

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.

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

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**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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JUDITH Z. GOLD (CSB #97098)  
1301 St. Charles St.  
Alameda, CA 94501  
Telephone: (510) 523-7923  
E-mail: judyzgold@aol.com

PILLSBURY WINTHROP SHAW  
PITTMAN LLP  
THOMAS V. LORAN III (CSB #95255)  
50 Fremont Street, Fifth Floor  
San Francisco, CA 94105  
Telephone: (415) 983-1000  
E-mail: thomas.loran@pillsburylaw.com

Attorneys for *Amici Curiae* Swords to Plowshares  
and Vietnam Veterans of America, Inc.

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.

  
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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).<sup>1</sup>

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

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<sup>1</sup> 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.<sup>2</sup>

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](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

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<sup>2</sup> 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.

## 2. **A Logjam Of Approximately A Half Million Unresolved Claims Is Choking The VA.**

Hundreds of thousands of veterans with Post Traumatic Stress Disorder (“PTSD”), and/or traumatic brain injury (“TBI”) and/or major depression arising from their service, veterans who are disabled, often indigent, and often even homeless, are being subjected to further incalculable suffering, now inflicted upon them by the VA, as they wait in limbo for defendants to act. There is what the VA has called a “backlog crisis” (Pls. Tr. Ex. 374), now consisting of a *half million* unresolved claims, and possibly more.<sup>3</sup> Over 700,000 more claims will likely be filed over the next ten years by injured veterans returning from Afghanistan, Iraq, and other combat locations, if claim rates merely equal those among Gulf War veterans (which is 45%). Stiglitz, Joseph E. and Bilmes, Linda J., *The Three Trillion Dollar War: The True Cost of the Iraq Conflict* at 78-79 (Norton 2008). The VA must be forced now to clear its massive claims logjam, or its entire system for resolving claims and delivering support and treatment to injured veterans will become entirely paralyzed, with intolerable consequences for hundreds of thousands of veterans, and for our society as a whole.

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<sup>3</sup> The reported numbers range from at least 400,000 and to possibly as much as 800,000. As of October 2007, the Veterans’ Disability Benefits Commission reported a backlog of about 400,000 claims. See <http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=A473681&Location=U2&doc=GetTRDoc.pdf>, at p. 309. James Terry, Chairman of the Board of Veterans Appeals, said in April 2007 that “[c]urrently, the VA is experiencing a backlog of approximately 400,000 cases.” [globalsecurity.org/military/library/congress/2007\\_hr/070412-scott.pdf](http://globalsecurity.org/military/library/congress/2007_hr/070412-scott.pdf). In February 2007, Rep. Robert Filner of California acknowledged a claims backlog of almost 700,000. See <http://www.oregon.gov/ODVA/directorupdate.shtml>. See also [www.dailygazette.com/news/2008/sep/14/0914\\_vetbenefits/](http://www.dailygazette.com/news/2008/sep/14/0914_vetbenefits/) (estimating a backlog of “600,000 to 800,000 unresolved claims and appeals with the U.S. Department of Veterans Affairs”).

**3. Defendants' Inaction Is Causing A Suicide Epidemic And Imposing Unacceptable Human And Societal Costs.**

The admitted "backlog crisis" also has produced a host of catastrophic social consequences.

The District Court observed that "[s]tudies indicate that the suicide rate among veterans is significantly higher than that of the general population." Findings of Fact, No. 15. Twenty percent of U.S. suicides are among veterans. "Male veterans face roughly twice the risk of dying from suicide as their civilian counterparts." Rand Report (Pls. Tr. Ex. 1253), pp. 128, 130. *See also* Trial Transcript, 275:2-8 (Iraq and Afghanistan veterans are 3.2 times likelier to commit suicides than non-veterans.)

In a series of secret internal emails, Dr. Ira Katz, Deputy Chief of Patient Care Services Office for Mental Health for the VA, noted that eighteen veterans per day -- *126 per week* -- commit suicide, while about 1,000 more per month attempt it (just among those veterans the VA sees in its medical facilities). Concerned about the potential public relations fallout from these findings, rather than the unimaginable suffering they reflect, Dr. Katz said, "Shhh! . . . Is this something we should (carefully) address ourselves in some sort of release before someone stumbles on it?" Pls. Tr. Ex. 1249.

Even apart from this tragic suicide epidemic, the consequences of defendants' neglect and delay are ruinous for injured veterans and their families. Rand Report (Pls. Tr. Ex. 1253), pp. xxii-xxiii. In San Francisco alone, at least 1,200 to 1,500 veterans (about 20 to 25% of San Francisco's total homeless population) are homeless. Nationwide, there are about 154,000 homeless veterans on any given night (Findings of Fact, No. 5); the number of homeless Vietnam era veterans is greater than the number of service persons who died during that war. *See* United States Department of Veterans Affairs, Homeless Veterans, Overview of Homelessness (March 6, 2008).

Even when a claimant is eligible for mental health care, the VA often fails to provide it. According to the VA itself, “during 2003-2005, there was a 232% increase of PTSD diagnosis for veterans born after 1972 . . . .” *See* Mem. of Decision at 18:46 (Findings of Fact, No. 13) (*quoting* Pls. Tr. Ex. 442 at 1722). In addition, while the number of veterans diagnosed with PTSD doubled between 1997 and 2005, “the number of clinic contacts per veteran per year declined steadily and relatively uniformly across the years.” *See id.* at 18:8-10 (*quoting* Pls. Tr. Ex. 442 at 1722). As the District Court stated:

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

*Id.*, No. 14. High rates of PTSD among Iraq veterans “are the result of various factors, including multiple deployments, the inability to identify the enemy, the lack of real safe zones, and the inadvertent killing of innocent civilians.” *Id.*, No. 12. Dr. Maris testified that, while the VA has created a strategic plan to improve the timely delivery of mental health care to eligible veterans, it has almost entirely failed to implement it. Trial Transcript, 277:20-280:13. *See also* Department of Veterans Affairs Office of Inspector General, “Follow up Health Care Inspection: VA’s Role in Ensuring Services for Operation Enduring Freedom/Operation Iraqi Freedom Veterans after Traumatic Brain Injury Rehabilitation,” May 1, 2008, at p. 8 (stating that “long-term care is not uniformly provided for TBI patients” and that “[i]n some cases, significant needs remain unmet”). Although in theory all veterans are eligible for health care, a veteran whose health problem is not service-connected (or who is not yet

through the claim process), or who is not indigent, stands in line behind all others, and in reality cannot get care. *See* United States Department of Veterans Affairs, VA Health Care Eligibility & Enrollment (July 28, 2008) (announcing that “Priority 8” veterans are not eligible for enrollment).

Defendants’ failings are placing extraordinary burdens on municipal, county, state, and private institutions that, unlike the VA itself, are in fiscal crisis. Many indigent veterans draw General Assistance, a county-funded subsistence stipend of last resort. Lacking any other viable option, indigent mentally ill veterans seek medical attention in the emergency rooms of county-funded hospitals, crowd shelters, and food banks, and place a burden on local law enforcement. Local government entities are unequipped to take on the burden of mental health treatment for veterans. Not-for-profit organizations like Swords and VVA, with finite resources, struggle to meet veterans’ needs, but the needs are overwhelming.

Quite apart from constitutional requirements and the dictates of conscience, to allow the present situation to persist, and inevitably to worsen, is economically foolhardy. The recent Rand Report (Pls. Tr. Ex. 1253, p. xxiii), estimates that the total cost over two years for the societal effects of PTSD and major depression, in veterans returning from Iraq and Afghanistan is between \$4.0 and \$6.2 billion; the cost attributable to TBI is an additional \$591 to \$910 million. Evidence-based treatment *alone* could reduce costs associated with PTSD and major depression by up to \$1.7 billion within two years. *Id.*, p. xxiv. But of the 1,400 VA hospitals and clinics, only twenty-seven have inpatient PTSD programs. We know, based upon the experience of Vietnam veterans, that if we neglect hundreds of thousands of veterans with PTSD and similar injuries, it will lead not only to incalculable suffering for those veterans, but also to epidemics of unemployment, homelessness, family breakdown, and

other ills that affect the quality of life for all of us -- costing taxpayers far more in the long run than it would cost to meet our obligations promptly.

Moreover, the District Court found, and it is beyond debate, that funds sufficient to fulfill their duties to injured veterans obligations are readily available to defendants. *See* Findings of Fact, Nos. 20-23 (Mem. of Decision at 19:26-20:24). Likewise, defendants concede that they have billions of unspent dollars available for mental health care, *and* that for every \$100 increase in per capita outpatient mental health spending, there was an associated 6% decrease in the rate of suicide. *Id.*, No. 23 (Mem. of Decision at 20:21-24). In 2007, the VA had a budget allocation of \$79.6 billion, and spent only \$72.8 billion. *See* OMB, Budget of the U.S. Government, Federal Programs by Agency and Account; *see* also Government Accountability Office, “VA Health Care, Spending For Mental Health Strategic Plan Initiatives Was Substantially Less Than Planned” (November 2006), at 25 (Pls. Ex. 88) (identifying hundreds of millions of unspent dollars available to the VA to carry out mental health initiatives). In any event, it is no defense to say that it costs money to comply with the Constitution. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The evidence thus shows that this crisis arises not from lack of funds, but from disorganization and a lack of any *enforceable* imperative requiring defendants to meet their obligations, which defendants have acknowledged. *See* October 2001 Claims Processing Task Force Report (Pls. Tr. Ex. 374) at ii, 27, 37.

#### **4. The District Court Cannot Rely On The VA to Repair Itself.**

Defendants do not contend that this nearly complete breakdown of their systems is acceptable; they merely vow to do better, later, “if it’s at all possible.” Trial Transcript, 607:2-15. But they have failed to implement even the most basic steps toward improving this unconstitutional situation, even those steps that

they themselves have resolved to perform. The VA's own October 2001 Claims Processing Task Force Report owns up to its history of broken promises and false hopes:

Over the last few years, VBA has developed many initiatives in the belief that these initiatives would produce a better capacity to adjudicate claims . . . . [T]he Task Force believes that VBA Central Office decisions . . . have exacerbated the claims backlog crisis. VBA has also created many problems through poor or incomplete planning and uneven execution of claims processing improvement projects . . . .

Pls. Tr. Ex. 374. Despite the Task Force's recommendations (few of which were ever carried out), what it even then called a "backlog crisis" of 533,000 has now grown to over 800,000. *See* note 3, *supra*.

The evidence also shows that almost none of the recommendations in defendants' 2007 Mental Health Plan for Suicide Prevention was carried out, and that *none* of its stated goals has been met. Trial Transcript, 277:20-22; 280:11-13. Defendants have not shown that *any* significant repair has been put in place, much less tested by experience. The one "reform" that has actually been implemented is their Suicide Prevention Hotline, which is demonstrably ineffective. Trial Transcript, 282:18-283:13; see Mem. of Decision at 30:16-23. When the VA fails to meet its stated "goals," it simply moves the goalpost.<sup>4</sup> Veterans who have served our nation in combat are dying at the rate of more than

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<sup>4</sup> For example, James Terry, Chairman of the Board of Veterans' Appeals, testified that in April 2005, the "goal" for appeals resolution time (from filing of appeal to final resolution by BVA) was 500 days, but the actual average was reportedly 599 days. Trial Transcript, 562:19-563:3. The following year, the BVA simply moved the goalpost to 600 days. Pls' Tr. Ex. 378. When that new goal was not met, the VA *again* adopted a new "goal," 700 days. The actual average time for appeal resolution, as of February 2008, is reported to be 671 days. *See* Pls. Tr. Ex. 413.

500 per month due to this intolerable situation, which is life-threatening for hundreds of thousands more veterans.

**B. The Court Can And Must Act.**

There is no doubt that the judiciary has both the power and the duty to remedy the VA's failings, and that there is a compelling need for judicial action in this case.

Defendants' duty to provide mental health care to veterans is immediate, mandatory, and unambiguous. *See* 38 U.S.C. § 1710(a)(1) (requiring VA to provide care and medical services to any veteran with a service-connected injury); *id.* § 1710(e) (requiring VA to provide any combat veteran with medical care and services for a period of five years after discharge, whether or not the injury is proven to be service connected). The VA may have discretion concerning what measures to take to comply with these mandates, but it has no discretion *whether* to comply. As the District Court found, these duties are "mandatory" (Mem. of Decision at 55:22 (Conclusions of Law, No. 14)) and create "entitlements." *Id.* at 55:8 (Conclusions of Law, No. 12). *See also id.* at 69:3-7 (Conclusions of Law, No. 39).

Moreover, taken together, the court's findings of fact and the trial evidence leave no room to doubt that the VA is in dereliction of these duties. The District Court also found that the VA benefits system "is not an adequate alternate forum for plaintiffs' systemic and facial constitutional challenges" (Mem. of Decision at 54:3-5) -- thus, that plaintiffs have no adequate remedy other than recourse to the Article III courts. Nevertheless, the District Court erroneously concluded that it was powerless to act because "it is beyond the power of this Court to determine when and how such care shall be provided." *Id.* at 55:22-24.

The District Court's approach would create a no-man's-land of clearly unlawful, clearly harmful, but unreviewable agency *inaction*, so that a complete

failure to fulfill a mandate imposed by Congress would never be reviewable. Such a result, shielding a clear dereliction of a mandatory statutory duty from any judicial review, would be entirely contrary to the remedial purpose of the APA, and to separation of powers principles. At the very minimum, if it was concerned about inappropriate judicial interference, the District Court could and should have simply and broadly ordered the VA to comply with its duties under 38 U.S.C. §§ 1710(a)(1) and (e).

**1. Courts Have The Power And Duty To Remedy Constitutional Violations.**

Even Alexander Hamilton, who viewed the proper role of courts as almost entirely reactive to the executive and legislative branches, recognized that there are cases in which it is the judicial *refusal* to act that poses a danger “to the political rights of the Constitution” -- that is, to the Constitution’s very structure. *See* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter Ed. 1961). In *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court recognized this threat. Chief Justice Marshall observed that it is “the province and the duty of the judicial department to say what the law is” (*id.* at 177) and to provide redress to persons injured by breaches of duties imposed by the law:

*“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded . . . ; for it is a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress.”*

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

*Id.* at 163, *quoting* Blackstone, Commentaries, 23, 109 (emphasis added.). *See also* Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1131 (1969).

The District Court's unduly constricted view of its remedial power, resulting in its refusal to address defendants' systemic violations of hundreds of thousands of veterans' constitutional rights, constitutes an abdication of the role that our Constitution assigns to the judiciary. Article III courts have not only broad equitable powers, but also the duty, to remedy constitutional violations. "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Demore v. Kim*, 538 U.S. 510, 516 (2003) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)); *Johnson v. Robison*, 415 U.S. 361, 367 (1974) (holding that a statutory provision barring review of decisions of the Veterans' Administration did not bar a constitutional challenge to veterans' benefits legislation).

The broad power and duty of Article III courts to remedy constitutional violations has long been established. In *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) ("*Brown I*"), the Court found "separate but equal" constitutionally offensive, declared a then-revolutionary right to desegregated public education but, fearing that immediate implementation would prove unfeasible or politically unpalatable, decreed that enforcement need not occur immediately, but only with "all deliberate speed." In *Brown v. Board of Education*, 349 U.S. 294, 298-301 (1955) ("*Brown II*"), a unanimous Court also held that the federal judiciary had inherent power to fashion an appropriate remedy for constitutional violations. *Id.* The Court remanded the cases before it to the district courts in which they arose so that each court could fashion a remedy based upon specific local conditions, and provided the following guidance to the lower courts on this issue:

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.

That any effective remedy in a given case may necessarily be equitable in nature does not, of course, mean that it is a judicial option whether to provide any remedy at all. Where there are systemic statutory and/or constitutional violations, courts are *required* to take action. Thus, courts have crafted remedies for constitutional violations in school systems, public housing bureaucracies, police and firefighting forces, foster care systems, mental hospitals, and prisons.

*Hutto v. Finney*, 437 U.S. 678 (1978), illustrates the breadth of the remedial power of Article III courts and their affirmative duty to remedy constitutional wrongs. The litigation was a sequel to several earlier cases addressing conditions in the Arkansas prison system. After finding prison conditions unconstitutional, the District Court did not immediately impose a detailed remedy, but instead directed defendants to “make a substantial start” on improving conditions. *Holt v. Sarver*, 300 F. Supp. 825, 833-834 (E.D. Ark. 1969). Later, the District Court concluded that prison conditions remained unconstitutional, offered administrators an opportunity to devise a remedial plan, and issued guidelines identifying areas of required change. *Holt v. Sarver*, 309 F. Supp. 362, 383 (E.D. Ark. 1970), *aff’d*, 442 F.2d 304 (8th Cir. 1971). Still later, the District Court terminated its continuing supervision. *Holt v. Hutto*, 363 F. Supp. 194, 217 (E.D. Ark. 1973). The Court of Appeals, however, reversed that decision, as an abdication of the court’s responsibility in the circumstances. *Finney v. Arkansas Board of Correction*, 505 F.2d 194 (8th Cir. 1974). In the penultimate Supreme Court case, *Hutto v. Finney*, 437 U.S. 678, the defendants challenged a further order of the District Court that limited solitary confinement to not more than 30 days. The Court made clear that *even though solitary confinement for a longer time would not be “cruel and unusual” in all cases*, the trial court had power to impose such a limit as part of an equitable remediation plan, given the long history of problems in the state’s penal system. The Court

further noted that “[i]n fashioning a remedy, the District Court had ample authority . . . to address each element contributing to the violation.” 437 U.S. 678, 688.

More than fifty years of jurisprudence following the *Brown* decisions have established that “[o]nce invoked, ‘the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.’” *Milliken v. Bradley*, 433 U.S. 267, 279-281 (1977) (citations omitted). *See also Brown II*, 349 U.S. at 300; *Salling v. Bowen*, 641 F. Supp. 1046, 1070 (W.D. Va. 1986) (stating that federal courts are obligated to remedy constitutional violations). When government institutions do not perform their duties, the courts have “no alternative but to take [an] active role in formulating appropriate relief.” Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 Ala. L. Rev. 271, 274 (1981). *See also Coffin, The Frontier of Remedies: A Call for Exploration*, 67 Calif. L. Rev. 983, 985 (1979).

In this case, as in the *Hutto* cases discussed above, the evidence demonstrates that defendants will not correct the situation absent a court order. Defendants’ wrongs, and the violations of hundreds of thousands of veterans’ rights, are ongoing, and indeed the situation only will worsen dramatically as new waves of injured veterans return from combat. As *Hutto* makes clear, the judicial power and duty to remedy past constitutional violations is especially broad in these circumstances, which cry out for judicial action.

**2. There Are Many Feasible Remedies For Ensuring That Defendants Comply With Their Constitutional Obligations.**

**a. The Court Can And Should Enter A Declaratory Judgment.**

The first aspect of the remedy required by the record in this case is declaratory relief.

It is worth noting that this case does not involve the political divisiveness of other cases in which the Supreme Court has deemed it constitutionally essential to take action. Unlike desegregation, prison reform litigation, redistricting, and other politically charged issues, there is a national consensus that wounded veterans deserve and are entitled to the care that they require upon return from war. Nevertheless, defendants suggest that even if they are violating veterans' rights, the Court can do nothing but throw up its hands in helpless dismay.

But the first step, and one that has nothing to do with the practical ability to fashion a remedy, is to declare that defendants are violating veterans' rights. Such an order is manifestly appropriate here. *See White v. Matthews*, 434 F. Supp. 1252, 1261 (D. Conn. 1976) (unreasonable delay is a denial of due process); *see also* 5 U.S.C. § 555(B) (requiring agencies to "conclude a matter . . . within a reasonable time"). Even the VA admits that it has failed to fulfill its many promises to reduce its shockingly protracted claims adjudication times. *See* note 4, *supra*.<sup>5</sup> Even if the Court begins by issuing only a declaratory order, defendants might finally respond by taking remedial action.

**b. The Court Can And Should Issue A General Order Requiring Defendants To Meet Broadly Defined Goals.**

A next step, well within the District Court's authority, would be to order defendants to meet broadly defined goals, without necessarily specifying how they should do so. *See* 5 U.S.C. § 706(1) (providing that court "shall . . . compel

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<sup>5</sup> A vague promise to "try" is merely speculation, not evidence. Courts have power to grant declaratory and even injunctive relief even when there is a complete *discontinuance* of the illegal conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). *See also Cupolo v. BART*, 5 F. Supp. 2d 1078, 1084 (N.D. Cal. 1997) (granting injunctive relief despite defendants' showing of actually having implemented repair initiatives to comply with Americans with Disabilities Act).

agency action unlawfully withheld or unreasonably delayed”); *Aetna Life Insurance Co. v. Haworth* 300 U.S. 227, 242–244 (1937), (stating that in conferring federal jurisdiction, “the Congress is not confined to traditional forms or traditional remedies”); *Barnett v. Bowen*, 794 F.2d 17, 21-22 (2d Cir. 1986); *Steffel v. Thompson*, 415 U.S. 452, 478 (1974) (White, J., concurring) (*citing* 28 U.S.C. § 2202 and stating that the declaratory judgment statute “provides for ‘[f]urther necessary or proper relief . . . against any adverse party whose rights have been determined by such judgment’ . . .”).

*Serrano v. Priest*, 5 Cal. 3d 584 (1971) (“*Serrano I*”), and *Serrano v. Priest*, 18 Cal. 3d 728 (1976) (“*Serrano II*”), involved general, goal-oriented orders of this type. *Serrano I* ruled that California's school financing structure improperly depended on a district's tax base, resulting in inequalities in per-pupil expenditures. In response, the Legislature enacted SB90, establishing a formula to begin to level school district income based on average attendance. In *Serrano II*, the court ruled that SB90 was a step in the right direction, but “wealth-related disparities” were still impermissible, and gave the state six years to bring the system into compliance.

Here defendants might be ordered to take immediate steps to reduce the claim backlog “substantially” within a stated period of time. As another example, defendants might be directed to provide claimants with minimal procedural safeguards “consistent with” *Goldberg v. Kelley*, 397 U.S. 254, 270-272 (1970), and *Solis v. Schweiker*, 719 F.2d 301 (9th Cir. 1983).<sup>6</sup> The District Court might well start with this kind of general “fix it” order, retaining

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<sup>6</sup> *Goldberg* holds that claims for welfare benefits affect “property interests,” entitling claimants to certain minimal due process safeguards -- including an evidentiary hearing, the right to make oral arguments and cross-examine witnesses, and the right to retain counsel, a right that veterans are denied at the initial stages of their claims. *Goldberg* at 266.

jurisdiction to enforce it by ordering more targeted remedies later, if necessary. Indeed, perhaps somewhat more than declaratory relief alone, an injunction of this type is likely to prompt the parties to negotiate about specific remedial steps, or might well motivate other branches of government to take action.

Alternatively, as appellants requested, the District Court could order defendants to propose a detailed remedial plan, or it could order the parties jointly to propose a plan. *See, e.g., Center for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174, 1184 (D. Ariz. 2003) (ordering Fish and Wildlife Commission to submit plan for protection of spotted owl); *Henrietta v. Guiliani*, No. 95 CV 0641 (SJ), 2001 WL 1602114 (E.D.N.Y. Dec. 11, 2001) (involving equal access of persons with disabilities to public assistance benefits).

**c. Implementation of The MHSP Is An Appropriate Remedy.**

Given the VA's long history of failed attempts at self-repair, it is possible that only judicial imposition of detailed rules will be effective. A clear starting point would be to order defendants to take the steps outlined in their own Mental Health Strategic Plan ("MHSP"), developed by the VA itself and adopted as a five-year plan in 2004. Pls' Ex. 398. The MHSP consists of 265 specific recommendations. Trial Transcript, 777:22-24. The District Court described the salient features of the MHSP as follows:

Among the initiatives intended to help reduce veteran suicides are ones to "[d]evelop a national systemic program for suicide prevention" and to "develop[] a plan to educate all staff that interact with veterans . . . about responding to crisis situations involving at-risk veterans" [quoting the MHSP (Ex. 398) at A-2]. Other key components of the MHSP are to develop "methods for tracking veterans with risk factors for suicide," and to "[r]equire annual screening for Mental Health and Substance Abuse Disorders" [quoting Ex. 398 at A-29]. In addition, the MHSP called for mental health screening for "[e]very returning service man/woman . . ." [quoting Ex. 398 at A-5].

Mem. of Decision at 22:6-18 (Findings of Fact, No. 29). Inexplicably, even the most elementary steps outlined in the MHSP were never implemented, despite

scathingly critical reports and directives by the United States Government Accountability Office and others. Mem. of Decision at 22:24-23:16. *See also id.* at 23:18-30:23. The MHSP, designed by the VA itself and including specific, commonsense steps toward improvement, was proposed by appellants as a model for a *remedy* for these failures. The Court can and should order defendants to implement it.

**d. If The Court Wishes Assistance, It Is Readily Available: The Court Can Appoint A Master, Monitoring Panel, Or Similar Delegate.**

It goes without saying that the courts have a special expertise in adjudicating claims, and fashioning a remedy for the VA's extraordinary lapses and delays in adjudicating claims is well within the competence of an Article III court. Moreover, there is no reason to assume that the VA has any special scientific knowledge about the adjudication of claims, or to defer to the agency on that matter. Insofar as expert or practical assistance might be useful to remedy the many failings in the VA's delivery of health care that the District Court found, such assistance is readily available.

Because courts *must* follow the basic equitable principle that "for every wrong there is a remedy," they have often relied upon masters, ombudsmen, or advisory committees when faced with intractable bureaucracies not easily susceptible to change. *See In re Peterson*, 253 U.S. 300, 306 (1920); All Writs Act, 28 U.S.C. § 1651(a) (providing that courts may "issue all writs necessary or appropriate in aid of [their] jurisdiction"); *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 (9th Cir. 1990); F.R.C.P. 53. Masters have designed remedial decrees, supervised compliance, negotiated with the persons affected, and resolved disputes about the meaning of decrees. *See Kirp and Babcock, Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 Ala. L. Rev. 313 (1981); Montgomery, *Force and Will:*

*An Exploration of The Use of Special Masters to Implement Judicial Decrees*,  
52 U. Colo. L. Rev. 105 (1980).

The use of special masters is common when large bureaucracies, including federal agencies, are permeated with constitutional or statutory violations.

Masters have helped courts design and enforce remedies for unlawful conduct by many institutions that were at least as complex and resistant to change as the VA, in cases involving:

- **Segregated schools** (*Milliken v. Bradley*, 433 U.S. 267 (1977) (upholding broad equitable remedies); *Hart v. Community School Board*, 383 F. Supp. 699, 768 (E.D.N.Y. 1974) (master created a “comprehensive plan dealing not only with the elimination of segregation . . . but also with the housing, non-residential development, community, social welfare, recreational, transportation and protective facilities with the [local] neighborhood necessary to provide a basis for effectively desegregating [the school at issue]”); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 306 F. Supp. 1299, 1313 (W.D.N.C. 1969) (using “consultant” to implement desegregation plan); *United States v. Board of Sch. Comm’rs*, 503 F.2d 68, 74 n.9 (7th Cir. 1974) (plan prepared by commissioner); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 726 F. Supp. 1544, 1546, 1549-1552 (E.D. Ark. 1989) (“metropolitan supervisor” used to develop student assignment plan); *Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir. 1976) (master used to implement busing plan).
- **Pervasive Eighth Amendment violations in prisons** (*Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (monitor used to ensure compliance with order); *Holt cases*, *supra*).
- **Systemic constitutional violations in mental institutions** (*Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), enforcing 325 F. Supp. 781 (M.D. Ala. 1971) (appointing “human rights committee” to ensure residents institution were afforded humane treatment)).
- **Systemic police misconduct** (*Nat’l Org. for the Reform of Marijuana Laws (NORML) v. Mullen*, 112 F.R.D. 120 (N.D. Cal. 1986) (monitor to ensure compliance)).
- **Voter redistricting plans** (*Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 698 (E.D.N.Y. 1992) (reapportionment plan); *Martin v. Mabus*, 700 F. Supp. 327, 337-343 (S.D. Miss. 1998) (accepting expert’s districting plan for judicial elections)).
- **Statutory and constitutional problems in state-wide foster care systems** (*John B. v. Menke*, 176 F. Supp. 2d 786, 807 (M.D. Tenn. 2001) (master used to develop a plan to ensure that the state’s 640,000 eligible children received Medicaid benefits); *Joseph A. v. New Mexico Dep’t of*

*Human Svcs.*, 69 F.3d 1081 (10th Cir. 1995) (*reversed on other grounds*) (masters and expert consultants to used to fashion remedy when most children in foster care languished for years in temporary placements, with result that by 2005, over 40% were placed within two years)).

- **Remedying systemic constitutional and statutory problems in a public housing system** (*Perez v. Boston Housing Authority*, 400 N.E. 2d 1231 (Mass. 1980)).

No one believes that the problems addressed in this case can be corrected overnight. Currently, however, the VA's treatment of combat veterans with mental health injuries, and the interminable waits veterans must suffer to obtain benefits decisions, are constitutionally unacceptable. Veterans face a rapidly worsening emergency, and *no* meaningful corrective action is being taken. Even the VA admits that change is urgently needed; society agrees it is morally obligatory; experts concur it is a fiscal imperative; and it is constitutionally essential. The funding to implement such change sits now in the VA's accounts. The judicial branch has both the duty and the practical ability to fashion remedies to deliver to mentally ill veterans the assistance and care that we owe them.

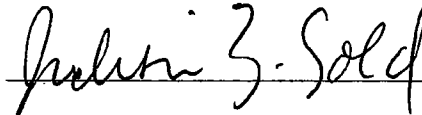
**III. CONCLUSION.**

For these reasons, *amici curiae* Swords to Plowshares and Vietnam Veterans of America respectfully urge this Court to reverse the District Court's order granting judgment for defendants and direct the District Court to fashion an appropriate remedy.


Dated: December 10, 2008.

Respectfully submitted,

JUDITH Z. GOLD



PILLSBURY WINTHROP SHAW PITTMAN LLP

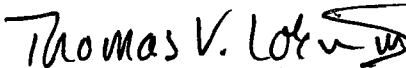
By   
Thomas V. Loran III

Attorneys for *Amici Curiae* Swords to  
Plowshares and Vietnam Veterans of  
America

**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED. R. APP. P. 29(d), 32(a)(7)(C), AND CIRCUIT RULE 32-1**

I certify that, pursuant to Fed. R. App. P. 29(d), 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points, and contains 6,564 words, exclusive of Cover Page and Tables, based on a count by the word processing system at Pillsbury Winthrop Shaw Pittman LLP.

Dated: December 10, 2008.

  
\_\_\_\_\_  
Thomas V. Loran III

Docket No. No. 08-16728

CERTIFICATE OF SERVICE BY MAIL

I, Amara Getzell, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the City of San Francisco, California.
2. My business address is 50 Fremont Street, San Francisco, CA 94105-2228. My mailing address is 50 Fremont Street, P. O. Box 7880, San Francisco, CA 94120-7880.
3. On December 9, 2008, I served a true copy of the attached document titled exactly

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

by placing it in an addressed sealed envelope and depositing it in the United States mail, first class postage fully prepaid, to the following:

**Mr. Daniel Bensing, Senior Counsel  
U.S. Department of Justice  
Civil Div., Federal Programs Branch  
20 Massachusetts Ave., NW  
Washington, DC 20530  
Daniel.Bensing@usdoj.gov**

**Gordon P. Erspamer  
Morrison & Foerster  
101 Ygnacio Valley Road, Suite 450  
Walnut Creek, CA 94596  
Gerspamer@mof.com**

**Scott N. Schools, Esq  
U.S. Attorney's Office  
450 Golden Gate Avenue, 11th Floor  
San Francisco, CA 94102**

**Sidney Wolinsky  
Disability Rights Advocates  
2001 Center Street  
Fourth Floor  
Berkeley, CA 94704  
swolinsky@dralegal.org**

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of December, 2008, at San Francisco, California.

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Amara Getzell