
Andrew Silverio*

The Department of Veterans Affairs (“VA”) is the organization responsible for providing American veterans with health care and disability benefits.1 In Veterans for Common Sense v. Shinseki,2 the United States Court of Appeals for the Ninth Circuit examined claims by several nonprofit organizations representing American Veterans (“Veterans”) as a class against the VA.3 Under the Administrative Procedure Act (“APA”), Veterans sought implementation of two VA mental health care initiatives and a restructuring of the adjudication process for disability compensation.4 Additionally, Veterans alleged the VA’s provision of statutorily mandated health care and disability benefits is inadequate.5 The Ninth Circuit found the terms of the APA precluded relief

* J.D. Candidate, Suffolk University Law School, 2013; B.A., Berklee College of Music, 2010. Mr. Silverio may be contacted at asilveriol@suffolk.edu.

1 38 U.S.C. § 1710 (2006). The extent of care and compensation is determined by a rating system representing the veteran’s level of disability. Id. For more information on the rating system, see infra note 20 and accompanying text. The National Center for Veterans Analysis and Statistics estimates that 8.34 million of the country’s 22.2 million veterans are enrolled in VA healthcare programs. See Department of Veterans Affairs Statistics at a Glance, U.S. DEPT OF VETERANS AFFAIRS (Nov. 2011), http://www.va.gov/vetdata/docs/quickfacts/Homepage-slideshow.pdf.

2 644 F.3d 845 (9th Cir. 2011).

3 Id. at 850.

4 Id. at 850, 861. Specifically, Veterans sought implementation of the VA’s 2004 “Five Year Mental Health Strategic Plan” to improve the state of mental health care provided by the VA, and the “Feeley Memorandum,” an internal memorandum by William Feeley, the VHA’s Deputy Under Secretary for Health Operations and Management at the time. Id. at 853-855, 861. The “Feeley Memorandum” in effect called for system wide implementation of the initiatives in 2004’s strategic plan. Id. at 855.

and that veterans' entitlements to mental health care and benefits were property interests protected by the Fifth Amendment Due Process Clause: therefore the unjustified and significant delays amounted to a deprivation of that property interest.6

Veterans' claims arose as a result of unnecessary barriers veterans faced when they attempted to acquire health benefits through the VA.7 Specifically, Veterans sought relief that would alleviate the excessive delays in the administration of statutorily mandated mental health care by the Veterans Health Administration ("VHA"), and the adjudication of service-connected death and disability compensation by the Veterans Benefits Administration ("VBA").8 The claims under the APA, if granted, would compel the VA to implement the internal initiative (the "Mental Health Strategic Plan") of the "Feeley Memo."9

Military veterans are entitled by statute to receive necessary medical services, including mental health care, from the VHA.10 Most veterans receiving care from the VHA do so at one of eight-hundred community-based outpatient clinics, which do not provide mental health care services, despite the dramatic spike in Post Traumatic Stress

some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Veterans, 644 F.3d at 884 (quoting Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961)). "Instead, ‘due process is flexible and calls for such procedural protections as the particular situation demands.’" Id. at 884 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). Veterans alleged the VA deprived Veterans of constitutionally protected property interests without due process. Id. at 851.

6 Id. at 890. The court noted that although implementation of the Mental Health Strategic Plan and the Feeley Memorandum would have helped the difficult situation faced by veterans seeking mental health services, the terms of the APA allow courts to compel only those discrete agency actions which are legally required. Id. at 869. Additionally, the VA had denied veterans the benefits they had been promised without affording them due process under the Constitution. Id. at 851. It is the court's duty to compel the agency to provide the procedural safeguards that will ensure their rights. See Veterans, 644 F.3d at 851.

7 Id. at 850. See infra notes 16-17 and accompanying text.

8 Veterans, 644 F.3d at 850-52. "[I]t takes an average of more than four years for a veteran to fully adjudicate a claim for benefits . . . [A]nd for some veterans, most notably those suffering from combat-derived mental illnesses such as PTSD, these delays may make the difference between life and death." Id. at 850. Veterans, 644 F.3d at 851; 38 U.S.C. § 1710 (establishing this duty). In addition to medical services, the VHA is also required to provide readjustment counseling and mental health services "upon request." 38 U.S.C. § 1712A (2006). For full information on VA health care benefits, see Federal Benefits for Veterans, Dependents, and Survivors, U.S. DEPT. OF VETERANS AFFAIRS (2011), http://www.va.gov/opa/publications/benefits_book.asp.
Disorder ("PTSD") diagnoses in veterans as a result of combat in Iraq and Afghanistan. Suicide is a significant risk for PTSD patients, and is further exacerbated when paired with veteran status—a group with a disproportionately high suicide rate within the general population. The VHA’s "suicide prevention coordinators" estimate about 1,000 suicide attempts per month by veterans being treated in VHA facilities.

The VA attempted to remedy this growing problem in 2004 by adopting a five year Mental Health Strategic Plan ("A Road Map for Transforming VA Mental Health Care"), citing as its core objective the reduction of veteran suicides. Nevertheless, a thorough report by the VA Office of Inspector General ("OIG") in 2007 revealed that much of the plan had not been implemented, and in the areas the VA had attempted to adopt the plan the implemented measures had fallen short. The problems caused by

11 Veterans, 644 F.3d at 853. One of three soldiers returning from Iraq was seen in a VHA facility for mental health treatment within one year of returning home at one of 153 VHA medical centers. Id. at 853-54. By 2009 these centers were all staffed with a suicide prevention officer, but there are no such personnel at any of the approximately eight-hundred outpatient clinics where most veterans receive care, and which do not provide mental health services. Id. at 854. PTSD is a psychological disorder that causes extreme anxiety, fear, and flashbacks, as well as avoidance and hyper-arousal symptoms in people who have gone through particularly stressful or terrifying events. Post Traumatic Stress Disorder (PTSD), NAT'L INST. OF MENTAL HEALTH, http://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd/nimh_ptsd_booklet.pdf (last visited Mar. 18, 2012). See generally Jacob B. Natwick, Unreasonable Delay at the VA: Why Federal District Courts Should Intervene and Remedy Five-Year Delays in Veterans Mental-Health Benefits Appeals, 95 IOWA L. REV. 723, 725 (2010) (discussing the nature of PTSD, its effects on combat veterans, and the delays faced in benefits appeals).

12 Veterans, 644 F.3d at 853. The 2006 "Katz Suicide Study" found that suicide rates for veterans are 3.2 times greater than that of the general population. Id. The study also estimated eighteen suicides per day out of America’s 25 million veterans, with four to five of those suicides including veterans receiving medical care from the VA. Id.

13 Id.

14 Id. The Mental Health Strategic Plan consists of an inventory of VA shortcomings in mental health care and recommendations on how to remedy these issues to better meet veterans' health care needs. See Implementing VHA’s Mental Health Strategic Plan Initiatives for Suicide Prevention, U.S. DEPT. OF VETERANS AFFAIRS (2007), http://www.va.gov/oig/54/reports/vaocig-06-03706-126.pdf.

15 Id. (noting lack of certain "full system-wide implementation"); Veterans, 644 F.3d at 854 (noting "61.8 percent of VHA facilities had not introduced a suicide prevention strategy"). The plan called "for thorough mental health screening" of every veteran returning from war. Id. Although mental health screening is now a part of a general examination when a veteran first enrolls in the VA, veterans who present mental health disorders are only asked two yes/no questions: "(1) During the past two weeks, have you felt down, depressed, or hopeless? and (2) During the past two weeks, have you had any thoughts that life was not worth living or any thoughts of harming yourself in any way?" Id. Patients who answer "yes" to the first question but "no" to the second
the VA’s failure to thoroughly evaluate returning veterans’ risk of suicide and mental
disorders have been compounded by significant delays in providing necessary mental
health care. Additionally, veterans who face such delays have no meaningful recourse
by which to appeal.

The other complaints raised by Veterans were against another branch of the
VA, the Veterans Benefits Administration, which distributes pensions as well as death
and disability compensation benefits. The United States District Court for the

receive no further screening for suicide risk. Id.

16 Id. at 854-55. A referred patient suffering from depression with “moderate” symptom severity
receives a same-day evaluation in a VA facility only forty-percent of the time, will have to wait
two to four weeks 24.5 percent of the time, and may wait as long as four to eight weeks at 4.5
percent of VA facilities. Id. 33.6 percent of facilities perform same day evaluation of individuals
referred with PTSD symptoms, with 26 percent reporting wait times between two and four
weeks, and 5.5 percent between four to eight weeks. Veterans, 644 F.3d at 854-55. The VA has
recognized the importance of timely treatment of mental illness, specifically in a memorandum
written by William Feeley in June 2007 that instructed the VA’s twenty-one regional directors to
put the initiatives of the 2004 Office of the Inspector General (“OIG”) plan in action;
particularly those guaranteeing that a veteran presenting mental health issues for the first time at a
VA facility be evaluated “within 24 hours.” Id. at 855. As of the 2009 trial, there was no
evidence that the initiatives in the Feeley memo had been implemented, and as of April 2008,
there were an estimated 84,450 veterans on VHA waiting lists for mental health services. Id.

17 Id. A veteran cannot appeal an administrative decision such as being placed on a wait list. Id.
A veteran can appeal a medical decision by a doctor or nurse that the veteran must wait to
receive care, but to do so he or she must lodge a complaint to a “Patient Advocate,” who is an
employee of the VHA and a colleague of the doctor or nurse whose decision is being challenged. Id. The Patient Advocate forwards the complaint to the center’s Chief of Staff, whose decision
can be further appealed to the Director of the Veterans Integrated Service Network. Veterans, 644
F.3d at 855. If the veteran disagrees with the Director’s decision, he or she may request that the
Director request an external review, but may not do so themselves. Id. Even if the Director
requests a review of his own decision, the veteran has no right to know its results. Id.

18 Id. at 850, 856.

For disability resulting from personal injury suffered or disease contracted in
line of duty, or for aggravation of a preexisting injury suffered or disease
contracted in line of duty, in the active military, naval, or air service, during a
period of war, the United States will pay to any veteran thus disabled and who
was discharged or released under conditions other than dishonorable from the
period of service in which said injury or disease was incurred, or preexisting
injury or disease was aggravated, compensation as provided in this subchapter,
but no compensation shall be paid if the disability is a result of the veteran’s
own willful misconduct or abuse of alcohol or drugs.

Northern District of California found that because of the limited formal education of the majority of recent veterans, many had difficulty applying for and ultimately receiving the benefits to which they were legally entitled. The application process is complex and wrought with procedural pitfalls, and the appeals process for benefits decisions is equally intimidating. A veteran may appeal the rating in one of two ways, but doing so is a complicated task—particularly for someone suffering from a mental disability—and can delay receipt of benefits for years. The district court also found that of the forty percent of appeals remanded back to the VBA for further proceedings, nineteen to forty-four percent are “avoidable remands” stemming from errors made at the regional level and resulting in significant further delay. The court held that the unexplained

establishing service-connected disability).

19 Veterans for Common Sense v. Peake, 563 F. Supp. 2d 1049, 1070 (N.D. Cal. 2008), aff’d in part, rev’d in part sub nom Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011). “[Eighty-two percent] of the Army personnel deployed have a high school diploma or less[, and] 89% of the Marines deployed have a high school diploma or less.” Id. (citations omitted). However, census data including all types of veterans indicate that a higher percentage of veterans compared to non-veterans have some college education, but a slightly lower percentage by comparison actually completes a bachelor’s degree. Educational Attainment of Veterans: 2000 to 2009, U.S. DEPT. OF VETERANS AFFAIRS (Jan. 2011), http://www.va.gov/vetdata/docs/SpecialReports/education_FINAL.pdf.

20 Veterans, 644 F.3d at 856. After the veteran completes the twenty-three page application and compiles the evidence required to demonstrate a connection between injury and military service, a Rating Veterans Service Representative (“rating specialist”) determines whether the disability is service-connected, and, if it is, assigns a percentage between zero and 100, in ten percent increments, to represent the level of disability, which determines the level of compensation. Id. at 856-57. The VA is required to assist the veteran in the application process. Id. For a detailed look at both the application and appeals processes, see Michael Serota & Michelle Singer, Veterans Benefits and Due Process, 90 NEB. L. REV. 388, 397-402 (2011).

21 Veterans, 644 F.3d at 857. A veteran can appeal either directly to the Board of Veterans’ Appeals or by filing an informal Notice of Disagreement with the veteran’s local VBA Regional Office. Id. After filing a Notice of Disagreement, the veteran elects whether to receive a de novo review of the rating decision or a more detailed explanation of the rating decision (a “Statement of the Case”) for use in a formal appeal. Id. at 858. Throughout the appeals process, veterans are subject to several time limits, failing to meet any of which can result in forfeiture of the appeal. Id. The VBA is not subject to any time limits at any stage of the appeals process. Id. at 858-59. Observing excessive delays during every stage of the process, none of which could be adequately explained by VA officials, the court found that veterans who initiate a direct appeal wait an average of 336 days to receive a decision on their case, and those who elect in their direct appeal to have a hearing with a Board of Veterans’ Appeals judge at their own expense wait an average of 455 days for the hearing. Id. at 859. Those veterans who choose to file a Notice of Disagreement and to obtain a Statement of the Case before filing an appeal with the board wait a staggering 1,419 days (3.9 years) on average to receive a decision on their appeal. Veterans, 644 F.3d at 859.

22 Id. at 859-60. Between January 1, 2008 and March 31, 2008, almost half of the avoidable
delays in the adjudication of benefits claims, as well as the inadequacy of the procedures in place to ensure veterans access to mental health care to which they were entitled, amounted to a due process violation. The court also held that the terms of the APA precluded Veterans from obtaining relief for their statutory claims.

A threshold question in any suit against the federal government or one of its agencies, such as the VA, is whether the United States government has consented to suit by waiving its sovereign immunity. The government waives sovereign immunity in piecemeal fashion for particular types of suits; under § 702 of the APA, the government established a broad waiver of sovereign immunity for suits seeking injunctive relief or other non-monetary remedies. Section 704 differs in scope from § 702, and states that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” Whether a suit stemming from “agency action” falls under the § 702 waiver, or must satisfy the § 704 requirements, depends on whether the cause of action is the APA itself. Additionally, remands occurred because VBA employees violated their duty to assist veterans in the application process. Id. at 860. About seventy-five percent of claims remanded by the Board of Veterans’ Appeals are appealed a second time, and it takes the Board an average of 149 days to issue a second decision on a claim. Id. After remand, it takes the VBA 499.1 days, on average, to either grant or withdraw a claim or to send it back up to the Board of Veterans’ Appeals. Id. A PTSD claim takes even longer, 563.9 days on average. Id. Veterans with serious disabilities, including mental disabilities, suffer greatly as a result of these delays; at least 1,467 veterans died while waiting for an appeal from the VA in just the six months between October 2007 and April 2008. Veterans, 644 F.3d at 860.

23 Id. at 890.
24 Id.
27 5 U.S.C. § 704 (2006); see also Bowen, 487 U.S. at 903. The APA’s grant of jurisdiction over agency action was not intended by Congress to duplicate established statutory procedures relating to specific agencies. Bowen, 487 U.S. at 903.
28 Compare Gallo Cattle Co. v. U.S. Dep’t of Agriculture, 159 F.3d 1194, 1198 (9th Cir. 1998) (holding the cause of action was the APA itself, and failure to satisfy the terms of § 704 took the claim outside the waiver of sovereign immunity), with Presbyterian Church v. U.S., 870 F.2d 518, 521 (D.C. Cir. 1989).
§ 706(1) empowers courts to “compel agency action unlawfully withheld or unreasonably delayed.”

Section 511 of the Veterans Judicial Review Act (“VJRA”) poses a second jurisdictional hurdle. The statute forbids official review of a decision by the Secretary of Veterans Affairs pertaining to a question of law and fact necessary to a decision affecting the provision of benefits to veterans or the dependents or survivors of veterans. As a result, federal courts offer no recourse if the claim necessitates review of a VA action or decision so as to fall within the language of the statute.

The first step in adjudicating a due process claim is to determine whether there is a valid property interest at stake, and, if so, whether there has been a deprivation of that interest. Once a deprivation has been established, the court must determine

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29 5 U.S.C. § 706(1); Veterans, 644 F.3d at 869. See Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 62-63 (2004) (holding that a claim under § 706(1) is only valid if it alleges a failure to take some discrete, specific action which is legally required).


31 Id. § 511(a). The statute has been commonly interpreted to only bar a formal decision actually made by the Secretary or a subordinate, and not to simply bar any challenge to VA action. Bates v. Nicholson, 398 F.3d 1355, 1365 (Fed. Cir. 2005); Broudy v. Mather, 460 F.3d 106, 114 (D.C. Cir. 2006) (benefits related claim was not barred by § 511 since the secretary had not actually issued a decision on the issue). But see Beamon v. Brown, 125 F.3d 965, 970 (6th Cir. 1997) (adopting a lone, broad interpretation of § 511). The court in Beamon held that § 511 barred a putative class action challenging delays in benefits processing, since determining proper procedure for claim adjudication is a “precursor” to actually deciding benefits claims, which is a question for the Secretary. Id.

32 See Magnus v. United States, 234 F.2d 673, 674-75 (7th Cir. 1956) (dismissing claim because it demanded review of a decision by the Administrator of Veterans Affairs on a question of law or fact); Fritz v. Dir. of Veterans Admin., 427 F.2d 154, 155 (9th Cir. 1970) (dismissing claim under the same reasoning); Cieliczka v. Johnson, 363 F.Supp 453, 455 (E.D. MI 1973) (protecting decisions from judicial review in the absence of action so discriminatory and unfair as to require constitutional re-examination of the statute); Anderson v. Veterans Admin., 559 F.2d 935, 936 (5th Cir. 1977) (holding the fact that the suit assumes the posture of constitutional attack, and that it seeks damages, does not remove the case from 38 U.S.C. § 211(a)).

33 See Nat’l Ass’n of Radiation Survivors v. Derwinski, 994 F.2d 583, n.7 (9th Cir. 1992). A “preliminary criterion for finding a procedural due process violation” is determining whether there is a constitutionally protected property interest. Id. It has been established that denial of
whether the procedural safeguards in place are sufficient to guard against such a deprivation of property.\textsuperscript{34} In the context of veteran benefits, courts apply the three part balancing test from \textit{Mathews v. Eldridge}\textsuperscript{35} to evaluate the adequacy of the procedural safeguards.\textsuperscript{36} The court will weigh the following factors: (1) the gravity of the private interest affected by the official action; (2) the risk of an erroneous deprivation of the interest through current methods and the probable benefit of additional safeguards; and (3) the government’s interest, particularly the projected fiscal and practical burdens of mandating additional or substitute procedural requirements.\textsuperscript{37}

In \textit{Veterans for Common Sense v. Shinseki}, the Ninth Circuit applied the appropriate APA provisions and the \textit{Mathews} test to the claims brought by Veterans.\textsuperscript{38} The court held that neither sovereign immunity nor the VJRA barred Veterans’ due process claims, and the terms of the APA precluded review of Veterans’ statutory claims.\textsuperscript{39} Additionally, the delays in providing mental health care and processing compensation claim appeals amounted to a deprivation of a valid property interest without due process.\textsuperscript{40} Examining the due process challenges, the court found that the declaratory and injunctive nature of the relief Veterans sought fell within the waiver of \S 702.\textsuperscript{41} As


\textsuperscript{35} 424 U.S. 319 (1976).

\textsuperscript{36} \textit{Id.} at 319. \textit{See Wilkinson v. Austin}, 545 U.S. 209, 224 (2005) (explaining the framework of the three part test that needs to be followed); \textit{City of Los Angeles v. David}, 538 U.S. 715, 716 (2003) (following the three part balancing test); \textit{Wright}, 587 F.2d at 355 (describing the guidance purported by \textit{Mathews v. Eldridge}).

\textsuperscript{37} \textit{Mathews}, 424 U.S. at 335.

\textsuperscript{38} \textit{See Veterans for Common Sense v. Shinseki}, 644 F.3d at 890 (applying factors to deprivation of veterans’ mental health benefits).

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.} (summarizing holdings and concluding deprivation of property interests without justification violates veteran’s constitutional rights).

\textsuperscript{41} \textit{Id.}
Veterans' claims sought to directly enforce the Constitution and did not depend on a statute, the limitation found in § 704 was held inapplicable, leaving Veterans free to pursue their claims. Turning next to Veterans' APA claims, the Ninth Circuit was bound by the Supreme Court's analysis in Norton, which held that such a claim may only succeed when a plaintiff asserts a failure to take some discrete and specific action that the defendant was actually legally required to take. The court reasoned that the general nature of the alleged deficiencies lacked the specificity required by Norton, and that the Feeley Memo and Mental Health Strategic Plan, while both "discrete," did not carry any legal obligation. Thus, Veterans' APA claims did not fall under § 706(1) and were precluded from review.

The court also rejected the argument that the terms of the VJRA precluded review of Veterans' due process claims, even though the argument was only raised by the VA as to the challenge to delays in compensation appeals. The court first found that the nature of the challenge to mental health care delays lacked the specificity required by the VJRA. Next, the court held that although individual cases would need to be examined, the claim regarding delays in compensation appeals was not essentially a challenge to any specific action or decision because Veterans need only show the risk of a deprivation of rights. The court reasoned that the purpose of this particular section of the VJRA—to "keep thousands of suits concerning individual benefits determinations from crowding the dockets of the federal courts"—would in no way be served by applying it to such a case. Turning finally to the merits of the two due

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42 Id. at 865.
43 Id. at 869; Norton, 542 U.S. at 64 (quoting TOM C. CLARK, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947)). The APA allows a court to compel only "a ministerial or non-discretionary act," or make an agency "take action upon a matter, without directing how it shall act." TOM C. CLARK, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947) (emphasis added). Agency action unlawfully withheld or delayed under § 706(1) may be compelled, but the court did not find that approach appropriate in this case. Veterans, 644 F.3d at 869.
44 Veterans, 644 F.3d at 870. The court noted that the Feeley Memo, unlike the strategic plan, which was just a set of recommendations, did create an affirmative obligation, but still lacked the force of law. Id.
45 Id.
46 Id. at 865. The court reasoned that Veterans' constitutional right to due process had been violated. Id.
47 Id. The court observed that a party cannot waive a jurisdictional defect, and that they have a duty to address such an issue regardless or the parties' agreement or failure to raise an objection. Veterans, 644 F.3d at 871.
48 Id.
49 Id. at 883 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). The court explained that
process claims, the court conducted two separate Mathews analyses and found that the delays in providing mental health care and the delays in appeals adjudication constituted a deprivation of a valid interest created by 38 U.S.C. § 1710.50

Although correctly ruling that the APA precluded the court from hearing Veterans' statutory claims, the Ninth Circuit overstepped its jurisdiction by evading the stringent limitations set by Congress regarding which courts may adjudicate issues of veterans' benefits.51 The VJRA clearly states that no court may conduct official review of any decision by the Secretary of Veterans Affairs as to any question of law and fact affecting the provision of benefits to veterans or the dependents or survivors of veterans.52 This mandate has been held to include claims "where review of such decisions is a 'necessary predicate.'"53 Veterans sought to evade this barrier by disclaiming complaints based on any specific veteran's denial of benefits, and framing their complaints purely through the "average" delays experienced in certain circumstances.54 By choosing this approach, Veterans avoided challenging any particular "decision" under VJRA § 511, an approach that satisfied the majority.55 Allowing a claim of this nature to go forward directly violated the longstanding rule that one does not have legal standing to bring suit for the damages of another, as it is a claim that disclaims any specific or personal harm, but instead alleges harm to an unknown group of third persons via evidence of average delays.56 By endorsing such a reframing of

Veterans do not seek to re-litigate whether the VA actually acted properly in making any particular decision in scheduling or administering benefits. Id. at 896.  
50 Id. at 874-75. The court determined that the properly weighed Mathews factors for the mental health care claim were (1) high private interest of veterans in receiving necessary care, (2) a significant risk of erroneous deprivation, and (3) the high value of (and lack of a compelling justification against) imposing additional safeguards. Id. Weighing the Mathews factors for the delays in appeals adjudication, the court found that (1) Veterans' interest in compensation benefits "could not be more vital," (2) the risk of erroneous deprivation is high since after the lengthy appeals process, sixty percent of claims end up being granted or remanded, and (3) the government's proffered justification in focusing on initial claims is dubious due to the extreme length of the delay and the fact that most of these initial claims are changed when appealed. Veterans, 644 F.3d at 884-87.  
51 Id. at 882-83; see also Beamon v. Brown, 125 F.3d 965, 970 (6th Cir. 1997) (holding VJRA § 511 barred jurisdiction over a class action by veterans).  
52 Veteran's Judicial Review Act, 38 U.S.C. § 511(a) (1988); see also Veterans, 644 F.3d at 867.  
53 Veterans, 644 F.3d at 891 (Kozinski, J., dissenting) (citing Price v. United States, 228 F.3d 420, 422 (D.C. Cir. 2000)).  
54 Id. at 881.  
55 Id. Veterans did not challenge a decision by the "Secretary" (of Veteran Affairs). Id.  
56 Id. at 894 (Kozinski, J., dissenting).  

Over the years . . . cases have established that the irreducible constitutional
claims, this decision opens up avenues of review that Congress fully intended to prohibit by passing § 511.57

While the Mathews test speaks of the “risk of erroneous deprivation” as one of its three factors, the claimant in Mathews was a specific disability beneficiary who brought suit because of his actual deprivation of Social Security benefits.58 The “risk” of deprivation was properly applied to his particular case to determine whether safeguards in place were adequate despite an actual deprivation.59 This does not support the proposition, as the majority seems to intimate, that mere risk of deprivation may serve as a substitute for any actual showing of damages in a due process case.60 No one would argue that every patient, regardless of their condition or the circumstances surrounding their benefit claim, requires the same care or the same amount of time to diagnose and

minimum of standing . . . [requires that the Plaintiff has] suffered an “injury in fact,” -an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) “actual or imminent, not 'conjectural' or 'hypothetical'”...


If the affiants were suing by themselves—which is how we must analyze the claim—asserting that the average time of processing was too long, it would be apparent that they were presenting a claim not for themselves but for others, indeed, an unidentified group of others. But one cannot have standing in federal court by asserting an injury to someone else.

Veterans, 644 F.3d at 894 (Kozinski, J., dissenting) (citing Vietnam Veterans of Am. v. Shinseki, 599 F.3d 654, 662 (D.C. Cir. 2010)).

57 Veterans, 644 F.3d at 892 (Kozinski, J., dissenting) (citing H.R. Rep. No. 100-963, at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5790). It has been Congress’ consistent and longstanding position that claims for veterans benefits should have “no judicial remedy.” Id. “The majority's not just dead wrong; it creates a square circuit split on an issue that requires national uniformity.” Id. at 894.


59 Id. at 341.

60 Compare Veterans, 644 F.3d at 871 (stating their claim Veterans must only show “risk of erroneous deprivation” and potential value of additional safeguards), with Mathews, 424 U.S. 319 at 341 (“the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decision-making process.”). See also Veterans, 644 F.3d at 894 (Kozinski, J., dissenting) (emphasis added) (citing Vietnam Veterans of America v. Shinseki, 599 F.3d 654, 662 (D.C. Cir. 2010)). “[T]he average processing time does not cause affiants injury; it is only their processing time that is relevant.” Id.
process.\textsuperscript{61} If the gravity of the private interest (the first \textit{Mathews} factor) differs from patient to patient, then different patients are due different levels of process to protect their interest under \textit{Mathews} balancing, and it cannot be held that a deprivation has occurred without comparing what a patient needed to what they were actually given.\textsuperscript{62}

As the dissent argues, the majority, in their \textit{Mathews} analysis, may have greatly undervalued the government’s interest in ensuring that the VA’s proceedings remain informal and non-adversarial.\textsuperscript{63} Additionally, the decision seems starkly at odds with Congress’s legislative intent behind § 511, which was to prevent the court system from being clogged with veteran’s claims.\textsuperscript{64} The action mandated by this decision opens the door for endless litigation on whether new measures are “necessary” or “appropriate.”\textsuperscript{65}

Even if the language of § 511 does not bar a broad challenge to procedural delays absent any particular VA decision, it is unlikely that Congress intended to bar federal courts from hearing complaints regarding specific decisions on benefit claims, while implicitly granting the same courts jurisdiction over broader questions that first require them to do precisely that which was excluded.\textsuperscript{66} As it remains impossible to show that such a delay

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\item Veterans, 644 F.3d at 897 (Kozinski, J., dissenting). The majority cites several decisions for the proposition that at some point, a delay will become a deprivation, but each looked at a particular case in making this determination. \textit{Id.} See Nat’l Ass’n of Radiation Survivors v. Derwinski, 994 F.2d 583, 588 (9th Cir. 1992); Griffeth v. Detrich, 603 F.2d 118, 120-21 (9th Cir. 1979).

\item Veterans, 644 F.3d at 890, (Kozinski, J., dissenting); Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305, 323-24 (1985) (acknowledging this as a strong government interest). \textit{See also Veterans}, 644 F.3d at 900 (Kozinski, J., dissenting) (noting that adding new levels of appeals or installing a judge to oversee appeals process would greatly harm this interest).

\item Johnson v. Robison, 415 U.S. 361, 369 (1974). The decision explained that there are dual purposes of the law: to prevent the courts and VA from being burdened with expensive and time consuming litigation, and to ensure consistency in such claims. \textit{Id.} “There is for consideration the added expense to the Government not only with respect to the added burden upon the courts, but the administrative expense of defending the suits.” Judicial Review of Compensation and Pension Claims: Hearing on H.R. 360, 478, 2442 and 6777 Before a subcomm. of the H. Comm. on Veterans Affairs, 82d Cong., 2d Sess., 1963 (1952).

\item Veterans, 644 F.3d at 890 (Kozinski, J., dissenting); \textit{see also id.} at 887. The majority gave the district court the charge on remand of entering an “appropriate” order for the VA to remedy the violations. \textit{Id.}

\item \textit{See Beamon v. Brown}, 125 F.3d 965, 969 (6th Cir. 1997).

The class action, a tool for the aggregation of claims, is merely “a convenient procedural device” that helps “reduce or eliminate a multiplicity of suits.” Although the Federal Rules of Civil Procedure make class actions available to
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amounts to a due process violation without examining any specific cases to see what level of process is due, federal courts cannot hear such a case absent revision of the statute.67

If other courts follow this decision, it will provide a new avenue by which to challenge VA actions otherwise made unassailable by the terms of § 511.68 In this particular instance the VA was unsuccessful, but it remains unclear whether Veterans actually won because, to be heard, the claims had to be framed in the form of average delays and disclaim any actual injury, the result being that any remedies flowing from those claims would presumably have to be aimed at reducing that average period of delay.69 This may be of little help to individual veterans languishing at the higher end of the spectrum waiting for much needed care that will come too late.70 A new system that does nothing but identify those mental health patients who will be the easiest and fastest to treat and process and hurries their process along could reduce the average wait time for veterans seeking mental health services.71 This system, however, would do little or nothing to remedy the increasingly prevalent problem of suicide among veterans or improve the means of getting professional help to those who need it most.72 A veteran

some plaintiffs in United States district courts, the rules themselves do not confer those courts with jurisdiction over claims that they could not hear if brought individually.

Id. (internal citations omitted).

67 Price v. United States, 228 F.3d 420 (D.C. Cir. 2001) (explaining § 511 bars a claim where determination that VA acted improperly “would require the district court to determine first whether the VA acted properly in handling Price’s request”); Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 568-69 (1972) (stating denial of process, lack of notice or hearing on Plaintiff’s non-retention was irrelevant absent actual deprivation); see also Broudy v. Mather, 460 F.3d 106, 115 (D.C. Cir. 2006) (holding “District Court was without jurisdiction to hear these claims because they would have required it to decide whether Thomas was entitled to medical treatment in the face of a prior VA determination that he was not”). “Because we lack jurisdiction to review the decisions creating these alleged delays, we can’t determine whether the time the VA takes to process an appeal is unreasonable.” Veterans, 644 F.3d at 897 (Kozinski, J., dissenting).

68 Veterans, 644 F.3d at 892 (Kozinski, J. dissenting). Allowing “system-wide” claims grants standing to a plaintiff without any injury, and approves a claim which if brought by the actual aggrieved party would be barred by § 511. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); supra text accompanying note 56; Beamon, 125 F.3d 965, 969 (6th Cir. 1997); supra text accompanying note 66.

69 Veterans, 644 F.3d at 889-90.

70 See Narwick, supra note 11, at 726-27; see also supra text accompanying note 12.

71 See supra notes 15-16 and accompanying text.

72 See supra notes 15-16 and accompanying text (outlining VA’s implementation of a policy in 2004 to reduce veteran suicides that fell short of its goals).
suffering from PTSD or who is otherwise in dire need of mental health care will not be comforted by a lower “average” wait time, taking into account that alarming suicide rates among veterans indicate that an unnecessary delay of even a few months, for what should be a high priority patient, could very well result in that veteran never actually receiving care. The court placed a district judge in charge of essentially crafting VA policy, determining what safeguards are necessary and appropriate to remedy the shortcomings in mental health care—exactly the situation the VJRA was intended to avoid—while providing an individual veteran whose rights have been violated with no new avenue by which to seek restitution.

In Veterans for Common Sense v. Shinseki, the Ninth Circuit held that by framing their complaints in terms of average wait times, Veterans evaded § 511’s jurisdictional bar to federal courts on claims stemming from any decision by the VA. Veterans’ complaints pertained to the VA’s inability to provide mental health care to veterans and process benefit claims appeals in a timely manner, but the bulk of the discussion concentrates on whether or not federal courts have authority to hear such a case. The court discussed in great detail the plight of veterans who have been denied the care they were promised by Congress, and observing that the system in place creates a very difficult situation for many, the court seems to have been looking for a way around the VJRA in order to help. If § 511 denies veterans any meaningful remedy against Due Process violations by the VA, a facial challenge to the constitutionality of the statute may be appropriate, but as no such claim has been made, the court lacked the necessary safeguards that will ensure their rights.

73 See supra note 12 and accompanying text; see also supra note 8 and accompanying text.
74 Veterans, 644 F.3d at 899. “The district court can’t review the VA’s procedures without also reviewing its regulations, and it therefore lacks jurisdiction to carry out the majority’s marching orders.” Id. “Were an individual veteran to allege that the VA deprived him of these veterans’ benefits, section 511 would preclude us from reviewing his case.” Id. at 892.
75 Id. at 884.
76 Id. at 867-72, 879-84 (discussing various jurisdictional issues).
77 Id. at 849-52.

Having chosen to honor and provide for our veterans by guaranteeing them the mental health care and other critical benefits to which they are entitled, the government may not deprive them of that support through unchallengeable and interminable delays. Because the VA continues to deny veterans what they have been promised without affording them the process due to them under the Constitution, our duty is to compel the agency to provide the procedural safeguards that will ensure their rights.

Veterans, 644 F.3d at 851.
authority to render this decision.\textsuperscript{78}

\textsuperscript{78} \textit{See} Price v. United States, 228 F.3d 420 (D.C. Cir. 2001); Beamon v. Brown, 125 F.3d 965, 969-70 (6th Cir. 1997); \textit{supra} notes 62-63 and accompanying text.
Articles
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Note
Chasing Technology: A Call for FDA Regulation of Pharmaceutical Internet Marketing

Use Comments
Constitutional Law – Subjecting the Commonwealth’s Adoption of FAVOR’s Eligibility Criteria to Strict Scrutiny—Finch v. Commonwealth Health Insurance Connector Authority, 946 N.E.3d 1252 (Mass. 2011)

Health Care Law – Resolving disputed diagnoses prior to applying the Allen test in claims brought pursuant to the National Childhood Vaccine Act—Lombardi v. Sec’y of Health & Human Services, 686 F.3d 1348 (Fed. Cir. 2011)
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