

From Stars and Stripes:

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WASHINGTON — Department of Veterans Affairs Secretary Robert Wilkie recommended the Justice Department **not** contest a federal court ruling that could extend benefits to Vietnam veterans who served on ships offshore during the war, he announced Tuesday.

The Court of Appeals for the Federal Circuit ruled 9-2 in January that “blue water” Navy veterans are eligible for benefits related to the chemical herbicide Agent Orange. The decision could pave the way for disability compensation for tens of thousands of veterans who served aboard aircraft carriers, destroyers and other ships but had been deemed ineligible for the same disability benefits as those who served on the ground and inland waterways.

The Justice Department and the VA, which disputed the veterans’ eligibility for the benefits, could challenge the decision before April 29 by seeking a review of the case from the U.S. Supreme Court.

Wilkie said publicly for the first time Tuesday that he opposed a Supreme Court review. The announcement came during his testimony to the Senate Veterans’ Affairs Committee.

“Is it true, Secretary Wilkie, that the blue water Navy court decision isn’t being challenged?” asked Sen. Johnny Isakson, R-Ga., the chairman of the committee.

Wilkie replied, “That would be my recommendation from VA.”

His stance differs from last year, when Wilkie fought efforts in Congress to extend benefits to blue water Navy veterans. At the time, he cited high costs and insufficient scientific evidence linking the veterans to Agent Orange exposure.

Since the court ruling in January, some lawmakers and veterans organizations have urged Wilkie and President Donald Trump to end the court battle.

Wilkie announced during his testimony before the Senate Veterans’ Affairs Committee on Tuesday that he recommended the Justice Department not pursue the case.

Sen. Mazie Hirono, D-Hawaii, asked him to “use your persuasive powers to make sure that happens.”

“I think your recommendation will be key,” said Sen. Richard Blumenthal, D-Conn. “I would express ... that the recommendation be adopted and endorsed heartily by this committee to bring fairness and justice to our blue water Navy veterans. It would culminate a bipartisan crusade.”

Some veterans have fought for years to secure the benefits.

The subject of the Court of Appeals case was Alfred Procopio Jr., 73, who served on the USS Intrepid during the Vietnam War. Ten years ago, the VA denied his disability claims for diabetes and prostate cancer.

At issue in his case was interpretation of the current law, which allows easier access to disability benefits for veterans who “served in the Republic of Vietnam” and suffer from any illness on a list of those linked to Agent Orange. The herbicide has been found to cause respiratory cancers, Parkinson’s disease and heart disease, as well as other conditions.

The court determined that territorial seas should be included in the definition of “Republic of Vietnam” — a point the government disputed.

John Wells, one of the lawyers for Procopio, lauded Wilkie’s announcement Tuesday. “We thank the secretary for bringing this tragic episode to a close and look forward to working with him on issues dealing with implementation,” Wells said.

Wells estimated that between 50,000 and 70,000 veterans could become eligible for benefits.

Isakson said if the court case goes unchallenged, the process of extending the benefits will be a formidable task.

“If that happens, we’re going to be in the process of beginning to swallow a big bite,” he said.

Likewise, Wilkie said the VA must work with Congress and might require creating a “historical division” that works with the Defense Department to comb through Navy records. He said Tuesday that he had opposed extending the benefits because, “I don’t think people had the way ahead laid out.”

“I thought it was coming fast and furious, and I had not been given the opportunity to say, ‘If this happens, we have to come back to Congress to talk about what happens to appeals,’” Wilkie said. “We’re going to have to create, really, a historical division.”

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Advice for Blue Water Vietnam Veterans Regarding Procopio v. Wilkie Decision

On January 29, 2019, the U.S. Court of Appeals for the Federal Circuit issued the groundbreaking decision Procopio v. Wilkie, No. 2017-1821 (Fed. Cir. Jan. 29, 2019). The Court held that veterans who served in the 12 nautical mile territorial seas of the Republic of Vietnam during the Vietnam era are entitled to the presumption that they were exposed to Agent Orange. This decision overruled the Court’s previous decision in Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008), which held that the Department of Veterans Affairs (VA) could exclude veterans from the presumption of Agent Orange exposure if they did not set foot on land or serve on the inland waterways of Vietnam.

If the Federal Circuit’s decision in Procopio becomes final, it would open the door for tens of thousands of Blue Water Vietnam Veterans or their survivors to obtain service-connected VA disability or death benefits for diseases caused by Agent Orange exposure. Right now, the Procopio decision is not final because the VA has 90 days (until April 29, 2019) to appeal the decision to the U.S. Supreme Court. If the VA does not petition the Supreme Court within the 90-day timeframe, the decision will then become final.

If the decision becomes final, veterans who served within the 12 nautical miles of Vietnam during the Vietnam era would be entitled to service connected disability benefits for diseases the VA presumes are associated with Agent Orange exposure. Those diseases include ischemic heart disease, type 2 diabetes, Parkinson’s disease, and numerous cancers. A full list of the diseases that the VA presumes are associated

with exposure to Agent Orange can be found at <https://www.publichealth.va.gov/exposures/agentorange/conditions/>.

Survivors of Blue Water Vietnam veterans who died from one of these diseases would also become entitled to service connected death benefits (known as DIC).

NVLSP has some advice regarding actions that Blue Water Vietnam veterans and their survivors may wish to take to preserve their rights during the period of time leading up to a final decision in the Procopio case. The advice we provide below is relevant to Blue Water Vietnam veterans who suffer from or have died of a disease that the VA presumes is associated with Agent Orange exposure.

1. If the VA previously denied service-connected disability or death benefits for an Agent Orange-related disease on the ground that the veteran was not exposed to Agent Orange because he or she served only in the waters offshore Vietnam, and that denial has become final, then it cannot hurt, and may help to immediately file a new claim with the VA for service connection or DIC for the Agent Orange-related diseases. We suggest that you state on the claim that the U.S. Court of Appeals for the Federal Circuit's recent decision in *Procopio v. Wilkie*, No. 2017-1821 (Fed. Cir. Jan. 29, 2019) supports an award of benefits.

2. If the VA has denied service-connected disability or death benefits for an Agent Orange-related disease on the ground that the veteran was not exposed to Agent Orange because he or she served only in the waters offshore Vietnam, but the denial has not yet become final, you should appeal the denial or continue pursuing the appeal of that denial.

3. If the veteran or survivor has not previously submitted a claim for service-connected disability or death benefits for an Agent Orange-related disease, but the veteran suffers from or died of an Agent Orange-related disease, you should immediately file with the VA a claim for service connected disability or death benefits for all relevant Agent Orange-related diseases. The earlier you file the claim, the earlier will be the effective date for the award of benefits if you ultimately are granted benefits based on Agent Orange exposure. We suggest that you state on the claim that the U.S. Court of Appeals for the Federal Circuit's recent decision in *Procopio v. Wilkie*, No. 2017-1821 (Fed. Cir. Jan. 29, 2019) supports an award of benefits.

4. If the veteran or survivor has a pending claim for service-connected disability or death benefits for an Agent Orange-related disease and the VA has not yet issued a decision on that claim, no action is required.