

Appeal No. 08-16728

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VETERANS FOR COMMON SENSE and
VETERANS UNITED FOR TRUTH, INC.,

Plaintiffs-Appellants,

vs.

JAMES B. PEAKE, M.D., Secretary of Veterans Affairs, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
Northern District of California
District Court No. C-07-3758-SC
The Honorable Samuel Conti

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants Veterans for Common Sense and Veterans United for Truth, Inc. are nonprofit corporations granted tax-exempt status under Internal Revenue Code § 501(c)(3). Plaintiffs-Appellants are not owned by any parent corporation, and no publicly traded corporation owns ten percent or more of Plaintiffs-Appellants' stock.

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I. JURISDICTIONAL STATEMENT

On July 23, 2007, Veterans for Common Sense and Veterans United for Truth, Inc. (collectively “Veterans”) filed an action against Defendants-Appellees federal agencies and officials (collectively “VA”) alleging violations of the Constitution and federal statutes. Excerpts of Record (“ER”) 243-315. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1361.

On June 25, 2008, the district court entered final judgment in VA’s favor. On July 25, 2008, Veterans filed a timely notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1). This Court has jurisdiction under 28 U.S.C. § 1291.

II. ISSUES PRESENTED

1. Whether the district court erred when it denied injunctive relief to remedy unreasonable delays in VA’s provision of mental health care to combat veterans pursuant to its statutory duty in 38 U.S.C. § 1710:

a. where review is properly within the scope of its powers under the Administrative Procedure Act (“APA”); and

b. where the district court’s findings of fact establish “unreasonable delay” under the APA.

2. Whether the district court erred when it denied declaratory and injunctive relief to remedy violations of Veterans’ due process rights where no

procedural mechanism exists to challenge protracted delays or denials of mental health care.

3. Whether the district court erred when it denied injunctive relief to remedy unreasonable delays in VA's adjudication of compensation claims:

a. where the district court declined to exercise jurisdiction based on the Veterans' Judicial Review Act, even though:

i. 38 U.S.C. § 511 directs individual veterans' challenges to their benefits decisions to VA's adjudicatory bodies but has no application to broader challenges to a system plagued by backlogs; and

ii. 38 U.S.C. § 502 directs facial challenges to VA regulations to the Federal Circuit but has no application to challenges to VA conduct that merely implicates regulations; and

b. where the district court's findings of fact establish "unreasonable delay" under the APA.

4. Whether the district court erred when it denied declaratory and injunctive relief to remedy violations of Veterans' procedural due process rights where the district court found four-year delays, on average, in VA's adjudication of compensation claims.

5. Whether the district court erred when it denied declaratory and injunctive relief to remedy violations of Veterans' due process rights where veterans are deprived of basic procedural protections in the adjudication of their compensation claims and the district court found many appeals were avoidable due to VA's failure to assist veterans.

6. Whether the district court erred in holding its findings of widespread violations were insufficient to support an injunction based on an undefined "systemic" standard that ignores Supreme Court and Ninth Circuit precedent.

7. Whether the district court abused its discretion when it imposed a six-week schedule for pre-trial discovery, and, in enforcing that schedule, denied critical discovery but nevertheless ruled Veterans failed to meet their burden of proof.

III. STATEMENT OF THE CASE

At stake in these proceedings is whether a federal agency may ignore its constitutional and statutory obligations to our Nation's veterans, unfettered by any form of judicial oversight. In exchange for service to our country, Congress created two basic entitlements for veterans: (1) health care for five years following honorable combat discharge; and (2) disability compensation for service-connected injuries. VA is charged with the administration of those entitlements. Due to VA inaction, veterans suffering from post-traumatic stress disorder are not receiving

mental health care or disability compensation determinations in a timely fashion. A national epidemic of veteran suicides is a tragic consequence of agency stalemate, with the highest suicide rates among young combat veterans returning from Iraq and Afghanistan.

After a preliminary injunction hearing merged with a bench trial on the merits, the district court concluded that it is “clear to the Court” that “VA may not be meeting all of the needs of the nation’s veterans.” ER 15 (Memorandum of Decision, Findings of Fact and Conclusions of Law (“Op”, or “F/F” or “C/L”), dated June 25, 2008, at 4:10-13). Having acknowledged the serious problems facing veterans in the VA system, the trial court nevertheless found Veterans’ grievances “misdirected,” because the “problems, deficiencies, delays and inadequacies complained of are not within the jurisdiction of this Court.” ER 12-13 (Op. at 1:27-2:1). That threshold determination colored the entire analysis and fundamentally misconceived the core functions of our coordinate branches of government. Both the Administrative Procedure Act and the Veterans’ Judicial Review Act contemplate a judicial check against agency inaction. But here the district court’s erroneous interpretations of the governing statutes effectively immunized VA from judicial scrutiny.

Had the district court correctly interpreted these statutes as permitting review of VA’s inaction, declaratory and injunctive relief was fully warranted

based on its own findings of fact. The ongoing injury to veterans demands a judicial remedy. To uphold the district court's ruling in this case denying veterans relief would undermine the federal system of checks and balances and exempt agencies wholesale from their obligations. Our veterans deserve more.

IV. STATEMENT OF FACTS

Veterans for Common Sense and Veterans United for Truth, Inc. are two nonprofit organizations dedicated to improving the lives of veterans. ER 25-26 (F/F 1); ER 625-26 (Reporter's Transcript ("RT") from the trial, 661:10-666:10); ER 554 (RT 811:20-812:6). Large numbers of Veterans' members suffer from service-connected disabilities, including post-traumatic stress disorder ("PTSD"),¹ and have sought service-connected death and disability compensation ("SCDDC") from the Veterans Benefits Administration ("VBA") and mental health care from the Veterans Health Administration ("VHA").² ER 26 (F/F 1); ER 626 (RT 665:22-666:7); ER 628 (RT 674:1-4); ER 554 (RT 813:24-814:9). Veterans' members have experienced unreasonable delays in the adjudication of their claims

¹ For the Court's convenience, attached hereto as Appendix 1 is a summary of acronyms defined herein.

² In its 35 pages of findings of fact, the district court set forth in great detail the operation of the VHA health care and VBA adjudication systems. ER 24-60 (F/F 6-113).

and in receiving health care from VA. ER 26 (F/F 1); ER 554 (RT 813:17-19); ER 555 (RT 815:4-816:16).

A. Unprecedented Numbers of Veterans Are Returning from Iraq and Afghanistan with Mental Health Problems.

The unique nature of the combat tactics employed in the Iraq and Afghanistan wars has produced an unprecedented number of veterans suffering from mental illnesses, particularly PTSD. ER 28 (F/F 9, 12); ER 1194 (Preliminary Injunction Hearing Transcript (“PIRT”) 216:17). PTSD is a psychological condition that occurs when people are exposed to extreme, life-threatening circumstances, or are in immediate contact with death or gruesomeness. ER 28 (F/F 11); ER 1297 (PIRT 62:25-63:6). If not properly treated, PTSD is one of the leading risk factors for suicide. ER 31-32 (F/F 24-26); ER 637 (RT 270:3-10); ER 638-39 (RT 273:1-276:24).

Recent government studies highlight the PTSD epidemic among veterans and VA’s failure to provide them with health care. Approximately 300,000 soldiers now deployed to Iraq and Afghanistan suffer from PTSD or major depression. ER 29 (F/F 14); ER 1496. Although the number of veterans diagnosed with PTSD doubled between 1997 and 2005, “[t]he number of clinic contacts per veteran per year declined steadily and relatively uniformly across the years.” ER 29 (F/F 13); ER 2064-65. The United States Government Accountability Office (“GAO”) questioned VA’s ability to “treat veterans

returning from military combat who may be at risk for developing PTSD, while maintaining PTSD services for veterans currently receiving them.” ER 40 (F/F 46); ER 2200. Only slightly more than half of the Iraq and Afghanistan war veterans seeking treatment for PTSD receive “minimally adequate care.” ER 29 (F/F 14); ER 1974.

B. VA Has Failed to Implement Its Own Mental Health Strategic Plan, Including Suicide Prevention Measures.

VA is failing to provide timely mental health services to our Nation’s veterans, resulting in a suicide epidemic. There are about 18 suicides per day among America’s 25 million veterans, including 4-5 suicides per day among veterans enrolled to receive VA health care. ER 30 (F/F 18); ER 2002-03; ER 1218 (PIRT 310:9-24, 312:21-313:1). Indeed, the veteran suicide rate is approximately 3.2 times higher than the rate in the general population. ER 29 (F/F 15); ER 638-39 (RT 274:15-275:19); ER 1412-16. In lieu of addressing the problem, VHA officials concealed their own alarming suicide statistics. In a February 2008 e-mail, Dr. Ira Katz, Deputy Chief of Patient Care Services for VA’s Office of Mental Health, wrote: “Shh! Our suicide prevention coordinators are identifying about 1,000 suicide attempts per month among the veterans we see in our medical facilities. Is this something we should (carefully) address ourselves in some sort of release before someone stumbles on it?” ER 30 (F/F 19); ER 1417-18.

VA contends that it provides “world class” mental health care to veterans, including suicidal veterans. ER 206 (RT 1386:14). Specifically, VA points to (1) its Mental Health Strategic Plan (“MHSP”), adopted in July 2004, and (2) the memorandum from William Feeley to the directors of VHA’s 21 Veterans Integrated Service Networks (“VISNs”), dated June 1, 2007 (“Feeley Memo”). ER 35 (F/F 34); ER 2373-417; ER 1437-40. VA, however, has neither implemented key initiatives from the MHSP and the Feeley Memo, nor monitored compliance in its medical facilities. ER 33-34 (F/F 31); ER 2114-93; ER 1437-40.

The MHSP requires VA medical facilities to implement specific mental health care requirements under rolling deadlines. ER 32 (F/F 27); ER 2373-417. But as of May 2007, key MHSP initiatives, including screening at-risk veterans and developing a suicide prevention database, were languishing in the pilot stage. ER 34 (F/F 31); ER 2175. A May 2007 Office of Inspector General (“OIG”) audit revealed: (1) that 61.8% of VA facilities had not implemented a suicide prevention strategy targeting veterans returning from Iraq and Afghanistan; and (2) that 70% of VA facilities had not implemented a tracking system for veterans with suicide risk factors. ER 32 (F/F 32); ER 2159; ER 2155.

William Feeley, the third-highest ranking official at VHA, is charged with ensuring that VHA facilities implement mandated procedures. ER 34 (F/F 33); ER 817-18). The Feeley Memo, sent to VISN directors *three years* after adoption

of the MHSP, instructed the VISNs, for the first time, to begin implementing the MHSP. ER 35 (F/F 34); ER 824; ER 1437-40. The Feeley Memo also directed the VISNs to adopt six discrete procedures that “reinforce the priorities established by the VHA Comprehensive MHSP.” ER 1437. For instance, a veteran visiting a VA medical facility for the first time *with a mental health issue* must receive an evaluation within 24 hours and a follow-up appointment within 14 days. ER 35 (F/F 35); ER 36 (F/F 37); ER 827; ER 437-40; ER 681 (RT 443:1-4); ER 1112 (PIRT 481:12-17). Deputy Under Secretary Feeley admits that VHA does not know whether its facilities have implemented the 24-hour screening procedure. ER 36 (F/F 38); ER 828; ER 681 (RT 446:18-21). As of March 2008, VA had conducted only two site visits to monitor implementation of the Feeley Memo. ER 36 (F/F 36); ER 827-28; ER 1106 (PIRT 457:19-25).

Money is not the obstacle. VHA witnesses, including its CFO, admit that adequate funds are available to provide the necessary health care. ER 30-31 (F/F 20); ER 1136 (PIRT 574:13-18). In fact, VHA’s current budget provides enough funding to cover a “worst-case scenario” of an influx of veterans returning from Iraq and Afghanistan with mental illness. ER 31 (F/F 20); ER 1088 (PIRT 787:17-20). Veterans continue to suffer as billions of dollars are sitting in VHA’s coffers, carried over from one fiscal year to the next. ER 1135 (PIRT 571:17-573:13).

C. Veterans Experience Substantial Delays in Obtaining Mental Health Care.

The suicide epidemic among veterans is due, in part, to VHA's failure to provide mental health care in a timely manner. The longer a veteran suffering from PTSD waits to receive medical attention, the greater the risk the disorder will develop into even more severe forms of pathology, such as severe depression. ER 32 (F/F 25); ER 1316 (PIRT 137:17-23). As of May 2007, 24.5% of VA facilities reported a wait time of 2-4 weeks for an evaluation, and 4.5% reported a wait time of 4-8 weeks for patients with symptoms of moderately severe depression. ER 37 (F/F 40); ER 2153. The wait times for PTSD referrals were even longer. ER 37 (F/F 40); ER 2153-54. As of April 2008, there were 85,450 veterans on VHA waiting lists for mental health services. ER 39 (F/F 44); ER 1426; ER 372-75. Moreover, VHA's data vastly understates the actual waiting times faced by veterans. ER 38 (F/F 43); ER 2081, 2083. While veterans may challenge clinical medical decisions, the long delays they face due to administrative scheduling decisions are not appealable. ER 41-42 (F/F 52); ER 1069 (PIRT 713:2-714:13); ER 1069 (PIRT 712:4-8).

D. Veterans Suffer Unreasonable Delays in the Adjudication of Disability Compensation Claims and Appeals.

In addition to VHA health care, veterans are entitled to receive compensation from VBA for service-connected disabilities, including PTSD.

Many recipients are totally or primarily dependent upon that compensation for financial support. ER 45 (F/F 61); ER 182. Despite veterans' needs, the system is choking. VBA currently has a backlog of 400,450 rating-based claims pending at its 57 Regional Offices ("ROs"). ER 52 (F/F 87); ER 771-83. In total, it takes an average 4.4 years for a veteran to adjudicate a claim through the agency—at least an average of 182 days for an initial RO decision plus 1,419 days for a Board of Veteran Appeals ("BVA") decision.³ ER 54 (F/F 95); ER 635 (RT 259:22-261:21); ER 742 (RT 221:22-222:7); ER 1999. The wait times are so long that at least 1,467 veterans recently died in a six-month period during the pendency of their appeals, thus extinguishing their claims. ER 57 (F/F 106); ER 422 (RT 1173:23-1174:1); ER 633-34 (RT 254:6-255:2); ER 985-996.

It takes an average of six months for a veteran to receive an initial RO decision. ER 46 (F/F 67); ER 52 (F/F 88); ER 462 (RT 936:11-15). PTSD claims take longer than the six-month average for all claims. ER 52 (F/F 88); ER 716-17 (RT 120:24-121:2); ER 671-72 (406:21-407:16); ER 847. Although VBA's strategic goal is to process claims in 125 days (ER 52 (F/F 88); ER 462 (RT 936:16-19)), at the time of trial, there were 101,019 rating-related claims pending more than 180 days. ER 52 (F/F 88); ER 1012.

³ BVA is VA's internal first-stage appellate body, overseeing the ROs.

Veterans are entitled to appeal any aspect of an RO rating decision by filing a Notice of Disagreement (“NOD”) within one year of the decision. ER 50 (F/F 82); ER 480 (RT 1008:9-24); 38 U.S.C. § 7105(b)(1). Upon receiving an NOD, either a *de novo* review of the claim is conducted or a Statement of the Case (“SOC”) is prepared, which provides a more detailed explanation of VA’s decision. ER 51 (F/F 84); ER 480-81 (RT 1009:2-1014:4); 38 U.S.C. § 7105(d)(1). On average, it takes 261 days from the NOD for an RO to prepare an SOC. ER 53 (F/F 90); ER 966. A veteran then has 60 days to file a VA “Form 9” Substantive Appeal. ER 52 (F/F 86); ER 480 (RT 1010:3-15); ER 481 (RT 1014:5-10); 38 U.S.C. § 7105(d)(3). Once the RO receives the Form 9, it must then certify the appeal to BVA, an administrative task that takes on average 573 days to complete. 38 C.F.R. § 19.35; ER 52 (F/F 86); ER 53 (F/F 90); ER 482 (RT 1017:2-12); ER 740-41 (RT 215:7-217:2); ER 970-71.

VBA’s delays in issuing SOCs and certifying appeals to BVA are abysmal. VBA offered no explanation as to why some veterans wait more than 1,000 days for an RO to simply certify an appeal or issue an SOC. ER 53 (F/F 90); ER 874-75 (Ex. 1260 at 6-7). The former VBA Under Secretary admitted that the delays are “unreasonable.” ER 805 (Ex. 1258 at 188:21-189:8); (Ex. 1258 at 191:1-9); ER 812-13 (Ex. 1258 at 296:23-297:10). Although veterans can submit new evidence at any time, this alone does not account for the extensive delays. ER 53-

54 (F/F 93); ER 738 (RT 207:25-208:3); ER 632 (RT 249:9-250:12); ER 661 (RT 364:9:23); ER 483 (RT 1019:15-20); ER 510 (RT 1129:15-1130:10); ER 421 (RT 1171:25-1172:18). VA witnesses acknowledged that the significant delays in ROs issuing SOCs and certifying appeals are due, in part, to the lower credits given to RO directors, pursuant to VA's incentive compensation system, for completing those actions. ER 53 (F/F 91); ER 421 (RT 1171:25-1172:18); ER 483 (RT 1019:1-1021:9); ER 510 (RT 1129:20-1130:10); ER 797.

Veterans' rights during the initial RO adjudication process are limited. For instance, veterans are statutorily prohibited from compensating an attorney. ER 50 (F/F 81); *see also* 38 U.S.C. § 5904. Only attorneys acting *pro bono* or lay representatives, i.e., Veterans Service Officers ("VSOs"), may assist veterans at the RO level. ER 50 (F/F 81); ER 461 (RT 932:20-934:21). All of the VSOs combined cannot meet the needs of veterans. ER 50 (F/F 81); ER 461 (RT 934:4-13); ER 588-89 (RT 514:19-515:1). Additionally, there are no procedures by which veterans may subpoena documents or witnesses to support their claims, including, for example, VHA treating physicians who have made PTSD diagnoses. While veterans forfeit claims or appeals by failing to meet various time limits, no specific time limits are imposed on VBA or BVA during any step of the adjudication process. ER 52 (F/F 86); ER 484 (RT 1024:17-20); ER 604-05 (RT 578:22-580:21).

After an original claim is certified for appeal, it takes BVA, on average, 336 days to issue a decision. ER 53 (F/F 92); ER 970-71. Thus, the total time between the NOD and an initial decision from BVA is, on average, 1,419 days. ER 54 (F/F 95); ER 1999; ER 742 (RT 221:22-222:7).

Veterans have the right to request a hearing before BVA. 38 C.F.R. § 20.700. At the time of trial, requests for BVA hearings had been pending, on average, 455 days. ER 54 (F/F 94); ER 959-60; ER 744 (RT 231:12-18); ER 605 (RT 581:24-582:2). Because of the lengthy hearing delays, most veterans do not request a BVA hearing even though veterans who receive hearings are more likely to prevail—25.3% compared to 18.4%. ER 54 (F/F 94); ER 959-60; ER 744 (RT 231:12-18); ER 605 (RT 581:24-582:2); ER 753.

Error rates are also high. A veteran's initial appeal results in reversal 20% of the time, and, in 40% of claims, BVA remands to the RO. ER 56 (F/F 101); ER 480 (RT 1007:2-25). During the first quarter of 2008, as admitted by BVA Chairman Terry, 44% of the reasons for remands were "avoidable," meaning that the cause for the remand was error by the RO. ER 962-63; ER 745 (RT 234:23-236:3); ER 600 (RT 559:9-560:10). Almost half of the avoidable remands are the result of RO employees violating their statutory "duty to assist" veterans. 38 U.S.C. § 5103A; ER 56 (F/F 102); ER 599 (RT 556:2-24); ER 420 (RT 1166:14-20).

BVA remands layer additional delays onto the resolution of appeals. VA witnesses agree that “the entire system is hurt by remands.” ER 57 (F/F 105); ER 600 (RT 559:9-560:13); ER 485 (RT 1027:9-16); ER 961-63; ER 596 (RT 543:20-25); ER 56 (F/F 102). Congress has mandated that VA undertake all actions necessary to resolve remands in an “expeditious” manner. 38 U.S.C. § 5109B. Nevertheless, it takes 563.9 days on average for PTSD claims to be granted, withdrawn, or returned to BVA after a remand. ER 57 (F/F 104); ER 761. High-ranking VA officials agree this is not “expeditious.” ER 805. Nearly 75% of remanded claims are returned to BVA, and it then takes BVA an average of 149 days to render a second decision. ER 57 (F/F 105); ER 970-71; ER 740-41 (RT 215:7-217:19); ER 596 (RT 544:15-24). Twenty-seven percent of remanded claims returned to BVA are then remanded to VBA a *second* time because BVA’s original remand instructions were not followed. ER 998-99; ER 596 (RT 544:25-545:11); ER 598 (RT 551:3-6). Thus, claims “churn” in the system for years on end. ER 2438.

V. PROCEDURAL HISTORY

A. VA’s Motion to Dismiss

Veterans filed this lawsuit on July 23, 2007, seeking declaratory and injunctive relief. ER 243-315. On September 25, 2007, VA filed a motion to dismiss. ER 2594. After oral argument, the district court issued its Order Granting

in Part and Denying in Part VA's Motion to Dismiss on January 10, 2008 ("MTD Order"), ER 201-42, holding that: (1) sovereign immunity did not bar Veterans' challenges; (2) Veterans "sufficiently alleged various challenges to 'final agency actions,'" specifically unreasonable delays that fell "within the exception provided for in § 706(1)"; (3) 38 U.S.C. § 511 did not preclude jurisdiction, because Veterans challenged "VA decisions that were not made in the course of a benefits proceeding, but instead were made at a broad, system-wide level"; and (4) "§ 1710(e)(1)(d) provides a mandatory entitlement to health care for veterans . . . a property interest protected by the Due Process Clause." ER 214, 228, 237.

B. Veterans' Motion for Preliminary Injunction

Veterans moved for a Preliminary Injunction ("MPI") on their health care claims on December 11, 2007. ER 333. After the conclusion of briefing, an evidentiary hearing was held from March 3-6, 2008. ER 1099-1363. Near the conclusion of the MPI hearing, the court deferred its ruling and merged the hearing with a trial on the merits, which it set to begin six weeks later. ER 1144-45 (PIRT 608:25-611:14); ER 1145-46 (PIRT 613:25-616:17); ER 1148 (PIRT 616:12-17); ER 1148 (PIRT 622:4-14). The trial would cover not only Veterans' health care claims, but also the disability compensation adjudication claims, which were not addressed at the MPI hearing. Veterans objected to the expedited trial schedule,

the lack of any discovery on the compensation adjudication claims, and the extremely limited discovery on the health care claims. ER 613-15 (RT 614:2-621:24). The court proceeded with the pretrial schedule over Veterans' objections. ER 613-15 (RT 614:2-621:24).

C. Pre-Trial Discovery Schedule

The district court artificially narrowed pre-trial discovery to a six-week period in a case alleging breakdowns in both the health care and adjudication systems of the second largest governmental agency. The Discovery Order, entered on March 13, 2008, limited Veterans to 30 narrowly drawn document requests and 11 depositions.⁴ ER 158-69. Due to delayed document productions, Veterans were forced to prepare for trial without a substantial portion of the documents in the Discovery Order.⁵ With less than three weeks until trial, Veterans moved to compel immediate production of certain categories of critical documents and

⁴ Before the close of the MPI hearing, the district court ordered Veterans to file a condensed list of document requests and proposed deponents the next day. ER 1144 (PIRT 609:9-14); ER 2608. On March 11, 2008, VA filed a counter-proposal, which significantly narrowed Veterans' discovery requests. ER 1047-57, 1018-46; ER 1047-57. Over Veterans' objections, the district court adopted VA's narrowed pretrial discovery proposal. ER 1013-17; ER 158-69.

⁵ The Discovery Order set rolling production deadlines, with VA's final production scheduled for April 17, 2008, four days before the April 21, 2008 trial date. ER 158-69. VA ultimately produced over 83% of the documents in the case within the two weeks preceding trial, more than 80,000 pages of documents within a week of trial, and were still producing responsive documents during trial and after several of Veterans' witnesses had testified.

requested a trial continuance to allow additional time to complete discovery and prepare for trial. ER 897-947; ER 123-25 (4/7/08 Transcript 20:6-22:10).

Denying Veterans' request for a continuance, the district court instead struck four previously ordered document requests from its Discovery Order. ER 122 (4/7/08 Transcript 21:7-22:25); ER 141-44 (4/7/08 Transcript 39:24-43:3).

D. Trial and Entry of Judgment.

Trial began on April 21, 2008 and lasted seven court days. ER 376-747 (RT 4/21-4/30/08). On June 25, 2008, the district court issued its Memorandum of Decision, Findings of Fact and Conclusions of Law. ER 12-93 (Memo of Decision, "FF/CL"). This appeal followed.

VI. SUMMARY OF THE ARGUMENT

Veterans appeal from final judgment after a bench trial in which the district court committed reversible error by finding veterans are suffering serious harm while simultaneously holding that the Administrative Procedure Act ("APA") and the Veterans' Judicial Review Act ("VJRA") barred its jurisdiction and circumscribed its power to redress that harm.

Using the strongest possible language to express its intent, Congress mandates that VA "shall" deliver mental health care to veterans in a "timely" manner. 38 U.S.C. §§ 1705(b)(1), 1710(a). VA developed and adopted its own plan for compliance with that statutory mandate—the Mental Health Strategic Plan

and follow-up Feeley Memo—which it failed to implement. As a result, tens of thousands of veterans suffering from PTSD experience protracted delays in obtaining mental health care. Meanwhile, veterans enrolled in VA’s health care system commit suicide at the rate of 4-5 every day and 1,000 more attempt suicide each month. Despite these findings, the district court denied APA relief under 5 U.S.C. § 706(1) to remedy VA’s “unreasonable delay” based on the court’s misapplication of *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004). These protracted delays also violate the Constitution. Veterans have a property interest in mental health care, earned by virtue of their combat service. The lack of any procedural mechanism for veterans to challenge intractable delays or non-clinical denials of care violates their procedural due process rights.

Coexistent with its obligation to provide timely mental health care is VA’s statutory obligation to expeditiously adjudicate veterans’ compensation claims. 38 U.S.C. §§ 5109B, 7101(a); 5 U.S.C. § 555(b). Yet, veterans currently wait an average of over four years for VA to adjudicate those claims through the first level of appeal, and that wait extends to six years if their claims are remanded. Those prolonged delays also violate the Due Process Clause. Further, veterans are stripped of basic procedural protections in VA’s adjudication system, which is an independent violation of due process rights and further complicates their struggles with long delays. The non-adversarial nature of VA’s adjudication system is a

fiction: VA data shows significant percentages of remanded claims were “avoidable” had VA complied with its statutory duty to assist veterans in the process.

Nevertheless, the district court held that two provisions of the VJRA barred its jurisdiction. Neither statute bars relief. 38 U.S.C. § 511, which curtails Article III review of an individual veteran’s claim and directs individual claims to VA’s own adjudicatory bodies, has no application to broader challenges to aspects of the adjudication system. Further, 38 U.S.C. § 502, which confers jurisdiction on the Federal Circuit over facial challenges to VA regulations, is inapplicable because veterans do not challenge any VA regulations.

Despite holding that the VJRA barred its jurisdiction, the district court went on to analyze Veterans’ APA and due process claims. Under the APA, the Ninth Circuit analyzes “unreasonable delay” claims using a six-factor test. *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997); 5 U.S.C. § 706(1). Those six factors impose a “rule of reason” with respect to agency delay and take into account the consequences to health and human welfare. The district court disregarded five of the six factors in acquiescence to perceived agency burdens without reference to findings of fact or other evidence of VA financial constraints. There was no such evidence in the record. Therefore, because four-year delays meet the six-factor APA delay test, entry of an injunction compelling agency

action was mandatory. With regard to Veterans' constitutional claims, the district court failed to conduct the required three-part balancing analysis under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Finally, the district court abstained from entering injunctive or declaratory relief based on its flawed interpretation of the requisite injury. Under this Circuit's precedent, system-wide relief is "required" where injuries resulting from statutory or constitutional violations "are attributable to policies or practices pervading the whole system (even though injuring a relatively small number of plaintiffs), or if the unlawful policies or practices affect such a broad range of plaintiffs that an overhaul of the system is the only feasible manner" to address those injuries. *Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001). The district court ignored that standard, imposing its own undefined concept of "systemic" to deny injured veterans relief. Additionally, a series of discovery rulings prejudiced Veterans in their quest to satisfy the district court's impossible standard.

In sum, the district court's misinterpretation of the APA and the VJRA effectively exempted one of the Nation's largest federal agencies from the *trias politica* of our Republic and compliance with congressional imperatives and the Constitution. The district court found extensive and serious harm to veterans; it was error to sanction that wrong by forgoing any remedy in purported deference to the coordinate branches of the federal government. The fundamental principle of

judicial review imposes a duty on Article III courts to serve as a check on the federal Tripartite. For these reasons, the district court should have entered injunctive and declaratory relief in favor of Veterans.

VII. STANDARDS OF REVIEW

Issues of law receive *de novo* review, including subject matter jurisdiction, *N.W. Env'tl. Advocates v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008), and sovereign immunity, *Commodity Futures Trading Comm'n v. Frankwell Bullion Ltd.*, 99 F.3d 299, 305 (9th Cir. 1996). This Circuit likewise reviews *de novo* questions of law and mixed questions of law and fact that implicate constitutional rights. *La Duke v. Nelson*, 762 F.2d 1318, 1322 (9th Cir. 1985), *modified*, 796 F.2d 309 (9th Cir. 1986).

Whether a district court possesses the authority to issue an injunction is also a question of law reviewed *de novo*. *Cont'l Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1102 (9th Cir. 1994). While the district court's decision whether to issue a permanent injunction is reviewed for abuse of discretion, any determination underlying the court's decision is reviewed by the standard that applies to the underlying determination. *Gathright v. City of Portland*, 439 F.3d 573, 576 (9th Cir. 2006). "When, as here, the injunction turns on a question of law, we review *de novo* the district court's injunction." *Id.* (internal quotation marks and citation omitted). The district court's decision granting or denying declaratory relief is

reviewed *de novo*. *Beaton v. Thompson*, 913 F.2d 701, 702 (9th Cir. 1990); *Fireman's Fund Ins. Co. v. Ignacio*, 860 F.2d 353, 354 (9th Cir. 1988). Decisions regarding litigation management are reviewed for abuse of discretion. *Stewart v. Ragland*, 934 F.2d 1033, 1042 (9th Cir. 1991).

VIII. THE DISTRICT COURT ERRED IN DENYING DECLARATORY AND INJUNCTIVE RELIEF TO REDRESS VA'S UNREASONABLE DELAYS IN DELIVERING STATUTORILY MANDATED MENTAL HEALTH CARE TO ELIGIBLE VETERANS AND THE LACK OF ADEQUATE PROCEDURES TO CHALLENGE SUCH DELAYS.

A. The APA Entitles Veterans to Injunctive Relief to Remedy VA's "Unreasonable Delays."

38 U.S.C. § 1710 provides that the Secretary of VA “*shall* furnish hospital care and medical services” to veterans “who served on active duty in a theater of combat operations” for a period of five years from the date of honorable discharge. 38 U.S.C. §§ 1710(a)(1), 1710(e)(1)(D), 1710(e)(3)(C)(i) (emphasis added); ER 65-66 (C/L 12). Veterans brought a claim under the APA to remedy unreasonable delays in the provision of statutorily mandated mental health care to combat veterans. Under § 706(1) of the APA, a reviewing court must “compel agency action unlawfully withheld or unreasonably delayed.” This Circuit employs a six-factor balancing test (the so-called “TRAC” factors) to measure unreasonable delay, which is discussed in § VIII.A.2, *infra*. *Independence Mining Co.*, 105 F.3d at 507 (citing *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (“TRAC”)). At the outset of the preliminary injunction

hearing, the district court found that the *TRAC* factors weighed in favor of relief. ER 1282 (PIRT 9:8-11:19).

Where the district court erred in its final decision denying relief, however, is in finding that Veterans' proposed remedies are barred under the Supreme Court's interpretation of § 706(1) of the APA in *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 71 (2004). Veterans address that threshold error first and then go on to show that relief is mandated under the facts found by the district court.

1. Veterans' Statutory Health Care Claims Are Not Barred by *Norton*.

The Supreme Court held in *Norton* that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." 542 U.S. at 64. The district court misapplied both of *Norton*'s requirements.

It is undisputed that VA is required to take action. By virtue of the Veterans' Health Care Eligibility Reform Act of 1996, 38 U.S.C. §§ 1704 *et seq.*, VA has a statutory duty to provide medical care to veterans. As the district court correctly acknowledged, the statute "created an entitlement to health care for veterans for five years after separation from active duty." ER 66 (C/L 12). VA must also "ensure that the [health care] system will be managed in a manner to ensure that the provision of care to enrollees is timely and acceptable in quality." 38 U.S.C. § 1705(b)(1).

The district court held, however, that these statutory requirements left too much discretion in the hands of the Secretary and it was thus “beyond the power of this Court to determine when and how much care will be provided.” ER 66 (C/L 14). Veterans did not ask the district court to make any such determination. Veterans did not propose their own mental health plan, but rather sought to compel VA to implement its own plan. The Secretary, exercising his discretion, expressly adopted the Mental Health Strategic Plan in 2004, as supplemented by the Feeley Memo, as VA’s method of complying with the statute. ER 1437-1440; ER 2374-417. Thus, the district court’s concern that “when an agency is compelled by law to act . . . , but the manner of its action is left to the agency’s discretion, a court . . . has no power to specify what the action must be” is misplaced. ER 67 (C/L 15).

Veterans simply request that VA comply with its own determination of what § 1710 requires. It is undisputed that VA has not done so. Despite an alarming spike in the suicide rate among young veterans returning from Iraq and Afghanistan (ER 30 (F/F 16)), the suicide-related initiatives required in the MHSP remain unimplemented. The Under Secretary for Health of VHA testified at trial that, as of April 2008, VHA had implemented 80% of the 265 initiatives in the MHSP. ER 545 (RT 777:14-24). At issue are the remaining 20%, among which are the critical initiatives focused on suicide prevention.

The district court held that the MHSP and Feeley Memo, standing alone, were not “required” and that the MHSP was not “discrete.” ER 73 (C/L 28); ER 74 (C/L 30). Thus, the district court held it did not have the power to redress VA’s failure to comply. But the actions described in the MHSP and Feeley Memo were “required” as that term was used in *Norton*. It is well-settled that an agency can bind itself to a course of action through internal documents less formal than regulations, particularly where individual rights are at stake. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) (“The legal proposition that agencies may be required to abide by certain internal policies is well-established.”). The *Norton* court emphasized that the agency had demonstrated no intention to be legally obligated by the *interim* land management plan at issue, explaining that it did not view the *interim* plan as a legal obligation, “at least absent clear indication of binding commitment.” 542 U.S. at 69. This is in stark contrast to VA’s commitments to the MHSP and Feeley Memo. As set forth in VA Secretary Principi’s May 2004 Capital Asset Realignment for Enhanced Services “CARES” Decision, providing for the development of the MHSP, which would be “incorporated into VA’s strategic planning process,” the actions set forth in the MHSP were always intended to be “required”:

This process *will require every VISN to develop mental health market plans that incorporate . . . the policies established in the strategic plan* to ensure that veterans across the VA system have

appropriate access to quality and complete mental health care services.

Request for Judicial Notice in Support of Appellants' Opening Brief ("RJN") filed herewith, Ex. B (CARES Decision at 2-12) (emphasis added).

At trial, top VA officials testified that the MHSP is VA's definitive plan to address mental health care for veterans. Dr. Ira Katz, the Deputy Chief of Patient Care Services for VA's Office of Mental Health testified the MHSP is "required":

Q. And is your office *required* to implement the comprehensive mental health strategic plan?

A. You bet. I was hired specifically to oversee the implementation of the 2004, 2005 mental health strategic plan.

ER 1075 (PIRT 738:3-6). Accordingly, in fiscal year 2007, VHA spent \$325 million on the MHSP and is on track to spend \$370 million in the current fiscal year. ER 33 (F/F 28); ER 1130-31 (PIRT 553:5-554:6). With unequivocal commitments at trial and devotion of hundreds of millions of dollars in resources, the MHSP is "required" from VA's own perspective.

Top VHA officials have also publicly committed to the MHSP and Feeley Memo before Congress. After the close of trial, Secretary Peake assured Congress that VA adopted the obligations set forth in the MHSP and Feeley Memo. In May 2008, the House Committee on Veterans Affairs held a hearing entitled "The Truth About Veteran Suicides," at which Secretary Peake relied upon the Feeley Memo rules, including the 24-hour screening and a full evaluation and treatment

plan within 14 days for non-emergent patients, to reassure Congress of VA's commitment to suicide prevention. RJN Ex. D (Peake Testimony at 26).

Moreover, in VA's written report to Congress regarding implementation of the Joshua Omvig Veterans Suicide Prevention Act, 38 U.S.C. § 1720F, VA claims the MHSP satisfies the statutory requirement that it maintain a comprehensive program to reduce veteran suicide. RJN Ex. C (Omvig Report at 1). Similarly, with regard to the Omvig Act's requirement for mental health assessments, VA relied upon the Feeley Memo's obligations, including an initial mental health care evaluation within 24 hours. RJN Ex. C (Omvig Report at 2). VA has unequivocally treated the MHSP and the Feeley Memo provisions as binding commitments to Congress, which satisfies the "required" prong of *Norton*. See *Soda Mtn. Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1260 (E.D. Cal. 2006) (finding the "agency went out of its way to make clear it was committing to a certain process, and withdrawing from that 'compact with the public' would appear to subject the agency to suit under § 706(1)"). It would be a Catch 22 for a federal agency to be able to argue to Congress that it is complying with statutory requirements based on particular plans but, in a *volte face* of rhetorical convenience, to argue to a federal court that it is not required to comply with those very plans.

Further, both the MHSP and the Feeley Memo are “discrete” as that term is used in *Norton*. 542 U.S. at 61-64. *Norton* held that a “failure to act” is “properly understood as a failure . . . to take one of the agency actions (including their equivalents) earlier defined in § 551(13).” *Id.* at 62-63. Early in the proceedings, at the motion to dismiss stage, the district court correctly ruled that Veterans challenged VA’s failure to take specific “agency actions” within the meaning of the APA. ER 213-14; ER 213, 214, 220. After trial the district court, without analysis or explanation, properly concluded that the Feeley Memo is discrete. ER 74 (C/L 30).

With regard to the MHSP, the district court commented that it is “dubious” whether a plan with 265 recommendations is “discrete.” ER 73 (C/L 28). But specificity, not quantity, is the hallmark of discreteness. The MHSP is a comprehensive mental health care plan with initiatives to be implemented in stages over the course of five years, starting in 2004.⁶ ER 32 (F/F 27); ER 2373-417. The MHSP’s suicide initiatives have not been implemented system-wide and most were still in the “pilot stage” as late as 2007. ER 33-34 (F/F 31-32). These include

⁶ VA’s OIG issued a report in May 2007 in which it audited VA’s implementation of the suicide prevention initiatives in the MHSP. ER 33, 34, 37 (F/F 31, 32, 40); ER 2114-93. One month later, in June 2007, VHA issued the Feeley Memo outlining key mental health care and suicide prevention initiatives in a mad-dash attempt to implement the languishing MHSP under the glare of public scrutiny. ER 35 (F/F 34); ER 1437-40.

key suicide prevention initiatives, such as screening veterans at risk, tracking veterans with suicide risk factors, implementing a strategy for suicide prevention targeting Iraq and Afghanistan veterans, and implementing a program to educate first-contact personnel to respond to crisis situations involving veterans at risk of suicide. ER 33-34 (F/F 31-32). The suicide prevention elements of the MHSP, critical yet unimplemented, are precisely the types of specific agency action the *Norton* court envisioned as sufficiently discrete to warrant review under § 706(1). 542 U.S. at 62-63.

Moreover, the *Norton* court expressly distinguished the kinds of implementation decisions at issue here from the broad policy determinations at issue in *Norton*. The Supreme Court explained, “a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them.” *Id.* at 71. The MHSP and Feeley Memo prescribe specific actions to be taken to provide mental health care for suicidal veterans and for veterans with PTSD who may become suicidal without proper treatment. For example, the MHSP requires “[e]very returning service man/woman [to] meet with a mental health professional as part of the post-deployment and separation medical examinations and be provided with a brief pamphlet that reviews the information provided during the session.” ER 2378. As of August 1, 2007, the Feeley Memo requires “veterans requesting or referred for mental health and/or substance abuse

treatment” to “receive an initial evaluation within 24 hours.” ER 1438. These specific initiatives are a far cry from an interim land use plan; they are not statements of priorities, as in *Norton*, but specific, mandatory actions for VA.

Remedying VA’s unlawful failure to timely care for our returning troops by requiring VA to take specific, but system-wide, actions is an appropriate judicial remedy under § 706(1). The Supreme Court accepted that APA relief “may ultimately have the effect of requiring a regulation, a series of regulations, or *even a whole ‘program’ to be revised by the agency in order to avoid the unlawful result that the court discerns.*” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 894 (1990) (emphasis added). Thus, where a court is faced with agency action unreasonably delayed, it must compel that delayed action to avoid unlawful results irrespective of the scope of reform necessary in the agency.⁷

Interpreting *Norton* and the APA in any other way would eviscerate judicial review of agency inaction. Congress did not intend the APA to shield agencies from their failures. On the contrary, in enacting the APA, Congress emphasized its

⁷ Moreover, Veterans’ requests are far from “programmatic.” See *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004) (finding that where specific discrete actions are alleged, judicial review is available under *Lujan*); *Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1067 (9th Cir. 2002) (holding that monitoring and management practices are reviewable when there is a relationship between the practices challenged and specific final agency actions). The actions VA should be compelled to take are concrete plans of its own invention—discrete actions deemed necessary to the delivery of veterans’ mental health care.

purpose as a judicial check on agency power: “We have set up a fourth order in the tripartite plan of Government which was initiated by the founding fathers of our democracy. They set up the executive, the legislative, and the judicial branches; but since that time we have set up a fourth dimension, if I may so term it, which is now popularly known as administrative in nature. . . . [The APA] is designed to provide guaranties of due process in administrative procedure.” RJN Ex. A (Senate Hearing, March 12, 1946, pp. 297-98). The APA therefore authorizes a judicial check on agency inaction with respect to veterans’ mental health care. The district court’s conclusion to the contrary was clear error.

2. Because the District Court Held the *TRAC* Factors Favor Relief, Injunctive Relief Was Mandatory.

Had the district court properly assessed § 706’s requirements under *Norton*, it would have been required to determine whether, in fact, the agency action at issue was unreasonably delayed.⁸ An assessment of whether final agency action has been “unreasonably delayed” under § 706(1) is governed by the six *TRAC* factors:

- (1) the agency’s time to decision must satisfy a “rule of reason”;

⁸ The district court also relied on the existence of differing interpretations of “timely” as a reason not to take the required action under the APA. ER 67 (C/L 16). But the *TRAC* factors set forth clear criteria to determine whether agency action has been unreasonably delayed within the meaning of § 706(1).

(2) whether a congressional “timetable” or “other indication” informs this rule of reason;

(3) delays affecting human health and welfare are “less tolerable” than delays that might be reasonable for economic regulations;

(4) the effect of relief on competing or higher agency priorities;

(5) “the nature and extent of the interests prejudiced by the delay”;
and

(6) agency delay may be deemed unreasonable even in the absence of “any impropriety lurking behind agency lassitude.”

Independence Mining Co., 105 F.3d at 507 (citing *TRAC*, 750 F.2d 70). At the outset of the preliminary injunction hearing, the district court found that all six *TRAC* factors supported relief on Veterans’ health care claim:

Under the APA framework, the first two *TRAC* factors favor relief. The VA is statutorily required to provide health care to veterans in a timely manner. 38 USC 1705(b)(1). And although the statute does not define what a timely manner entails, if Plaintiffs—if Plaintiffs—are able to demonstrate that the delay veterans face when seeking health care results in unnecessary suicide or serious injury, then it seems likely that the health care is not being provided in a timely manner. The third factor clearly supports granting relief. The fourth factor would also likely favor relief as it is difficult to imagine how preventing veteran suicides could be trumped by a greater priority. Nonetheless, this factor also suggests that the Court must carefully consider the effect any relief may have on other services provided by the VA, especially in light of the budget crisis already facing the VA. The fifth and sixth factors also support relief.

ER 1284 (PIRT 10:14-11:5).

When the *TRAC* factors weigh in favor of granting relief, an injunction compelling the action delayed is mandatory. ER 1284 (PIRT 9:8-10:7) (quoting

5 U.S.C. § 706(1): “The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.”); *Brower v. Evans*, 257 F.3d 1058, 1067 n.10 (9th Cir. 2001) (“‘Shall’ means shall.”) (citing *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187-88 (10th Cir. 1999) (the use of the word “shall” means courts “must compel agency action unlawfully withheld”)).

Because the *TRAC* factors favor relief, the only remaining inquiry is whether “the health care being provided by the VA to suicidal veterans is in fact being unreasonably delayed or denied.” ER 1284 (PIRT 11:7-9). The district court’s own findings of fact support that showing. Tens of thousands of veterans face protracted delays despite VHA policies that require new patients seeking mental health services be seen within 24 hours and receive a follow-up appointment within 14 days. ER 35 (F/F 35); ER 36 (F/F 37); ER 827; ER 1437-40; ER 1037-40; ER 681 (RT 443:1-4); ER 112 (PIRT 481:8-13). As of April 2008, there were approximately 85,450 veterans on VHA waiting lists for mental health services.⁹ ER 39 (F/F 44); ER 372-75. VHA’s data significantly underestimates the actual wait times veterans face. ER 38 (F/F 43); ER 2081, 2083. The 30-day wait times persist despite VA’s stated policy to provide mental health assessments within 24 hours and follow-up appointments within 14 days. ER 35 (F/F 35); ER 36

⁹ Only individuals waiting more than 30 days for an appointment are placed on waiting lists. ER 39 (F/F 45); ER 1148 (PIRT 623:12-13).

(F/F 37). Wait times for PTSD referrals are even worse, with veterans waiting up to eight weeks for an appointment. ER 37 (F/F 40); ER 2153-54.

VA's failure to provide timely access to mental health services has manifested in a suicide epidemic among our Nation's veterans. As the district court recognized, suicide rates among veterans are currently 3.2 times higher than the rates in the general population. ER 29 (F/F 15); ER 638-39 (RT 274:15-275:19); ER 1412-16. There are 4-5 suicides *per day* among the veteran population currently enrolled in VA's health care system, and another 1,000 suicide attempts *per month* in the same population. ER 30 (F/F 18, 19); ER 2002-03; ER 1417-18. Long wait times only increase the risk of suicide. ER 32 (F/F 25); ER 1313 (PIRT 127:17-23); ER 1300 (PIRT 75:17-24); ER 1228 (PIRT 352:24-353:12); ER 1229 (PIRT 355:20-25); ER 1093 (PIRT 809:10-14). These findings of fact were sufficient to justify an order compelling VA to implement its own plan to provide statutorily required mental health care for eligible veterans.

B. The Lack of Available Procedural Mechanisms to Challenge Delays or Denials of Mental Health Care Violates Due Process.

Apart from the claim under the APA, Veterans brought a constitutional claim challenging the lack of procedural protections for veterans turned away at VA medical facilities experiencing delay in the receipt of medical care. In particular, a veteran cannot appeal a decision by VA about the timing of providing services. That is, if a veteran comes in and says he or she is having suicidal

thoughts, and VA clerical staff offers him an appointment a month later, there is no process for appealing that decision to seek an earlier appointment based on emergency circumstances. By contrast, VA already has a process in place for a veteran to appeal a doctor's clinical decision.¹⁰

As noted above, by virtue of honorable discharge from combat service, veterans are entitled to five years of free mental health care. ER 66 (C/L 12). The "mandatory entitlement to health care," encoded in 38 U.S.C. § 1710, thus creates a property interest protected by the Due Process Clause. ER 65-66 (C/L 12); ER 79 (C/L 38). The Supreme Court has established a three-prong framework for assessing what procedures are required:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. The district court performed a cursory *Mathews*

¹⁰ As the district court specifically found, the appeal procedure created by the VA Clinical Appeals Directive applies only to clinical determinations. ER 1451-60; ER 41-42 (F/F 52). It does not permit veterans to challenge delays in scheduling appointments or emergency treatment. ER 42 (F/F 52). Individual veterans facing delays are left without recourse. ER 2007, 2010-11; ER 2033; ER 2020-21; ER 2025, 2027-28.

balancing test, and concluded that veterans receive all the process they are due.¹¹ ER 69-70 (C/L 20). The district court legally erred in balancing these three factors. Given the nature of the interests at stake, the complete lack of procedure currently available and the minimal burden associated with additional procedural safeguards, *Mathews* dictates a finding that the VA status quo violates Veterans' due process rights. The district court held that, "[w]ithout question, the private interest of veterans in receiving health care is high." ER 70 (C/L 23). The

¹¹ By reaching the merits of the due process argument, the district court implicitly found a waiver of sovereign immunity. ER 70-71 (C/L 23). The district court reached the correct outcome, but its analysis of the contours of the APA's sovereign immunity waiver for non-APA claims, such as the constitutional claim, contradicts Ninth Circuit authority. The district court held that Veterans' constitutional claims (which were not brought under the APA, but under the non-statutory review doctrine) must satisfy the substantive elements of the APA to qualify for the waiver of sovereign immunity set forth in § 702. ER 19 (Op. at 8); 5 U.S.C. § 702. It is well recognized, however, that § 702 provides a broad waiver of sovereign immunity in non-statutory review actions seeking injunctive relief unconstrained by the substantive elements of an APA cause of action, i.e., the requirements set forth in §§ 704 and 706. *Compare Presbyterian Church v. United States*, 870 F.2d 518, 524 (9th Cir. 1989) (holding that for constitutional claims, the waiver of sovereign immunity in § 702 is not constrained by the substantive elements of an APA claim); *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 187 (D.C. Cir. 2006) (same); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549-50 (10th Cir. 2001) (same); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988) (same); *Johnsrud v. Carter*, 620 F.2d 29, 30-31 (3d Cir. 1980) (same) *with Gallo Cattle Co. v. Dep't. of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (involving claim brought under the APA, and finding that the § 702 waiver is constrained by the APA's "agency action" requirements); and *Gros Ventre Tribe v. United States*, 469 F.3d 801, 809 (9th Cir. 2006) (recognizing distinction between *Presbyterian Church* and *Gallo Cattle*). A contrary result would shield unconstitutional agency actions, if non-discrete and non-final, from judicial review.

devastating consequences are not in dispute. Eighteen veterans take their own lives every day. ER 30; ER 2002-03.¹² Veterans suffering from PTSD experience nightmares, insomnia, flashbacks, anxiety, and inability to focus, which can result in their inability to function in society. They often lose their jobs, their families, and their homes. ER 2013, 2031, 2034, 2044-45; ER 1298, 1300 (PIRT 66:8-18, 76:23-77:22). Treating veterans with PTSD substantially reduces the likelihood that they will ultimately die by their own hand; failing to treat them, on the other hand, increases the likelihood of suicide. ER 1300 (PIRT 74:14-16); ER 1313 (PIRT 127:17-23); ER 1228 (PIRT 352:24-353:12); ER 1229 (PIRT 355: 20-25); ER 1093 (PIRT 809:10-14). For suicidal veterans, delay is tantamount to a denial of care. ER 1313 (PIRT 127:17-23); ER 1300 (PIRT 75:17-24); ER 1228 (PIRT 352:24-353:12); ER 1229 (PIRT 355:20-25); ER 1093 (PIRT 809:10-14). The private interest at stake is not limited to veterans' interest in treatment. Families also face the hardship of watching veterans enter into a downward spiral, often resulting in suicide, and all as a result of a treatable illness.

¹² Individual suicidal veterans are being denied care at VA facilities, only to turn around and take their own lives. ER 2027-28; ER 2037-38; ER 2020-21; ER 2057-60. In connection with the preliminary injunction briefing, the court admitted individual declarations into evidence (ER 2005-2060), but Veterans were not permitted to call individuals to testify during the MPI hearing or at trial. ER 158-69, 170-72.

Because the need for immediate mental health care is critical for veterans who are suicidal or suffering from acute PTSD, veterans must have some procedure to challenge scheduling decisions when they urgently need care. Absent any procedural mechanism to challenge delay, the risk of suicidal veterans falling through the cracks is high. The lengthy delays veterans face in the receipt of mental health care are evident, as set forth in detail in § IV.C, *supra*. Even VA concedes that veterans have complained of long wait times for PTSD treatment and difficulties in obtaining mental health care. ER 27-28 (F/F 8); ER 173-200. But the district court justified ignoring those delays by adopting an undefined “systemic” threshold. As set forth in § X.B, *infra*, Veterans established sufficiently widespread delays in accessing medical care to justify relief under any principled formulation of “systemic.” And these delays, when combined with the critical nature of mental health care, and the absence of any procedure by which to challenge such delays, result in an unacceptably high risk of erroneous deprivation. ER 41-42 (F/F 52). *See Mathews*, 424 U.S. at 335.

Finally, it is impossible to conceive of a governmental interest that would justify depriving combat veterans of the mental health care to which they are entitled by virtue of their service. The district court overly concerned itself with perceived burdens on VA in light of the findings that VHA is currently operating under budget and has sufficient funding to provide the requisite medical care.

ER 30-31 (F/F 20); ER 1136 (PIRT 574:13-18); ER 1196 (PIRT 225:12-23); ER 1088 (PIRT 787:17-20). Moreover, burdens associated with providing veterans additional safeguards would be minimal; VA already has in place a procedure that allows veterans to challenge clinical determinations. ER 41-42 (F/F 52). Expansion of that system to allow veterans to contest scheduling decisions would provide a modicum of process while utilizing existing VA procedures. For these reasons, the *Mathews* factors weigh in favor of relief.

IX. THE DISTRICT COURT ERRED IN DENYING DECLARATORY AND INJUNCTIVE RELIEF TO REDRESS UNREASONABLE AND UNCONSTITUTIONAL DELAYS IN VA'S CLAIMS ADJUDICATION SYSTEM, WHICH ITSELF LACKS ADEQUATE PROCEDURES UNDER THE DUE PROCESS CLAUSE.

In addition to mental health care, veterans suffering from PTSD are entitled to receive compensation from VA. Mirroring the health care system, VA's adjudication system for determining eligibility for such compensation suffers from unconscionable delays and lacks sufficient procedural protections. The district court denied Veterans' APA and Due Process Clause claims seeking to remedy delay in VA's logjammed adjudication system.

The district court's decision was tainted by legal errors concerning two provisions of the VJRA that the district court erroneously found deprived it of jurisdiction over Veterans' claims. Those rulings misinterpret this Circuit's

precedent and, when put aside, relief is required due to findings of fact establishing violations of the APA and Due Process Clause.

A. The District Court Erred in Finding the VJRA Barred Its Jurisdiction over Veterans' Compensation Claims.

The district court held that two statutes limited its jurisdiction over Veterans' statutory and constitutional challenges to the veterans' benefits adjudication system. ER 75 (C/L 33, 34). Passed by Congress as part of the VJRA, both statutes redirect certain challenges from the district courts to other adjudicatory bodies. 38 U.S.C. §§ 502, 511.¹³ Both statutes are inapplicable to Veterans' claims.

1. The District Court Erroneously Conflated System-Wide Average Delays with Individual-Benefits Determinations When Applying the Jurisdictional Provisions of 38 U.S.C. § 511.

Congress did not express any intent in § 511, let alone a clear intent, to restrain district court review of administrative delays under the APA and under the Due Process Clause. Section 511(a) provides:

The Secretary [of Veterans Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans

¹³ Section 511 is expressly limited to the benefits-adjudication process. 38 U.S.C. § 511(a) (stating scope of Secretary's powers "under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans"). It does not apply to Veterans' challenges to the timeliness of mental health care at VHA facilities, discussed separately in § VIII, *supra*.

or the dependants or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a).¹⁴

The plain text shows that Veterans' claims are not barred by § 511.

Section 511 is limited to a challenge to a “decision of the Secretary as to any such question,” i.e., a “question[] of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans.” Veterans' claims regarding average delays do not involve “questions of law or fact necessary to a decision” about providing benefits to an individual veteran. *See Bates v. Nicholson*, 398 F.3d 1355, 1365 (Fed. Cir. 2005) (“Section 511(a) does not apply to every challenge to an action by the VA. As we have held, it only applies where there has been a ‘decision by the Secretary.’ In the context of the history of this provision, the statute plainly contemplates a formal ‘decision’ by the Secretary or his delegate” on individual claims brought by veterans.) (citation omitted); *see also Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006) (“Section 511(a) does not give the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans' benefits or to consider all issues that

¹⁴ Section 511(b), which modifies § 511(a), provides for four exceptions, none of which are relevant. 38 U.S.C. § 511(b).

might somehow touch upon whether someone receives veterans benefits. Rather, it simply gives the VA authority to *consider* such questions when making a decision about benefits.”) (emphasis altered from original); *but see Beamon v. Brown*, 125 F.3d 965, 970 (6th Cir. 1997).

The Court of Appeals for Veterans Claims (“CAVC”), the Article I court brought to life by the VJRA itself, interprets its jurisdiction in precisely the same fashion. *See Dacoron v. Brown*, 4 Vet. App. 115, 118-19 (1993) (“Nothing in title 38 prohibits a constitutional challenge to any of the provisions of that title from being litigated in U.S. district court.”). Relying on the phrase “in the course of a benefits proceeding,” the district court excluded from the reach of § 511 “VA decisions that were not made in the course of a benefits proceeding, but instead were made at a broad, system-wide level.” ER 228. Accordingly, the district court correctly distinguished the power to review constitutional questions that arise in the context of individual benefits determinations from exclusive jurisdiction to consider all constitutional questions impacting veterans’ benefits. The APA and the Due Process Clause are not laws that “affect the provision of benefits by the Secretary.” 38 U.S.C. § 511(a). They are independent, generally applicable laws that apply to all government action.

The plain reading of the text is supplemented by the strong presumption that Congress does not intend to prevent a district court from exercising its authority

under § 1331 to vindicate constitutional and other federal rights. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (“[W]here Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear.”); *Am. Fed’n of Gov’t Employees Local 1 v. Stone*, 502 F.3d 1027, 1035 (9th Cir. 2007).

The legislative history confirms that Congress intended to preserve district court jurisdiction over constitutional and other challenges that are broader in scope than one individual veteran’s benefits determination. H.R. Rep. No. 100-963, 1988 U.S.C.C.A.N. 5782, 5801-03. Before Congress adopted the VJRA, § 211 precluded judicial review of veterans’ benefits decisions. 38 U.S.C. § 211(a) (“decisions of the Administrator on any question of law or fact under any law administered by the Veterans’ Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision”). In *Johnson v. Robison*, 415 U.S. 361, 362, 373 (1974), the Supreme Court held that, despite § 211’s broad jurisdictional prohibition, a district court *must* nevertheless have jurisdiction over constitutional challenges. The *Robison* court reasoned that such constitutional challenges implicate the most fundamental right to judicial review and, due to the absence of clear congressional intent to restrict review of constitutional questions, must be permissible in Article III courts. 415 U.S. at 368-69, 373. “Such challenges obviously do not contravene the

purposes of the no-review clause, for they cannot be expected to burden the courts by their volume, nor do they involve technical considerations of Veterans' Administration policy." *Id.* at 373.

Fourteen years after *Robison* was decided, Congress enacted the VJRA, amending § 211 (now § 511) to provide limited review of individual benefits decisions in BVA, CAVC, and Federal Circuit. In revising § 211, Congress expressed its intent not to disturb *Robison's* principle of concomitant district court judicial review. H.R. Rep. No. 100-963, 1988 U.S.C.C.A.N. 5782, 5801-04 (“*Robison* was correct in asserting judicial authority to decide whether statutes meet constitutional muster”). Section 511 requires individual veterans to utilize the special adjudicatory system set up by Congress for their individual claims to avoid clogging the Article III district courts with hundreds of thousands of individual complaints and to simultaneously restrict judicial forays into individual agency decisions. H.R. Rep. No. 100-963, 1988 U.S.C.C.A.N. 5782, 5803-04.

Article III district courts and the Article I veterans' court alike have affirmed the continuing vitality of *Robison* after the passage of § 511. *See Dacoron*, 4 Vet. App. at 118-19 (“[N]othing in the VJRA or in the current provisions of 38 U.S.C. § 511(a) changes the Supreme Court's above-quoted analysis in *Johnson* [*v. Robison*] as to whether . . . such a challenge may be brought in U.S. district court without regard to those statutory provisions.”); *see also Disabled Am.*

Veterans v. U.S. Dep't of Veterans Affairs, 962 F.2d 136, 138, 140-41 (2d Cir. 1992); *Brown v. Dep't of Veterans Affairs*, 451 F. Supp. 2d 273, 280-81 (D. Mass. 2006); *Quiban v. U.S. Veterans Admin.*, 713 F. Supp. 436, 437 (D.D.C. 1989); *but see Beamon*, 125 F.3d at 973; *Hall v. U.S. Dep't of Veterans' Affairs*, 85 F.3d 532, 534-35 (11th Cir. 1996).¹⁵

At the motion to dismiss stage, the district court held § 511 did not bar jurisdiction. ER 220-29. In its final judgment, the district court again rebuked VA's attempts to reargue § 511's "extremely broad preclusive effect." ER 23-24 (Op. at 12:26-13:1). Despite apparently adopting the correct statutory construction of § 511, the district court nevertheless held that "the determination of whether the delay [in resolving benefits appeals] is unreasonable may depend on the facts of each particular claim," and "511 prevents this Court from undertaking such a review." ER 75 (C/L 33); ER 227. But forays into individual decisions were not required to resolve Veterans' challenges to delays across the adjudication system. The statistical findings regarding average delays across the system in no way bring

¹⁵ The Ninth Circuit has relied upon the *Robison* principle to uphold jurisdiction over constitutional challenges to other benefits schemes, but has not yet directly addressed *Robison* in light of § 511 in a published opinion. *See, e.g., Am. Fed'n of Gov't Employees Local 1*, 502 F.3d at 1035 (Aviation and Transportation Security Act); *Rodrigues v. Donovan*, 769 F.2d 1344, 1347 (9th Cir. 1985) (Federal Employees Compensation Act). Other circuits have similarly applied *Robison* to uphold Article III jurisdiction in the context of other benefits schemes. *See, e.g., Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435, 1439-40 (7th Cir. 1996) (en banc) (Federal Employees Compensation Act).

Veterans' delay claims within the ambit of § 511. The only connection that systemic delay has to individual veterans is the simple fact that an average is, by necessity, an aggregate of the underlying claim processing times.

The district court's holding would deny federal courts any jurisdiction to remedy unconstitutional or APA delay in VA's adjudication system. Under the interpretation of § 511's predecessor by the Supreme Court in *Robison*, Veterans are entitled to a forum in which to bring their challenge to the administrative gridlock plaguing the adjudication system. An individual can challenge the delay in his or her case (and even then, only through the extraordinary mechanism of a petition for writ of mandamus), but such a challenge would, at most, simply move that individual to the front of the line, thus adding to the delays experienced by other individuals who are also waiting for resolution of their claims. It will require a systemic approach to remedy the backlog of hundreds of thousands of claims and end the years of delay from initiation of a claim for compensation to completion. The only forum for such a challenge is an Article III district court. Section 511 was never intended to deprive veterans of a forum in which to seek to enforce their collective due process and APA rights to timely adjudication of their claims; it was merely intended to provide a forum and right to appeal VA's individual claims decisions. Confusing those two concepts was clear legal error.

2. 38 U.S.C. § 502 Only Confers Exclusive Jurisdiction on the Federal Circuit in Facial Challenges to VA Regulations.

The district court also erroneously held that 38 U.S.C. § 502 stripped it of jurisdiction to remedy “substantial” delays in VA’s adjudication system. ER 75-76 (C/L 34). But § 502 grants the Federal Circuit exclusive jurisdiction to decide only “direct challenges to VA rules and regulations.” *Nehmer v. U.S. Dep’t of Veterans Affairs*, 494 F.3d 846, 857-58 (9th Cir. 2007) (emphasis added) (holding § 502 inapplicable because veterans’ motion did not directly challenge VA regulations); *see also Preminger v. Peake*, 536 F.3d 1000, 1004-05 (9th Cir. 2008) (holding only direct facial challenges subject to exclusive jurisdiction of Federal Circuit). Direct facial challenges “challenge either the merits of the VA’s regulation or the VA’s rulemaking authority.” *Nehmer*, 494 F.3d at 857-58. Legal challenges that implicate VA regulations, but do not require the court to “engage in judicial review of . . . or invalidate” those regulations, are reviewable in district court. *Id.* at 858-59. Veterans did not challenge the merits of any VA regulation or VA’s rulemaking authority but rather challenge the protracted delays in VA’s adjudication system. To remedy those delays, Veterans sought affirmative time limits for the adjudication of compensation claims. ER 94-98.

Ignoring this Circuit’s interpretation of § 502, the district court improperly concluded that it lacked jurisdiction because the remedy sought by Veterans “implicated” VA regulations. ER 75-76 (C/L 34). As in *Nehmer*, VA simply

“raised the existence of the regulations as a defense” to Veterans’ claim, but “the assertion of that defense” does “not convert” Veterans’ due process and APA claims into “a direct facial challenge to VA regulations.” 494 F.3d at 858-59. Moreover, the regulations invoked by VA in its defense at trial, and cited by the district court, do not set time limits for VA action in the adjudication process. ER 75-76 (C/L 34) (citing 38 C.F.R. § 3.159(b)(1)) (requiring VA to notify claimants of receipt of their claim application); 38 C.F.R. § 3.159(c) (requiring VA to assist veterans in obtaining medical records); 38 C.F.R. § 3.109(a) (providing veteran’s claim is treated as abandoned if evidence not submitted within one year); 38 C.F.R. § 20.200-20.202 (outlining procedural requirements for veterans on appeal). The findings of fact expressly acknowledge that “[t]here are no statutory or regulatory time limits imposed on the VA during any step of the adjudication and appeals process for SCDDC.” ER 52 (F/F 86). Therefore, the district court’s conclusion that “an injunction requiring expedited claims processing would necessarily challenge” VA regulations and “force the VA to alter or repeal some of these regulations” is legally and factually incorrect, and jurisdiction was proper in the district court. ER 76 (C/L 34).

B. VA’s Delay in Adjudicating Veterans’ Compensation Claims Is Unreasonable, Mandating Relief Under the APA.

On the merits of Veterans’ claims of unconscionable delays and backlog in compensation adjudication under the APA, the district court erred in holding that

these were not agency actions “unreasonably delayed.” 5 U.S.C. § 706(1). The district court correctly determined that the APA prerequisites for review, i.e., the *Norton* discreteness and required factors, were met because “the adjudication of benefits claims is a discrete agency action that the VA is required to take.” ER 76 (C/L 35 n.5). But the district court misapplied the six-part *TRAC* factor analysis, *see* § VIII.A.2, *supra*, in holding that, on balance, those factors weighed against relief.

1. The District Court Erred in Failing to Apply the First and Second *TRAC* Factors.

The district court concluded that the first two *TRAC* factors were inapplicable because the statutory scheme lacks “fixed time limits.” ER 76-77 (C/L 35). That ruling ignores the purpose of the *TRAC* factors: to evaluate whether delay is unreasonable *in the absence of* quantitative deadlines. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 n.19 (10th Cir. 1998) (explaining that *TRAC* factor analysis only applies in the absence of a “mandatory deadline”). The first *TRAC* factor simply supplies the standard by which agency delay is judged in the absence of an explicit deadline, i.e., a “rule of reason.” *TRAC*, 750 F.2d at 80.

The second *TRAC* factor looks to congressional expectations of timeliness to provide content for the “rule of reason.” *Id.* The APA itself, of course, requires agencies to conclude matters “within a reasonable time” 5 U.S.C. § 555(b). In addition, Congress has expressly directed BVA to “conduct hearings and

dispose of appeals . . . in a timely manner,” 38 U.S.C. § 7101(a), and VA “to provide for the expeditious treatment” of claims remanded by BVA to the ROs. 38 U.S.C. § 5109B. Regarding the initial adjudication stage at the ROs, VBA Under Secretary Michael Walcoff testified that 125 days is a “realistic and attainable” average time frame. ER 468 (RT 962:10-23). With respect to certifying appeals to BVA, VA announced a pilot program in 2008 that asks participating ROs to certify appeals within 30 days of receipt of a substantive Form 9 appeal. ER 58 (F/F 109); ER 420 (RT 1167:10-1168:14). The district court should have treated these congressional and VA expectations as providing content to the “rule of reason” under *TRAC* factor two.

The actual delays experienced by veterans grossly exceed the “rule of reason” applicable to VA’s adjudication system. The initial adjudication processing time at ROs is 182 days; PTSD claims take longer on average to process; and as of April 2008, there were 101,019 claims pending more than 180 days. ER 52 (F/F 88); ER 462 (RT 936:8-12); ER 782-83. The resolution of appeals takes on average 1,419 days, including 573 days to simply certify the appeal to BVA; the delay to obtain a BVA hearing is 455 days; and it takes 564 days for PTSD-related remands to be adjudicated. ER 52-55, 57 (F/F 88, 90, 94, 98, 104); ER 771-83, 970-71, 761, 959-60. *TRAC* factors one and two thus weigh strongly in Veterans’ favor. Delays over four years are unacceptable under

any “rule of reason,” and are especially unreasonable here where both Congress and VA’s own witnesses have expressed an expectation of “timely” and “expeditious” claims adjudication.

**2. The District Court’s *TRAC* Factor Balancing Analysis
Erroneously Perceived Constraints on VA Resources.**

The district court’s findings and the record show that the third, fifth, and sixth *TRAC* factors also weigh heavily in Veterans’ favor. With respect to factors three and five, the court concluded that “no one can dispute that the health and welfare of veterans is at stake . . . the nature and extent of the interests prejudiced by the delay could not be any more serious.” ER 78 (C/L 36). VA’s delay in adjudicating claims has devastating consequences on the lives of recipients, many of whom are “totally or primarily dependent” on disability compensation for support. ER 45 (F/F 61). Noting that “VA’s track record, especially in the area of delays, is troubling,” the district court further concluded the sixth *TRAC* factor favors relief. ER 78 (C/L 36).

The district court nevertheless held that the fourth *TRAC* factor—competing agency priorities—precluded relief. The district court’s simplistic analysis assumed that an order expediting the appellate process would “divert resources from the RO level.” ER 79 (C/L 37). The district court erred in its application of the fourth *TRAC* factor for four independent reasons.

First, the district court's conclusion was based on a flawed assumption. It was VA's burden to submit evidence regarding the extent of any impact on its other activities. *See Liu v. Novak*, 509 F. Supp. 2d 1, 10 (D.D.C. 2007) (holding that "defendants have failed to provide information that would allow the Court to find plaintiff's interests outweighed by the impact of a remedy on other agency activities"). VA provided no such evidence. In fact, Under Secretary Walcoff testified that VBA is "now in a position, because we have the additional resources that we didn't have before, to do something about appeals," and that VBA is "going to start rebalancing some of [its] priorities to put more weight on some of the appellate issues, to try to bring this down to a – to a level that it should be." ER 483 (RT 1020:6-1021:9); ER 421 (RT 1171:25-1172:18). VA never argued that other VA activities outweighed Veterans' interests. The district court erroneously reached that conclusion without any support in the record.

Second, the district court's analysis failed to acknowledge the important nuances distinguishing the various steps in the claims adjudication process, all of which suffer from unconscionable delays. *See* § IV.D, *supra*. Because BVA has its own resources, a subset of the delay—the 455-day average wait for a BVA hearing and the 336-day average for issuance of a BVA decision for first-time appeals—is wholly unrelated to RO resources. 38 U.S.C. § 7101(d); ER 53-54 (F/F 92, 94); ER 970-71, 959-60. In addition, the single longest delay in the

process is waiting for VA to certify appeals to BVA—573 days on average nationwide. ER 970-71. VA admitted that “this is an area that we have got to do better on [sic].” ER 483 (RT 1019:9-24). Indeed, when significant delays “occur over uncomplicated matters,” they “may not be justified merely by assertions of overwork.” See, e.g., *Dabone v. Thornburgh*, 734 F. Supp. 195, 203 (E.D. Pa. 1990) (citing *Abela v. Gustafson*, 888 F.2d 1258 (9th Cir. 1989)). A proper TRAC factor analysis considers the fourth factor in relation to each stage of the adjudication process.

Third, the district court’s finding that “only 4% of the total claims are actually pursued to a decision [in] the BVA” obfuscates the core problem. If the appeals process did not take more than 1,400 days to complete, it is reasonable to assume that more veterans would exercise their rights to file appeals and request BVA hearings. Further, as the court explained in *White v. Mathews*, in the context of delays in Social Security appeals:

The reversal rate is much lower, to be sure, when measured against the total number of original denials, many of which are not appealed. However with respect to those individuals who feel sufficiently aggrieved with the Agency’s decision to seek an appeal (the relevant class in this case), the prospects for a reversal are substantial. It cannot be persuasively maintained that a pattern of extended delay in the completion of hearings before an administrative law judge is but a matter of small consequence to such aggrieved applicants.

434 F. Supp. 1252, 1255-56 (D. Conn. 1976).

Finally, the delays in the adjudication process have plagued the system for many years. In 2001, for instance, a VA Claims Processing Task Force issued a self-critical assessment of the delays and backlog afflicting the adjudication system. ER 2426-41. The problem has steadily grown worse over time, despite VA's repeated promises to fix it. VA's inventory of pending claims increased from about 338,000 in 2005 to over 400,000 in 2008. ER 52 (F/F 87); ER 771-83. During the same time frame, the appeals inventory has increased from about 132,000 to over 150,000. ER 771-83. "[E]xtensive or repeated delays are unacceptable notwithstanding competing interests." *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 40 (D.D.C. 2000) (citing *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980)). VA's troubling track record demands immediate relief.

Given VA's concession that it does need to improve its timeliness and intends to shift resources to appellate work, (ER 58-59 (F/F 109-110); 38 C.F.R. Parts 3 and 20; ER 483 (RT 1020:6-1021:10)), the district court's dispositive treatment of Veterans' APA claim, based on *TRAC* factor four, was erroneous. In sum, the district court's legal errors of declining to consider the first and second *TRAC* factors, and concluding that factor four alone is dispositive, require reversal.

C. The District Court Failed to Conduct a Due Process Analysis of Delay in the Veterans' Benefits Adjudication System.

Undisputed four-year delays in VA's adjudication process not only violate the APA's requirements, they also constitute a violation of the Due Process Clause. The district court held as a matter of law that applicants for and recipients of "statutorily-entitled compensation have a property interest under the Due Process Clause . . ." ER 79 (C/L 38). As a result, VA must provide procedural protections comporting with due process when adjudicating veterans' compensation claims. Abdicating the constitutionally required analysis under *Mathews*, the district court devoted only a single paragraph in its 82-page opinion to summarily rejecting Veterans' due process claim, basing its ruling on a distinguishable Seventh Circuit case.¹⁶

Substantial delays in adjudicating claims for disability benefits can, without more, violate the Due Process Clause. *See, e.g., Rodrigues*, 769 F.2d at 1348 (due process claim based on "considerable delay" in deciding right to disability benefits found not "insubstantial"); *Andujar v. Weinberger*, 69 F.R.D. 690, 694 (S.D.N.Y. 1976) ("[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.

¹⁶ That cursory analysis violated this Circuit's mandate that procedural due process claims should not be subject to *de minimis* analysis. *See Clement v. City of Glendale*, 518 F.3d 1090, 1095 n.9 (9th Cir. 2008) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

1992) (“[D]elay in processing can become so unreasonable as to deny due process.”). “[E]xcessive delay in the appellate process may also rise to the level of a due process violation.” *Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1990) (emphasis omitted); *Talamantes-Penalver v. INS*, 51 F.3d 133, 135 (8th Cir. 1995) (citing *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)) (“Once the right to appeal is created . . . the procedures employed on appeal must provide plaintiffs with due process of law.”).¹⁷ Here, the undisputed facts establishing delay of 4.4 years to adjudicate a claim through the first level of administrative appeal are alone sufficient to establish a Due Process violation. ER 54 (F/F 95); ER 635 (RT 259:22-261:21).¹⁸

Four-year delays are well within the realm of due process violations. *See, e.g., Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 490 (3d Cir. 1980) (four years to render benefits decision “is well past any reasonable time limit,” “wholly inexcusable,” and violates due process); *White*, 434 F. Supp. at 1254, 1260-61 (“chronic delay in the disposition of appeals” of six to seven months violates due process); *Andujar*, 69 F.R.D. at 694 (“lengthy delays in the delivery of benefits state constitutional

¹⁷ This requirement applies to administrative appeals as well as judicial appeals. *Id.*; *see also Gonzalez-Julio v. INS*, 34 F.3d 820, 823 (9th Cir. 1994) (Due Process Clause applies to administrative appeal in deportation matter), *abrogated on other grounds, Liu v. Waters*, 55 F.3d 421, 425 (9th Cir. 1995).

¹⁸ Even BVA Chairman Terry “was unable to explain [the] lengthy delay in the resolution of appeals.” ER 44 (F/F 98); ER 604 (RT 575:21-576:9).

claims of denial of property without due process”); *cf. also Erspamer v. Derwinski*, 1 Vet. App. 3, 11 (1990) (“Ten years is an undeniably, and unacceptably, long time to have passed since the petitioner’s husband first filed the claim for benefits with the VA.”).

The legal analysis for judging administrative delays under the Due Process Clause is the same balancing test set forth in *Mathews*. “The acceptable duration of delay is determined by analyzing ‘the importance of the private interest and the harm to this interest occasioned by the delay and its relation to the underlying government interest; and the likelihood that the interim decision may have been mistaken.’” *Finch v. New York State Office of Children & Family Servs.*, 499 F. Supp. 2d 521, 535 (S.D.N.Y. 2007) (quoting *FDIC v. Mallen*, 486 U.S. 230, 242 (1988)). Had the district court applied this balancing test, instead of ignoring it altogether, it would have found a due process violation.

The interests at stake here could not be greater. This Circuit has stated that “in 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” *Briggs v. Sullivan*, 886 F.2d 1132, 1145 (9th Cir. 1989) (finding excessive delay in payment of benefits under the Social Security Act). Moreover, in the context of agency proceedings, “delays that might be

reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake.” *TRAC*, 750 F.2d at 80.

The district court found that many disability compensation recipients are totally or primarily dependent upon that compensation for financial support. ER 44-45 (F/F 61); ER 183. Because of the long wait times, 1,467 veterans recently died in a *six-month period* during the pendency of their appeals, extinguishing their claims. ER 57 (F/F 106); ER 985-96; ER 633-34 (RT 254:6-255:2). Moreover, obtaining a final BVA decision is required to bring an appeal to the next level of appeal, the Article I CAVC, compromising veterans’ ability to assert that right. ER 50-51 (F/F 83).

In addition, the risk of erroneous deprivation is high. *See Fusari v. Steinberg*, 419 U.S. 379, 389 (1975) (“Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations.”). In total, BVA affirms an RO’s disposition of a claim only 40% of the time. ER 56 (F/F 101); ER 480 (RT 1007:10-22). An RO’s decision is reversed approximately 20% of the time, and 40% of appeals are remanded. ER 56 (F/F 101); ER 480 (RT 1007:2-25). Further, as noted above, 44% of BVA’s reasons for remand are avoidable. ER 56 (F/F 102); ER 599 (RT 556:2-24); ER 460 (RT 1166:14-20). Two-thirds of the avoidable reasons for remand are due to VA violating its statutory “duty to assist” veterans; 21% are due

to VA committing “due process” violations; and the remainder are a result of VA violating its statutory “duty to notify” veterans. ER 962-63.

VA’s interest in ensuring accurate and timely adjudication of compensation claims coincides with veterans’ interest in timely adjudication. *See Goldberg v. Kelly*, 397 U.S. 254, 265 (1970); *Jeffries v. Ga. Residential Fin. Auth.*, 503 F. Supp. 610, 620-21 (N.D. Ga. 1980). VA’s failure to offer evidence that its own interests outweighed veterans’ interests is fatal to any claim to the contrary.

The district court ignored the *Mathews* factors and rested its entire due process analysis on one distinguishable Social Security case from the Seventh Circuit, *Wright v. Califano*, 587 F.2d 345, 356 (7th Cir. 1978).¹⁹ The Seventh

¹⁹ In *Wright*, Social Security disability claimants challenged hearing delays of up to 180 days, and sought to impose time limits on the processing of claims and to require interim awards for noncompliance with deadlines. In *Wright*, the Seventh Circuit refused to impose “time limitations on an agency which for good faith and unarbitrary reasons has amply demonstrated its inability to comply” *Id.* at 353-56. However, the *Wright* court also cautioned that “there may be . . . in the more typical situation unjustified and unreasonable delays constituting a deprivation of property in violation of due process requiring our intervention” *Id.* at 356.

The district court also cited a case brought under the APA in which the Fifth Circuit overturned an injunction halting a Federal Trade Commission proceeding against a single company. *Fed. Trade Comm’n v. J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964). The district court quoted *Weingarten* for the proposition that “it would be the extremely rare case where a Court would be justified in holding . . . that the passage of time and nothing more presents an occasion for the peremptory intervention of an outside Court in the conduct of an agency’s adjudicative proceedings.” ER 81 (C/L 40) (quoting *Weingarten*, 336 F.2d at 692).

Circuit's holding in *Wright* does not dispose of Veterans' due process claim. The 180 days of delay in the *Wright* decision pales in comparison to the four-year delays found by the district court. ER 54 (F/F 95); ER 635 (RT 259:22-261:21). Further, the *Wright* court based its decision in part on the Social Security Administration's "severe resource constraints," but, here, VA did not claim to have any resource constraints. 587 F.2d at 354; *see Kelly*, 625 F.2d at 491 (rejecting argument that delay in adjudication of benefits was justified by agency's "backlog of cases and limited resources"). On the contrary, as noted above, VA witnesses conceded that the delays were too long and claimed that VA was taking steps to shift resources to appellate work. ER 483 (RT 1020:6-1021:9); ER 421 (RT 1171:25-1172:18).

Further, unlike in *Wright*, there is evidence of a "lack of evenhandedness" or a "dilatory attitude" on the part of VA. 587 F.2d at 352-53. The dramatically disproportionate average processing times among ROs show that the delays are not solely the result of a backlogged system. The delay in certifying appeals to BVA ranges from 189 days (Providence, Rhode Island RO) to 1,047 days (Seattle, Washington RO). ER 970-971. Likewise, the delay in issuing SOC's ranges from 93 days (St. Paul, Minnesota RO) to 859 days (New Orleans, Louisiana RO). ER 965-66. The aggregate appeals resolution time, without a remand, ranges from

Since that case was decided in 1964, however, courts have routinely held that delays in processing claims can violate due process.

990 days (Salt Lake City, Utah RO) to 1,965 days (New York, New York RO). ER 1998-99. The discrepancies among RO processing times also distinguish this case from *Wright*. 587 F.2d at 352-53.

Although the district court correctly observed that “there is no talismanic number of years or months, after which due process is automatically violated,” that fact did not excuse the court from analyzing the due process claim. ER 80 (C/L 40) (quoting *Coe*, 922 F.2d at 531 (finding delay in appeal constituted violation of due process)). Indeed, “[g]iven the case-by-case approach required in due process cases,” the four-year delay faced by veterans who appeal called for a thoughtful balancing of the *Mathews* factors. *Kraebel*, 959 F.2d at 405 (citing *Mathews*, 424 U.S. at 344). All three *Mathews* factors required entry of injunctive relief to remedy VA’s due process violation.

D. The District Court Erred in Rejecting Veterans’ Challenge to the Adequacy of VA Procedures at the Regional Office Level.

The district court similarly rejected Veterans’ challenge to the procedures afforded veterans at the RO level of claims adjudication. ER 86 (C/L 48). Veterans are afforded little process, on the theory that the system is designed to assist them in establishing their eligibility for compensation. ER 47-49 (F/F 72-77). Despite the adjudicatory nature of the proceedings, traditional due process rights have been severely curtailed in the benefits adjudication setting on that premise. Veterans diagnosed with PTSD by their treating physicians must still

undergo a Compensation and Pension (“C&P”) exam by a second VA physician to establish a compensation claim. ER 49 (F/F 77). If the diagnoses conflict, veterans lack the power either to subpoena the treating physician to supply evidence of PTSD or to cross-examine the physician who came to a contrary conclusion. Veterans are also “statutorily prohibited from compensating a lawyer to represent him [or her] at the RO level.” ER 50 (F/F 81); 38 U.S.C. § 5904. Documentary evidence gathering is in the exclusive control of VA. ER 47-48 (F/F 74-75).

Beyond the procedural straightjacket veterans experience at the RO level, VA adopts internal extra-judicial procedures that affect the most deserving applicants. Dubbed the “extraordinary awards procedure,” ROs must send all claims folders for any claim that would result in a retroactive payment of at least eight years or a payment of more than \$250,000 to the C&P service for an additional level of review.²⁰ ER 59 (F/F 112); ER 489 (RT 1043:2-12). This procedure is not specified in any statute or regulation. ER 59 (F/F 112); ER 879-80. Veterans are not notified of the process, even if it affects their award amount. ER 59-60 (F/F 112); ER 489 (RT 1045:17-23). The district court found that the

²⁰ The impetus for the extraordinary awards program was itself a recognition that protracted adjudication delays are leading to large retroactive awards. Of the 800 “extraordinary awards” reviewed, more than 775 of them were reviewed because they were retroactively awarded for eight years or more. ER 60 (F/F 113).

vast majority of “extraordinary awards” reviews resulted in a reduction of proposed compensation. ER 60 (F/F 113); ER 856.

A key element of finding the RO level of benefits adjudication “non-adversarial” is VA’s duty to assist the veteran in developing and presenting his or her claim. ER 47 (F/F 72); 38 U.S.C. § 5103. However, the district court also found that up to 44% of BVA’s reasons for remand are classified as “avoidable,” the majority due to the RO adjudicators’ failure to comply with the statutory duty to assist the veteran. ER 56 (F/F 102); ER 600 (RT 559:9-560:13); ER 485 (RT 1027:9-16); ER 961-63. As a result, in practice, the system is an adversarial one in which veterans are deprived of their right to a fair and impartial hearing by pitting the self-interest of adjudicators against veterans.²¹

The district court’s finding that “the current system for adjudicating veterans’ SCDDC claims satisfies due process” was error in light of its failure to properly weigh Veterans’ due process challenge to the procedures available to

²¹ RO-level adjudicators are incentivized to deny claims to save the agency money through such mechanisms as quotas and links to incentive compensation, creating a more adversarial system. For example, the evidence specially admitted by the district court after closing arguments and investigated by Congress at a subsequent hearing demonstrates the improper incentives. A PTSD director at a large multi-VISN facility instructed her mental health staff to misdiagnose veterans with PTSD, a compensable mental health diagnosis, with non-compensable “[a]djustment [d]isorder,” “[g]iven that we are having more and more compensation seeking veterans.” ER 371; ER 348-69 (Transcript of Hearing on June 10, 2008).

veterans at the RO level. ER 83 (C/L 45). While the district court purported to apply the *Mathews* test, it held that VA's interests outweighed all other factors.²²

The district court found "without doubt that veterans and their families have a compelling interest in receiving disability benefits and that the consequences of erroneous deprivation can be devastating." ER 83 (C/L 45). Moreover, the court found that "additional safeguards Plaintiffs seek would likely reduce the number of avoidable remands and erroneous deprivations" ER 84 (C/L 46).

Nevertheless, the district court found the "fiscal and administrative burdens of these additional procedural requirements are significant" and outweighed the other factors. ER 84 (C/L 46). If fiscal burdens on large agencies were sufficient to defeat any and all other considerations of constitutional importance, agencies would be de facto exempted from constitutional compliance. As the Supreme Court noted in *Mathews*, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." 424 U.S. at 348. Moreover, VA offered no

²² Moreover, as with the APA delay analysis, the district court misused statistics to trivialize the devastating risk of erroneous deprivation. Relying on a finding that "4% [of veterans] proceed past the NOD to a decision by the BVA," the district court found the risk of erroneous deprivation to be "relatively small." ER 84 (C/L 45). The frequency of appeals, however, is irrelevant to the constitutional process due veterans who do appeal. *Talamantes-Penalver*, 51 F.3d at 135 ("Once the right to appeal is created . . . the procedures employed on appeal must provide plaintiffs with due process of law.").

evidence to support the court's assumptions regarding the burdens associated with additional procedural safeguards. Therefore, the district court erred in holding the costs associated with implementation of additional procedural protections outweighed the interest of Veterans.

X. THE DISTRICT COURT HAD THE POWER TO GRANT THE PROPOSED DECLARATORY AND INJUNCTIVE RELIEF.

Two separate types of relief were appropriate to remedy VA's delay: (1) a permanent injunction; and (2) declaratory relief. The district court concluded that an injunction was inappropriate because Veterans failed to show "systemic" injury to all veterans, but the district court's conclusion regarding the evidence necessary to sustain a system-wide injunction misinterprets the law. First, the findings of widespread violations were sufficient to support a system-wide injunction, and any inquiry should have been directed to the *scope* of the injunction, not to its propriety in the first instance. Second, the proposed injunctive relief to remedy the egregious delays in benefits adjudication is well within this Circuit's due process jurisprudence. Finally, the district court never addressed declaratory relief, which is also an appropriate remedy.

A. The District Court Adopted an Overly Restrictive Interpretation of Its Power to Enter Relief.

As a threshold matter, the district court’s abstention from relief based on separation of powers misconceives the proper roles of the coordinate branches of the federal government.

Enforcement of the nation’s [] laws has been delegated by Congress to the Executive Branch. Nonetheless, the federal judiciary has been vested with the ultimate authority to determine the constitutionality of the action of the other branches of the federal government. While the co-equal branches of the federal government are entitled to “the widest latitude in the dispatch of their own internal affairs,” *the executive branch has no discretion with which to violate constitutional rights.*

La Duke, 762 F.2d at 1325 (emphasis added). Likewise, the Executive Branch has no right to disregard statutory entitlements and unreasonably delay the provision of required services. Article III courts have a duty to protect veterans from VA’s statutory violations and unconstitutional infringements of their due process rights.

B. The “Systemic” Standard Employed by the District Court Has No Basis in Law and Departs from Analogous Contexts.

During the preliminary injunction hearing and the merged trial, the district court repeatedly invoked an undefined concept of “systemic” to preclude discovery requests, testimony, exhibits, and, ultimately, Veterans’ requested relief.²³ ER 13

²³ ER 395-96 (RT 1341:9-1345:9) (denying request to call a rebuttal witness on grounds that her experiences as a VA suicide prevention coordinator were irrelevant to the system-wide failures); ER 625 (RT 659:8-20) (refusing to hear testimony by a veterans advocate who works with hundreds of veterans across the

(Op. at 2:8-10) (“The Court can find no systemic violations system-wide that would compel district court intervention. The broad injunctive relief that veterans request is outside the scope of this Court’s jurisdiction.”). Despite the term’s centrality to final judgment, the district court never defined “systemic” and failed to link the term to any objective legal standard under the APA or the Due Process Clause.²⁴ Moreover, the lower court’s injury-without-remedy conundrum illustrates its erroneous conflation of liability with remedy.

The district court’s findings of fact demonstrate that there is undisputably a group of veterans for whom VA is not providing the timely services and benefits

country on grounds that her experience was “irrelevant” to the system-wide failures to provide care); ER 1317 (PIRT 141:17-144:3) (refusing to admit into evidence a report from the OIG analyzing appointment wait times throughout VA as irrelevant to the current system-wide delays); ER 1235 (PIRT 380:8-22) (refusing to allow expert testimony regarding appointment wait times in the San Francisco Bay Area as irrelevant to the national wait times); ER 142-44 (4/7/08 Transcript 41:10-43:2) (denying discovery of suicide incident briefs on relevance grounds); ER 670 (RT 399:19-400:10) (refusing to consider testimony regarding individual examples of the extraordinarily long system-wide delays in the benefits adjudication system).

²⁴ The district court’s “systemic” standard may have been drawn from its analysis of § 511. At the motion to dismiss stage, the district court held that § 511 did not preclude its jurisdiction, because Veterans challenged “VA decisions that were not made in the course of a benefits proceeding, but instead were made at a broad, system-wide level.” ER 228. That “systemic” concept was then interwoven into the fabric of the proceedings and eventually used to defeat relief after trial on the merits. Insofar as the district court intended to derive its “systemic” standard from § 511, it erred in applying it to health care claims. ER 69-70 (C/L 20). The plain language of § 511 makes clear the statute applies exclusively to VBA’s adjudication of veterans’ benefits, 38 U.S.C. § 511(a), a VA system wholly separate from medical treatment.

mandated by statutes and the Due Process Clause, and that these denials result from policies and practices that pervade the entire system. Even if, as the district court suggested, that group is very small, that determination should have served as a benchmark for the appropriate *scope* of the relief, not for Veterans' basic entitlement to relief. See *Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001). Where a violation is demonstrated, "[t]he scope of injunctive relief is dictated by the extent of the violation established." *Lewis v. Casey*, 518 U.S. 343, 360 (1996) (citation omitted). The key question regarding the propriety of relief is whether the injury is in fact "widespread enough to justify systemwide relief." *Id.* at 359. As this Circuit explained:

System-wide [injunctive] relief is required if the injury is the result of violations of a statute or the constitution that are attributable to policies or practices pervading the whole system (even though injuring a relatively small number of plaintiffs), or if the unlawful policies or practices affect such a broad range of plaintiffs that an overhaul of the system is the only feasible manner in which to address the class's injury.

Armstrong, 275 F.3d at 870.²⁵ The district court was "required" to enter system-wide injunctive relief where, as here, the backlog and long delays in the

²⁵ The propriety of injunctive relief under *Lewis* is bolstered by two additional factors. First, federal courts ordering federal agencies to act do not implicate the same federalism concern that temper federal courts when they order state agencies to act. *La Duke*, 762 F.2d at 1325 ("Obviously, none of the considerations inherent in the judicial concept of 'Our Federalism,' are implicated in constitutional challenges to executive branch behavior in federal courts.").

adjudication of veterans' benefits are directly attributable to VA policies and practices. *Id.*

Accordingly, this Circuit has affirmed system-wide injunctive relief where evidence of statutory and constitutional violations fell far short of the findings of fact here. For example, the Ninth Circuit affirmed broad injunctive relief against the California Board of Prison Terms, finding that evidence of the treatment of only seventeen prisoners was "symptomatic of its treatment of a broad class of inmates" and was "sufficient to satisfy *Lewis's* [*v. Casey*] requirement that factual findings support the relief sought." *Armstrong*, 275 F.3d at 871; *see also Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998) (affirming injunction requiring reopening of aliens' document fraud and deportation proceedings, even where there was evidence that some aliens had received adequate notice and a number of agents and branch offices employed procedures that ensured adequate notice). No magic number of plaintiffs is required to satisfy the injury requirement. *Id.*

Second, constitutional rights mitigate any separation of powers concerns. *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1047 (9th Cir. 1999) ("[T]he entitlement asserted . . . is constitutionally mandated. It is a right that the courts have the primary obligation to protect. For that reason, the plaintiff's assertion of the rights they seek to enforce does not raise the separation of powers concern described in *Lewis*.") (Reinhardt, J., concurring).

(“*Lewis* does not require a particular number of named plaintiffs before system-wide relief is appropriate.”).²⁶

Other areas of law provide parameters for “systemic” proof based on these principles. For example, discrimination pattern and practice cases involve two types of proof for “systemic” disparate treatment: statistical, establishing past treatment of the group, and anecdotal, from the protected class members. *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158 (2d Cir. 2001) (“Plaintiffs have typically depended upon two kinds of circumstantial evidence to establish the existence of a policy, pattern, or practice of intentional discrimination: (1) statistical evidence aimed at establishing the defendant’s past treatment of the protected group, and (2) testimony from protected class members detailing specific instances of discrimination.”) (internal citation omitted); *see also Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 338-40 (1977).

Ignoring legal standards for “system-wide” relief, the district court’s lack of any clear definition resulted in inconsistent application of its undefined “systemic” threshold. The district court’s standard for “systemic” is either a “majority” or the

²⁶ The same basic principles also hold true for declaratory relief. *See Hodgers-Durgin*, 199 F.3d at 1044 (“In suits seeking both declaratory and injunctive relief against a defendant’s continuing practices, the ripeness requirement serves the same function in limiting declaratory relief as the imminent-harm requirement serves in limiting injunctive relief.”).

impossible threshold of every single case.²⁷ Neither of those conflicting standards comports with this Circuit's standard for system-wide relief. *Armstrong*, 275 F.3d at 870-71. The practical effect of the district court's "systemic" standard is to improperly immunize VA from judicial scrutiny, which undermines the APA's fundamental tenet of judicial scrutiny of agency action. *See Ruiz v. Johnson*, 37 F. Supp. 2d 855, 888-89 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001). Therefore, denial of injunctive and declaratory relief for violation of Veterans' rights under the Constitution was error.²⁸

²⁷ Regarding the health care claims, the lower court deemed its own findings that hundreds of thousands of veterans are not receiving timely health care to be insufficient proof of a "systemic" violation because less than the "majority of veterans" were affected. ER 37-39 (F/F 40-44); ER 69-70 (C/L 20); ER 2114-93, 2071-113, 1426, 372-75. Regarding compensation claims, the district court disregarded average delays for all veterans in the benefits system on the hypothetical conjecture, without citation to any finding of fact, that "a veteran who raises seven or eight issues in his or her claim will likely face a more protracted delay than a veteran who raises only one or two issues." ER 75 (C/L 33). In other words, the averages failed to take into account the individual circumstances of the underlying claims, and therefore, the only proof the district court would have accepted was a case-by-case showing for each veteran included in the aggregate delay. Veterans were not permitted such broad discovery in the six weeks prior to trial on the merits, nor would the district court accept anecdotal evidence from particular veterans' cases. Therefore, the district court actively prohibited Veterans from satisfying that threshold.

²⁸ Because the *TRAC* factors are satisfied for the statutory claims, the agency action unreasonably delayed *must* be compelled. *Cockrum v. Califano*, 475 F. Supp. 1222, 1239-40 (D.D.C. 1979) (holding failure to enjoin agency delay "would neglect the Court's duty" under § 706 of the APA).

C. The Proposed Injunctive Relief Is Proper.

Indeed, the district court held that “broad injunctive relief . . . is outside the scope of [the] court’s jurisdiction,” ER 13 (Op. at 2:10-11), but such relief is historically one of the most traditional and significant functions of Article III courts. The district court not only had the power to enter an injunction, it also had several options for fashioning relief. Ordering VA to reduce wait times for the adjudication of benefits would neither have required judicial oversight nor overstepped the bounds of an Article III court’s jurisdiction, and similar injunctions have been upheld as within a federal court’s remedial powers.

For example, the district court could have ordered VA to submit a proposed plan to remedy the matters at issue, *Cockrum*, 475 F. Supp. at 1239-40, or imposed lawful and reasonable time limits, *White v. Matthews*, 559 F.2d 852, 855 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). In fact, granting VA the first opportunity to draft and propose a plan for reducing wait times would have appropriately deferred to the Agency’s expertise. *Cockrum*, 475 F. Supp at 1240; *Armstrong*, 275 F.3d at 883-84 (Berzon, J., concurring); *Walters*, 145 F.3d at 1053. Where an agency is allowed to “develop the remedial plan needed to implement the injunction[, n]o further deference [i]s required.” *Katie A v. Los Angeles Cty.*, 481 F.3d 1150, 1157 (9th Cir. 2007).

In addition, the district court could have appointed a third party to relieve it from the prospect of monitoring compliance. *See, e.g., Ex parte Peterson*, 253 U.S. 300, 312 (1920) (recognizing that trial courts have “inherent power to provide themselves with appropriate instruments required for the performance of their duties[,] [including] appoint[ing] persons unconnected with the court to aid judges”); *Perez v. Boston Hous. Auth.*, 379 Mass. 703 (1980) (appointment of receiver to manage administration of the Boston Housing Authority). Moreover, the district court could have appointed an expert or monitor to assist the parties with shaping of specific reforms. *See, e.g., Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir. 1976), *cert. denied*, 426 U.S. 935 (1976) (use of special masters to develop desegregation plans for Boston public schools); *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff’d*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) (use of special master to reform Texas Department of Corrections).

D. Declaratory Relief Is Appropriate to Remedy Violations of Veterans’ Statutory and Constitutional Rights.

This Court “must exercise [its] own discretion to determine the propriety” of declaratory relief. *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1112 (9th Cir. 1987). Though the district court acknowledged Veterans’ request for declaratory relief (ER 14 (Op. at 3:6-16)), it failed to rule on the matter, disregarding its obligation to decide the merits of the declaratory relief sought.

Declaratory judgment delineates important rights and responsibilities and is “a message not only to the parties but also to the public and has significant educational and lasting importance.” *Bilbrey v. Brown*, 738 F.2d 1462, 1471 (9th Cir. 1984). Accordingly, the Ninth Circuit has repeatedly granted declaratory relief in cases where, as here, litigants sought a declaration of constitutional rights. *See, e.g., id.* at 1471 (holding plaintiffs entitled to declaratory relief for violation of Fourth Amendment rights); *Greater Los Angeles Council*, 812 F.2d at 1113 (remanding district court’s denial of declaratory relief for violation of plaintiffs’ constitutional due process rights because “such relief might be appropriate as vindication of plaintiffs’ position and as a public statement of the extent of [Plaintiffs’] rights”); *see also, e.g., Alsager v. Dist. Ct. of Polk County*, 518 F.2d 1160 (8th Cir. 1975) (reversing denial of declaratory relief and remanding to district court where plaintiffs alleged state court proceedings violated First Amendment vagueness standards); *ICR Graduate Sch. v. Honig*, 758 F. Supp. 1350, 1355 (S.D. Cal. 1991) (relying on *Bilbrey* to grant declaratory relief for constitutional due process violations).²⁹

²⁹ Courts have also granted declaratory relief in instances where, as here, plaintiffs sought vindication of their statutory rights under the APA. *See, e.g., N.W. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 691 (9th Cir. 2007) (granting plaintiffs declaratory relief under APA); *Alvarado Cmty. Hosp. v. Shalala*, 155 F.3d 1115, 1125-26 (9th Cir. 1996), *as amended*, 166 F.3d 950 (9th Cir. 1999) (same).

When determining whether to grant declaratory relief, this Circuit considers whether relief would: (1) aid in clarifying and settling legal relations; (2) terminate the proceedings and relieve the parties from uncertainty; and (3) further the public interest, especially where declarations can “serve an important educational function for the public at large as well as for the parties to the lawsuit.” *Greater Los Angeles Council*, 812 F.2d at 1112.³⁰ Veterans’ request for a declaration of their constitutional rights and VA’s statutory obligations meets that standard. The proposed declaratory relief requested the trial court clarify legal issues—whether VA violated veterans’ statutory and constitutional rights by failing to provide prompt and adequate mental health care and by failing to adjudicate veterans’ compensation claims within a reasonable time. Further, declaratory judgment would settle disputes regarding VA’s obligations vis-à-vis the numerous deficiencies the district court found in its benefits and health care administration, and would terminate any uncertainties giving rise to the proceedings. *See Alsager*, 518 F.2d at 1165. Finally, there can be no question that declaratory relief would represent a significant step “along the road to implementation” of veterans’ legal

³⁰ “[T]he existence of other remedies does not preclude appropriate declaratory relief.” *Greater Los Angeles Council*, 812 F.2d at 1112 (citing Fed. R. Civ. P. 57); *see also Bilbrey*, 738 F.2d at 1470 n.9 (“[D]ifferent considerations enter into a federal court’s decision as to declaratory relief, on the one hand, and injunctive relief, on the other.”).

protections. *Bilbrey*, 738 F.2d at 1471. Thus, the district court's failure to consider or award declaratory relief was clear error.

XI. VETERANS WERE SUBSTANTIALLY PREJUDICED BY TWO KEY DISCOVERY RULINGS.

The fundamental flaws in the District Court's management of discovery, both individually and combined, require reversal and remand for a new trial. In addition to the unreasonably abbreviated six-week pre-trial discovery schedule, the district court abused its discretion by denying Veterans two key pieces of discovery, which resulted in severe prejudice to Veterans: (1) "suicide incident briefs" that linked veteran suicides to VHA's failure to abide by the MHSP and Feeley Memo requirements; and (2) the average number of days PTSD claims are pending at the RO level. Although the existing findings of fact are sufficient to support entry of injunctive and declaratory relief, Veterans were entitled to additional discovery and the denial was an abuse of discretion. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2007) (finding lower court's discovery ruling was an abuse of discretion and remanding for additional discovery); *River City Ranches #1 Ltd. v. Comm'r*, 401 F.3d 1136, 1143 (9th Cir. 2005) (same).

A. The District Court Improperly Revoked Its Order Compelling the Production of “Suicide Incident Briefs.”

The district court’s refusal to compel production of “suicide incident briefs” severely prejudiced Veterans’ ability to litigate their claim that VHA fails to provide veterans with access to timely mental health care. “Suicide incident briefs” are reports prepared by VA following the suicide or attempted suicide of a veteran under VA care. These briefs analyze the circumstances surrounding a veteran’s suicide, including VA failure to follow policies or procedures. ER 109-11 (4/7/08 Transcript 5:9-6:25); ER 832; ER 1364-411; ER 2525-81.

In the original pre-trial discovery order, VA was ordered to produce the incident briefs. ER 158-69. However, less than three weeks before trial, and for the purpose of enforcing the extremely expedited trial schedule, the district court withdrew its prior order after VA had produced only a small fraction of the incident briefs. ER 897-947; ER 124-25 (4/7/08 Transcript 21:7-22:25); ER 141-44 (4/7/08 Transcript 39:24-43:3). In response to VA’s burden objection, and given the limited time available to complete discovery, Veterans requested a continuation of the trial date to provide additional time to complete this key discovery and allow adequate time for trial preparation and expert analysis.³¹

³¹ In addition to its asserted burden objection, VA claimed that confidentiality concerns prevented it from producing the documents without significant redactions, for which it argued it had insufficient time. ER 135-36

ER 123-25 (4/7/08 Transcript: 20:6-22:11). The court denied that request and struck that discovery from its original order.³²

The limited subset of suicide incident briefs produced prior to the revoked order revealed their central relevance.³³ The suicide incident briefs provide a direct link between VA's failure to follow its mental health care procedures and the resulting suicide epidemic. ER 143 (4/7/08 Transcript 42:13-23). Dr. Ronald Maris, Veterans' suicidology expert, reviewed the subset of incident briefs VA produced and reached several troubling conclusions: VA delayed treatment of suicidal veterans, neglected to evaluate patients for suicide risks, failed to commit veterans requiring inpatient psychiatric care, and ignored its own policies on suicide assessment and appointment scheduling. ER 2582-83; ER 643-44 (RT 294:18- 296:22). A comprehensive expert analysis of the total universe of

(4/7/08 Transcript 33:4-34:19). Veterans agreed to redaction of the confidential information, which would have been a simple solution to VA's confidentiality concerns given the entry of a protective order. ER 112-13 (4/7/08 Transcript 7:21-8:12); ER 987-947.

³² Denying the motion to compel production of the suicide incident briefs, the district court concluded: "I don't think I have any authority to talk about their policies . . . I'm going to deny that." ER 143-44 (4/7/08 Transcript 42:24-43:2). The court's ruling evidences a misunderstanding of Veterans' claims and the nature of the discovery sought. Veterans did not seek to use the incident briefs to challenge the adequacy of VA policies and procedures but rather to show non-compliance therewith and the link between that non-compliance and the resulting suicides. ER 143 (4/7/08 Transcript 42:19-23).

³³ VA produced only a small subset of approximately 15,000 pages of suicide incident briefs. ER 127 (4/7/08 Transcript at 25:4-6).

suicide incident briefs would have provided an additional evidentiary link between VA's failure to comply with policies and procedures and veteran suicide. *See, e.g., Hadix v. Caruso*, 461 F. Supp. 2d 574, 586 (S.D. Mich. 2006) (considering similar reports and noting "certain sentinel events, especially including deaths, are important in analyzing the quality of services provided by an organization because they suggest what are typical responses of the system to a given set of events"), *remanded on other grounds*, 248 Fed. Appx. 678 (6th Cir. 2007).

Given the probative value of the suicide incident briefs and the inadequacies a small subset revealed, there is a high probability that the outcome of the case would have been different had the documents been provided. The district court's decision to sacrifice key discovery in favor of enforcing the unreasonably expedited six-week discovery schedule was an abuse of discretion that mandates remand for further discovery.

B. The District Court Denied Veterans Critical Discovery Regarding PTSD Claim Processing Times.

Despite its findings that PTSD claims take "even longer" than the average 182 days it takes to process other compensation claims (ER 52 (F/F 88)), the district court denied Veterans an interrogatory response regarding just how much longer. Veterans sought the average number of days PTSD claims were pending at

the ROs,³⁴ and VA responded that the information was “not available.”³⁵ ER 520. Deposition and trial testimony of key VA witnesses, however, revealed that the information was in fact readily available.³⁶ ER 514-16. When pressed at trial as to the discrepancy, VA explained that “not available” meant VA could generate the information but the resulting data set might not include certain PTSD claims processed through VA’s Benefits Delivery at Discharge (“BDD”) Program, under which the date of discharge is used in place of the date of application, thereby lowering the average processing time. ER 514-16. Those concerns should have gone to the weight of the evidence, not its discoverability. *See United States v. Scholl*, 166 F.3d 964, 978 (9th Cir. 1999) (holding “objections that an exhibit may contain inaccuracies, ambiguities, or omissions go to the weight and not the admissibility of the evidence”). The district court erroneously refused to compel

³⁴ Interrogatory No. 10 specifically requested VA to “[s]tate the average number of days SCDDC claims and PTSD claims are pending at each stage of the Complete Claim Cycle Period, and the method for calculation of that number, from 2005 to present.” ER 520.

³⁵ On the first day of trial, Veterans moved to compel a response to Interrogatory No. 10. The court deferred ruling on Veterans’ motion until after the testimony of a defense witness who VA represented would testify to the unavailability of the data. ER 688-90 (RT 6:24-13:10).

³⁶ Veterans thereafter renewed their motion to compel. ER 414 (RT 1143:6-15).

VA to produce the available data in response to the interrogatory. ER 414 (RT 1143:7-15).

Additionally, the discovery response VA provided to Veterans' request for average processing times for SCDDC claims vastly understated the average RO delays for three reasons. First, this 183-day average includes all types of rating-related claims. Some types of rating-related claims have nothing to do with disability compensation and take less time to adjudicate. ER 418 (RT 1158:21-1159:13). Second, the 183-day average includes claims that are processed through the BDD program. ER 500 (RT 1089:16-1090:17). Although the adjudication of BDD claims begins well before discharge from the military, the clock does not start ticking until the moment of discharge. ER 500 (RT 1089:16-1090:17). Thus, the six-month average is artificially reduced by inclusion of numerous BDD claims, which VBA aims to complete within 60 days of discharge. ER 500 (RT 1089:16-1090:17). Third, the 183-day average processing time does not take into account claims that are prematurely denied and then reopened, sometimes multiple times, resulting in a single claim that generates multiple average processing times well below the 183-day average. ER 719-20 (RT 132:23-134:24). Accordingly, the average processing time for SCDDC claims is actually significantly longer than 183 days, and, as the district court found, is even longer

for PTSD claims. ER 52 (F/F 88); ER 849 (RT 120:24-121:2); ER 671-72 (RT 406:21-407:16). Veterans were entitled to know exactly how much longer.

The denial of discovery relating to the average PTSD-specific delays at the RO level was central to Veterans' APA and due process delay claims. As a result, Veterans were substantially prejudiced, and the district court's refusal to compel discovery was an abuse of discretion.

XII. CONCLUSION

For the foregoing reasons, Veterans respectfully request that the district court's judgment be reversed and that injunctive and declaratory relief be entered in favor of Veterans.

Dated: December 10, 2008

MORRISON & FOERSTER LLP
DISABILITY RIGHTS ADVOCATES

By: /s/ Gordon P. Erspamer
Gordon P. Erspamer

Attorneys for Plaintiffs-Appellants
Veterans for Common Sense and
Veterans United for Truth, Inc.

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP.
P 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1 FOR
CASE NUMBER 06-80151**

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Appellants' Opening Brief is proportionately spaced, has a typeface of 14 points, and contains 20,383 words.

Dated: December 10, 2008

MORRISON & FOERSTER LLP
DISABILITY RIGHTS ADVOCATES

By: /s/ Gordon P. Erspamer
Gordon P. Erspamer

Attorneys for Plaintiffs-Appellants
Veterans for Common Sense and
Veterans United for Truth, Inc.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Veterans for Common Sense and Veterans United for Truth, Inc. hereby state that they are unaware of any related cases pending before this Court.

Dated: December 10, 2008

/s/ Gordon P. Erspamer

Gordon P. Erspamer

APPENDIX 1—DEFINED ACRONYMS LIST

ACRONYM	DEFINITION
APA	Administrative Procedure Act
BDD	Benefits Delivery at Discharge
BVA	Board of Veteran Appeals
CARES	Capital Asset Realignment for Enhanced Services
C&P	Compensation and Pension
GAO	Government Accountability Office
MHSP	Mental Health Strategic Plan
NOD	Notice of Disagreement
OIG	Department of Veterans Affairs Office of Inspector General
PTSD	Post-Traumatic Stress Disorder
RO	Regional Office
SCDDC	Service-Connected Death and Disability Compensation
SOC	Statement of the Case
VA	Department of Veterans Affairs
VBA	Veterans Benefits Administration
VHA	Veterans Health Administration
VISN	Veterans Integrated Service Network
VJRA	Veterans' Judicial Review Act
VSO	Veterans Service Officers

APPENDIX 2—STATUTORY ADDENDUM

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5 U.S.C. § 555

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter [*5 USCS §§ 551 et seq.*].

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court

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shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

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5 U.S.C. § 702

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money 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 States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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5 U.S.C. § 706

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this *title* [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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38 U.S.C. § 502

TITLE 38. VETERANS' BENEFITS
PART I. GENERAL PROVISIONS
CHAPTER 5. AUTHORITY AND DUTIES OF THE SECRETARY
SUBCHAPTER I. GENERAL AUTHORITIES

§ 502. Judicial review of rules and regulations

An action of the Secretary to which section 552(a)(1) or 553 of title 5 [5 *USCS* § 552(a)(1) or 553] (or both) refers is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 [5 *USCS* §§ 701 et seq.] and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this *title* [38 *USCS* §§ 7251 et seq.], the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5 [5 *USCS* §§ 701 et seq.].

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38 U.S.C. § 511

TITLE 38. VETERANS' BENEFITS
PART I. GENERAL PROVISIONS
CHAPTER 5. AUTHORITY AND DUTIES OF THE SECRETARY
SUBCHAPTER I. GENERAL AUTHORITIES

§ 511. Decisions of the Secretary; finality

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to--

- (1) matters subject to section 502 of this *title* [38 USCS § 502];
 - (2) matters covered by sections 1975 and 1984 of this *title* [38 USCS §§ 1975 and 1984];
 - (3) matters arising under chapter 37 of this *title* [38 USCS §§ 3701 et seq.];
- and
- (4) matters covered by chapter 72 of this *title* [38 USCS §§ 7251 et seq.].

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38 U.S.C. § 1705

TITLE 38. VETERANS' BENEFITS
PART II. GENERAL BENEFITS
CHAPTER 17. HOSPITAL, NURSING HOME, DOMICILIARY, AND
MEDICAL CARE
SUBCHAPTER I. GENERAL

§ 1705. Management of health care: patient enrollment system

(a) In managing the provision of hospital care and medical services under section 1710(a) of this *title* [38 USCS § 1710(a)], the Secretary, in accordance with regulations the Secretary shall prescribe, shall establish and operate a system of annual patient enrollment. The Secretary shall manage the enrollment of veterans in accordance with the following priorities, in the order listed:

- (1) Veterans with service-connected disabilities rated 50 percent or greater.
- (2) Veterans with service-connected disabilities rated 30 percent or 40 percent.
- (3) Veterans who are former prisoners of war or who were awarded the Purple Heart, veterans with service-connected disabilities rated 10 percent or 20 percent, and veterans described in subparagraphs (B) and (C) of section 1710(a)(2) of this *title* [38 USCS § 1710(a)(2)].
- (4) Veterans who are in receipt of increased pension based on a need of regular aid and attendance or by reason of being permanently housebound and other veterans who are catastrophically disabled.
- (5) Veterans not covered by paragraphs (1) through (4) who are unable to defray the expenses of necessary care as determined under section 1722(a) of this *title* [38 USCS § 1722(a)].
- (6) All other veterans eligible for hospital care, medical services, and nursing home care under section 1710(a)(2) of this *title* [38 USCS § 1710(a)(2)].
- (7) Veterans described in section 1710(a)(3) of this *title* [38 USCS § 1710(a)(3)] who are eligible for treatment as a low-income family under section 3(b) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)) for the area in which such veterans reside, regardless of whether such veterans are treated as single person families under paragraph (3)(A) of such section 3(b) or as families under paragraph (3)(B) of such section 3(b).
- (8) Veterans described in section 1710(a)(3) of this *title* [38 USCS § 1710(a)(3)] who are not covered by paragraph (7).

(b) In the design of an enrollment system under subsection (a), the Secretary--

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(1) shall 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;

(2) may establish additional priorities within each priority group specified in subsection (a), as the Secretary determines necessary; and

(3) may provide for exceptions to the specified priorities where dictated by compelling medical reasons.

(c) (1) The Secretary may not provide hospital care or medical services to a veteran under paragraph (2) or (3) of section 1710(a) of this *title* [38 USCS § 1710(a)] unless the veteran enrolls in the system of patient enrollment established by the Secretary under subsection (a).

(2) The Secretary shall provide hospital care and medical services under section 1710(a)(1) of this *title* [38 USCS § 1710(a)(1)], and under subparagraph (B) of section 1710(a)(2) of this *title* [38 USCS § 1710(a)(2)], for the 12-month period following such veteran's discharge or release from service, to any veteran referred to in such sections for a disability specified in the applicable subparagraph of such section, notwithstanding the failure of the veteran to enroll in the system of patient enrollment referred to in subsection (a) of this section.

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38 U.S.C. § 1710

TITLE 38. VETERANS' BENEFITS
PART II. GENERAL BENEFITS
CHAPTER 17. HOSPITAL, NURSING HOME, DOMICILIARY, AND
MEDICAL CARE
SUBCHAPTER II. HOSPITAL, NURSING HOME, OR DOMICILIARY
CARE AND MEDICAL TREATMENT

§ 1710. Eligibility for hospital, nursing home, and domiciliary care

(a)

(1) The Secretary (subject to paragraph (4)) shall furnish hospital care and medical services which the Secretary determines to be needed--

(A) to any veteran for a service-connected disability; and

(B) to any veteran who has a service-connected disability rated at 50 percent or more.

(2) The Secretary (subject to paragraph (4)) shall furnish hospital care and medical services, and may furnish nursing home care, which the Secretary determines to be needed to any veteran--

(A) who has a compensable service-connected disability rated less than 50 percent or, with respect to nursing home care during any period during which the provisions of section 1710A(a) of this *title* [38 USCS § 1710A(a)] are in effect, a compensable service-connected disability rated less than 70 percent;

(B) whose discharge or release from active military, naval, or air service was for a disability that was incurred or aggravated in the line of duty;

(C) who is in receipt of, or who, but for a suspension pursuant to section 1151 of this *title* [38 USCS § 1151] (or both a suspension and the receipt of retired pay), would be entitled to disability compensation, but only to the extent that such veteran's continuing eligibility for such care is provided for in the judgment or settlement provided for in such section;

(D) who is a former prisoner of war or who was awarded the Purple Heart;

(E) who is a veteran of the Mexican border period or of World War I;

(F) who was exposed to a toxic substance, radiation, or other conditions, as provided in subsection (e); or

(G) who is unable to defray the expenses of necessary care as determined under section 1722(a) of this *title* [38 USCS § 1722(a)].

(3) In the case of a veteran who is not described in paragraphs (1) and (2), the Secretary may, to the extent resources and facilities are available and subject to

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the provisions of subsections (f) and (g), furnish hospital care, medical services, and nursing home care which the Secretary determines to be needed.

(4) The requirement in paragraphs (1) and (2) that the Secretary furnish hospital care and medical services, the requirement in section 1710A(a) of this *title* [38 USCS § 1710A(a)] that the Secretary provide nursing home care, the requirement in section 1710B of this *title* [38 USCS § 1710B)] that the Secretary provide a program of extended care services, and the requirement in section 1745 of this *title* [38 USCS § 1745] to provide nursing home care and prescription medicines to veterans with service-connected disabilities in State homes shall be effective in any fiscal year only to the extent and in the amount provided in advance in appropriations Acts for such purposes.

(5) During any period during which the provisions of section 1710A(a) of this *title* [38 USCS § 1710A(a)] are not in effect, the Secretary may furnish nursing home care which the Secretary determines is needed to any veteran described in paragraph (1), with the priority for such care on the same basis as if provided under that paragraph.

(b)

(1) The Secretary may furnish to a veteran described in paragraph (2) of this subsection such domiciliary care as the Secretary determines is needed for the purpose of the furnishing of medical services to the veteran.

(2) This subsection applies in the case of the following veterans:

(A) Any veteran whose annual income (as determined under section 1503 of this *title* [38 USCS § 1503]) does not exceed the maximum annual rate of pension that would be applicable to the veteran if the veteran were eligible for pension under section 1521(d) of this *title* [38 USCS § 1521(d)].

(B) Any veteran who the Secretary determines has no adequate means of support.

(c) While any veteran is receiving hospital care or nursing home care in any Department facility, the Secretary may, within the limits of Department facilities, furnish medical services to correct or treat any non-service-connected disability of such veteran, in addition to treatment incident to the disability for which such veteran is hospitalized, if the veteran is willing, and the Secretary finds such services to be reasonably necessary to protect the health of such veteran. The Secretary may furnish dental services and treatment, and related dental appliances, under this subsection for a non-service-connected dental condition or disability of a veteran only (1) to the extent that the Secretary determines that the dental facilities of the Department to be used to furnish such

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services, treatment, or appliances are not needed to furnish services, treatment, or appliances for dental conditions or disabilities described in section 1712(a) of this *title* [38 USCS § 1712(a)], or (2) if (A) such non-service-connected dental condition or disability is associated with or aggravating a disability for which such veteran is receiving hospital care, or (B) a compelling medical reason or a dental emergency requires furnishing dental services, treatment, or appliances (excluding the furnishing of such services, treatment, or appliances of a routine nature) to such veteran during the period of hospitalization under this section.

(d) In no case may nursing home care be furnished in a hospital not under the direct jurisdiction of the Secretary except as provided in section 1720 of this title.

(e)

(1) (A) A Vietnam-era herbicide-exposed veteran is eligible (subject to paragraph (2)) for hospital care, medical services, and nursing home care under subsection (a)(2)(F) for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(B) A radiation-exposed veteran is eligible for hospital care, medical services, and nursing home care under subsection (a)(2)(F) for any disease suffered by the veteran that is--

(i) a disease listed in section 1112(c)(2) of this *title* [38 USCS § 1112(c)(2)]; or

(ii) any other disease for which the Secretary, based on the advice of the Advisory Committee on Environmental Hazards, determines that there is credible evidence of a positive association between occurrence of the disease in humans and exposure to ionizing radiation.

(C) Subject to paragraphs (2) and (3) of this subsection, a veteran who served in the Southwest Asia theater of operations during the Persian Gulf War is eligible for hospital care, medical services, and nursing home care under subsection (a)(2)(F) for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such service.

(D) Subject to paragraphs (2) and (3), a veteran who served on active duty in a theater of combat operations (as determined by the Secretary in consultation with the Secretary of Defense) during a period of war after the Persian Gulf War, or in combat against a hostile force during a period of hostilities (as defined in section 1712A(a)(2)(B) of this *title* [38 USCS § 1712A(a)(2)(B)])

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after November 11, 1998, is eligible for hospital care, medical services, and nursing home care under subsection (a)(2)(F) for any illness, notwithstanding that there is insufficient medical evidence to conclude that such condition is attributable to such service.

(E) Subject to paragraph (2), a veteran who participated in a test conducted by the Department of Defense Deseret Test Center as part of a program for chemical and biological warfare testing from 1962 through 1973 (including the program designated as "Project Shipboard Hazard and Defense (SHAD)" and related land-based tests) is eligible for hospital care, medical services, and nursing home care under subsection (a)(2)(F) for any illness, notwithstanding that there is insufficient medical evidence to conclude that such illness is attributable to such testing.

(2)

(A) In the case of a veteran described in paragraph (1)(A), hospital care, medical services, and nursing home care may not be provided under subsection (a)(2)(F) with respect to--

(i) a disability that is found, in accordance with guidelines issued by the Under Secretary for Health, to have resulted from a cause other than an exposure described in paragraph (4)(A)(ii); or

(ii) a disease for which the National Academy of Sciences, in a report issued in accordance with section 3 of the Agent Orange Act of 1991 [38 *USCS* § 1116 note], has determined that there is limited or suggestive evidence of the lack of a positive association between occurrence of the disease in humans and exposure to a herbicide agent.

(B) In the case of a veteran described in subparagraph (C), (D), or (E) of paragraph (1), hospital care, medical services, and nursing home care may not be provided under subsection (a)(2)(F) with respect to a disability that is found, in accordance with guidelines issued by the Under Secretary for Health, to have resulted from a cause other than the service or testing described in such paragraph.

(3) Hospital care, medical services, and nursing home care may not be provided under or by virtue of subsection (a)(2)(F)--

(A) in the case of care for a veteran described in paragraph (1)(A), after December 31, 2002;

(B) in the case of care for a veteran described in paragraph (1)(C), after December 31, 2002; and

(C) in the case of care for a veteran described in paragraph (1)(D) who--

(i) is discharged or released from the active military, naval, or air service after the date that is five years before the date of the enactment of the National

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Defense Authorization Act for Fiscal Year 2008 [enacted Jan. 28, 2008], after a period of five years beginning on the date of such discharge or release; or

(ii) is so discharged or released more than five years before the date of the enactment of that Act and who did not enroll in the patient enrollment system under section 1705 of this *title* [38 USCS § 1705] before such date, after a period of three years beginning on the date of the enactment of that Act.

(D) [Deleted]

(4) For purposes of this subsection--

(A) The term "Vietnam-era herbicide-exposed veteran" means a veteran (i) who served on active duty in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, and (ii) who the Secretary finds may have been exposed during such service to dioxin or was exposed during such service to a toxic substance found in a herbicide or defoliant used for military purposes during such period.

(B) The term "radiation-exposed veteran" has the meaning given that term in section 1112(c)(3) of this *title* [38 USCS § 1112(c)(3)].

(5) When the Secretary first provides care for veterans using the authority provided in paragraph (1)(D), the Secretary shall establish a system for collection and analysis of information on the general health status and health care utilization patterns of veterans receiving care under that paragraph. Not later than 18 months after first providing care under such authority, the Secretary shall submit to Congress a report on the experience under that authority. The Secretary shall include in the report any recommendations of the Secretary for extension of that authority.

(f) (1) The Secretary may not furnish hospital care or nursing home care (except if such care constitutes hospice care) under this section to a veteran who is eligible for such care under subsection (a)(3) of this section unless the veteran agrees to pay to the United States the applicable amount determined under paragraph (2) or (4) of this subsection.

(2) A veteran who is furnished hospital care or nursing home care under this section and who is required under paragraph (1) of this subsection to agree to pay an amount to the United States in order to be furnished such care shall be liable to the United States for an amount equal to--

(A) the lesser of--

- (i) the cost of furnishing such care, as determined by the Secretary; or
- (ii) the amount determined under paragraph (3) of this subsection; and

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(B) before September 30, 2010, an amount equal to \$ 10 for every day the veteran receives hospital care and \$ 5 for every day the veteran receives nursing home care.

(3)

(A) In the case of hospital care furnished during any 365-day period, the amount referred to in paragraph (2)(A)(ii) of this subsection is--

(i) the amount of the inpatient Medicare deductible, plus

(ii) one-half of such amount for each 90 days of care (or fraction thereof) after the first 90 days of such care during such 365-day period.

(B) In the case of nursing home care furnished during any 365-day period, the amount referred to in paragraph (2)(A)(ii) of this subsection is the amount of the inpatient Medicare deductible for each 90 days of such care (or fraction thereof) during such 365-day period.

(C) (i) Except as provided in clause (ii) of this subparagraph, in the case of a veteran who is admitted for nursing home care under this section after being furnished, during the preceding 365-day period, hospital care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of hospital care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such nursing home care until--

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made, whichever occurs first.

(ii) In the case of a veteran who is admitted for nursing home care under this section after being furnished, during any 365-day period, hospital care for which the veteran has paid an amount under subparagraph (A)(ii) of this paragraph and who has not been furnished 90 days of hospital care in connection with such payment, the amount of the liability of the veteran under paragraph (2) of this subsection with respect to the number of days of such nursing home care which, when added to the number of days of such hospital care, is 90 or less, is the difference between the inpatient Medicare deductible and the amount paid under such subparagraph until--

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made, whichever occurs first.

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(D) In the case of a veteran who is admitted for hospital care under this section after having been furnished, during the preceding 365-day period, nursing home care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of nursing home care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such hospital care until--

(i) the veteran has been furnished, beginning with the first day of such nursing home care furnished in connection with such payment, a total of 90 days of nursing home care and hospital care; or

(ii) the end of the 365-day period applicable to the nursing home care for which payment was made,
whichever occurs first.

(E) A veteran may not be required to make a payment under this subsection for hospital care or nursing home care furnished under this section during any 90-day period in which the veteran is furnished medical services under paragraph (3) of subsection (a) to the extent that such payment would cause the total amount paid by the veteran under this subsection for hospital care and nursing home care furnished during that period and under subsection (g) for medical services furnished during that period to exceed the amount of the inpatient Medicare deductible in effect on the first day of such period.

(F) A veteran may not be required to make a payment under this subsection or subsection (g) for any days of care in excess of 360 days of care during any 365-calendar-day period.

(4) In the case of a veteran covered by this subsection who is also described by section 1705(a)(7) of this *title* [38 USCS § 1705(a)(7)], the amount for which the veteran shall be liable to the United States for hospital care under this subsection shall be an amount equal to 20 percent of the total amount for which the veteran would otherwise be liable for such care under subparagraphs (2)(B) and (3)(A) but for this paragraph.

(5) For the purposes of this subsection, the term "inpatient Medicare deductible" means the amount of the inpatient hospital deductible in effect under section 1813(b) of the Social Security Act (42 U.S.C. 1395e(b)) on the first day of the 365-day period applicable under paragraph (3) of this subsection.

(g) (1) The Secretary may not furnish medical services (except if such care constitutes hospice care) under subsection (a) of this section (including home health services under section 1717 of this *title* [38 USCS § 1717]) to a veteran who is eligible for hospital care under this chapter [38 USCS §§ 1701 et seq.] by

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reason of subsection (a)(3) of this section unless the veteran agrees to pay to the United States in the case of each outpatient visit the applicable amount or amounts established by the Secretary by regulation.

(2) A veteran who is furnished medical services under subsection (a) of this section and who is required under paragraph (1) of this subsection to agree to pay an amount to the United States in order to be furnished such services shall be liable to the United States, in the case of each visit in which such services are furnished to the veteran, for an amount which the Secretary shall establish by regulation.

(3) This subsection does not apply with respect to home health services under section 1717 of this *title* [38 USCS § 1717] to the extent that such services are for improvements and structural alterations.

(h) Nothing in this section requires the Secretary to furnish care to a veteran to whom another agency of Federal, State, or local government has a duty under law to provide care in an institution of such government.

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38 U.S.C. § 5109B

TITLE 38. VETERANS' BENEFITS
PART IV. GENERAL ADMINISTRATIVE PROVISIONS
CHAPTER 51. CLAIMS, EFFECTIVE DATES, AND PAYMENTS
SUBCHAPTER I. CLAIMS

§ 5109B. Expedited treatment of remanded claims

The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the appropriate regional office of the Veterans Benefits Administration of any claim that is remanded to a regional office of the Veterans Benefits Administration by the Board of Veterans' Appeals.

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38 U.S.C. § 7101

TITLE 38. VETERANS' BENEFITS
PART V. BOARDS, ADMINISTRATIONS, AND SERVICES
CHAPTER 71. BOARD OF VETERANS' APPEALS

§ 7101. Composition of Board of Veterans' Appeals

(a) There is in the Department a Board of Veterans' Appeals (hereinafter in this chapter [38 USCS §§ 7101 et seq.] referred to as the "Board"). The Board is under the administrative control and supervision of a chairman directly responsible to the Secretary. The Board shall consist of a Chairman, a Vice Chairman, and such number of members as may be found necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner. The Board shall have such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board. The Board shall have sufficient personnel under the preceding sentence to enable the Board to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner.

(b) (1) The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, for a term of six years. The Chairman shall be subject to the same ethical and legal limitations and restrictions concerning involvement in political activities as apply to judges of the United States Court of Appeals for Veterans Claims.

(2) The Chairman may be removed by the President for misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman's duties. The Chairman may not be removed from office by the President on any other grounds. Any such removal may only be made after notice and opportunity for hearing.

(3) The Chairman may be appointed under this subsection to more than one term. If, upon the expiration of the term of office for which the Chairman was appointed, the position of Chairman would become vacant, the individual serving as Chairman may, with the approval of the Secretary, continue to serve as Chairman until either appointed to another term or a successor is appointed, but not beyond the end of the Congress during which the term of office expired.

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(4) The Secretary shall designate one member of the Board as Vice Chairman. The Vice Chairman shall perform such functions as the Chairman may specify. Such member shall serve as Vice Chairman at the pleasure of the Secretary.

(c) (1) (A) The Chairman may from time to time designate one or more employees of the Department to serve as acting members of the Board. Except as provided in subparagraph (B), any such designation shall be for a period not to exceed 90 days, as determined by the Chairman.

(B) An individual designated as an acting member of the Board may continue to serve as an acting member of the Board in the making of any determination on a proceeding for which the individual was designated as an acting member of the Board, notwithstanding the termination of the period of designation of the individual as an acting member of the Board under subparagraph (A) or (C).

(C) An individual may not serve as an acting member of the Board for more than 270 days during any one-year period.

(D) At no time may the number of acting members exceed 20 percent of the total of the number of Board members and acting Board members combined.

(2) In each annual report to the Congress under section 529 of this *title* [38 *USCS* § 529], the Secretary shall provide detailed descriptions of the activities undertaken and plans made in the fiscal year for which the report is made with respect to the authority provided by paragraph (1) of this subsection. In each such report, the Secretary shall indicate, in terms of full-time employee equivalents, the number of acting members of the Board designated under such paragraph (1) during the year for which the report is made.

(d) (1) After the end of each fiscal year, the Chairman shall prepare a report on the activities of the Board during that fiscal year and the projected activities of the Board for the fiscal year during which the report is prepared and the next fiscal year. Such report shall be included in the documents providing detailed information on the budget for the Department that the Secretary submits to the Congress in conjunction with the President's budget submission for any fiscal year pursuant to section 1105 of title 31 [31 *USCS* § 1105].

(2) Each such report shall include, with respect to the preceding fiscal year, information specifying--

(A) the number of cases appealed to the Board during that year;

(B) the number of cases pending before the Board at the beginning and at the end of that year;

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(C) the number of such cases which were filed during each of the 36 months preceding the current fiscal year;

(D) the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the preceding fiscal year;

(E) the number of members of the Board at the end of the year and the number of professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the preceding fiscal year; and

(F) the number of employees of the Department designated under subsection (c)(1) to serve as acting members of the Board during that year and the number of cases in which each such member participated during that year.

(3) The projections in each such report for the current fiscal year and for the next fiscal year shall include (for each such year)--

(A) an estimate of the number of cases to be appealed to the Board; and

(B) an evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required by section 7101(a) of this *title* [38 USCS § 7101(a)].

(e) A performance incentive that is authorized by law for officers and employees of the Federal Government may be awarded to a member of the Board (including an acting member) by reason of that member's service on the Board only if the Chairman of the Board determines that such member should be awarded that incentive. A determination by the Chairman for such purpose shall be made taking into consideration the quality of performance of the Board member.