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Claims Under a Procedural Due Process Analysis**

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# Iraq Veterans’ War with the U.S. Department of Veterans Affairs: Post Traumatic Stress Disorder Claims Under a Procedural Due Process Analysis

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## I. INTRODUCTION

Joseph Dwyer, a Private First Class medic who was deployed to fight the war in Iraq in 2003, became an instant hero when an *Army Times* photographer took a picture of him, dressed in his full combat gear, as he rescued an injured Iraqi child near the Euphrates River.<sup>1</sup> This photograph ap-

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1. The Associated Press, *GI in Famous Photo Defeated by His „Dæmons“: A Hero to Many, He Writhed and Died in Private Hell After Returning From War*, MSNBC, July 21, 2008, <http://www.msnbc.msn.com/id/25775792/> [hereinafter *Demons*].

peared on several magazine covers around the world.<sup>2</sup> Although Dwyer insisted that he did not deserve the special attention for his act, he was recognized with many awards for his heroism.<sup>3</sup> Sadly, however, no one knew of the deep and painful battles the hero would face with himself once he returned home.<sup>4</sup>

When Dwyer came back to the United States in June of 2003, about three months after he was deployed, his family and friends became worried about his extreme weight loss—Dwyer had lost over fifty pounds while he was overseas.<sup>5</sup> Although he still seemed to be the fun-loving guy he was before his deployment, those around Dwyer quickly noticed changes in his behavior.<sup>6</sup>

At restaurants, Dwyer requested to be seated in a place where his back would be against a wall so that he had a clear view of his surroundings—he wanted to eliminate the possibility of someone being able to sneak up on him.<sup>7</sup> He stopped going to movie theatres because of the crowds.<sup>8</sup> Dwyer even began talking about how the “desert landscape around El Paso, and the dark-skinned Hispanic population, reminded him of Iraq.”<sup>9</sup>

Although Dwyer was given antidepressant prescriptions, his condition only worsened.<sup>10</sup> He had a car accident because he thought he saw a roadside bomb and swerved off the road to dodge it.<sup>11</sup> Dwyer began answering the door with a gun in hand, he began sniffing inhalants to the point of disorientation, and thought Iraqis were all around him.<sup>12</sup> In the summer of

2. *Id.*

3. *Id.* (“Dwyer was given a „Hometown Hero“ award by child-safety advocate John Walsh; the Army awarded him the Combat Medical Badge for service under enemy fire. The attention embarrassed him. „Really, I was just one of a group of guys . . . I wasn't standing out more than anyone else.””).

4. *Id.*

5. *Id.* (“When he deployed, he was pudgy at 6-foot-1 and 220 pounds. Now he weighed around 165, and the other Musketeers immediately thought of post-traumatic stress disorder.”).

6. *Demons*, *supra* note 1.

7. *Id.* (“At restaurants, Dwyer insisted on sitting with his back to the wall so no one could sneak up on him.”).

8. *Id.* (“He turned down invitations to the movies, saying the theaters were too crowded.”).

9. *Id.*

10. *Id.*

11. *Demons*, *supra* note 1 (“One day, he swerved to avoid what he thought was a roadside bomb and crashed into a convenience store sign.”).

12. *Id.* (“He began answering his apartment door with a pistol in his hand and would call friends from his car in the middle of the night, babbling and disoriented from sniffing inhalants . . . Martina told friends that he was seeing imaginary Iraqis all around him.”).

2005, Dwyer was treated for his inhalant addiction, but he needed more help.<sup>13</sup>

That October, when Dwyer's superiors went to his apartment in order to convince him to receive medical treatment, he "barricaded himself in. Imagining Iraqis swarming up the sides and across the roof, he fired his pistol through the door, windows[,] and ceiling."<sup>14</sup> After much effort by Dwyer's brother, he calmed down and sought psychiatric treatment.<sup>15</sup>

After the treatment, Dwyer told a magazine that he was afraid a post traumatic stress disorder diagnosis would affect his job opportunities as a policeman.<sup>16</sup> Dwyer elaborated, saying that many soldiers are "suffering in silence"<sup>17</sup> and are shying away from counseling out of fear for damaging their careers.<sup>18</sup> He said, "I'm a soldier . . . I suck it up. That's our job."<sup>19</sup>

In January of 2006, Dwyer and his family moved back to their home state of North Carolina, where the terrain was less likely to remind him of Iraq.<sup>20</sup> But his situation did not improve. While celebrating the Fourth of July with his family on their deck, Dwyer ran into his house and took cover under his bed when the fireworks went off.<sup>21</sup> Problems with Dwyer's mental instability continued, as the police had to be called for incidents related to post traumatic stress disorder (PTSD).<sup>22</sup> After Dwyer purchased a new rifle and made death threats, he once again checked into a medical center for several months.<sup>23</sup> His father said the U.S. Department of Veterans Affairs' "solution was a „pharmaceutical lobotomy.“<sup>24</sup> But when Dwyer completed the treatment, his symptoms returned within days, and his wife decided to move out—taking their daughter with her.<sup>25</sup>

13. *Id.*

14. *Id.*

15. *Id.* ("After a three-hour standoff, Dwyer's eldest brother, Brian, also a police officer, managed to talk him down over the phone. Dwyer was admitted for psychiatric treatment.").

16. *Demons*, *supra* note 1 ("Dwyer told Newsday that he'd lied on a post-deployment questionnaire that asked whether he'd been disturbed by what he'd seen and done in Iraq. The reason: A PTSD diagnosis could interfere with his plans to seek a police job.").

17. *Id.*

18. *Id.* ("[Dwyer] said he hoped to become an envoy to others who avoided treatment for fear of damaging their careers.").

19. *Id.*

20. *Id.*

21. *Demons*, *supra* note 1.

22. *Id.* ("In June 2007, police responded to a call that Dwyer was „having some mental problems related to PTSD.“).

23. *Id.* ("„He said that he was coming to my residence to get his gun back," she wrote in the June 25, 2007, complaint. „He was coming packed with guns and someone was going to die tonight.“).

24. *Id.*

25. *Id.*

Dwyer continued on his downward spiral. He “patrolled” at night and he hid knives all over his house in order to protect himself.<sup>26</sup> In his final days, Dwyer started to disclose his feelings to his parents.<sup>27</sup>

What bothered him most, he said, was the sheer volume of the gunfire. He talked about the grisly wounds he'd treated and dwelled on the people he was unable to save. His nasal membranes seemed indelibly stained with the scents of the battlefield—the sickeningly sweet odor of rotting flesh and the metallic smell of blood. Yet despite all that, Dwyer continued to talk about going back to Iraq. He told his parents that if he could just get back with his comrades and do his job, things would right themselves.<sup>28</sup>

The day Dwyer died, he was lying on the floor and did not have the strength to open the front door of his house for the taxi cab driver he had called to take him to the hospital.<sup>29</sup> After police officers arrived and kicked his door open, they found “Dwyer lying on his back, his clothes soiled with urine and feces.”<sup>30</sup> surrounded by cans of Dust-Off.<sup>31</sup> Although paramedics were able to get him into an ambulance, Dwyer died a half hour later.<sup>32</sup>

His friends and family remain heartbroken that the joyful young man they loved “returned a tormented, confused disillusioned shadow of his former self that was not being given the help he needed.”<sup>33</sup>

Unfortunately, Joseph Dwyer is only one of thousands of United States servicemen who have gone overseas to fight the war in Iraq and Afghanistan who have developed PTSD. He is just one example of why the U.S. Department of Veterans Affairs (VA) needs to put forth an efficient system in which it can offer disability compensation and medical care for those who risked their lives to serve the United States and who have returned with mental disabilities such as PTSD.

This Comment analyzes two main aspects of the disability compensation and medical care claims procedures within the United States Depart-

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26. *Demons*, *supra* note 1 (“He reverted to Iraq time, sleeping during the day and „patrolling” all night. Unable to possess a handgun, he placed knives around the house for protection.”).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Demons*, *supra* note 1.

32. *Id.* (“Unable to stand or even sit up, Dwyer was hoisted onto a stretcher. As paramedics prepared to load him into an ambulance, an officer noticed Dwyer's eyes had glassed over and were fixed. A half hour later, he was dead.”).

33. *Id.*

ment of Veterans Affairs under procedural due process for veterans who are suffering from PTSD. More specifically, the claims procedure is addressed under the test laid out in the Supreme Court decision of *Mathews v. Eldridge*.<sup>34</sup> This Comment argues that the first element of the test, in which it must be shown that a “private interest will be affected by the official action,”<sup>35</sup> is satisfied because a veteran’s disability compensation and medical care benefits qualify as property interests. Next, this Comment argues that the second prong of the *Mathews* test, “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,”<sup>36</sup> shows that the VA claims and medical procedures in the Veterans Judicial Review Act of 1988<sup>37</sup> do not have a high risk of erroneous deprivation.<sup>38</sup> This conclusion is based on the analysis of procedural due process claims asserted by two veterans groups, Veterans for Common Sense and Veterans United for Truth, in recent cases against the VA.<sup>39</sup> These claims are that the lack of neutral decision-makers and the lack of an additional procedure enabling a veteran with a mental health emergency to challenge the timing of medical care if he is given a later appointment do not create a high risk of erroneous deprivation. Finally, this Comment argues that the third prong of the test, the government’s interest,<sup>40</sup> is not high because the substitution and addition of procedures would be burdensome to the VA. Because the second and the third prongs are not satisfied, veterans do not have a valid procedural due process claim regarding neutral decision-makers within the VA and lack a procedure allowing a veteran, who was turned away for a later appointment, to challenge the timing of his obtainment of medical care during a mental health care emergency.

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

35. *Id.*

36. *Id.*

37. Veterans Judicial Review Act of 1988, 38 U.S.C. §§ 101-03 (2006 & Supp. II 2008).

38. *See infra* Part IV.B.

39. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1081-82 (N.D. Cal. 2008); *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919 (N.D. Cal. Jan. 10, 2008); Complaint for Declaratory & Injunctive Relief under the United States Constitution and Rehabilitation Act at 50, *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC (N.D. Cal. Jan. 10, 2008), 2007 WL 4718845.

40. *See Mathews*, 424 U.S. at 355.

## II. HISTORY AND BACKGROUND INFORMATION ON PTSD AND VETERANS

### A. WHAT IS PTSD?

PTSD is a disorder in which an individual develops “characteristic symptoms” triggered by watching or being involved with a severely traumatic event that may have threatened his life or caused serious injury.<sup>41</sup> Those who experience PTSD may be the victim of the traumatic event themselves, could have a loved one who suffered from the event, or may have been witness to a loved one’s or stranger’s encountering the traumatic event.<sup>42</sup> Although PTSD can be triggered by many different types of events, it was first brought to national attention when war veterans returned home from the battlefield, particularly Vietnam War veterans.<sup>43</sup>

People who suffer from PTSD generally change from the way they used to be before experiencing the traumatic event.<sup>44</sup> They seem to be apathetic, do not enjoy the activities they used to, are irritable, and become more aggressive and violent.<sup>45</sup> Those who have the disorder often have flashbacks to the horrific event and feel as if they are reliving it.<sup>46</sup> It can be as simple as hearing a similar sound to those heard during the traumatic event—like Joseph Dwyer, who heard fireworks go off and thought of either gunshots or bombs blasting and ran for cover under his bed.<sup>47</sup> PTSD affects 7.7 million adults in the United States today and often coexists with depression and substance abuse.<sup>48</sup>

### B. VETERANS WITH PTSD: WORRISOME STATISTICS

PTSD and war veterans are especially related. A recent 2008 RAND study shows that since October of 2001, 1.6 million American troops have been deployed to fight the War on Terror in Iraq and Afghanistan and that most have been subjected to long periods of combat stress and many unfor-

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41. AM. PSYCHIATRIC ASS’N, DSM-IV: DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994).

42. National Institute of Mental Health, Anxiety Disorders: Post-Traumatic Stress Disorder, <http://www.nimh.nih.gov/health/publications/anxiety-disorders/post-traumatic-stress-disorder.shtml> (last visited Apr. 26, 2010).

43. ERIC T. DEAN, JR., SHOOK OVER HELL: POST-TRAUMATIC STRESS, VIETNAM, AND THE CIVIL WAR 14-15 (1999).

44. National Institute of Mental Health, *supra* note 42.

45. *Id.*

46. *Id.*

47. *See id.*; *Demons*, *supra* note 1.

48. National Institute of Mental Health, *supra* note 42.

gettable traumatic events.<sup>49</sup> The study found that 300,000, almost 20% of all of those deployed, or one out of five, suffer from PTSD or major depression.<sup>50</sup> Half of the servicemen said they had a friend who was badly injured or died, almost half said they saw non-combatants get badly injured or die as well, and about 10% said their traumatizing moment came from when they were hurt directly themselves.<sup>51</sup>

Furthermore, the study found that almost half of all who suffer from PTSD or major depression do not seek help because they are scared that such a diagnosis could harm their career.<sup>52</sup> But out of all of the veterans who do seek treatment, only half of them actually receive it—and usually, the treatment received is considered to be “minimally adequate”<sup>53</sup> by researchers.<sup>54</sup>

### C. THE PROCESS OF FILING A PTSD CLAIM WITH THE VA AND RECEIVING MEDICAL CARE

The United States Department of Veterans Affairs carries out many responsibilities—it provides pensions, healthcare, vocational rehabilitation and employment, compensation to dependants and survivors, and burial benefits for veterans.<sup>55</sup> Included in this list is the VA’s responsibility for providing compensation and medical care for veterans who have a service-connected disability.<sup>56</sup>

The VA uses a grading system in order to determine the amount of compensation a veteran receives.<sup>57</sup> The grading system is based on the level of diminished earning capacity from a civil occupation caused by the injury suffered.<sup>58</sup> There are ten grades of disability available, such as 10%, 20%,

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49. Press Release, RAND Corporation, One In Five Iraq and Afghanistan Veterans Suffer from PTSD or Major Depression, (Apr. 17, 2008), <http://www.rand.org/news/press/2008/04/17/index.html>.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. RAND Corporation, *supra* note 49.

55. U.S. Department of Veterans Affairs, A Summary of VA Benefits: Putting Veterans First, <http://www.vba.va.gov/VBA/benefits/factsheets/general/21-00-1.pdf> (last visited Apr. 26, 2010).

56. 38 U.S.C. § 1155 (2006).

57. *Id.* (“The Secretary shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations.”).

58. 38 U.S.C. § 1155 (2006).



through 90% and 100%.<sup>59</sup> When the VA is determining the compensation for a veteran with a mental health disability, the veteran's condition will be assessed by an examiner, but the VA will consider evidence that shows impairments in other settings, such as occupational or social.<sup>60</sup> The agency says by allowing this, the assessment is not solely based on the veteran's condition at the time of examination.<sup>61</sup> However, the agency will not base the rating on the veteran's social impairments alone.<sup>62</sup> Also, if the soldier is released from active duty because of an event that caused such severe and traumatic stress, he or she should not receive less than a 50% rating.<sup>63</sup>

However, there is a specific formula that the VA's rating boards must follow in assigning mental disability ratings for mental disorders such as PTSD.<sup>64</sup> The VA limits its guidelines to the disability ratings of 100%, 70%, 50%, 30%, 10%, and 0%.<sup>65</sup> Regardless of the particular mental disorder that a veteran is diagnosed with, the VA analyzes all mental disorders using this same set of guidelines.<sup>66</sup> They are the following:

Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name..... 100

Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effec-

59. *Id.* ("The schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10[%], 20[%], 30[%], 40[%], 50[%], 60[%], 70[%], 80[%], 90[%], and total, 100[%]. The Secretary shall from time to time readjust this schedule of ratings in accordance with experience.").

60. 38 C.F.R. § 4.126(a) (2008).

61. *Id.*

62. *Id.* § 4.126(b).

63. *Id.* § 4.129.

64. *Id.* § 4.130.

65. 38 C.F.R. § 4.130 (2008).

66. *Id.*

tively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships ..... 70

Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships ..... 50

Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events)..... 30

Occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by continuous medication..... 10

A mental condition has been formally diagnosed, but symptoms are not severe enough either to interfere with occupational and social functioning or to require continuous medication ..... 0<sup>67</sup>

The United States Court of Appeals for Veterans Claims has acknowledged, however, that these guidelines are not necessarily requirements to obtain a

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67. *Id.*

specific rating, but instead are examples of conditions that would be associated with a given rating.<sup>68</sup>

The VA also has a fixed amount of money associated with each rating group.<sup>69</sup> For example, someone who is given a 10% rating will only receive \$123 per month, 30% will receive \$376, a 50% rating will receive \$770, and 100% will receive \$2673 per month in disability pay.<sup>70</sup> If veterans disagree with the rating they are given from the rating board, they have one year to appeal after they receive notification from the VA about their disability compensation; this process can be lengthy.<sup>71</sup> They must first provide the VA office that made the decision regarding their rating with a written notice of disagreement.<sup>72</sup> The VA will then give the veteran a “Statement of the Case,” which explains the facts and laws used by the department to arrive at its conclusion.<sup>73</sup> The veteran then has sixty days to file for a substantive appeal and the decision will go to the Board of Veterans’ Appeals (BVA), which decides cases on behalf of the VA secretary.<sup>74</sup> Ultimately, if the veteran is still dissatisfied when the final decision is given by the Board of Veterans’ Appeals, he or she can appeal to the U.S. Court of Appeals for Veterans Claims, which is independent of the VA.<sup>75</sup> However, this court does not conduct trials or allow the admission of new evidence.<sup>76</sup>

In addition to disability compensation, veterans are also provided with access to medical services.<sup>77</sup> The VA provides health care to veterans with service-connected disabilities.<sup>78</sup> The VA also provides health care services for five years starting the day of the veteran’s discharge or release from

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68. Hoke v. Peake, No. 07-0042, 2008 WL 5111468, at \*1 (Ct. Vet. App. Nov. 26, 2008); see also Mauerhan v. Principi, 16 Vet. App. 436, 442 (2002) (“[E]stablishing one general formula to be used in rating more than 30 mental disorders, there can be no doubt that the Secretary anticipated that *any* list of symptoms justifying a particular rating would in many situations be either under- or over-inclusive. The Secretary’s use of the phrase „such symptoms as,” followed by a list of examples, provides guidance as to the severity of symptoms contemplated for each rating, in addition to permitting consideration of other symptoms, particular to each veteran and disorder, and the effect of those symptoms on the claimant’s social and work situation.”).

69. Department of Veterans Affairs, *Federal Benefits for Veterans, Dependents & Survivors*, 2009, at 20, [http://www.va.gov/opa/publications/benefits\\_book/federal\\_benefits.pdf](http://www.va.gov/opa/publications/benefits_book/federal_benefits.pdf).

70. *Id.*

71. *Id.* at 95.

72. *Id.*

73. *Id.*

74. Department of Veterans Affairs, *Federal Benefits for Veterans, Dependents & Survivors*, 2009, at 95, [http://www.va.gov/opa/publications/benefits\\_book/federal\\_benefits.pdf](http://www.va.gov/opa/publications/benefits_book/federal_benefits.pdf).

75. *Id.* at 96.

76. *Id.*

77. 38 U.S.C. § 1710(a) (2006 & Supp. II 2008).

78. *Id.*

active service, if the release was after January 23, 2003.<sup>79</sup> The benefits of the system include free medical care and medications related to the service-connected disability.<sup>80</sup> The VA is to also provide readjustment counseling and related mental health services for a veteran who has mental disorders and trouble readjusting to civilian life.<sup>81</sup> A mental and psychological assessment can be given to determine the disorder the veteran has and to determine if he or she does indeed have trouble readjusting to civilian life.<sup>82</sup> After receiving the request from a veteran, who must have been involved in combat against a hostile force during armed conflict after November 11, 1998,<sup>83</sup> the VA must give the veteran an assessment as soon as practicable, but no later than thirty days.<sup>84</sup> If the assessment done by a physician or psychologist employed by the VA determines that it is necessary for the veteran to receive care for readjusting to civilian life because of mental health issues, the VA will provide services.<sup>85</sup> These services may include consultation and counseling.<sup>86</sup>

### III. HISTORY AND BACKGROUND INFORMATION ON PROCEDURAL DUE PROCESS

The concept of due process can be found in both the Fifth and Fourteenth Amendments of the United States Constitution, where it is written that the government—federal or state—cannot deprive a person “of life, liberty, or property, without due process of law.”<sup>87</sup> These clauses have been interpreted in two different scopes, divided into substantive due process and

79. Department of Veterans Affairs, *VA Healthcare: Combat Veteran Eligibility*, June 2009, <http://www4.va.gov/healtheligibility/Library/pubs/CombatVet/CombatVet.pdf> (last visited Apr. 26, 2010).

80. *Id.* at 1 (“Combat veterans who were discharged or released from active service on or after January 28, 2003, are now eligible to enroll in the VA health care system for 5 years from the date of discharge or release. This means that combat veterans who were originally enrolled based on their combat service but later moved to a lower priority category (due to the law’s former 2-year limitation) are to be placed back in the priority for combat veterans for 5 years beginning on the date of their discharge or release from active service. . . . Combat veterans who were discharged from active duty before January 28, 2003, but who did not enroll in VA health care system now have 3 years to enroll and receive care as combat veterans. This 3-year period of enhanced eligibility begins on January 28, 2008, and expires on January 27, 2011.”).

81. 38 U.S.C. § 1712A (2006 & Supp. II 2008).

82. *Id.*

83. 38 U.S.C. §§ 1712A(a)(3), 1712(a)(1)(B)(iii), 1712A(a)(2)(B) (2006 & Supp. II 2008).

84. 38 U.S.C. § 1712A(a)(3) (2006 & Supp. II 2008).

85. 38 U.S.C. § 1712A(b)(1) (2006 & Supp. II 2008).

86. 38 U.S.C. § 1712A(b)(2) (2006 & Supp. II 2008).

87. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

procedural due process.<sup>88</sup> While substantive due process focuses more on issues that are concerned with the constitutionality of statutes and laws,<sup>89</sup> a procedural due process analysis focuses on the procedures the government should use before depriving a person of an interest.<sup>90</sup> Therefore, the arguments of veterans groups against the VA's procedures concerning disability compensation and medical care are procedural issues because they involve the procedures used by the VA when depriving veterans of their property interest. As a result, it is clear that a procedural due process analysis is required.

#### A. THE *MATHEWS V. ELDRIDGE* TEST

In order to determine the constitutionality of procedures under the Due Process Clause, the Supreme Court developed a test in the landmark case of *Mathews v. Eldridge*<sup>91</sup> that it has since relied on to decide related claims.<sup>92</sup> Eldridge was a man who received disability benefits under the Social Security Act, starting in June 1968.<sup>93</sup> Almost four years later, he was mailed a questionnaire, regarding his disability, from a state agency that was monitoring his condition.<sup>94</sup> After the state agency received Eldridge's completed questionnaire, it determined that he no longer qualified for the disability benefits he had been receiving, and it notified him of the termination of benefits in July 1972.<sup>95</sup> Although Eldridge could have asked for reconsideration from the agency, he challenged the constitutionality of the procedures used to determine if he had a disability.<sup>96</sup>

The Court looked at three different areas in determining the merits of Eldridge's claim, looking first at whether Eldridge had an interest that was affected by the procedures in place.<sup>97</sup> The Court stated that the deprivation caused by the termination of disability benefits is not comparable to the termination of welfare benefits.<sup>98</sup> Next, the Court examined "the fairness and reliability of the existing pre-termination procedures, and the probable

88. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 523 (2d ed. 2002); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004).

89. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); see also CHERMERINSKY, *supra* note 88, at 556.

90. CHERMERINSKY, *supra* note 88, at 523 (defining procedural due process as the "procedures that the government must follow before it deprives a person of life, liberty, or property").

91. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

92. CHERMERINSKY, *supra* note 88, at 558.

93. *Mathews*, 424 U.S. at 323.

94. *Id.* at 324.

95. *Id.*

96. *Id.* at 325.

97. *Id.* at 340.

98. *Mathews*, 424 U.S. at 341.

value, if any, of additional procedural safeguards.”<sup>99</sup> The Supreme Court said “the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decision-making process.”<sup>100</sup> The Court doubted that the additional safeguard of an evidentiary hearing would be valuable for avoiding erroneous deprivation.<sup>101</sup> The last area the Court examined in *Mathews* was the government’s interest.<sup>102</sup> The Court stated that a government’s interest is analyzed by accounting for administrative burdens and financial costs.<sup>103</sup> The Court determined that there would be a great financial burden if the government was required to provide pre-termination hearings and continue to pay disability benefits to individuals while they were participating in the appeals process.<sup>104</sup> After analyzing the three areas, the Court held that an evidentiary hearing is not required before terminating disability benefits and that the current procedures satisfy due process.<sup>105</sup>

The Supreme Court has applied the *Mathews* test frequently. The test examines:

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.<sup>106</sup>

Furthermore, federal district courts have used the *Mathews* test when analyzing due process claims from veterans groups in recent decisions.<sup>107</sup> Although the *Mathews* test has been criticized for giving the courts too much discretion,<sup>108</sup> it permits the courts to effectively balance the interests of the affected parties.<sup>109</sup>

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99. *Id.* at 343.

100. *Id.* at 340-41 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

101. *Id.* at 346-47.

102. *Id.* at 347.

103. *Mathews*, 424 U.S. at 347.

104. *Id.*

105. *Id.* at 349.

106. *Id.* at 335; see CHEMERINSKY, *supra* note 88, at 558-59.

107. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1060-61 (N.D. Cal. 2008); *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919, at \*15-16 (N.D. Cal. Jan. 10, 2008).

108. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 562 (1985) (Rehnquist, J., dissenting) (“This customary „balancing“ inquiry conducted by the Court in these cases reaches a result that is quite unobjectionable, but it seems to me that it is devoid of any prin-

#### IV. ANALYZING PTSD DISABILITY COMPENSATION AND MEDICAL CARE WITH THE VA UNDER THE *MATHEWS V. ELDRIDGE* TEST

In order to analyze PTSD disability compensation and medical care procedures under the procedural due process test laid out in *Mathews v. Eldridge*,<sup>110</sup> this Comment focuses on two claims asserted by the veterans groups Veterans for Common Sense and Veterans United for Truth, who work to improve the lives and situations of veterans.<sup>111</sup> The two veterans groups came together in *Veterans for Common Sense v. Nicholson*, where they asserted a variety of claims against the VA for its inefficiency in handling claims of veterans suffering from PTSD.<sup>112</sup> Included in these assertions was the claim that veterans were deprived of procedural due process because the VA has non-neutral decision makers adjudicating its claims.<sup>113</sup> Although the VA moved to dismiss the various claims of the veterans groups, the court in *Nicholson* denied the motion for three of four counts, and granted one of four.<sup>114</sup> This case then went to the Northern District of California for a second time with the name *Veterans for Common Sense v. Peake*<sup>115</sup> as the veterans groups sought injunctive relief from the VA. In *Peake*, the veterans claimed that the lack of a procedure allowing veterans to challenge the time they receive medical care when they are experiencing mental health emergencies is a deprivation of due process.<sup>116</sup> The court denied the veterans groups' motion for preliminary injunction.<sup>117</sup> Veterans for Common Sense and Veterans United for Truth have filed an appeal to the decision to the Ninth Circuit Court.<sup>118</sup>

As a result of these cases, the two main aspects of the disability compensation and medical care claims procedures within the United States De-

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principles which will either instruct or endure. The balance is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively views the underlying interests at stake.”).

109. *Mathews*, 424 U.S. at 335.

110. *Id.*

111. Veterans for Common Sense, About VCS, <http://www.veteransforcommonsense.org/index.php/about-vcs> (last visited Apr. 26, 2010).

112. *Nicholson*, 2008 WL 114919, at \*2. The court did not address the issue of non-neutral adjudicators within the VA in depth. *See id.* at \*15-17.

113. Complaint for Declaratory and Injunctive Relief at 50, *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919 (N.D. Cal. Jan. 10, 2008), 2007 WL 4718845.

114. *Nicholson*, 2008 WL 114919, at \*20.

115. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1055-56 (N.D. Cal. 2008).

116. *Id.* at 1081-82.

117. *Id.* at 1091-92.

118. *See Appellants' Opening Brief at 35-36, Veterans for Common Sense v. Peake*, No. 08-16728 (9th Cir. Dec. 10, 2008), 2008 WL 6913188.

partment of Veterans Affairs will be analyzed under procedural due process. The first element of the test, where it must be shown that a “private interest that will be affected by the official action,”<sup>119</sup> is satisfied because a veteran’s disability compensation and medical care benefits qualify as property interests. Analysis of the second prong of the *Mathews* test, “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,”<sup>120</sup> demonstrates that the VA claims and medical procedures in the Veterans Judicial Review Act of 1988<sup>121</sup> do not have a high risk of erroneous deprivation. More specifically, the Comment will address the procedural due process claims, made by Veterans for Common Sense and Veterans United for Truth, that the lack of neutral decision-makers and the lack of an additional procedure enabling a veteran with a mental health emergency to challenge the timing of medical care if he is given a later appointment. The Comment concludes that these do not create a high risk of erroneous deprivation and therefore the second prong is not met. And finally, the last prong requiring the analysis of the government’s interest<sup>122</sup> is not met because the substitution and addition of procedures would be burdensome to the VA. Since the second and the third prongs are not satisfied, the Comment concludes that the veterans do not have a valid procedural due process claim regarding these specific claims of deprivation.<sup>123</sup>

#### A. FIRST PRONG: THE PRIVATE INTEREST OF PROPERTY AFFECTED

The first prong of the procedural due process test laid out in *Mathews v. Eldridge* checks to see if the procedures that are in place affect an interest of the individual.<sup>124</sup> In the present situation, it is necessary to analyze whether the procedures that are currently in place and used by the VA for determining PTSD claims and medical care affect a veteran’s interest.<sup>125</sup>

The Due Process Clause includes constitutional protection when an individual has been deprived of life, liberty, or property.<sup>126</sup> A veteran who is claiming compensation for a service-connected disability or is seeking medical care has a property interest at stake.<sup>127</sup>

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

120. *Id.*

121. Veterans Judicial Review Act of 1988, 38 U.S.C. §§ 101-103 (2006 & Supp. II 2008).

122. *Mathews*, 424 U.S. at 335.

123. *Id.*

124. *Id.*

125. *Id.*

126. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

127. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire



A major Supreme Court decision, *Goldberg v. Kelly*, analyzed procedural due process and the deprivation of property.<sup>128</sup> The case involved residents of New York City who claimed they were deprived of procedural due process when the welfare benefits they were receiving through federally-funded programs, such as Aid to Families with Dependent Children, were terminated without notice or a hearing given beforehand.<sup>129</sup> The Court found that the claimants' property interest was affected because the loss of welfare payments would be a significant detriment in the daily lives of the recipients.<sup>130</sup> Although the argument between a constitutional right and a privilege has often been made in the past, the *Goldberg* Court has found that no such distinction seems to exist anymore, as it holds welfare payments to be considered property because "[s]uch sources of security . . . are no longer regarded as luxuries or gratuities; to the recipients they are essentials."<sup>131</sup>

A similar problem presented itself to the Supreme Court when the case of *Board of Regents of State Colleges v. Roth* came forth two years later.<sup>132</sup> Here, the plaintiff was an assistant professor at Wisconsin State University at Oshkosh who claimed the university he had worked for deprived him of procedural due process when the university did not rehire him for the next academic year.<sup>133</sup> Roth claimed that one of the interests he was deprived of by not being rehired by Wisconsin State University was his property interest.<sup>134</sup> The Court went into a detailed analysis about the definition of the word "property."<sup>135</sup> The Court held that "property" is a broad term and that "the Court [had] fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of pro-

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for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.").

128. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

129. *Id.* at 255-56.

130. *Id.* at 263 n.8 ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'" Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that '[s]ociety today is built around entitlement . . . . Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.'" (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245, 1255 (1965))).

131. *Id.*

132. *Roth*, 408 U.S. 564.

133. *Id.* at 566.

134. *Id.* at 571.

135. *Id.* at 571-72, 576-78.

cedural due process rights.”<sup>136</sup> The Court also clarified saying that the definition of property in regards to procedural due process protection does not limit itself to actual ownership of things such as land and tangible goods.<sup>137</sup>

Next, the *Roth* Court talked about how the protection of a property interest acts as a safeguard for benefits that an individual has already gained access to through statutory or administrative means, such as the receipt of welfare benefits that the Court addressed in *Goldberg*.<sup>138</sup> The Court stressed that in order to have a property interest in a benefit, a person must have more than a desire or expectation of it.<sup>139</sup> Rather, the person must “have a legitimate claim of entitlement to it.”<sup>140</sup> Justice Stewart, who wrote the majority opinion of the cases, emphasized that the procedural due process protection for property interests is meant to protect people’s interest in things they rely on in their daily lives.<sup>141</sup> In this case, because Roth’s contract was for a fixed amount of time and was supposed to terminate after the end of the academic year, his property interest was only protected until the termination date and did not mean he was owed another contract for the following year from the university.<sup>142</sup>

It is important to note that the decisions in *Mathews*, *Goldberg*, and *Roth* seem to say that procedural due process protection is afforded only when the claimants have already been receiving the benefit or entitlement.<sup>143</sup> Although the Court may analyze whether or not the claimant has “present enjoyment”<sup>144</sup> of the benefit, it does not appear to limit or restrict procedural due process protection to only such instances.

In the case of *American Manufacturers Mutual Insurance Co. v. Sullivan*,<sup>145</sup> where employees filed a complaint because their medical benefits were terminated without prior notice or hearing, the Court clarified the broader definition for what qualifies as a property interest under procedural due process.<sup>146</sup> The Court first made a point that in *Goldberg* and *Mathews*,

136. *Id.* at 571 n.9 (citing prior cases where it was ruled “that public employment in general was a „privilege,” not a „right,” and that procedural due process guarantees therefore were inapplicable” (quoting *Bailey v. Richardson*, 341 U.S. 918 (1951))).

137. *Roth*, 408 U.S. at 572.

138. *Id.* at 576 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

139. *Id.* at 577.

140. *Id.*

141. *Id.*

142. *Roth*, 408 U.S. at 578.

143. See *Mathews v. Eldridge*, 424 U.S. 319, 320 (1976); *Roth*, 408 U.S. at 576 (“The Fourteenth Amendment’s procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.”); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

144. *Baldwin v. Hous. Auth. of Camden*, 278 F. Supp. 2d 365, 378 (D.N.J. 2003).

145. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

146. *Id.* at 47, 61.

the claimants had a property “interest in *continued* payment of benefits [before they] could be terminated.”<sup>147</sup> However, the Court strayed from this concept and said that the present case was different.<sup>148</sup> Under Pennsylvania law, for an employee to claim a property interest, two elements needed to be proved: “First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary.”<sup>149</sup> When these two factors are met, is when the employee has the same property interest such as those found in *Goldberg* and *Mathews*.<sup>150</sup>

Furthermore, the Supreme Court held in *Walters v. National Association of Radiation Survivors*,<sup>151</sup> that past decisions “establish that „due process“ is a flexible concept—that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur.”<sup>152</sup> Here, the Court acknowledged that the way an interest is measured for qualification of procedural due process protection varies depending on circumstances and significance.<sup>153</sup> However, the Court also acknowledged that although “[t]he District Court held that applicants for benefits, no less than persons already receiving them, had a „legitimate claim of entitlement“ to benefits if they met the statutory qualifications,” the Supreme Court has never clearly ruled on the matter.<sup>154</sup>

Although the Supreme Court has not clearly held that applicants for benefits have a property interest under procedural due process, it has been so held in every circuit court that benefit applicants may possess a property interest for benefits, such as welfare entitlements.<sup>155</sup> Also, the circuit court

147. *Id.* at 60.

148. *Id.*

149. *Id.* at 61.

150. *Sullivan*, 526 U.S. at 61.

151. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985).

152. *Id.* at 320 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

153. *Walters*, 473 U.S. at 320.

154. *Id.* at 321 n.8.

155. *Kapps v. Wing*, 404 F.3d 105, 115 (2d Cir. 2005); *see Hamby v. Neel*, 368 F.3d 549, 557-59 (6th Cir. 2004); *Foss v. Nat’l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998); *Flatford v. Chater*, 93 F.3d 1296, 1304-05 (6th Cir. 1996); *Malette v. Arlington County Employees’ Supp. Ret. Sys. II*, 91 F.3d 630, 637-40 (4th Cir. 1996); *Kraebel v. New York City Dep’t of Hous. Pres. & Dev.*, 959 F.2d 395, 404-05 (2d Cir. 1992); *Ward v. Downtown Dev. Auth.*, 786 F.2d 1526, 1531 (11th Cir. 1986); *Daniels v. Woodbury County*, 742 F.2d 1128, 1132-33 (8th Cir. 1984); *Charry v. Hall*, 709 F.2d 139, 144 (2d Cir. 1983); *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 489-90 (3d Cir. 1980); *Griffeth v. Detrich*, 603 F.2d 118, 121-22 (9th Cir. 1979); *Basciano v. Herkimer*, 605 F.2d 605, 609 (2d Cir. 1978); *Raper v. Lucey*, 488 F.2d 748, 752 (1st Cir. 1973).

made clear in *Gonzales v. City of Castle Rock*<sup>156</sup> that even if it is found that someone does not satisfy the prerequisites and the conditions “necessary to receive the benefit, the underlying property entitlement remains and cannot be denied without due process of law.”<sup>157</sup> Therefore, an individual still has a property interest. In fact, when the Supreme Court is faced with procedural due process questions of law when the individual is a benefits applicant, the court will assume a claim of entitlement for applicants.<sup>158</sup>

By taking procedural due process jurisprudence into account, veterans who seek disability compensation and medical care for their service-connected disability of PTSD have a property interest. Although the situation does not chiefly concern veterans who have already been granted disability compensation and medical care and then had it terminated, such as the discontinued welfare benefits in *Goldberg*<sup>159</sup> or social security disability benefits in *Mathews*,<sup>160</sup> veterans still have a property interest as applicants for disability compensation and medical care. Most of the veterans seeking disability compensation and medical care in the present situation did not have present enjoyment of the benefits—they are still trying to receive them. However, veterans still have a property interest because, as noted in *Roth*, they have more than a desire or expectation of it.<sup>161</sup> Rather, compensation for their disability and medical care is a necessity in order to treat PTSD and they have a legitimate claim to their entitlements from the VA because it is something they would rely on in their daily lives.<sup>162</sup> As many federal courts have already noted, applicants have a property interest so long as they fulfill their statutory requirements.<sup>163</sup>

The court in *Devine v. Cleland* decided that eligible veterans have a property interest in educational benefits from the VA.<sup>164</sup> Furthermore, in the case of *Veterans for Common Sense v. Nicholson*,<sup>165</sup> the court held that a statute requiring that the VA and its Secretary provide medical services for

156. *Gonzales v. City of Castle Rock*, 366 F.3d 1093 (10th Cir. 2004), *rev'd en banc in part and cert. granted on other grounds*, 543 U.S. 955 (2004).

157. *Id.* at 1103 n.7.

158. *Lyng v. Payne*, 476 U.S. 926, 942 (1986).

159. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

160. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

161. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

162. *Id.*

163. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985).

164. *Devine v. Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980) (“The class, if „eligible veterans“ as defined by 38 U.S.C. § 1652(a)(1), and if enrolled and taking the prescribed units of approved courses at an educational institution meeting the requirements of 38 U.S.C. § 1651 *et seq.*, has a statutory entitlement to receipt of an educational assistance allowance. Such a statutory entitlement does constitute a „property right“ protected by the Due Process Clause.” (citation omitted)).

165. *Veterans for Common Sense v. Nicholson*, 2008 WL 114919, at \*18 (N.D. Cal. Jan. 10, 2008).

veterans “does in fact create a property interest protected by the Due Process Clause.”<sup>166</sup>

Because a property interest exists when a claimant relies on it in their daily lives<sup>167</sup> and courts have ruled that a veteran’s medical care qualifies as a property interest,<sup>168</sup> it is clear that veterans who are seeking service-connected PTSD disability compensation and medical care have a property interest. Therefore, the first element of the procedural due process test laid out in *Mathews v. Eldridge* has been satisfied.<sup>169</sup>

B. SECOND PRONG: ERRONEOUS DEPRIVATION OF THE PROPERTY INTEREST THROUGH PROCEDURES USED BY THE VA

The second prong of the procedural due process test laid out in *Mathews v. Eldridge* is analyzing “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.”<sup>170</sup> The Supreme Court has defined the meaning of a deprivation regarding property interests in *Goldberg*<sup>171</sup> and *Roth*.<sup>172</sup> In *Goldberg*, the Supreme Court held that the termination of aid can constitute a deprivation of a property interest, especially when the interest is the claimant’s way of life—such as a welfare recipient whose welfare benefits were terminated.<sup>173</sup> On the contrary, in *Roth*, the Supreme Court made it clear that if one has a property interest in employment, it could not be terminated without a hearing and a statement of reasons.<sup>174</sup> However, because *Roth* did not have an established property interest in the first place, it could not be taken away from him—and he therefore was not deprived of anything.<sup>175</sup> As a result, the Supreme Court seems to define deprivation as the termination or taking away of an interest. When the termination is improper or faulty, it constitutes an erroneous deprivation.<sup>176</sup>

166. *Id.*

167. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

168. *Nicholson*, 2008 WL 114919, at \*18.

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

170. *Id.*

171. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

172. *Roth*, 408 U.S. at 578.

173. *Goldberg*, 397 U.S. at 264 (“[T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.”).

174. *Roth*, 408 U.S. at 578 (“In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.”).

175. *Id.*

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

In applying this prong to veterans with PTSD and their disability claims, it is necessary to examine the consequences of an erroneous deprivation of a veteran's property interest regarding disability compensation or medical care. If a veteran with PTSD is denied disability compensation, the means by which he lives could be taken from him, very much like the welfare recipient in *Goldberg*.<sup>177</sup> The symptoms of PTSD can be so severe in some people that it prohibits them from getting and keeping a job.<sup>178</sup> If veterans are unable to obtain employment, they have no income and are dependent on disability compensation from the VA in order to meet their basic needs of food and shelter.<sup>179</sup> Therefore, if a lower rating is given when a veteran cannot work, the veteran will get less money or no money which would negatively and severely affect his means to live. It is clear that an erroneous deprivation of disability compensation and medical care could have grave, negative consequences. It is also important to acknowledge that while benefits such as social security payments can be adjusted if there was an erroneous deprivation through retroactive payments,<sup>180</sup> it is more difficult to adjust disability compensation and medical care for veterans. If veterans cannot work, they have no source of income and are in dire need of their disability compensation in order to live. If the veterans do not receive medical treatment in a timely fashion, one cannot reverse the effects of PTSD, which can become worse with time.<sup>181</sup> An erroneous deprivation carried out by the VA would clearly have terrible and risky consequences.

Now that the consequences of an erroneous deprivation have been analyzed, it is necessary to examine whether current procedures of the VA allow for a high risk of erroneous deprivation. The central cases that deal with veteran applicants for PTSD disability claims and medical care, which address the second prong of the *Mathews v. Eldridge* test under a procedural due process analysis, are *Veterans for Common Sense v. Nicholson*<sup>182</sup> and *Veterans for Common Sense v. Peake*.<sup>183</sup> As mentioned before, veterans groups are asserting and arguing two main reasons as to why the VA's cur-

177. *Goldberg*, 397 U.S. at 264.

178. 38 C.F.R. § 4.130 (2008); see Joseph Shapiro, *Attitudes, PTSD Complicate Iraq Vet's Job Search*, NPR, Nov. 12, 2007, <http://www.npr.org/templates/story/story.php?storyId=16175287> ("Kraft is one of them. Looking back at his time at MTV Networks, he realizes he would go to work and have trouble concentrating. Only later would he come to understand that as a symptom of his own PTSD.").

179. *Id.*

180. *Mathews*, 426 U.S. at 342.

181. National Institute of Mental Health, *supra* note 42 ("In some people, the condition becomes chronic.").

182. *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919 (N.D. Cal. Jan. 10, 2008).

183. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049 (N.D. Cal. 2008).

rent procedures allow veterans who are seeking disability compensation and medical care to face a high risk of being deprived of their property interest in their benefits.<sup>184</sup> First, the plaintiffs argue that the procedures and criteria contained in chapters of the Veterans Judicial Review Act of 1988 (VJRA)<sup>185</sup> do not permit a proper adjudication system for veterans disability claims because the VA does not have neutral decision-makers.<sup>186</sup> Second, the veterans groups argue that the lack of an additional procedure allowing veterans to challenge the timing of medical care in emergency situations, if they are turned away for a later appointment, deprives veterans of due process.<sup>187</sup>

*1. The First Argument of Veterans Groups: Procedures Used by the VA Do Not Allow Neutral Decision Makers*

The authority and the nature of the decision-makers within the Department of Veterans Affairs must be analyzed. As mentioned before, when a veteran first files a claim, it is reviewed by the VA's regional office and they determine what rating and amount of money the veteran shall receive.<sup>188</sup> But if the veteran disagrees and wants to appeal the rating or the decision given by the VA, veterans are given one year to appeal their disability compensation by giving a written notice of disagreement.<sup>189</sup> After the VA gives the veteran their Statement of the Case, the veteran then has sixty days to file for an appeal.<sup>190</sup> The decision will then go to the Board of Veterans' Appeals, which are VA adjudicators who decide the cases on the behalf of the VA secretary.<sup>191</sup> After reviewing this process of a veteran's disability claim, it is clear that there are two different positions that decide a veteran's PTSD disability claim. There are the veterans law judges (VLJs) who are employed by the BVA to serve in the VA's very own court system when a veteran appeals a decision.<sup>192</sup> There are also rating specialists who

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184. *Id.*

185. Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

186. *Peake*, 563 F. Supp. 2d at 1082, 1089.

187. Appellants' Opening Brief at 35-36, *Veterans for Common Sense v. Peake*, No. 08-16728 (9th Cir. Dec. 10, 2008), 2008 WL 6913188.

188. Department of Veterans Affairs, *Federal Benefits for Veterans and Dependents*, 2008, at 89, <http://www.va.gov/opa/vadocs/fedben.pdf>.

189. *Id.*

190. *Id.*

191. *Id.*

192. Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended at 38 U.S.C. § 7292 (2006 & Supp. II 2008)); 38 U.S.C. § 7253(a) (2006 & Supp. II 2008).

sit on the ratings board at the VA's regional office which makes the initial decision on a claim.<sup>193</sup>

In *Veterans for Common Sense v. Nicholson*, the plaintiffs argued that statutory regulations allow the VA to be the single entity that both tries the facts and decides the claim—the VA therefore has “dual authority.”<sup>194</sup> The plaintiffs also contended that the “inherent conflict in the VA's dual role is reflected in the VA's own regulations, which on the one hand require the VA to assist a veteran in gathering information to support a claim, but then qualifies that responsibility by requiring that the decision „protect[ ] the interests of the government.”<sup>195</sup> It was argued that the VA had given their employees two contradicting objectives to follow in their occupation.<sup>196</sup>

The first group of employees to analyze for their neutrality in their decision making is VLJs. VLJs are employed by the BVA to serve in the VA's very own court system.<sup>197</sup> The fact that veterans' appeals regarding their disability compensation and medical treatment are being decided by non-independent adjudicators might seem frightening to some. After all, VLJs are employed by a branch of the VA, the same department who pays their salaries, and as a result, the judges may be more likely to be biased and side with the position of their employer.

VLJs are similar to Administrative Law Judges [hereinafter ALJs]—they both “preside[ ] at an administrative trial-type proceeding to resolve a dispute between a federal government agency and someone affected by a decision of that agency . . . . The major difference between federal ALJs and the VLJs . . . is that ALJs are appointed under the Administrative Procedure Act of 1946”<sup>198</sup> where they are appointed by the agency itself,<sup>199</sup> whereas VLJs are appointed by the President.<sup>200</sup>

193. Department of Veterans Affairs, *Federal Benefits for Veterans and Dependents*, 2008, at 89, <http://www.va.gov/opa/vadocs/fedben.pdf>.

194. Complaint for Declaratory and Injunctive Relief at 50, *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919 (N.D. Cal. Jan. 10, 2008), 2007 WL 4718845.

195. *Id.* (citing 38 C.F.R. § 3.103(a) (2008)) (alteration in original) (emphasis omitted).

196. *Id.*

197. Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988); 38 U.S.C. § 7253(a) (2006 & Supp. II 2008).

198. *Hearings Before the H. Subcomm. on Disability Assistance and Memorial Affairs of the Committee on Veteran's Affairs, U.S. House of Representatives*, 110th Cong. (2007) (statement of Barton F. Stichman, Joint Executive Director, National Veterans Legal Services Program), available at [http://veterans.house.gov/hearings/Testimony\\_Print.aspx?newsid=115&Name=\\_Barton\\_F.\\_Stichman](http://veterans.house.gov/hearings/Testimony_Print.aspx?newsid=115&Name=_Barton_F._Stichman).

199. 5 U.S.C. § 3105 (2006).

200. Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988); 38 U.S.C. § 7253(b) (2006 & Supp. II 2008).



When examining the role of decision makers and administrative law judges in past Supreme Court decisions, it is clear that they are not supposed to be partial or biased in order to afford due process.<sup>201</sup> In the case of *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, the Supreme Court held that “due process requires a „neutral and detached judge.”<sup>202</sup>

In *Gibson v. Berryhill*, the Supreme Court ruled that “[it] is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.”<sup>203</sup> The case also clarifies that “most of the law concerning disqualification because of interest applies with equal force to administrative adjudicators.”<sup>204</sup> Once again, the Supreme Court rules that if adjudicators stand to gain financially or have an interest in the outcome of a case, they should not be the ones deciding the case.<sup>205</sup>

In the federal appellate court case of *Grant v. Shalala*, the dissenting opinion by Circuit Judge Higginbotham emphasized that although the Supreme Court has said that administrative law judges are “functionally comparable” to federal judges, it has “never held that ALJs are federal judges.”<sup>206</sup> He goes on to say that federal judges require independence and impartiality from the decisions they make because of the separation of powers doctrine in the Constitution, but the independence of an ALJ “is not rooted in the Constitution but rather is a function of the need for administrative efficiency, the recognition of administrative expertise, and the need to build an adequate administrative record for judicial review.”<sup>207</sup> He writes that ALJs are not the judiciary, but are members of the executive branch of government.<sup>208</sup> As a result, Judge Higginbotham is saying ALJs do not have the same protection as federal judges from scrutiny of the court.<sup>209</sup>

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201. *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993); see *Johnson v. Mississippi*, 403 U.S. 212, 215 (1971) (“Trial before „an unbiased judge” is essential to due process.”); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *Bloom v. Illinois*, 391 U.S. 194, 205 (1968).

202. *Concrete*, 508 U.S. at 617.

203. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

204. *Id.*

205. *Id.*; see also *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

206. *Grant v. Shalala*, 989 F.2d 1332, 1354 (3d Cir. 1993) (Higginbotham, J., dissenting).

207. *Id.* (citing *Weinberger v. Sulfi*, 422 U.S. 749, 765 (1975)).

208. *Grant*, 989 F.2d at 1354. (Higginbotham, J., dissenting); see also Louis A. Chiaffalo, *Administrative Law-Judicial Review—District Court May Not Make Independent Findings of Fact in a Class Action by Plaintiffs Alleging Bias of an Administrative Law Judge—Grant v. Shalala*, 989 F.2d 1332 (3d Cir. 1993), 24 SETON HALL L. REV. 517, 522 (1993).

209. *Id.*

Although it is easy to assume that bias would be more susceptible in an environment where those who are adjudicating are employed by the agency that the action is taken against, the Supreme Court and several federal courts have ruled that actual bias must be shown and not just the potential for bias.<sup>210</sup> In order for an ALJ to be disqualified from adjudicating a claim, it is not enough to show the possibility for bias—actual bias needs to be proved and the “mere appearance of impropriety”<sup>211</sup> is not enough.<sup>212</sup> There cannot be a successful procedural due process claim without showing actual bias of the adjudicator.<sup>213</sup> This precedent case law seemingly shows that VLJs are not shown to be biased and therefore, a high risk for erroneous deprivation does not exist.

The second group of employees to analyze for their neutrality in their decision making is those who sit on the rating boards of the regional offices of the VA. The plaintiffs in *Veterans for Common Sense v. Nicholson* were the first to present to the court that VA employees have a work credit system.<sup>214</sup> Subsequently, *Veterans for Common Sense v. Peake* argued that rating specialists who decide on the initial disability claim are biased because they receive credit when they decide a claim in front of a court.<sup>215</sup> Therefore, if the rating specialists wrongly decide a claim initially, the claim can come through again and the raters will get additional credit to rate the claim again.<sup>216</sup>

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210. *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (holding that due process requires a fair trial before a judge with no actual bias); *Bunnel v. Barnhart*, 336 F.3d 1112, 1115 (9th Cir. 2003) (“[T]his court holds that actual bias must be shown to disqualify an administrative law judge.”); *Guerrero-Perez v. I.N.S.*, 242 F.3d 727, 727 n.2 (7th Cir. 2001) (“To successfully make out a due process claim, one has to demonstrate actual prejudice.”); *Ikpeazu v. Univ. of Neb.*, 775 F.2d 250, 254 (8th Cir. 1985) (“With respect to the claim of bias, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven.”); *Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 288 (E.D.N.Y. 2002) (“Plaintiffs can only overcome the presumption of honesty by showing that . . . the circumstances surrounding the proceedings posed „a risk of actual bias or prejudice” that would offend due process.”).

211. *Bunnel*, 336 F.3d at 1115.

212. *Id.*

213. *Guerrero-Perez*, 242 F.3d at 727 n.2.

214. Complaint for Declaratory and Injunctive Relief at 11, 58, *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919 (N.D. Cal. 2007), 2007 WL 4718845.

215. Appellants’ Opening Brief at 13, *Veterans for Common Sense v. Peake*, No. 08-16728 (9th Cir. Dec. 10, 2008), 2008 WL 6913188.

216. *Board of Veterans’ Appeals Adjudication Process and the Appeals Management Center: Hearings Before the Subcomm. on Disability Assistance and Memorial Affairs of the Committee on Veteran’s Affairs, U.S. House of Representatives*, 110th Cong. 1 (2007), available at <http://veterans.house.gov/hearings/transcript.aspx?newsid=115> [hereinafter *Hearings*].

On September 25, 2007, the members of Disability Assistance and Memorial Affairs, a subcommittee of the Committee on Veterans' Affairs in the House of Representatives had a hearing to address the growing backlog of cases at the BVA.<sup>217</sup> Steve Smithson, the deputy director of the Veterans Affairs and Rehabilitation Commission, served as a witness at the hearing conducted on that day. He argued:

Well right now with the end product work measure system, the adjudicators, the rating specialist they get credit each time they rate a case. So in the current system if I file a claim, they rate the claim, they deny the claim, I submit additional evidence or I file a notice of disagreement or I question it and they come back and they rate it again, they get another credit. They keep getting credit for that same claim.

. . . So the system itself, as it is set up now, there is really an incentive not to do it right the first time because they continue to get credit each time they rate that claim.<sup>218</sup>

The statements of Mr. Smithson show that the adjudicators who serve on the rating boards of the VA may gain credits when they deny claims initially because the claims can come back through the system, with additional evidence from the veteran, and the raters can gain additional credits.<sup>219</sup> Their judgment is argued to be biased because they have this incentive of receiving credits. Furthermore, a report from the Office of Inspector General of the VA also acknowledged the end product work measure system in place at regional offices of the VA.<sup>220</sup> The report finds employees on the rating boards were driven to enhance their productivity to gain additional credits and that they deviated from VBA policies and procedures in order to do so.<sup>221</sup>

The end product work measure system is not contained in the procedures of the VA in adjudicating a claim and cannot be found in existing

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217. *Id.* (statement of Steve Smithson, Deputy Director, Veterans Affairs and Rehabilitation Commission).

218. *Id.* (statement of Steve Smithson, Deputy Director, Veterans Affairs and Rehabilitation Commission).

219. *Id.* (statement of Steve Smithson, Deputy Director, Veterans Affairs and Rehabilitation Commission).

220. U.S. Department of Veterans Affairs: Office of Inspector General, *Combined Assessment Program Review of the VA regional Office Winston-Salem, North Carolina*, Apr. 27, 2004, at 5-6, <http://www.va.gov/oig/CAP/VAOIG-04-00947-137.pdf>.

221. *Id.*

case precedent.<sup>222</sup> Consequently, it remains unclear what the credits are—if they are bonuses in pay, promotions, job security, or another beneficial incentive. But if the system is in use by a VA regional office, such a system allows for erroneous deprivation because the procedures of the VA enable employees to decide veterans' disability compensation claims in such a manner where the employees can benefit themselves by making flawed decisions. The rating specialists would have an incentive to make these flawed decisions and would therefore create an environment where one could expect biased decisions.<sup>223</sup> A bill seeking to improve the processing of claims at the VA was introduced to Congress in 2007.<sup>224</sup> The bill's passage would establish the work credit system for regional offices but also includes an additional safeguard of a procedure where "regional office of the Veterans Benefits Administration may only receive work credit for a claim assigned to that regional office when the appellate period for the claim has expired or the Board of Veterans Appeals has issued a final decision with respect to the claim."<sup>225</sup> Under these circumstances, the raters would not have the incentive to wrongly deny claims because they would not receive additional credit if the claim was to come through to the board again.<sup>226</sup>

2. *The Second Argument by Veterans Groups: The Lack of an Additional Procedure Allowing Veterans to Challenge the Timing of Medical Care in Emergency Situations Deprives Them of Due Process*

Veterans groups claim that the lack of procedures available to veterans who are experiencing delays in receiving medical care results in a high risk of erroneous deprivation of their property interest of medical care.<sup>227</sup> More specifically, the plaintiffs in *Veterans for Common Sense v. Peake* argue that veterans are not allowed to appeal the timing in which they receive

222. U.S. Department of Veterans Affairs, *Federal Benefits for Veterans and Dependents*, 2008, at 89, <http://www.va.gov/opa/vadocs/fedben.pdf>.

223. *Hearings*, *supra* note 216 (statement of Steve Smithson, Deputy Director, Veterans Affairs and Rehabilitation Commission).

224. Veterans Claims Processing Innovation Act of 2007, H.R. 3047, 110th Cong. § 713 (2007).

225. *Id.*

226. *Id.*

227. Appellants' Opening Brief at 35-36, *Veterans for Common Sense v. Peake*, No. 08-16728 (9th Cir. Dec. 10, 2008), 2008 WL 6913188; *see* *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919, at \*18 (N.D. Cal. Jan. 10, 2008) ("[Section] 1710(a)(4) does in fact create a property interest protected by the Due Process Clause.").

medical care services because there are no procedures in place to do so.<sup>228</sup> “[I]f a veteran comes in and says he or she is having suicidal thoughts, and VA clerical staff offers him an appointment a month later, there is no process for appealing that decision to seek an earlier appointment based on emergency circumstances.”<sup>229</sup> The veterans groups argue that because these delays prolong medical treatment and no procedures are in place for veterans to challenge such delays when they are experiencing a mental health emergency, a high risk of erroneous deprivation is created.<sup>230</sup>

The symptoms of PTSD can cause veterans to be irritable, aggressive, have intense nightmares, and can cause them to have flashbacks.<sup>231</sup> Furthermore, PTSD coexists with depression and substance abuse which can lead to suicide.<sup>232</sup> If veterans experiencing these severe symptoms are not given medical care, a high risk is presented because their condition could worsen and their lives would be at risk. With additional safeguards, such as procedures allowing veterans to challenge an appointment decision by VA medical facilities, this risk can be minimized so that the veteran gets help sooner.

The interest is obviously high because veterans’ lives, mental health, and well-being are at stake when dealing with PTSD.<sup>233</sup> However, as the court correctly concluded in *Veterans for Common Sense v. Peake*, the risk of erroneous deprivation is less.<sup>234</sup> During the trial, the court was presented with evidentiary testimony that veterans who go to VA medical facilities with mental health emergencies are seen immediately.<sup>235</sup> The court acknowledged it was not a guarantee that every veteran who seeks treatment for emergency mental health issues will receive immediate care.<sup>236</sup> The court also concluded that the risk of erroneous deprivation was not high because the plaintiffs did not prove “a systemic denial or unreasonable delay in mental health care.”<sup>237</sup> If it is common practice that those experiencing mental health emergencies are seen immediately, then there likely is no risk of erroneous deprivation. However, it is important to note that the court

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228. Appellants’ Opening Brief at 35-36, *Veterans for Common Sense v. Peake*, No. 08-16728 (9th Cir. Dec. 10, 2008), 2008 WL 6913188.

229. *Id.*

230. *Id.* at 39 (“And these delays, when combined with the critical nature of mental health care, and the absence of any procedure by which to challenge such delays, result in an unacceptably high risk of erroneous deprivation.”).

231. National Institute of Mental Health, *supra* note 42.

232. *Id.*

233. *Id.*

234. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1081 (N.D. Cal 2008).

235. *Id.*

236. *Id.* at 1081-82.

237. *Id.* at 1082.

did not define what a “systemic denial”<sup>238</sup> would require.<sup>239</sup> It is unclear how many veterans must be denied medical care before it is considered to be a systemic denial, which the court seems to suggest would present a high risk of erroneous deprivation.<sup>240</sup>

### C. THIRD PRONG: THE GOVERNMENT’S INTEREST

The third prong of the *Mathews v. Eldridge* test analyzes the government’s interest and administrative convenience, which includes “the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>241</sup> In the present situation, the substitute procedure of having judges who are not employed by the VA adjudicate claims and the substitute procedure of having rating specialists at regional offices not receive credit for their work unless their claims are accurate needs to be analyzed. Also, the additional safeguard of including a procedure where veterans who are experiencing emergency mental health issues can appeal the timing of their appointment should be analyzed.<sup>242</sup>

When the Supreme Court has applied the government interest prong in the past, it has considered different aspects.<sup>243</sup> In *Mathews*, the Court said substantial financial burdens should be considered.<sup>244</sup> The Court also said that although financial cost is not the only factor considered, the government’s interest is also the public’s interest, and as a result “conserving scarce fiscal and administrative resources is a factor that must be weighed.”<sup>245</sup> In *Goldberg*, the court considered the “[promotion] of general welfare”<sup>246</sup> as a government interest.

238. *Id.*

239. Appellants’ Opening Brief at 39, *Veterans for Common Sense v. Peake*, No. 08-16728 (9th Cir. Dec. 10, 2008), 2008 WL 6913188.

240. *See Peake*, 563 F. Supp. 2d at 1082.

241. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see* CHEMERINSKY, *supra* note 88, at 558-59.

242. Appellants’ Opening Brief at 35-36, *Veterans for Common Sense v. Peake*, No. 08-16728 (9th Cir. Dec. 10, 2008), 2008 WL 6913188.

243. *Mathews*, 424 U.S. at 347; *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).

244. *Mathews*, 424 U.S. at 347 (“This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision.”).

245. *Id.* (“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. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in

The first area of substitute procedure to analyze would be to have judges who are not employed by the VA to adjudicate appeals for disability ratings given at regional offices to dispose of any potential for bias. This would, no doubt, prove to be an enormous administrative burden on the VA, because they would have to revamp their entire appeals process if they are required to remove VLJs and abandon their court system.<sup>247</sup> If veteran's appeals were not handled within the VA's own court system, it would presumably cause a large backlog of cases within the federal court system.

The second substitute procedure to analyze would be to make it so that rating specialists and regional offices of the VA "only receive work credit for a claim assigned to that regional office when the appellate period for the claim has expired or the Board of Veterans Appeals has issued a final decision with respect to the claim"<sup>248</sup> in order to dispose of the bias raters may have due to the incentive to earn more credits.<sup>249</sup> The burden this procedure may have on the VA and the government is that the current end product work measure system in place is used as a monitoring and management tool.<sup>250</sup> This is necessary to monitor because a "[c]orrect work measurement is essential to substantiate proper staffing requirements and determine pro-

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terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited." (citing Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1303 (1975)).

246. *Goldberg*, 397 U.S. at 264-65 ("[I]mportant governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to „promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.“ The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end." (footnote omitted)).

247. See 38 U.S.C. § 7253(a) (2006 & Supp. II 2008).

248. Veterans Claims Processing Innovation Act of 2007, H.R. 3047, 110th Cong. § 713 (2007).

249. *Hearings*, *supra* note 216 (statement of Steve Smithson, Deputy Director, Veterans Affairs and Rehabilitation Commission).

250. DEP'T OF VET. AFF., VETERANS BENEFITS ADMINISTRATION MANUAL, M21-4, App. C, Change 72: § I (Oct. 3, 2006), [http://www.warms.vba.va.gov/admin21/m21\\_4/chg72.doc](http://www.warms.vba.va.gov/admin21/m21_4/chg72.doc).

ductive capacity.”<sup>251</sup> The system is also helpful in formulating budgets.<sup>252</sup> However, implementing this procedure would not cause an undue burden for the VA, because as the VA may still monitor claims and backlog, they may only *reward* rating specialists and regional offices after the appellate period for a claim has expired or the BVA has given its final decision.<sup>253</sup> This procedure would not pose financial burdens, seeing that the system is already in place. The VA would just be changing the time in which it awards credits.

The last procedure to analyze is the additional safeguard of including a procedure where veterans can appeal the timing of medical care if they are experiencing emergency mental health issues and are turned away.<sup>254</sup> The court in *Veterans for Common Sense v. Peake* correctly concluded “additional safeguards at this level would impose burdens on the VA.”<sup>255</sup> The court based its conclusion on the Supreme Court decision of *Parham v. J.R.* where the Court said the government “has a genuine interest in allocating priority to the diagnosis and treatment of patients as soon as they are admitted to a hospital rather than to time-consuming procedural minutets before the admission.”<sup>256</sup> The Supreme Court also stressed that the government has a strong interest in seeing that its expensive healthcare system is being used by people who truly need it.<sup>257</sup> In the opening brief filed by the veterans groups for *Veterans for Common Sense v. Peake*, the plaintiffs argue that because the VA already has procedures in place to challenge clinical decisions, it should not be burdensome to expand the challenges to scheduling decisions.<sup>258</sup> However, these areas are entirely different. Challenging a clinical decision involves the reconsideration of a medical decision made at a veteran’s health facility.<sup>259</sup> Therefore, the veteran has already seen an ex-

251. *Id.*

252. *Id.* (“Received and completed end products are also used to formulate the annual budget submission to the Secretary, OMB, the President, and Congress.”).

253. Veterans Claims Processing Innovation Act of 2007, H.R. 3047, 110th Cong. § 713 (2007).

254. Appellants’ Opening Brief at 35-36, *Veterans for Common Sense v. Peake*, No. 08-16728 (9th Cir. Dec. 10, 2008), 2008 WL 6913188.

255. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1082 (N.D. Cal. 2008) (citing *Parham v. J.R.*, 442 U.S. 584, 605 (1979)).

256. *Parham*, 442 U.S. at 605.

257. *Id.* at 604-05.

258. Appellants’ Opening Brief at 39, *Veterans for Common Sense v. Peake*, No. 08-16728 (9th Cir. Dec. 10, 2008), 2008 WL 6913188.

259. DEP’T VET. AFF., VHA HANDBOOK: VHA PATIENT ADVOCACY PROGRAM 1 (Sept. 2, 2005), [http://www1.va.gov/VHAPUBLICATIONS/ViewPublication.asp?pub\\_ID=1303](http://www1.va.gov/VHAPUBLICATIONS/ViewPublication.asp?pub_ID=1303) (“A clinical appeal is a higher-level reconsideration request to override a medical decision made at the facility level.”).



aminer and does not agree with the medical decision rendered.<sup>260</sup> Implementing a procedure where veterans can challenge the time they obtain medical care when they are experiencing a mental health emergency lays wholly outside of the realm of clinical decision appeals—the veteran is not challenging a medical decision, but his timing of receiving care. It would be a completely new type of challenge that would need adjudication, which means it will cost the VA more money and time.

Outside the substitute procedure for rating specialists and regional offices of the VA only receiving credit when a claim's appellate period has expired or when there has been a final decision given by the BVA, the other procedures mentioned would be highly burdensome on the VA because of costs and efficiency. Therefore, there is a lack of government interest when it comes to replacing VLJs and the VA's court system, and adding the additional procedure of allowing veterans to challenge the timing of when they receive medical care when they are experiencing a mental health emergency.

## V. CONCLUSION

*Mathews v. Eldridge* provides a balancing test in determining procedural due process.<sup>261</sup> The test requires the analysis of three different areas:

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.<sup>262</sup>

The first prong of the test was easily satisfied. Based on the prior rulings of the Supreme Court in *Goldberg*,<sup>263</sup> *Roth*,<sup>264</sup> and *Mathews*,<sup>265</sup> a clear property interest in veteran's disability compensation and medical care was established. The second prong of the risk of an erroneous deprivation and the value of additional or substitute procedural safeguards was not so easily

260. *Id.*

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

262. *Id.*; see CHEMERINSKY, *supra* note 88, at 558-59.

263. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

264. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

265. *Mathews*, 424 U.S. at 340-41.

satisfied.<sup>266</sup> Although the degree of the consequence of an erroneous deprivation could have serious, negative effects, the assertions of the lack of neutral decision-makers and the need for an additional procedure for challenging the timing of medical care in mental health emergencies did not show a high risk for erroneous deprivations. The actual bias of VLJs would need to be shown in order to violate due process. The rating specialists at regional offices of the VA are given credits for claims and may have an incentive to make improper decisions on claims in order to receive more credits. Adding a procedure for challenging the timing of medical care in mental health issue emergencies does not have a high risk for erroneous deprivations because individuals with emergency mental health issues are usually seen immediately. The third prong of government interest was also not satisfied because the substitute and additional procedures seemed to be burdensome on the VA. The substitute procedure of having non-VA employees adjudicate veterans claims would require the VA to abandon its current court system completely.<sup>267</sup> The substitute procedure for rating specialists and regional offices of the VA only receiving credit when a claim's appellate period has expired or when there has been a final decision given by the BVA does not burden the VA because the only change is in the timing of the credit given.<sup>268</sup> Lastly, the additional procedure where veterans can appeal the timing of medical care if they are experiencing emergency mental health issues and are turned away would impose a burden on the government because it would be a new type of challenge that would need adjudication, which means it will cost the VA more money and time.

As a result, the risk of erroneous deprivation is not high enough to outweigh the lack of government interest. Veterans were not deprived of procedural due process under the analysis of neutral decision makers adjudicating claims and the need for an additional procedure where veterans can appeal the timing of medical care if they are experiencing emergency mental health issues and are turned away. If the risk of erroneous deprivation is not high and the government does not have an interest, there is no procedural due process claim.<sup>269</sup>

With it determined that veterans were not deprived of procedural due process under these specific claims, the VA needs to continue improving in processing veterans claims for disability compensation and medical care. PTSD is a mental condition that can become worse with time and the veterans who have returned from Iraq and Afghanistan need to be treated

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266. *Id.* at 335.

267. Complaint for Declaratory and Injunctive Relief at 50, *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919 (N.D. Cal. 2007), 2007 WL 4718845.

268. *Id.*

269. *Mathews*, 424 U.S. 319.

promptly.<sup>270</sup> More than 300,000 veterans, which is one out of five who have been deployed, have returned from their service suffering from PTSD or major depression, like Joseph Dwyer.<sup>271</sup> Now that they served our country, the VA should be all that it can be for the veterans.

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270. National Institute of Mental Health, *supra* note 42.

271. RAND Corporation, *supra* note 49; *see Demons, supra* note 1.

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