVA and MVA will continue to push for a favorable change to the "boots on the ground" regulation in light of the *Gray* Ruling. In addition to this court action, the organizations will continue to press for enactment of Congressional action to force the VA to extend the presumption of exposure to the territorial seas of the Republic of Vietnam. MVA continues to seek additional relief in individual cases brought before the Board of Veterans Appeals and the Court of Appeals for Veteran Claims. We are not giving up!