

SAVING MONEY, NOT LIVES: WHY THE VA'S CLAIMS ADJUDICATION SYSTEM DENIES DUE PROCESS TO VETERANS WITH POST-TRAUMATIC STRESS DISORDER AND HOW THE VA CAN AVOID JUDICIAL INTERVENTION

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I. INTRODUCTION

To care for him who shall have borne the battle and for his widow and his orphan: this is the motto of the Department of Veterans' Affairs (VA). Frustrated by delays in health care, two veterans' advocacy groups, Veterans for Common Sense and Veterans United for Truth, questioned the VA's commitment to their motto and filed a lawsuit in federal court seeking

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change in the VA's health care system. The advocacy groups charged that the VA has failed to provide statutorily-mandated benefits to thousands of veterans, specifically those seeking medical treatment or disability claims based on post-traumatic stress disorder (PTSD). Seeking declaratory and injunctive relief, and not monetary damages, the advocacy groups painted a disturbing picture of a VA bureaucracy that, instead of living up to its motto, abandons veterans, which ultimately leads to broken lives, homelessness, and staggering social costs.¹

The organizations pointed to documents and studies describing layers of failure on the part of the VA to address not only the mental health needs of veterans returning from foreign wars, but the monetary benefits due these veterans as well.² These statistics focused specifically on veterans returning from Iraq and Afghanistan with symptoms of PTSD.³ The organizations' lawsuit focused primarily on the following issues: 1) "[t]he widespread breakdown of the [VA's] adjudication and health care systems for veterans experiencing PTSD"⁴, 2) "[t]he prolonged administrative delays in processing PTSD claims, at both the regional office and appellate levels"⁵, and 3) "[a] variety of statutory and regulatory impediments to a veteran's ability to collect PTSD compensation, [including] the inability to obtain discovery, the absence of subpoena power for documents and witnesses, and the inability to hire a lawyer to help out at the regional office level."⁶

PTSD is one of the most common diagnoses of returning service members from Iraq and Afghanistan, with nearly nineteen percent reporting symptoms.⁷ The prevalence of PTSD in veterans returning from war is dramatic when compared to the prevalence of PTSD in the general public, which is only approximately four percent.⁸ Additional studies indicate that the suicide rate among veterans is approximately 3.2 times higher than that

1. See generally *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049 (N.D. Cal. 2008).

2. See, e.g., *Peake*, 563 F. Supp. 2d at 1049; INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY (Terri Tanielian & Lisa H. Jaycox eds., Rand Center for Military Health Policy Research, 2008) [hereinafter INVISIBLE WOUNDS OF WAR]; Karen H. Seal et al., *Bringing the War Back Home: Mental Health Disorders Among 103 788 US Veterans Returning from Iraq and Afghanistan Seen at Department of Veterans Affairs Facilities*, 167 ARCH INTERN MED. 476 (2007).

3. See generally *Peake*, 563 F. Supp. 2d at 1055 (outlining plaintiffs' argument seeking injunctive and declaratory relief against the VA alleging that the procedures for obtaining disability benefits violated veterans' rights).

4. Veterans PTSD Class Action Homepage, <http://www.veteransptsdclassaction.org/index.html> (last visited March 8, 2009) [hereinafter PTSD Homepage].

5. *Id.*

6. *Id.*

7. *Peake*, 563 F. Supp. 2d at 1062, accord Seal et al., *supra* note 2, at 478.

8. Guido R. Zanni, PhD, *PTSD: Treating the Wounds We Do Not See*, 74 PHARMACY TIMES 44, 44 (2008).

of the general population.⁹ Not surprising is the fact that PTSD is a significant risk factor for suicide,¹⁰ leading to the conclusion that treating PTSD, and thus avoiding its long-term implications, would inevitably prove to be a cost-effective strategy: not only in dollars, but in human lives as well.

Lack of access to statutorily-mandated health care and disability benefits, however, is leading to serious long-term complications for veterans with PTSD, including a serious suicide epidemic. An adversarial claims adjudication process only serves to exacerbate the situation¹¹ Only months after the lawsuit was filed, the VA became aware, through an internal email, that eighteen veterans committed suicide each day and that the VA's own data demonstrated that four to five of the suicides were among those who were receiving care from the VA.¹²

Another internal VA email, dated eight months after the lawsuit was filed, revealed that 12,000 veterans under VA care attempted suicide each year.¹³ The financial costs associated with mental health and cognitive conditions stemming from the conflicts in Afghanistan and Iraq are substantial. Although confounded by a few uncertainties, the two-year costs for PTSD-related and major depression could range from \$4.0 to \$6.2 billion (in 2007 dollars).¹⁴

Costs are being incurred in more than just dollars. In health terms, research documents a relationship between PTSD and coronary heart disease ("CHD"),¹⁵ between PTSD and mortality,¹⁶ and between PTSD and health-compromising behaviors such as smoking, drug abuse, and alcohol abuse.¹⁷ PTSD and its resultant complications can ultimately lead to suicide and its related costs. Veterans returning from Iraq and Afghanistan may, indeed, receive treatment from the VA after seeking it. The quality and continuity of the treatment, however, is often dependent upon whether the veteran lives near a VA facility that offers mental health care.¹⁸ "These shortfalls have reached a crisis point; with substance abuse, homelessness, family dissolution, and suicide at unacceptable levels."¹⁹

Many veterans are totally or primarily dependent upon benefits received based on their service. Service-connected ratings, known as service-connected death and disability compensation ("SCDDC"), determine the

9. *Peake*, 563 F. Supp. 2d at 1063.

10. Kevin Caruso, PTSD and Suicide, <http://www.suicide.org/ptsd-and-suicide.html> (last visited March 8, 2009), accord *Peake*, 563 F. Supp. 2d at 1062.

11. PTSD Homepage, *supra* note 4.

12. *Peake*, 563 F. Supp. 2d at 1063.

13. *Id.*

14. INVISIBLE WOUNDS OF WAR, *supra* note 2, at xxiii.

15. *Id.* at 131.

16. *Id.*

17. *Id.* at 134-36.

18. Amy N. Fairweather, *Compromised Care: The Limited Availability and Questionable Quality of Health Care for Recent Veterans*, ABA HUMAN RIGHTS, Spring 2008, at 4.

19. *Id.*

monthly payment made to a veteran who has a disability for a disease or injury that was incurred or aggravated by service in the armed forces.²⁰

For those who cannot work [due to the incapacitating effects of PTSD], the difference [in a SCDDC rating] can be a lifetime of bare economic stability (with benefits topping out at about \$2,500 per month for a single veteran with no dependants) or abject poverty (a 50 percent disability will net a veteran about \$725 a month).²¹

The VA not only has a statutory duty to allow veterans access to appropriate health care and disability benefits, but a constitutional duty as well. And the burden to the VA of treating those veterans afflicted with PTSD is lower than the burden of allowing the disease to remain untreated.²²

In *Veterans for Common Sense v. Peake*, the court found that two veterans' advocacy groups did have standing to bring their members' claims to the district court.²³ Although the court held that the system established by Congress for adjudicating veterans' individual claims did not provide an adequate alternative remedy for plaintiffs' systemic facial constitutional challenges, the court found that plaintiffs' challenges failed for other reasons, 'including failure to challenge a final agency action.'²⁴ Additionally, the court held that the grievances of the plaintiffs were misdirected and that the remedies of the problems, deficiencies, delays, and inadequacies complained of were not within the jurisdiction of the court. The court found no systemic violations system-wide that would have compelled district court intervention.²⁵

In light of the documented inadequacies of the VA's claims adjudication system and the harm it causes the veterans of our nation, this note will examine the decision of the Northern District of California federal court regarding the constitutional challenge of denial of due process. Specifically, this note will address why judicial intervention is not precluded, but will suggest how the VA can make necessary changes without such intervention. Part II of this note will discuss PTSD and its effects on veterans, and inevitably, society. Part II will also provide an overview of the VA's claims ad-

20. See generally Compensation and Pension Benefits Page, U.S. Dep't of Veterans Affairs, <http://www.vba.va.gov/bln/21/index.htm> (last visited March 8, 2009) (providing general information regarding SCDDC for veterans).

21. Fairweather, *supra* note 18, at 4.

22. See INVISIBLE WOUNDS OF WAR, *supra* note 2, at 439.

23. *Peake*, 563 F. Supp. 2d at 1077.

24. *Id.* at 1078.

25. *Id.* at 1055.

judication system and the length of time it takes for veterans to receive their benefits. Part III will provide an analysis of why judicial intervention is not precluded from providing relief to the veterans' claims of denial of constitutional due process. Facial constitutional challenges to the VA are allowed, not only through the Fifth Amendment, but also through the Administrative Procedure Act ("APA"). Finally, Part IV will examine recommendations as to how the VA can implement cost-effective changes that will immediately benefit veterans affected with PTSD, thus averting the proposed judicial intervention.

II. BACKGROUND

A. PTSD: Clinical Presentation, Short-term, and Long-term Effects

PTSD did not officially exist until 1980, when the American Psychiatric Association task force revised the Diagnostic and Statistical Manual of Mental Disorders ("DSM") and entered PTSD in the 1980 DSM-III.²⁶ PTSD moved from being designated a "syndrome" to being designated a "disorder." A syndrome is defined as "a group of signs and symptoms that together are characteristic or indicative of a specific disease or other disorder."²⁷ A disorder is an illness. "PTSD changed from being part of a collective indicator to a singular illness, a significant medical distinction."²⁸

PTSD is described as occurring when the following criteria are met:

- A. The person has been exposed to a traumatic event in which both of the following were present: (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self (i.e. combat, friendly fire, being mortared or rocketed, wounded, captured, driving a truck on a mined road, flying in a helicopter that was shot at, jumping out of a helicopter into a hot LZ) or others (if you had a buddy who was wounded or lost squad members, family member, or seeing anyone who has recently been killed or in-

26. Carol Cruzan Morton, *PTSD: The Suffering Continues for Vets*, FOCUS ONLINE, http://focus.hms.harvard.edu/2008/032108/public_health.shtml (last visited October 18, 2008).

27. MSN ENCARTA DICTIONARY, http://encarta.msn.com/dictionary_1861717757/syndrome.html (last visited July 21, 2009).

28. I.S. PARRISH, *MILITARY VETERANS PTSD REFERENCE MANUAL 3* (Infinity Publishing.com 2008) (2001).

jured such as being a medic or nurse on a trauma ward, body bagging, seeing someone you didn't know killed, seeing kids, women or other Americans or civilians who had been killed, or wounded, etc.)[,]
 (2) the person's response involved intense fear, helplessness or horror.²⁹

B. The traumatic event is persistently re-experienced in one (or more) of the following ways: (1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions[;] (2) recurrent distressing dreams of the event[;] (3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated)[;] (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event[;] (5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.³⁰

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma).³¹

D. Persistent symptoms of increased arousal (not present before the trauma).³²

29. *Id.* (quoting, with references to children excluded, "from The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), Washington, D.C., American Psychiatric Association, 1994, section 309.81, beginning on page 427 with supplemental information, in parentheses . . . , from The Post-Traumatic Gazette, edited by Mrs. Patience Mason").

30. *Id.* at 3-4.

31. *Id.* at 4 (going on to say that this is evidenced by at least three of the following:

(1) efforts to avoid thoughts, feelings or conversations associated with the trauma . . . [;] (2) efforts to avoid activities, places, or people that arouse recollections of the trauma . . . [;] (3) inability to recall an important aspect of the trauma . . . [;] (4) markedly diminished interest or participation in significant activities . . . [;] (5) feelings of detachment or estrangement from others . . . [;] (6) restricted range of affect . . . [;] (7) sense of a foreshortened future . . .).

32. *Id.* at 4-5 (going on to say that this is evidenced by at least two of the following:

(1) difficulty falling or staying asleep; (2) irritability or outbursts of anger; (3) difficulty concentrating . . . [;] (4) hypervigilance) always looking for danger, worrying about people getting hurt, still looking for tripwires and sitting with your back to the wall, avoiding crowds, etc.);

- E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than [one] month.³³
- F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.³⁴

By simply reading the lengthy, complex criteria to diagnose PTSD, it is easy to conclude that diagnosing PTSD requires that veterans have access to qualified mental health professionals. Research has shown that the majority of persons “in whom PTSD develops meet the criteria for the diagnosis of this disorder within the first three months after the traumatic event.”³⁵ It would seem, then, that veterans not only need access to qualified mental health professionals, but they need that access in a *timely manner*: within the first three months of experiencing the triggering traumatic event.

Patients diagnosed with PTSD have to deal with both short-term and long-term effects. The brains of patients under the stress that accompanies PTSD might have a more difficult time healing, and there are major neurobiological consequences to PTSD.³⁶ Some problems that PTSD patients experience include clear problems with attention, working memory, learning, and executive functioning. Insomnia, depression and irritability are other overlapping symptoms.³⁷

Due to the nature of the symptoms experienced by those diagnosed with PTSD, those affected tend to miss more days of work, report being less productive while at work, and are more likely to be unemployed.³⁸ In addition, “[p]sychiatric illnesses appear to predict homelessness.”³⁹ Furthermore, those affected with PTSD suffer in their interpersonal relationships, leading to disrupted marriages, interference with parenting, and ultimately problems can arise in the children of those affected with PTSD that “extend the costs of combat experiences across generations.”⁴⁰

No statement portrays the plight of the diagnosed PTSD patient better than the following: “The effects of a post-combat mental health [condition] can be compared to ripples spreading outward on a pond. But whereas ripples diminish over time, the consequences of mental health and cognitive conditions may grow more severe, especially if left untreated.”⁴¹ These are

(5) exaggerated startle response (hit the dirt at the sound of a backfire, can’t be touched when asleep, etc.).

33. *Id.* at 5.

34. PARRISH, *supra* note 28, at 5.

35. Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13, 20 (2004) (citation omitted).

36. Stephen Spotswood, *Like PTSD/TBI Symptoms Complicate Treatment*, 44 U.S. MEDICINE, Sept. 2008, at 17.

37. *Id.*

38. INVISIBLE WOUNDS OF WAR, *supra* note 2, at 149.

39. *Id.*

40. *Id.*

41. *Id.*

documented effects occurring in the diagnosed PTSD veteran. The problem is that many veterans do not even get the “benefit” of a diagnosis of PTSD, even when that diagnosis is clearly warranted. Without the diagnosis, there can be no treatment for these veterans.

Although some have attempted to document the direct medical cost of treatment of PTSD,⁴² direct medical costs of treatment represent only a fraction of the total costs related to the injuries sustained by the PTSD patient. “Indirect, long-term individual and societal costs stem from lost productivity, reduced quality of life, homelessness, domestic violence, the strain on families, and suicide.”⁴³

PTSD is not a new phenomenon for our veterans. “Nearly one in five Vietnam veterans suffered . . . (PTSD) – and nearly one in 10 was still suffering 11 to 12 years after the war . . .”⁴⁴ Today, the average age of a United States soldier serving in Iraq/Afghanistan is thirty years old. Knowing that leaving PTSD untreated can lead to years of suffering and impactful societal costs, the nation faces serious implications if these veterans continue to be denied access to statutorily-mandated benefits which would, in turn, give them access to evidence-based care.

B. VA Claims Adjudication System: an Overview

Getting a medical diagnosis, and subsequent medical treatment, for PTSD is only one obstacle a veteran faces when dealing with the VA after discharge from active duty. Veterans are having a difficult time compelling the VA to make timely determinations on requests for disability benefits. As previously mentioned, levels of disability and corresponding monetary benefits for veterans are based on service-connected ratings, and the benefit is referred to as SCDDC.⁴⁵ Disabilities can include those associated with emotional injuries, such as PTSD. In order “[t]o establish a claim for SCDDC, a veteran must present evidence of (1) a disability; (2) service in the military that would entitle him or her to benefits; and (3) a nexus between the disability and the service.”⁴⁶

The initial claims procedure is extremely complicated, beginning with a daunting twenty-three page form. Complications in completing the required form include strict technical requirements which if missed may disqualify the claim regardless of its underlying merit.⁴⁷ “Veterans often make

42. See INVISIBLE WOUNDS OF WAR, *supra* note 2, at xxiii.

43. *Id.* at 8.

44. Sean Alfano, *Fewer Vietnam Vets Suffer from PTSD; But Study Shows Post-Traumatic Stress Levels Still Quite High*, CBS NEWS, Aug. 17, 2006, <http://www.cbsnews.com/stories/2006/08/17/health/webmd/main1908799.shtml> (last visited July 21, 2009).

45. See generally Compensation and Pension Benefits Page, *supra* note 20.

46. *Peake*, 563 F. Supp. 2d at 1070.

47. *Peake*, 563 F. Supp. 2d at 1071. See also <http://www.warms.vba.va.gov/regis/38CFR/BOOKb/supple-b-66.DOC>, for an example of a “supplement” to filing for service

mistakes when completing this application and veterans suffering from PTSD have a particularly hard time”⁴⁸ It is no surprise that many first time attempts by veterans with PTSD to complete these forms result in denials or inappropriately low SCDDC ratings.⁴⁹ The enormity of the impact of the claims adjudication process begins to unfold when the statistics are laid bare.

It takes an average of 183 days for a veteran to receive an initial decision based upon his filing for SCDDC, after which a notice of disagreement may be filed.⁵⁰ Veterans pursuing a claim for PTSD have an additional burden of proving a “stressor” event during their service. This makes the claim more complex to adjudicate, and so the length of time to adjudicate these claims is increased.⁵¹

A veteran who has been denied SCDDC does have the opportunity to appeal the denial, though he will be without compensation during the time that he is waiting for his appeal to be decided. An adverse claims decision can be appealed to the Board of Veterans Appeals (BVA).⁵² It is noteworthy to remember that veterans experiencing symptoms of PTSD, whether they have had the good fortune to be diagnosed or not, may be experiencing the short-term effects of the disease state mentioned previously while they wait for a decision from the BVA. Thus while waiting for the BVA’s decision, a veteran may be homeless, jobless, and experiencing severe depression. This becomes startling when looking at the next set of statistics.

After filing the initial twenty-three page form, receiving a denial, and filing a notice of disagreement, it takes the VA, on average, 261 days to mail a veteran a Statement of the Case.⁵³ Subsequently, it takes the veteran approximately forty-three days to file a required Form 9 substantive appeal based on the Statement of the Case.⁵⁴ After receiving a Form 9 appeal from the veteran, it then takes the VA another 573 days after receiving the veteran’s Form 9 to certify the appeal.⁵⁵ Some veterans have had to wait more than 1,000 days to get this certification.⁵⁶ The veteran then has the pleasure of waiting yet another 336 days, on average, for a decision to be rendered on his appeal.⁵⁷ Bottom line: it takes, on average, 4.4 *years* for a veteran to adjudicate a claim all the way through the appeals process, excluding the time the veteran had to wait for the initial denial of benefits.⁵⁸

connected benefits.

48. *Peake*, 563 F. Supp. 2d at 1071.

49. Fairweather, *supra* note 18, at 4.

50. *Peake*, 563 F. Supp. 2d at 1070-72.

51. *Id.* at 1070. *See also* 38 C.F.R. § 3.304 (2008) (outlining the specific requirements for a veteran to substantiate service-connected disabilities).

52. *Peake*, 563 F. Supp. 2d at 1072.

53. *Id.* at 1073.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1074.

58. *Peake*, 563 F. Supp. 2d at 1073-74.

Even more startling is the fact that a veteran cannot pay for counsel to represent him during the initial phases of the claims adjudication process. Although a veteran may be represented throughout the claims adjudication process at the Regional Office (“RO”), the veteran is statutorily prohibited from compensating a lawyer to represent him at the RO level.⁵⁹ This is not to say that a veteran is left completely out in the cold: he can be assisted by attorneys acting pro bono or by Veteran Service Organizations (“VSO”).⁶⁰ Even so, as noted by the court in *Veterans for Common Sense v. Peake*, the VA does not provide training on how to assist the veteran and “all of the VSOs combined cannot meet the needs of all the veterans seeking benefits.”⁶¹

As previously mentioned, veterans often make mistakes when completing the initial claim for SCDDC, and veterans suffering from PTSD are particularly susceptible to difficulty in completing the form. “Repairing a poorly crafted claim is difficult and time consuming and can leave the veteran without proper compensation for years.”⁶² Although veterans are now able to hire an attorney to assist with their claims on appeal, few attorneys have any level of expertise in the area of VA claims.⁶³ It follows, then, that without the ability to consult competent counsel or trained-VSO representatives, a veteran is left to flounder along helplessly while his fate is left in the hands of the VA claims adjudication process: a process that takes, on average, 4.4 years to complete.

No other claims adjudication process even remotely approaches the time frame of the VA claims adjudication system. The private sector health care/financial services industry, which processes thirty billion claims annually, averages 89.5 days per claim, including the time required for resolution of disputed claims.⁶⁴ “Between October 1, 2007, and March 31, 2008, alone, at least 1,467 veterans died during the pendency of their appeals. When an appellant dies, the appeal is extinguished.”⁶⁵ There is no doubt that the veterans’ advocacy groups’ lawsuit was necessary to bring national attention to the shameful denial of benefits to our nation’s veterans. By asking the court to intervene, as is statutorily and constitutionally allowed, the lawsuit just may force the VA to make the necessary changes to provide the nation’s veterans with their mandated benefits: without judicial inter-

59. *Peake*, 563 F. Supp. 2d at 1072, see also 38 U.S.C. §5904 (2007) (outlining the guidelines provided by Congress for attorney compensation).

60. *Peake*, 563 F. Supp. 2d at 1072.

61. *Id.* (citation omitted).

62. Fairweather, *supra* note 18, at 5.

63. *Id.*

64. Linda Bilmes, *Soldiers Returning from Iraq and Afghanistan: The Long-Term Costs of Providing Medical Care and Disability Benefits* at 8 (2007) (unpublished research paper, on file with Harvard University Kennedy School of Government), available at [http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP07-001/\\$File/rwp_07_001_bilmes.pdf](http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP07-001/$File/rwp_07_001_bilmes.pdf).

65. *Peake*, 563 F. Supp. 2d at 1075.

vention.

III. ANALYSIS: FEDERAL DISTRICT COURTS DO HAVE THE POWER TO GRANT A REMEDY

A. Facial Constitutional Challenges to VA Allowed

The Veteran's Judicial Review Act ("VJRA") contains statutory provisions that preclude review of various challenges to the VA in federal district courts.⁶⁶ But the VJRA does not strip district courts of the ability to hear facial constitutional challenges to the VA benefits system.⁶⁷ In addition, under the Administrative Procedure Act, a district court shall "compel agency action unlawfully withheld or unreasonably delayed."⁶⁸ Even the Court of Veterans' Appeals ("CVA") held that federal district courts provided an alternative forum to the VA system to litigate constitutional challenges stating:

A claim which alleges only the unconstitutionality of a statute is not a claim "under a law that affects the provision of benefits by the Secretary" under § 511(a), but rather is a claim under the Constitution of the United States. As such, it is beyond the purview of section 511(a). Nothing in title 38 prohibits a constitutional challenge to any of the provisions of that title from being litigated in U.S. district court.⁶⁹

In order for the claim to move forward, the advocacy groups needed to establish standing and a waiver of sovereign immunity by the VA.

1. Establishment of Standing

Although the VA attempted to argue that the advocacy groups did not have standing to bring the lawsuit before the district court, Judge Conti ruled otherwise.⁷⁰

An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at

66. Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687 (1988); 38 U.S.C. §§ 7251-7298 (2000).

67. 38 U.S.C. §§ 511, 1975 (1994).

68. 5 U.S.C. § 706(1) (1993).

69. *Dacoron v. Brown*, 4 Vet. App. 115, 119 (Vet. App. 1993).

70. *Peake*, 563 F. Supp. 2d at 1056.

stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.⁷¹

The court also found that the veterans' advocacy groups demonstrated that the significant delays in receiving medical care and disability benefits from the VA did indeed satisfy the element of suffering injuries in fact.⁷² In fact, the court acknowledged the severity of the injury, stating the injuries suffered by the veterans affected were anything but conjectural or hypothetical "given the dire consequences many of these veterans face without timely receipt of benefits or prompt treatment for medical conditions, especially . . . PTSD."⁷³

"Delays in health care, especially for mental health issues, and delays in receipt of disability benefits, which are often the primary or sole source of income for a veteran, can lead to exactly the type of injuries complained of by Plaintiffs."⁷⁴ Thus, a causal connection between the injuries suffered and the VA's conduct in question, established the second element needed for standing.

Finally, the court acknowledged that the injunctive and declaratory relief sought by the advocacy groups would likely result in redressing the veterans' injuries.⁷⁵ Although the court eventually held that it was not within the power of the court to actually grant the requested relief, the plaintiffs' established all the necessary elements for standing.⁷⁶

2. Establishment of Waiver of Sovereign Immunity by the VA

Standing is not the only matter the advocacy groups needed to establish for a district court to hear their complaint against the VA. "The United

71. *Id.* at 1056 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000)). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (explaining the three elements a member would need to establish to sue in his own right:

First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision. (citations omitted)).

72. *Peake*, 563 F. Supp. 2d at 1077.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

States must waive its sovereign immunity before a federal court may adjudicate a claim brought against a federal agency.”⁷⁷ Despite the fact that the Northern District of California federal court found in a preliminary decision that the advocacy groups had “sufficiently alleged various challenges to ‘final agency actions’,”⁷⁸ the court reversed its previous finding stating that the advocacy groups failed to challenge a final agency action.⁷⁹

The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, is the relevant statute for determining whether a valid waiver of sovereign immunity exists. Section 702 of the APA states, in part:

An action in a court of the United States seeking relief other than monetary damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States⁸⁰

Section 704 of the APA states, in part, that only “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court, are subject to judicial review.”⁸¹ Therefore, the advocacy groups needed to establish: 1) that a final agency action had taken place on the part of the VA, and 2) that the veterans had no other adequate remedy in a court in order for the district court to provide judicial review based on a waiver of sovereign immunity.

The Northern District of California federal court in *Veterans for Common Sense v. Peake* correctly held that the VA benefits system for adjudicating veterans individual benefit claims does not provide an adequate alternative remedy for the limited purpose of plaintiffs’ systemic, facial constitutional challenges.⁸² The court incorrectly deduced, however, that the plaintiffs failed to challenge a final agency action, reversing its previous decision.⁸³ In the alternative, the court did not take into consideration that “[r]eview of an agency’s failure to act has been referred to as an exception

77. *Peake*, 563 F. Supp. 2d at 1056 (citing *Rattlesnake Coalition v. U.S. EPA*, 509 F.3d 1095, 1103 (9th Cir. 2007)).

78. *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 U.S. Dist. LEXIS 4540, at *19 (N.D. Cal. Jan. 10, 2008).

79. *Peake*, 563 F. Supp. 2d at 1078.

80. 5 U.S.C.A. § 702 (current through P.L. 111-4 approved 2009). See also *Gallo Cattle Co. v. Dep’t of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (stating that the APA “does provide a waiver of sovereign immunity in suits seeking judicial review of a federal agency action under [28 U.S.C.] § 1331”).

81. 5 U.S.C. § 704 (1993).

82. *Peake*, 563 F. Supp. 2d at 1079.

83. *Nicholson*, *supra* note 78, at *19.

to the final agency action requirement.”⁸⁴

a. Final agency action

Agency action is defined as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.”⁸⁵ The district court addressed the veterans’ concerns in its preliminary decision and stated that the veterans’ challenges to aspects of the VJRA are “rightfully considered final agency action as they constitute the VA’s denial of relief of health care and benefits.”⁸⁶ The court went on to say that “the summary and allegedly premature denial of PTSD claims . . . result in allegedly unlawful denial of benefits . . . [and such] . . . policies and procedures fall within the broad statutory definition of ‘final agency action’.”⁸⁷

Nonetheless, in the court’s final decision, rendered just five months later, the court stated that the advocacy groups’ challenges failed “for other reasons, including failure to challenge a final agency action, failure to challenge a discrete agency action, and/or failure to challenge an action that the agency is required to take.”⁸⁸ Nowhere in its opinion does the court actually give a reason for this determination. In fact, the court simply states that 38 U.S.C. § 511 prevents the court from undertaking a review of the unreasonable delay in claims adjudication as such a review would depend on the facts of each particular claim, and such a review is barred by § 511.⁸⁹

The district court did, however, acknowledge that the Supreme Court, in *Norton v. S. Utah Wilderness Alliance*, stated that “[i]t is uncontested the adjudication of benefits claims is a discrete agency action that the VA is required to take.”⁹⁰ Given the statistics outlined previously, it would appear that an average adjudication time for veterans’ appeals of benefits decisions approaching 4.4 years would qualify as the VA’s failure to act on a discrete agency action that the VA is required to take. Forays into individual claims are not required to resolve the challenges to delays across the adjudication system. The only connection that systemic delay has to individual veterans is the fact that the average is an aggregate of the underlying claim processing times. Thus, 38 U.S.C. § 511 would not bar the district court from review.

The district court subsequently undertook an analysis to support its decision denying the veterans relief despite its statement that the advocacy

84. *Ctr. For Biological Diversity et al. v. Abraham*, 218 F. Supp. 2d 1143, 1157 (N.D. Cal. 2002).

85. 5 U.S.C. § 551(13) (1966) (emphasis added).

86. *Nicholson*, *supra* note 78, at *17.

87. *Id.*

88. *Peake*, 563 F. Supp. 2d at 1078.

89. *Id.* at 1083-84.

90. *Id.* (citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64, 124 S. Ct. 2373, 159 L. Ed. 2d, 137 (2004)).

groups failed to challenge a discrete agency action and/or failed to challenge a final agency action.⁹¹ The court did not undertake an analysis as to whether the VA's significant delays in SCDDC claims adjudication constituted a failure to act, which would constitute an exception to the final agency act requirement. Given the statistical evidence presented and the lack of explanation as to why the court changed its position, one can conclude that the advocacy groups did, indeed, challenge final agency action.

b. No other alternate adequate remedy

In addition to the requirement of challenging a final agency action, the advocacy groups had to show that there was no other adequate alternative remedy in a court.⁹² The district court ultimately found that "the VA benefits system is not an adequate alternate forum for [p]laintiffs' systemic and facial constitutional challenges."⁹³

Because the veterans' advocacy groups could arguably establish both elements to show a waiver of sovereign immunity on the part of the VA, and standing for the groups was clearly established, the district court's review of the delay in the VA's claims adjudication process was warranted, despite the court's statement that it was precluded from such a review. The court, notwithstanding its proclamation that review was beyond its purview, still went through an analysis of the VA's claims adjudication system. In undertaking this analysis the court looked to the APA, applicable congressional statutes, and the Fifth Amendment of the Constitution in an effort to assess whether veterans are being denied due process caused by unreasonable delay in benefit claims adjudication.

B. Applicable Law: Administrative Procedure Act (APA), Congressional Statutes, Fifth Amendment to the United States Constitution

Various statutes admonish the VA to adjudicate benefits, claims, and appeals in a timely manner.⁹⁴ The APA entitles veterans to injunctive relief to remedy the VA's "unreasonable delays." Section 706(1) of the APA permits federal courts to compel agency action unlawfully withheld or un-

91. *Peake*, 563 F. Supp. 2d at 1083-89.

92. 5 U.S.C. § 704 (1993).

93. *Peake*, 563 F. Supp. 2d at 1079.

94. *See, e.g.*, 38 U.S.C. § 7101 (1994) (imposing a statutory duty to hire sufficient personnel to process appeals at the BVA in a timely manner); 38 U.S.C. § 5109B (1994) (imposing a statutory duty to resolve remands in an expeditious manner); 38 U.S.C. § 1705 (1994) (imposing a statutory duty to ensure that the system will be managed in a manner to ensure that the provision of care to enrollees is timely and acceptable in quality); 5 U.S.C. § 706(1) (1993) (stating that a reviewing court shall compel agency action unlawfully withheld or unreasonably delayed).

reasonably delayed.⁹⁵ The United States Court of Appeals for the District of Columbia Circuit in *Telecommunications Research and Action Center (TRAC) v. Federal Communications Commission (FCC)* decided that courts designated by statute to review agency action should do so when the agency has improperly withheld or unreasonably delayed action it is required to take.⁹⁶ The court went on to state that although no single test had yet been articulated to determine whether an agency had unreasonably delayed action, one could discern "the hexagonal contours of a standard."⁹⁷ These hexagonal contours include the following six factors to assess claims of agency delay:

(1) the time agencies take to make decisions must be governed by a "rule of reason" . . . ; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason . . . ; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake . . . ; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority . . . ; (5) the court should also take into account the nature and extent of the interests prejudiced by delay . . . ; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"⁹⁸

These factors have since become known as the *TRAC* factors and have been used by subsequent courts to assess whether an agency's actions have been unreasonably delayed.⁹⁹ The court in *Veterans for Common Sense v. Peake* undertook an analysis of the VA's actions, using the *TRAC* factors, to determine if unreasonable delay existed in the adjudication of benefit claims for veterans, even though it had stated that it had no authority to rule on such an issue.¹⁰⁰ The court subsequently held that an analysis using the *TRAC* factors did not "favor a finding that the delays in the VA claims ad-

95. 5 U.S.C. § 706(1) (1993).

96. *Telecomm. Research and Action Ctr. v. Fed. Comm'n's Comm'n*, 750 F.2d 70, 76 (U.S. App. D.C. 1984).

97. *Id.* at 80.

98. *Id.* (citations omitted).

99. *See, e.g., Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997).

100. *See Peake*, 563 F. Supp. 2d at 1084-85.

judication system are unreasonable.”¹⁰¹

Apart from the claim under APA, the veterans’ advocacy groups brought a constitutional claim challenging that the delays and waiting times for veterans filing SCDDC claims and/or appeals were “so lengthy as to constitute an unconstitutional deprivation of property under the *Due Process Clause*” of the Fifth Amendment.¹⁰² It has been well established that the veterans have a property interest in their benefits, as the benefits are statutorily-mandated. “Claimants who satisfy the statutory criteria for eligibility are entitled as a matter of law to SCDDC benefits. Based on the statutory framework, many veterans have a protected property interest as applicants for and recipients of SCDDC benefits.”¹⁰³

Substantial delays in adjudicating claims for disability benefits can, in and of themselves, violate the Due Process Clause.¹⁰⁴ In evaluating whether a procedure satisfies Due Process, courts balance (1) the private interest, (2) the risk of erroneous deprivation and the probable value, if any, of additional safeguards, and (3) the government’s interest, “including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”¹⁰⁵ The veterans’ advocacy groups charged violation of due process as “there is no opportunity for any hearing by a neutral decision-maker, the process is unduly complicated and lengthy, and there is no provision for any expedited process that would apply in an emergency situation such as a threatened suicide.”¹⁰⁶

In *Veterans for Common Sense v. Peake*, the district court did not even undergo an analysis of the required three-part balancing test outlined in *Mathews v. Eldridge* in order to determine if a due process claim applied to the veterans. The district court devoted only a single paragraph to summarily reject the veterans’ due process claims.¹⁰⁷ The court cited *Wright v. Califano*, a case involving benefit dispensation by the Social Security Administration, stating that the holding in *Wright* was “illuminating.”¹⁰⁸ It is important

101. *Id.* at 1085.

102. *Id.* (quoting plaintiff’s proposed order page 7).

103. *Peake*, 563 F. Supp. 2d at 1086.

104. *See, e.g.*, *Rodrigues v. Donovan*, 769 F.2d 1344, 1348 (9th Cir. 1985) (stating that due process claim based on considerable delay in deciding right to disability benefits found not insubstantial); *Andjugar v. Weinberger*, 69 F.R.D. 690, 694 (S.D.N.Y. 1976) (stating that “[D]elays themselves may result in a deprivation of property.”); *Kraebel v. New York City Dep’t. of Hous. Preservation and Dev.*, 959 F.2d 395, 405 (2d Cir. 1992) (stating that “delay in processing can become so unreasonable as to deny due process.”).

105. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

106. *Peake*, 563 F. Supp. 2d at 1082.

107. *Id.* at 1086.

108. *Id.* (quoting *Wright v. Califano*, 587 F.2d 345, 356 (7th Cir. 1978)). The *Wright* court stated that

although judicial intervention may be required at some point, the solution must come from the SSA itself with the assistance of Congress. To impose on the SSA the crash review program sought by plaintiffs could

to note here that the district court also cited yet another case which held that it would be rare for a court to intervene when the passage of time, and nothing more, presented an occasion for the court to intervene in an agency's adjudicative proceedings.¹⁰⁹

It is also important to note the link between the delays in the veterans' access to mental health care for PTSD and the delays in adjudication for SCDDC benefit claims. As mentioned previously, the district court found that many disability compensation recipients are totally or primarily dependent upon their statutorily-mandated SCDDC benefits for financial support. 38 U.S.C. § 1710 provides that the Secretary shall furnish medical services determined to be needed to any veteran for a service-connected disability for a five-year period.¹¹⁰ The district court found that this language created an entitlement to health care for veterans for five years after separation from active duty.¹¹¹ The district court found that the evidence presented did not show that there was a "system-wide crisis" in which health care was not being provided within a reasonable time.¹¹²

Although the passage of 4.4 years to adjudicate a contested SCDDC benefit claim in itself is appalling, the fact that 1,000 veterans a month are attempting or succeeding in committing suicide, some simply waiting for the claims adjudication process to be completed to grant them their property right of benefit payouts. This certainly warrants more attention from the district court than a single paragraph. And the case the veterans put forth via the advocacy groups show, without a doubt, that there is more to the story than simply "the passage of time, and nothing more." Without access to the appropriate diagnosis and treatment for the disease state of PTSD, coupled with the denial of statutorily-mandated SCDDC benefits for some veterans to the tune of 4.4 years, these veterans are in desperate need of help: and the district court has it in its power to deliver that help. This lawsuit is that cry for help.

C. Application of TRAC Factor Analysis and Due Process Analysis to the VA's Claims Adjudication Process

1. TRAC Factor Analysis

Again, Section 706(1) of the APA permits federal courts to compel agency action unlawfully withheld or unreasonably delayed.¹¹³ The district

be expected to result in a deterioration of the quality of the review, and possibly more injustice to claimants than justice.

109. *Peake*, 563 F. Supp. 2d at 1086 (quoting the holding of *Fed'l Trade Comm'n v. Weingarten*, 336 F.2d 687, 692 (5th Cir. 1964)).

110. 38 U.S.C. § 1710 (1994).

111. *Peake*, 563 F. Supp. 2d at 1079.

112. *Id.* at 1081.

113. 5 U.S.C. § 706(1) (1993).

court undertook a *TRAC* factor analysis in regards to the VA's claims adjudication process and concluded that "[a]lthough the delays faced by veterans, especially during the appeals process, are significant, the *TRAC* factors militate against a finding of unreasonableness."¹¹⁴

It is noteworthy that the *TRAC* factors impose a rule of reason with respect to agency delay and take into account the consequences to health and human welfare, balanced by the imposition of complying with timeliness of agency action upon the agency. The first and second *TRAC* factors specifically address the rule of reason and whether Congress has mandated any timetables or indications that inform of a rule of reason.¹¹⁵ The district court concluded that these first two factors favored "neither a finding of reasonableness nor unreasonableness" because the applicable statutory scheme lacked any fixed time limits, thus rendering the veterans' claims of entitlement to relief under the APA for the delays in claims adjudication without merit.¹¹⁶ The court deduced further that this holding was "reinforced by the fact that Congress specifically did not include any fixed time limits for the adjudication of veterans benefit claims."¹¹⁷

Yet, the entire purpose of the *TRAC* factors is to evaluate whether delay is unreasonable in the *absence* of such defined deadlines.¹¹⁸ Thus, the first *TRAC* factor supplies courts with a "rule of reason" standard by which agency delay can be assessed absent an explicitly-defined deadline. When looking at the statistics put forth by the veterans' advocacy groups, and supported by the VA's own data, it is difficult to believe that a 4.4 year adjudication time-frame for *any* SCDDC claim is "reasonable" under a "rule of reason" standard.

In fact, this time frame becomes even more "unreasonable" when compared to the private sector health care/financial services industry. This industry processes an annual thirty billion claims in an average of 89.5 days per claim, which includes the time required for claims that are disputed.¹¹⁹ It is interesting to note that the United States Government Accountability Office ("GAO") has published several statements admonishing the VA's claims processing performance; and these admonishments span nearly a decade.¹²⁰

114. *Peake*, 563 F. Supp. 2d at 1084.

115. *Telecomm. Research and Action Ctr.*, 750 F.2d at 79.

116. *Peake*, 563 F. Supp. 2d at 1084.

117. *Id.*

118. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 n. 19 (10th Cir. 1998) (stating that *TRAC* factor analysis only applies in the absence of any statutorily defined mandatory deadlines).

119. Bilmes, *supra* note 64, at 7.

120. See, e.g., U.S. GOVT. ACCOUNTABILITY OFFICE, VETERANS' BENEFITS: PROCESSING ENCOURAGING, BUT CHALLENGES STILL REMAIN (1999); U.S. GOVT. ACCOUNTABILITY OFFICE, VETERANS' BENEFITS: QUALITY ASSURANCE FOR DISABILITY CLAIMS AND APPEALS PROCESSING CAN BE FURTHER IMPROVED (2002); U. S. GOVT. ACCOUNTABILITY OFFICE, VETERANS' DISABILITY BENEFITS: LONG-STANDING CLAIMS PROCESSING CHALLENGES

The district court belittled this statistic by emphasizing that only four to eleven percent of veterans who pursue appeals would face lessened delays should the VA be forced to adjudicate these claims in a timely, or reasonable, manner.¹²¹ What the district court failed to address is the fact that among that four to eleven percent are veterans who are suffering from PTSD, whether they have been diagnosed or not. The stress caused by struggling with VA bureaucracy exacerbates the already overwhelming symptoms of PTSD, and these veterans are left without a means to survive until their claims are finally adjudicated, or until they simply cannot wait any longer and attempt to adjudicate the situation in their own way: by joining the ever-growing ranks of veterans attempting suicide at the rate of 1,000 per month.

The district court could have looked to the VA's own pilot program for expedited claims adjudication to provide content to the rule of reason under the second *TRAC* factor.¹²² This pilot program asks participating RO's to certify appeals to the BVA within thirty days of receipt of a Form 9 appeal.¹²³ If the VA itself recognizes that a problem with claims adjudication exists to the point that a pilot program is needed to test the viability of expediting the claims adjudication process, then surely the district court could have acknowledged the same.

Allowing that the first and second *TRAC* factors impose a rule of reason upon the VA for adjudicating claims in a reasonable manner, and that the *TRAC* factors exist to evaluate whether delay is unreasonable in the absence of any defined deadlines, the evidence weighs heavily in favor of the veterans for these first two *TRAC* factors. The district court's conclusion that these first two *TRAC* factors favored neither a finding of reasonableness nor unreasonableness simply does not ring true when applying the actual timeliness of the VA's claims adjudication timeframe for claims that must make their way through the entire appeals process. Delays of over four years are unacceptable under any rule of reason, especially when compared to the private sector's average of 89.5 days per claim, which includes the time needed to adjudicate disputed claims.

The district court found that analysis under the third, fifth and sixth *TRAC* factors also weighed heavily in the veterans' favor.¹²⁴ The court stated that it was beyond "dispute that the health and welfare of veterans was at stake,"¹²⁵ which directly addressed the third *TRAC* factor. The court

PERSIST(2007) [hereinafter GAO LONGSTANDING CLAIMS];); U. S. GOVT. ACCOUNTABILITY OFFICE, VETERANS' DISABILITY BENEFITS: PROCESSING OF CLAIMS CONTINUES TO PRESENT CHALLENGES (2007) [hereinafter GAO PROCESSING OF CLAIMS].

121. *Peake*, 563 F. Supp. 2d at 1085.

122. Board of Veterans' Appeals: Expedited Claims Adjudication Initiative-Pilot Program, 73 Fed. Reg. 20571 (proposed April 16, 2008) (to be codified at 38 C.F.R. pts. 3 and 20).

123. *Id.*

124. *Peake*, 563 F. Supp. 2d 1085.

125. *Id.* (reiterating that the third *TRAC* factor declares that delays that might be reason-

addressed the fifth *TRAC* factor by stating that the “nature and extent of the interests prejudiced by the delay could not be any more serious.”¹²⁶ Finally, the court found that the sixth *TRAC* factor, in which a finding of unreasonable delay need not be based on impropriety on the part of an agency, favored relief for the veterans.¹²⁷

Nevertheless, the court went on to state that when applying the *TRAC* factor analysis, the weight of all other factors, including the factor stating that delays affecting human health and welfare are less tolerable than those in the sphere of economic regulation, did not “overcome the fourth factor, which states that the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority.”¹²⁸ The only justification that the court offered in finding that the fourth *TRAC* factor outweighed all the overwhelming evidence in favor of the veterans was that only four percent “of the total claims are actually pursued to a decision by the BVA.”¹²⁹ The court mentioned Congress’ continuing concern that mandatory deadlines would subordinate quality to timeliness,¹³⁰ and that competing agency priorities precluded relief.

Be that as it may, the VA never argued that implementing a more reasonable, timely adjudication of appealed claims would compromise the timeliness of claims adjudication at the initial RO level. Nor did the VA argue that decreasing the time to adjudicate appealed claims would subordinate quality to timeliness; neither for claims at the RO level, nor for appealed claims. Finally, the VA did not offer any competing priorities that would preclude it from adjudicating appealed veterans’ claims in a timelier manner. “[E]xtensive or repeated delays are unacceptable notwithstanding competing interests.”¹³¹

Thus, the court’s conclusion that lessening the unconscionable delays at the appellate level of claims adjudication would negatively impact the claims adjudication at the RO level is unfounded. Likewise, the court’s conclusion that factor four of the *TRAC* analysis outweighs all the other factors weighing in favor of the veterans is unjustified.

Under the APA, should a court determine that agency action has been unreasonably delayed, the court must compel the agency to act.¹³² Given the fact that delays in the adjudication of veterans’ claims have spanned more than a decade, coupled with the fact that the *TRAC* factor analysis

able in the sphere of economic regulation are less tolerable when human health and welfare are at stake).

126. *Peake*, 563 F. Supp. 2d at 1085.

127. *Id.*

128. *Id.* at 1084-85 (quoting *Independent Mining Co. v. Babbitt*, 105 F.3d 502, 507 n. 7 (9th Cir. 1997)).

129. *Id.*

130. *Id.* at 1084.

131. *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 40 (2000 U.S. Dist. LEXIS 22871)

132. 5 U.S.C. § 706(1) (1993).

weighs heavily in the veterans' favor, the district court had within its power to rule that the VA had "unlawfully withheld or unreasonably delayed" benefits to deserving veterans under section 706(1) of the APA. Thus, the district court should have compelled the VA to act pursuant to the statutory mandates set forth by Congress.¹³³

2. Due Process Analysis

Not only do the four-year delays in claims adjudication violate congressional statutory mandates and the APA requirements, but these delays also constitute a violation of the Due Process Clause. The veterans' advocacy groups contended "that the delays in adjudicating SCDDC benefit claims [were] excessive and unreasonable and therefore violate the rights of veterans under . . . the *Due Process Clause*."¹³⁴ The district court, however, held that although the "delays in benefits claims adjudications, especially for appeals, [were] substantial, the existing statutory framework . . . prevent[ed] this Court from taking remedial action"¹³⁵ and stated "[t]his conclusion [was] reinforced by the fact that only 4% of the total claims each year are appealed and pursued to a decision by the BVA."¹³⁶

The district court did recognize that veterans who satisfy eligibility criteria outlined in the applicable statute are entitled, as a matter of law, to SCDDC benefits.¹³⁷ As such, veterans who qualify have a property interest under the Due Process Clause. Nevertheless, the court went on to quote case law supporting its view that a due process violation had not occurred, stating that "[T]here is no talismanic number of years or months, after which due process is automatically violated."¹³⁸ The court continued down this path of reasoning, justifying its decision to not undergo a thorough due process analysis, writing, "In determining when due process is no longer due process because past due, the influence of other significant circumstances is not to be ignored Delay is a factor but not the only factor."¹³⁹

133. See, e.g., 38 U.S.C. § 7101(a) (1994) (imposing a statutory duty to hire sufficient personnel to process appeals at the Board of Veterans Appeals ("BVA") in a timely manner); 38 U.S.C. § 5109B (1994) (imposing a statutory duty to resolve remands in an expeditious manner); 38 U.S.C. § 1705 (1994) (imposing a statutory duty to ensure that the system will be managed in a manner to ensure that the provision of care to enrollees is timely and acceptable in quality); 5 U.S.C. § 706(1) (1993) (stating that a reviewing court shall compel agency action unlawfully withheld or unreasonably delayed).

134. *Peake*, 563 F. Supp. 2d at 1083.

135. *Id.*

136. *Id.*

137. *Id.* at 1086. See also 38 U.S.C. § 1710 (1994) (providing that the Secretary shall furnish medical services determined to be needed to any veteran for a service-connected disability for a five-year period).

138. *Peake*, 563 F. Supp. 2d at 1086 (quoting *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990)).

139. *Peake*, 563 F. Supp. 2d at 1086 (quoting *Wright v. Califano*, 587 F.2d 345, 354 (7th Cir. 1978)).

The simple passage of time, though, is relevant for veterans being denied their statutorily-mandated benefits: for some suffering from PTSD, it can mean the difference between life and death. With “eighteen U.S. veterans kill[ing] themselves every day . . . [more] veterans are committing suicide than are dying in combat overseas.”¹⁴⁰ Indeed, the court’s own argument that other significant circumstances are not to be ignored would seem to justify a closer look at how the denial of SCDDC benefits in a timely manner may, or may not, be a contributing factor in the escalating number of veteran suicides.

As stated previously, delays in adjudicating claims for disability benefits can, without more, violate the Due Process Clause.¹⁴¹ Given that the veterans’ advocacy groups firmly established that some veterans, albeit perhaps only four percent, have waited four years or more for a claims determination, the district court shirked its duty by not undertaking a thorough due process analysis. Had the district court undergone an analysis of the required three-part balancing test outlined in *Mathews v. Eldridge* to determine if a due process claim applied to the veterans being denied SCDDC benefits, it would have found a due process violation.

To reiterate, the *Mathews v. Eldridge* balancing test requires that courts balance (1) the private interest, (2) the risk of erroneous deprivation and the probable value, if any, of extra safeguards, and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or procedural requirement would entail.¹⁴² In regards to the private interest involved, the veterans’ interests could not be higher.

“[I]n assessing the injury caused by deprivations of federal benefits, we look to claimants’ individual dependency on the benefits, and the potential injury incurred by losing those benefits”¹⁴³ Many disability compensation recipients are either totally, or primarily, dependent upon SCDDC benefits for financial support,¹⁴⁴ as they may be jobless upon relinquishing their positions as active service members. Indeed, the delay in processing these claims for benefits hinders disabled veterans’ ability to make payments on their homes and other necessities.

For veterans who may be experiencing the effects of PTSD, the inabil-

140. Aaron Glantz, *Vets Health System in Need of Triage*, INTER PRESS SERVICE NEWS AGENCY, Jan. 15, 2009, <http://ipsnews.net/news.asp?idnews=45423> (last visited July 21, 2009).

141. See, e.g., *Rodrigues*, 769 F.2d at 1348 (finding that a due process claim based on “considerable delay” in deciding the right to disability benefits was not insubstantial); *Kraebel*, 959 F.2d at 405 (stating that “[D]elay in processing can become so unreasonable as to deny due process.”); *Andujar*, 69 F.R.D. at 694 (stating that “[D]elays themselves may result in a deprivation of property.”).

142. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

143. *Briggs v. Sullivan*, 886 F.2d 1132, 1145 (9th Cir. 1989).

144. *Peake*, 563 F. Supp. 2d at 1070.

ity to secure the SCDDC benefits owed to them only exacerbates the underlying disease state, leading to a sense of hopelessness which may inevitably contribute to the risk of these veterans taking matters into their own hands, at the rate of eighteen suicides a day. "Between October 1, 2007, and March 31, 2008, alone, at least 1,467 veterans died during the pendency of their appeals."¹⁴⁵ Amazingly, upon an appellant's death, the appeal is extinguished, thus effectively extinguishing any hope that the veteran's survivors will benefit from any SCDDC benefits. Noting the devastating effect this can have on the veteran's survivors, proposed legislation would have allowed for substitution by surviving spouses as claimants when a veteran spouse dies while a claim is pending.¹⁴⁶ Alas, the veterans were not even afforded this relief, as the proposed legislation never came up for a vote in the Senate, despite passage in the House of Representatives.

When evaluating the private interest of the veterans, it appears to be a very small leap in logic that this factor weighs heavily in favor of the prospect that veterans are being denied due process. In addition, the risk of erroneous deprivation is high. Statistics brought out in *Veterans for Common Sense v. Peake* paint a clear picture of the level of erroneous deprivation:

The BVA reverses RO decisions 21 percent of the time and remands another 41 percent of the cases; the cumulative error rate on VARO decisions is over 90 percent. By the VA's own calculations, 44 percent of the reasons for remand by the BVA are "avoidable," . . . Seventy-five percent of the remanded cases return to the BVA a second time, and 27 percent of those cases are remanded once again.¹⁴⁷

Further, the district court noted that Veterans Benefits Administration ("VBA") employees "violating their duty to assist veterans" accounted for almost half of the avoidable remands in the very short time frame between January 1, 2008, and March 31, 2008.¹⁴⁸

The district court also stated, though, that "[i]n looking at the totality of SCDDC claims . . . the risk of erroneous deprivation is relatively small."¹⁴⁹ The court justifies this position by stating that only four percent of claims filed proceed to the BVA, and thus the affected veterans must ab-

145. *Id.* at 1075.

146. Veterans Disability Benefits Claims Modernization Act of 2008, H.R. 5892, 110th Cong. § 111 (2008), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-5892>.

147. Gordon P. Erspamer, *The New Suspect Class. Tragically, Our Veterans*, ABA HUMAN RIGHTS, Spring 2008, at 20.

148. *Peake*, 563 F. Supp. 2d at 1075.

149. *Id.* at 1087.

ide by the principle that “the effect that a process must be judged by the generality of cases to which it applies, and therefore, process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them.”¹⁵⁰

The district court, though, failed to address just how many veterans fall within that four percent affected by the VA’s claims adjudication process. The most recent number available states that the VBA has a backlog of “somewhere between 400,000 and 600,000” claims.¹⁵¹ Thus, at least 400,000 claims are awaiting final adjudication through the VBA, with the possibility that those claims may not be adjudicated for 4.4 years. This hardly seems to be an insignificant percentage of veterans waiting for their SCDDC benefits. And with eighteen veterans committing suicide each day, this number becomes appalling.

The district court did attempt to minimally address the second *Mathews* factor by stating that “although the additional safeguards Plaintiffs seek would likely reduce the number of avoidable remands and erroneous deprivations, the fiscal and administrative burdens of these additional procedural requirements are significant.”¹⁵² So although factor two under the *Mathews* analysis also weighs heavily in favor of the veterans, the district court placed all emphasis on the third *Mathews* factor. In effect, the district court deduced that the perceived administrative burden to the VA for implementing some of the veterans’ requests for relief outweighed the veterans’ interests in obtaining the requested relief.

But the VA’s interest in ensuring accurate and timely adjudication of SCDDC claims is not at odds with the veterans’ interest in timely adjudication; in fact, the two interests coincide. In addition, the VA presented no evidence that implementation of some of the veterans’ requests would present such perceived administrative burdens. The court simply held that “[i]mplementation and maintenance of such a system would be costly in terms of the resources and manpower that the VA would need to commit to the RO proceedings.”¹⁵³

One such request is the ability to pay an attorney from the beginning of the claims adjudication process. Given that the claim forms are exceedingly technical, lengthy, and difficult to fill out, and that many times claims are denied based on information contained in the initial claim form, it would seem appropriate for veterans to have the benefit of legal counsel.

150. *Id.* at 1087 (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 330, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985)).

151. *Bilmes*, *supra* note 64, at 16. *See also* GAO LONG-STANDING CLAIMS, *supra* note 120; Statement of Daniel Bertoni, *supra* note 120 (outlining the backlog of VBA claims and the persistent challenges to adjudicating those claims).

152. *Peake*, 563 F. Supp. 2d at 1088.

153. *Id.* at 1088 (noting that plaintiffs requested “the general right of discovery, including the power to subpoena witnesses and documents, the ability to examine and cross-examine witnesses, the ability to pay an attorney, and the right to a hearing.”).

“Imagine if our legal system were set up so that plaintiffs were forced to assemble, file, and argue their own lawsuits, and that attorneys could only be paid for their assistance after the initial case was lost”¹⁵⁴

This is the end effect of not allowing veterans to pay for attorney assistance at the outset of the claims adjudication process, per The Veterans’ Choice of Representation and Benefits Enhancement Act of 2006.¹⁵⁵ The district court could have granted this request, which would have benefitted the veterans and the VA, without any additional administrative costs to the VA. The VA already employs a host of attorneys to look after its interests. It seems only right that the veterans be allowed the same legal representation.

The district court, rather than engaging in an in-depth analysis using the *Mathews* factors, instead based its due process analysis on a single Social Security case from the Seventh Circuit.¹⁵⁶ In *Wright*, Social Security disability claimants challenged hearing delays of up to 180 days and asked the court to impose time limits on the processing of claims, or else make interim payments of benefits.¹⁵⁷ Although the district court stated it found the *Wright* decision “illuminating,” the very phrases the court pulled out of the *Wright* decision to make its case actually appear to benefit the arguments the veterans put forward.

For instance, the district court quoted the *Wright* decision, stating that “[i]n determining when due process is no longer due process because past due, the influence of other significant circumstances is not to be ignored Delay is a factor but not the only factor.”¹⁵⁸ These quotes actually seem to lean towards favoring the veterans, and not the VA. The veterans absolutely take issue with factors other than the simple delay of claims adjudication. The veterans put forth statistics that claims for veterans suffering from PTSD are more difficult for the veterans to fill out during the initial phase of claim filing, and that these claims are more susceptible to denial based on mistakes the veterans with PTSD make due to their illness. Besides, the 180 days of delay in the *Wright* decision pales in comparison to the four-year delays experienced by veterans trying to maneuver their way through the VA’s claims adjudication system.

The *Wright* court went on to state that “[t]here may be . . . in the more typical situation unjustified and unreasonable delays constituting a deprivation of property in violation of due process requiring our interven-

154. Craig Kabatchnick, *After the Battles: The Veterans’ Battle with the VA*, ABA HUMAN RIGHTS, Spring 2008, at 13.

155. See 38 U.S.C. §§ 5902-5905 (2007).

156. *Peake*, 563 F. Supp. 2d at 1086 (referring to the decision in *Wright v. Califano*, 587 F.2d 345 (7th Cir. 1978)).

157. *Wright v. Califano*, 587 F.2d 345 (7th Cir. 1978).

158. *Peake*, 563 F. Supp. 2d at 1086 (quoting *Wright v. Califano*, 587 F.2d 345, 354 (7th Cir. 1978)).

tion”¹⁵⁹ The veterans in *Veterans for Common Sense v. Peake* surely put forth arguments strong enough to advocate just such a judicial intervention.

When actually looking more deeply into a due process analysis applying the facts of the veterans’ experience with the VA claims adjudication process to the *Mathews* factors, it appears as though each factor weighs in favor of the veterans, thus implying that the veterans are in fact being denied due process. For those veterans whose claims are trapped in the “churn” of the VA claims adjudication process, sometimes for decades, the denial of due process regarding those claims can result in the most irreparable type of harm: loss of hope, onset of despair, and sometimes even death by suicide.

IV. RECOMMENDATIONS

While the evidence strongly suggests that veterans, particularly those with PTSD, are being denied constitutional due process, thus mandating judicial intervention, several recommendations exist that would grant the veterans relief without such intervention. Although the court denied the veterans the injunctive relief they sought, perhaps the trial was necessary to bring the issues into sharp focus so that steps, other than judicial intervention, could be taken to alleviate the suffering many veterans with PTSD experience when trying to maneuver through the VA’s claims adjudication system.

“The Government Accountability Office, House Veterans’ Affairs Committee staff, and the VA’s own Inspector General have come out with report after report cataloguing shortfalls in the expenditure of funds and delivery of services” to the veterans.¹⁶⁰ In regards to the overwhelming delays seen in the VA’s claims adjudication system, a reasonable remedy would be to presumptively approve disability claims, particularly those related to PTSD, “to ensure no veteran languishes or falls into poverty while awaiting financial assistance.”¹⁶¹ This approach would be strikingly similar to that employed by the Internal Revenue Service (“IRS”), where the IRS deters fraudulent claims by presuming that the taxpayer’s filed return is correct and then subsequently audits those returns. “This startlingly easy switch would ensure that the US no longer leaves disabled veterans to fend for themselves.”¹⁶²

159. *Wright*, 587 F.2d at 356.

160. Fairweather, *supra* note 18, at 24. *Accord* GAO LONG-STANDING CLAIMS, *supra* note 120; DANIEL BERTONI, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, VETERANS’ DISABILITY BENEFITS: PROCESSING OF CLAIMS CONTINUES TO PRESENT CHALLENGES (GAO-07-562T), March 13, 2007.

161. Fairweather, *supra* note 18, at 24.

162. Bilmes, *supra* note 64, at 18.

Despite this simple proposed solution, VA spokesperson Kerri Childress stated that “[v]eterans are human Some are in desperate situations. Some have the choice of going to jail or the military. So a portion of them would commit fraud.”¹⁶³ Ms. Childress goes on to say that “[e]liminating the proof requirement would open the VA’s checkbook to fraudulent claims”¹⁶⁴ Nevertheless, part of the district court’s very decision in *Veterans for Common Sense v. Peake* to refuse the veterans relief for denial of due process centered around the fact that “only” four percent of veterans who file claims are ultimately affected. If this is true, then over ninety percent of initial claims are approved. As an initial safeguard against the fraud that Ms. Childress fears would be rampant, the VA could start small: automatically approve PTSD claims “with the understanding that deployment to Iraq and Afghanistan means VBA concedes there was at least one stressor sufficient enough to cause PTSD, unless there is evidence to the contrary.”¹⁶⁵

Yet another suggestion to reduce the number of backlogged claims is to “fast track” claims submitted by returning Iraq and Afghanistan veterans in a “single center staffed with highly experienced group of adjudicators who could provide most veterans with a decision within 90 days.”¹⁶⁶ This could be readily accomplished by expanding “the Vet Centers to offer some assistance in helping veterans figure out their disability claims.”¹⁶⁷ This solution would grant greater access to the veterans than the current system, where the veteran has to travel to one of the fifty-seven VA Regional Offices throughout the country to file a claim for SCDDC benefits. For the PTSD veteran, the increased access to both experienced claims adjudicators and filing locations would not only ease the process of filing, but would better ensure that the initially filed claim was prepared appropriately.

Finally, “attorney representation should be available from the earliest claims stage.”¹⁶⁸ The services of attorneys can ensure the successful completion of the very complex PTSD claim. Unrepresented PTSD veterans have great difficulty in preparing and filing their SCDDC claims, especially since the very condition giving rise to the claim adversely affects the veteran’s ability to do so.

Currently, a veteran is allowed to pay for legal counsel only after a

163. Joshua Kors, *How the VA Abandons Our Vets*, THE NATION, Sept. 15, 2008, available at <http://www.thenation.com/doc/20080915/kors> (last visited July 21, 2009).

164. *Id.*

165. *Hearing on Regional Office Solutions to Reduce the 65,000 Claim Backlog at the Veterans Benefits Administration: Hearing Before the Subcommittee on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans’ Affairs*, 110th Cong. Appendix (2008) (statement of Paul Sullivan, Executive Dir., Veterans for Common Sense).

166. Bilmes, *supra* note 64, at 18.

167. *Id.*

168. Fairweather, *supra* note 18, at 24.

veteran's initial claim for SCDDC benefits has been denied.¹⁶⁹ This seems to be a counter-intuitive way to assist the nation's veterans with the filing of their SCDDC benefit claims. It is at the *initial* filing that veterans are in desperate need of legal assistance. The initial filing is the veteran's opportunity to produce the evidence necessary to prove his claim for SCDDC benefits.

This includes the presentation of such evidence as: (1) statements from doctors who have provided treatment for the disability at issue over a prolonged period of time; (2) submission reports from board-certified medical doctors who specifically specialize in the field of medicine for which the claimed disability is at issue; and (3) articles and citations from recognized medical treatises, buddy statements, morning reports, evidence of citations, or other proof to help the veteran develop his or her claim for disability compensation or pension.¹⁷⁰

Clearly, this burden would be difficult for any veteran, but most especially for a PTSD veteran who may be experiencing the very symptoms that lead him to file the claim in the first place.

Opposition to allowing attorneys to be involved from the initial stage of claim filing argue that such action would "make the VA claims adjudication process adversarial rather than nonadversarial, as intended."¹⁷¹ But the experiences that the veterans have at the initial filing of claims for SCDDC benefits strongly suggest that the VA claims adjudication process is no longer nonadversarial in nature. "The burden of proof is always on the veteran to somehow prove that his or her claim for service-connected benefits is meritorious and worthy of a grant of service-connected benefits."¹⁷² The initial twenty-three page disability application is "loaded with charts and legal jargon."¹⁷³ It would only seem right that a nation wishing to provide for the veterans who served our nation would do so by allowing the veterans the right to pay for legal assistance at the most critical stage of requesting SCDDC benefits: the very first stage of claims filing.

In sum, the VA could avoid what may prove to be inevitable judicial intervention by implementing several recommendations made by different sources. These recommendations include 1) presumptively approving disability claims, particularly those related to PTSD, 2) fast tracking claims

169. 38 U.S.C. §§ 5902-5905 (2007).

170. Kabatchnick, *supra* note 154, at 15.

171. *Id.* at 16.

172. *Id.*

173. Kors, *supra* note 163.

submitted by returning Iraq and Afghanistan veterans, and 3) allowing veterans the option of attorney representation at the earliest stage of the claims benefit process.

V. CONCLUSION

It is an undisputed fact that eighteen veterans a day, or close to 6,000 veterans a year, commit, or attempt to commit suicide. The lawsuit brought by the two advocacy groups in *Veterans for Common Sense v. Peake* brought to the nation's attention some of the underlying reasons for this stark statistic. Although this lawsuit sought injunctive relief against the VA and not damages, the district court could not seem to find in its analysis of the facts presented that the VA claims adjudication system does, indeed, deny due process for veterans; particularly those experiencing the disease state of PTSD.

Although it seems evident that judicial intervention is not precluded from offering the veterans the relief they seek, perhaps the bringing of this lawsuit served a different purpose. By acknowledging that there is a significant underlying problem with the VA's claims adjudication system, this lawsuit perhaps opened the door to alternative solutions. These alternatives may alleviate some of the stress veterans experience in filing for SCDDC benefits: stress that could ultimately contribute to a veteran's decision to take his life.

By implementing some of the well thought out alternatives to judicial intervention, the VA could streamline the claims adjudication process with minimal effort and accomplish the goal of providing for our nation's returning war veterans, thus averting what appears to inevitably be judicial intervention. Presumptively approving disability claims (particularly those related to PTSD), fast-tracking claims submitted by returning Iraq and Afghanistan veterans in a single center staffed with highly experienced group of adjudicators, and allowing legal representation at the initial stages of filing claims for SCDDC benefits would significantly relieve the backlog of claims that currently plagues the VA.

Although the VA's claims adjudication process should be scrutinized to ensure due process and the timely disposal of claims, perhaps by implementing the suggestions put forth by a variety of knowledgeable sources the VA could once again commit to its own motto: To care for him who shall have borne the battle and for his widow and his orphan.