

1 complained of are not within the jurisdiction of this Court.
2 Rather, this authority lies with Congress, the Secretary of the
3 Department of Veterans Affairs ("VA"), the adjudication system
4 within the VA, and the Federal Circuit. Congress has bestowed
5 district courts with limited jurisdiction. Congress has
6 specifically precluded district courts from reviewing veterans'
7 benefits decisions and has entrusted decisions regarding veterans'
8 medical care to the discretion of the VA Secretary. The Court can
9 find no systemic violations system-wide that would compel district
10 court intervention. The broad injunctive relief that Plaintiffs
11 request is outside the scope of this Court's jurisdiction. The
12 statutes and caselaw are quite clear as to the extent of this
13 Court's authority. Among them is 38 U.S.C. § 511, which states in
14 part: "The Secretary shall decide all questions of law and fact
15 necessary to a decision by the Secretary under a law that affects
16 the provision of benefits by the Secretary to Veterans or the
17 dependents or survivors of veterans [T]he decision of the
18 Secretary as to any such question shall be final and conclusive
19 and may not be reviewed by any other official or by any court . .
20 . . ."

21 In addition, 38 U.S.C. § 1710(a)(1) provides that the medical
22 care veterans receive is to be determined by the Secretary, and
23 under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et
24 seq., judicial review is prohibited where actions are "committed
25 to agency discretion by law." 5 U.S.C. § 701(a)(2). For the
26 foregoing and following reasons, Plaintiffs' requested relief is
27 DENIED. The Court now proceeds with its finding of facts and

1 conclusions of law.
2

3 **II. BACKGROUND**

4 Veterans for Common Sense and Veterans for Truth
5 ("Plaintiffs") are non-profit organizations devoted to improving
6 the lives of veterans. Plaintiffs filed the present lawsuit in
7 July 2007, seeking declaratory and injunctive relief against the
8 VA, alleging that the manner in which the VA provides mental
9 health care and the procedures for obtaining veteran disability
10 benefits violate various statutory and constitutional rights.
11 Plaintiffs' Complaint seeks declaratory relief for the following:
12 (1) denial of due process in violation of the Fifth Amendment; (2)
13 denial of access to the courts in violation of the First and Fifth
14 Amendments; (3) violation of 38 U.S.C. § 1710(e)(1)(D) relating to
15 medical care for returning veterans; and (4) violation of Section
16 504 of the Rehabilitation Act. Compl., Docket No. 1, ¶¶ 258-72.
17 In addition, Plaintiffs' fifth cause of action seeks injunctive
18 relief. Id. ¶¶ 273-78.

19 On January 10, 2008, this Court issued an Order Granting in
20 Part and Denying in Part Defendants' Motion to Dismiss ("Motion to
21 Dismiss Order"). Docket No. 93. In that Order, the Court held
22 that Plaintiffs' first, second, and third claims survived
23 Defendants' various challenges, including standing, sovereign
24 immunity, and subject matter jurisdiction. The Court dismissed
25 Plaintiffs' fourth claim.

26 After Defendants submitted their Motion to Dismiss,
27 Plaintiffs filed a Motion for Preliminary Injunction. Docket No.

1 88. The Court scheduled a hearing on this motion and from March 3
2 through March 6, the Court heard testimony and received evidence.
3 At the close of the hearing, in light of the issues raised by
4 Plaintiffs and the importance of addressing Plaintiffs'
5 allegations promptly, the Court continued the matter and set an
6 expedited schedule for discovery and for consideration of
7 Plaintiffs' Request for Permanent Injunction and Declaratory
8 Relief. A bench trial was then held from April 21 through April
9 30, 2008.

10 After hearing testimony and argument during almost three
11 weeks of trial and reviewing the parties' voluminous submissions,
12 two things have become clear to the Court: the VA may not be
13 meeting all of the needs of the nation's veterans, and the
14 remedies proposed by Plaintiffs are beyond the power of this
15 Court.

16
17 **III. LEGAL FRAMEWORK**

18 **A. Standing**

19 An association has standing to bring suit
20 on behalf of its members when its members
21 would otherwise have standing to sue in
22 their own right, the interests at stake
23 are germane to the organization's
24 purpose, and neither the claim asserted
25 nor the relief requested requires the
26 participation of individual members in
27 the lawsuit.

28 Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528
U.S. 167, 181 (2000).

For Plaintiffs' members to have standing to sue in their own
right, they must satisfy three elements. Lujan v. Defenders of

1 Wildlife, 504 U.S. 555, 560-61 (1992).

2 First, the plaintiff must have suffered
3 an injury in fact - an invasion of a
4 legally protected interest which is (a)
5 concrete and particularized . . . and (b)
6 actual or imminent, not conjectural or
7 hypothetical Second, there must
8 be a causal connection between the injury
9 and the conduct complained of - the
10 injury has to be fairly traceable to the
11 challenged action of the defendant, and
12 not the result of the independent action
13 of some third party not before the court.
14 . . . Third, it must be likely, as
15 opposed to merely speculative, that the
16 injury will be redressed by a favorable
17 decision.

18 Id. (internal quotation marks, citations, and alterations
19 omitted). "Since [these elements] are not mere pleading
20 requirements but rather an indispensable part of the plaintiff's
21 case, each element must be supported in the same way as any other
22 matter on which the plaintiff bears the burden of proof, i.e.,
23 with the manner and degree of evidence required at the successive
24 stages of the litigation." Id. at 561. Thus, at the final stage
25 of the proceedings, any disputed facts "must be supported
26 adequately by the evidence adduced at trial." Id. at 561
27 (internal quotation marks omitted).

28 **B. Sovereign Immunity**

"The United States must waive its sovereign immunity before a
federal court may adjudicate a claim brought against a federal
agency." Rattlesnake Coalition v. U. S. Env'tl. Prot. Agency, 509
F.3d 1095, 1103 (9th Cir. 2007) (citing United States v. Mitchell,
445 U.S. 535, 538 (1980)). As discussed in the Conclusions of
Law, various of Plaintiffs' challenges fail because of the lack of

1 a valid waiver of sovereign immunity. The Administrative
2 Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides such a waiver
3 in certain circumstances and "permits a citizen suit against an
4 agency when an individual has suffered 'a legal wrong because of
5 agency action' or has been 'adversely affected or aggrieved by
6 agency action within the meaning of a relevant statute.'" Id.
7 (quoting 5 U.S.C. § 702). "This provision contains two separate
8 requirements." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882
9 (1990). "First, the person claiming a right to sue must identify
10 some 'agency action' that affects him in the specified fashion . .
11 . ." Id. Second, "the party seeking review under § 702 must show
12 that he has suffered legal wrong because of the challenged agency
13 action or is adversely affected or aggrieved by that action within
14 the meaning of the relevant statute." Id. at 883 (internal
15 quotation marks omitted).

16 **1. Agency Action**

17 "Agency action" is "the whole or a part of an agency rule,
18 order, license, sanction, relief, or the equivalent or denial
19 thereof, or failure to act" 5 U.S.C. § 551(13). The APA
20 defines "agency rule" as "the whole or a part of an agency
21 statement of general or particular applicability and future effect
22 designed to implement, interpret, or prescribe law or policy . . .
23 ." Id. § 551(4).

24 As an initial matter, Plaintiffs argue that their
25 constitutional claims are not limited by the requirement that they
26 challenge an agency action. In support of their argument, they
27 rely on Presbyterian Church v. United States, 870 F.2d 518 (9th
28

1 Cir. 1989). In analyzing whether there was valid waiver of
2 sovereign immunity, the court in Presbyterian Church held that "§
3 702's waiver of sovereign immunity is not limited to suits
4 challenging 'agency action.'" Id. at 525 n.8.

5 Although Presbyterian Church has not been overruled, its
6 vitality has been called into question. As this Court noted in
7 its Motion to Dismiss Order, in Gallo Cattle Co. v. Department of
8 Agriculture, 159 F.3d 1194 (9th Cir. 1998), the Ninth Circuit held
9 that "the APA prescribes standards for judicial review of an
10 agency action" Id. at 1198. The tension between
11 Presbyterian Church and Gallo Cattle was recognized in Gros Ventre
12 Tribe v. United States, 469 F.3d 801 (9th Cir. 2006), where the
13 court stated:

14 Under The Presbyterian Church, § 702's
15 waiver is not conditioned on the APA's
16 "agency action" requirement. Therefore,
17 it follows that § 702's waiver cannot
18 then be conditioned on the APA's "final
19 agency action" requirement. . . . But
20 that is directly contrary to the holding
21 in Gallo Cattle where we stated that "the
22 APA's waiver of sovereign immunity
23 contains several limitations," including
24 § 704's final agency action requirement.

25 Id. at 809 (citing Gallo Cattle, 159 F.3d at 1198). Although the
26 court in Gros Ventre declined to resolve the conflict between the
27 two cases, it did note that it "saw no way to distinguish
28 Presbyterian Church from Gallo Cattle." Id. at 809. Plaintiffs
urge that the court in Gros Ventre "may have been mistaken in
suggesting that [these two cases] are not distinguishable." Pls.'
Post-Trial Br., Docket No. 229, at 6. Plaintiffs argue that
because Presbyterian Church dealt with constitutional violations,

1 while Gallo Cattle addressed statutory violations, it should be
2 inferred that constitutional claims are not constrained by the
3 requirement that a plaintiff, for a valid waiver of sovereign
4 immunity under the APA, challenge an agency action.

5 Plaintiffs' argument fails for several reasons. First and
6 foremost, the Ninth Circuit found this distinction unremarkable
7 and held that the cases were not distinguishable. Gros Ventre,
8 469 F.3d at 809. This Court is constrained by that holding.
9 Second, the court in Presbyterian Church did not rely on the fact
10 that the claims before it were constitutional, rather than
11 statutory. See Presbyterian Church, 870 F.2d at 524-26. If such
12 a distinction were meaningful, as Plaintiffs suggest, then the
13 court would have so noted. Instead, in reaching its conclusion
14 about the limits of § 702's waiver, the court relied on the
15 legislative history and on the plain language of the statute
16 itself. Id.

17 Third, subsequent to Presbyterian Church, the Supreme Court
18 decided National Wildlife Federation. In National Wildlife
19 Federation, the Court made clear that waiver of sovereign immunity
20 under § 702 is constrained by the provisions contained in § 704.
21 The Court stated: "[T]he person claiming a right to sue [under §
22 702] must identify some 'agency action' that affects him in the
23 specified fashion" 497 U.S. at 882. The Ninth Circuit,
24 more recently, reiterated this proposition, holding that when a
25 suit is brought against an agency pursuant to a waiver of
26 sovereign immunity under the APA, the suit must challenge agency
27 action. Rattlesnake Coalition, 509 F.3d at 1103. Finally, the

1 Court notes that it has already ruled on this issue, stating, in
2 its Motion to Dismiss Order, that "waiver of sovereign immunity
3 under § 702 of the APA is limited by § 704." Mot. to Dismiss
4 Order at 10. Nonetheless, as Plaintiffs raised a new argument in
5 their Post-Trial Brief, the above discussion was warranted. For
6 these reasons, Plaintiffs must challenge an "agency action" to
7 establish a valid waiver of sovereign immunity.

8 In addition, when a claim is brought pursuant to the general
9 review provisions of the APA, rather than under a private right of
10 action or authorization for judicial review under a substantive
11 statute, "the 'agency action' in question must be 'final agency
12 action.'" Nat'l Wildlife Fed'n, 497 U.S. at 882 (quoting 5 U.S.C.
13 § 704¹); see also Rattlesnake Coalition, 509 F.3d at 1103; Ecology
14 Ctr. v. U. S. Forest Serv., 192 F.3d 922, 925 (9th Cir. 1999).
15 Neither party argues that the agency action in question is made
16 reviewable by any statute. Accordingly, the additional
17 limitations of § 704 also apply to the present case, and
18 Plaintiffs must show that the agency action they challenge is not
19 only "final agency action" but also that there is no adequate
20 alternative remedy. 5 U.S.C. § 704; Nat'l Wildlife Fed'n, 497
21 U.S. at 882; Gallo Cattle, 159 F.3d at 1198.

22 Finally, the APA provides that a "reviewing court shall
23 compel agency action unlawfully withheld or unreasonably delayed."
24 5 U.S.C. § 706(1). "[A] claim under § 706(1) can proceed only

25
26 ¹ Section 704 states, in part, that only "[a]gency action
27 made reviewable by statute and final agency action for which there
28 is no other adequate remedy in a court, are subject to judicial
review."

1 where a plaintiff asserts that an agency failed to take a discrete
2 agency action that it is required to take." Norton v. S. Utah
3 Wilderness Alliance, 542 U.S. 55, 64 (2004) (emphasis in
4 original). "Review of an agency's failure to act has been
5 referred to as an exception to the final agency action
6 requirement." Ctr. for Biological Diversity v. Abraham, 218 F.
7 Supp. 2d 1143, 1157 (N.D. Cal. 2002). "Courts have permitted
8 jurisdiction under the limited exception to the finality doctrine
9 only when there has been a genuine failure to act." Ecology Ctr.,
10 192 F.3d at 926. The Ninth Circuit "has refused to allow
11 plaintiffs to evade the finality requirement with complaints about
12 the sufficiency of an agency action dressed up as an agency's
13 failure to act." Id. (internal quotation marks omitted).

14 **a. Final Agency Action**

15 An agency action is "final" under the APA where two
16 conditions are met: (1) the action "mark[s] the consummation of
17 the agency's decisionmaking process . . . --it must not be of a
18 merely tentative or interlocutory nature," and (2) the action is
19 one "by which rights or obligations have been determined, or from
20 which legal consequences will flow." Bennet v. Spear, 520 U.S.
21 154, 178 (1997) (internal citations and quotation marks omitted).

22 **b. Adequate Alternative Remedy**

23 In addition to final agency action, § 704 also requires that
24 "there is no other adequate remedy in a court" for there to be a
25 valid waiver of sovereign immunity under the APA. 5 U.S.C. § 704.

26 **2. Legal Wrong/Adverse Effect**

27 "[T]he party seeking review under § 702 must [also] show that
28

1 he has suffered legal wrong because of the challenged agency
2 action or is adversely affected or aggrieved by that action within
3 the meaning of the relevant statute." Nat'l Wildlife Fed'n, 497
4 U.S. at 883 (internal quotation marks omitted). Neither party
5 disputes that this prong of APA waiver of sovereign immunity is
6 satisfied.

7 **C. Jurisdictional Limitations of the VJRA**

8 The VJRA contains several statutory provisions that preclude
9 review of various challenges to the VA in federal district courts.
10 Although this issue was also dealt with extensively in the Motion
11 to Dismiss Order, it too must be revisited.

12 **1. § 502**

13 Pursuant to 38 U.S.C. § 502, "VA rulemaking is subject to
14 judicial review only in the Federal Circuit." Chinnock v.
15 Turnage, 995 F.2d 889, 893 (9th Cir. 1993); see also Preminger v.
16 Principi, 422 F.3d 815, 821 (9th Cir. 2005) (stating "Congress has
17 explicitly provided for judicial review of direct challenges to VA
18 rules and regulations only in the Federal Circuit"). Thus, any
19 challenge by Plaintiffs to VA regulations is not reviewable in
20 this Court.

21 **2. § 511**

22 38 U.S.C. § 511 states, in part:

23 The Secretary [of Veterans Affairs] shall
24 decide all questions of law and fact
25 necessary to a decision by the Secretary
26 under a law that affects the provision of
27 benefits by the Secretary to veterans or
28 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

1 be reviewed by any other official or by
2 any court, whether by an action in the
3 nature of mandamus or otherwise.

4 38 U.S.C. § 511(a). As previously held by various courts,
5 including this one in its Motion to Dismiss Order, § 511 does not
6 strip district courts of the ability to hear facial constitutional
7 challenges to the VA benefits system. See Mot. to Dismiss Order
8 at 20-30; see also Larabee v. Derwinski, 968 F.2d 1497, 1501 (2d
9 Cir. 1992) (stating "district courts continue to have jurisdiction
10 to hear facial challenges of legislation affecting veterans'
11 benefits") (internal quotation marks and emphasis omitted); Broudy
12 v. Mather, 460 F.3d 106, 114 (D.C. Cir. 2006) (stating "district
13 courts have jurisdiction to consider questions arising under laws
14 that affect the provision of benefits as long as the Secretary has
15 not actually decided them in the course of a benefits
16 proceeding"); Beamon v. Brown, 125 F.3d 965, 972-73 (6th Cir.
17 1997) (stating "district court jurisdiction over facial challenges
18 to acts of Congress survived the statutory revisions that
19 established the CVA").

20 Thus, while review of individual benefits decisions is
21 clearly precluded by § 511, facial constitutional challenges are
22 not. In addition, as this Court held in its Motion to Dismiss
23 Order, where Plaintiffs challenge VA decisions that were made
24 outside the course of a benefits proceeding, § 511 does not
25 necessarily preclude review in this Court. For reasons discussed
26 below, however, it is unnecessary to determine the precise
27 contours of § 511's preclusive effect. Suffice it to say, § 511
28 does not provide the extremely broad preclusive effect advocated

1 by Defendants.

2 **D. Due Process**

3 **1. Delay**

4 Under the APA, a district court "shall . . . compel agency
5 action unlawfully withheld or unreasonably delayed." 5 U.S.C. §
6 706(1). In assessing whether agency action has been unreasonably
7 delayed or withheld, courts look to the so-called TRAC factors.
8 Independence Mining Co. v. Babbitt, 105 F.3d 502, 507 (9th Cir.
9 1997). These factors are:

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

21 Id. at 507 n.7 (quoting Telecomms. Research & Action v. F.C.C.,
22 750 F.2d 70, 79-80 (D.C. Cir. 1984)) (modifications in original).

23 **2. Other Due Process Violations**

24 Plaintiffs also argue that the medical clinical appeals
25 process and the benefits adjudication process violate veterans'
26 Due Process rights under the Fifth Amendment. "[D]ue process is
27 flexible and calls for such procedural protections as the

1 particular situation demands." Mathews v. Eldridge, 424 U.S. 319,
2 335 (1976). In evaluating whether a procedure satisfies Due
3 Process, courts balance (1) the private interest, (2) the risk of
4 erroneous deprivation and the probable value, if any, of extra
5 safeguards, and (3) the government's interest, including the
6 function involved and the fiscal and administrative burdens that
7 the additional or procedural requirement would entail. Id.
8 "Procedural due process requires adequate notice and an
9 opportunity to be heard." Kirk v. U. S. Immigration and
10 Naturalization Serv., 927 F.2d 1106, 1107 (9th Cir. 1991). It
11 does not, however, "always require an adversarial hearing."
12 Hickey v. Morris, 722 F.2d 543, 549 (9th Cir. 1983).

13
14 **IV. FINDINGS OF FACT**

15 1. Plaintiffs are two non-profit organizations that
16 represent the interests of veterans. RT 661:10-666:10; 811:20-
17 812:6.² Veterans United for Truth is an advocacy organization
18 with between 1,200 and 1,300 members hailing from 40 states. Id.
19 661:11-13; 664:20; 665:18-19. A large percentage of these members
20 are enrolled with the VA, many of them suffer from a service-
21 connected disability, including Post Traumatic Stress Disorder
22 ("PTSD"), and many have sought benefits within the VA. Id.
23 665:22-666:7; 674:1-4. Veterans for Common Sense, based in
24 Washington D.C., represents approximately 12,000 members. Id.

25
26 _____
27 ² "RT" refers to the transcript of record from the trial,
28 held April 21-30, 2008. "PIRT" refers to the transcript of record
from the preliminary injunction hearing held March 3-6, 2008.

1 811:20-812:1. Among these ranks are members who receive services
2 from the VA for mental health issues, including those who have
3 received treatment from the VA for depression and PTSD, and
4 members who have served in Iraq or Afghanistan. Id. 813:24-814:9.
5 In addition, within the last year, members of Veterans for Common
6 Sense have experienced problems with delays in processing benefits
7 claims and delays in receiving health care. Id. 813:17-19; 815:4-
8 816:16. Veterans for Common Sense devotes more than half of its
9 resources to advocating for better veterans' health care and
10 benefits. Id. 813:12-16.

11 2. The mission of the VA is: "To care for him, who has borne
12 the battle and for his widow and for his orphan." PIRT 245:4-6.
13 Defendants concede that the VA not only has a "broad obligation,"
14 but also a "moral imperative [] to provide medical care to the men
15 and women who have served our country." Defs.' Proposed Findings
16 of Fact and Conclusions of Law ("Defs.' Post-Trial Brief"), Docket
17 No. 230, at 11.

18 3. The VA has approximately 230,000 employees and 1,400
19 sites of care. RT 778:19-24. The VA is comprised of three major
20 organizations: the Veterans Health Administration ("VHA"), the
21 Veterans Benefits Administration ("VBA"), and the National
22 Cemetery Administration ("NCA"), only the first two of which are
23 relevant to the present case.

24 4. There are approximately 25 million veterans in the United
25 States today. Ex. 1247.³ As of May 2007, between 5 and 8 million

26
27 ³ Unless otherwise noted, all exhibits refer to Plaintiffs'
28 Trial Exhibits.

1 of these veterans were enrolled with the VA. PIRT 254:23; Exs.
2 133, 357.

3 5. On any given night in the United States, it is estimated
4 that 154,000 veterans are homeless. RT 503:19-20.

5 **A. Veterans Health Administration**

6 6. The VHA, one of the largest health-care systems in the
7 world, is divided into approximately 21 geographical areas called
8 Veteran's Integrated Service Networks ("VISNs"). PIRT 623:16-17;
9 RT 703:1. Each VISN contains a number of VA hospitals, also known
10 as medical centers, of which there are 153 throughout the country.
11 PIRT 245:17; 246:6; 623:16-17. Each VISN also has numerous
12 community-based outpatient clinics ("CBOCs"), of which,
13 nationwide, there are approximately 800. Id. 247:2-7. CBOCs
14 typically provide, at a minimum, primary health care. Id. 247:10-
15 11. Most veterans enrolled in the VA receive their care at CBOCs.
16 Ex. 357; RT 1318:15-17.

17 7. The VHA also has approximately 200 Readjustment
18 Counseling Centers, known as "Vet Centers." PIRT 247:24-25. Vet
19 Centers are small, community-based counseling centers, with
20 average staff sizes of four to six people. Id. 55:7-9.

21 **1. Veterans' Mental Health and Suicide Rates**

22 8. More than 1.6 million men and women have served in Iraq
23 and/or Afghanistan since October 2001. Answer, Docket No. 110, ¶
24 7; Ex. 1253 at iii. As of December 31, 2007, 803,757 veterans of
25 Iraq and Afghanistan were eligible for VA health care. Answer ¶
26 7; Ex. 420 at 5. Defendants concede that veterans have complained
27 of long wait times for PTSD treatment and difficulties in

1 obtaining mental health care in rural areas. Answer ¶ 10.

2 9. Approximately one out of every three soldiers returning
3 from Iraq was seen in the VA for a mental health visit within a
4 year of their return. RT 220:7-11; PIRT 219:3-220:17. PTSD is a
5 leading diagnosis for the mental health disorders of veterans
6 returning from Iraq. PIRT 216:17.

7 10. Dr. Arthur Blank testified for Plaintiffs as an expert
8 in psychiatry, specializing in treatment of veterans with mental
9 health problems, including PTSD. PIRT 59:23-62:3. Dr. Blank
10 spent 10 years as a teaching and supervising psychiatrist at the
11 Westhaven VA Medical Center, was a national director of the Vet
12 Centers at the VA headquarters in Washington from 1982-1994, and
13 was the chief psychiatrist on the PTSD team at the Minneapolis VA
14 from 1994-1997. Id. 54:19-25; 55:1-3; 57:18-23.

15 11. Dr. Blank testified that PTSD is a "psychological
16 condition that occurs when people are exposed to extreme, life-
17 threatening circumstances, or [when they are in] immediate contact
18 with death and/or gruesomeness, such as [what] occurs in combat,
19 severe vehicular accidents or natural disasters. It produces a
20 complex of psychological symptoms which may endure over time."
21 PIRT 62:25-63:6.

22 12. Dr. Gerald Cross, the Deputy Under Secretary for Health
23 in the VA, testified that the high rates of PTSD among Iraq
24 veterans are the result of various factors, including multiple
25 deployments, the inability to identify the enemy, the lack of real
26 safe zones, and the inadvertent killing of innocent civilians.
27 PIRT 216:23-218:2.

1 13. In 2008, Dr. Robert Rosenheck, Director of VA's
2 Northeast Program Evaluation Center ("NEPEC"), issued a report
3 entitled "Recent Trends in VA Treatment of Post-Traumatic Stress
4 Disorder and other Mental Disorders." Exs. 442, 444. The report
5 found that during 2003-2005, there was a 232% increase of PTSD
6 diagnosis for veterans born after 1972. Ex. 442 at 1722. In
7 addition, while the number of veterans diagnosed with PTSD doubled
8 between 1997 and 2005, "the number of clinic contacts per veteran
9 per year declined steadily and relatively uniformly across the
10 years." Id. at 1722, 1723.

11 14. A study released on April 17, 2008, by the RAND
12 Corporation found that 18.5% of U.S. service members who have
13 returned from Iraq and Afghanistan currently have PTSD. Ex. 1191
14 at 1. The RAND study also found that approximately half of those
15 who need treatment for PTSD seek it, and of those who actually
16 receive treatment, only slightly more than half get "minimally
17 adequate care." Id. The study estimates that 300,000 soldiers
18 now deployed to Iraq and Afghanistan "currently suffer PTSD or
19 major depression." Ex. 1253 at xxi.

20 15. Studies indicate that the suicide rate among veterans is
21 significantly higher than that of the general population. RT
22 274:15-275:19. One study, the "Katz Suicide Study," dated
23 February 21, 2008, found that suicide rates among veterans are
24 approximately 3.2 times higher than the general population. Id.;
25 Ex. 1183.

26 16. Dr. Stephen Rathbun, the interim head of the Department
27 of Epidemiology and Biostatistics at the University of Georgia,
28

1 testified as Plaintiffs' expert in biostatistics. PIRT 303:13-18.
2 Dr. Rathbun analyzed data provided to him by CBS News and
3 concluded that, in 2005, the last year for which suicide data was
4 available, the suicide rate among male veterans aged 20 to 24
5 years old was three or four times the non-veteran rate in that
6 group. Id. 304:11-17; 307:1; 310:9-311:2. Internal VA emails
7 state that Dr. Rathbun's methodology was "defensible" and "appears
8 to be correct." Exs. 1306, 1248.

9 17. Dr. Ira Katz, Deputy Chief of Patient Care Services
10 Office for Mental Health for the VA, testified that his primary
11 job is to direct mental health services at the VA. PIRT 736:24-
12 25. Suicide prevention is an important component of his job. Id.
13 738:21-24.

14 18. Dr. Katz, in an internal VA email dated December 15,
15 2007, wrote that "[t]here are about 18 suicides per day among
16 American's 25 million veterans." Ex. 1247. The email further
17 states that the "VA's own data demonstrate 4-5 suicides per day
18 among those who receive care from us." Id.

19 19. In another internal VA email dated February 13, 2008,
20 Dr. Katz wrote: "Shh! Our suicide prevention coordinators are
21 identifying about 1,000 suicide attempts per month among the
22 veterans we see in our medical facilities. Is this something we
23 should (carefully) address ourselves in some sort of release
24 before someone stumbles on it?" Ex. 1249.

25 2. VHA Budget

26 20. Paul Kearns, the VHA's Chief Financial Officer,
27 testified that the VHA is not currently facing a budget crisis and
28

1 has adequate money to "meet the mission requirements." PIRT
2 574:13-18. Dr. Cross agreed with this assessment and testified
3 that the VA has sufficient funding to carry out its mission of
4 ensuring that veterans have the medical care they need. Id.
5 225:12-23. Dr. Katz testified that the VHA's current budget
6 provides enough funding to cover a "worst-case scenario" of an
7 influx of veterans returning from Iraq and Afghanistan with mental
8 illness. Id. 787:17-20.

9 21. In 2006, VHA spending on mental health care was
10 approximately \$2.4 billion. PIRT 555:17020. In 2007, this figure
11 rose to \$3.2 billion. Id. 557:8-10. In 2008, the VHA is on
12 target to spend \$3.5 billion on mental health care. Id. 558:2-3.
13 The estimated budget for 2009 is \$3.9 billion. RT 774:25-775:3.

14 22. Over the past few years, the VA has hired more than
15 3,800 new mental health staff. PIRT 739:12-13. There remain 500-
16 600 unfilled mental health staff positions, out of a total of
17 16,500. Id. 419:12-22. In addition, for general health staff,
18 the VA has approximately 1,400 unfilled physician positions out of
19 21,000 and 2,400 unfilled nursing positions out of 40,000. Id.
20 224:2-7; 231:9-13.

21 23. Dr. Rosenheck, Director of VA's NEPEC, concluded that
22 for every \$100 increase in per capita outpatient mental health
23 spending, there was an associated 6% decrease in the rate of
24 suicide. Ex. 446 at 118.

25 3. Depression, PTSD, and Suicide

26 24. Dr. Ronald Maris, an expert witness for Plaintiffs in
27 suicidology, testified that depression and PTSD are two of the
28

1 leading risk factors for suicide. RT 270:3-10; 273:1-276:24. In
2 general, Dr. Maris was highly critical of the manner in which the
3 VA is treating suicidal or potentially suicidal veterans. Id.

4 25. Dr. Alan Berman testified as an expert witness for
5 Defendants in suicidology. RT 1272:4-10. Dr. Berman agreed that
6 depression is a leading risk factor for suicide and that PTSD is a
7 "significant risk factor." Id. 1322:25-1323:6. Dr. Berman also
8 agreed that it is important to treat PTSD on a timely basis, and
9 that PTSD, if not properly treated, can lead to depression, and
10 that depression and PTSD, if not properly treated, increase the
11 risk of suicide. Id. 13237-20. Dr. Berman agreed that soldiers
12 returning from Iraq have an elevated rate of suicide. Id. 1324:1-
13 6. Dr. Berman testified that the quality of the VA suicide
14 prevention program is "terrific." Id. 1294:7-10.

15 26. Dr. Blank testified that there is a strong connection
16 between PTSD and suicide. RT 69:23-70:6. He also testified that
17 depression is one outcome of untreated PTSD and that depression
18 increases the risk of suicide. Id. 70:21-25; 71:1-7. Dr. Blank
19 was critical of the VA's treatment methods for veterans with PTSD.
20 Id. 83:14-22; 83:10-13.

21 4. Mental Health Strategic Plan

22 27. In July 2004, the VA developed and adopted the Mental
23 Health Strategic Plan ("MHSP"). Ex. 398. The MHSP consists of
24 265 recommendations and was developed as a five year plan. RT
25 777:22-24; PIRT 477:24-478:1. It currently is in its fourth year
26 of implementation. Id. Plaintiffs concede that the MHSP is a
27 good plan. RT 705:14-706:7.

1 28. In fiscal year 2006, the VHA spent approximately \$118
2 million out of a targeted \$200 million on the MHSP. PIRT 553:1-4.
3 In fiscal year 2007, the VHA spent approximately \$325 million on
4 the MHSP and for fiscal year 2008 the VHA is on target to increase
5 this spending to \$370 million. Id. 553:5-554:6.

6 29. One of the goals of the MHSP is to "[r]educe suicides
7 among veterans." Ex. 398 at A-2. Among the initiatives intended
8 to help reduce veteran suicides are ones to "[d]evelop a national
9 systemic program for suicide prevention" and to "develop[] a plan
10 to educate all staff that interact with veterans, including clerks
11 and telephone operators, about responding to crisis situations
12 involving at-risk veterans." Id. at A-2. Other key components of
13 the MHSP are to develop "methods for tracking veterans with risk
14 factors for suicide," and to "[r]equire annual screening for
15 Mental Health and Substance Abuse Disorders." Id. at A-29. In
16 addition, the MHSP called for mental health screening for "[e]very
17 returning service man/woman . . . as part of the post-deployment
18 and separation medical examination." Id. at A-5.

19 30. Dr. Katz testified that his office is responsible for
20 "strategic planning about program development." PITR 737:4-5. He
21 further testified that he was hired "specifically to oversee the
22 implementation of the 2004, 2005 Mental Health Strategic Plan."
23 Id. 738:5-6.

24 31. On May 10, 2007, the VA Office of Inspector General
25 ("OIG") issued a report titled "Implementing VHA's Mental Health
26 Strategic Plan Initiatives for Suicide Prevention" ("May 2007 OIG
27 Report"). Ex. 133. This report concluded that many components of
28

1 the MHSP had not been implemented. Id. Initiatives such as
2 screening veterans at risk, a suicide prevention database,
3 emerging best practices for treatment, and education programs were
4 all still at the "Pilot Stage" three years after the MHSP was
5 implemented. Id. at 53.

6 32. The May 2007 OIG Report also found 61.8% of VA
7 facilities had not implemented a suicide prevention strategy to
8 target veterans returning from Iraq and Afghanistan. Ex. 133 at
9 37. In addition, 42.7% of VA facilities had not implemented a
10 program to educate first-contact, non-medical personnel about how
11 to respond to crisis situations involving veterans at risk for
12 suicide. Id. at 46. 70% of VA facilities had not implemented a
13 tracking system for veterans with risk factors for suicide. Id.
14 at 33. 16.4% of VA facilities had not implemented a system to
15 facilitate referral of veterans with risk factors for suicide.
16 Id. at 30.

17 **5. Feeley Memo**

18 33. William Feeley has been the Deputy Under Secretary for
19 Health Operations and Management since February 10, 2006. Ex.
20 1259 at 1, Feeley Depo. Tr. Mr. Feeley, in his own words, is
21 "responsible for the 21 [VISN] network directors in implementing
22 policy and procedure that comes in, that gets developed at
23 headquarters." Id. Mr. Feeley, as the number three person in the
24 VHA, is tasked with ensuring that the VA Medical Centers and CBOCS
25 comply with the "policies and the rules and regulations of the
26 organization." Id. 2. He testified that when it comes to
27 compliance in implementing procedures, the "[b]uck stops with me."

1 Id.

2 34. On June 1, 2007, Mr. Feeley issued a memorandum to all
3 VISN directors regarding "Mental Health Initiatives" ("the Feeley
4 Memo"). Ex. 1259 at 4; Defs.' Ex. 513. The purpose of the Feeley
5 Memo was to direct the VISN directors to begin implementing the
6 specific initiatives of the mental health plan. Ex. 1259 at 8;
7 Defs.' Ex. 513. According to Mr. Feeley, even though the MHSP was
8 developed in 2004, he was unaware of whether the VHA had actually
9 begun to implement the plan prior to June 2007. Ex. 1259 at 4.
10 Furthermore, Mr. Feeley was unaware of whether the VISN directors
11 were supposed to begin implementing the MHSP prior to his Memo.
12 Id. Mr. Feeley conceded that he is unaware of "whether there's
13 compliance with the tracking of veterans with risk factors for
14 suicide," but agreed that such tracking, in addition to being part
15 of the MHSP, was "a good suggestion." Id. at 7-8.

16 35. Part of the Feeley Memo states that veterans who present
17 to a Medical Center or CBOC for the first time with mental health
18 issues should be evaluated within 24 hours. Ex. 1259 at 11;
19 Defs.' Ex. 513. Mr. Feeley conceded that he has no way of knowing
20 whether any of the Medical Centers or CBOCS have implemented this
21 initial 24 hour evaluation directive. Ex. 1259 at 12. Mr. Feeley
22 testified that Drs. Zeiss and Katz were going to perform site
23 visits to ensure compliance with this directive. Id. at 11.

24 36. Dr. Antoinette Zeiss is the Deputy Chief Consultant for
25 the Office of Mental Health Services. PIRT 395:11-12. She has
26 held this position since September of 2005 and she reports to Dr.
27 Katz. Id. 395:13-16. Her section's responsibilities include

1 "oversight for mental health programs in VA. That means working
2 with those above [her section] on policies, working on
3 consultation [with] the field about appropriate implementation of
4 programs, and particularly implementing the Mental Health
5 Strategic Plan." Id. 3961-6. Since the Feeley Memo was issued in
6 June 2007, Dr. Zeiss testified that as of March 5, 2008, only two
7 site visits to ensure implementation had been conducted. Id.
8 457:19-25. The first of these visits occurred approximately three
9 weeks prior to Dr. Zeiss's testimony. Id. 457:9-12. Other than
10 these site visits, Dr. Zeiss has seen no reports that would
11 otherwise indicate whether the Feeley Memo directives were being
12 implemented system-wide. Id. 456:20-23.

13 37. The Feeley Memo also directs that a veteran who seeks an
14 appointment for mental health issues be given a follow-up
15 appointment within 14 days. RT 443:1-4; PIRT 481:12-17; Defs.'
16 Ex. 513.

17 38. The VHA does not have the staff or resources to directly
18 track whether the 24 hour evaluation policy outlined in the Feeley
19 Memo is being implemented systemwide. RT 446:18-21.

20 39. Instead, in order to monitor compliance with the Feeley
21 Memo directives, the VA uses two tangential metrics. RT 449:1-
22 452:23. The first metric tracks the number of mental health
23 providers hired at medical facilities within a VISN and the second
24 tracks whether medical centers are complying with the requirement
25 that a veteran who presents with mental health needs be given an
26 appointment within 14 days. Id. 443:1-23; 446:6-25; 454:10-17.

27 ///

6. Delays in Mental Health Care

1
2 40. The May 2007 OIG Report found delays in obtaining
3 referrals for depression and PTSD. Ex. 133 at 31. Where a
4 primary care provider refers a patient with symptoms of moderate
5 severity for depression, 40% of VA facilities reported same-day
6 evaluation, 24.5% reported a wait time of 2-4 weeks and 4.5%
7 reported a wait time of 4-8 weeks. Id. The wait times for PTSD
8 referrals were longer, with only 33.6% reporting same-day
9 evaluation, 26% reporting 2-4 weeks, and 5.5% 4-8 weeks. Id. at
10 31-32. Nonetheless, the majority of veterans of Iraq and
11 Afghanistan are being seen at clinics offering mental health
12 services within 30 days. PIRT 594:11-595:16; Defs.' Ex. 514.

13 41. On September 10, 2007, the VA's OIG issued a report
14 titled, "Audit of the Veterans Health Administration's Outpatient
15 Waiting Times" ("September 2007 OIG Report"). Ex. 169. This
16 report was prepared at the request of the U.S. Senate Committee on
17 Veterans Affairs. Id. at i. The purpose of the report was to
18 follow up on a July 2005 audit that found that the "VHA did not
19 follow established procedures when scheduling medical appointments
20 for veterans seeking outpatient care." Id. The July 2005 report
21 made eight recommendations for corrective action, five of which
22 the September 2007 OIG Report found had not been implemented. Id.
23 at vi.

24 42. The September 2007 OIG Report found that "25 percent[]
25 of the appointments we reviewed had waiting times over 30 days
26 when we used the desired date of care that was established and
27 documented by the medical providers in the medical records." Ex.

1 169 at ii. The report also found that "72 percent[] of the 600
2 appointments for established patients had unexplained differences
3 between the desired date of care documented in medical records and
4 the desired date of care the schedulers recorded" Id. at
5 iii. In addition, the report concluded that "[o]f the 100 pending
6 consults, 79 (79 percent) were not acted on within the 7-day
7 requirement and were not placed on the electronic waiting list.
8 Of this number, 50 veterans had been waiting over 30 days without
9 action on the consult request." Id. at vi.

10 43. The September 2007 OIG Report found that schedulers were
11 not adequately trained. Ex. 169 at vi. Of 113 schedulers
12 interviewed, 47% had no training on consults within the last year,
13 and 53% had no training on the electronic waiting list in the last
14 year. Id. Furthermore, the report stated the following: "While
15 waiting time inaccuracies and omissions from electronic waiting
16 lists can be caused by a lack of training and data entry errors,
17 we also found that schedulers at some facilities were interpreting
18 the guidance from their managers to reduce waiting times as
19 instruction to never put patients on the electronic waiting list.
20 This seems to have resulted in some 'gaming' of the scheduling
21 process." Id. The report concluded that "VHA's method of
22 calculating the waiting times of new patients understates the
23 actual waiting times," id. at 7, and that even though the "VHA has
24 established detailed procedures for schedulers to use when
25 creating outpatient appointments[, it] has not implemented
26 effective mechanisms to ensure scheduling procedures are
27 followed." Id. at 9.

1 Id. at 26, 27. The report summarized: "VA's delay in fully
2 implementing the recommendations raises questions about VA's
3 capacity to identify and treat veterans returning from military
4 combat who may be at risk for developing PTSD, while maintaining
5 PTSD services for veterans currently receiving them." Id. at 3.

6 47. Dr. Frances Murphy was the Deputy Under Secretary of
7 Health Policy Coordination within the VA from October 2002 through
8 April 2006. Ex. 1262 at 1. Dr. Murphy had helped draft the MHSP.
9 Id. at 4. In the fall of 2005, Dr. Murphy informed then-Secretary
10 Nicholson that there were "still significant gaps in delivery of
11 substance abuse care, and that in certain areas of the country
12 mental health access was still not meeting VHA standards." Id. at
13 4. In a speech on March 29, 2006, Dr. Murphy, while acknowledging
14 that the VA "has achieved benchmark performance in quality,
15 patient satisfaction, patient safety and coordination of
16 healthcare services," also noted that "[i]n some communities, VA
17 clinics do not provide mental health or substance abuse care or
18 waiting lists render that care virtually inaccessible." Ex. 397
19 at 6, 7. In February 2006 Dr. Murphy's office was eliminated.
20 Ex. 1262 at 1, 2.

21 48. Every VA Medical Center now has a Suicide Prevention
22 Coordinator. RT 1280:21-23. The Coordinators are charged with
23 the task of overseeing the clinical care and tracking at-risk
24 patients. Id. In preparation for their roles as Suicide
25 Prevention Coordinators, the Coordinators, who are all mental
26 health professionals, received only two and one half days of
27 special training, which took place at the University of Rochester

1 School of Medicine's center for the study of suicide. Id. 1290:6-
2 11. As Defendants' expert Dr. Berman testified, the primary role
3 of the Coordinators includes "identifying or making sure that
4 suicidal patients are identified, in tracking, that they are
5 getting the appropriate treatment, in educating and training the
6 staff of the medical center, in promoting suicide awareness and
7 education." Id. 290:18-23. As of May 2007, only 30% of the
8 facilities polled had suicide tracking systems. Ex. 133 at 33.

9 49. The Suicide Prevention Coordinators are only at the 153
10 VA medical centers, and are not located at any of the roughly 800
11 CBOCs. RT 1318:10-1319:3. Most veterans receive their care at
12 CBOCs. Ex. 357; RT 1318:15-17.

13 50. CBOCS only provide outpatient services during regular
14 business hours, generally Monday through Friday from 8:00 a.m.
15 until 4:30 or 5:00 p.m. PIRT 169:22-25.

16 51. In July 2007, the VA implemented a national Suicide
17 Prevention Hotline. PIRT 746:12-749:9. Between July 2007 and
18 January 2008, the Hotline received 26,000 calls, of which 9,000
19 were confirmed to be from veterans and 900 from the families of
20 veterans. Id. 778:1-9. In that same time period, the Suicide
21 Prevention Hotline made approximately 2000 referrals of veterans
22 seeking help to the Suicide Prevention Coordinators. Id. 745:7-
23 14.

24 7. Medical Appeals Process

25 52. Veterans may appeal clinical medical decisions that
26 affect eligibility determinations. For example, a veteran may
27 appeal a clinical determination by a nurse or doctor but a veteran
28

1 may not appeal the decision of an appointment scheduler. PIRT
2 713:2-714:13. If a veteran is told that the next available
3 appointment is two weeks away but the veteran wants something
4 sooner, the veteran cannot appeal this type of administrative
5 scheduling decision. Id. 712:4-8. If, however, the veteran is
6 told by a nurse or doctor that it is ok for him to wait those two
7 weeks before his appointment--i.e., if a nurse or doctor makes a
8 clinical decision regarding the veteran's need for access to
9 health care--then the veteran may appeal this decision. Id.; Id.
10 656:25-657:25. The veteran appeals this decision by asking to
11 speak with a "Patient Advocate." Id. 656:25.

12 53. The Patient Advocate Program is a system that VHA has in
13 place to provide patients with an individual to help them with any
14 issues or problems they might have with VHA. PIRT 638:16-19.

15 54. The Patient Advocate, after receiving a complaint from a
16 veteran, is then supposed to log the veteran's complaint into the
17 Patient Advocate database. PIRT 657:6-10. If the complaint deals
18 with a clinical decision about the need for treatment, it will be
19 referred up to the chief of staff, who then has seven days to make
20 a decision on how to handle the complaint. Id. 657:7-15.

21 55. If the veteran disagrees with the decision by the chief
22 of staff, he or she can then appeal the decision to the VISN
23 director at the network level, who would make the final decision.
24 Id. 659:13-18. If the veteran disagrees with the VISN director's
25 decision, the veteran can ask the VISN director to request an
26 external review. Id. 661:14-663:4. Only the VISN director can
27 request external review, and the veteran, on his or her own, has

1 no way of independently securing it. Id. If the VISN director
2 does request an external review, the veteran does not have the
3 right to know the results of this review. Id. 719:5-10. If the
4 VISN director refuses to share the results of the external review
5 with the veteran, the only manner in which the veteran might
6 obtain the results would be through a Freedom of Information Act
7 request. Id. 719:10-17.

8 **8. PTSD and Suicide Screening**

9 56. When veterans first enroll in the VHA after separating
10 from the service, they are given a mental health screen at their
11 initial primary care visit. PIRT 518:5-21. They are screened for
12 PTSD, depression, traumatic brain injury, military sexual trauma,
13 and problem drinking. Id.

14 57. In addition, all veterans who present for evaluation of
15 primary mental health and/or addiction disorders are screened for
16 suicide risk. Ex. 365. This screening consists of the following
17 two questions: (1) "During the past two weeks, have you felt down,
18 depressed, or hopeless?" and (2) During the past two weeks, have
19 you had any thoughts that life was not worth living or any
20 thoughts of harming yourself in any way?" Id. If the patient
21 answers "yes" to the first question but "no" to the second, no
22 further suicide risk assessment is called for, unless the veteran
23 is being admitted to an inpatient psychiatric unit. Id. Thus,
24 unless the veteran admits to having suicidal thoughts within the
25 last two weeks, no further suicide screening is performed, even if
26 the veteran admits to having recently felt depressed or hopeless.
27 Id.

1 93; Answer, ¶ 93. Many benefits recipients are totally or
2 primarily dependent upon SCDDC for support. Id.

3 62. After deployment to Iraq, soldiers aged 18-24 comprised
4 50% of the Army and 80% of the Marines. RT 357:9-19. 82% of the
5 Army personnel deployed have a high school diploma or less. Id.
6 358:3-7. 89% of the Marines deployed have a high school diploma
7 or less. Id. These figures indicate that many of these soldiers,
8 once they separate and become veterans, may have difficulty
9 navigating complex benefit application procedures unless they are
10 provided with substantial assistance.

11 **1. Adjudication Process for SCDDC Claims**

12 63. Veterans may file a claim for compensation and pension
13 benefits at any of the 57 VA Regional Offices ("ROs") throughout
14 the country. RT 887:21-888:8.

15 64. A rating claim may seek compensation for more than one
16 injury and each separate injury is considered an "issue" in the
17 claim. RT 930:11-15.

18 65. In fiscal year 2007, the VBA received 838,141 ratings
19 claims. Defs.' Ex. 542; RT 972:16-22. Of these, 225,173 were
20 "original" claims, that is, first time requests for benefits by
21 veterans. Ex. 543. The remaining 612,968 claims were "reopened"
22 claims--claims from veterans who had previously sought benefits
23 from the VA. Exs. 542, 543. Of the original claims that year,
24 58,532 had 8 or more issues and 166,641 had 7 or fewer issues.
25 Ex. 543. Since fiscal year 2005, the number of claims with 8 or
26 more issues has increased by 34%, while the number of claims with
27 7 or fewer issues has remained mostly constant. Id.; RT 983:16-

1 984:13.

2 66. Roughly 88% of veterans are granted SCDDC for at least
3 one claimed disability. RT 1042:10-24.

4 67. Average Days to Complete ("ADC") measures the time
5 required to adjudicate all rating claims over a finite period. RT
6 900:12-902:8. ADC is computed by taking all rating claims
7 adjudicated during a period, adding the number of days it took to
8 complete each one, and dividing by the total number of claims that
9 were adjudicated. Id. 900:12-18. As of trial, the ADC for fiscal
10 year 2008 was approximately 183 days. Defs.' Ex. 541; RT 936:11-
11 12. Thus, on average, it takes the VBA 183 days to adjudicate a
12 claim filed by a veteran. RT 936:11-15.

13 68. To establish a claim for SCDDC, a veteran must present
14 evidence of (1) a disability; (2) service in the military that
15 would entitle him or her to benefits; and (3) a nexus between the
16 disability and the service. RT 887:8-11.

17 69. Veterans pursuing a SCDDC claim for PTSD have the
18 additional burden of proving a "stressor" event during their
19 service. RT 952:22-953:8. Evidence of a stressor is required by
20 38 C.F.R. § 3.304. A "stressor" is a specific event during the
21 veteran's service that led to the development of PTSD. RT 953:2-
22 8. This additional requirement makes SCDDC claims for PTSD unique
23 from all other types of claims. Id. 952:24-953:1. As Ronald
24 Aument, the Deputy Under Secretary for Benefits until January 3,
25 2008, testified, PTSD claims, because of the substantial
26 subjectivity involved in their evaluation, are among the most
27 complex claims that the VA is asked to adjudicate. Ex. 1257 at 5.

1 records such as VA medical records or social security records. RT
2 942:6-944:8. The VA must continue to seek these records until the
3 responsible agency attests that they are no longer available. Id.
4 940:23-941:4.

5 75. The duty to assist also requires the VBA to undertake
6 reasonable efforts to acquire non-federal records, typically
7 private medical records, identified by the veteran. RT 941:5-9;
8 944:9-945:2. The VBA cannot initiate the search for these records
9 without a release executed by the veteran. Id.

10 76. The duty to notify letter provides veterans with a 60-
11 day deadline to respond with any releases and with any evidence in
12 the veteran's possession. RT 941:19-24. Once the releases are
13 received, the VBA is required to request the private records from
14 their respective custodians. Id. 944:22-945:4. The request asks
15 the custodian to provide the records within 60 days. Id. 945:3-
16 13. If the records custodian fails to do so, the VBA sends out
17 another request seeking a reply within 30 days. Id.

18 77. The duty to assist also includes the duty of "providing
19 a medical examination or obtaining a medical opinion when such an
20 examination or opinion is necessary to make a decision on the
21 claim." 38 U.S.C. § 5103A. This medical examination is known as
22 a Compensation and Pension Examination ("C&P Exam"). RT 946:22-
23 947:6. The purpose of the C&P Exam is to confirm that a
24 disability exists and to assess the medical implications of that
25 disability in order to assist the claim adjudicator in determining
26 the percentage the veteran will be considered disabled pursuant to
27 the rating schedule. Id. 946:25-947:13. Thus, some veterans who

1 have been treated for a disability at a VA medical facility may
2 nonetheless be required to undergo a C&P exam. For example, a
3 veteran may have actually been diagnosed with and treated for PTSD
4 at a VA medical center, but because of some shortcoming in the
5 medical records or evidence or because of some other deficiency,
6 the veteran would still need to submit to a C&P exam if the VBA
7 determines that one is necessary. Furthermore, a veteran may be
8 diagnosed as not having, for example, PTSD, during a C&P Exam even
9 after he or she was previously diagnosed as having PTSD by a
10 treating physician at a VA medical center.

11 78. The VBA arranges and pays for a C&P exam. RT 951:18-
12 952:20. The current wait time for a C&P exam is approximately 30-
13 35 days. Id. 951:14-17.

14 79. Throughout the claims adjudication process, the
15 evidentiary record remains open. RT 948:18-949:8. Thus, at any
16 point, the veteran may supply new evidence. Id. The VACC duty to
17 assist applies to this new evidence. Id. 945:3-13. In addition,
18 the veteran may, at any time, introduce a new issue into the
19 claim. Id. 949:9-950:1. For new issues, the claim development
20 process is reinitiated so that the necessary evidence of this
21 issue may be collected. Id. Between 10% and 20% of all claims
22 have a new issue presented during the pendency of the claim. Id.

23 80. Once all the evidence has been gathered, a Rating
24 Veterans Service Representative ("RVSR" or "rating specialist")
25 decides whether the disability is service connected and, if it is,
26 assigns a rating to the claim. RT 895:16-896:5; 956:19-957:9.
27 The rating assigned to a claim is based on a sliding scale of

1 monthly compensation ranging from \$115 per month for a 10% rating
2 to \$2471 per month for a 100% rating. 38 U.S.C. § 1114.
3 Approximately 88% of all ratings claims are at least partially
4 granted. RT 1042:15-24.

5 81. Although a veteran may be represented throughout the
6 claim adjudication process at the RO, the veteran is statutorily
7 prohibited from compensating a lawyer to represent him at the RO
8 level. 38 U.S.C. § 5904. Thus, veterans may be represented by
9 attorneys acting pro bono or, more commonly, by Veteran Service
10 Organizations ("VSOs"). RT 932:20-934:21. VSOs are organizations
11 that work on behalf of veterans. Id. The VA in some cases
12 provides VSOs with office space in the ROs, computer systems and
13 access to VA databases. Id. VA, however, does not provide
14 training to VSOs regarding how to assist veterans. Id. 934:4-13.
15 In addition, all of the VSOs combined cannot meet the needs of all
16 the veterans seeking benefits. Id. 514:19-515:1.

17 82. Veterans may appeal a rating decision by the RO by
18 filing a Notice of Disagreement ("NOD"). RT 1008:9-24. The NOD
19 must be filed within one year of the RO's decision. 38 U.S.C. §
20 7105(b)(1). The NOD is an informal paper stating that the veteran
21 disagrees with some part of the rating decision and wishes to
22 appeal. RT 1008:9-24. The veteran may appeal any part of any
23 issue in the rating decision, including the denial of an issue,
24 the percentage of disability assigned, or the effective date. Id.

25 83. As noted above, the record remains open throughout the
26 appeals process, thus allowing the veteran to submit additional
27 evidence at any time. RT 176:9-20. A veteran who disagrees with
28

1 the RO decision can file an appeal with the Board of Veterans
2 Appeals ("BVA"), which decides an appeal only after the claimant
3 has been given an opportunity for a hearing. 38 U.S.C. § 7105(a).
4 An adverse decision by the BVA may then be appealed to the CAVC,
5 an Article I court established by Congress with the passage of the
6 VJRA. The CAVC has exclusive jurisdiction to review decisions of
7 the BVA. See 38 U.S.C. § 7252(a). Adverse decisions from the
8 CAVC may then be appealed to the United States Court of Appeals
9 for the Federal Circuit, id. § 7292(a), and then to the Supreme
10 Court. Id. § 7292(c).

11 84. Upon receiving an NOD, the RO sends the veteran an
12 election letter asking the veteran to choose between two non-
13 exclusive appeals processes: a veteran may elect de novo review
14 with a Decision Review Officer ("DRO") or the veteran may request
15 the RO to issue a Statement of the Case ("SOC"), which provides a
16 more detailed explanation of the rationale underlying the rating
17 decision. RT 1009:2-1014:4; 38 U.S.C. § 7105(d)(1).

18 85. If the veteran elects de novo review with a DRO, the
19 DRO, who is a senior rating specialist, will review the file and
20 perform any additional development, including, if necessary,
21 meeting with the veteran and any representative the veteran may
22 have procured. RT 896:6-12; 1011:10-20. Because the DRO review
23 occurs post-NOD, a veteran may retain paid counsel at this stage
24 of the proceedings. 38 U.S.C. § 5904. DROs are empowered to
25 reverse the initial rating decision if they determine that it was
26 not warranted. RT 1012:4-6. If the DRO resolves some but not all
27 of the appeal, an SOC will be prepared, and the traditional

1 appellate path is followed. Id. 1010:3-14; 1012:12.

2 86. If the veteran elects to pursue the traditional
3 appellate path, he or she must file a VA Form 9 within 60 days of
4 receiving the SOC, or within a year of receiving the rating
5 decision, whichever is longer. RT 1010:3-15; 1014:5-10; 38 U.S.C.
6 § 7105(d)(3). Once the RO receives the veteran's Form 9
7 substantive appeal, the RO must then certify the appeal to the
8 BVA. 38 C.F.R. § 19.35; RT 1017:2-12. There are no statutory or
9 regulatory time limits imposed on the VA during any step of the
10 adjudication and appeals process for SCDDC. RT 578:22-580:21.
11 Veterans, conversely, are constrained by various time limits and
12 failure to meet any of these deadlines can result in forfeiture of
13 the appeal. Id. 1024:17-20.

14 **2. VBA Inventory of Claims**

15 87. The VBA's inventory of pending rating-related claims has
16 increased from 337,742 claims as of January 1, 2005, to 400,450
17 claims as of April 12, 2008. Ex. 1322.

18 88. On average, it takes an RO 182 days from the date a
19 claim is filed to issue an initial decision on that claim. RT
20 936:8-12. As of April 12, 2008, there were 101,019 rating-related
21 claims pending more than 180 days. Ex. 1322. VBA's strategic
22 goal is to process all claims in 125 days. RT 936:8-15. PTSD
23 claims take longer to adjudicate than average SCDDC claims. Id.
24 120:24-121:2; 406:21-407:16; Ex. 1264 at 160:17-21.

25 **3. Delays in Appeals Process**

26 89. Of the more than 830,000 ratings claims filed each year,
27 approximately 11% result in an NOD being filed by the veteran. RT

1 1006:12-24. Only 4% of the total number of claims filed each year
2 actually proceed past the NOD to a decision by the BVA. Id.

3 90. On average, as of March 2008, it was taking 261 days for
4 an RO to mail an SOC to a veteran after receiving an NOD. Ex.
5 1320 at VA322-00002598. It takes a veteran 43 days, on average,
6 to file a Form 9 substantive appeal after receiving an SOC. Ex.
7 1310 at VA322-00002505-06; RT 215:7-216:20. It takes 573 days, on
8 average, for an RO to certify an appeal to the BVA after receiving
9 a Form 9 appeal from a veteran. Ex. 1310 at VA322-00002505-06; RT
10 215:7-217:2. Some veterans have had to wait more than 1,000 days
11 for an RO to issue a certification of appeal to the BVA. Ex. 1260
12 at 6-7. In addition, some veterans have had to wait more than
13 1,000 days for an RO to even issue an SOC. Id. The Director of
14 the Compensation and Pension Service within the VA, Bradley Mayes,
15 testified at a deposition that VBA has not "made a concerted
16 effort to figure out what's causing" these delays. Id. at 7.

17 91. The Deputy Undersecretary for Benefits for the VA,
18 Michael Walcoff, testified that the significant delays by the ROs
19 in issuing SOCs and certifications of appeal are attributable, in
20 part, to the priority VA has focused on adjudicating initial
21 claims. RT 1019:1-1020:5; 1129:20-1130:10; 1171:25-1172:18; Ex.
22 1258 at 12.

23 92. On average, it takes the BVA 336 days to issue a
24 decision on an original appeal, as opposed to a remand, after a
25 claim is certified to the BVA by an RO. Ex. 1310 at VA322-
26 00002505-06.

27 93. Although veterans have a right to submit new evidence at
28

1 any time during the appeals process, this alone does not account
2 for the extensive delays. RT 207:25-208:3; 249:9-250:12; 364:9-
3 23; 1019:15-20; 1129:15-1130:10; 1171:25-1172:18. When a veteran
4 submits new evidence, the VBA issues a supplemental statement of
5 the case ("SSOC"). Id. 208:4-19. Form 9 substantive appeals
6 without an SSOC have been pending, on average, for 320 days. Id.
7 237:4-239:16; Ex. 1320 at VA 322-00002598, 2600.

8 94. As part of the appeal process to the BVA, veterans have
9 the right to a hearing before a BVA judge. 38 C.F.R. § 20.700; RT
10 528:23-25. At the veteran's option, the hearing may be held at
11 the expense of the veteran in Washington D.C., or by video-
12 conference, or at the closest RO in what is called a Travel Board
13 hearing. 38 C.F.R. § 20.700; RT 529:1-4; 1017:16-1018:2. The
14 Travel Board hearings typically happen only once or twice a year
15 at each RO. RT 1018:3-16. If a veteran requests a hearing, he or
16 she will have to wait, on average, 455 days. Ex. 1324 at VA322-
17 00002653-54; RT 231:12-18; 581:24-582:2. Veterans who receive
18 hearings are more likely to prevail on their appeal. Ex. 1243 at
19 5.

20 95. For veterans who pursue an appeal to completion, it
21 takes, on average, 1,419 days to receive a BVA decision after
22 filing an NOD. Ex. 1323 at VA322-00002552; RT 221:22-222:7. It
23 takes approximately 4.4 years--182 days for an initial RO decision
24 plus 1,419 days for a BVA decision--for a veteran to adjudicate a
25 claim all the way to a BVA decision. RT 259:22-261:21. This 4.4
26 years excludes the time between an RO's initial decision and a
27 veteran's NOD filing, which may be as long as one year. Id.

1 261:3-6.

2 96. The metric "Appeals Resolution Time" measures the
3 average number of days, nationwide, that it takes to resolve
4 appeals from the date an NOD is filed. RT 568:20-24. This
5 metric, unlike the one described in the preceding paragraph,
6 includes claims that are resolved before the BVA issues an
7 opinion. Id. 568:20-569:3. If a veteran dies before the BVA
8 adjudicates his appeal, the appeal is considered resolved. Id.
9 1174:2-10.

10 97. The Appeals Resolution Time increased from 599 days in
11 April 2005, to 671 days by the end of February 2008. RT 563:14-
12 16; 567:17-19. During this same time period, VBA's internal goal
13 for Appeals Resolution Time increased from 500 to 700 days. Id.
14 563:14-18; 567:13-16. The Appeals Resolution Time is expected to
15 increase by another 100 days in fiscal year 2008. Ex. 1264 at 15-
16 16.

17 98. If one excludes from the Appeals Resolution Time those
18 claims that are resolved, for whatever reason, before the BVA
19 issues a decision, the Appeals Resolution Time jumps to 1,419
20 days, or almost four and a half years. RT 573:21-574:3. At
21 trial, James Terry, the Chairman of the BVA, was unable to explain
22 this lengthy delay in the resolution of appeals. Id. 575:21-
23 576:9.

24 99. The composition of the BVA is determined, in part, by
25 statute. 38 U.S.C. § 7101. Section 7101 states that "[t]he Board
26 shall consist of a Chairman, a Vice Chairman, and such number of
27 members as may be found necessary in order to conduct hearings and
28

1 dispose of appeals properly before the Board in a timely manner."
2 Id. The statute further states that "[t]he board shall have
3 sufficient personnel . . . to enable the Board to conduct hearings
4 and consider and dispose of appeals properly before the Board in a
5 timely manner." Id.

6 100. In addition to the chairman and vice-chairman, the BVA
7 is currently comprised of 60 judges and their respective staffs.
8 RT 557:19-558:5. The number of judges employed by the BVA is
9 within the discretion of the VA Secretary. Id. The BVA issued
10 40,401 decisions in fiscal year 2007. Ex. 370 at 2. 95% of these
11 decisions dealt with SCDDC claims. Id. The BVA received 39,817
12 appeals in fiscal year 2007 and expects to receive 43,000 appeals
13 in fiscal year 2008. Id.

14 101. On average, the BVA affirms an RO's disposition of a
15 veteran's claim only 40% of the time. RT 1007:10-11. The BVA, on
16 average, grants a veteran's appeal roughly 20% of the time, and
17 the veteran's appeal is remanded by the BVA to the VBA in the
18 remaining 40% of the cases. Id. 1007:2-25.

19 102. Of the cases certified for appeal by the ROs, between
20 19% and 44% were "avoidable remands." RT 559:9-560:13; 1027:9-16;
21 Ex. 1312. An avoidable remand is defined as an appeal in which an
22 error is made by the RO before it certifies the appeal to the BVA.
23 Id. 1026:21-1027:4. Almost half of the avoidable remands that
24 occurred between January 1, 2008, and March 31, 2008, were the
25 result of the VBA employees violating their duty to assist
26 veterans. Id. 556:2-24; 1166:14-20.

27 103. A survey of VBA rating specialists at ROs found that
28

1 70% of them believed that speed in assigning ratings to claims was
2 emphasized over accuracy. RT 161:23-163:3.

3 104. When the BVA remands a claim, the claim is sent either
4 to the Appeals Management Center ("AMC"), or returned to an RO.
5 RT 210:10-14. Once an SCDDC claim is remanded by the BVA, it
6 takes on average 499.1 days for this claim to be granted,
7 withdrawn, or returned to the BVA for a second time. Ex. 1243 at
8 13. It takes, on average, 563.9 days for PTSD claims to be
9 granted, withdrawn, or returned to the BVA. Id.

10 105. Approximately 75% of the claims that are remanded by
11 the BVA are subsequently appealed to the BVA a second time. RT
12 544:15-24. It then takes the BVA an average of 149 days to render
13 a second decision on a claim that had already been remanded once
14 and subsequently re-appealed to the BVA. Ex. 1310 at VA322-
15 00002505-06; RT 215:7-217:19. The BVA Chairman Terry testified
16 that "the entire system is hurt by remands." RT 543:20-25.

17 106. Between October 1, 2007, and March 31, 2008, alone, at
18 least 1,467 veterans died during the pendency of their appeals.
19 Ex. 1316 at VA322-00002613-24; RT 254:6-255:2. When an appellant
20 dies, the appeal is extinguished. RT 1173:24-1174:1.

21 107. It is beyond doubt that disability benefits are
22 critical to many veterans and any delay in receiving these
23 benefits can result in substantial and severe adverse
24 consequences, including the inability to make mortgage or car
25 payments. RT 517:25-518:9; PIRT 324:13-325:5. Although a benefit
26 award is generally retroactive to the date of the claim, the
27 veteran is not entitled to interest. RT 551:7-14.

1 **4. VA Efforts for Reducing Delay**

2 108. In Spring of 2007, Congress authorized VBA to hire an
3 additional 3,100 employees and provided the necessary additional
4 appropriations. RT 918:4-21; 999:1-19. 2,700 of these new
5 employees will be hired into the Compensation and Pension line of
6 business. Id. At the time of trial, 2,100 of the 2,700 employees
7 had already been hired. Id. Prior to this round of hiring, the
8 VBA had a total of 8,000 employees. Id.

9 109. On April 16, 2008, the VBA proposed a new pilot
10 program, in the form of a regulation, for expedited claims
11 adjudication. Defs.' Ex. 557; 38 C.F.R. Parts 3 and 20. The two-
12 year program would be limited to four ROs. Defs.' Ex. 557; 38
13 C.F.R. Parts 3 and 20. The program would ask veterans to sign a
14 waiver upon filing a claim whereby several time limits imposed on
15 the veteran would be shortened. Defs.' Ex. 557; 38 C.F.R. Parts 3
16 and 20; RT 1169:9-19. In addition, the program imposes a time
17 limit, albeit one that is unenforceable, on the VBA during the
18 appellate process between a veteran's Form 9 filing and an RO's
19 certification of appeal to the BVA. RT 1167:10-1168:22. There
20 are no consequences for the BVA if it exceeds its recommended time
21 limit. Id. 1024:11-16; 1168:10-14.

22 110. According to Deputy Under Secretary for Benefits
23 Walcoff's trial testimony, the VBA is also pursuing two other
24 efforts at reducing delays in the appellate process at ROs. RT
25 1020:6-1021:9. The first is to establish Appeals Resource Centers
26 dedicated solely to appellate work. Id. Mr. Walcoff conceded,
27 however, that these centers are not yet in place and he has not
28

1 seen a plan to create them. Id. 1162:7-8; 1167:6-8. The second
2 effort at reducing delays involves emphasizing appellate
3 performance measures in evaluations. Id. 1020:6-1021:9.

4 **5. Extraordinary Awards Procedure**

5 111. The Compensation & Pension Service ("C&P") is an
6 organization within the VA's central office in Washington, D.C.
7 RT 903:13-904:24. C&P is responsible for setting the policies
8 governing adjudication of SCDDC claims. Id. C&P is not empowered
9 to decide claims. Ex. 1260 at 12.

10 112. C&P conveys policies and procedures to ROs by
11 publishing manuals. RT 905:22-25. C&P issues "Fast Letters" to
12 RO directors when there are changes to a procedure within a
13 manual. Id. 913:4-25. ROs are expected to abide by the terms of
14 a Fast Letter. Id. 913:7-15. In Fast Letter 07-19, dated August
15 27, 2007, C&P outlined an "extraordinary awards" procedure for ROs
16 to follow when dealing with claims that would result in a
17 retroactive payment of at least eight years or a payment of more
18 than \$250,000. Ex. 375-A at 1-2; RT 1043:2-12. This procedure is
19 not specified in any statute or regulation. Ex. 1260 at 11-12.
20 The procedure directs ROs to send the claims folder for all cases
21 meeting the criteria to C&P for a concurring opinion before the
22 benefit award is given to the veteran. Ex. 375-A at 1-2; RT
23 1043:2-12. Pursuant to this Fast Letter, C&P only reviews claims
24 where the veteran was awarded retroactive benefit payments for
25 eight years or a payment of more than \$250,000. RT 1044:18-20.
26 C&P does not review denials of such claims. Id. Veterans are not
27 notified that their claims are reviewed pursuant to this
28

1 procedure. Id. 1045:17-23.

2 113. C&P has reviewed approximately 800 rating decisions,
3 most of which were reviewed because they called for benefits to be
4 retroactively awarded for eight or more years. RT 1043:20-24.
5 Less than 25 of the 800 rating decisions were reviewed by C&P
6 because the proposed award was greater than \$250,000. Id. The
7 vast majority of those reviews resulted in a reduction of the
8 proposed benefits. Ex. 1264 at 18.

9
10 **V. CONCLUSIONS OF LAW**

11 With the background of the foregoing findings, the Court
12 turns to the conclusions of law and, in particular, addresses the
13 relief sought by Plaintiffs.

14 **A. Standing**

15 1. Plaintiffs have demonstrated that their members have
16 suffered injuries in fact. Defenders of Wildlife, 504 U.S. at
17 560-61. As testified to at trial, their members have faced
18 significant delays in receiving disability benefits and medical
19 care from the VA. Furthermore, given the dire consequences many
20 of these veterans face without timely receipt of benefits or
21 prompt treatment for medical conditions, especially depression and
22 PTSD, these injuries are anything but conjectural or hypothetical.

23 2. Plaintiffs have also demonstrated a causal connection
24 between the injury and the conduct at issue. Id. As Defendants
25 concede, delays in health care, especially for mental health
26 issues, and delays in receipt of disability benefits, which are
27 often the primary or sole source of income for a veteran, can lead

1 to exactly the type of injuries complained of by Plaintiffs.

2 3. Finally, the relief sought by Plaintiffs would likely
3 result in the amelioration of the injuries. Id. Defendants argue
4 that any relief afforded by the Court would be too speculative to
5 redress Plaintiffs' injuries. If, however, the Court were to
6 order, for example, that the VBA adjudicate a veteran's appeal of
7 a denial of benefits within a certain time period, Plaintiffs'
8 injuries would be redressed. The issue, as discussed below, is
9 whether this and the other relief sought by Plaintiffs are within
10 the power of the Court to grant. Nonetheless, for the purpose of
11 standing, the Court finds that Plaintiffs' individual members
12 would have standing to sue.

13 4. It is clear, and Defendants do not argue otherwise, that
14 the interests at stake are germane to the purposes of both
15 organizations. Friends of the Earth, 528 U.S. at 181. Both
16 organizations are comprised primarily of veterans and both
17 organizations are working to decrease the wait times for, and
18 improve the quality of, mental health care and delivery of
19 disability benefits.

20 5. The participation of Plaintiffs' individual members was
21 not required at any point throughout the duration of the trial.
22 Id. For all of these reasons, the Court concludes that
23 Plaintiffs, as organizations, have standing to bring suit on
24 behalf of their members.

25 **B. Waiver of Sovereign Immunity**

26 6. To fall within the APA's waiver of sovereign immunity
27 under 5 U.S.C. § 702, Plaintiffs must establish that they

1 challenge final agency action for which there is no alternate
2 adequate remedy. Nat'l Wildlife Fed'n, 497 U.S. at 882; 5 U.S.C.
3 §§ 702, 704. In determining whether Plaintiffs have challenged
4 final agency action, the Court examines each of Plaintiffs
5 specific challenges below. In assessing whether there exists an
6 adequate alternate forum, the Court notes that in the Motion to
7 Dismiss Order, the Court held that the system established by
8 Congress for adjudicating veterans' individual benefit claims does
9 not provide an adequate alternative remedy for the limited purpose
10 of Plaintiffs' systemic, facial constitutional challenges.
11 However, as discussed in detail below, even though there may not
12 be adequate alternative remedy, Plaintiffs' challenges under the
13 APA fail for other reasons, including failure to challenge a final
14 agency action, failure to challenge a discrete agency action,
15 and/or failure to challenge an action that the agency is required
16 to take. See Nat'l Wildlife Fed'n, 497 U.S. at 882; Norton, 542
17 U.S. at 64. Nonetheless, in the interest of uniformity, the Court
18 briefly revisits its discussion on adequate alternative remedy.

19 7. The Veterans' Judicial Review Act ("VJRA"), Pub. L. No.
20 100-687, 102 Stat. 4105 (1988), permits veterans to challenge VA
21 decisions on individual benefits decisions in the CAVC. 38 U.S.C.
22 § 7261. Pursuant to statute, the CAVC, an Article I appellate
23 court, only has jurisdiction to affirm, reverse, or remand
24 decisions of the BVA on individual claims for benefits. 38 U.S.C.
25 § 7252(a). The CAVC's jurisdiction is therefore limited to the
26 issues raised by each veteran based on the facts in his or her
27 claim file from his or her particular case. See, e.g., Clearly v.

1 Brown, 8 Vet. App. 305, 307 (1995) (stating "[i]n order to obtain
2 review by the Court of Veterans Appeals of a final decision of the
3 Board of Veterans' Appeals ["BVA"], a person adversely affected by
4 that action must file a notice of appeal with the Court")
5 (emphasis added). Accordingly, the CAVC would not have
6 jurisdiction over or the power to provide a remedy for the
7 systemic challenges to the VA health system such as those brought
8 by Plaintiffs.

9 8. The CAVC itself has recognized its limited remedial
10 power, stating: "[I]t must be borne in mind that the jurisdiction
11 of this Court is over final decisions of the BVA. . . . Nowhere
12 has Congress given this Court either the authority or the
13 responsibility to supervise or oversee the ongoing adjudication
14 process which results in a BVA decision." Clearly, 8 Vet. App. at
15 308. Although the facts in Clearly are clearly distinguishable
16 from those before this Court, many of Plaintiffs' challenges are
17 aimed directly at the processes that the regional offices and the
18 BVA use to reach decisions of individual claims. These processes,
19 as conceded by the CAVC itself, are outside the purview of its
20 jurisdiction.

21 9. In Dacoran v. Brown, 4 Vet. App. 115 (1993), the CAVC,
22 then named the Court of Veterans Appeals ("CVA"), again recognized
23 the limitation of its own remedial power. The court noted that
24 constitutional challenges will be "presented to this Court only in
25 the context of a proper and timely appeal taken from such decision
26 made by the VA Secretary through the BVA." Id. at 119.
27 Plaintiffs in the present case, for the reasons stated below,

1 would be unable to bring a claim before a VA regional office, much
2 less appeal such a claim to the BVA or CAVC. Regarding its
3 ability to address constitutional issues through the All Writs
4 Act, the court stated:

5 Although this Court also has authority to
6 reach constitutional issues in
7 considering petitions for extraordinary
8 writs under 28 U.S.C. § 1651(a), the
9 Court may, as noted above, exercise such
10 authority only when a claimant has
11 demonstrated that he or she has no
12 adequate alternative means of obtaining
13 the relief sought and is clearly and
14 indisputably entitled to such relief.
15 See Erspamer [v. Derwinski], 1 Vet. App.
16 3, 7 (1990)]. Where, as here, a claimant
17 remains free to challenge the
18 constitutionality of a statute in the
19 U.S. district court, she has not
20 demonstrated that she lacks adequate
21 alternative means of obtaining the relief
22 sought.

23 Id. Thus, the very courts that were established by the VJRA
24 recognize not only the jurisdiction of district courts for
25 constitutional claims but, more importantly for this issue,
26 recognize the limited jurisdiction that they themselves possess.

27 10. Plaintiffs, as organizations seeking to protect the
28 interests of a broad class of veterans, would be unable to bring
suit in the VA system. Organizations do not and cannot submit
individual claims for benefits to the regional offices and,
therefore, are precluded from ever presenting claims on appeal to
the BVA, the CAVC, or the Federal Circuit. Under the position
advocated by Defendants, Plaintiffs would be barred from raising
these particular claims in any forum. Plaintiffs' members would
be left to litigate their own individual claims while also

1 attempting to shoehorn into their claims the challenges now
2 asserted. The statutory framework of the VA benefits system does
3 not provide for this and, as such, the VA benefits system is not
4 an adequate alternate forum for Plaintiffs' systemic and facial
5 constitutional challenges.

6 **C. Plaintiffs' Proposed Remedies**

7 11. One issue that has generated some difficulty throughout
8 this litigation has been determining exactly which practices and
9 actions of the VA Plaintiffs challenge. For example, in their
10 Complaint, Plaintiffs allege that "certain widespread practices
11 and policies of the VA" are illegal. Compl. ¶ 31. Among these,
12 Plaintiffs list protracted delays in adjudication and treatment of
13 PTSD, premature denial of PTSD claims, and "[v]arious other
14 illegal practices and procedures as outlined" in other parts of
15 the 68 page Complaint. Id. ¶ 31a-e.

16 To ensure that the Court addresses the specific relief sought
17 by Plaintiffs, the Court will use Plaintiffs' Proposed Conclusions
18 of Law as well as the Proposed Order submitted with Plaintiffs'
19 Post-Trial Briefing as a template to address Plaintiffs' claims
20 and remedies.

21 **1. Mental Health Care**

22 12. Section 1710 states, in part, that the Secretary "shall
23 furnish hospital care and medical services which the Secretary
24 determines to be needed to any veteran for a service-connected
25 disability" 38 U.S.C. § 1710(a)(1). It further states,
26 inter alia:

27 [A] veteran who served on active duty in

1 a theater of combat operations . . .
2 after November 11, 1998, is eligible for
3 hospital care, medical services and
4 nursing home care . . . notwithstanding
5 that there is insufficient medical
6 evidence to conclude that such condition
7 is attributable to such service.

8 38 U.S.C. § 1710(e)(1)(D). Section 1710(e)(3)(C)(i) provides a
9 five-year period for this medical care. For reasons discussed at
10 length in the Motion to Dismiss Order, the Court found that this
11 language created an entitlement to health care for veterans for
12 five years after separation from active duty. See Mot. to Dismiss
13 Order at 35-38. The Court need not repeat this discussion, as
14 even with this finding, the remedies proposed by Plaintiffs are
15 beyond the power of this Court.

16 13. Plaintiffs, in their Proposed Order, state the
17 following:

18 Defendants' failure to provide timely and
19 effective health care to veterans with
20 PTSD, and related or co-occurring
21 conditions such as depression or
22 traumatic brain injury, and/or veterans
23 exhibiting suicidal intentions or
24 symptoms, constitutes a statutory
25 violation of 38 U.S.C. §§ 1705 and 1710,
26 and that failure constitutes agency
27 action unreasonably delayed under 5
28 U.S.C. § 706(1).

29 Proposed Order ¶ 5.

30 14. Although the provision of care is mandatory, it is
31 beyond the power of this Court to determine when and how such care
32 shall be provided. Were it to do so, the Court would have to
33 substitute its own definitions of both "timely" and "effective,"
34 something prohibited by both the APA and by §§ 1705 and 1710
35 themselves.

1 **a. Timely and Effective Mental Health Care**

2 15. Section 706(1) of the APA permits federal courts to
3 order agencies to act only where the agency fails to "take a
4 discrete agency action that it is required to take." Norton, 542
5 U.S. at 64 (emphasis in original). "Thus, when an agency is
6 compelled by law to act . . . , but the manner of its action is
7 left to the agency's discretion, a court . . . has no power to
8 specify what the action must be." Id. at 65. Furthermore,
9 "[g]eneral deficiencies in compliance . . . lack the specificity
10 requisite for agency action." Id. at 66.

11 16. As became obvious from the parties' own mental health
12 experts, what constitutes "timely" and "effective" health care is
13 an issue that lacks consensus even among those who are experts in
14 the mental health field. Thus, for example, at trial there was
15 strong disagreement as to what constitutes appropriate or adequate
16 care for diagnosis and treatment of veterans with PTSD,
17 depression, and/or suicidal ideation. See, e.g., Findings of Fact
18 ¶¶ 58,59, supra. These disagreements alone, even if the Court had
19 the power to step in, would make it exceedingly difficult to
20 fashion a plan and order the VA to implement a prescribed course
21 of mental health care.

22 17. The Court is prohibited from even reaching that issue,
23 however, as "[t]he prospect of pervasive oversight by federal
24 courts over the manner and pace of agency compliance with . . .
25 congressional directives is not contemplated by the APA." Norton,
26 542 U.S. at 66. For these reasons, Plaintiffs' claim that the VA
27 is not providing timely or effective mental health care is plainly
28

1 precluded by the APA. Any order by this Court relating to the
2 sufficiency and timeliness of mental health care would effectively
3 draw this Court into the position of overseeing various aspects of
4 the VA, something the Supreme Court has expressly prohibited. The
5 Supreme Court has stated:

6 If courts were empowered to enter general
7 orders compelling compliance with broad
8 statutory mandates, they would
9 necessarily be empowered, as well, to
10 determine whether compliance was
11 achieved--which would necessarily mean
12 that it would ultimately become the task
13 of the supervising court, rather than the
14 agency, to work out compliance with the
15 broad statutory mandate, injecting the
16 judge into the day-to-day agency
17 management.

18 Norton, 542 U.S. at 67.

19 18. Finally, Plaintiffs' claim that the VA is failing to
20 provide any mental health care is not supported by the evidence
21 presented at trial. Even had Plaintiffs' made this showing,
22 however, the APA would likely have prevented review in this Court,
23 as the APA does not allow "plaintiffs to evade the finality
24 requirement with complaints about the sufficiency of an agency
25 action dressed up as an agency's failure to act." Ecology Ctr.,
26 192 F.3d at 926 (internal quotation marks omitted).

27 19. In addition, § 1710 commits decisions about the
28 provision of medical care to the Secretary's discretion. 38
U.S.C. § 1710. As noted above, the Court would have no manner in
which to determine what type of mental health care is required.
See Webster v. Doe, 486 U.S. 592, 600 (1988) (stating "under §
701(a)(2) [of the APA], even when Congress has not affirmatively

1 precluded judicial oversight, review is not to be had if the
2 statute is drawn so a court would have no meaningful standard
3 against which to judge the agency's exercise in discretion")
4 (internal quotation marks omitted). Section 1705 also dictates
5 that the Secretary "ensure that the system will be managed in a
6 manner to ensure that the provision of care to enrollees is timely
7 and acceptable in quality." 38 U.S.C. § 1705. As such, the
8 design and implementation of a health care enrollment system is
9 delegated to the Secretary of the VA, leaving courts with no
10 meaningful standards against which to judge the agency's exercise
11 in discretion. Plaintiffs' challenge to the timeliness and
12 effectiveness of the VA's delivery of mental health care is thus
13 also barred by §§ 1705 and 1710.

14 **b. Delay in Mental Health Care and Due Process**

15 20. The TRAC factors provide the framework for a court to
16 determine whether agency action has been unreasonably delayed.
17 See Section III.D.1., supra. Before the Court can even reach the
18 TRAC factors and the issue of unreasonable delays in the provision
19 of mental health care, however, there must be a showing that there
20 are in fact system-wide delays in providing this care. The
21 evidence presented at trial falls short of this. For example, the
22 Court received evidence that the majority of veterans of Iraq and
23 Afghanistan are being seen at clinics offering mental health
24 services within 30 days. Findings of Fact ¶ 40. Although the
25 evidence clearly did not prove that every veteran always gets
26 immediate mental health care, it by no means follows that there is
27 a system-wide crisis in which health care is not being provided

1 within a reasonable time.⁴

2 **c. Clinical Appeals Process**

3 21. Plaintiffs, in their Proposed Order, assert the
4 following:

5 [T]he VA's process for resolving clinical
6 disputes about health care treatment
7 violates the Due Process Clause in that
8 it does not apply to refusals to provide
9 care

10 Proposed Order ¶ 6. As noted in the Findings of Fact, a veteran
11 may appeal a clinical medical decision, but if, for example, a
12 veteran is told to return at a later date solely on the basis that
13 there are no available appointments, he or she has no way of
14 appealing this decision. If, however, a veteran is told to come
15 back later because a VA employee has indicated that the veteran's
16 health will not be adversely affected by coming at a later time,
17 then the veteran can appeal this clinical diagnosis.

18 22. "[D]ue process is flexible and calls for such procedural
19 protections as the particular situation demands." Mathews, 424
20 U.S. at 335. In evaluating whether a procedure satisfies Due
21 Process, courts balance (1) the private interest, (2) the risk of
22 erroneous deprivation and the likely value, if any, of extra
23 safeguards, and (3) the government's interest, especially the
24 burden any additional safeguards would impose. Id. at 332.

25 23. Without question, the private interest of veterans in
26 receiving health care is high. The risk of erroneous deprivation,

27 ⁴ Plaintiffs, perhaps realizing this, did not include in
28 their Proposed Order any language relating to Due Process
violations and delays in mental health care. See Proposed Order ¶¶
4-6.

1 however, is less so. The Court heard testimony during the trial
2 that veterans who present at a VA medical facility with emergency
3 mental health issues are seen immediately. This is not to say
4 that every time a veteran presents with a mental health emergency,
5 he or she is guaranteed immediate treatment. Nonetheless,
6 Plaintiffs did not prove a systemic denial or unreasonable delay
7 in mental health care. In addition, a veteran who is told to come
8 back at a later time because his or her health is such that
9 immediate treatment is not required may appeal this clinical
10 decision. Finally, additional safeguards at this level would
11 impose burdens on the VA. See Parham v. J.R., 442 U.S. 584, 605
12 (1979) (stating that the government "has a genuine interest in
13 allocating priority to the diagnosis and treatment of patients . .
14 . rather than to time-consuming procedural minuets").

15 24. Plaintiffs' Proposed Order also states that the clinical
16 appeals process violates Due Process because "there is no
17 opportunity for any hearing by a neutral decision-maker, the
18 process is unduly complicated and lengthy, and there is no
19 provision for any expedited process that would apply in an
20 emergency situation such as a threatened suicide." Proposed Order
21 ¶ 6. "Procedural due process requires adequate notice and an
22 opportunity to be heard." Kirk, 927 F.2d at 1107.

23 25. The process for clinical appeals involves consultation
24 with the treating physician, access to patient advocates, and the
25 opportunity to appeal a medical decision to both the facility and
26 VISN level. Findings of Fact ¶ 52. Moreover, due process does
27 not "always require an adversarial hearing," nor does it require
28

1 an "independent decision maker come from outside the hospital
2 administration." Hickey, 722 F.2d at 549. The process afforded
3 veterans seeking to appeal their medical decisions strikes the
4 Court as an appropriate balance between safeguarding the veteran's
5 interest in medical treatment and permitting medical treatment
6 without overly burdensome procedural protections. In addition,
7 the Court is mindful of the Supreme Court's admonition that "[t]he
8 mode and procedure of medical diagnostic procedures is not the
9 business of judges." Parham, 442 U.S. at 607-08. For these
10 reasons, the Court cannot conclude that the VA clinical appeals
11 process violates Due Process.

12 **2. Mental Health Strategic Plan**

13 26. Plaintiffs ask the Court to order the VA, within 150
14 days, to fully implement the MHSP. Proposed Order ¶ 12.
15 Plaintiffs concede that the MHSP is a good plan. Thus, rather
16 than attacking the MHSP itself, Plaintiffs instead attack the VA's
17 slow progress and/or failure in implementing the MHSP.

18 27. Such an attack relies on § 706 of the APA, which
19 provides that a "reviewing court shall compel agency action
20 unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(a).
21 "Review of an agency's failure to act has been referred to as an
22 exception to the final agency action requirement." Ctr. for
23 Biological Diversity, 218 F. Supp. 2d at 1157. "Courts have
24 permitted jurisdiction under the limited exception to the finality
25 doctrine only when there has been a genuine failure to act."
26 Ecology Ctr., 192 F.3d at 926. The Ninth Circuit "has refused to
27 allow plaintiffs to evade the finality requirement with complaints

1 about the sufficiency of an agency action dressed up as an
2 agency's failure to act." Id. (internal quotation marks omitted).
3 Plaintiffs' challenge to the manner and speed with which the MHSP
4 has been implemented is foreclosed by this caselaw.

5 28. Furthermore, waiver of sovereign immunity under § 706 of
6 the APA requires a challenge to "a discrete agency action that
7 [the agency] is required to take." Norton, 542 U.S. at 64. The
8 MHSP falls outside of this definition. The MHSP consists of 265
9 recommendations. Findings of Fact ¶ 27. Whether a plan with this
10 many recommendations can be characterized as "discrete agency
11 action" is dubious. More problematic, however, is the fact that
12 the actions and strategies outlined in the MHSP are
13 recommendations, and, accordingly, are not actions the VA "is
14 required to take."

15 29. Finally, as Plaintiffs concede, the MHSP was developed
16 as a five year plan and is currently only in the fourth year of
17 implementation. It would be anomalous for the Court to find that
18 the MHSP were a final agency action or that the VA has failed or
19 delayed to implement the MHSP, when the action is ongoing and is
20 not even expected to conclude until late next year. For these
21 reasons, Plaintiffs' request that the Court order the VA to
22 implement the MHSP within 150 days is barred by sovereign
23 immunity.

24 3. Feeley Memorandum

25 30. Plaintiffs' request that the Court order the VA to fully
26 implement the Feeley Memo within 150 days is equally problematic
27 under the APA's requirements for waiver of sovereign immunity.

1 Although the Feeley Memo, and its call for 24-hour mental health
2 triage and 14-day follow-up mental health care is much more akin
3 to a discrete agency action than the MHSP, it nonetheless is not
4 an action that the VA is required to take. Instead, the Feeley
5 Memo contains "initiatives" created by the Secretary that were
6 designed to "enhance the capacity of mental health services, and
7 facilitate access to high quality services." Findings of Fact ¶
8 34. "The limitation to required agency action rules out judicial
9 direction of even discrete agency action that is not demanded by
10 law." Norton, 542 U.S. at 65. Moreover, "[g]eneral deficiencies
11 in compliance, unlike [a] failure to issue a ruling . . ., lack
12 the specificity requisite for agency action." Id. at 66. For
13 these reasons, Plaintiffs' request that the Court order the VA to
14 fully implement and monitor the Feeley Memo initiatives is barred
15 by sovereign immunity.

16 **4. Delays in Adjudication of SCDDC Benefits**

17 31. Plaintiffs assert that the delays in adjudicating SCDDC
18 benefit claims are excessive and unreasonable and therefore
19 violate the rights of veterans under the APA and the Due Process
20 Clause.

21 32. It takes the VBA, on average, 183 days to adjudicate a
22 claim filed by a veteran. Findings of Fact ¶ 67. Of the more
23 than 830,000 ratings claims filed each year, approximately 11%
24 result in an NOD being filed by the veteran. Id. ¶ 89. Only 4%
25 of the total number of claims filed each year actually proceed
26 past the NOD to a decision by the BVA. Id. For veterans who
27 pursue an appeal to completion, it takes, on average, 1,419 days
28

1 to receive a BVA decision after filing an NOD. Id. ¶ 95.

2 Although these delays in benefits claims adjudications, especially
3 for appeals, are substantial, the existing statutory framework and
4 caselaw prevent this Court from taking remedial action. This
5 conclusion is reinforced by the fact that only 4% of the total
6 claims each year are appealed and pursued to a decision by the
7 BVA.

8 33. As noted above, 38 U.S.C. § 511 prevents the Court from
9 reviewing delays in individual veterans' cases. The issue,
10 however, of whether a veteran's benefit claim adjudication has
11 been substantially delayed will often hinge on specific facts of
12 that veteran's claim. For example, a veteran who raises seven or
13 eight issues in his or her claim will likely face a more
14 protracted delay than a veteran who raises only one or two issues.
15 Thus, although the determination of whether the delay is
16 unreasonable may depend on the facts of each particular claim,
17 Crosby v. Soc. Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986), §
18 511 prevents this Court from undertaking such a review.

19 34. Furthermore, were the Court to implement the injunctive
20 relief requested by Plaintiffs and order that the VA shorten the
21 average wait times, such an order would invariably implicate VA
22 regulations. For example, 38 C.F.R. § 3.159(b)(1) requires the VA
23 to notify claimants once the VA has received most or all of a
24 claim application; 38 C.F.R. § 3.159(c) requires the VA to assist
25 the veteran in obtaining medical records; 38 C.F.R. § 3.103(c)
26 provides the time limit for filing a Notice of Disagreement; 38
27 C.F.R. § 3.109(a) provides that a veteran's claim is treated as

1 abandoned if evidence is not submitted within one year; and 38
2 C.F.R. §§ 20.200-20.202 set forth the procedural requirements to
3 pursue an appeal. 38 U.S.C. § 502 permits litigation of
4 challenges to VA regulations only in the Federal Circuit. See
5 Preminger, 422 F.3d at 821 (stating "Congress has explicitly
6 provided for judicial review of direct challenges to VA rules and
7 regulations only in the Federal Circuit"). Plaintiffs argue that
8 even though various regulations are implicated in the relief they
9 seek, § 502 does not strip the jurisdiction of this Court because
10 Plaintiffs do not directly challenge the regulations. An order
11 expediting claims adjudications, however, would force the VA to
12 alter or repeal some of these regulations. Although the Court
13 does not suggest that VA regulations alone are responsible for the
14 substantial delays, an injunction requiring expedited claims
15 processing would necessarily challenge some of these regulations,
16 and any such challenge is reviewable only in the Federal Circuit.

17 35. Plaintiffs also argue they are entitled to relief under
18 the APA for the delays in claims adjudications. In assessing
19 whether agency action has been unreasonably delayed pursuant to §
20 706 of the APA, courts look to the TRAC factors.⁵ See III.D.1.,
21 supra. Although the delays faced by veterans, especially during
22 the appeals process, are significant, the TRAC factors militate
23 against a finding of unreasonableness. The first and second
24 factors, dealing with the "rule of reason" and any Congressional

25
26 ⁵ It is uncontested the adjudication of benefits claims is a
27 discrete agency action that the VA is required to take. Norton,
28 542 U.S. at 64; 5 U.S.C. § 706.

1 timetable or indication of the speed with which the agency should
2 act, favor neither a finding of reasonableness nor
3 unreasonableness. Various statutes admonish the VA to adjudicate
4 benefits claims and appeals in a timely manner. See, e.g., 38
5 U.S.C. § 7101 (statutory duty to hire sufficient personnel to
6 process appeals at the BVA in a timely manner); 38 U.S.C. § 5109B
7 (statutory duty to resolve remands in expeditious manner). These
8 statutes, rather than providing meaningful signposts for what
9 constitutes a reasonable time, however, instead beg the question.
10 This conclusion is reinforced by the fact that Congress
11 specifically did not include any fixed time limits for the
12 adjudication of veterans benefits claims, an act of which it is
13 perfectly capable and which would definitively and immediately
14 remedy the delays. Cf. Heckler v. Day, 467 U.S. 104, 117-18
15 (1984) (stating "[i]n light of Congress' continuing concern that
16 mandatory deadlines would subordinate quality to timeliness, and
17 its recent efforts to ensure the quality of agency determinations,
18 it hardly could have been contemplated that courts should have
19 authority to impose the very deadlines it repeatedly has
20 rejected").⁶

21 36. The third TRAC factor favors a finding of
22 unreasonableness. Delays affecting human health and welfare are
23 less tolerable than those in the sphere of economic regulation and

24
25 ⁶ Legislation was introduced, and rejected, during the 102st
26 and 102nd Congresses that would have required the VA to pay interim
27 benefits if disability and dependency claims that were not decided
28 within 180 days. See Veterans' Claims Administrative Equity Act of
1990, H.R. 5793, 101st Cong. (1990); Veterans' Claims
Administrative Equity Act of 1991, H.R. 141, 102nd Cong. (1991).

1 no one can dispute that the health and welfare of veterans is at
2 stake. For this same reason the fifth factor favors relief, as
3 the nature and extent of the interests prejudiced by the delay
4 could not be any more serious. The sixth factor, in which a court
5 need not find impropriety in order to find the agency action was
6 unreasonably delayed, also favors relief. Although the VA's track
7 record, especially in the area of delays, is troubling, the Court
8 has found no impropriety.

9 37. These factors, however, cannot overcome the fourth
10 factor, which states that "the court should consider the effect of
11 expediting delayed action on agency activities of a higher or
12 competing priority." Indep. Mining Co., 105 F.3d at 507 n.7. The
13 Court heard testimony that the current delays in the claims
14 appeals process are, in part, the result of the VA's decision to
15 emphasize initial claim adjudication at the expense of appeals.
16 Findings of Fact ¶ 91. Clearly this does not fully explain the
17 significant delays. One of the most common reasons for a claim to
18 be remanded to an RO is the VA's failure to meet its duty to
19 assist veterans. This is proof that internal, avoidable forces
20 within the VA are also creating these delays. Nonetheless, given
21 the substantial number of claims and appeals received each year by
22 the VA, and the fact that only 11% of veterans file Notices of
23 Disagreement after their claims are adjudicated at the RO level
24 and only 4% of the total claims are actually pursued to a decision
25 by the BVA, the Court finds that the fourth TRAC factor outweighs
26 the others. An order by this Court requiring the VA to decrease
27 its appeals times would necessarily impact those seeking initial
28

1 benefits, as resources would be diverted from the RO level to the
2 appellate level. As discussed elsewhere in this Order, claims
3 adjudications at the RO level already face delays. The relief
4 Plaintiffs seek would, in effect, divert resources from the RO
5 level, where 88% of veterans finalize their receipt of benefits,
6 so that the 4% to 11% of veterans who pursue appeals would face
7 lessened delays. Given that almost 90% of veterans depend solely
8 on the RO adjudication process for their benefits, the Court is
9 wary of granting relief that would jeopardize the already taxed
10 ROs. For these reasons, the TRAC factors do not favor a finding
11 that the delays in the VA claims adjudication system are
12 unreasonable. This conclusion is consistent with the Supreme
13 Court's warning to district courts that the "prospect of pervasive
14 oversight by federal courts over the manner and pace of agency
15 compliance with . . . congressional directives is not contemplated
16 by the APA." Norton, 542 U.S. at 66.

17 38. Plaintiffs also assert that the "[d]elays and waiting
18 times for applicants and recipients filing SCDDC claims or appeals
19 are so lengthy as to constitute an unconstitutional deprivation of
20 property under the Due Process Clause." Proposed Order ¶ 7.
21 Recipients of statutorily-entitled compensation have a property
22 interest under the Due Process Clause in the continued receipt of
23 such compensation. Mathews, 424 U.S. at 332; Goldberg v. Kelly,
24 397 U.S. 254, 261-62 (1970). More importantly for present
25 purposes, "[t]he Ninth Circuit has long held that applicants have
26 a property interest protectible under the Due Process Clause where
27 the regulations establishing entitlement to the benefits are . . .

1 mandatory in nature." Foss v. Nat'l Marine Fisheries Serv., 161
2 F.3d 584, 588 (9th Cir. 1998).

3 39. Claimants who satisfy the statutory criteria for
4 eligibility are entitled as a matter of law to SCDDC benefits.
5 Based on the statutory framework, many veterans have a protected
6 property interest as applicants for and recipients of SCDDC
7 benefits.

8 40. "[T]here is no talismanic number of years or months,
9 after which due process is automatically violated." Coe v.
10 Thurman, 922 F.2d 528, 531 (9th Cir. 1990). "In determining when
11 due process is no longer due process because past due, the
12 influence of other significant circumstances is not to be
13 ignored." Wright v. Califano, 587 F.2d 345, 354 (7th Cir. 1978).
14 "Delay is a factor but not the only factor." Id. Although the
15 delays in claims adjudication are significant, the Court, in light
16 of many of the factors creating these delays, cannot conclude that
17 the due process rights of veterans are being violated. The
18 court's discussion in Wright of delays in the Social Security
19 Administration context is illuminating. The court stated:

20 In view of the reasons for delay,
21 nationwide in scope, not individualized,
22 and the nature of particular benefits, a
23 judicial fiat cannot help the SSA or
24 claimants. Although judicial intervention
25 may be required at some point, the
26 solution must come from the SSA itself
with the assistance of Congress. To
impose on the SSA the crash review
program sought by plaintiffs could be
expected to result in a deterioration of
the quality of the review, and possibly
more injustice to claimants than justice.

27 Wright, 587 F.2d at 356. The Court finds this reasoning

1 applicable to the present case. See also Fed'l Trade Comm'n v.
2 Weingarten, 336 F.2d 687, 692 (5th Cir. 1964) (holding that "it
3 would be the extremely rare case where a Court would be justified
4 in holding . . . that the passage of time and nothing more
5 presents an occasion for the peremptory intervention of an outside
6 Court in the conduct of an agency's adjudicative proceedings").

7 **5. Claims Adjudication Process**

8 41. Plaintiffs assert that the claims adjudication process
9 violates the due process rights of veterans, stating:

10 Given the adversarial and complicated
11 nature of the VA claims processes, the
12 unavailability or lack of utilization of
13 basic procedural protections, such as a
14 right to a pre-decisional hearing and the
15 right to discovery, both alone and in
16 combination with the inability to retain
17 paid counsel at the Regional Office
18 level, constitute an independent
19 violation of the Due Process Clause.

20 Proposed Order ¶ 8.

21 42. VA regulations state:

22 Every claimant has the right to written
23 notice of the decision made on his or her
24 claim, the right to a hearing, and the
25 right of representation. Proceedings
26 before VA are ex parte in nature, and it
27 is the obligation of VA to assist a
28 claimant in developing the facts
pertinent to the claim and to render a
decision which grants every benefit that
can be supported in law while protecting
the interests of the Government.

38 C.F.R. § 3.103. In addition, 38 U.S.C. § 5904(c) prohibits
paid counsel at the RO level. Once the veteran files a notice of
disagreement with an RO decision, the veteran may then retain paid
counsel.

1 42. To begin, the Court notes that in the Motion to Dismiss
2 Order, the Court cited a case from the Federal Circuit in support
3 of the proposition that the claims adjudication system, although
4 designed to be non-adversarial, had shifted towards an adversarial
5 system. See Mot. to Dismiss Order at 32 (stating "[t]he Federal
6 Circuit, which has exclusive appellate jurisdiction under the
7 VJRA, has recognized [a] de-facto shift towards an adversarial
8 system") (citing Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998)
9 (en banc)). In Bailey, the court stated:

10 Since the Veterans' Judicial Review Act .
11 . . . , it appears the system has changed
12 from a nonadversarial, ex parte,
13 paternalistic system for adjudicating
14 veterans' claims, to one in which
15 veterans . . . must satisfy formal legal
 requirements, often without the benefit
 of legal counsel, before they are
 entitled to administrative and judicial
 review.

16 Bailey, 160 F.3d at 1365 (internal citations and quotation marks
17 omitted). Based on this assessment, this Court permitted
18 Plaintiffs' due process challenge to the VA claims adjudication
19 system to proceed, noting, "[i]f the VA claims adjudication
20 process were truly non-adversarial, then Plaintiffs' due process
21 claim would be on shaky ground." Mot. to Dismiss Order at 32.

22 43. Four years after Bailey, the Federal Circuit clarified
23 its holding, stating that the "veterans' benefits system remains a
24 non-adversarial system when cases are pending before the Veterans'
25 Administration," while the "Court of Appeals for Veterans Claims'
26 proceedings are not non-adversarial." Forshey v. Principi, 284
27 F.3d 1335, 1355 (Fed. Cir. 2002) (en banc) (superceded by statute
28

1 on other grounds by Pub. L. No. 107-330, § 402(a), 116 Stat. 2820,
2 2832 (2002)). Thus, according to the Federal Circuit, the process
3 at the RO level remains non-adversarial.

4 44. Nonetheless, Plaintiffs challenge the absence of trial-
5 like proceedings and assert that the current system violates
6 veterans' due process rights. "[D]ue process is flexible and
7 calls for such procedural protections as the particular situation
8 demands." Mathews, 424 U.S. at 335. In evaluating whether a
9 procedure satisfies Due Process, courts balance (1) the private
10 interest, (2) the risk of erroneous deprivation and the probable
11 value, if any, of extra safeguards, and (3) the government's
12 interest, including the function involved and the fiscal and
13 administrative burdens that the additional or procedural
14 requirement would entail. Id. Although "[p]rocedural due process
15 requires adequate notice and an opportunity to be heard," Kirk,
16 927 F.2d at 1107, it does not "always require an adversarial
17 hearing." Hickey, 722 F.2d at 549. "The role of the judiciary is
18 limited to determining whether the procedures meet the essential
19 standard of fairness under the Due Process Clause and does not
20 extend to imposing procedures that merely displace congressional
21 choices of policy." Landon v. Plasencia, 459 U.S. 21, 34-35
22 (1982).

23 45. Under the Mathews factors, the current system for
24 adjudicating veterans' SCDDC claims satisfies due process. It is
25 without doubt that veterans and their families have a compelling
26 interest in receiving disability benefits and that the
27 consequences of erroneous deprivation can be devastating. In

1 looking at the totality of SCDDC claims, however, the risk of
2 erroneous deprivation is relatively small. 11% of veterans file
3 Notices of Disagreement upon adjudication of their claims by ROs.
4 Only 4% proceed past the NOD to a decision by the BVA. Thus,
5 while the avoidable remand rates at the VA are extraordinarily
6 high,⁷ only 4% of veterans who file benefits claims are affected.
7 Plaintiffs here "confront the constitutional hurdle posed by the
8 principle enunciated in cases such as Mathews to the effect that a
9 process must be judged by the generality of cases to which it
10 applies, and therefore, process which is sufficient for the large
11 majority of a group of claims is by constitutional definition
12 sufficient for all of them." Walters v. Nat'l Ass'n of Radiation
13 Survivors, 473 U.S. 305, 330 (1985).

14 46. Moreover, although the additional safeguards Plaintiffs
15 seek would likely reduce the number of avoidable remands and
16 erroneous deprivations, the fiscal and administrative burdens of
17 these additional procedural requirements are significant.
18 Plaintiffs seek, in essence, to transform the claims adjudication
19 process at the RO level from an ostensibly non-adversarial
20 proceeding into one in which the full panoply of trial procedures
21 that protects civil litigants is available to veterans. For
22 example, Plaintiffs seek the general right of discovery, including
23 the power to subpoena witnesses and documents, the ability to
24 examine and cross-examine witnesses, the ability to pay an

25
26 ⁷ The avoidable remand rate measures remands from the BVA to
27 the ROs where the RO made an error in the initial adjudication of
28 the claim. The current rate is between 19% and 44%. Findings of
Fact ¶ 102.

1 attorney, and the right to a hearing.⁸ Implementation and
2 maintenance of such a system would be costly in terms of the
3 resources and manpower that the VA would need to commit to the RO
4 proceedings.

5 47. The Supreme Court addressed a similar challenge to the
6 VA benefits adjudication process in Walters, 473 U.S. at 307.
7 There, the plaintiffs challenged the statutory fee limitation on
8 attorneys during VA benefits proceedings. Id. at 307. The Court,
9 after noting that "the [benefit adjudication] process here is not
10 designed to operate adversarially," id. at 330, held that,
11 "[e]specially in light of the Government interests at stake," the
12 limit on attorneys fees did not violate the Due Process Clause.
13 Id. at 334. In so doing, the Court noted the high showing
14 necessary to "warrant upsetting Congress' judgment that this is
15 the manner in which it wishes claims for veterans' benefits
16 adjudicated." Id. Although it might seem anomalous, as one
17 witness candidly suggested at trial, that criminal defendants and
18 undocumented immigrants are permitted to pay attorneys at their
19 initial proceedings while veterans are prohibited from doing the
20 same, Congress has nonetheless seen fit to establish such a system
21 and this Court, so long as the system does not violate the
22 Constitution, is powerless to alter it. See also Vt. Yankee
23 Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S.
24 519, (1978) (stating:

25
26 ⁸ The Court notes that veterans currently have the right to a
27 hearing before an RO. 38 C.F.R. § 3.103(c) ("Upon request, a
28 claimant is entitled to a hearing at any time on any issue involved
in a claim . . .").

1 Agencies are free to grant additional
2 procedural rights in the exercise of
3 their discretion, but reviewing courts
4 are generally not free to impose them if
5 the agencies have not chosen to grant
6 them. This is not to say necessarily
7 that there are no circumstances which
8 would ever justify a court in overturning
9 agency action because of a failure to
10 employ procedures beyond those required
11 by the statute. But such circumstances,
12 if they exist, are extremely rare.)

13 48. For these reasons, the Court finds that the SCDDC
14 benefits adjudication process does not violate the Due Process
15 Clause.

16 **6. Right of Access the Courts**

17 49. Plaintiffs assert that the lack of adequate procedural
18 protections for veterans in the SCDDC claims process deprives
19 claimants of meaningful access to the courts and of their right to
20 redress grievances in violation of the First Amendment and the Due
21 Process Clause. Plaintiffs argue that the cumulative effect of
22 foreclosing the opportunity to subpoena witnesses and records,
23 disallowing payment of counsel, and requiring veterans to rely on
24 non-neutral VBA service representatives denies veterans any
25 meaningful opportunity to litigate their appeals at the CAVC and
26 the Federal Circuit.

27 50. A forward-looking denial of access claim requires "an
28 arguable underlying claim and present foreclosure of a meaningful
opportunity to pursue that claim." Broudy, 460 F.3d at 121
(relying on Lewis v. Casey, 518 U.S. 343, 353 (1996), and
Christopher v. Harbury, 536 U.S. 403, 415)).

51. Plaintiffs' claim is foreclosed by Walters, 473 U.S. at

1 305, and by this Court's finding that the SCDDC benefits
2 adjudication process does not violate the Due Process Clause.

3 52. In the present case, as in Walters, "the asserted First
4 Amendment interest is primarily the individual interest in best
5 prosecuting a claim" Walters, 473 U.S. at 335. The Court
6 in Walters, however, rejected the notion that there was a
7 meaningful distinction between the plaintiffs' due process claims
8 and their First Amendment claim, stating, "appellees' First
9 Amendment arguments, at base, are really inseparable from their
10 due process claims." Id. Accordingly, the appellees' "First
11 Amendment claim ha[d] no independent significance" from the due
12 process claims. Id. The same analysis is directly applicable to
13 the present action. For these reasons, Plaintiffs' right of
14 access claim is without merit.

15 **7. Extraordinary Awards Procedure**

16 53. Plaintiffs assert that the informal adoption of the
17 Extraordinary Awards Procedure ("EAP") by C&P, as described in the
18 Findings of Fact ¶¶ 111-13, supra, deprives veterans with claims
19 that would result in a retroactive payment of at least eight years
20 of benefits or a payment of more than \$250,000 of their property
21 interest in the receipt of SCDDC benefits under the Due Process
22 Clause.⁹

23 54. A brief review of the EAP: C&P is an organization within
24 the VA's central office in Washington, D.C., that is responsible

25
26 ⁹ A similar challenge to the EAP is now pending in the
27 Federal Circuit. See Military Order of the Purple Heart v. Sec'y
28 of Veterans Affairs, Docket No. 2008-7076 (Fed. Cir.).

1 for setting the policies governing adjudication of SCDDC claims.
2 Although C&P is not empowered to decide claims, it does convey
3 policies and procedures to ROs by publishing manuals. When there
4 are changes to a procedure within a manual, C&P issues "Fast
5 Letters" to RO directors. In Fast Letter 07-19, dated August 27,
6 2007, C&P outlined the EAP. This procedure is not specified in
7 any statute or regulation. The procedure directs ROs
8 to send the claims folders for all cases meeting the criteria¹⁰ to
9 C&P for a concurring opinion before the benefit award is given to
10 the veteran. C&P reviews only the granting of such claims by ROs,
11 not denials, and veterans are not notified that their claims are
12 reviewed pursuant to this procedure. C&P has reviewed
13 approximately 800 rating decisions and almost all of these reviews
14 resulted in a reduction of the proposed benefits.¹¹

15 55. The Secretary of the VA may delegate the "authority to
16 act and to render decisions, with respect to all laws administered
17 by the Department, to such officers and employees as the Secretary
18 may find necessary." 38 U.S.C. § 512(a). In addition, the
19 "Secretary has authority to prescribe all rules and regulations
20 which are necessary or appropriate to carry out the laws
21 administered by the Department and are consistent with those laws,
22 including . . . the manner and form of adjudications and awards."
23 38 U.S.C. § 501(a). In delegating authority for benefits

24
25 ¹⁰ Claims that would result in a retroactive payment of at
26 least eight years of benefits or a payment of more than \$250,000
are reviewed by C&P.

27 ¹¹ These facts are taken from the Findings of Fact, ¶¶ 111-13,
28 supra.

1 adjudication, the following regulation was promulgated:

2 Authority is delegated to the Under
3 Secretary for Benefits and to supervisory
4 or adjudicative personnel within the
5 jurisdiction of the Veterans Benefits
6 Administration designated by the Under
7 Secretary to make findings and decisions
8 under the applicable laws . . . as to
entitlement of claimants to benefits
under all laws administered by the [VA]
governing the payment of monetary
benefits to veterans and their
dependents, within the jurisdiction of
[C&P].

9 38 C.F.R. § 3.100.

10 56. As a threshold matter, Defendants argue that Plaintiffs
11 have failed to demonstrate that any of their members have been
12 affected or will be affected by the EAP. As Defendants concede,
13 however, a veteran whose benefit award is reviewed by C&P is never
14 told of this review process. Thus, for example, a veteran's
15 benefit may initially be set at \$275,000 by the RO. Because the
16 award is greater than \$250,000, however, the EAP is triggered and,
17 before the veteran is notified of this award, his claim folder is
18 sent to C&P. Hypothetically, C&P might then reduce the award to
19 less than \$250,000. The veteran would subsequently be granted the
20 benefit without ever knowing that his award had been reduced by
21 C&P, or even that the benefit award had initially qualified for
22 EAP. As veterans have no way of knowing whether their benefits
23 were affected by the EAP, Plaintiffs have no way of demonstrating
24 that any of their members were adversely affected. For present
25 purposes, the Court is confident that Plaintiffs have standing to
26 pursue this claim, which the Court discusses in the following
27 Conclusion of Law, ¶ 57.

1 57. Plaintiffs argue that, in essence, the EAP is an extra-
2 judicial process that the VA has added to the benefits
3 adjudication system in an effort to strip veterans of benefits
4 that have already been determined by the RO. As the above-cited
5 statutory language indicates, Congress provided the Secretary of
6 the VA with wide discretion in determining how benefits are to be
7 determined. See 38 U.S.C. § 512(a). Against this backdrop, the
8 Court is forced to conclude that the EAP is an internal management
9 directive that merely establishes the procedures by which a
10 certain class of benefits claims is reviewed. The EAP is
11 essentially an auditing mechanism implemented by the VA to ensure
12 that these types of awards are accurately adjudicated. Such a
13 procedure does not offend due process.

14
15 **VI. POST-TRIAL HEARING**

16 On June 10, 2008, after the close of evidence, the Court held
17 a hearing regarding newly discovered evidence. Docket Nos. 236,
18 237. The evidence was an email sent by the PTSD Program
19 Coordinator of the Central Texas Veterans Health Care system, Dr.
20 Norma Perez, to her colleagues. Plaintiffs apparently were
21 provided the email by a Washington D.C.-based non-profit
22 organization, which had procured the email through a Freedom of
23 Information Act ("FOIA") request.¹² See Pls.' Letter to Court,
24 Docket No. 231.

25 At the hearing, the Court permitted the email to be entered

26 _____
27 ¹² It is unclear to the Court why this email was not produced
28 by Defendants prior to the trial.

1 into evidence and hereby designates the email Plaintiffs' Trial
2 Exhibit 1347. In addition, Plaintiffs requested that the Court
3 enter into evidence the transcript from a June 4, 2008, hearing
4 held by the Senate Committee on Veterans Affairs. This hearing
5 had been convened by the Senate Committee to address the above-
6 described email. At the Senate hearing, testimony was received
7 from Dr. Norma Perez, Dr. Michael Kussman, Under Secretary for
8 Health, Dr. Katz, Deputy Chief of Patient Care Services Office of
9 Mental Health for the VA, and Admiral Patrick Dunne, Acting Under
10 Secretary for Benefits. The Court entered the transcript for this
11 hearing into evidence and hereby designates it Plaintiffs' Trial
12 Exhibit 1348.

13 The email at issue contains the subject "Suggestion," and
14 states:

15 Given that we are having more and
16 more compensation[-]seeking veterans, I'd
17 like to suggest that you refrain from
18 giving a diagnosis of PTSD straight out.
19 Consider a diagnosis of Adjustment
20 Disorder, R/O [Rule Out] PTSD.

21 Additionally, we really don't or
22 [sic] have time to do the extensive
23 testing that should be done to determine
24 PTSD.

25 Also, there have been some incidence
26 [sic] where the veteran has a C&P is not
27 given a diagnosis of PTSD, then the
28 veteran comes here and we give the
29 diagnosis, and the veteran appeals his
30 case based on our assessment.

31 This is just a suggestion for the
32 reasons listed above.

33 Ex. 1347.

34 At the hearing, Plaintiffs argued that the email was
35 compelling evidence of the VA's failure and/or refusal to properly
36 diagnose and treat PTSD. In addition, Plaintiffs argued that

1 without further discovery, it would be impossible to know for sure
2 whether similar directives or "suggestions" were being followed at
3 other medical centers. According to Plaintiffs, this email could
4 likely lead to further evidence of a systemic denial of PTSD care
5 to veterans.

6 The Court denied Plaintiffs' request to reopen discovery,
7 noting that the evidentiary record was closed except for the
8 limited purpose of admitting the email at issue and the Senate
9 testimony transcript and evaluating the import of their contents.

10 Dr. Perez is one minor supervisor in a bureaucracy of 230,000
11 employees. At the time of the email, Dr. Perez had less than a
12 year in her position at the VA and the email she sent had limited
13 distribution. Although the message Dr. Perez's email conveys is
14 troubling, the Court concludes that the email is not enough to
15 alter the fact that Plaintiffs have failed to demonstrate systemic
16 denials of health care and benefits and that, absent proof of
17 systemic problems, the Court is unable to grant the relief
18 requested by Plaintiffs.

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VII. CONCLUSION

The remedies sought by Plaintiffs are beyond the power of this Court and would call for a complete overhaul of the VA system, something clearly outside of this Court's jurisdiction. For the reasons stated above, the Court DENIES Plaintiffs' request for a permanent injunction and GRANTS judgment in favor of Defendants.

IT IS SO ORDERED.

Dated: June 25, 2008



UNITED STATES DISTRICT JUDGE