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Veterans' Benefits and Due Process

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I. INTRODUCTION

> "When men and women sign up to put on the uniform and defend our country, they sign a contract. We need to make sure that America is living up to our part of that contract."[1]

At the culmination of the Civil War, President Abraham Lincoln called on Congress "to care for him who shall have borne the battle and for his widow, and his orphan."[2] These words have become emblematic of one of America's greatest moral obligations: to care for its veterans, who have risked their lives to protect our nation. In return for their service, Congress created the Department of Veterans Affairs (VA) to administer a number of benefits programs that support American veterans and their families.[3] These programs reflect the deep sense of pride and gratitude that Americans feel toward the nation's service members. As the VA proudly proclaims on its website, "The United States has the most comprehensive system of assistance for veterans of any nation in the world."[4]

Given both the size of the Armed Forces and the regularity with which it is utilized, the veterans' benefits system plays a central role in American life. Nearly 3.3 million people currently receive benefits from the VA, including veterans who became disabled while serving, survivors of service members who died during active duty or while serving in combat, and low-income veterans who receive pension bene-

1. *Addressing the Backlog: Can the U.S. Department of Veterans Affairs Manage One Million Claims?: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 111th Cong. 1 (2009) (statement of Rep. John J. Hall, Chairman, House Subcomm. on Disability Assistance and Memorial Affairs), *available at* http://democrats.veterans.house.gov/hearings/transcript.aspx?newsid=426.
2. DEP'T OF VETERANS AFFAIRS, VA HISTORY IN BRIEF 5, *available at* http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf (last visited May 5, 2010).
3. *See id.* at 12 (discussing Congress's creation of the Veterans Administration, now called the Department of Veterans Affairs).
4. *VA History*, DEP'T OF VETERANS AFFAIRS, http://www.va.gov/about_va/vahistory.asp (last visited May 5, 2010).

fits.[5] The vast majority of veterans' benefits are disability benefits that compensate veterans for their average impairment in earning capacity and for a reduction in their quality of life due to an injury incurred during service.[6] About 3.1 million veterans currently receive disability benefits,[7] which play an essential—and oftentimes life-sustaining—role in their lives.

But despite the importance of veterans' benefits and the concomitant necessity that they be dispensed in a timely manner, the VA's system for adjudicating benefits claims has become nothing short of a national disgrace. The VA has a backlog of nearly one million claims, and the current VA Secretary, Eric Shinseki, has estimated that claims will likely increase by 30% in 2011.[8] Without a systemic overhaul, the VA predicts that by 2015, some 2.6 million claims will be backlogged—a 250% increase in just five years.[9]

Even more staggering than the backlog, however, are the VA's delays in deciding benefits claims, particularly those decisions that are appealed. By the VA's own estimate, a veteran seeking an initial decision on a disability benefits claim must wait an average of nearly six months for the VA to accept or reject the claim,[10] while thousands of veterans will wait at least twice as long.[11] Unfortunately for many veterans, this is only the beginning of their wait for a benefits decision. Approximately 12% of those veterans who file claims are denied each year, forcing those veterans to enter the VA's dreaded appellate

5. *See* Facts about the Department of Veterans Affairs, DEPT. OF VETERANS AFFAIRS 1 (Jan. 2009), http://www.va.gov/opa/publications/factsheets/fs_department_of_veterans_affairs.pdf (last visited Oct. 1, 2011); VA Benefits and Health Care Utilization, DEP'T OF VETERANS AFFAIRS, http://www1.va.gov/VETDATA/Pocket-Card/4X6_summer10_sharepoint.pdf (last visited May 5, 2010) (showing breakdown of recipients of benefits).

6. Linda J. Bilmes, *Soldiers Returning from Iraq and Afghanistan: The Long Term Costs of Providing Veterans Medical Care and Disability Benefits* 6 (John F. Kennedy Sch. of Gov't Faculty Research Working Paper Series, No. RWP07-001, 2007), *available at* http://web.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=4329 (follow hyperlink to pdf).

7. *VA Benefits and Health Care Utilization*, *supra* note 5.

8. Marin Cogan, *Vets Battle Disability-Claim Backlog*, POLITICO (Feb. 23, 2010), http://dyn.politico.com/printstory.cfm?uuid=F7C8F350-18FE-70B2-A89E64CF862BFF98.

9. Kimberly Hefling, *VA Tests System for Electronic Disability Claims*, BOSTON GLOBE (March 25, 2010), http://www.boston.com/business/technology/articles/2010/03/25/va_tests_system_for_electronic_disability_claims/.

10. Veterans for Common Sense v. Peake (*VCS*), 563 F. Supp. 2d 1049, 1073 (N.D. Cal. 2008) *aff'd in part, rev'd in part, sub nom.* Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011).

11. Office of Inspector Gen., Dep't of Veterans Affairs, *Audit of VA Regional Office Rating Claims Processing Exceeding 365 Days*, DEP'T OF VETERANS AFFAIRS, 24 (Sept. 23, 2009), http://www4.va.gov/oig/52/reports/2009/VAOIG-08-03156-227.pdf. Thousands of claims assessed in the audit had been pending for approximately 1.3 years. *Id.*

system, derided as "the hamster wheel" by many veterans.[12] The VA's appellate system takes approximately 4.4 years to adjudicate an average benefits appeal,[13] and, even then, many cases are remanded, forcing veterans to begin the process all over again.[14]

These delays take a severe toll on our disabled veterans, presumably exacerbating the effects of the financial hardship and post-traumatic stress disorder that many already experience and that might be the very subject of their claim for benefits.[15] Because disability benefits compensate veterans for their impairment in earning capacity, the failure to receive those benefits amounts to an untenable situation. A lack of crucial financial support just as a veteran is reentering civilian life can diminish a veteran's ability to buy food and clothing for himself and his family, to make mortgage payments, and to avoid serious mental health problems. And this combined financial and psychological impact only contributes to the foreclosure, divorce, and even suicide that is prominent among veterans.[16]

The systemic delays veterans are forced to confront in the VA's claims adjudication process are not only morally unconscionable, but they also violate the Due Process Clause of the Fifth Amendment. The Constitution, which empowers the President to send the Armed Forces into battle, also forbids the executive branch from depriving a veteran of "property" without providing "due process of law."[17] It is well established that statutory entitlements, such as veterans' disability benefits, are a constitutionally protected form of "property," and that as a result, the government may not deprive recipients of their entitlements without applying fair procedures.[18] More recently, courts have also found that applicants for entitlements—those individuals whom the government has yet to adjudicate as qualifying recipients—possess a constitutionally protected property interest that

12. *VCS*, 563 F. Supp. 2d at 1070 (explaining that "[r]oughly 88% of veterans are granted [benefits for] at least one claimed disability"); *see also* Michael Serota, Op-Ed, *Justice Delayed is Justice Denied*, S.F. CHRON. (June 1, 2010), http://www.sfgate.com/cgi-bin/blogs/opinionshop/detail?entry_id=64633; Michael Serota, Op-Ed, *Vets Suffer While Benefits Appeals Drag On*, AOL NEWS (Nov. 11, 2010), http://www.aolnews.com/2010/11/11/opinion-vets-suffer-while-benefits-appeals-drag-on/.

13. *VCS*, 563 F. Supp. 2d at 1074.

14. *Id.* at 1075.

15. RAND CTR. FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 128–31, 143–44 (Terri Tanielian & Lisa H. Jaycox eds., 2008) [hereinafter INVISIBLE WOUNDS].

16. *Id.*

17. U.S. CONST. amend. V.

18. *See* Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) (holding that welfare benefits are a form of "property" protected by the Due Process Clause).

affords them a fair adjudication of their entitlement claims.[19] In this Article, we argue that the VA's nearly five-year delays in adjudicating claims for disability benefits that affect the essential and basic needs of veterans fail to provide veterans with the fair adjudication to which they are entitled. As a result, we conclude that the judiciary must take remedial action. We then explain why an equitable injunction directing the VA to remedy these delays within a fixed deadline is the only way to adequately safeguard the due process rights of veterans.

This Article proceeds as follows: Part II provides the history, background, and mechanics of the VA and its claims adjudication process. Part III analyzes the claims adjudication process in light of the Due Process Clause of the Fifth Amendment. Part IV discusses the judiciary's role in remedying systemic constitutional problems, and then proposes an injunction to resolve the VA's widespread due process violations.

II. VETERANS' BENEFITS AND THE CLAIMS ADJUDICATION PROCESS

A. A Brief History of Government Assistance to Veterans

The practice of providing benefits to American service members is deeply rooted in American history. In fact, veterans' benefits predate the founding of the United States: the first recorded provision of veterans' benefits in America occurred in 1636 when the Plymouth Colony offered money to those who became disabled while defending the colony against Native Americans.[20] A century later, the Continental Congress tried to recruit and retain soldiers by passing a law granting veterans "half pay for life in cases of loss of limb or other serious disability."[21] In 1789, the same year the U.S. Constitution was ratified, Congress enacted the first federal pension for veterans.[22]

In 1817, President James Monroe proposed granting pensions to indigent veterans of both the Revolutionary War and the War of 1812.[23] Although some members of Congress argued that establishing a pension system might be too costly, Monroe's program eventually

19. *See, e.g.*, Cushman v. Shinseki, 576 F.3d 1290, 1297 (Fed. Cir. 2009) (quoting Nat'l Ass'n of Radiation Survivors v. Derwinski, 994 F.2d 583, 588 n.7 (9th Cir. 1992)) (brackets and internal quotation marks omitted); *see also* Kapps v. Wing, 404 F.3d 105, 115 (2d Cir. 2005) (stating that "applicants for benefits, no less than current benefits recipients, may possess a property interest in the receipt of public welfare entitlements").

20. *See* VA HISTORY IN BRIEF, *supra* note 2, at 3.

21. *Id.*

22. *Id.*

23. Peter M. Juul, *The History of Veterans Affairs*, *in* SERVING AMERICA'S VETERANS: A REFERENCE HANDBOOK 15, 16 (Lawrence J. Korb et al. eds., 2009) (quoting RICHARD SEVERO & LEWIS MILFORD, THE WAGES OF WAR: WHEN AMERICA'S SOLDIERS CAME HOME: FROM VALLEY FORGE TO VIETNAM 32–33 (1989)).

passed, and over 15,000 veterans began receiving compensation.[24] Over the next decade, the implementation of Monroe's pension system consumed an increasing portion of the nation's finances, and in 1833, Congress established the Bureau of Pensions, the first administrative entity dedicated solely to assisting veterans.[25] This arrangement continued, with minor adjustments, until the Civil War.[26]

After the Civil War, the number of veterans significantly expanded. At the war's inception in 1861, the nation had approximately 80,000 veterans;[27] by the war's conclusion four years later, the number of veterans had increased to 1.9 million.[28] In response to this increase, President Lincoln famously called on Congress to ensure that the government would support veterans injured during the war and the families of those who perished on the battlefield.[29] Congress responded, and during the following sixty years, benefits programs grew to include disability compensation, insurance for service members and veterans, family allotment programs for service members, and vocational rehabilitation for the disabled.[30]

The end of World War I brought another significant increase in the number of veterans. Nearly five million Americans fought in World War I, 116,000 of whom died in service and 204,000 of whom were wounded.[31] After the war, Congress consolidated several separate agencies into the Veterans Bureau in order to better accommodate the growing numbers of veterans entering the benefits system.[32] In 1930, President Herbert Hoover finished the process of consolidation by combining the remaining benefits agencies into the Veterans Administration.[33] The Veterans Administration was charged with providing medical services, disability compensation, life insurance, bonus certificates, Army and Navy pensions, and retirement payments for both military and civilian employees.[34]

After World War I, many veterans struggled to survive due to the worsening economy.[35] Congress attempted to help these veterans

24. *Id.* at 16–17.
25. *Id.* at 17.
26. VA HISTORY IN BRIEF, *supra* note 2, at 4.
27. *Id.*
28. *Id.*
29. Rory E. Riley, *Preservation, Modification, or Transformation? The Current State of the Department of Veterans Affairs Disability Benefits Adjudication Process and Why Congress Should Modify, Rather Than Maintain or Completely Redesign, the Current System*, 18 FED. CIR. B.J. 1, 4 (2008).
30. *Id.* at 5.
31. VA HISTORY IN BRIEF, *supra* note 2, at 7.
32. *Id.* at 8. These programs were the Bureau of War Risk Insurance, the Public Health Service, and the Federal Board of Vocational Education. *Id.*
33. *Id.* at 12.
34. *Id.*
35. *Id.* at 9.

weather severe financial hardship by passing the World War Adjustment Compensation Act, which issued bonuses to World War I veterans.[36] However, for bonuses greater than $50, veterans were required to wait twenty years from the time they were issued to redeem them.[37] In 1932, frustrated veterans marched in Washington, D.C. to convince Congress to pay the bonuses sooner.[38] The march turned violent when police officers tried to evict some veterans from the city, and federal troops intervened, forcibly removing more than 3,500 veterans who refused to leave the nation's capital.[39] Although the marchers were unsuccessful in obtaining immediate payment of their bonuses, Congress did eventually authorize payment four years later in 1936.[40] More importantly, however, the march highlighted the government's failures in adequately caring for its veteran population.[41]

In addition to other external pressures, the march eventually led Congress to pass what is known as the G.I. Bill of Rights, which was a comprehensive benefits package for the sixteen million veterans trying to reintegrate into society after World War II.[42] A variety of other post-World War II reforms, such as the creation of a separate department of medicine and the beginning of outpatient treatment for veterans with disabilities unrelated to military service, also drastically improved the treatment veterans received.[43] During this period, the Veterans Administration itself grew exponentially, adding over 46,000 employees, thirteen branch offices, fourteen regional offices, and twenty-nine new hospitals.[44] This rapid expansion continued throughout the Korean War, and was further bolstered by the 1952 passage of the Korean G.I. Bill, which provided unemployment insurance, job placement, home loans, and other important benefits to veterans.[45]

Due to the outbreak of the Vietnam War, which lasted for approximately two decades, the veteran population continued growing rapidly.[46] Moreover, advances in battlefield airlift evacuation and medical treatment meant a greater number of soldiers survived their injuries than ever before.[47] To support this influx of veterans, Congress passed the Vietnam G.I. Bill in 1966, substantially increasing

36. *Id.*
37. *Id.*
38. *Id.* at 9–11.
39. *Id.* at 10.
40. *Id.*
41. *Id.*
42. *Id.* at 13–14.
43. *Id.* at 15.
44. *Id.*
45. *Id.* at 16–17.
46. *Id.* at 18.
47. *Id.*

educational benefits for veterans.[48] During the post-Vietnam War period, Congress also provided new forms of life insurance, created new benefits outreach programs, and established special medical programs to support those veterans suffering from illnesses caused by Agent Orange.[49] In 1979, Congress passed the Veterans Health Care Amendments Act,[50] which enabled the Veterans Administration to set up a nationwide network of Vet Centers to provide crucial readjustment counseling for veterans and their families.[51]

By the 1980s, the Veterans Administration had the largest budget of any independent federal agency and the second-largest number of employees.[52] Indeed, a sizable one-third of the entire U.S. population was eligible to receive veterans' benefits.[53] Given both the size and importance of the Veterans Administration, in 1988, President Ronald Reagan signed legislation elevating it to cabinet-level status, establishing what is now known as the Department of Veterans Affairs.[54]

B. Claims Adjudication: Establishing Judicial Review

Until 1988, there was no judicial recourse for veterans when the government denied their benefits claims.[55] Although President Franklin Roosevelt established the Board of Veterans' Appeals (the Board) within the VA in 1933 to hear appeals of benefits decisions, if the Board chose to deny a claim, veterans were afforded no independent review of the Board's decisions.[56] Those seeking judicial review of agency decision-making in other administrative agencies had the right to appeal those decisions to an Article III court, but veterans were denied that right.[57] Thus, for over five decades, the Board provided veterans with the final decision on their benefits claims.[58]

Public pressure for judicial review of decisions on veterans' benefits claims mounted toward the end of the twentieth century, particularly when an influx of post-Vietnam War claims in the 1970s and

48. *Id.*
49. *Id.* at 19–20. Agent Orange is an herbicide that was used extensively during the Vietnam War to destroy the cover of enemy forces by defoliating trees. *Id.* at 20.
50. Pub. L. No. 96-22, 93 Stat. 47 (codified as amended in scattered sections of 38 U.S.C.).
51. VA HISTORY IN BRIEF, *supra* note 2, at 23. A ful list of the services incorporated in readjustment counseling can be found on the VA website. *See Services*, DEP'T OF VETERANS AFFAIRS, http://www.vetcenter.va.gov/Vet_Center_Services.asp (last visited January 28, 2011).
52. VA HISTORY IN BRIEF, *supra* note 2, at 26.
53. *Id.*
54. *Id.*
55. *History*, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, www.uscourts.cavc.gov/about/History.cfm (last visited May 5, 2010).
56. *Id.*
57. *Id.*
58. *Id.*

1980s demonstrated that the claims adjudication process needed to be reformed.[59] Veterans and their advocacy groups urged Congress to establish judicial review of VA decision-making.[60] However, the House Committee on Veterans' Affairs resisted efforts to alter the VA's independence, instead maintaining what a committee report called the VA's "splendid isolation as the single federal administrative agency whose major functions were explicitly insulated from judicial review."[61] But after nearly three decades of debate, Congress finally relented. In 1988, it passed the Veterans' Judicial Review Act (VJRA), creating the United States Court of Appeals for Veterans Claims (CAVC) under Article I of the Constitution and allowing appeals of CAVC decisions to the United States Court of Appeals for the Federal Circuit, an Article III court.[62]

C. The Demographics of the Veteran Population

There is little doubt that one of our country's most significant obligations is to ensure that veterans receive exemplary medical care and benefits and are supported with programs that improve their quality of life when they return home from war.[63] America currently has a population of veterans numbering approximately 22.7 million, with an additional 37 million spouses, children or other dependents, and survivors of deceased veterans.[64] Altogether, this constitutes about 20% of the population of the United States.[65] Approximately 3.1 million of those veterans currently receive disability benefits from the VA.[66]

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59. *Id.*

60. *Id.*

61. H.R. REP. NO. 100-963, at 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5791 (quoting Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 905 (1975)) (internal quotation marks omitted).

62. Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified at 38 U.S.C. § 101 (2006)).

63. Sean E. Duggan, *Veteran Demographics: Today's Population, Tomorrow's Projections*, *in* SERVING AMERICA'S VETERANS, *supra* note 23, at 93. The VA explains that it "not only has a broad obligation, but also a moral imperative to provide medical care to the men and women who have served our country." Veterans for Common Sense v. Peake (*VCS*), 563 F. Supp. 2d 1049, 1061 (N.D. Cal. 2008), *aff'd in part*, *rev'd in part, sub nom.* Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011).

64. Nat'l Ctr. for Veterans Analysis and Statistics, *Veteran Population Projections: FY2000 to FY2036*, DEP'T OF VETERANS AFFAIRS (Dec. 2010), *available at* http://www.va.gov/VETDATA/docs/QuickFacts/population-slideshow.pdf; *see* Duggan, *supra* note 63, at 94.

65. Duggan, *supra* note 63, at 94.

66. *VA Benefits and Health Care Utilization*, *supra* note 5.

Overall, the number of veterans with service-connected disabilities has risen 39% since 1990.[67]

The current veteran population already includes 1.3 million veterans of the wars in Iraq and Afghanistan, but this number is expected to significantly increase once the service members currently in Iraq and Afghanistan return to the United States.[68] Nearly half of those veterans have filed for benefits, but currently only 16% are receiving them.[69] As the wars in Iraq and Afghanistan create new veterans, the demands on the VA will increase significantly.[70] Over 700,000 more claims will likely be filed over the next ten years by these injured veterans, if claim rates equal those of Gulf War veterans.[71] For example, nearly one-third of service members returning from Iraq seek mental health care at the VA within a year of returning home.[72] Moreover, as medical treatments have improved, many service members are surviving battlefield injuries that might have been fatal in earlier conflicts, leading to even more claims for disability benefits.[73] Approximately 20% of Iraq War veterans have suffered traumatic brain or spinal cord injuries, 20% live with an amputation, blindness, deafness, or a severe burn injury, and 36% have been diagnosed with mental illness.[74]

D. Claims Processing at the Regional Office Level

The VA administers veterans' benefits through its Veterans Benefits Administration (VBA). Within the VBA, the Compensation and Pension Service (CPS) is responsible for administering "rating claims" filed by injured veterans seeking compensation for a disability arising

67. Nat'l Ctr. for Veterans Analysis and Statistics, *Trends in the Utilization of VA Programs and Services*, DEP'T OF VETERANS AFFAIRS (Dec. 2010), http://www.va.gov/VETDATA/docs/QuickFacts/utilization_slideshow.pdf.

68. Jerry Markon, *'Veterans Court' Faces A Backlog That Continues to Grow*, WASH. POST (Apr. 22, 2011), *available at* http://www.washingtonpost.com/politics/veterans-court-faces-backlog-that-continues-to-grow/2011/04/15/AFFaavRE_story.html. This figure is current through April 2011. *Id.*

69. *Id.*

70. BD. ON MILITARY AND VETERANS HEALTH, INST. OF MEDICINE OF THE NAT'L ACADS., A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 37 (Michael McGreary et al. eds., 2007).

71. JOSEPH E. SIGLITZ & LINDA J. BILMES, THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT 78–79 (2008) (explaining that 45% of Gulf War veterans filed for disability benefits).

72. Veterans for Common Sense v. Peake (*VCS*), 563 F. Supp. 2d 1049, 1062 (N.D. Cal. 2008), *aff'd in part*, *rev'd in part, sub nom.* Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011).

73. BD. ON MILITARY AND VETERANS HEALTH, *supra* note 70 ("The ratio of wounded to killed in the current wars in Iraq and Afghanistan is 9.1 to 1, compared with 3.2 to 1 in Vietnam and 2.3 to 1 in World War II.").

74. Brief for Appellants at 4, Viet. Veterans of Am. v. Shinseki, 599 F.3d 654 (D.C. Cir. 2010) (No. 09-5260), 2009 WL 6931514.

from an injury or disease they allege occurred during their service.[75] Veterans can file these rating claims at any of the fifty-seven VA Regional Offices around the country.

The purpose of rating claims is to determine whether a veteran has a disability that qualifies for disability compensation. Veterans must satisfy three requirements in order to receive disability benefits: (1) eligible service; (2) a currently diagnosed disability; and (3) a nexus between the service and the disability.[76] If a veteran establishes these three elements, then the CPS assigns a percentage of disability (1%–100%) based on a statutory rating schedule for how disabled a veteran is in relation to the "average impairments of earning capacity resulting from such injuries in civil occupations."[77] The rating assigned to a claim is based on a sliding scale of monthly compensation currently ranging from $123 per month for a 10% rating to $2,673 per month for a 100% rating.[78] The number of veterans receiving ratings of 50 to 100 percent is rising.[79]

The process for adjudicating rating claims is non-adversarial. The Veterans Claims Assistance Act (VCAA)[80] established that the VA has a "duty to assist" veterans throughout the initial claims process, which means that the VA must help veterans develop the evidence to support their claims.[81] As such, once a veteran files a claim at a Regional Office, the VCAA imposes a "duty to notify," under which a VBA employee—a Veterans Service Representative—must inform a veteran of the evidence the VBA needs to adjudicate her claim. As part of this process, a Representative must delineate which evidence a veteran must provide to the VBA and which evidence a Representative will seek on her behalf.[82]

Representatives are obligated to seek out all federal government records relating to a veteran's claim, including VA medical treatment records and social security records, unless the Representative con-

75. 38 U.S.C. § 1155 (2006). CPS also administers non-rating claims, claims for which no disability rating is required. Non-rating claims include dependency changes, claims for burial benefits, initial death pension claims for widows, and adjustments to benefits due to incarceration. Defendant's Motion to Dismiss at 3 n.1, Viet. Veterans of Am. v. Peake, No. 08-1934 (RBW) (D.D.C. Dec. 4, 2008).

76. 38 C.F.R. § 3.303 (2009). Financial need, however, is not a factor. *Id.*

77. *Id.*

78. 38 U.S.C. § 1114 (2010); *see also Disability Compensation Benefits*, DEP'T OF VETERANS AFFAIRS, http://www.vba.va.gov/VBA/benefits/factsheets/index.asp (last visited July 8, 2011).

79. *Trends in the Utilization*, *supra* note 67.

80. 38 U.S.C. § 5103, 5103A.

81. 38 C.F.R. §§ 3.103(a), 3.159. In addition, independent lawyers can represent veterans throughout the initial claims adjudication process, but the VCAA dictates that lawyers cannot be compensated for doing so. 38 U.S.C. §§ 5901–5904; 38 C.F.R. §§ 14.629–14.630.

82. *See* 38 U.S.C. § 5103(a); 38 C.F.R. § 3.159(b)(1).

cludes that the records do not exist or that further efforts to obtain the records would be futile.[83] Representatives are also required to make reasonable efforts to acquire non-federal records identified by a veteran; usually this consists of private medical records.[84] A Representative may also order a medical examination of a veteran to confirm that a disability exists and to obtain information to help the VBA rate a veteran's disability on the rating scale.[85]

If the CPS grants a rating claim, the VBA issues a rating decision and a notice informing the veteran of the percentage of disability awarded.[86] The notice also includes the date from which the veteran is entitled to compensation, known as the "effective date."[87] In most cases, the effective date is the date that a veteran filed a claim.[88] If a claim is denied, the VBA informs the veteran of its reasons for denying it.[89]

E. Appealing a Claim

1. Tiers of Review

A veteran dissatisfied with a rating decision has five available tiers of review.[90] The first tier is an initial appeal of the decision within the VBA. A veteran begins by filing a Notice of Disagreement (Notice),[91] after which a veteran must wait until the Regional Office at which the original claim was filed provides a Statement of the Case, which is a more detailed explanation of the contested decision. As of March 2008, the VA took an average of 261 days to provide a Statement of the Case; however, some veterans have waited as long as 1,000 days.[92]

Once the Regional Office produces a Statement of the Case, a veteran must file an appeal with the Board of Veterans' Appeals, which takes an average of forty-three days to complete.[93] These appeals are commonplace; unsatisfied veterans appeal the VBA's decisions on about 11% of the approximately 830,000 ratings claims filed every

83. 38 U.S.C. § 5103A(c); 38 C.F.R. §§ 3.159(c)(2), 3.159(c)(3).
84. 38 C.F.R. § 3.159(c)(1).
85. *Id.* § 3.159(c)(4).
86. *Id.* § 3.303.
87. *Id.*
88. *Id.* §§ 3.323, 3.324.
89. 38 U.S.C. § 5104(b) (2006).
90. Miguel F. Eaton et al., *Ten Federal Circuit Cases from 2009 that Veterans Benefits Attorneys Should Know*, 59 AM. U. L. REV. 1155, 1161 (2009). A veteran can appeal any part of any issue in the rating decision: a denial of service connection, the percentage disability assigned, or the effective date. *Id.*
91. Veterans for Common Sense v. Peake (*VCS*), 563 F. Supp. 2d 1049, 1072 (N.D. Cal. 2008), *aff'd in part, rev'd in part, sub nom.* Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011).
92. *Id.* at 1073.
93. *Id.*

year.[94] The Regional Office must then certify each appeal to the Board.[95] While this is a routine administrative task, it takes an average of 573 days, and sometimes as long as 1,000 days, for the Regional Office to certify an appeal.[96] After the Board receives the certified appeal, it issues a decision, which takes an average of 336 days.[97] In all, it takes an average of 1,419 days from the time a veteran files a Notice for the Board to complete an appeal.[98]

The Regional Offices have a dismal record on appeal. The Board reverses the Regional Offices outright approximately 20% of the time, and it remands about 40% of appeals to the Regional Offices for further adjudication.[99] Of the cases remanded to the Regional Offices, between 19% and 44% are deemed "avoidable remands"—appeals in which the Regional Office makes an error before it certifies the appeal to the Board.[100] Nearly half of the avoidable remands that occurred during the first three months of 2008 resulted from VBA employees violating their duty to assist veterans.[101] This may be due in part to the fact that 70% of the VBA ratings specialists at Regional Offices believe that their offices emphasize speed over accuracy in assigning ratings.[102]

Once the Board remands a claim, it takes an average of 499 days for the VBA to either grant it or return it to the Board for a second time.[103] The latter is the most frequent result; veterans appeal approximately 75% of remanded claims to the Board a second time.[104] It then takes the Board an average of 149 days to render a decision on that re-appealed claim.[105] In sum, from the time a veteran files an initial claim with a Regional Office to the time the Board makes its final decision, the average wait time is 4.4 years per decision.[106]

If a veteran is unsatisfied with the Board's decision, her third tier of review is the Court of Appeals for Veterans Claims (CAVC).[107] The

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1074.
98. *Id.*
99. *Id.* at 1075.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* In addition, many veterans withdraw their claims during this time. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 1075–76 (explaining that the average wait time includes 182 days for an initial decision from the Regional Office and 1,419 days for a Board decision, but excludes the time between a veteran's Notice filing and a Regional Office's initial decision, which may be as long as one year).
107. 38 U.S.C. § 7252(a) (2006).

CAVC receives an average of 400 new cases every month,[108] making it one of the busiest federal appellate courts in the country.[109] In fact, the CAVC's caseload has doubled in recent years, and in 2009, the court decided 4,379 cases, some 3,270 of which were decisions on the merits.[110] All of this has occurred while three of the nine seats on the court remain unfilled.[111] The majority of appeals were meritorious; in 60% of its decisions, the court either remanded a claim to the Board or reversed the Board outright.[112]

If a veteran remains unsatisfied with the outcome from the CAVC, the veteran can appeal to the United States Court of Appeals for the Federal Circuit.[113] Lastly, a veteran's fifth tier of available review is to petition the United States Supreme Court for certiorari.[114]

2. Ever-Increasing Delays

i. Growing Dysfunctionality

To successfully appeal a claim at each tier of review, a veteran faces numerous deadlines.[115] If the veteran misses even one, the appeal is considered to be forfeited.[116] Ironically, the VA imposes no deadlines on itself for administering the claims process, and it faces no consequences if it takes an excessive amount of time to adjudicate a claim.[117] In fact, the Government Accountability Office (GAO) has found the VA's system dysfunctional on four separate occasions, but little has been done to address these concerns. In 2000, prior to the wars in Afghanistan and Iraq, the GAO found the long processing times for initial disability claims and the large backlog of pending claims unacceptable.[118] The GAO reiterated these concerns in both 2003 and 2005, noting that fundamentally changing the VA's disability compensation programs had become a high priority because of the

108. *See* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS (2009) [hereinafter CAVC ANNUAL REPORTS], *available at* http://www.uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf.
109. Markon, *supra* note 68.
110. CAVC ANNUAL REPORTS, *supra* note 108; Markon, *supra* note 68 (noting that "[j]udges are working nights and weekends but say they still have difficulty keeping pace").
111. Markon, *supra* note 68.
112. Veterans for Common Sense v. Peake (*VCS*), 563 F. Supp. 2d 1049, 1075 (N.D. Cal. 2008), *aff'd in part*, *rev'd in part, sub nom.* Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011).
113. 38 U.S.C. § 7292.
114. 28 U.S.C. § 1254.
115. *VCS*, 563 F. Supp. 2d at 1073.
116. *Id.*
117. *Id.*
118. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-00-65, VETERANS' BENEFITS: PROMISING CLAIMS-PROCESSING PRACTICES NEED TO BE EVALUATED 3 (2000), *available at* http://www.gao.gov/archive/2000/he00065.pdf.

"large numbers of pending claims and lengthy processing times."[119] Finally, in 2007, the GAO found the disability benefits program "in urgent need of attention and transformation" because it was unable to provide "meaningful and timely support for [veterans] with disabilities."[120]

The VA Office of the Inspector General (OIG) has also identified pervasive dysfunction and delay in the claims adjudication system. A recent OIG report concluded that as of August 2008, some 11,099 rating claims had been pending for an average of 1.3 years each.[121] The OIG also found that inefficient workload management at the Regional Offices caused avoidable processing delays averaging 187 days for 90.5% of those delayed claims, estimating that "$14.4 million [in benefits payments were] unnecessarily delayed by an average of 8 months because of claims processing deficiencies."[122] In contrast, the private health care and services industry, which handles thirty billion claims annually, has an average claims processing time of under three months, *including* the time necessary for appeals.[123]

The growing backlog of cases at all levels of the VA's claims processing system further exacerbates the delays and slows its processing of new cases. From fiscal year 2003 through fiscal year 2006, the number of claims increased substantially each year, amounting to an overall growth rate of almost 50%.[124] As of May 1, 2010, some 523,976 rating claims were pending, 189,048 of which had already been delayed for over 125 days.[125] Thus, the present backlog constitutes more than an entire year's worth of cases.[126]

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119. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-749T, *Introduction* to VETERANS' DISABILITY BENEFITS: CLAIMS PROCESSING PROBLEMS PERSIST AND MAJOR PERFORMANCE IMPROVEMENTS MAY BE DIFFICULT (2005), *available at* http://www.gao.gov/new.items/d05749t.pdf; *see* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-1045, VETERANS' BENEFITS: IMPROVEMENTS NEEDED IN THE REPORTING AND USE ON THE ACCURACY OF DISABILITY CLAIMS DECISIONS 11 (2003), *available at* http://www.gao.gov/new.items/d031045.pdf.

120. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-562T, VETERANS' DISABILITY BENEFITS: PROCESSING OF CLAIMS CONTINUES TO PRESENT CHALLENGES 7–8 (2007), *available at* http://www.gao.gov/new.items/d07562t.pdf.

121. *Audit of VA Regional Office Rating Claims Processing Exceeding 365 Days*, *supra* note 11, at i.

122. *Id.*

123. Brief of Appellants at 7, Viet. Veterans of Am. v. Shinseki, 599 F.3d 654 (D.C. Cir. 2010) (No. 09-5260), 2009 WL 6931514.

124. *Id.* at 9. The number of claims rose from about 254,000 to 378,000. *Id.*

125. U.S. Dep't of Veterans Affairs, *2010 Monday Morning Workload Reports* (May 3, 2010), *available at* http://www.vba.va.gov/REPORTS/mmwr/2010/050310.xls.

126. BOARD OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2007, at 2 (2008), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2007AR.pdf.

ii. Proposals for Reform

There have been several proposals for reforming the VA claims processing system. In 2004, Congress created the Veterans' Disability Benefits Commission, which from May 2005 to October 2007 conducted an in-depth study of the benefits and services available to veterans.[127] The Commission issued a report containing extensive recommendations it believes the VA should follow to guide the development and delivery of benefits.[128] Furthermore, in July 2007, the President's Commission on Care for America's Returning Wounded Warriors issued a report detailing a proposal for redesigning the current VA and Department of Defense benefits systems.[129] However, none of these proposals has been adopted.

In fact, despite these proposals, the Director of Compensation and Pension Services admitted in 2008 that the VA had not even tried to determine the cause of the delays, nor had it made any effort to address the problem of appellate delay.[130] Instead, empirical data suggests that the Board has responded to its ever-increasing caseload by simply denying more claims on appeal. Between fiscal years 2004 and 2007, the number of claims the Board denied nearly doubled,[131] but there is no evidence to support the notion that twice as many appealed claims lacked merit in 2007 as they did in 2004.

In recent years, though, the VA has made some progress in beginning to address the causes of the delays.[132] Current VA Secretary General Eric Shinseki has demonstrated a willingness to confront the shortfalls of the VA claims adjudication process.[133] At Shinseki's confirmation hearing, he stated that he aspires to reduce the initial claims processing time from six months to 145 days by 2015.[134] Fur-

127. VETERANS' DISABILITY BENEFITS COMM'N, HONORING THE CALL TO DUTY: VETERANS DISABILITY BENEFITS IN THE 21ST CENTURY 1–3 (2007), *available at* http://www.co.st-lawrence.ny.us/data/files/Departments/Veterans/VetDisBenefitComm9-27.pdf.

128. *Id.* at 2–3.

129. PRESIDENT'S COMM'N ON CARE FOR AMERICA'S RETURNING WOUNDED WARRIORS: SERVE, SUPPORT, SIMPLIFY (2007), *available at* http://www.veteransforamerica.org/wp-content/uploads/2008/12/presidents-commission-on-care-for-americas-returning-wounded-warriors-report-july-2007.pdf.

130. Veterans for Common Sense v. Peake (*VCS*), 563 F. Supp. 2d 1049, 1073–74 (N.D. Cal. 2008), *aff'd in part*, *rev'd in part, sub nom.* Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011).

131. BOARD OF VETERANS' APPEALS, *supra* note 126, at 20.

132. *See The Promise Audit: Tracking President Obama's Progress on Campaign Promises*, NAT'L J., [hereinafter *The Promise Audit*] (listing articles enumerating a variety of VA achievements) http://promises.nationaljournal.com/veterans/improve-va-administrative-systems/ (last visited Nov. 31, 2010).

133. *Id.*

134. *Id.* When the VA asked VA employees and members of Veterans Service Organizations for ideas on how to improve disability claims processing times, it received 3,000 responses in two months. U.S Dept't of Veterans Affairs, *Craigslist*

ther, under Shinseki, the VA instituted a pilot program to test a paperless claims processing system, and in October 2009, added four judges to the Board.[135] Notwithstanding these laudable goals, however, implementation is years away. While reducing initial claims processing times is a praiseworthy objective, the appellate delays must be addressed immediately, because, as we explain in the next Part, the delays violate the Due Process Clause of the Fifth Amendment.

III. ADMINISTRATIVE DELAY AND PROCEDURAL DUE PROCESS

When Congress establishes government entitlement programs, the administrative agencies charged with implementing them must follow procedures that comply with the Fifth Amendment's Due Process Clause, which guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[136] The due process guarantee applies not only to an initial hearing but also throughout an entire claims adjudication process, including appeals.[137] As such, when a court is faced with a claim of administrative delay under the Due Process Clause, it must determine whether the government's action deprived an individual of "life, liberty, or property," and if so, evaluate whether the government provided sufficient process.[138] In this Part, we argue that a veteran alleging a service-connected disability has a due process right to the fair adjudication of a claim for benefits and that an average delay of 4.4 years clearly violates this right.

Founder Joins VA Innovation Search Panel (Nov. 4, 2009), *available at* http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=1808.

135. *The Promise Audit*, *supra* note 132.

136. U.S. CONST. amend. V; Mathews v. Eldridge, 424 U.S. 319, 334 (1976); *see also* Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950) ("The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body.").

137. *See* Evitts v. Lucey, 469 U.S. 387, 393 (1985); Talamantes-Penalver v. INS, 51 F.3d 133, 135 (8th Cir. 1995) ("Once the right to appeal is created . . . the procedures employed on appeal must provide . . . due process of law." (citing *Evitts*, 469 U.S. at 393)); Coe v. Thurman, 922 F.2d 528, 530 (9th Cir. 1990) (citing United States v. Antoine, 906 F.2d 1379, 1382 (9th Cir. 1990)); Burkett v. Cunningham, 826 F.2d 1208, 1221 (3d Cir. 1987) (citing Codispoti v. Howard, 589 F.2d 135, 142 (3d Cir. 1978)); DeLancy v. Caldwell, 741 F.2d 1246, 1247 (10th Cir. 1984) (per curiam) (citing United States v. Pratt, 645 F.2d 89, 91 (1st Cir. 1981)); Rheuark v. Shaw, 628 F.2d 297, 302 (5th Cir. 1980).

138. RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 744 (5th ed. 2010).

A. The Right to Procedural Due Process

1. Background

The concept of due process embodies what Justice Felix Frankfurter once eloquently described as "a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history."[139] Supreme Court case law interpreting the Fifth Amendment's Due Process Clause has construed it as an independent check on the exercise of the federal government's power.[140] The Clause imposes two types of limitations on government action—

139. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting). The notion of "due process of law" is deeply rooted in Western society; its origins can be traced as far back as England's thirteenth-century Magna Carta. FAITH THOMPSON, MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629, at 86–97 (1948). The Magna Carta established that "[n]o freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and *by the law of the land*." RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 1–2 (2004); Magna Carta art. XXXIX (1215) (emphasis added). The phrase "by the law of land" is considered a historical antecedent to the Constitution's Due Process Clause, as it assured both barons and freemen a trial by their peers, barred execution before judgment, and prohibited other types of arbitrary action by the king. WASSERMAN, *supra*, at 1–2. The colonists who arrived in America invoked due process and the "law of the land" language from the Magna Carta during their struggles with England prior to the Revolutionary War. *Id.* at 3. During the Constitutional Convention, several states became concerned that a stronger federal government could interfere with the rights of individual citizens. *Id.* at 4. They pushed for the Constitution to include a bill of rights that mentioned due process rights but were unsuccessful. *Id.* However, the ratification debates that followed the Convention centered on the lack of a bill of rights, and as a result, the framers reached a compromise wherein ratifying states could subsequently submit a set of proposed amendments to the Constitution. *Id.* at 5. Seven states submitted proposals, four of which included the "law of the land" text from the original Magna Carta. *Id.* When the new Congress met in New York to consider the Bill of Rights, James Madison offered his own set of proposed amendments, one of which included King Edward's "due process of law" phrase. *Id.* That phrase was eventually incorporated into the text of the Fifth Amendment, which was adopted in 1791. *Id.* at 6; U.S. Const. amend. V. As the Supreme Court explained in 1855, "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta." *Den ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855). This understanding of the Due Process Clause is the one that remains today.

140. *See, e.g.*, *Mathews*, 424 U.S. at 332. For a meditation on how the enactment of the Fourteenth Amendment's Due Process Clause and its subsequent interpretation have greatly affected the current understanding of the Fifth Amendment's Due Process Clause, see Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 500 (2010).

substantive and procedural—that are often closely intertwined.[141] Substantive due process requires that laws be fair and reasonable and based on adequate justifications.[142] Procedural due process, on the other hand, requires that when the government deprives a person of her life, liberty, or property, it must do so according to fair procedures.[143] A procedural due process challenge assumes that an enacted law is substantively valid, but asserts that the manner employed to enforce or apply that law is unfair.[144] Thus, claims that the VA's administrative delay violates veterans' due process rights are procedural; they do not dispute the validity of the law governing the adjudication of their claims but allege instead that the VA's conduct in applying the law—conduct that results in years-long delays in adjudication—is unconstitutional.

The Supreme Court's framework for analyzing procedural due process questions is to first ascertain whether there has been a deprivation of life, liberty, or property, and if so, then to ask whether the applied procedures "satisfy some normative conception of fairness."[145] In practice, procedural due process has proven to be a "flexible" concept, "call[ing] for such procedural protections as the particular situation demands."[146] Therefore, when judges evaluate government actions through the lens of the Due Process Clause, their analysis is highly contextual, accounting for factors such as the time, place, and circumstances of the challenged action.[147] The touchstone of procedu-

141. Williams, *supra* note 140, at 417–18 ("Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible." (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting))); *see* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 335–36 (1933) ("[O]ur problem turns out to be not to discover the location of a pre-existing 'line' [between substance and procedure] but to decide where to draw a line.").

142. ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 54 (2d ed. 2001).

143. *Id.*; *see* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 215–16 (2004) ("The idealization of a pure rule of procedure assumes that procedural rules regulate the sphere of adjudicative institutions. Similarly, the idealization of a pure rule of substance posits that the function of the substantive law is to regulate primary conduct—the whole of human activity outside adjudicative contexts.").

144. IDES & MAY, *supra* note 142, at 159.

145. Williams, *supra* note 140, at 420–21; *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) ("The heart of the matter is that democracy implies respect© for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness.").

146. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

147. Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961) ("'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances." (quoting *McGrath*, 341 U.S. at 162–63 (Frankfurter, J., concurring))).

ral due process is notice and a fair opportunity to be heard,[148] which brings with it the right to be heard "at a meaningful time and in a meaningful manner."[149]

2. The Development of the Mathews *Balancing Test*

The most important contemporary doctrinal development in procedural due process came in 1976, when the Supreme Court set forth a balancing test in *Mathews v. Eldridge*[150] to facilitate the judicial determination of whether government action comports with the requirements of the Due Process Clause. In *Mathews*, the Social Security Administration (SSA) canceled George Eldridge's social security disability benefits without a pre-termination evidentiary hearing.[151] Instead of seeking reconsideration of the SSA's decision, Eldridge challenged the constitutional validity of the administrative procedures promulgated by the Secretary of Health, Education, and Welfare, arguing that the Due Process Clause required the SSA to afford a recipient of disability benefits a pre-termination evidentiary hearing—an assertion the Court rejected based upon what it considered to be the limited utility of a pre-evidentiary hearing relative to its cost.[152]

In rejecting Eldridge's claim, the Court established a test that identifies constitutionally required procedures by conducting a cost-benefit analysis that accounts for both the private and governmental interests at stake in light of the value that increased safeguards would offer.[153] Thus, as the *Mathews* Court explained, to determine whether a specific procedure complies with the Due Process Clause, a judge must weigh the following three factors:

148. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); *see also* N. Ala. Express, Inc. v. United States, 585 F.2d 783, 786 (5th Cir. 1978) ("The due process clause requires that notice be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. In the administrative context, due process requires that interested parties be given a reasonable opportunity to know the claims of adverse parties and an opportunity to meet them." (citations omitted)).

149. Armstrong v. Manzo, 380 U.S. 545, 552 (1965); *see also* United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1378 (2010) ("Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (citation and internal quotation marks omitted)); *Mullane*, 339 U.S. at 313 ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

150. 424 U.S. 319 (1976).

151. *Id.* at 323–24.

152. *Id.* at 324–26.

153. *Id.* at 348.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[154]

Under this approach, called the "*Mathews* balancing test," courts evaluate the adequacy of a particular procedure by weighing its impact on an aggrieved individual against the burden that a change in the procedure would likely impose on the government and the public.[155] The Court justified its use of a balancing test approach by reasoning that "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."[156]

Although a balancing test approach has been used to evaluate the limits of individual rights in a variety of contexts, the *Mathews* balancing test is unique in that it provides no minimum constitutional floor for what process is due to an individual.[157] Instead, as Professors Martin Redish and Lawrence Marshall explain, the *Mathews* cost-benefit calculus emphasizes economic efficiency rather than fairness by treating the government and individual interests as co-equal determinants in assessing whether a constitutional right to a specific procedure exists.[158] This is a departure from traditional balancing tests, which first establish a right and then place a burden on the government to prove that its interest outweighs that right.[159]

To highlight this point, let us consider the First Amendment's Free Speech Clause, which requires courts to balance an individual's right to free speech against the government's interest in limiting that speech.[160] To conclude that the government's interest overrides an individual's right to free speech in this context, a court must first subordinate an individual's constitutional right to a government objective.[161] Because courts are sensitive to overriding the Constitution,

154. *Id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).
155. *Id.* at 334–35; *see* 32 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., JUDICIAL REVIEW § 8129, at 82 (2005) (noting that "the cornerstone for all analysis of procedural adequacy has become Justice Powell's opinion in *Mathews v. Eldridge*").
156. *Mathews*, 424 U.S. at 348.
157. *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 472–73 (1986).
158. *Id.* at 473.
159. *See, e.g.*, United States v. Lee, 455 U.S. 252, 259 (1982) (addressing the right to free exercise of religion); Widmar v. Vincent, 454 U.S. 263 (1981) (addressing the right to free speech and free exercise of religion); Sherbert v. Verner, 374 U.S. 398 (1963) (addressing the right to free exercise of religion); NAACP v. Alabama, 357 U.S. 449 (1958) (addressing the right to freedom of association).
160. *Widmar*, 454 U.S. at 269–70.
161. Redish & Marshall, *supra* note 157, at 473.

they may be less willing to legitimize governmental incursions on established rights.[162] But the *Mathews* test lacks this traditional dynamic, thereby relieving courts of the burden of finding that a governmental interest overrides a clear constitutional right.[163] As a result, the deck is stacked in favor of the government; as Redish and Marshall note, "it is likely that the Court's balancing test, lacking any minimum floor of procedural protection, will generally find in favor of the governmental interest."[164] And yet, despite this quixotic approach, judges have applied the *Mathews* balancing test in a variety of circumstances to find violations of procedural due process.

3. Administrative Delay as a Violation of Procedural Due Process

The due process guarantee applies not only to an initial hearing before an administrative agency, but also throughout an entire claims adjudication process, including appeals.[165] This is because, as Judge Richard Posner explains, "implicit in the conferral of an entitlement is a further entitlement, to receive the entitlement within a reasonable time."[166] To be sure, delay is only one of many factors courts consider, but it is nonetheless a "significant factor" in determining the constitutionality of administrative procedures.[167] In fact, claims processing delays can become so unreasonable that they alone deny a claimant her due process rights, leading courts to declare them unconstitutional.[168]

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162. *Id.* For another criticism of the *Mathews* test, see Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 37 HOUS. L. REV. 635, 643–44 (2000) ("The deeper source of disquiet is the tendency of *Mathews* analysis to set state interests against those of the individual. The perceived juxtaposition of these two categories of interests has long been a part of due process jurisprudence. . . . As applied, this utilitarian balancing invariably pits the benefit to the individual against the cost to the community. Yet process has costs as well as benefits for the individual and benefits as well as costs for the overall system.").

163. Redish & Marshall, *supra* note 157, at 473.

164. *Id.*

165. *See* Evitts v. Lucey, 469 U.S. 387, 393 (1985); *accord* Talamantes-Penalver v. INS, 51 F.3d 133, 135 (8th Cir. 1995) ("Once the right to appeal is created . . . the procedures employed on appeal must provide plaintiffs with due process of law." (citing *Evitts*, 469 U.S. at 393)); Coe v. Thurman, 922 F.2d 528, 530 (9th Cir. 1990) (citing United States v. Antoine, 906 F.2d 1379, 1382 (9th Cir. 1990)); Burkett v. Cunningham, 826 F.2d 1208, 1221 (3d Cir. 1987) (citing Codispoti Y-1353 v. Howard, 589 F.2d 135, 142 (3d Cir. 1978)); DeLancy v. Caldwell, 741 F.2d 1246, 1247 (10th Cir. 1984) (per curiam) (citing United States v. Pratt, 645 F.2d 89, 91 (1st Cir. 1981) and Rheuark v. Shaw, 628 F.2d 297, 302 (5th Cir. 1980)).

166. Schroeder v. City of Chicago, 927 F.2d 957, 960 (7th Cir. 1991).

167. Wright v. Califano, 587 F.2d 345, 354 (7th Cir. 1978).

168. *See, e.g.*, Kraebel v. N.Y.C. Dep't of Hous. Pres. & Dev., 959 F.2d 395, 405 (2d Cir. 1992) ("[D]elay in processing can become so unreasonable as to deny due process."); Kelly v. R.R. Ret. Bd., 625 F.2d 486, 490 (3d Cir. 1980) (finding that the Railroad Retirement Board's administrative appeals process violated due process

In practice, there is no bright-line definition of the amount of time that constitutes an excessive delay; indeed, courts have held that a variety of delay lengths violate due process. For example, in *Kelly v. Railroad Retirement Board*, the U.S. Court of Appeals for the Third Circuit held that a three-year-and-nine-month delay in the Railroad Retirement Board's disability benefits appeals process violated the recipient's due process rights.[169] The court reasoned that although "there is no magic length of time after which due process requirements are violated," it was "certain that three years, nine months, is well past any reasonable time limit, when no valid reason for the delay is given."[170] Thus, it concluded that "[a] situation such as this, where the administrative review process of a single disability application extended to nearly four years, is wholly inexcusable."[171]

Similarly, in *White v. Mathews*, the Second Circuit found that 211.8-day glacial delays in the social security disability appeals process were so unreasonable that they violated the Due Process Clause.[172] The court reasoned that since a "disability insurance program is designed to alleviate the immediate and often severe hardships that result from a wage-earner's disability," the lengthy delays "detract[ed] seriously from the effectiveness of the program."[173] Thus, even after considering the "serious problems with which the SSA has had to cope," and moreover, that "the SSA had, commendably, tried to overcome them,"[174] the court found that the delays were unjustified. It concluded that "[w]hen the government does not act with reasonable promptness, those claiming total disability are required to bear an unreasonable delay and suffer unwarranted deprivation of that which is lawfully theirs."[175]

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for producing inordinate delays); White v. Mathews, 434 F. Supp. 1252, 1261 (D. Conn. 1976) ("The Court finds that the lengthy and persistent delays experienced . . . averaging 211.8 days . . . are unreasonable. Such delay denies due process rights."), *aff'd* 559 F.2d 852 (2d Cir. 1977).

169. *Kelly*, 625 F.2d at 490.

170. *Id.* at 490.

171. *Id.*

172. 559 F.2d 852, 859 (2d Cir. 1977).

173. *Id.* at 858 ("Perhaps this unfortunate impact might be diminished to a tolerable level if a high percentage of claimants seeking hearings before an administrative law judge were not actually entitled to benefits. But such hearings have led to reversals in more than half the cases heard.").

174. *Id.* at 859 (citing White v. Mathews, 434 F. Supp. 1252, 1261 (D. Conn. 1977), *aff'd* 559 F.2d 852 (2d Cir. 1977)).

175. *See infra* section IV.B for a discussion of the remedy the *White* court imposed. In another Second Circuit case, *Kraebel v. New York City Department of Housing Preservation & Development*, 959 F.2d 395 (2d Cir. 1992), the court found that when the city delayed for eighteen months in making a determination as to whether a landlord was entitled to property tax benefits, the city may have violated the landlord's due process rights. *Id.* at 405–06 ("[W]e are not prepared to conclude, without further evidence, that the delays here are reasonable. Al-

And yet, while procedural due process case law makes clear that courts are willing to hold lengthy delays unconstitutional, it also demonstrates that not every delay in the administrative review process offends the Constitution or demands a judicial response. For example, the Fifth Circuit found that a twenty-day delay in the receipt of one monthly welfare check did not deny due process because the delay occurred during the agency's review for program eligibility, which was necessary to the government's interest in preventing undeserving recipients from receiving entitlements.[176] The Third Circuit found that a nine-month delay between a recommended decision and a final decision in a social security benefits case was constitutional, in light of the volume of cases before the body handling final decisions.[177] And the Second Circuit found that a nineteen-month delay in Medicare reimbursements of claims under $500 was justified because the small amount of benefits unrelated to financial need meant the private interest was low, the court had no information about the risk of erroneous deprivation, and the government had a substantial interest in resolving claims by private hearing officers.[178]

As these cases demonstrate, courts can be reticent to interfere with administrative procedures on constitutional grounds, and such action is not taken lightly.[179] But while courts may be hesitant to inject themselves into the administrative process—and although they may reach differing conclusions on where the line between undesirable and unconstitutional delay should be drawn—it is indisputable that such a line exists. As we explain in the next section, if the concept of procedural due process is to have any meaning at all, then judges must hold

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though no bright-line rule exists for determining when a delay is so burdensome as to become unconstitutional, we think that there is at least a question of fact as to whether these delays were egregious and without any rational justification."). The court explained that "even before the state makes a definitive decision as to entitlement, the road to that determination must be paved by due process." *Id.* at 405. Highlighting the "case-by-case approach required in due process cases," the court remanded for the district court to consider whether the delay was justified, weighing the landlord's interest in prompt payment against the city's difficulty in making eligibility determinations. *Id.* at 405–06.

176. Barrett v. Roberts, 551 F.2d 662 (5th Cir. 1977).

177. Littlefield v. Heckler, 824 F.2d 242 (3d Cir. 1987).

178. Isaacs v. Bowen, 865 F.2d 468 (2d Cir. 1989).

179. *See* Redish & Marshall, *supra* note 157, at 473. For example, in *Wright v. Califano*, the Seventh Circuit reversed an Illinois district court's order that the SSA provide hearings and appeals within specified time limits or make mandatory interim payments of benefits until the SSA reached a final decision. 587 F.2d 345, 346–47 (7th Cir. 1978). The court found that the 180-day delay in the SSA's review process did not, under the circumstances, amount to a due process violation. *Id.* at 354. Even so, however, the court acknowledged that "unjustified and unreasonable administrative delays constituting a deprivation of property in violation of due process" could require judicial intervention in the future. *Id.* at 356.

that the 4.4-year average delays within the VA claims adjudication system are unconstitutional.

B. Delay at the VA as a Violation of Procedural Due Process

1. Veterans' Benefits as a Property Interest

As enumerated in the Fifth Amendment, the Due Process Clause applies to deprivations of "property."[180] Statutory entitlements such as food stamps,[181] welfare benefits,[182] and veterans' benefits[183] qualify as property and are therefore entitled to due process protections.[184] Further, although the Supreme Court has not yet addressed whether claimants possess a property interest in their *applications* for benefits, over half of the federal circuit courts of appeals that have addressed that question have answered in the affirmative.[185]

For example, in *Cushman v. Shinseki*, the United States Court of Appeals for the Federal Circuit—the intermediary appellate court with jurisdiction over individual veterans' appeals—explicitly held that a veteran applying for disability benefits whose right to those disability benefits had not yet been established possessed a constitutionally protected property interest in the fair adjudication of his claim.[186] In *Cushman*, the plaintiff was a Vietnam War veteran whose medical records had been improperly altered by the government to understate his disability and thus limit his access to disability benefits.[187] He argued that by considering the altered document, the government infringed upon his constitutional right to a fair adjudication of his enti-

180. U.S. CONST. amend. V.

181. *See* Atkins v. Parker, 472 U.S. 115, 128 (1985) (holding that food stamps are a form of property protected by the Due Process Clause).

182. *See* Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) (holding that welfare benefits are a form of property protected by the Due Process Clause).

183. *See* Cushman v. Shinseki, 576 F.3d 1290, 1296 (Fed. Cir. 2009) (holding that veterans' benefits are a form of property protected by the Due Process Clause).

184. *See Goldberg*, 397 U.S. at 262–63.

185. Kapps v. Wing, 404 F.3d 105, 115 (2d Cir. 2005) (stating that "applicants for benefits, no less than current benefits recipients, may possess a property interest in the receipt of public welfare entitlements"); Hamby v. Neel, 368 F.3d 549, 557–59 (6th Cir. 2004) (involving an applicant for Medicaid benefits); Mallette v. Arlington Cnty. Emps. Supplemental Ret. Sys. II, 91 F.3d 630, 637–40 (4th Cir. 1996) (involving an applicant for retirement benefits); Gonzalez v. Sullivan, 914 F.2d 1197, 1203 (9th Cir. 1990) (involving an applicant for social security benefits); Daniels v. Woodbury Cnty., 742 F.2d 1128, 1132–33 (8th Cir. 1984) (involving applicants for welfare benefits); Ressler v. Pierce, 692 F.2d 1212, 1214–15 (9th Cir. 1982) (involving an applicant for federal rent subsidies); Kelly v. R.R. Ret. Bd., 625 F.2d 486, 489–91 (3d Cir. 1980) (involving an applicant for a disabled child's annuity); Griffeth v. Detrich, 603 F.2d 118, 121–22 (9th Cir. 1979) (involving an applicant for welfare benefits); Wright v. Califano, 587 F.2d 345, 354 (7th Cir. 1978) (involving an applicant for social security benefits).

186. *Cushman*, 576 F.3d at 1292.

187. *Id.* at 1294.

tlement claim.[188] The Federal Circuit agreed, reasoning that a veteran's entitlement to non-discretionary disability benefits is a property interest protected by the Due Process Clause:

> [Veterans'] disability benefits are nondiscretionary, statutorily mandated benefits. A veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations. We conclude that such entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.[189]

Thus, *Cushman* stands for the proposition that a veteran forced into the hamster wheel of the VA claims processing system has a Fifth Amendment right to a fair resolution of his application for benefits. Given that due process rights attach from the moment a veteran files a claim and continue until the veteran exhausts the final appeal, the only question that remains is whether the delays discussed in section II.E rise to the level of a due process violation—which, as we demonstrate through a *Mathews* balancing test analysis, they undoubtedly do.[190]

2. The Delays' Impact on Veterans' Essential and Basic Needs

Under the first prong of the *Mathews* balancing test, a court must evaluate "the private interest that will be affected by the official action"[191] by "examin[ing] the importance of the private interest and the harm to this interest occasioned by delay."[192] With regard to veter-

188. *Id.* at 1292.

189. *Id.* at 1298.

190. On May 10, 2011, the Ninth Circuit held that the 4.4-year delays within the VA's claims adjudication process was in fact a violation of veterans' right to procedural due process. Veterans for Common Sense v. Shinseki, 644 F.3d 845, 878–79 (9th Cir. 2011) (holding that the "entitlement to service-connected death and disability compensation is a property interest protected by the Due Process Clause, and that the lack of adequate procedures to prevent undue delay in the provision of that property constitutes a deprivation that violates [v]eterans's [sic] constitutional rights"). Due to this violation, the Ninth Circuit remanded for the district court to "either approve an agreement reached by the parties or enter an appropriate order instructing the VBA to provide [v]eterans with the procedural safeguards to which they are entitled." *Id.* at 878. At the time the Ninth Circuit opinion was released, this Article was already in a late stage of the publication process. The *Mathews* analysis conducted by the Ninth Circuit supports the conclusion reached in this Article. *See infra* section IV.B. *But see* Viet. Veterans of Am. v. Shinseki, 599 F.3d 654, 662 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 195 (2010) (dismissing a similar lawsuit by finding that the plaintiff veterans organization lacked standing to challenge the delays because they used "average processing time" to assert their injury, which the court concluded did not "cause" their injury).

191. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

192. FDIC v. Mallen, 486 U.S. 230, 242 (1988). Indeed, in *Mallen*, the Court rearticulated the *Mathews* test, stating that in assessing whether an administrative agency has violated a person's due process rights, "it is appropriate to examine

ans' disability benefits, the private interest—the timely adjudication of a veteran's claim—is vital. Because disability benefits compensate a veteran for an average impairment in earning capacity,[193] delays in the claims adjudication process can place disabled veterans' economic survival at risk. This weighs heavily in favor of veterans, since as the Supreme Court noted in *Goldberg v. Kelly*, whether an "eligible recipient [may be deprived] of the very means by which to live while he waits" is a "crucial factor" in the due process analysis.[194]

Indeed, the importance of veterans' benefits cannot be understated. Many veterans are primarily or fully dependent on these benefits for financial support because their disabilities often prevent them from becoming employed.[195] As a result of this dependence, and due to the fact that veterans receive no money from the VA until their claims are approved, many applicants have no viable means of financial support during the average of 4.4 years it takes to appeal an initial denial. This can reduce a disabled veteran's ability to buy food and clothing and to make mortgage payments, causing significant psychological stress that can lead to marital and family difficulties,[196] domestic violence,[197] divorce,[198] and even suicide.[199] In fact, an average of eighteen veterans commit suicide each day[200]—a rate that is eight times the national average.[201]

The overall harm caused by the delay is exacerbated because a significant portion of veterans applying for disability benefits already suffer from severe mental health problems, such as PTSD.[202] This additional harm manifests itself in two ways. First, veterans suffer-

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the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Id.* at 242. Courts assessing the constitutionality of an administrative agency's procedures have used this test to guide their balancing. *See, e.g.*, Veterans for Common Sense v. Shinseki, 644 F.3d 845, 884 (9th Cir. 2011) (using the *Mallen* test to determine whether process is "past due").

193. Bilmes, *supra* note 6, at 6.
194. Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (emphasis omitted).
195. Nat'l Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1314 (N.D. Cal. 1984).
196. INVISIBLE WOUNDS, *supra* note 15, at 141–48.
197. *Id.* at 143–44.
198. *Id.*
199. *Id.* at 128–31.
200. Katharine Euphrat, *22,000 Vets Called Suicide Hot Line in a Year*, ARMYTIMES (July 28, 2008), http://www.armytimes.com/news/2008/07/ap_suicide_hotline_072808/.
201. Kara Zivin et al., *Suicide Mortality Among Individuals Receiving Treatment for Depression in the Veterans Affairs Health System: Associations with Patient and Treatment Setting Characteristics*, 97 AM. J. PUB. HEALTH 2193, 2195 (2007), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2089109/pdf/0972193.pdf.
202. *Id.* at 2193.

ing from PTSD experience increased anxiety in response to perceived hostile events, so the psychological impact of waging a nearly five-year legal battle with the VA can be particularly profound.[203] Second, the delays can also prevent veterans with PTSD from getting the treatment they need in the first place. Due to the VA's well-documented failure to diagnose PTSD,[204] veterans with PTSD are often improperly denied access to VA medical assistance, presumably leaving them to seek costly private medical and psychological treatment. But for those veterans dependent upon disability benefits to pay for that private health care, the lengthy delays could cause them to delay treatment until their appeals are completed. This lack of treatment, in turn, can lead to a whole host of problems, including the development of other psychiatric disorders, higher rates of physical health problems, higher rates of unhealthy behaviors, a greater likelihood of being unemployed, and relationship and parenting problems.[205]

In short, the VA's delays severely affect the lives of America's veterans. Furthermore, as we explain in the next section, the risk of erroneous deprivation is high, and only grows as the length of the delays increases.

3. VA Delays as an Erroneous Deprivation of Property

The second *Mathews* factor requires a court to evaluate "the risk of an erroneous deprivation" of benefits,[206] and therefore, to assess "the

203. INVISIBLE WOUNDS, *supra* note 15, at 144.

204. *See, e.g.*, Allen G. Breed, *In Tide of New PTSD Cases, Fear of Growing Fraud*, SEATTLE TIMES (May 1, 2010), http://seattletimes.nwsource.com/html/nationworld/2011753743_apusthewarwithinfakeclaims.html; Judith Graham, *VA Psychologist to Staff: Don't Diagnose PTSD,* CHI. TRIB. (May 16, 2008), http://newsblogs.chicagotribune.com/triage/2008/05/va-psychologist.html; *see also* Pia Malbran, *VA Staffer Discourages PTSD Diagnoses*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/stories/2008/05/15/cbsnews_investigates/main4102226.shtml (discussing an internal VA e-mail discouraging mental health professionals from diagnosing veterans with PTSD); *Judge May Reopen Case Against VA After PTSD Email Emerges*, PUBLIC RECORD (June 9, 2008), http://pubrecord.org/law/522/judge-may-reopen-case-against-va-after-ptsd-email-emerges/ (discussing multiple email correspondences within different VA offices that suggest "a pattern to downplay the rising number of PTSD cases").

205. INVISIBLE WOUNDS, *supra* note 15, at 437 (explaining that veterans suffering from PTSD are "likely to have other psychiatric problems (e.g., substance use) and to attempt suicide . . . [and are] more likely to have higher rates of unhealthy behaviors (e.g., smoking, overeating, unsafe sex); higher rates of physical health problems and mortality; a tendency to miss more days of work and report being less productive while at work; and a greater likelihood of being unemployed. Suffering from these conditions can also impair personal relationships, disrupt marriages, aggravate difficulties with parenting, and cause problems in children that extend the costs of combat experiences across generations. There is also a possible connection between having one of these conditions and being homeless").

206. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

likelihood that the interim decision [prior to appeal] may have been mistaken."[207] This factor requires a judge to evaluate the overall accuracy of the process afforded to an individual by an agency.[208] With regard to the VA's appellate process, the risk of erroneous deprivation is high, given the poor accuracy rate of the claims adjudicators.

Consider the following statistics. After years of waiting, the Board grants a veteran's appeal outright 20% of the time and remands it 40% of the time;[209] in other words, Regional Offices are likely to make mistakes on the majority of claims with which they are tasked.[210] Furthermore, nearly half of avoidable remands result from VA employees violating their duty to assist veterans.[211] Most distressingly, approximately 75% of the rating claims that the Board remands are subsequently appealed to the Board a second time.[212]

This poor accuracy rate is unsurprising, however, given that 70% of VA ratings specialists believe that the VA emphasizes speed over accuracy in the claims adjudication process.[213] Further, the longer a decision on a veteran's disability benefits claim is delayed, the more likely it is that substantial mistakes will be made in the claims adjudication process, thereby further increasing the likelihood of erroneous deprivation.[214] This is because delays increase the likelihood that Re-

207. FDIC v. Mallen, 486 U.S. 228, 242 (1988).

208. Fusari v. Steinberg, 419 U.S. 379, 389 (1975) (noting that "the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process").

209. Veterans for Common Sense v. Peake (*VCS*), 563 F. Supp. 2d 1049, 1075 (N.D. Cal. 2008), *aff'd in part*, *rev'd in part, sub nom.* Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011).

210. *See also* Veterans for Common Sense v. Shinseki, 664 F.3d 845, 885 n.37 (9th Cir. 2011) (alterations in the original) (quoting Transcript of Oral Argument at *52, Astrue v. Ratliff, 130 S. Ct. 2521 (U.S. 2010) (No. 08-1322) 2010 WL 603696). The court in *Veterans for Common Sense v. Shinseki* cites the following exchange from a recent Supreme Court oral argument:

> [Assistant to the Solicitor General Anthony] YANG: [The reversal rate in the VA context is] in the order of either 50 or maybe slightly more than 50 percent. It might be 60. But the number is substantial that you get a reversal . . . .
> CHIEF JUSTICE ROBERTS: Well, that's really startling, isn't it? In litigating with veterans, the government more often than not takes a position that is substantially unjustified?
> MR. YANG: It is an unfortunate number, Your Honor. And it is—it's accurate.

Id.

211. *VCS*, 563 F. Supp. 2d at 1075.

212. *Id.*

213. *Id.*

214. Since it is unquestionable that a substantial portion of remands have merit, meaning a Regional Office inappropriately denied a claim, there is little doubt that procedural reforms that require claims to be adjudicated in a timelier fashion would be of great value to veterans who have been erroneously deprived of their benefits. *See id.* Indeed, whereas the *Mathews* Court was skeptical that the

gional Offices will lose, misplace, or otherwise destroy vital evidence and files pertaining to veterans' claims.[215] For example, a recent national review of the Regional Offices found that the VA had slated nearly five hundred benefits claims records for destruction.[216] Similarly, during a routine audit, the VA's Office of Inspector General discovered that 132 documents that were needed to support and facilitate claims processing had instead been inappropriately discarded in shredding bins at four Regional Offices.[217] After the OIG informed the VA of its findings, the VA discovered that 474 additional claims-related documents had been inappropriately discarded in forty-one of the fifty-eight Regional Offices.[218] If a single audit revealed such significant levels of document destruction, one can only imagine the actual scope of this problem.

Thus, given the high rate of mistakes at the Regional Office level—and the remands and document destruction that accompany those mistakes—the risk of erroneous deprivation is high. With this in mind, we now examine the third *Mathews* factor: the government's interest in maintaining the status quo.

4. The Government's Interest Substantially Aligns with Veterans' Interests

The final factor under the *Mathews* balancing test requires a court to evaluate the government's interest in preserving the procedures currently utilized by the VA.[219] Specifically, this factor focuses the

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full evidentiary hearing requested would substantially increase the accuracy of the administrative process at the SSA, it is certain that the expedition of the VA claims adjudication process would be of direct, substantial value to veterans. *See* Andrew Lloyd Merritt, *Judicial Resolution of Systemic Delays in Social Security Hearings*, 79 COLUM. L. REV. 959, 976–77 (1979).

215. Yvonne Miller-Halee, *Veterans' Claims Found in Shredder Bins*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/stories/2008/10/16/cbsnews_investigates/main4527134.shtml.

216. Amanda Ruggeri, *Military Veterans' Benefit Claims Records Wrongly Headed for VA Shredders*, U.S. NEWS & WORLD REP. (Oct. 31, 2008), http://www.usnews.com/articles/news/national/2008/10/31/military-veterans-benefit-claims-records-wrongly-headed-for-va-shredders.html.

217. *Document Tampering and Mishandling at the U.S. Department of Veterans Affairs: Hearing Before the Subcomm. on Disability Assistance & Memorial Affairs and the Subcomm. on Oversight and Investigations of the H. Comm. on Veteran's Affairs*, 111th Cong. 55 (2009) (statement of Belinda J. Finn, Assistant Inspector General for Auditing, Office of Inspector General, U.S. Department of Veterans Affairs), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg48418/pdf/CHRG-111hhrg48418.pdf.

218. *Id.*

219. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* FDIC v. Mallen, 486 U.S. 228, 242 (1988) (explaining that this factor should assess "the justification offered by the Government for delay and its relation to the underlying governmental interest").

due process analysis on the range of government or community interests underlying the government program.[220] It is important to point out, however, that the government or community interest analyzed under the third *Mathews* fact "is not conceptually adverse to the individuals [sic] interest."[221] Thus, as the Supreme Court explained in *Goldberg v. Kelly*, the "same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it."[222] Therefore, given the moral and legal obligation of the government to veterans, the government's interest in the timely and accurate dispensation of veterans' disability benefits largely reflects a veteran's personal interest in receiving them.

But the scope of the government's interest in the timely dispensation of veterans' benefits extends further than simply mirroring a veteran's personal interest. There are also national security implications. Veterans' benefits provide an important incentive to those considering whether to join the Armed Forces—an incentive that is particularly relevant at a time when enlistment levels are low but need is high.[223] One way to incentivize enlistment is to demonstrate a strong record of care for veterans, in which veterans' benefits, and more specifically, timely adjudication of benefits claims, play a central role. The VA's inability to carry out its mission to care for disabled veterans is currently a frequent topic in the media, and it has generated a sense of societal resentment and anger among both veterans and the general public.[224] In fact, a 2010 poll found that 94% of veterans do not trust the VA to handle their compensation claims fairly.[225] These conditions could create an environment in which potential recruits might no longer see the armed services as a viable option.

And yet, while the government has a clear interest in shortening the delays, that interest must be balanced by its interest—and the

220. WRIGHT & KOCH, *supra* note 155, § 8129, at 88.

221. *Id.*

222. 397 U.S. 254, 265 (1970).

223. *See Reality: Military Repeatedly Fails to Meet Recruiting Goals*, VETERANS FOR COMMON SENSE (Jan. 2, 2010, 21:21), http://www.veteransforcommonsense.org/index.php/national-security/1549-vcs (explaining that "the military [has] failed to reach new enlistment goals for the past decade").

224. Jason Grotto & Tim Jones, *VA Laboring Under Surge of Wounded*, CHI. TRIB. (Apr. 11, 2010), http://www.chicagotribune.com/health/ct-met-disabled-veterans-cost-20100409,0,5841974.story (discussing the VA's claims backlog and veterans' reactions); Peter Katel, *Caring for Veterans*, 20 CQ RESEARCHER 16, Apr. 23, 2010, at 361 (giving examples of individual veteran's feelings toward the system while highlighting the overall problem).

225. *94% of Veterans Do Not Trust Their VA Compensation Claim Will Be Handled Fairly by the VA*, PR WEB (Mar. 1, 2010), http://www.prweb.com/releases/2010_VA_disability_lawyer/02_poll/prweb3645864.htm.

taxpayers' interest—in controlling the cost of government.[226] Because government resources are limited, "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."[227] However, while reducing delay times would undoubtedly require the expenditure of government resources, it does not appear that a lack of funding or staffing shortages are constraining the VA from ameliorating the delays.[228] Since 2008, the VA's overall budget has increased substantially, growing by 16% for fiscal year 2010—the largest increase in 30 years.[229] Further, the proposed 2011 Department of Veterans Affairs budget included an "unprecedented" 27% increase in funding for the Veterans Benefit Administration.[230]

Most importantly, however, the VA "is not without weapons to minimize [the] increased costs" associated with reducing its delays.[231] Seventy percent of rating specialists believe the VA emphasizes speed over accuracy.[232] In fact, between 19% and 44% of remands were "avoidable," and almost half of the avoidable remands were caused by the failure to assist veterans in developing their claims and supporting evidence.[233] And when the Board remands a claim, it adds an average of 688 days—nearly two years—to the delay a veteran faces in obtaining a determination on her benefits appeal.[234] Reforming this

226. Mathews v. Eldridge, 424 U.S. 335, 348 (1976) ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed.").

227. *Id.*

228. *See* Veterans for Common Sense v. Shinseki, 644 F.3d 845, 885 (9th Cir. 2011) (explaining that the VA has not pointed to a lack of resources as preventing it from remedying the delays).

229. Kara Rowland, *Vets Salute Obama on Funding*, WASHINGTON TIMES (April 29, 2010), http://www.washingtontimes.com/news/2010/apr/29/vets-salute-obama-on-funding/. Obama's proposed VA budget for 2011 asks for $125 billion for the agency, a 10% increase from 2010. *Id.*

230. Rick Maze, *VA Claims Expected to Take Longer in 2011*, ARMYTIMES (Feb. 2, 2010), http://www.armytimes.com/news/2010/02/military_vaclaims_2011_020210w/.

231. Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (explaining that "[m]uch of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt . . . hearings and by skillful use of personnel and facilities").

232. Veterans for Common Sense v. Peake (*VCS*), 563 F. Supp. 2d 1049, 1075 (N.D. Cal. 2008) *aff'd in part*, *rev'd in part, sub nom.* Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011).

233. *Id.*

234. This includes 499 days for the VBA to grant the second appeal or return it to the Board for a second time, and 149 days for the Board to issue a second decision. *VCS*, 563 F. Supp. 2d at 1075.

poorly structured incentive system might enable the VA to shorten its delay time without incurring substantial costs.[235]

But whatever the ultimate cost of reforming the VA's claims adjudication process, it must nonetheless give way to veterans' interest in the timely adjudication of their benefits claims. Both the individual and community interests at stake in ensuring that the government fulfills its legal obligation to furnish veterans' benefits according to fair procedures outweigh the cost of doing so. For as the district court in *White v. Mathews* noted, "the question is not whether there shall be costs incurred, but who shall bear them while the governmental machinery responsible for providing appeals puts itself in order."[236] Thus, given that the VA is violating veterans' due process rights, we explain in the next Part how Article III courts can remedy these violations.

IV. THE NEED FOR A JUDICIAL REMEDY

Federal courts are empowered to declare what the Constitution requires and to provide a remedy when government action exceeds the bounds of constitutionally permissible process.[237] Although the coequal branches of government are entitled to discretion in how they conduct their internal affairs[238]—and enforcement of the nation's laws is the province of the executive branch—the Constitution does not provide the executive branch with discretion to violate constitutional rights.[239] In the context of agency action, courts have a particularly important role to play in safeguarding these rights, given that

235. *See, e.g.*, *Is VBA's Systematic Technical Accuracy Review Making the Grade?*: Hearing on Examination of VA Regional Office Disability Claims Quality Review Methods Before the Subcommittee on Disability Assistance and Memorial Affairs Committee on Veterans' Affairs, 111th Cong. (March 24, 2010) (statement of Belinda J. Finn, Assistant Inspector Gen. for Audits and Evaluations) (discussing inadequacies of the VA's current programs and offering recommendations for improvement); *see also Claims Summit 2010: Hearing Before the H. Comm. on Veterans' Affairs*, 111th Cong. (2010); *Examining Appellate Processes and Their Impact on Veterans: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 111th Cong. (2009), *available at* http://www.veteranslawlibrary.com/files/House_Hrg_Transcripts/H.Hrg.111-19.pdf; *Review of Veterans' Disability Compensation: What Changes Are Needed to Improve the Appeals Process?: Hearing Before the S. Comm. on Veterans' Affairs*, 111th Cong. (2009); Riley, *supra* note 29 (discussing flaws of the current veterans' benefits system).

236. 434 F. Supp. 1252, 1261 (D. Conn. 1976).

237. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 177 (1803); *see* LaDuke v. Nelson, 762 F.2d 1318, 1325 (9th Cir. 1985) (noting that the judiciary "has been vested with the ultimate authority to determine the constitutionality of the actions of the other branches of the federal government").

238. Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 896 (1961).

239. *LaDuke*, 762 F.2d at 1325 ("[T]he executive branch has no discretion with which to violate constitutional rights.").

unelected administrators are in many ways shielded from the democratic accountability that, at least in theory, constrains the actions taken by elected officials.[240] Thus, to prevent the type of arbitrary government action that is likely to increase as accountability decreases, judicial enforcement of constitutional rights is a necessity.[241] Given the pervasiveness of administrative regulation—from drivers and professional licenses to disability and welfare benefits, from commercial activities to the operation of prisons[242]—the importance of a judiciary willing and able to provide a check on irresponsible agency action cannot be understated.[243] With regard to the substantial delays facing veterans, a judicial remedy is vital to ensuring that the VA's claims adjudication process affords veterans procedural due process. Accordingly, Article III courts must fulfill their constitutional imperative and issue injunctive relief to veterans.[244]

A. Injunctive Relief in the Context of Administrative Delay

What is a remedy? The traditional view is that a remedy is the enforcement provision of a right—that is, "it is what a plaintiff re-

240. Sara B. Tosdal, Note, *Preserving Dignity in Due Process*, 462 HASTINGS L.J. 1003, 1036 (2011); *see* Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 401–02 (2006) (explaining that administrative law is focused "on problems raised by the exercise of [agency] discretion," among which is "the danger that permitting undemocratic, extraconstitutional decisionmakers to construe the law unfettered by precise statutory mandate will foster arbitrary or unreflective governance"); Marshall J. Breger, *The Structure of Government Accountability: Government Accountability in the Twenty-First Century*, 57 U. PITT. L. REV. 423, 434 (referencing the "traditional concern that the administrative state, if unchecked, would likely act arbitrarily and capriciously"); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 494 (explaining that "the concern for arbitrary administrative decisionmaking" is "a concern of paramount importance in the administrative state"); *cf.* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 6 (1990) ("As the bureaucracy's role has grown, so have the risks and benefits associated with official action.").

241. Tosdal, *supra* note 240, at 1036.

242. *Id.* at 1007.

243. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); THE FEDERALIST No.78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that there are situations in which the judiciary's refusal to act would threaten the Constitution's protections of individual rights and against encroachment by the government).

244. In addition to injunctive relief, veterans should also be afforded declaratory relief, which is the remedial power of Article III courts to "declare the rights and other legal relations of any interested party seeking such a declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (2006). Declaratory judgment delineates important rights and responsibilities and is "a message not only to the parties but also to the public and has significant educational and lasting importance." Bilbrey v. Brown, 738 F.2d 1462, 1471 (9th Cir. 1984). For purposes of this Article, however, we focus on injunctive relief.

ceives to cure the legal wrong committed against her."[245] Or, in even more general terms, "a remedy is anything a court can do for a litigant who has been wronged or is about to be wronged."[246] The existence of a remedy is important because it enables a right to be characterized as legal, rather than as moral or natural;[247] as Paul Gewirtz puts it, "[t]he function of a remedy is to 'realize' a legal norm [and] to make it a 'living truth'" so it can be "effective in the real world."[248]

Judges use remedies to provide redress for past harm or to prevent future harm from occurring.[249] To safeguard constitutional rights, courts often utilize the equitable remedy of injunctive relief,[250] which effectuates the latter objective. Injunctive relief is a judicial command that an errant party "do, or refrain from doing, some specified act."[251]

245. Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 679 (2001). While a cause of action bestows upon a litigant the right "to seek judicial relief from injuries caused by another's violation of a substantive legal requirement," Cannon v. Univ. of Chi., 441 U.S. 677, 730 n.1 (1979) (Powell, J., dissenting), a remedy is the type of relief a court grants.

246. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 1 (2d ed. 1994).

247. Tracy A. Thomas, Ubi Jus, Ibi Remedium*: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1639 (2004) ("The enforcement power of the remedy is the quality that converts pronouncements of ideals into operational rights. It is this enforceability that makes something a legal rather than a moral or natural right.").

248. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983) ("Our constitutional ideal of equal justice under law is thus made a living truth." (quoting Cooper v. Aaron, 358 U.S. 1, 20 (1958))).

249. LAYCOCK, *supra* note 246, at 1.

250. Carolyn Grose, Note,*"Put Your Body on the Line": Civil Disobedience and Injunctions*, 59 BROOKLYN L. REV. 1497, 1517 (1994). The injunction's modern foundation was laid by the Supreme Court's landmark 1954 opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954). After declaring that the existence of segregated schools violated the plaintiff students' constitutional right to a desegregated public education, the Court imposed the affirmative remedy of a mandatory injunction—instead of simply declaratory or prohibitory relief—to induce what it found was constitutionally-required change. Thomas, *supra* note 247, at 1633. In so doing, the Court allowed the injunction's "contemporary character and potency" to emerge. Gewirtz, *supra* note 248, at 588. And due in part to the vehement resistance to *Brown*'s decree, district courts assumed an unprecedented role, crafting detailed and strategic remedies and becoming the managers of their implementation. *Id.* at 580. Thus, *Brown* allowed the judiciary to embrace and manage injunctive relief as a way to define and protect substantive constitutional rights. Thomas, *supra* note 247, at 1634.

251. McQueen v. Lustine Realty Co., 547 A.2d 172, 176 (D.C. 1988); *see* United Bonding Ins. Co. v. Stein, 410 F.2d 483, 486 (3d Cir.1969) ("An injunction is a prohibitive writ issued by a court of equity forbidding a party-defendant from certain action, or in the case of a mandatory injunction, commanding positive action."); Gainsburg v. Dodge, 101 S.W.2d 178, 180 (Ark. 1937) ("'A writ of injunction may be defined as a judicial process, operating in personam, and requiring the person to whom it is directed to do or refrain from doing a particular thing.'" (quoting High on Injunctions (4th Ed.) § 1, p. 2)); Inhabitants of Lincolnville v. Perry, 104 A.2d 884, 887 (Me. 1954) ("An injunction has been well described as a judicial process whereby a party is required to do or refrain from doing a particular

However, the fact that a plaintiff succeeds on the merits of a constitutional claim does not necessarily entitle him to an injunction. Rather, as the Supreme Court has explained, the decision to issue an injunction is "a matter of equitable discretion" left to the trial judge.[252] That discretion currently functions within the boundaries of a four-factor test articulated by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, under which a plaintiff seeking an injunction must establish four factors: (1) irreparable injury; (2) inadequate remedies available at law; (3) that a remedy in equity is warranted after balancing the hardships; and (4) that the public interest "would not be disserved by a permanent injunction."[253] Given the emphasis placed upon balancing the hardships and the public interest, the *eBay* test substantially

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thing."); Bellows v. Ericson, 46 N.W.2d 654, 658 (Minn. 1951) ("'A writ of injunction may be defined as a judicial process, operating in personam, and requiring the person to whom it is directed *to do* or to refrain from doing a *particular thing*.'" (quoting 3 Dunneil, Dig. § 4467)); Cutten v. Latshaw, 344 S.W.2d 257, 262 (Mo. App. 1961) ("'An injunction is a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience.'" (quoting 43 C.J.S. *Injunctions* § 1, p. 405)); BLACK'S LAW DICTIONARY 705 (5th ed. 1979); 42 AM. JUR. 2D *Injunctions* §§ 1–2 (1969); 43 C.J.S. *Injunctions* § 2 (1978).

252. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 32 (2008).

253. 547 U.S. 388, 391 (2006) (explaining that this test reflects "well-established principles of equity"); *see also* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2757 (U.S. 2010) ("An injunction should issue only if the traditional four-factor test [established in *eBay*] is satisfied."). However, remedies scholars have criticized the *eBay* formulation of the test as not reflecting reality. *See, e.g.*, LAYCOCK, *supra* note 246, at 57 ("There is no 'familiar' four-factor test."); John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 695 (2009) (criticizing the test as being "something of a hoax"); Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63, 76 n.71 (2007) ("Remedies specialists had never heard of the four-point test . . . . [T]he Court appears to vindicate a 'traditional' standard for a final injunction that never existed, except perhaps for a preliminary injunction."). These scholars note that although there is a four-factor test courts traditionally conduct prior to issuing *preliminary* injunctions, the Court's attempt at translating those factors into a test for instituting *permanent* injunctions should have produced a three-factor test due to the elimination of the need to ascertain "the probability that [the movant] will succeed on the merits." Golden, *supra*, at 695 (explaining that "[b]y the time a permanent injunction is at issue, this probability-of-success factor effectively drops out," since "[b]y this time, the movant must have actually prevailed on the merits") (quoting 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAYE KANE, FEDERAL PRACTICE AND PROCEDURE § 2948, at 133 (2d ed. 1995)). Instead, the Court "obtained four factors by doubling up, confusingly, on the irreparable harm factor, redundantly restating it as a requirement that legal remedies be inadequate." Golden, *supra*, at 695. The Court also stated a retrospective test for irreparable harm—asking whether a plaintiff "has suffered an irreparable injury"—instead of prospectively asking whether a plaintiff would continue to suffer that irreparable injury. *Id.* at 696. Regardless of these serious problems, though, for now, the *eBay* test remains the law guiding the imposition of perma-

overlaps with the *Mathews* analysis. It is therefore unsurprising that just as the nature, severity, and impact of the VA's appellate delay justifies the finding of a due process violation, so too does it justify the issuance of an injunction under the *eBay* test.

The first *eBay* factor asks whether a plaintiff has suffered an "irreparable injury," which is an injury that defies measure or cannot be adequately compensated by money.[254] Unfortunately, although the existence of an irreparable injury is the touchstone of injunctive relief,[255] its application is less than clear; indeed, this requirement is regularly maligned by courts and commentators alike for its obfuscation of the remedial inquiry.[256] As a general matter, irreparable injury does not demand that the threatened injury actually be incapable of being compensated, but only that it be "substantial and serious" enough to justify the injunctive relief being sought.[257] Courts regularly find irreparable injury where a plaintiff's loss cannot be replaced, such as with real property, unique personal property, or where intangible rights have been violated, such as in civil rights and environmental litigation.[258] Among these categories, the inquiry is fact-sensitive, requiring courts to ascertain where along the spectrum of severity a particular injury resides.[259] Moreover, in the context of deprivations of constitutional rights, there is a presumption that a deprivation results in irreparable harm.[260]

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nent injunctions, and we therefore use it to establish that a permanent injunction should be entered against the VA.

254. BLACK'S LAW DICTIONARY 856–57 (9th ed. 2009).

255. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 712 (1977); Steffel v. Thompson, 415 U.S. 452, 462–66 (1974).

256. *See, e.g.*, Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966) (noting that "recitation of irreparable injury generally produces more dust than light"); Grose, *supra* note 250, at 1514 (noting that showing irreparable harm is not easy because it is not entirely clear what the term "irreparable" means); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 689 (1990) (noting the "confusion" caused by the irreparable harm requirement).

257. BLACK'S LAW DICTIONARY 856–57 (9th ed. 2009) (quoting ELIAS MERWIN, PRINCIPLES OF EQUITY AND EQUITY PLEADING 426–27 (H.C. Merwin ed., 1896)). For a meditation on the complexities of irreparable harm, see Laycock, *supra* note 256, at 703–14.

258. Laycock, *supra* note 256, at 703–14.

259. For example, suspension of a plaintiff's driving privilege is not serious enough to constitute irreparable injury. MacBeth v. Utah, 332 F. Supp. 1191 (D. Utah 1971).

260. Elrod v. Burns, 427 U.S. 347, 373 (1973) (explaining that where plaintiffs have established the deprivation of a constitutional right, there is a presumption that this deprivation results in irreparable harm); *see also* Jolly v. Coughlin, 76 F.3d 468, 482 (1996) (noting the "presumption of irreparable injury that flows from a violation of constitutional rights"). Although some have argued that the *eBay* test eliminated this presumption due to its direction that "the plaintiff must demonstrate" the existence of the four factors, *see* Golden, *supra* note 254, at 697,

Wherever the boundaries of the irreparable harm requirement may actually lie, there is little doubt that if the requirement is to have any meaning at all, then the profound harm suffered by veterans must qualify as such. The grim statistics presented in Part III evidence that the harm caused by the VA's delays is economic, threatening veterans' financial viability; physical, causing many veterans to live without essential health care and basic necessities; and psychological, disrupting veterans' attempts to reintegrate into society while forcing them to endure a prolonged legal battle with the very government they enlisted to defend. Further, the longer the appeals process continues, the greater the harm becomes; indeed, the VA itself has admitted that the length of time required to resolve appeals is likely to *increase*, rather than decrease, in coming years.[261] Thus, the irreparable harm requirement is met.

The second *eBay* factor requires that legal remedies, such as monetary relief, be inadequate to compensate for an injury.[262] This factor substantially overlaps with, if not duplicates, the irreparable injury requirement[263]—indeed, as the judge who applied the newly minted four-factor *eBay* test on remand opined, "the irreparable harm inquiry and remedy at law inquiry are essentially two sides of the same coin."[264] Because of the widespread and severe psychological and physical impact caused by the VA's delays, the challenge of calculating the monetary value of the deprivation and the resulting damages would be nearly insurmountable.[265] Moreover, a legal remedy is considered inadequate when it will not sufficiently deter a repeated violation by the defendant, but instead will cause a plaintiff to engage in another lawsuit involving the same issues.[266] Here, even if the VA

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it is not at all clear that the Court intended to do so, particularly in the context of violations of constitutional rights.

261. Veterans for Common Sense v. Peake, 563 F. Supp. 2d. 1049, 1074 (N.D. Cal. 2008) *aff'd in part*, *rev'd in part, sub nom.* Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011).

262. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

263. Laycock, *supra* note 256, at 694 ("The irreparable injury rule has two formulations. Equity will act only to prevent irreparable injury, and equity will act only if there is no adequate legal remedy. The two formulations are equivalent; what makes an injury irreparable is that no other remedy can repair it.").

264. MercExchange, L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 592 n.11 (E.D. Va. 2007); *accord* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (noting the similarity of these two factors); Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63, 87 (2007) (noting that the "inadequate legal remedy and irreparable injury seem to be functionally, at least, one test").

265. *See* Walters v. Reno, 145 F.3d 1032, 1048 (9th Cir. 1998).

266. Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 349 (1981) (explaining that courts should issue an injunction in a case where, "[i]f the court simply awards monetary damages, the defendant will probably continue his actions"); *cf.* Farmland Indus., Inc. v. Kansas-

were to compensate veterans for their past injuries, the thousands of veterans who will surely continue to suffer from the ever-growing delays would have no recourse but to bring future lawsuits against the VA, creating a perpetual cycle of lawsuits and litigation.[267] Thus, given that the VA's unconstitutional delays are likely to continue for the foreseeable future without some form of judicial intervention, an injunction is the only way to prevent their future recurrence.

The third factor requires a court to balance the hardships between the plaintiff and the defendant,[268] which entails a fact-sensitive judicial evaluation of the potential consequences of an injunction.[269] The emphasis in balancing the interests of both parties is on avoiding economic waste; as Professor James Fischer puts it, "the defendant's cost of complying with the injunction should not be inappropriately large relative to the plaintiff's benefits gained from obtaining the injunction."[270] And like the substantially similar balancing test required under the third prong of the *Mathews* balancing test indicates, the weighing of the interests here overwhelmingly tips the scales in favor of veterans.[271] The significant benefit of timely claims adjudication to veterans defies monetization.

Conversely, whatever economic hardship that an injunction against the VA might cause is undercut by the unprecedented increase in its yearly budget,[272] the fact that the VA has not asserted a lack of resources as a rationale for the delays, and the stunning inefficiencies of the VA's claims adjudication process that are at least partially responsible for the delays. Thus, when these facts are viewed in light of the struggles that veterans experience, there is little doubt that the equities favor veterans. The VA's hardship in executing the contemplated injunction—mandatory deadlines and payment of interim ben-

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Nebraska Natural Gas Co., 349 F. Supp. 670, 681 (D. Neb. 1972) (noting that nothing suggested the "likelihood of recurrences of past behavior," making injunctive relief unnecessary); Johnson v. Mansfied Hardwood Lumber Co., 143 F. Supp. 826, 834–35 (W.D. La. 1956) (showing that multiple suits "could or would be required" was enough to show that plaintiffs did not have an adequate legal remedy).

267. *See* LaDuke v. Nelson, 762 F.2d 1318, 1330 (9th Cir. 1985), *amended*, 796 F.2d 309 (9th Cir. 1986) (noting that the high likelihood that violations will recur absent issuance of an injunction counsels in favor of equitable rather than legal relief).

268. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

269. David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 633 (1988).

270. James M. Fischer, *What Hath* eBay v. MercExchange *Wrought?*, 14 LEWIS & CLARK L. REV. 555, 565 (2010).

271. *See supra* subsection III.B.4.

272. *See generally* Rowland, *supra* note 229.

efits, discussed *infra*[273]—is low in comparison to the severe hardships veterans endure while they await decisions on their benefits claims.

Finally, the fourth factor requires that the public interest "not be disserved by a permanent injunction," which demands that the proposed injunction not be contrary to public policy.[274] Far from being disserved, the public has a clear interest in ensuring that veterans are adequately cared for and that the VA is able to fulfill its mission. In fact, given that veterans are entitled to disability benefits as a consequence of their service, ensuring that those who are injured in the course of their service are provided their disability benefits in a timely manner is a compelling public interest. In the words of one federal district court:

> When a government agency has unreasonably delayed action in a manner that affects not only the property rights of hundreds of thousands of American citizens, but also undermines their fundamental rights of survival, the issuance of an order that will compel the agency to comply with its legal obligations to those citizens in a reasonable manner directly advances the public interest.[275]

Thus, the public interest factor weighs in favor of issuing an injunction.

In sum, applying the *eBay* factors to veterans' due process claims demonstrates that the veterans' claims are sufficient to support an injunction. A question still remains, however, as to its proper scope, which is a function of the breadth of the violation.[276] Federal courts have previously granted system-wide injunctive relief against administrative agencies for violating the constitutional rights of individuals;[277] in these cases, the analysis centers upon whether the injury is in fact "widespread enough to justify systemwide relief."[278] As the Ninth Circuit has noted, system-wide injunctive relief is "required" if a violation is "attributable to policies or practices pervading the whole

273. *See infra* section IV.B (discussing the content of the proposed injunction).

274. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

275. Cobell v. Norton, 283 F. Supp. 2d 66, 212–13 (D.D.C. 2003), *vacated in part*, 392 F.3d 461 (D.C. Cir. 2004).

276. Lewis v. Casey, 518 U.S. 343, 360 (1996) (citation omitted); *see also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417 (1977) ("[I]nstead of tailoring a remedy commensurate with the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope.").

277. *See* Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119, 1151 (2005) ("[I]t is now beyond question that federal courts have the power to issue [nationwide and class-wide relief]."). For example, in *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998), the Ninth Circuit upheld a permanent injunction against the Immigration and Naturalization Service after analyzing the adequacy of legal remedies and the existence of an irreparable injury, and then balancing the equities. *Id.* at 1048.

278. *Lewis*, 518 U.S. at 359; *see also Brinkman*, 433 U.S. at 420 ("Only if there has been a systemwide impact may there be a systemwide remedy.").

system (even though injuring a relatively small number of plaintiffs), or if the unlawful policies or practices affect such a broad range of plaintiffs that an overhaul of the system is the only feasible manner in which to address the . . . injury."[279] Since the unconstitutional delays in the adjudication of veterans' benefits are both a direct result of VA policies and practices and are national in scope, system-wide injunctive relief is surely justified.[280] With that in mind, in the next section, we discuss the contours of our proposal for a system-wide injunction against the VA.

B. Mandatory Deadlines as Injunctive Relief for Administrative Delay

The VA's claims processing and adjudicatory systems must be fundamentally transformed to adequately protect the constitutional rights of our nation's veterans. Secretary Shinseki has begun this process, demonstrating a willingness to change and showing encouraging signs of improvement.[281] But there is still a long way to go before the VA's claims adjudication process operates within the constitutional limitations of the Fifth Amendment. While Congress and the VA continue to work toward addressing these problems, an injunction must be issued in the interim in order to compel compliance with the Constitution. Such an injunction must not only require the VA to reduce its delays by specific dates, but must also allow veterans to automatically obtain benefits if the delays persist beyond the deadlines imposed.

Given the chronic delays disabled veterans face and the unique sensitivities they possess, the proper remedial action is an injunction consisting of the following: (1) a determination of the amount of time beyond which delay violates the Constitution;[282] (2) a transition process that employs multiple deadlines, enabling the VA to gradually shorten its delays until they no longer violate the Constitution; (3) a provision entitling veterans to interim payments in an amount

279. Armstrong v. Davis, 275 F.3d 849, 870 (9th Cir. 2001).

280. Finally, it is worth pointing out that certain concerns relevant to imposing injunctive relief in other circumstances are not relevant to whether courts should impose an injunction against the VA. While there are federalism concerns implicated when federal courts order state agencies to act, those concerns are not relevant here, where federal courts would be ordering a federal agency to act. Indeed, "none of the considerations inherent in the judicial concept of 'Our Federalism' are implicated in the constitutional challenges to executive branch behavior in federal courts." LaDuke v. Nelson, 762 F.2d 1318, 1325 (1985) (citations omitted).

281. *See The Promise Audit, supra* note 132.

282. In devising this deadline, courts should be particularly sensitive to the severity of the harm suffered by veterans while they endure these prolonged delays: bankruptcy, home foreclosure, divorce, psychological dysfunction, and in some cases, suicide. *See supra* notes 196–201 and accompanying text.

equivalent to the benefits being claimed if the VA fails to meet those deadlines; (4) a provision entitling the VA to recoup those interim payments if veterans do not prevail on appeal; and (5) a grace period for the VA to begin implementing the injunction.

We now consider the virtues of this approach. First, establishing the outer bounds of procedural due process by imposing a hard deadline provides the VA with clear, identifiable guidance. Further, by allowing for a grace period and utilizing a graduated process to transition the VA into compliance with the fixed deadline, our approach strikes a normatively desirable compromise between the burden of implementing such a substantial reform and the need to expediently mitigate the negative effects of the delays. Relatedly, the payment of interim benefits ensures that veterans receive the support they desperately need within the limitations set by that compromise. To be sure, paying interim benefits involves clear risks—namely, paying benefits to those who are either undeserving or intentionally taking advantage of the system—but they are a necessary sacrifice in the attempt to ensure that deserving veterans receive vital support in a timely fashion. Allowing for a grace period, benchmarks, and a right to recoup undeserving payments minimizes these risks to the greatest extent possible.

Regarding the temporal content of the injunction, courts can and should allow flexibility as to the way in which the VA meets the deadlines, as long as it does meet them. There are numerous avenues the VA could take to help it process appeals more quickly, such as: asking Congress for more funding, increasing staff at the Board or shifting staff roles, providing better training to Regional Office staff to lessen the errors made, or increasing efficiency and better utilizing available technology. The injunction should enable the VA to take advantage of all of these methods, or any other that it develops, while deferring to the agency's expertise in managing its own affairs.[283]

Additionally, in order to manage the challenges inherent in developing, implementing, and monitoring a systemic injunction against the VA, courts might consider appointing a special master to assist with the process.[284] Judicially mandated institutional reform requires technical expertise and a substantial investment of time;[285] by delegating authority to an outside expert to oversee this process, courts can effectively ensure compliance while conserving vital judi-

283. *See* Cockrum v. Califano, 475 F. Supp. 1222, 1240 (D.D.C. 1979); Armstrong v. Davis, 275 F.3d 849, 883–84 (9th Cir. 2001) (Berzon, J., concurring); Walters v. Reno, 145 F.3d 1032, 1053 (9th Cir. 1998).

284. *See* FED. R. CIV. P. 53 (authorizing the appointment of a special master).

285. *See* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1295.

cial resources.[286] Special masters have been appointed in the past to assist with desegregating schools, addressing systemic problems in state prisons, and eradicating discriminatory practices in a federal agency.[287] Special masters can be used to accomplish a range of tasks necessary to facilitate court-ordered institutional reform, including developing the injunction, supervising compliance, providing assistance to the defendant organization, communicating ongoing developments to the judge, and monitoring whether the injunction should be amended in light of new developments.[288] With regard to the injunction we propose here, a special master could fulfill any or all of these functions, filling in the basic injunctive framework outlined above and carrying it to fruition so as to ensure compliance with the court's decree.

It is also important to note that the specific type of injunctive relief we propose here is not without precedent. For example, in *White v. Mathews*, a federal district court remedied constitutional violations caused by administrative delay in the social security benefits process by imposing an injunction with fixed deadlines.[289] In *White*, a district court judge determined that 306 days had passed between White's petition for a hearing and the ALJ's final decision.[290] The judge also made the following findings, which are remarkably similar to, although notably less severe than, the delays currently endured by disabled veterans:

> The plaintiff's experience with the SSA appeals process is not unique. As a result of various factors . . . , an extremely large backlog of cases has devel-

286. James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 802 (1991); *see generally* Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 481–87 (2009) (discussing the benefits of appointing a special master).

287. *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910, 1926 (May 23, 2011) (explaining that "[t]he court appointed a Special Master to oversee development and implementation of a remedial plan of action"); Morgan v. Kerrigan, 530 F.2d 401 (1st Cir. 1976) (using special masters to develop desegregation plans for Boston public schools); Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd*, 679 F.2d 1115 (5th Cir. 1982) (using a special master to reform Texas Department of Corrections); Pigford v. Glickman, 206 F.3d 1212, 1215 (2000) (using a special master to review the United States Department of Agriculture's compliance with a consent decree resolving allegations of discrimination on behalf of African-American farmers in the processing of credit and benefit applications).

288. Horowitz, *supra* note 285, at 1298. Courts have broad and flexible power to modify the injunctive relief they institute. N.Y. State Assn. for Retarded Children, Inc. v. Carey, 706 F.2d 956, 967 (2d Cir. 1983). As the Supreme Court recently explained in *Plata*, "[a] court that invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order." 131 S. Ct. 1910, at 1946.

289. 434 F. Supp. 1252, 1261–62 (D. Conn. 1976).

290. *Id.* at 1254.

> oped in the SSA's Hearings and Appeals Bureau. In April of 1975, there was a record total backlog of 113,000 pending cases nationwide. The result has been a chronic delay in the disposition of appeals. During the period between January 1973 and March 1975 the average waiting period between an initial request for hearing and the entry of a final decision was 195.2 days nationally, and 211.8 days for petitions in Connecticut or, approximately six and one-half and seven months respectively.
> . . . The incidence of reversals by administrative law judges exceeds 50 percent of all the cases heard. The reversal rate is much lower, to be sure, when measured against the total number of original denials, many of which are not appealed. However with respect to those individuals who feel sufficiently aggrieved with the Agency's decision to seek an appeal (the relevant class in this case), the prospects for reversal are substantial.[291]

Concluding that the appellate delays violated the applicants' constitutional rights, the judge entered an injunction imposing mandatory deadlines for the Social Security Administration to shorten the delays within its adjudicatory body.[292] The judge's order required the SSA to "reduce[ ] the maximum delay" to 180 days by July 1, 1977; to 150 days by the end of December 1977; and to 120 days by July 1, 1978.[293] If the SSA failed to meet these deadlines, then it was required to dispense benefits to applicants "as though favorable action had been taken" in their case, "subject to termination upon a subsequent unfavorable hearing result."[294] The court further required that if an unfavorable hearing result occurred, "the SSA [was] entitled to full recoupment for interim amounts paid in the meantime."[295] Finally, the court also provided the SSA with a one-year grace period to begin complying with the injunction.[296]

The government appealed the order to the Second Circuit, which affirmed the trial court's decision.[297] The court described the order as a "laudable effort" and as an effective "equitable solution to the difficult problem of balancing administrative difficulties and wage earners' needs."[298] The government subsequently filed a petition for certiorari with the U.S. Supreme Court, which was denied.[299]

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291. *Id.* at 1254–56 (footnotes omitted).
292. *Id.* at 1261–62.
293. *Id.* at 1261.
294. *Id.* at 1262. The court further held that "[e]xcludable from the foregoing time limitation shall be such periods of delay as are caused directly by a petitioner's own failure to provide essential information for an adjudication." *Id.*
295. White v. Mathews, 559 F.2d 852, 860 (2d Cir. 1977).
296. *Id.*
297. *Id.*
298. *Id.*
299. Califano v. White, 435 U.S. 908 (1978). Seven years later, in *Heckler v. Day*, 467 U.S. 104 (1984), the U.S. Supreme Court struck down "an injunction issued on behalf of a statewide class" that required "the Secretary of Health and Human Services to adjudicate all future disputed disability claims under Title II of the Social Security Act . . . according to judicially established deadlines and to pay interim benefits in all cases of noncompliance with those deadlines." *Id.* at 105.

To be sure, the types of challenges facing veterans—a backlog of cases, chronic delay in the disposition of appeals, and a high reversal and remand rate—are remarkably similar to those faced by the benefits applicants in *White*, albeit more pronounced, given the greater length of delays facing veterans. As a result, the content of the injunction we propose here finds specific support in the *White* injunction, lending credence to the use of fixed deadlines to remedy delays in administrative action.[300]

The proposed injunction also finds support in a recent groundbreaking Supreme Court decision, *Brown v. Plata*,[301] which upheld a similarly-styled injunction addressing systemic constitutional violations by the government. In *Plata*, the plaintiffs brought a lawsuit against the state of California alleging that overcrowded conditions in its prison system violated the prisoners' Eighth Amendment right to be free of cruel and unusual punishment.[302] The district court agreed, concluding that the prison population, which was nearly double the prison system's designed capacity, could not be larger than 137.5% of that capacity in order to remain compliant with the Eighth Amendment.[303]

Based on this finding, the district court crafted an injunction so as to bring California's prison system within constitutional limits. It ordered the State of California to develop a plan to reduce the prison population to 137.5% of design capacity in two years,[304] and to submit the plan to the court for approval, which, after one failed attempt, the state did.[305] Without endorsing the particular content of the state's

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However, the district court issuing that injunction never reached the plaintiff's due process claims, and therefore, *Heckler* does not speak to a federal district court's ability to enter an injunction imposing mandatory deadlines premised upon a violation of the Due Process Clause of the Fifth Amendment. *Id.* at 110 n.13; *see also id.* at 131 (Marshall, J. dissenting) ("Excepting, of course, those cases where denial of benefits rises to the level of violations of due process, I would agree that the problem of delay may at times not be susceptible to judicial solution.").

300. White v. Mathews, 434 F. Supp. 1252, 1255–56 (D. Conn. 1976).

301. 131 S. Ct. 1910 (2011).

302. Coleman v. Schwarzenegger, 2010 U.S. Dist. LEXIS 2711, at *30 (Jan. 12, 2010).

303. *Id.*

304. *Id.* at *30–31. Litigation regarding prisons is governed by the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 104th Cong. (1996), which allows a three-judge district court to issue an order limiting a prison population in certain circumstances. *Plata*, 131 S. Ct. at 1929 ("When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population."). As a result, the *Plata* district court based its decision to issue a population-limiting injunction on the requirements of the PLRA, not on those of *eBay*. However, the remedial principle underlying the *Plata* decision, that "[c]ourts . . . must not shrink from their obligation to enforce the constitutional rights of all persons," is directly relevant. *Id.* at 1928.

305. *Coleman*, 2010 U.S. Dist. LEXIS 2711 at *30–*31.

plan—allowing it to change if circumstances require—the court instituted a series of four six-month benchmarks for the state to meet; these benchmarks required an incremental reduction in the prison population until it reached the capacity of 137.5%.[306]

On certiorari, the Supreme Court agreed that the conditions in the California prisons amounted to cruel and unusual punishment, and upheld the district court's injunction on the grounds that when "government fails to fulfill" its constitutional obligations, it is the courts' "responsibility" to remedy them.[307] In so doing, the Court reinforced the notion that equitable injunctions are a useful and powerful mechanism for remedying constitutional violations by government agencies, thereby reaffirming the central role that the judicial exercise of remedial power can play in safeguarding individual rights.

In sum, both *White* and *Plata* are powerful examples demonstrating that "[c]ourts . . . must not shrink from their obligation to enforce the constitutional rights of all persons[.]"[308] Just as the courts in those cases refused to ignore government encroachment upon the individual rights of those seeking SSA entitlements or of California prison inmates, so too must federal courts refuse to ignore the infringement upon veterans' individual rights that results from the severe and widespread delays in the VA claims adjudication process. The delays not only clearly violate veterans' procedural due process rights, but they also meet the requirements necessary for equitable relief—so the courts must issue it. Notwithstanding the organizational challenges and costs of an injunction imposing mandatory deadlines and the payment of interim benefits, such an injunction is the only way to truly ensure that our nation's veterans receive the due process to which they are constitutionally entitled.

V. CONCLUSION

That the VA allows so many veterans to unnecessarily suffer while they wait for their benefits claims to be processed is truly a national shame. The same Constitution that empowers our President to send American troops into battle also demands that the VA afford our veter-

306. *Id.* at *35–36. The state is required to report to the court on whether it is reaching these benchmarks, and to update the court on other developments, including legislative changes. *Id.* at *37–38.

307. *Plata*, 131 S. Ct. at 1928. The Court found authority for upholding the injunction in the PLRA. *Id.* at 1922–23 (stating that "[t]he appeal presents the question whether the remedial order issued by the three-judge court is consistent with requirements and procedures set forth" in the PLRA, and reasoning that "[t]he overcrowding is the 'primary cause of the violation of a Federal right,' 18 U.S.C. § 3626(a)(3)(E)(i)" before concluding that "the PLRA does authorize the relief afforded in this case and that the court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights").

308. *Id.* at 1928 (citation and internal quotation marks omitted).

ans due process of law. The executive branch, however, is failing to live up to its constitutional obligations, and the judiciary—as the final arbiter of individual rights—must act within its discretion to provide the relief to which veterans are constitutionally entitled. Courts should find that the VA's unreasonable delays violate the Due Process Clause and should institute injunctive relief that would require the VA to either remedy its violations or begin paying interim benefits before thousands more veterans face the same plight that so many thousands already have. We owe it to our veterans to do nothing less.