Legal Services For Struggling Veterans -- Then and Now


by Steven K. Berenson
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Introduction

In celebration of the hundredth anniversary of Southeastern Minnesota Regional Legal Services (SMRLS) and its contributions to the broader movement to provide greater access to justice for poor people in America, the following essay looks at the provision of legal services to one particular group of subordinated clients, struggling veterans, over that same period. For purposes of this essay, I define struggling veterans as those veterans suffering from one or more disabilities, and those whose incomes are sufficiently low to qualify them to receive free legal assistance under most publicly provided legal services programs. Throughout SMRLS’ hundred-year existence, the broader movement for the provision of civil legal services to poor people in America has gone through a number of periods of expansion, contraction, and stasis. Yet for the most part, struggling veterans have stood outside these ebbs and flows, and have not generally been considered an appropriate demographic group at which to target the provision of free civil legal assistance. The first part of this essay demonstrates that observation by describing important developments in the history of the civil legal assistance movement in America, and setting those alongside important developments in access to justice for struggling veterans during that same period. The second part of the essay offers some partial explanations for why struggling veterans have

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largely stood apart from other subordinated client groups who have benefited from expansions in civil legal assistance programs over the years.

The third part of this essay looks at challenges facing returning service members, particularly those returning from the current conflicts in Iraq and Afghanistan. Many of these challenges can result in legal issues pursuant to which struggling veterans would greatly benefit from the assistance of counsel. Fortunately, a number of initiatives have recently been undertaken to provide needed legal assistance to struggling veterans. Part four of this essay discusses some of those initiatives. Though these initiatives represent a very positive first step, more needs to be done to bring needed legal services to struggling veterans. Also, most of these new initiatives focus on providing legal services to veterans in conjunction with their claims for benefits filed with the U.S. Department of Veterans’ Affairs (VA). While there is a great need for legal representation in this area, struggling veterans have perhaps even greater needs for civil legal assistance in other areas of law, such as family matters, other public assistance programs, and in housing and employment related issues. Yet there are virtually no programs that focus primarily on providing legal assistance to struggling veterans in these non-veterans’ benefits related areas. This essay concludes with a call for greater provision of free legal assistance to struggling veterans, both in relation to their claims for veterans benefits, but also particularly in non-VA claims related matters.

I. History

This first part of this essay describes the growth and development of civil legal assistance programs for poor Americans over the hundred-year history of SMRLS. It also compares that growth and development to the availability, or lack thereof, of civil legal assistance for struggling veterans over that same period. The discussion is divided into discrete time periods: 1909-1959; the 1960s and 1970s; and the 1980s through the present.
A. 1909-1959

At the time SMRLS opened its doors in 1909, the movement for the provision of civil legal assistance to people of limited means in America was in its infancy. Though most scholars date the opening of the first legal aid office in America in 1876,1 by the time Reginald Heber Smith wrote the first comprehensive study of legal aid programs in America in 1919,2 he was able to identify forty-one legal aid programs in thirty-seven American cities based upon data collected from 1916.3 For the most part, these programs did not target their services at particular demographic categories.4 Indeed, these early legal aid programs were passive in their case selection

2 HEBER SMITH, supra note 1. Heber Smith was a long-time Boston attorney who received a grant from the Carnegie Foundation to study the delivery of legal aid in America. See Brian Gilmore, Love You Madly: The Life and Times of the Neighborhood Legal Services Program of Washington, D.C., 10 U.D.C. L. Rev. 69, 108 (2007). At the time, Heber Smith was working as an attorney with the Boston Legal Aid Society and had developed a reputation for innovative practices. Id. Later, the federally funded legal services program would name a fellowship program after him. Id. Colloquially known as “Reggies,” these fellows played a major role in the growth of legal aid programs during the late 1960s. Id. at 108-09.
3 BROWNELL, supra note 1, at 8, 11.
4 The first legal aid society in America was formed to provide services to immigrants from Germany. BROWNELL, supra note 1, at 7. However, 14 years after it was founded, the German American Society’s legal aid program was expanded to serve all people regardless of their national origin. Id. at 7-8.
processes: they simply pursued the legal needs of the individuals who sought the programs’ assistance.\(^5\) As a result, their case loads tended to cluster in the areas of domestic relations, wage and hour, and contract disputes.\(^6\) Indeed Heber Smith’s groundbreaking work makes no mention whatsoever of the delivery of legal services to veterans as a distinct class of people.\(^7\)

The lack of a focus on veterans as a distinct class of persons warranting legal assistance at this time cannot be attributed to a lack of laws or programs focusing directly on veterans. Indeed, since the colonial era, disabled American veterans have been eligible to receive some type of pension benefits.\(^8\) By the time of the First World War, federal legislation provided injured veterans the right to receive certain rehabilitation and vocational services, as well as maintenance allowances for those unable to work.\(^9\) Such veterans were also entitled to government provided medical care.\(^10\)

The next major study of legal assistance programs in America was published by Emery Brownell in 1951.\(^11\) The growth in civil legal aid programs had been slow, and somewhat episodic, between the time of Heber Smith’s volume and that of Brownell’s.

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\(^5\) Cantrell, supra note 1, at 12.

\(^6\) Quigley, supra note 1, at 244.

\(^7\) By contrast, Heber Smith does make reference to a couple of efforts by legal aid organizations to provide services to active duty military personnel and their families during World War I. HEBER SMITH, supra note 2, at 212-14.


\(^9\) VA HISTORY IN BRIEF, supra note 8, at 7.

\(^10\) Id.

\(^11\) BROWNELL, supra note 1. Brownell was an attorney with the Rochester Legal Aid Society and secretary of the National Association of Legal Aid Organizations. Id. at xiv. The National Association of Legal Aid Organizations was the successor to the first national association of legal aid providers, the National Alliance of Legal Aid Societies, which was formed in 1911. Id. at 147.
This fact should not be surprising given the occurrences of two world wars and the great depression during that interval. Nonetheless, by 1949, the number of civil legal aid offices throughout the country had increased to ninety-two, up from forty-one as of 1916. However, Brownell pointed out that when increases in population were considered, the overall ability of legal aid programs to meet the “standard of need” identified, based on Heber Smith’s data, did not increase significantly during that period.

In any event, as was the case with Heber Smith’s study, Brownell’s work makes little or no mention of the provision of legal services to veterans as an identifiable class of persons. Again, this was not due to a lack of existence of public assistance programs for struggling veterans. Indeed, the scope of benefits available to veterans expanded during the period between the two world wars, as did the overall number of veterans receiving

12 See id. at 8; DAVIS, supra note 1, at 17.
13 BROWNELL, supra note 1, at 26.
14 See supra note 3, and accompanying text.
15 That standard of need was identified as 10 cases being handled by a legal aid organization per thousand people of population in a particular city. BROWNELL, supra note 1, at 17-19, 33.
16 According to Brownell, “[t]he ability of the established [legal aid] organizations to meet the full need [10 cases per thousand of population] in their communities had risen only from 51 per cent in 1916 to 55 per cent in 1947. Id. at 33.
17 One of the “typical” legal aid cases offered by Brownell did involve “a young married veteran [who] seeks advice as to how he should protect his interests in a small partnership venture ....” Id. at 47. However, there is no further discussion of this hypothetical. As was the case with Heber Smith, see supra note 7, Brownell does make mention of the provision of legal services to active duty military personnel. BROWNELL, supra note 1, at 82.
18 VA HISTORY IN BRIEF, supra note 8, at 8-12; HONORING THE CALL, supra note 8, at 33-35. President Franklin Delano Roosevelt dramatically cut veterans benefits by executive order in 1933. See VA HISTORY IN BRIEF, supra note 8, at 12; HONORING THE CALL, supra note 8, at 35. However, most of these benefits were reinstated by Congress in 1935 when the President’s authority to establish benefits by executive order expired. VA HISTORY IN BRIEF, supra note 8, at 12; see also HONORING THE CALL, supra note 8, at 35.
benefits and the overall value of the benefits being provided.\textsuperscript{19} Moreover, perhaps the greatest expansion of benefits available to veterans in American history occurred with the passage of the Servicemen’s Readjustment Act of 1944, or GI Bill of Rights, popularly known simply as the GI Bill.\textsuperscript{20} The GI Bill provided three new categories of assistance to veterans: 1) financial support for higher education; 2) home, farm, and business loans; and 3) unemployment compensation for those veterans who were out of work.\textsuperscript{21} In addition to transforming the system of veterans’ benefits in the United States, the GI bill is credited by many with transforming the broader economy in a manner that set off an unparalleled period of growth and expansion that propelled America to world economic leadership in the second half of the 20\textsuperscript{th} Century.\textsuperscript{22}

\textbf{B. The 1960s and 1970s}

There is little evidence to suggest that the pace of growth of civil legal assistance programs expanded in the 1950s beyond that of the previous three decades. However, beginning in the early 1960s, there was a tremendous increase in the pace of the growth and development of civil legal assistance programs in America.\textsuperscript{23} This should not be surprising, given the confluence of factors that fundamentally altered American society at this time including the civil rights movement, President Johnson’s war on poverty, and a general social and cultural awakening. A detailed description of these developments lies beyond the scope of this paper. Indeed, many fine histories of the growth of civil legal aid programs during

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\item[\textsuperscript{19}] VA HISTORY IN BRIEF, supra note 8, at 8, 12-13; HONORING THE CALL, supra note 8, at 33-35.
\item[\textsuperscript{20}] VA HISTORY IN BRIEF, supra note 8, at 13; HONORING THE CALL, supra note 8, at 37.
\item[\textsuperscript{21}] VA HISTORY IN BRIEF, supra note 8, at 13-14; HONORING THE CALL, supra note 8, at 37.
\item[\textsuperscript{22}] VA HISTORY IN BRIEF, supra note 8, at 14.
\item[\textsuperscript{23}] Quigley, supra note 1, at 245.
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this period have been written. One of these focuses exclusively on one important piece of the history of the development of civil legal assistance, the birth of the Office for Economic Opportunity (OEO) Legal Services Program (LSP). The OEO was created as part of one of the centerpieces of President Johnson’s war on poverty, the Economic Opportunity Act. Though the original act made no provision for funding legal services, “by the following year, a combination of support from the leadership of the OEO and the American Bar Association (ABA), along with the implicit support of the President and Congress, resulted in the creation of the OEO LSP.” During its decade long existence, before it morphed into the current federal Legal Services Corporation (LSC) in 1974, the OEO LSP funded countless legal services programs in a wide range of communities across America, including storefront legal clinics, multi-service agencies, and back up centers devoted to supporting law reform, or “impact” litigation. Yet as was the case with Heber Smith and Brownell’s groundbreaking histories mentioned above, Earl Johnson Jr.’s exhaustive history of the OEO legal services program similarly makes no mention of the delivery of legal services to veterans as a distinct class of people.

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26 Quigley, supra note 1, at 245.

27 Berenson, Primer, supra note 1, at 606 (citations omitted).

28 Cantrell, supra note 1, at 17-18; Quigley, supra note 1, at 246-48.

29 Johnson was the second director of the OEO LSP. See Alan W. Houseman, Political Lessons: Legal Services for the Poor—A Commentary, 83 Geo. L.J. 1669, 1682 (1995). He later became a professor at the University of Southern California Law School, and a judge on California’s 4th District Court of Appeal. See Justice Earl Johnson, Jr. Returns to Western Center on Law and Poverty:
I also believe that the centrality of the anti-Vietnam War protest movement to the growth and development of civil legal aid in the 1960s and 1970s should be considered to be a contributing factor to the slow growth in the provision of legal assistance to veterans. Indeed, many of the attorneys who staffed civil legal assistance programs during the late 1960s and 1970s were active participants in the anti-war movement, and then went to law school and then into poverty law practice as an outlet for their social change oriented impulses. Unfortunately, during this period, there was a tendency among anti-war activists to direct some of their antipathy toward returning veterans who fought in Vietnam, in addition to directing that antipathy to the policy leaders in Washington who were responsible for the decisions to enter, and remain in the war, as well as for the tactical decisions regarding the manner in which the war was conducted. In any event, this antipathy may have caused some legal services lawyers to fail to consider struggling veterans as worthy targets for outreach, as well as causing struggling veterans to avoid seeking the assistance of legal services lawyers.

Even though the political inclinations of legal assistance lawyers during this period may have moved some away from representing veterans, these same political inclinations drove such lawyers to the assistance of draft resisters and dissident service members who left military service prior to completion of their tours of duty. Beginning in the late 1960s, lawyers affiliated with the National Lawyers Guild began counseling draftees and active duty


30 Cf. PHILIP C. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION 3-10 (1998) (discussing subsequent movement of these activist lawyers into clinical legal education).

service members on draft resistance and military law matters. By the late 1970s, this group had organized formally into the National Lawyers Guild’s Military Law Task Force. The MLTF continues to be active in this area, providing direct legal representation to service members and veterans, and support for lawyers representing clients with regard to issues of military and veterans’ law. The group also publishes in the areas of military and veterans’ law, including its newsletter “On Watch.”

Around the same time, the organization Swords to Plowshares was founded in San Francisco. Swords to Plowshares is a multi-service agency that provides a range of services to needy veterans, including counseling and case management, housing, and employment and training. In addition, the organization provides legal representation to veterans seeking VA benefits. Because the organization does not charge veterans for legal representation, it has not been limited in its representation by the civil war era fee limitation statute discussed infra. Swords to Plowshares is unique in the comprehensive range of services it provides to veterans and in the scope of the assistance it provides.

The late 1970s represented something of a high water mark, at least in terms of the federal financial support for the provision of civil legal assistance to poor Americans. Therefore, it should not

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33 Id.

34 Id.

35 Id.

36 The organization was founded in 1974. Id.

37 Berenson, Primer, supra note 1, at 606 & n.25.


39 Id.

40 Id.

41 Berenson, Primer, supra note 1, at 609; HOUSEMAN & PERLE, supra note 24, at 22; Quigley, supra note 1 at 254-55.
be surprising that during this period, the federal government began to consider expanding the federal legal services program to reach population groups that traditionally had not been reached effectively by its services, including veterans. For example, in 1977 Congress amended the Legal Services Corporation Act, section 1007(h), to require the Corporation to “conduct a study on whether eligible clients who are . . . veterans . . . have special difficulties of access to legal services or special legal problems which are not being met[,] and to include in the report and implement appropriate recommendations.” The so called 1007(h) report represents the most comprehensive study that has been performed regarding the legal needs of and access to justice for struggling veterans.

Given the history described above, it should not be surprising that the 1007(h) report found that veterans rarely received the assistance of legal services programs on “veteran related problems.” The report credited two factors for this fact: 1) the availability of representation from veterans’ service organizations (VSOs), and 2) low demand for services for veterans from legal services programs resulting in such programs being unaware of and failing to reach out to address the need for legal advocacy on the part of veterans. Despite the availability of

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42 See Legal Services Corporation, Special Legal Problems and Problems of Access for Legal Services of Veterans, Migrant and Seasonal Farm Workers, Native Americans, People with Limited English Speaking Abilities, Individuals in Sparsely Populated Areas: A Report to Congress As Required by Section 1007(h) of the Legal Services Corporation Act of 1974, as Amended, Summary 1 (1979) (hereinafter 1007(h) report) (copy on file with author). The title of the 1007(h) report sets forth the other population groups with perceived access problems who the LSC was required to study and report on. Additionally, the corporation chose to study and make recommendations regarding access to justice issues for the elderly and persons with disabilities as well. Id. at 2.

43 Id. at 17.

44 For a discussion of VSOs, see infra notes 105-106 and accompanying text.

45 1007(h) report, supra note 42, at 17. The report also concluded that the lack of exposure to veterans’ cases had resulted in legal services programs failing to
VSO representation, the report concluded that veterans would benefit from the services of lawyers, at least at the Board of Veterans Appeals (BVA) level of the veterans benefits claims process.\textsuperscript{46} The report also concluded that legal representation would be particularly useful to veterans seeking review of their military discharge status before the service branches’ Discharge Review Boards and Boards of Correction of Military Records.\textsuperscript{47}

Based on these findings, the report made a number of recommendations for actions the LSC planned to take to increase access to legal services for veterans. Some of these recommendations related to publishing back up materials relating to veterans’ law issues for legal services attorneys and providing trainings for legal services attorneys regarding veteran’s benefits law and discharge review law.\textsuperscript{48} The LSC also planned to create a capacity to handle a limited number of cases in Washington, DC before the BVA and service branch Review Boards.\textsuperscript{49} Indeed, the

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\item \textsuperscript{46} \textit{Id.} at 17-18. For a description of the various levels of the VA claims process, see \textit{infra} notes 78-94 and accompanying text.
\item \textsuperscript{47} \textit{1007(h) report, supra} note 42, at 17-19. For the most part, VA benefits are restricted to veterans with discharge status’ of honorable or “under honorable conditions.” See \textsc{Barton F. Stichman & Ronald B. Abrams, Veterans Benefits Manual} 1631 (2008). In order to be eligible for benefits, veterans who received lower discharge status’ must first “upgrade” their discharge status to one of the two categories just mentioned. This can be accomplished by seeking such relief from one of the service branches’ Discharge Review Boards (DRBs) or Board of Corrections of Military Records (BCMRs). \textit{Id.} at 1631-32. However, success rates for such applications are quite low and have decreased significantly since the time of the 1007(h) report. See \textsc{Veterans For America, The American Veterans and Service Members Survival Guide} 324-325, available at \url{http://www.veteransforamerica.org/wp-content/uploads/2008/11/15-Discharge-Upgrades.pdf} (last visited Jan. 23, 2009).
\item \textsuperscript{48} \textit{1007(h) report, supra} note 42, at 20 (recommendations 1 and 2).
\item \textsuperscript{49} \textit{Id.} at 21. The Report had previously found that the fact that most BVA hearings as well as those of DRBs and BCMRs are held only in Washington, DC, presents a further impediment to the availability of legal representation for veterans. \textit{Id.} at 18.
\end{itemize}
1007(h) report led directly to the LSC providing funds to create the National Veterans Legal Services Program (NVLSP), the first federally funded legal services project devoted solely to serving the legal needs of veterans. Since its founding in 1982, NVLSP has been dedicated to training attorneys and other advocates to provide quality representation in veterans’ benefits cases. Additionally, NVLSP provides back up materials for veterans and their advocates relating to veterans benefits law, including the well-known Veterans Benefits Manual, which has become “the Bible” for attorneys representing veterans in VA benefits claims.

C. The 1980s through the Current Conflicts

Despite the founding of the NVLSP, overall the 1980s represented a period of retrenchment for public support for legal assistance programs. President Reagan was overtly hostile to the LSC, and appointed members to its board who were opposed to the Corporation’s fundamental mission. This period also witnessed a significant reduction in the LSC budget, and the imposition of restrictions on the types of cases and substance of the work that could be performed by recipients of LSC funds.

The 1980s did provide one major development that would go a long way toward helping to ensure that veterans’ rights were protected in the VA claims process. In 1988, Congress enacted

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51 See STICHMAN & ABRAMS, supra note 47.
52 Reagan had clashed with LSC funds recipient California Rural Legal Assistance while he was Governor of California. See HOUSEMAN & PERLE, supra note 24, at 15; NLADA History, supra note 24; Berenson, Primer, supra note 1, at 608; Quigley, supra note 1, at 249-50.
53 HOUSEMAN & PERLE, supra note 24, at 28-29; NLADA History, supra note 24; Berenson, Primer, supra note 1, at 608.
54 See HOUSEMAN & PERLE, supra note 24, at 28; NLADA History, supra note 24; Berenson, Primer, supra note 1, at 608; Quigley, supra note 1, at 257.
55 See HOUSEMAN & PERLE, supra note 24, at 28; Berenson, Primer, supra note 1, at 608; Quigley, supra note 1, at 258.
legislation creating the United States Court of Veterans Appeals.\textsuperscript{56}

Up to that point, veterans were unable to obtain judicial review of the decisions of the VA relating to the benefits claims.\textsuperscript{57} Indeed, the VA stood alone as the only federal administrative agency whose decisions were not subject to judicial oversight.\textsuperscript{58} A brief review of statistics relating to the disposition of cases before the Court amply illustrates the need for judicial oversight of the VA’s claims adjudications. For example, over the last ten years, only about 30\% of the VA decisions appealed to the Court and decided on the merits (i.e., not on purely procedural grounds) have been affirmed in whole or in part.\textsuperscript{59} By contrast, the overall rate of affirmance in whole or in part for merits decisions in the United States Courts of Appeal as a whole was more than 75\% during the twelve-month period ending September 30, 2007.\textsuperscript{60} Similarly, while more than a quarter of the CAVC’s decisions on the merits resulted in a reversal of VA’s decision or a vacating and remand of that decision during


\textsuperscript{58} See United States Court of Appeals for Veterans Claims, About the Court, http://www.uscourts.cavc.gov/about/History.cfm (last visited Nov. 13, 2008).

\textsuperscript{59} From FY 1999 through FY 2008 (fiscal years ending September 30), the Court decided 21,358 cases on the merits. United States Court of Appeals for Veterans Claims, Annual Reports, 1999-2008, available at http://www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf. Of these, only 4122 were affirmed in their entirety, and 2185 were affirmed or dismissed in part and reversed or vacated and remanded in part. Id.

that same period, only slightly more than 10% of the merits decisions in the U.S. Courts of Appeal during fiscal year 2007 reached a similar result.

Additionally, Congress was aware that proceedings in a federal court would lack the informality of proceedings before the VA. Thus, the Veterans Judicial Review Act also removed the $10 limit on attorneys’ fees that may be charged to a veteran for representation before the CAVC. Despite this modification of the fee limitation statute, attorneys did not exactly rush to the side of veterans in their cases before the CAVC. Indeed, in the early years of the court, approximately 80% of the appellants were not represented by lawyers. As a result, the Court decided to provide a portion of its annual appropriation to the LSC to create a program to provide pro bono legal representation to appellants in the Court. A group of three national VSOs, the American Legion, Disabled American Veterans, and the Paralyzed Veterans of America, along with the NVLSP, formed the Veterans Consortium, whose proposal was adopted by LSC to create the Veterans Consortium Pro Bono program. In addition to providing its own staff attorneys to represent veterans before the Court, the Consortium recruits and trains volunteer lawyers to handle these appeals. As a result of this and other efforts, the ratio of represented to unrepresented litigants at the Court has completely inverted in the twenty years since the Court’s founding. Thus, for fiscal year 2007, only 19% of

62 Judicial Business of the United States Courts 2007, Table B-5, supra note 60.
63 Dowd, supra note 57, at 61. More accurately, the Act amended 38 U.S.C. § 5904(c) to allow an attorney to charge a veteran for representation after the BVA has issued a final decision regarding the relevant issue. Id.
64 See The Veterans Consortium Pro Bono Program, About the Program, http://www.vetsprobono.org/about.htm (last visited Nov. 18, 2008).
65 Id.
66 Id.
67 Id.
appellants were not represented by counsel at the conclusion of their appeals before the Court. 68

Nonetheless, only a small percentage of all claims for veterans’ disability benefits are actually appealed to the Court. For example, in Fiscal Year 2007, the VA received 838,141 claims for disability benefits. 69 However, only approximately 11% of veterans file a Notice of Disagreement (NOD) with the initial decisions made on their claims by the Veterans Affairs Regional Office (VARO). 70 And only 4% of these veterans actually pursue their appeals through a decision by the BVA. 71 And, a similarly small percentage of BVA final decisions are appealed to the CAVC. Thus, in spite of the efforts of the Court and the Consortium described above, the vast majority of veterans remained without the assistance of lawyers in pursuing their benefits claims.

Despite the Democrats’ reclaiming of the White House in 1992, the 1990s represented a period of further retrenchment for the

68 See United States Court of Appeals for Veterans Claims, Annual Reports, 1999-2008 supra note 59.

69 Veterans for Common Sense v. Peake, 563 F.Supp.2d 1049, 1070 (N.D. Cal. 2008). This figure includes 225,173 “original” (i.e., newly presented) claims, and 612,968 “reopened claims.” Id. There is essentially no statute of limitations or principle of claim preclusion with regard to claims for veterans’ benefits. Such claims can always be reopened if the veteran provides “new and material evidence” in support of the claim that had not previously been submitted to the VA. Id. at 1074.

70 Id. at 1087. The way these sentences are written should not be read to imply that the VA necessarily issues a claims decision in the same year in which the veteran applies for benefits. In fact, the court in Veterans for Common Sense found that the average days to complete adjudication of a veteran’s claim was 183 days in fiscal year 2008. Id. at 1070. Also, these low review rates should not be read to reflect an inordinately high level of satisfaction on the part of claimants with the decisions of the VA. To the contrary, it is a well-documented phenomenon with regard to a wide range of government benefits programs that numerous applicants, even ones with clearly valid claims, drop out of the claims process before their claims are approved. Indeed, government bureaucracies rely on these high “dropout” rates to ensure they have adequate funds to pay benefits that are awarded. See, e.g., Michael Lipsky, Bureaucratic Disentitlement in Social Welfare Programs, 58 SOC. SERV. REV. 3 (1984).

71 Veterans for Common Sense, 563 F.Supp.2d at 1073.
federally funded legal services program. Though the LSC budget appropriation reached an all time high of $415 million in Fiscal Year 1995, the budget appropriation was reduced to $278 million for fiscal year 1996. Additionally, a stringent set of restrictions was put into place that limited the types of representation lawyers for programs receiving LSC funds could engage in, the categories of clients such lawyers could represent, and the types of relief that could be sought. The federally funded LSC program has never quite rebounded to the strength and scope that it enjoyed during the late 1970s. However, a “silver lining” that has emerged from this cloud is an expansion in the range and sources of support for the provision of legal services to poor clients. Whereas, at one point in time LSC funds were the primary source for such services, in the 1990s and beyond a variety of state and local bar and government entities developed programs to enhance the delivery of legal services to poor people. One major such source of such support were interest on lawyer trust account or IOLTA programs, in which interest earned on deposits in lawyers’ client trust accounts are used to support legal service programs for poor clients. Indeed at present, the LSC budget represents only about a third of the total amount of money spent in America on the delivery of legal services to poor persons. Yet despite this burgeoning array of new programs for the delivery of legal services to poor people, few if any of these programs devoted their resources exclusively or even primarily to the legal needs of struggling veterans.

During this period, however, there was a shift in public attitudes away from the hostility that greeted Vietnam Veterans upon their return to America. The first Gulf War was very popular
with the American public, and Gulf War veterans were treated as heroes upon their return. Tom Brokaw famously dubbed as “the greatest generation” the men and women who were adults during the two world wars, and he also lionized the valor of the men and women who fought in those wars.77 And though the current conflicts in Afghanistan and Iraq have been controversial from the start, even most of those who opposed the wars were careful to distinguish their opposition to President Bush’s foreign policy from support and respect for the brave men and women who fought in those conflicts.

II. Some Reasons for the Dearth of Legal Services Historically Available to Struggling Veterans

This subsection will present a few factors which may help to explain, at least in part, the historical absence of veterans as a distinct class from the civil legal assistance landscape. However, before doing so, it may be useful to explain the current steps in the application process for veterans’ benefits. Some of the terminology from this process will reappear in the following discussion, and a general understanding of the veterans’ benefits system will be helpful to understanding some of the impediments discussed herein.

As suggested above,78 a wide range of benefits are available to veterans through the VA.79 For present purposes, our focus will be on service-connected death and disability compensation (SCDDC), or cash payments available to veterans or their survivors for injuries suffered in the course of their military service.80

78 See supra notes 8-10, 18-21, and accompanying text.
80 See Veterans for Common Sense, 563 F. Supp.2d at 1069-70. This case involved a broad-ranging challenge by two organizations that work to improve the lives of veterans, to the VA’s policies and procedures for providing medical and other benefits to veterans struggling with mental health issues, including major depression and Post Traumatic Stress Disorder (PTSD). Id. at 1061.
Generally, in order to be eligible for SCDDC, a veteran must present adequate evidence of: 1) a disability; 2) service in the military that would entitle them to benefits; and 3) a nexus between the disability and the service. To apply for benefits, the veteran must complete a difficult twenty-three page form provided by the VA. The application is filed with one of the VA’s fifty-seven regional offices (ROs), within which the initial determination is made whether to grant or to deny the claimed benefits. If a decision is made to grant benefits, the degree of disability is “rated” by a Rating Veterans Service Representative (RVSR) or rating specialist within the RO. Disabilities can be rated anywhere from 0% to 100%. At present, the amount of monthly compensation for a single veteran with no dependents with a 10% disability rating is $123.00. For a 100% disabled single veteran with no dependents, the amount of monthly compensation is $2,673.00.

A veteran who is denied SCDDC, or who is dissatisfied with the VA’s rating of her disability, may file a notice of disagreement (NOD) with the VA’s decision. Though the Court found that many problems exist with the VA’s practices for delivering such benefits, it concluded that the relief sought by the plaintiffs was outside the scope of the Court’s authority. In any event, the Court’s very thorough findings of fact represent perhaps the best current description available of the VA’s policies and practices in this area. See also Dowd, supra note 57, at 58.

81 This element relates to the discharge status issue discussed earlier. See supra note 47 and accompanying text.
82 Veterans for Common Sense, 563 F. Supp.2d at 1070; See also STICHMAN & ABRAMS, supra note 47, at 51.
83 Veterans for Common Sense, 563 F. Supp.2d at 1070.
84 Id. at 1070-72; See also Dowd, supra note 57, at 58.
85 Veterans for Common Sense, 563 F. Supp.2d at 1072.
86 Id.
88 Id.
89 Veterans for Common Sense, 563 F. Supp.2d at 1072; Dowd, supra note 57, at 58.
of two non-exclusive review processes. First, the veteran may obtain a de novo review of her claim before a Decision Review Officer (DRO) within the same RO. Alternatively, the veteran can request that the RO provide a Statement of the Case (SOC), which is a more formal statement of the reasoning behind the VA’s decision, and forms the basis for a more formal appeal by the veteran to the BVA. Decisions of the BVA, in turn, can be appealed to the Court of Appeals for Veterans Claims (CAVC). From the CAVC, further appeals are to the U.S. Court of Appeals for the Federal Circuit, and finally to the U.S. Supreme Court.

One historic limitation on veterans’ ability to obtain legal assistance in pursuing VA benefits was an 1862 statute that limited to $5 the amount an attorney was able to charge a veteran for the provision of legal services in conjunction with a claim for veterans’ benefits. That amount was increased to $10 in 1864, and the limitation remained largely in effect until 2007. The justifications for this limitation were twofold. First, there was a concern that attorneys would take unfair advantage of struggling veterans and

90 Veterans for Common Sense, 563 F. Supp.2d at 1073.
91 Id.
92 Veterans for Common Sense, 563 F. Supp.2d at 1073; Dowd, supra note 57, at 58. If the veteran elects a de novo hearing before a DRO, the veteran may still appeal the subsequent decision to the BVA by following the aforementioned procedures. Veterans for Common Sense, 563 F. Supp.2d at 1073.
93 Id. at 1072. See also Dowd, supra note 57, at 58.
94 Veterans for Common Sense, 563 F. Supp.2d at 1072; Dowd, supra note 57, at 59-60.
95 See id. at 60 & n.60 (citing Act of July 14, 1862, ch. 166, §§ 6, 12 Stat. 566, 568).
96 Id. at 60 & n.61 (citing Act of July 4, 1864, ch. 247, §§ 12, 13 Stat. 387, 389).
97 See Pub. L. 109-461, Title I, Sec. 101(a)(1), (b), (c)(1), (d) to (f), Dec. 22, 2006, 120 Stat. 3405, 3407, 3408. As was discussed previously at note 63 and accompanying text, when the U.S. Court of Veterans Appeals was created in 1988, an exception was created to the $10 fee limit for attorney representation before the Court. See Dowd, supra note 57, at 61-62. In 2006, the fee limit was eliminated for legal representation at all stages of the VA benefit claims process after the claim is initially reviewed. See infra notes 175-177 and accompanying text.
charge them unconscionably large fees. Indeed, there is evidence from the historical record to suggest that some individuals, though not necessarily all or even mostly attorneys, did scam unsuspecting veterans out of significant portions of pension awards in exchange for assistance in securing pensions that was either unnecessary or at least grossly overcompensated. Second, the fact that the veterans’ benefits system was designed to be informal and non-adversarial has been cited as grounds for the proposition that attorney assistance is neither necessary nor appropriate in the pursuit of claims for such benefits. The U.S. Supreme Court has upheld the constitutionality of the fee limitation provision.

One may question whether a limit on the amount of fees available in veterans’ benefits cases would have an impact on the availability of legal assistance to low-income veterans through legal assistance programs. After all, such services are often provided without regard to the client’s ability to pay a fee. However, it should be noted that in the early days of legal assistance programs, for example at the time Heber Smith wrote, legal assistance programs did charge fees, albeit small ones, to their clients. While the $10 fee limit would not have impacted the customary 10 to 50 cent retainer fees that were required by some legal aid programs at the time Heber Smith wrote, it might have impacted the other common practice of charging what would currently be known as contingent fees – requiring clients to pay a portion of any money recovered on their behalf back to the legal assistance

100 Id. at 16-17. See discussion infra at notes 113-116 and accompanying text.
102 See Heber Smith, supra note 2, at 165.
103 Id.
In any event, over time, the more likely effect of the fee limit in terms restricting access to legal services for struggling veterans was in inhibiting the development of a segment of the bar that would have familiarity with and expertise in handling veterans’ benefits cases. This would have made it difficult for legal assistance programs to hire qualified attorneys to staff programs for veterans, even if they chose to offer them. The fee limit also inhibited the development of a cadre of pro bono attorneys who might have been available to assist with such cases, whether in conjunction with a legal services program or independently.

Another factor which has impeded the development of a cadre of lawyers to represent veterans is the historical role of VSOs in providing lay representation to veterans in their dealings with the VA. The best known VSOs include the Veterans of Foreign Wars (VFW), Disabled American Veterans (DAV), Paralyzed Veterans of America (PVA), and the American Legion. Most of these organizations will provide representation for veterans without regard to the veteran’s membership in the organization. Additionally, some state and local governments provide lay representation for veterans regarding claims for benefits, too. Undoubtedly, many of the claims representatives provided to veterans by these organizations are experienced and effective advocates. Nonetheless, because no case is turned down, such representatives often have crushing case loads that prevent the development of the kind of claims files that would be most likely to result in effective claims for veterans. Moreover, given the complexity of the legal regime that governs veterans’ claims, it is

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104 Id. at 66. It is worth noting that the percentage of the overall recovery charged as a fee seems extremely modest by contemporary standards, with the percentage of the recovery charged as a fee often running in the single digits. Id.

105 See e.g., California Department of Veterans Affairs, Veterans Claims and Benefits Representation, http://www.cdva.ca.gov/VetService/Claims.aspx (last visited Nov. 4, 2008).

beyond doubt that many veterans would benefit from the particular skills and training that lawyers could bring to their representation.

Other factors might help to explain the failure of legal services for veterans to expand at anything like the rate of expansion in benefits available to veterans as well. The first of these is the VA’s unique “duty to assist” veterans with their claims for benefits. Described as the “cornerstone” of the veterans’ claims process, the duty to assist requires the VA to take steps such as developing a full medical record on which to evaluate a claim for disability compensation, or making sufficient efforts to collect service medical records on behalf of the claimant. No similar duty exists on the part of other government agencies to assist claimants with their efforts to receive government benefits. Despite the obvious advantages to veterans that result from this policy, it has caused many to underestimate the degree to which veterans might benefit from attorney assistance during the claims process, including the United States Supreme Court. Indeed, a recent U.S. District Court decision found that between 19% and 44% percent of the decisions regarding claims for SCDDC that were certified for appeal to the BVA involved avoidable errors at the RO level, and that for the first quarter of 2008, half of these errors involved violations of the duty to assist.

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108 Little v. Derwinski, 1 Vet.App. 90, 92 (1990) (holding that VA failed to satisfy its duty to assist by failing to develop an adequate medical record on which to evaluate petitioner’s claim).

109 Id. See also Pond v. West, 12 Vet.App. 341, 346 (1999) (failure of medical examiners to follow instructions regarding which medical issues to examine for resulted in failure of duty to assist).

110 Hayre v. West, 188 F.3d 1327, 1335 (Fed. Cir. 1999), rev’d on other grounds, Cook, 318 F.3d at 1336.

111 See Walters, 473 U.S. at 310, 333.

112 Veterans for Common Sense, 563 F.Supp.2d at 1075.
Another principle that is said to be adhered to in the disposition of VA benefits claims is that of non-adversarialism. This idea of non-adversarialism comes from a number of sources. First, the lack of counsel for veterans was thought to contribute to a non-adversarial environment. Second, the VA’s duty to assist is inconsistent with traditional understandings or our adversarial court system in which each side of a dispute is charged with preparing and presenting its best case to a neutral fact finder. Third, VA claims decisions involve a “benefit of the doubt” principle, so that all reasonable disagreements are resolved in favor of the veteran. Another way to look at this is that the burden of proof in VA claims cases is less than the traditional preponderance of the evidence standard that applies in civil litigation. If the evidence shows that the veteran’s allegation is as likely as not to be true, the fact is established at the RO level.

Despite all these facts, even to the extent that the non-adversarial principle operated effectively in practice in the past, there is evidence that the non-adversarial atmosphere in VA claims adjudication has eroded in recent years. According to the Federal Circuit in Bailey v. West, since the Veterans’ Judicial Review Act . . . , it appears the system has changed from a nonadversarial, ex parte, paternalistic system for adjudicating veterans’ claims, to one in which veterans . . . must satisfy formal legal requirements, often without the benefit of legal counsel, before they are entitled to administrative and judicial review.

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114 Bailey v. West, 160 F.3d 1360, 1367 (Fed. Cir. 1998) (en banc) (holding that the doctrine of equitable tolling applies to appeals from decisions for the Board of Veterans Appeals (BVA) to the Court of Appeals for Veterans Claims (CAVC)).
115 Id. at 1365 (internal citations and quotation marks omitted).
Though the court would later qualify its statement, contending that it was referring only to proceedings before the CAVC, rather than to all levels of the claims review process, many would agree with the court’s earlier statement.

III. Issues Facing Veterans Returning from the Current Conflicts

As discussed previously, public opinion regarding veterans has been on the rise for the past two and a half decades. It is with that type of support in mind that one must view the furor that emerged over news accounts of the struggles faced by many veterans upon their return from the field in the current conflicts. In February of 2007, Washington Post writers Dana Priest and Anne Hull published an exposé regarding deplorable conditions facing injured service members at Walter Reed Army Medical Center in Washington, D.C., previously considered the military’s flagship medical facility. The worst conditions affected wounded service members who had completed their hospital treatment, but were being housed at Walter Reed as “outpatients,” where they received continuing treatment while the military bureaucracy struggled to determine whether to discharge the service members or to return them to active duty. The large number of injured accumulating over five and a half years of sustained combat, advances in medical treatment allowing more service members to survive injuries they formerly would have died from, along with high levels of bureaucratic inefficiencies and delays, resulted in the outpatient population at Walter Reed greatly outstripping the available

117 See supra note 77 and accompanying text.
118 Dana Priest & Anne Hull, Service members Face Neglect, Frustration at Army’s Top Medical Facility, WASHINGTON POST, February 18, 2007, at A01.
119 Id.
facilities. At the time of the exposé, outpatients outnumbered hospital patients at Walter Reed by a 17 to 1 ratio. Thus, outpatients were housed in any available building, including nearby hotels and apartments leased to the Army.

The worst conditions appeared in the now infamous Building 18, which featured crumbling walls and floors, black mold, roaches and rodents, and sights and smells that no person would tolerate. The public was naturally outraged by the deplorable conditions facing those who had sacrificed so much in service to their country. The Army and the Bush Administration quickly shifted to damage control mode. The President appointed a Commission on Care for America’s Wounded Warriors, which issued a report on July 26, 2007, recommending fundamental changes to the military’s medical system and assistance for veterans. Despite the public attention and the Administration’s efforts, reforms of the system for dealing with injured veterans from the current conflicts remain “frustratingly slow.”

In a sense, the amputees and other visibly maimed warriors returning from Iraq and Afghanistan have an advantage in that their wounds and needs are hard to ignore. But this is not the case for the thousands of returning service members suffering from the “invisible injuries” of Post Traumatic Stress Disorder (PTSD), major depression, and Traumatic Brain Injury (TBI), which have been described as the “signature wounds” of the current conflicts due to their prevalence.


See Anonymous, Editorial “Frustratingly Slow:” Wounded Veterans are Still Getting the Run Around From Their Government, WASHINGTON POST, October 21, 2007, at B06.

See generally RAND CENTER FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR
Prevention defines TBI as “craniocerebral trauma associated with decreased level of consciousness, amnesia, other neurologic or neuropsychologic abnormalities, skull fracture, intracranial lesions, or death.”\textsuperscript{127} PTSD is defined as “an anxiety disorder that occurs after a traumatic event in which a threat of serious injury or death was experienced or witnessed, and the individual’s response involved intense fear, helplessness or horror. In addition, the disorder is marked by the following symptoms occurring for more than one month and causing significant distress and/or impairment: re-experiencing the event, avoidance of stimuli relating to the event, numbing of general responsiveness and hyper-arousal.”\textsuperscript{128}

Of course, psychological and other less visible forms of injuries have been a feature of warfare from the beginning of human existence.\textsuperscript{129} However, a number of features of the current conflicts may be influencing an increase in the prevalence of such injuries. The first of these relates to changes in military operations,
including extended deployments. 130 “Troops are seeing more-frequent deployments, of greater lengths, with shorter rest periods in between – factors thought to create a more stressful environment for servicemembers.”131 Additionally, the line between combat and non-combat situations has blurred in the current conflicts. Thus, rather than experiencing distinct periods of combat, followed by periods of rest, service members face a constant threat of guerilla type attacks. 132 The constant vigilance required to defend oneself is a type of stressor that has been linked to PTSD.

A second change relating to the current conflicts has to do with the high survival rates of wounded service members. 133 In part due to advances in battlefield medicine, 134 service members are surviving injuries that would have resulted in deaths in prior conflicts. 135 However, service members surviving such catastrophic injuries face numerous psychological and emotional hurdles in addition to the physical struggles they face. 136

A third important change relates to TBIs. The changing nature of the combat involved in Iraq and Afghanistan was noted above. The signature weapon of the fighters opposing American troops in these countries has been the improvised explosive device (IED). 137 These homemade explosives are relatively cheap and easy to make and to conceal, and have been distributed along roads and other routes frequently traveled by American personnel. Large numbers of service members have been exposed to explosions by such devices. While many service members have lost limbs or

130 Id. at 5.
131 Id. See also id. at 69; Veterans for Common Sense, 563 F.Supp.2d at 1062.
132 Veterans for Common Sense, 563 F.Supp.2d at 1062.
133 INVISIBLE WOUNDS, supra note 126, at 6.
134 See id. at 73. Advances in battlefield medicine have also resulted in less seriously injured service members being returned to battle at quicker rates. INVISIBLE WOUNDS, supra note 126, at 6. However, such quick returns from injuries may exacerbate the stresses mentioned above. See supra notes 126 - 132 and accompanying text.
135 INVISIBLE WOUNDS, supra note 126, at 6, 72.
136 Id. at 6.
137 Id. at 25.
suffered other catastrophic injuries as a result of such explosions, others may at first glance appear to have escaped unscathed from the explosion. The availability of Kevlar helmets and other sophisticated body armor for service members contributes to this result. However, while no wounds may appear visible, the impact of the blast may result in a TBI, whose effects may not become fully known for some time.

It is certainly difficult to determine conclusively the prevalence of these invisible injuries in the population of service members returning from Iraq and Afghanistan. In 2008, the Rand Corporation conducted a major study attempting to address this and other questions relating to the care and treatment of our returning wounded warriors. The results of this study identified rates of PTSD in formerly deployed service members at approximately 14%, with a similar prevalence of major depression among the same population. The study also determined that approximately 19% reported a probable TBI during deployment. Nearly a third of those surveyed reported at least one of the three conditions (31%). The rates of PTSD and major depression found were consistent with the results of numerous other studies that have been done regarding the same issue, despite significant variations in the methodologies used in such studies. This was also true for the TBI results, although there have been fewer studies regarding that issue. Note that for a variety of reasons, the Rand Study concludes that its findings likely understate the true prevalence of these issues in the population of returning service members. Given that approximately 1.6 million service members had been deployed pursuant to the wars in Afghanistan (Operation Enduring Freedom or OEF) and Iraq (Operation Iraqi Freedom or OIF) as of

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138 Id. at 96.
139 Id.
140 Id.
141 Id. at 105.
142 See id.
143 Id.
the time of the study, the results suggest more than ¼ million service members will suffer from each of these maladies.144

Of course, veterans suffering from PTSD, major depression, TBI, or some combination of the three, face many challenges as they attempt to reintegrate into civilian life after a period of military service. First, individuals who suffer from such mental and physical health issues tend suffer disproportionately from additional mental and physical health issues.145 Such persons are also at increased risk of suicide146 and substance abuse.147 All of these factors can combine to cause persons suffering from such conditions to struggle in labor and employment related contexts.148 Additionally, these issues manifest themselves in terms of struggles within family and interpersonal settings. Thus, persons suffering from PTSD, major depression, and/or TBI are at increased risk of experiencing marital discord and divorce, parenting difficulties, and being involved in domestic violence.149 Additionally, all of these types of problems may have a cumulative effect over the course of a lifetime.150 Thus, a loss of employment due to suffering from one of these conditions may inhibit one’s career prospects over an entire lifetime. The same may be true for losses due to substance abuse, family dissolution or violence, etc. Thus, even if the service member ultimately receives effective treatment and support for the underlying condition, lasting harm to the individual’s life prospects may already have been suffered.

144 Id. at 98.
145 Id. at 125-28 (co-morbidity with other mental health issues), 131-34 (co-morbidity with physical health issues).
146 Id. at 128-31. Note that veterans in general seem to be at increased risk of suicide. See Veterans for Common Sense, 563 F.Supp.2d at 1063. This risk is further exacerbated by the presence of mental health issues such as PTSD and depression. Id. at 1064.
147 INVISIBLE WOUNDS, supra note 126, at 134-37.
148 Id. at 137-40.
149 Id. at 148.
150 Id. at 122.
Therefore, early treatment and intervention for service members returning to America with such impediments is critical.\textsuperscript{151} Yet to date, the provision of such services has been inadequate. Only about half of the returning OEF/OIF veterans who receive a referral for mental health services actually receive such services.\textsuperscript{152} Moreover, the number of service members who receive mental health referrals may be artificially low.\textsuperscript{153} Service members in large numbers under report their need for mental health assistance. This is true for a number of reasons. First, deployed military personnel believe that admitting a need for mental health services will delay their return home.\textsuperscript{154} Military personnel also fear acknowledging mental health issues will hurt their military careers.\textsuperscript{155} Additionally, there is a culture in the military of refusal to acknowledge weakness or injuries, or to seek assistance of any kind.\textsuperscript{156} These impediments combine with negative attitudes in broader society that impede individuals’ willingness to seek assistance for mental health conditions.\textsuperscript{157} As a result, far fewer than half of the returning service members who need mental health assistance actually receive such assistance.

The situation is not significantly better for those suffering from a TBI. According to the Rand survey, as high as 57\% of those who report suffering a probable TBI are never evaluated for brain injury.\textsuperscript{158} At first blush, this figure may make the problem sound worse than it is, because the vast majority of mild TBIs do not require medical treatment, and will resolve themselves within a relatively short period of time after the injury.\textsuperscript{159} And, moderate to severe TBIs are more likely to be treated immediately, as they are often accompanied by other physical injuries as a result of the

\begin{footnotes}
\item[151] Id. at 437.
\item[152] Id. at 252.
\item[153] Id.
\item[154] Id.
\item[155] Id. at 277.
\item[156] Id. at 277.
\item[157] See id. at 275.
\item[158] Id. at 435.
\item[159] Id. at 306, 307.
\end{footnotes}
blast. Nonetheless, a significant number of TBIs that were not initially believed to be severe do require significant follow-up treatment, and often the need for such treatment is not obvious until some time after the injury. And many of the same impediments that prevent service members and veterans from seeking treatment for mental health issues apply equally in the case of TBI. Moreover, even less is known about treating TBIs than mental health issues, so barriers to care relating to lack of knowledge and misinformation may be even greater in the context of TBIs than mental health issues. On the other hand, the many ripple effects that can harm both personal and professional relationships that were noted above in relation to mental health issues apply equally in the case of TBIs.

Another problem for those who receive referrals for follow-up care is delay in the delivery of such care. Anecdotal evidence often demonstrates extremely lengthy waits for mental health services within the VA healthcare system. A September 2007 report by the VA’s Office of Inspector General found that 25% of the appointments for outpatient medical care had delay times of more than thirty days. The Report identified other serious problems with the VA’s system for scheduling and tracking appointments for veterans with mental health issues. Given the high correlations between mental health issues and suicide, and substance abuse and other forms of violence, it is clear that delays of this sort put struggling veterans suffering from mental health issues at great risk of significant harm.

A number of initiatives have been undertaken to help to assure that returning veterans get the mental and physical health

160 Id. at 310.
161 Id. at 307.
162 See supra notes 155-157 and accompanying text; INVISIBLE WOUNDS, supra note 126, at 317-19.
163 See id.
164 See supra notes 145-150 and accompanying text; INVISIBLE WOUNDS, supra note 126, at 317.
165 Veterans for Common Sense, 563 F. Supp.2d at 1066.
166 Id. at 1066-67.
assistance they need in order to reintegrate into civilian society, and avoid many of the problems associated with PTSD, major depression and TBI identified above. First, the government has extended five years’ worth of free VA medical care to all other than dishonorably discharged returning veterans of the current conflicts.\textsuperscript{167} In 2004, the VA developed and adopted a Mental Health Strategic Plan (MHSP), a five year plan designed to address the mental health needs of veterans.\textsuperscript{168} However, a May 2007 report of the VA’s Office of Inspector General concluded that many of the components of the MHSP had not been implemented as of that time.\textsuperscript{169} Additionally, recognizing the limits on what the federal government acting alone can do, numerous state and local government entities have initiated programs designed to ease the transition from military to civilian life and to deal with some of the issues causing problems for our returning veterans.\textsuperscript{170}

Delays in receipt of cash benefits for veterans suffering from service connected mental and physical health disabilities also contribute to the struggles of such veterans upon their return from the current conflicts. It takes approximately 6 months for the average benefits’ claim to be initially determined.\textsuperscript{171} Yet because claims involving PTSD are among the most complex that the VA is asked to adjudicate,\textsuperscript{172} one must assume that such claims take longer, on average, to adjudicate, than the typical claim for benefits.\textsuperscript{173} To the extent that a veteran is not successful in their initial claim, or the claim is rated at a lower level than the veteran believes is appropriate, the review and appeals process can add exponential delays to the veteran’s receipt of the needed cash

\textsuperscript{167} Id. at 1079 (citing 38 U.S.C. § 1701(e)(3)(C)(i)). Previously, all separating veterans were eligible for two years’ worth of free VA medical care. See INVISIBLE WOUNDS, supra note 126, at 264.
\textsuperscript{168} Veterans for Common Sense, 563 F. Supp.2d at 1064.
\textsuperscript{169} Id. at 1064-65 (citing VA OFFICE OF INSPECTOR GENERAL, IMPLEMENTING VHA’S MENTAL HEALTH STRATEGIC PLAN FOR SUICIDE PREVENTION (2007)).
\textsuperscript{170} INVISIBLE WOUNDS, supra note 126, Appendix 7.E, at 398.
\textsuperscript{171} Veterans for Common Sense, 563 F. Supp.2d at 1070.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 1073.
assistance.\textsuperscript{174} Obviously, where mental or physical disabilities are such that they prevent the veteran from earning income following their return to civilian life, the need for prompt cash assistance is vital to the veterans’ survival.

In recognition of the benefit that attorney assistance might play in expediting this process, in 2006, Congress further eased the limitations on attorney assistance in veterans’ benefits cases from the level allowed following the 1988 legislation.\textsuperscript{175} At present, the relevant statute removes the $10 fee limitation for legal representation at any stage of the benefits application process after the VA has issued an initial decision regarding a claim.\textsuperscript{176} Thus, as a practical matter, a paid attorney can represent a veteran either in seeking a \textit{de novo} hearing with a Decision Review Officer within the Regional Office, or in appealing the VA’s decision to the Board of Veterans Appeals.\textsuperscript{177}

For reasons identified above, many struggling veterans will lack the resources necessary to pay a private attorney a retainer fee or the attorney’s typical hourly rate for representation regarding a VA benefits claim. However, because any benefits awarded are retroactive to the date of filing the claim, and in many cases the claims take years or even decades to be finally resolved, there is often a pool of money at the end of the case from which an attorneys’ fee could be drawn. In recognition of these facts, the recent legislation does permit attorneys to represent VA claimants on a contingent fee basis, provided that the fee is reasonable.\textsuperscript{178} The statute further identifies 20\% as a presumptively reasonable contingent fee, and directs the Secretary of Veterans Affairs to promulgate regulations implementing the attorneys’ fee policy.\textsuperscript{179} The regulations subsequently enacted identify a contingent fee agreement for an amount greater than 33 and \(\frac{1}{3}\)\% of the benefits

\textsuperscript{174} \textit{Id.} at 1074-75.
\textsuperscript{177} \textit{See supra} notes 90-92 and accompanying text.
\textsuperscript{179} \textit{Id.}
awarded to be presumptively unreasonable. The regulations further provide that the VA will not deduct the attorneys’ fee from the benefits awarded and send the fee directly to the attorney if the agreed upon contingent fee is greater than 20%. The 20% contingent fee that has thus become the norm in VA benefits cases is significantly below the contingent fee rates typically charged by personal injury and medical malpractice plaintiffs attorneys, which may run 40% or greater. In light of the relatively small amounts of benefits available to disabled veterans, the length of time required to litigate a claim successfully, and the fact that a successful claim will most likely require several thousands of dollars in out of pocket costs for independent medical reviews, the 20% contingent fee is rarely adequate to make representing veterans in VA cases financially attractive to private attorneys. Thus, despite the passage of the new attorneys’ fee legislation relatively few private attorneys have undertaken to represent veterans in VA cases for a fee.

IV. Current Initiatives to Provide Legal Services to Struggling Veterans

The 2007 amendment to 38 U.S.C. § 5904, along with increasing awareness of the plight of many veterans returning from the current conflicts, has provided some momentum for an increase in the provision of legal services to struggling veterans. On the other hand, continuing tight budgets for legal services organizations make them unlikely candidates for the provision of such services. This is particularly true in light of the budgetary shortfalls brought about by the financial crisis of late 2008. Thus, a range of efforts

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182 See supra notes 87-88 and accompanying text.
183 Thanks to Professor Tom Reed, who directs Widener University School of Law’s Veterans Legal Clinic, for pointing out the inadequacies of the current legislation to attract private attorneys to represent veterans in VA benefits cases.
184 See supra note 175 and accompanying text.
have been initiated outside the scope of the legal services program to bring needed legal services to struggling veterans.\footnote{185}

A number of private law firms have launched pro bono projects designed to provide legal representation to struggling veterans returning from the conflicts in Afghanistan and Iraq. Firms such as Wilmer Cutler, Morrison and Foerster, and DLA Piper have all launched initiatives to bring pro bono legal representation to needy veterans.\footnote{186}

Law school clinics have also been at the forefront of bringing legal services to struggling veterans. In the fall of 2006, three students at John Marshall Law School in Chicago founded the school’s Veterans Legal Support Center and Clinic.\footnote{187} After receiving a grant of $100,000 from the Illinois Department of Veterans Affairs, the clinic opened its doors in January 2008 and began providing legal representation to veterans in VA benefits cases.\footnote{188} In addition to providing legal representation, the clinic provides classes and training to both students and practicing attorneys regarding veterans’ legal issues.\footnote{189} In November 2008, the Clinic hosted a wonderful conference bringing together a range of national experts to discuss legal and medical issues facing our nation’s veterans.\footnote{190}

\footnote{185} A notable exception is the NVLSP’s “Lawyers Serving Warriors” project. This is a national referral network, staffed by volunteer lawyers designed to provide legal representation to OEF/OIF veterans in disability, discharge, and veterans’ benefits cases. See generally Lawyers Serving Warriors, www.lawyersservingwarriors.com (last visited Jan. 6, 2009). As mentioned above, NVLSP is funded, in part, by LSC funds.


\footnote{187} The three students were Nick Henry, Ryan Coward, and Michael Barnicle. Each was a veteran, and all three have since graduated law school and returned to active duty in the JAG corps. See John Marshall Law School, Veterans Legal Support Center History, http://www.jmls.edu/veterans/history.shtml (last visited Jan. 6, 2009).

\footnote{188} Id.

\footnote{189} Id.

\footnote{190} Two-Day CLE Conference Brings Legal and Medical Professionals Together to Discuss Veterans Benefits, VLSC Newsletter, Winter 2008, at 5, available at
Around the same time the John Marshall Clinic began representing clients, the University of Detroit-Mercy School of Law launched its Project Salute. Project Salute provides representation to veterans in veterans’ benefits cases, as does the John Marshall Law Clinic. However, Project Salute also utilizes a mobile law office that travels throughout the country in an effort to increase the provision of legal services to struggling veterans. In each city it arrives, the Project Salute team meets with prospective clients who have claims pending or who are contemplating filing claims with the VA. The team then conducts a full day training session for local attorneys in veterans’ benefits law, before matching these attorneys with the prospective clients previously identified, for pro bono representation. Thus, in addition to using its own students to provide legal representation, Project Salute is creating a nationwide cadre of attorneys who are ready, willing, and able to help veterans with their VA claims. One important feature of Project Salute is its effort to bring legal representation to veterans at the RO stage of their claims, as encouraged pursuant to the 2007 statutory amendments. As indicated above, most previous efforts to bring representation to veterans in the benefits cases have focused on higher levels to the VA appeals process.

Other law schools which have recently started legal clinics designed to help veterans with their benefits claims include William & Mary Law School, North Carolina Central University School

192 See supra notes 64-68 and accompanying text.
of Law, and Southern Illinois University School of Law. These projects join much longer-standing veterans’ legal assistance clinics at Widener University School of Law and the University of South Carolina School of Law. Taken together, these law school clinics, along with the numerous initiatives by practitioners to bring needed legal services to veterans with regard to their benefits claims, should go a long way toward helping to address the gap in the need for legal assistance with regard to veterans’ benefits claims identified above.

On the other hand, there remains a gaping hole regarding the availability of legal services to struggling veterans in areas other than veterans’ benefits claims. As discussed above, many of the mental and physical ailments that effect returning veterans cause them to experience a wide range of legal problems beyond solely veterans’ benefits claims. Many struggling veterans have legal needs in areas including child support, custody, and visitation, dissolution of marriage, social security and other public benefits matters, consumer protection, housing, and labor and employment issues. With traditional legal aid programs overwhelmed without regard to the struggling veteran population, there have been very few initiatives to bring needed legal services to these struggling veterans in non-VA benefits matters.

197 See George Mason University School of Law operates the only law school clinic in the nation devoted to serving the legal needs of active duty military personnel. See George Mason University School of Law, Clinic for Legal Assistance to Service members, http://www.law.gmu.edu/academics/clinics/clas (last visited Jan. 8, 2009).
One such effort is the Thomas Jefferson Veterans Legal Assistance Clinic (TJVLAC) at Thomas Jefferson School of Law in San Diego.\textsuperscript{198} The TJVLAC involves a unique collaboration between the law school and Veterans Village of San Diego (VVSD), a nationally recognized recovery program for homeless veterans with substance abuse problems.\textsuperscript{199} Veterans Village provides a comprehensive recovery program for its clients, with a broad range of services relating to “food, clothing, substance abuse recovery, mental health counseling, job training, and job search assistance.”\textsuperscript{200} Though VVSD has been able to provide assistance to its clients with misdemeanor criminal legal matters through its Homeless Court program,\textsuperscript{201} until the fall of 2006, the organization was not able to provide consistent legal services to its clients relating to civil legal matters. The TJVLAC was created to fill that gap. California Bar certified law students provide legal services to the residents, alumni, and affiliates of VVSD in a wide range of civil legal matters, including family law matters, public assistance matters (including veterans’ benefits claims), consumer matters,

\textsuperscript{198} See Thomas Jefferson School of Law, Veterans Legal Clinic, http://www.tjsl.edu/academic_veterans (last visited Jan. 20, 2009).
\textsuperscript{199} See Veterans Village of San Diego, http://www.vvsd.net (last visited Jan. 8, 2009). Among its many accomplishments, VVSD is noted for pioneering the “Stand Down” concept. Stand Downs represent a weekend-long effort to bring together struggling veterans and the providers of services that may help struggling veterans to address their plight. Id. See also National Coalition for Homeless Veterans, Stand Down, http://www.nchv.org/standdown.cfm (last visited Jan. 8, 2009). Stand Downs have now been held in numerous locations throughout the country. Additionally, VVSD pioneered a Homeless Court program following its first Stand Down. Homeless Court allows homeless veterans to address the “nuisance” violations such as public urination or intoxication that one may accumulate while living on the streets. See Veterans Village of San Diego, Homeless Court, http://www.vvsd.net/court.htm (last visited Jan. 8, 2009). Often, a recovery program such as VVSD is provided as an alternative sentence for such charges. Id.
\textsuperscript{200} See Veterans Village, supra note 199.
\textsuperscript{201} See supra note 199.
\textsuperscript{202} VVSD provides a number of affiliate programs throughout the rest of San Diego County. See Veterans Village, supra note 199.
criminal records expungments and probation modifications, and just about any other civil legal issue imaginable. While neither VVSD nor the TJVLAC restrict their services to veterans of the current conflicts, such veterans are becoming an increasingly large component of each program’s client base.

While the TJVLAC represents a successful model for bringing needed legal services to struggling veterans in areas beyond veterans’ benefits claims, it is a small program that serves only a fraction of the needs of struggling veterans in San Diego alone, let alone nationwide. Thus, many more resources need to be devoted to addressing the broad range of legal needs experienced by struggling veterans.

Conclusion

The 100 year history of SMRLS has paralleled a history of the broader civil legal assistance movement in America marked by intermittent periods of growth, retraction, and stasis. However, throughout that time, struggling veterans have largely stood outside the predominant channels for the delivery of civil legal services to poor Americans. Indeed, even during the rapid expansion civil legal assistance programs during the 1960s and 1970s, struggling veterans as a distinct class were largely ignored by legal aid activists. Perhaps this in part had to do with a tension between the veterans’ military service and the anti-Vietnam War attitudes of the social reformers who fueled the expansion of civil legal assistance programs during this area. The uniqueness and complexity of the law surrounding applications for veterans’ benefits, the civil war era statute capping legal fees for lawyers in veterans’ benefits cases at $10, the availability of lay representation in veterans’ benefits cases through Veterans Service Organizations, and the “non-adversarial” nature of VA claims cases, all contributed further to the dearth of legal assistance available to struggling veterans.

In the decades following the Vietnam War, public attitudes toward veterans in American have changed, and members of the public have increasingly come to appreciate the sacrifices made by
the men and women who serve their country through military enlistment. Such attitudes came to a head recently with media exposés of the struggles of veterans returning from the current conflicts in Afghanistan and Iraq. As a result, new efforts have been made to bring greater assistance to struggling veterans, including legal assistance.

The current conflicts differ from prior American military engagements in a number of respects. Service members are being required to participate in longer and more frequent deployments. The line between combat and non-combat situations has blurred. The “signature weapon” of the insurgents battling American troops in the current conflicts, the improvised explosive device, has resulted in new types of injuries predominating among injured service members. Though improvements in military equipment and battlefield medicine have dramatically improved survival rates among wounded service members, these factors have also contributed to an increase in the “signature wounds” of the current conflicts, Post Traumatic Stress Disorder, Major Depression, and Traumatic Brain Injury.

Literally hundreds of thousands of American service members will suffer from one or more of these ailments upon their return from Operations Enduring Freedom and Iraqi Freedom. The prevalence of PTSD, major depression, and TBI will in turn contribute to the development of a host of problems, both legal and non-legal, for these returning veterans. Though veterans suffering from such illnesses may need medical and financial support most of all, the need for legal services should not be underestimated. While a number of promising initiatives have been undertaken to bring legal assistance to our nation’s wounded warriors, more needs to be done. Though Congress acted properly in removing the civil war era fee limitation provision, its replacement still effectively caps attorneys’ fees in VA benefits cases at a level too low to attract significant private attorney involvement. Thus, the statute should be modified to raise the contingent fee limit. In the interim, efforts should be made to continue to increase the number of attorneys willing to take such cases on pro bono.
Additionally, though veterans would benefit greatly from more assistance from lawyers in pursuing their claims for veterans benefits, struggling veterans go virtually entirely without legal assistance with problems involving family law, other public assistance programs, labor and employment law, and consumer and housing law. It is in these areas that lawyers, and those who are able to fund the provision of legal services, can make the most difference in assisting those veterans who have sacrificed so much in service to their country. Therefore, additional public and private charity funds should be devoted to supporting legal services in these areas, and attorneys who work in these areas should pay particular attention to directing their pro bono resources to struggling veterans.