

No. 08-16728
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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VETERANS FOR COMMON SENSE, a District of Columbia Nonprofit
Organization; and VETERANS UNITED FOR TRUTH, INC., a California
Nonprofit Organization, representing their members and a class of all veterans
similarly situated,

Plaintiffs,

v.

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

Defendants.

Appeal from the United States District Court for the Northern District of
California
Case No. C 07-3758 SC

**BRIEF OF *AMICI CURIAE* SWORDS TO PLOWSHARES AND VIETNAM
VETERANS OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLANTS
VETERANS FOR COMMON SENSE and VETERANS UNITED FOR
TRUTH, INC. AND IN SUPPORT OF REVERSAL OF THE JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), the undersigned counsel states that neither *amicus curiae* Swords to Plowshares nor *amicus curiae* Vietnam Veterans of America, Inc. has a parent corporation and that no publicly held corporation owns 10% or more of the stock, if any, of either *amicus curiae* Swords to Plowshares or of *amicus curiae* Vietnam Veterans of America, Inc.

Dated: December 10, 2008.



Thomas V. Loran III

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Amici Curiae Swords to Plowshares (“Swords”), and Vietnam Veterans of America, Inc. (“VVA”), respectfully submit this brief urging reversal of the judgment in favor of defendants and appellees.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Both Swords and VVA were founded in the 1970s to serve some of the pressing needs of Vietnam War veterans who, returning from an unpopular war, found themselves shunned by large segments of our society and virtually abandoned by the VA and other governmental institutions. Post Traumatic Stress Disorder (“PTSD”), with its disabling psychological and neurological effects had yet to be widely recognized by the medical community. Swords and VVA were established in part to help the tens of thousands of Vietnam- era veterans suffering from PTSD in the aftermath of their service to our country, and, as a new wave of tens of thousands of injured veterans returns from the Middle East, Swords and VVA continue to serve thousands of veterans with service-connected PTSD and other mental health injuries. Both Swords and VVA are thus vitally interested in, and can bring unique expertise and perspective to, this case, in which the District Court has erroneously concluded that it lacks the power and/or the ability to remedy the severe wrongs that it acknowledges are being inflicted upon thousands of veterans daily. Further detail about the proposed *amici* and the nature of their interest is discussed in their accompanying motion for leave to file this brief.

ARGUMENT

I. INTRODUCTION.

Because thousands of their members, veterans with mental health injuries that they suffered while serving our nation, are catastrophically affected by the facts proven at trial, Swords to Plowshares (“Swords”), and Vietnam Veterans of

America, Inc. (“VVA”) have sought leave to file this brief as *amici curiae*. This brief discusses the constitutional role of the judiciary in relationship to the other branches of government, and the remedial mechanisms available to Article III courts, when faced with systemic institutional failures such as those the District Court found in this case.

Defendants concede that they have a “broad obligation” and a “moral imperative . . . to provide medical care to the men and women who have served our country.” Defs.’ Proposed Findings at 11. By statutory mandate, defendants “shall furnish hospital care and medical services which the Secretary determines to be needed to any veteran for a service-connected disability” 38 U.S.C. § 1710(a)(1) (emphasis added).¹

Defendants are gravely in breach of this moral and legal mandate. Based upon the trial record, the District Court found that thousands of veterans have “faced significant delays in receiving disability benefits and medical care from the VA.” The court below also found that the significant delays have caused, and continue to cause, thousands of veterans to suffer serious physical consequences:

Furthermore, given the dire consequences many of these veterans face without timely receipt of benefits or prompt treatment for medical conditions, especially depression and PTSD, these injuries are anything but conjectural

Mem. of Decision at 49:15-22. The court also recognized that “[t]he relief sought by plaintiffs would likely result in the amelioration of the injuries alleged in the Complaint,” and that plaintiffs had no other adequate remedy. *Id. See also id.* at 54:3-5. Nevertheless, the court then erroneously decided that it lacked

¹ Section 1710(e)(1)(D) further states that “a veteran who served on active duty in a theater of combat operations . . . after November 11, 1998, is eligible for . . . medical services . . . notwithstanding that there is insufficient medical evidence to conclude that such condition is attributable to such service.”

power to address this national emergency, *or even to declare it unlawful*. *Id.* at 55:11-12.

The District Court thus abdicated the fundamental power and duty of the judiciary: to declare what the Constitution requires, and to provide a remedy when its precepts are violated. As held in *Marbury v. Madison*, 5 U.S. 137, 163, 177 (1803), the structural integrity of the Constitution itself depends upon the assignment of that role to the judiciary -- and on the courts' fulfilling it. We therefore ask this Court to reaffirm the elementary and vitally important principle that for every wrong -- in particular, for every Constitutional wrong -- there is a remedy to be had in the Article III courts. Without such a remedy here, the constitutional guarantees at issue are virtually meaningless.

II. DISCUSSION.

A. Defendants' Health Care System Is Unconstitutionally Dysfunctional.

The simple and essentially undisputed facts that were proven at trial establish that defendants' health care system, as presently administered, is constitutionally as well as morally intolerable, and that it can and must be remedied.

1. Hundreds Of Thousands Of Veterans With Mental Health Injuries Must Wait For Inexcusable Periods For Their Claims To Be Resolved.

Veterans' claims for service-connected disability benefits are subject to what the District Court called "extensive delays" (Mem. of Decision at 43:2) at every step of the adjudication process. That is an understatement. The salient fact, as the District Court found, is that injured veterans commonly must wait five, six, seven, or even more years for their claims to be resolved. The court further found that "[i]t is beyond doubt that disability benefits are critical to

many veterans and any delay in receiving these benefits can result in substantial and severe adverse consequences.” Findings of Fact, No. 107.

The delays are astounding. For claims in which there is an appeal of the initial Notice of Decision, the time for resolution of appeals is 1,419 days -- almost *four and a half years*. Trial Transcript, 573:21-574:3. (This excludes claims that are resolved before the BVA issues a decision: *e.g.*, because the veteran’s death has extinguished the claim, which happened at least 1,467 times between October 2007 and March 2008 *alone*. *Id.* at 46:17-20.) As the District Court found, “James Terry, the Chairman of the BVA, was unable to explain this lengthy delay in the resolution of appeals.” *Id.* at 44:17-23.²

Defendants’ repeated promises to reduce these unacceptable delays have come to nothing. For example, the VA had promised that this year it would be able to reduce the time for the initial Regional Office decision from 183 days to 169 days, but nothing has changed. See July 8, 2008 statement of Rear Admiral Patrick W. Dunne, USN (Ret.), the VA’s Acting Undersecretary for Benefits (http://www.senate.gov/~veterans/public/index.cfm?pageid=16&release_id=11731&sub_release_id=11755&view=all). In fact, as the Acting Undersecretary for benefits has acknowledged, it has simply been “business as usual” at the VA this past year as far as claims processing is concerned:

The timeliness of our claims processing decisions has essentially remained stable throughout this fiscal year. In FY 2007 our average processing time was 183 days; we have averaged 182 days through May of this year. This is very disappointing to us”

Id.

No other adjudicatory process comes to mind that even approaches this time frame. A California judge may not receive a salary “while any cause before

² It also takes approximately 182 days for an initial Regional Office decision. Mem. of Decision at 41:18-20 (Findings of Fact, No. 18).

the judge remains pending and undetermined for 90 days” Cal. Const., Art. VI, § 19. Under the California Workers Compensation scheme (and in many other states), if the claims administrator does not decide a claim within 90 days, it is presumptively compensable. Cal. Lab. Code § 5402(b). Private disability insurers are at risk of liability for actual and punitive damages if they do not act on claims without unreasonable delay. Cal. Ins. Code § 790.03 (4).

Full-fledged personal injury litigation -- including complicated disputes about causation and extent of injuries -- is typically resolved in a year or two. A California case that is not brought to trial within five years is subject to mandatory dismissal; discretionary dismissal for dilatory litigation after only three years is not infrequent. Cal. Code Civ. Proc. §§ 583.310, 583.360; 583.420(a)(2)(B). The Social Security Administration processes about 4.5 million Social Security Disability Insurance and Supplemental Security Income applications annually, in an average of 1,048 days (about three years). Social Security Administration, Fiscal Year Performance and Accountability Report, 2005, p. 17.

In short, litigants, insurers, and state and federal institutions involved in administering disability claims of all kinds are legally required to, and do, resolve disability and injury claims in far shorter times than the astronomical periods that the VA consumes. As the court found, “[i]t is beyond doubt that disability benefits are critical to many veterans and any delay in receiving these benefits can result in substantial and severe adverse consequences.” Mem. of Decision at 46: 21-25. To force injured veterans to wait four, five, six, or even more years for their claims to be resolved does not honor our nation’s veterans who have been wounded in combat -- and it is not due process.

