

The New Suspect Class: Tragically, Our Veterans

By Gordon P. Erspamer

One of the most obscure discrimination issues existing today relates to our country's treatment of its veterans, a group that hardly qualifies under the legal definition of a "suspect class" as currently conceived. Nevertheless, it remains a fact that veterans are the most prominent remaining class of persons who suffer from invidious forms of institutionalized discrimination. It is veterans who are the subject of a judicially crafted exception to government tort liability under the Federal Torts Claims Act, as a result of the Supreme Court's Cold War-era decision in *Feres v. United States*, 340 U.S. 135 (1953), where the Supreme Court in effect legislated an exception to the waiver of sovereign immunity contained in that act. Our veterans (1) cannot pay a lawyer any sum whatsoever for legal assistance on any types of claims filed with the agency of original jurisdiction, the regional offices (ROs) of the Department of Veterans Affairs (VA); (2) have to face VA adjudicators who act as both the opposition and the trier of fact; (3) cannot subpoena VA doctors (or any other VA employees) to testify, e.g., to obtain testimony to support a diagnosis or challenge a misdiagnosis; or (4) cannot obtain any redress for denials of medical care or treatment, for there is no procedure available.

Even with respect to judicial review, each veteran, like Sisyphus, must climb a mountain to obtain relief even as to patently illegal policies or procedures of the VA, as there is no class action procedure, no ability to obtain injunctive relief, and the U.S. Court of Appeals for Veterans Claims (Veterans Court) lacks the ability to enforce any of its decisions at the RO level, as its former Chief Judge Frank Nebeker repeatedly decried in his "state of the court" speeches.

What We Learned from VCS

Veterans returning from Iraq and Afghanistan have served upon a stage where the effects of these legal niceties are played out every day, as chronicled in the recent trial of *Veterans for Common Sense v. Peake (VCS)*, Case No. 07-03758 (N.D. Cal.). The court heard systemic evidence concerning the VA's programs for treating veterans, disputes arising out of medical care or treatment (administered by the Veterans Health Administration), and the adjudication system that processes claims for service-connected death and disability compensation (administered by the Veterans Benefits Administration). With respect to both the medical and adjudication systems, the plaintiffs in *VCS* emphasized the VA's handling of posttraumatic stress disorder (PTSD) and traumatic brain injuries (TBI), the signature injuries sustained in the Iraq and Afghanistan wars. The picture that emerged was not a pretty one, as an internal VA study, never previously released, found that veterans under VA care were attempting suicides at a rate of about 1,000 per month and succeeding an average of eighteen times every day. Thus the total number of veteran suicides in a single year eclipsed the number of combat deaths in the Iraq and Afghanistan wars combined. Our nation's newspapers and local television news reports are filled with poignant and tragic stories of the families of veterans torn apart by suicide and other events that they cannot control and often cannot really comprehend.

Other highlights from *VCS* included:

- A Washington state VA emergency room doctor testified to the unfolding "tsunami of medical need" among veterans returning from recent conflicts. Studies by the VA and other institutions point to highly elevated suicide rates among veterans, as much as 7.5 times the national average.

- A RAND Corp. study released in 2008 estimates that 300,000 U.S. soldiers who served in Iraq or Afghanistan suffer from PTSD or major depression, and nearly 320,000 report experiencing a TBI. “Roughly half of those who need treatment for these conditions seek it, but only slightly more than half who receive treatment get minimally adequate care,” RAND reported. And the availability of that inadequate care for PTSD is dwindling. Despite the exponential increase in veterans diagnosed with it, a March 2008 report by the VA confirms that the average number of visits per veteran in PTSD mental health programs has actually rapidly decreased.
- Although the VA has a “sacred mission” to provide medical care for veterans—free for life in the case of those with PTSD or suicidal tendencies—there were 3,800 unfilled mental health positions at the VA as of October 31, 2007, despite the fact that the VA is currently operating under budget, according to one official at trial. Approximately 2,400 nursing and 1,400 doctor positions remain unfilled.
- Delay times for care is a critical problem. In 2006 the VA’s former deputy undersecretary for Health and Health Policy Coordination said, “In some communities, VA clinics do not provide mental health or substance abuse care or waiting lists render that care virtually inaccessible.” As of April 2008, more than 85,000 U.S. veterans are waiting over thirty days for an appointment.
- Evidence produced at trial also showed that VA timeliness statistics were “fudged,” and that the true waiting times that veterans encounter for medical care or disability claim decisions are even longer than those the VA reports.

Much of the blame for the suicide epidemic lies with the VA, which had, somewhat belatedly in 2004, developed the Mental Health Care Strategic Plan (MHC Plan), to tackle the mental health care problems it expected to occur amongst the global war on terror veterans. Tragically, when James Nicholson replaced Anthony Principi as the Secretary for Veterans Affairs, the chief author and proponent of the MHC Plan, Dr. Francis Murphy, was fired, and critical elements of the MHC Plan were either scrapped or put on the back burner. Even today, most of the key elements of the MHC Plan are still only at the pilot stage. The outcome of the MHC Plan reflected a recurrent theme throughout the trial: the divergence between appearance and reality. Programs look good on paper but often are never implemented or enforced.

Major Problems in Handling Veterans Claims

At the same time, the VA’s adjudication system for handling death and disability compensation claims is being choked by a huge influx of claims by veterans and their survivors, leading to unprecedented delays throughout the system. Currently, more than 600,000 veterans await decisions from VA ROs, a number that is expected to increase to close to one million by 2008, as a recent study by Linda Bilmes of the John F. Kennedy School of Government at Harvard University predicted under the surge scenario.

The situation at the Board of Veterans Appeals (BVA), the body within the VA that handles internal appeals from RO decisions, is even more dire, as the backlog of initial appeals of denied claims has swelled to over 40,000, leading to delays averaging 1,419 days (3.89 years) for an appeal to be heard. The next level of appeal is to the Veterans Court, where Chief Judge William M. Greene, according to the paper record, faces a backlog of over 6,000 appeals—and veterans face an additional wait of almost four years.

Further delays are caused by the need to remand many claims, some of them multiple times, because the VA ROs frequently make mistakes in developing the record, creating a

recycling problem and extending the average claim decision time to 1,957 days. When multiple remands and appeals to the Veterans Court or Federal Circuit are factored in, we are at the point where the complete claim cycle exceeds ten years for most claims and as long as twelve to fifteen years in more complicated claims, such as those involving PTSD and TBI. The evidence shows that the VBA undersecretary made a policy decision to deemphasize the processing of appeals, and hence thousands of veterans die each year while they wait in line to have their appeals decided. In fact, there are currently no statutory or regulatory time limits imposed on the VA during any step of the adjudication process for benefits. However, the VA does impose time limits on veterans, and a veteran's failure to meet certain time limits within the appellate process results in a jurisdictional dismissal of the veteran's appeal.

One other startling revelation during VCS was that hearings "almost never" occur at the RO stage, despite the facts that veterans obtaining hearings had higher success rates, that it is more difficult to overturn an adverse decision than to obtain a favorable decision in the first instance, and that VA regulations guarantee claims a hearing "at any time on any issue." Was the absence of hearings a product of lack of access to counsel or veterans' frustrations with lengthy delays to obtain hearings (fifteen months or longer) or was it evidence of a more systematic and diabolical scheme to deprive veterans of their hearing rights? In an earlier case, *National Association of Radiation Survivors v. Turnage* (NARS), No. C-83-1861-MHP (N.D. Cal. 1983), discovery had disclosed a concerted effort to deprive veterans of the right to predecisional hearings that was based upon the VA's claim of lack of resources.

At the same time, VA error rates are unprecedented. The BVA reverses RO decisions 21 percent of the time and remands another 41 percent of the cases; the cumulative error rate on VA RO decisions is over 90 percent. By the VA's own calculations, 44 percent of the reasons for remand by the BVA are "avoidable," meaning that had the RO fulfilled its duties to the veteran in the first place, the case would not have needed to be appealed. Seventy-five percent of the remanded cases return to the BVA a second time, and 27 percent of those cases are remanded once again. This creates a system where veterans claims essentially "churn" in the VA system, in some cases, for decades.

Perhaps the most disturbing revelation was that of the military's program to discharge thousands of soldiers exhibiting signs of PTSD and TBI, including combat soldiers and victims of sexual assault, as having preexisting personality disorders, a category of mental illness that develops in juveniles. The almost inevitable outcome is that the veterans are found ineligible for either medical care or disability compensation. The story of Jon Town, a combat veteran from Iraq injured by a rocket-propelled grenade, was compellingly told by Joshua Kors in a series of articles written earlier this year for *The Nation*. Just as tragically, these veterans' DD-214 discharge forms show the personality disorder discharge, making it extremely difficult for them to obtain employment.

Who Is to Blame?

What has led our nation to this national predicament? Many of the veterans' civil rights issues are vestigial ones associated with the history of veterans benefits dating back to the Civil War, and these are now coupled with an entrenched bureaucracy that is very resistant to change. But more than ever it is now cost that is dictating policy, a factor that a U.S. Department of Justice lawyer alluded to in arguing the VA's motion to dismiss the VCS case when he rationalized the VA's institutional shortcomings as inevitable in a system of "mass justice," by which he seemed to mean the truncated form of justice appropriate for large numbers of what we

might call the “little people”—those without the means to assert their rights or defend themselves.

Nor can we really place the blame at the foot of Congress, which has consistently given the VA the money it said it needed—or even more—to do the job. Yet if you probe further, you will find that the VA budgets submitted by the Bush administration in FY2005 and FY2006 produced huge deficits just as large numbers of our troops assigned to the global war on terror began to return home and become veterans. This, we later learned, was primarily due to the VA’s decision, apparently under pressure from the Bush administration, to use prewar assumptions regarding the number of veterans the VA would need to treat and the incidence of particular types of medical problems. These were coupled with assumptions about phantom cost savings, leading to deficits of over \$1 billion, as found by the Government Accounting Office in a recent investigation. Relatively early in its tenure, the Bush administration had highlighted its policy direction to reduce personnel costs and increase funding for armaments, as reflected in the candid interview of David Chu, undersecretary of Defense for Personnel and Readiness. Greg Jaffe, *Balancing Act: As Benefits for Veterans Climb, Military Spending Feels Squeeze*, WALL ST. J. Jan. 25, 2005. Just recently, President Bush vetoed the VA budget passed by Congress. To honor the words of Abraham Lincoln, whose words form the motto of the VA—“For him that shall have borne the battle, and for his widow and his orphan”—would require both leadership from the president and Congress—and further increases in the VA budget. This is the elephant in the room that crowds out the voices of our disabled veterans.

In the end, neither the repeating of platitudes, nor laying a wreath on Memorial Day, nor displaying a “Mission Accomplished” banner can constitute a true barometer of respect for the sacrifices made by our veterans in defense of our country. The only true measure of our devotion to those who have borne the battle is the degree to which we follow up with action to try to make whole their lives and those of their loved ones.

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