NOS. 17-1762, 17-1789, 17-1796, 17-1926

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

EDWARD THOMAS ROSE; TAYLOR DANIELS;
HERBERT MITCHELL MILLER; AND LESLIE PUNT,

Appellants,

v.

DAVID J. SHULKIN, M.D.,

Appellee.

On Appeal from the United States Court of Appeals for Veterans Claims
(Nos. 16-2494, 16-2498, 16-2505, 16-2510)
(Hon. Robert N. Davis, William S. Greenberg, JJ.)

APPELLANTS' CONSOLIDATED REPLY BRIEF

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INTRODUCTION

The Secretary admits in his Opposition that "delays in the VA appeals system are real and harmful—and that veterans deserve better." Opp'n at 39. He describes the appeals process as "broken," "complex," "inefficient," "ineffective," and "confusing." *Id.* Yet the Secretary urges this Court to excuse him from these admitted and serious failings by denying relief to Appellants—veterans who have been harmed by years of delay in processing and adjudicating their appeals of disability benefit denials.

To avoid judicial scrutiny of and accountability for what the Secretary admits is a "broken," "inefficient," and "ineffective" appeals process, the Secretary argues that only Congress can provide the relief Appellants are requesting. But Appellants are not asking the Court to rewrite the VA's procedures and policies. Rather, Appellants request relief that falls squarely and uniquely within the province of a court: a ruling that the conceded and worsening agency-imposed delays are unconstitutional.

On Appellants' constitutional challenge, the Secretary has almost nothing to say in his defense. Most notably, he acknowledges that

"veterans' interest in obtaining timely adjudication of their claims for benefits is not in dispute," Opp'n at 46, and that "[o]f course the Government has no interest in 'delay,'" thereby conceding two of the three *Mathews* factors. *Id.* at 48. The Secretary tries to minimize the impact of the VA's delays by lauding the recently enacted Veterans Appeals Improvement and Modernization Act of 2017 ("the Modernization Act"), Pub. L. 115-55 (2017), Opp'n at 36–38, 48–49, but he fails to mention that this new legislation applies only to appeals filed after February 2019 and thus does not help Appellants (or the other hundreds of thousands of veterans whose appeals are already pending). In fact, the Modernization Act will likely exacerbate the existing delays by moving future appeals into and through the system faster, causing the more than 470,000 existing appeals to slip further behind. And those pending appeals, including Appellants' appeals, are likely meritorious: There is no dispute that the VA gets it wrong in *more than 50%* of the denials that are appealed to the BVA.

Having little to say in response to Appellants' constitutional challenge, the Secretary spends most of his Opposition as he did below, trying to defend the indefensible mandamus standard invented by the

CAVC in *Costanza v. West*, 12 Vet. App. 133 (1999). None of the Secretary's arguments, however, changes the reality pointed out in Appellants' opening brief: The *Costanza* standard disregards the prevailing test (*i.e.*, *TRAC*) for assessing claims of agency delay under the All Writs Act, conflicts with the CAVC's own organic statute, and is so insurmountable as to render illusory the right of a veteran to challenge the constitutionality of agency delay. It is little wonder that, as the Secretary himself has acknowledged, not a single veteran bringing a claim of unreasonable or unconstitutional delay appears to have succeeded in obtaining mandamus relief in the nearly twenty years since the *Costanza* standard was adopted.

It is time for the VA to be held accountable. Instead of just paying lip service to veterans "deserving better," the VA should be required to give veterans what they deserve: timely processing and adjudication of their appeals of their disability benefit denials. This Court can and should exercise its authority under the Constitution and the All Writs Act and enter an order finding (1) that the delays suffered by these Appellants are unconstitutional and (2) that the CAVC has applied the

wrong standard to Appellants' mandamus petitions raising claims of unreasonable delay.

ARGUMENT

A. The CAVC Erred in Dismissing Appellant Punt's Case As Moot.

The Secretary does not dispute that the CAVC erred in dismissing Appellant Punt's petition as moot. *See* Opp'n at 9–10. The CAVC's ruling in this regard should be reversed.

The Secretary does, however, argue that the petition of Appellant Herbert Mitchell Miller is moot because Mr. Miller passed away and does not have dependents. *See* Opp'n at 9 (citing Appx1443). Although Appellants agree that Mr. Miller's claim is now moot, his case spotlights the hopeless situation the VA's unconscionable delays impose on veterans. Mr. Miller, a World War II Navy frogman who fought in the Pacific theater, died never having received the benefits to which he would have been entitled had his appeal been successful. That outcome is tragic in itself. More broadly, it epitomizes the plight of numerous other veterans who die—all too often by committing suicide—while the VA delays their claims. The VA should not be permitted to run out the clock on those who served their country.

B. The CAVC Erred in Denying Appellants' Due Process Claim.

The Secretary's Opposition confirms that the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), weigh strongly in favor of Appellants and against the Secretary.[1] The Secretary concedes that the first of the three *Mathews* factors—"veterans' interest in obtaining timely adjudication of their claims for benefits"—is "not in dispute." Opp'n at 46. Nor does the Secretary dispute that Appellants' interests here are essential to human health and welfare and are interests of the highest order.

The Secretary simply attempts to brush aside the third *Mathews* factor—the government's interest in maintaining the status quo—by saying there is "little value" to considering it "given that the VA has pressed to change the current system and, based on a framework proposed by VA and its partners, Congress has enacted legislation to do

[1] The Secretary argues that the *Mathews* test is not "literal" and can be "awkward[]" in cases regarding delay. Opp'n at 44–45. Whatever that may mean, the *Mathews* test by nature is "flexible" and to the extent there is any "awkwardness" in applying it to a delay case, the Supreme Court clarified its application in precisely such a context in *FDIC v. Mallen*, 486 U.S. 230, 242 (1988). *See also Jordan v. Jackson*, 15 F.3d 333, 345 (4th Cir. 1994) (noting that the Supreme Court refined the *Mathews* test in *Mallen* to avoid "the awkwardness of a literal application of the *Mathews* factors" in a delay case).

so." Opp'n at 45, 48–49. That legislation is the Modernization Act discussed above, and its passage actually highlights the severity of the delays at issue here: The Modernization Act was enacted precisely because the "current system" is so deficient (or, in the words of the Secretary, "broken," "inefficient," and "ineffective").[2] Opp'n at 39. Although the Secretary portrays the Modernization Act as proof that "the political branches have acted to address the problem of delays in the VA appeals process," Opp'n at 36–38, 48–49, that argument has no application to Appellants or any other veteran who has already filed an appeal. As counsel for the Secretary recently admitted during

[2] Despite his own concessions that the system is "broken," the Secretary suggests that the VA should be lauded for (1) providing Mr. Rose with various documents in November 2016 and a BVA hearing in July 2017, Opp'n at 6–7; (2) providing Mr. Daniels an SOC in September 2016, *id.* at 9; and (3) providing Ms. Punt partial benefits and two SOCs in September and October 2016 and certifying her appeal to the BVA in June 2017, *id.* at 9–10. Those actions were not the result of a properly functioning system, but rather were triggered by Appellants' mandamus petitions. Prior to those petitions, Appellants' cases stagnated in precisely the same way that tens of thousands of other veterans' cases do. Far from exonerating the Secretary or countenancing the current system, the VA's handling of these (and other) cases demonstrates that the Secretary will go to great lengths to avoid judicial scrutiny of his conduct. *See* Opp'n at 31 n.9 (admitting the Secretary's history of attempting to moot cases before a mandamus petition is adjudicated).

argument before this Court in a case presenting a similar challenge to VA delay, the Modernization Act applies only to appeals initiated after the February 2019 effective date of the legislation; veterans with pending appeals will not directly benefit from the Modernization Act. *See* Tr. Oral Arg. 26:30–26:58, *Ebanks v. Shulkin* (Fed. Cir. Oct. 19, 2017).[3]

Indeed, there is strong reason to believe the new legislation will exacerbate the existing delays by moving future appeals into and through the system faster, pushing the more than 470,000 existing appeals (Opp'n at 39) further back in line. *See* Hearing Before the House Committee on Veterans' Affairs (May 2, 2017) (written statement of John Rowan, President, Vietnam Veterans of America) (discussing the concern that "the new appeals system will take priority over appeals that have languished in the system for many years").[4]

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[3] The Secretary notes that there are two "opt-ins" to the new legislation for existing claimants. Opp'n at 37 n.12. But the first opt-in, Pub. L. 115-55 § 2(x)(3), applies only to claimants who receive an adverse decision *after the date of enactment*, which inherently excludes all of the Appellants. Similarly, the second opt-in, Pub. L. 115-55 § 2(x)(5), applies only to claimants who have *not yet received an SOC*, which again excludes each Appellant here.

[4] *See* http://tinyurl.com/y7bdwpb4.

With the first and third *Mathews* factors indisputably pointing toward a due process violation, only the second *Mathews* factor—the risk of erroneous deprivation—is left. The Secretary argues that the "risk of a mistaken initial decision in the VA system is relatively low" because only eleven to twelve percent of claimants disagree with rating decisions and only four to five percent of those claimants ultimately proceed to the BVA. Opp'n at 46–47. But those percentages are based on the wrong numbers. Those percentages relate to *all* of the benefits claims before the VA, including those that are granted to the claimants' satisfaction and those where a claimant simply gives up and does not challenge the decision. By contrast, the question before this Court is the delay occurring *after* the VA makes those initial decisions, *i.e.*, after the veteran initiates an appeal by filing an NOD. The only relevant "risk of error" here is the percentage of *appealed* claims that the BVA either reverses or remands. The statistics in Appellants' Opening Brief demonstrate that, of *appealed* denials—which are the claims it takes *years* to process and adjudicate—the VA got nearly 79% of its decisions either wrong or at least not right (based on a 31.8% reversal rate and a 47.1% remand rate). Opening Br. at 11.

As to the remanded cases, the remand rate is not as easily explained away as the Secretary would like. *See* Opp'n at 47–48. The VA claims that "the majority" of board remands result from new evidence becoming available after the initial decision was made. *Id.* The precise number according to BVA statistics is 59%. Appx1675, Government Accountability Office, *VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions* 13 (March 2017).[5] Conversely, then, "41[%] of the reasons for the remands in fiscal year 2015 were due to [Veterans Benefits Administration] error." Appx1676. Combining the errors that cause remands with the errors that cause outright reversals brings the VA error rate to 51.1%.[6] In other words, the VA gets it wrong in more than half of all cases that come before the BVA. By any measure, these numbers demonstrate a high risk of error.

[5] The GAO report states this rate to be 60%, but on the next page notes the percent of remand due to error to be 41%, meaning it must more precisely be 59%. Appx1675–1676.

[6] This number is derived as follows: (1) a 31.8% reversal rate, plus (2) a 19.3% remand-due-to-error rate (which consists of the total remand rate (47.1%) multiplied by the percentage of remands due to error (41%)).

Furthermore, as to the 59% of remands purportedly due to the open record system, the Secretary does not contest that the years-long delays themselves likely necessitate the submission of new evidence as a claimant's disability develops and changes. *See* Opening Br. at 39 n.10; Opp'n at 50. And, according to one study, 75% of claims that reach the BVA for a second time are remanded yet again. *See* Opening Br. at 39 (citing Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 Neb. L. Rev. 388, 416 (2011)).

The three *Mathews* factors compel the conclusion that the VA's appeal delays violate Appellants' constitutional due process rights. The Secretary has admitted that Appellants' interests are strong and the government has no interest in preserving the status quo, and the government's own statistics reveal that the risk of erroneous deprivation is high, with it being more likely than not that the benefits denial being appealed was wrong. The Court should reverse the CAVC's orders, find that the delays suffered by Appellants violate their constitutional rights, and order the Secretary to eliminate unreasonable delay.

C. The CAVC Erroneously Denied Appellants' Requests for Writs of Mandamus to Correct the Delay.

The Secretary argues that the *Mathews* factors are irrelevant here because the CAVC correctly concluded that Appellants were not entitled to a writ of mandamus. Opp'n at 13, 44 (the CAVC was "not required to employ the three-factor *Mathews* test proposed by appellants" because the *Costanza* mandamus test overrides those factors). The CAVC, however, applied the wrong mandamus standard when it held that Appellants had not proved that their delays stemmed from an "arbitrary refusal to act" under the *Costanza* standard. That standard does not square with the CAVC's enacting statute, 38 U.S.C. § 7261. More importantly, it is inconsistent with longstanding All Writs Act case law that provides the proper objective test by which to measure a mandamus claim for agency delay.

On this latter point (that the All Writs Act case law provides the proper test for mandamus), the parties agree. The Secretary acknowledges that "[t]he standard for evaluating a mandamus petition is governed by the All Writs Act, 28 U.S.C. § 1651(a), and the case law interpreting it." Opp'n at 22.

The "case law interpreting" the All Writs Act, however, is *TRAC*—the very case Appellants say should control the assessment of whether a writ of mandamus is appropriate. *TRAC* has been the prevailing standard for 33 years, during which it has provided the dominant framework for assessing mandamus petitions predicated on agency delay. *TRAC* has been applied to a broad spectrum of agencies in cases throughout the nation,[7] regarding delays that are significantly shorter and less injurious than those here.[8] It is *the* prevailing test for mandamus relief in agency-delay cases. *See* Admin. Conf. of the United States, *Judicial Review of Preliminary Challenges to Agency Action*, 53 Fed. Reg. 39,585 (Sept. 16, 1988) (recognizing *TRAC* as "[t]he leading

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[7] *See, e.g.*, *Towns of Wellesley, Concord & Norwood, Mass. v. F.E.R.C.*, 829 F.2d 275 (1st Cir. 1987); *Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 710 F.3d 71, 84 (2d Cir. 2013), as amended (Mar. 21, 2013); *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130 (5th Cir. 1994); *In re Howard*, 570 F.3d 752, 757 (6th Cir. 2009); *Irshad v. Johnson*, 754 F.3d 604, 607 (8th Cir. 2014); *Indep. Min. Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997); *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1423 (11th Cir. 1993).

[8] *See, e.g.*, *In re Ctr. for Auto Safety*, 793 F.2d 1346 (D.C. Cir. 1986) (two-, six-, and seven- month delay in promulgating fuel economy standards); *Ensco Offshore Co. v. Salazar*, 781 F. Supp. 2d 332, 338 (E.D. La. 2011) (four-month delay in issuing drilling permit); *Huang v. Mukasey*, 545 F. Supp. 2d 1170, 1175 (W.D. Wash. 2008) (27-month delay in processing immigration status adjustment).

decision on th[e] subject" of agency delay and recommending that preliminary challenges to agency action "should follow the principle of TRAC"). The Secretary does not suggest otherwise.

TRAC's framework should apply to VA appeal delays, too. Contrary to the Secretary's contention, applying *TRAC*'s approach would not allow a veteran to prevail on a delay claim if the CAVC were merely "to ask whether the delay is 'unreasonabl[e]' and . . . answer[] 'yes' to that question." Opp'n at 23. Rather, *TRAC* identifies six objective criteria for a court to consider when evaluating agency delay. Those criteria—unlike *Costanza*'s "arbitrary refusal to act" standard—would give weight to veterans' interests, not just the VA's interests, and would channel a court's discretion regarding whether the VA "unreasonably delayed."

In this critical respect, *Costanza* and *TRAC* are not just different; they are diametrically opposed. The *Costanza* standard focuses solely on the VA's interests; it gives no consideration whatsoever to the veterans' interests, even though the Secretary admits that they are of the highest order and that veterans suffer "real and harmful" delays. Opp'n at 39. The *TRAC* criteria, by contrast, not only consider veterans'

interests, but also give them the special weight they deserve because "human health and welfare are at stake."[9] 750 F.2d 70, 80 (D.C. Cir. 1984). By weighing both sides, *TRAC* provides the appropriate framework for assessing the reasonableness of agency delay—as courts nationwide have concluded for more than three decades.

The Secretary articulates no reason why the *TRAC* approach is unsuitable for the VA; the Secretary opposes the *TRAC* framework simply because the Secretary cannot satisfy it here. In fact, in his Opposition, in the face of Appellants' detailed analysis of the *TRAC* factors, the Secretary does not even try to explain how the VA satisfies those *TRAC* factors in Appellants' cases (*compare* Opening Br. at 53–55, *with* Opp'n at 24–25).

The Secretary does not refute that the *Costanza* mandamus standard he champions in lieu of *TRAC* erects an insurmountable barrier to veterans' obtaining relief from unreasonable delay. In fact, his admissions in another pending appeal prove that it does. In *Ebanks*

[9] Moreover, while *Costanza* directs courts to focus exclusively on whether the agency has arbitrarily "refused" to act, *TRAC* expressly counsels that courts need not find "any impropriety lurking behind agency lassitude" before finding a delay to be unreasonable. *TRAC*, 750 F.2d at 80.

v. Shulkin, No. 17-1277, this Court directed the Secretary to submit citations to decisions in which the CAVC found unreasonable delay under the *Costanza* "arbitrary refusal to act" standard. In response, the Secretary acknowledged that "[a] review of [CAVC] matters has not revealed a decision in which that court granted a writ of mandamus based exclusively on delay while explicating [or] citing the *Costanza* standard." ECF No. 57 at 5, *Ebanks v. Shulkin*, No. 17-1277. Appellants' cases are no exception: in all seventeen of the petitions filed by Appellants here and in the related *Martin* case, the CAVC ruled against the veteran every time.

Not once, then, has the CAVC ever found a delay-based claim worthy of mandamus relief under *Costanza*.[10] Requiring veterans to satisfy the *Costanza* mandamus standard rather than *TRAC* means not only that veterans are treated differently from other litigants who challenge delay by federal agencies, but also that veterans are

[10] The sole example the Secretary cites of a case in which mandamus was granted under the *Costanza* standard was not based exclusively on delay and arose in far different circumstances than those presented in Appellants' cases. *See Ribaudo v. Nicholson*, 20 Vet. App. 552, 559 (2007) (granting mandamus where the Secretary "chose to delay a decision on the petitioner's claim because he disagree[d] with the decision" of the CAVC in a related case).

effectively deprived of a forum in which they can make constitutional challenges to VA delays. This situation persists even though there is no dispute that delay can violate the Due Process Clause and that the longer benefits are withheld, the more "acutely affected" are the private interests at stake. *See, e.g.*, *Isaacs v. Bowen*, 865 F.2d 468, 476, 477 (2d Cir. 1989).[11]

As a matter of fundamental fairness—and, perhaps, even of equal protection—that cannot be the law and is not the law. To the contrary, rather than singling out veterans as having a higher burden to overcome for challenging agency delay, Congress used precisely the same language in the CAVC's enabling statute that it used many years earlier in the APA: "unreasonably delayed." 38 U.S.C. § 7261(a)(2); 5 U.S.C. § 706(1).[12] The Secretary admits this point when he explains

[11] According to the Secretary, a mandamus petition to the CAVC is the *only* method available to veterans to challenge such delays. Opp'n at 33 n.10.

[12] Congress added the "unreasonably delayed" language to Section 7261 to ensure that Section 7261 mirrored the parallel provision of the Administrative Procedures Act. *See* 135 Cong. Rec. S12525-06 (daily ed. Oct. 3, 1989) (explaining that the 1989 amendment to the Veterans' Judicial Review Act would "authorize the [CAVC] to compel actions that have been 'unreasonably delayed,' as well as, under current law, to compel actions that have been 'unlawfully withheld,'" and noting that (continued...)

that Section 7261(a)(2)'s language was derived specifically from Section 706 of the Administrative Procedures Act, which, in turn, the Supreme Court has "equated . . . with the mandamus standard." Opp'n at 23 n.5. Because the CAVC must follow Congress's direction in analyzing the claims before it, *see Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (requiring that the CAVC follow the statutory mandates in 38 U.S.C. § 7261), the CAVC should not have applied to Appellants' petitions a mandamus standard that treats veterans differently from other litigants challenging federal agency delay.[13]

Further discrediting the use of the *Costanza* standard, the Secretary also admits that this Court has never affirmed that standard in a precedential decision, Opp'n at 18, and that, in an unpublished mandamus decision about delay, this Court cited *TRAC* favorably as support for its mandamus authority, Opp'n at 24 n.6 (citing *In re*

"[t]his change would parallel the comparable judicial-review provision in the Administrative Procedure Act, section 706(1) of title 5, United States Code") (Statement of Sen. Cranston); *see also* Veterans' Benefits Amendments of 1989, Pub. L. No. 101-237, § 602(c), 103 Stat. 2062 (1989) (adding "or unreasonably delayed" to Section 7261(a)(2)).

[13] To the extent it is ambiguous whether "unreasonably delayed" really means "arbitrarily refused" (plainly, it does not), that ambiguity "is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117–18 (1994).

Paralyzed Veterans of Am., 392 F. App'x 858, 859–60 (Fed. Cir. 2010)). Moreover, the Secretary is wrong that the CAVC has never relied on *TRAC* in a delay case, *see* Opp'n at 24: The CAVC cited *TRAC* multiple times in one of its first published decisions evaluating delay by the VA. *See Erspamer v. Derwinski*, 1 Vet. App. 3, 7, 9–10 (1990). Indeed, in *Erspamer*, the CAVC quoted and applied three *TRAC* factors that cannot be reconciled with *Costanza*'s standard: (1) "[d]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake"; (2) "the court should also take into account the nature and extent of the interests prejudiced by delay"; and (3) "the court need not 'find any impropriety lurking behind agency lassitude.'" *Id.* at 10 (quoting *TRAC*, 750 F.2d at 80).

Unable to defend *Costanza* on its own terms, the Secretary attempts to fill it with content found nowhere in the single-page, *per curiam* opinion itself. For example, the Secretary claims that the case "takes account of the practical and legal realities of the veterans' benefits system, and asks whether a delay is so extraordinary that court intrusion is the only means to obtain relief." Opp'n at 20; *id.* at 21 (asserting that *Costanza* reflects the CAVC's "informed judgment on

this particular administrative system"); *id.* at 25 (asserting that the *Costanza* standard "properly accounts for the VA benefits scheme, to include the many levels of process built into it"). *Constanza* does nothing of the sort: It never explains how its standard is consistent with the All Writs Act, with cases applying the All Writs Act to agency delay, or with Section 7261(a)(2); why the VA should be subject to a different mandamus standard than other agencies in delay cases; or how substituting the "arbitrary refusal to act" standard for the broadly applied, multi-factor *TRAC* analysis is uniquely appropriate in veterans' benefits cases.

The CAVC's handling of Appellants' specific cases underscores why *Costanza* is inappropriate and unfair. For example, the CAVC accepted as true every fact alleged by Appellant Leslie Punt—including that her appeal gathered dust for five years between the filing of her NOD and the VA's issuance of an SOC (which occurred only after Ms. Punt filed her petition with the CAVC)—but nevertheless refused to intervene, providing no analysis whatsoever for its ruling. Appx0007. The *Costanza* standard, lacking as it does any objective factors by which to measure the VA's conduct, invited such a naked conclusion, even

though mandamus case law—including *TRAC* itself—does not permit such an unreasoned analysis. *Envt'l Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099–1100 (D.C. Cir. 1970) (denying a petition in the "face of the impressive evidence presented" requires a basis that "should appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review"). The CAVC's decisions regarding Mr. Rose and Mr. Daniels were similarly unreasoned.

Apart from *Costanza*, the Secretary argues that Appellants are not entitled to mandamus relief because they did not identify the precise source of the VA delays and explain how the VA should remedy them. It is not Appellants' burden to identify the cause of those delays, however. *See, e.g.*, *Kelly v. R.R. Retirement Bd.*, 625 F.2d 486, 491 (3d Cir. 1980) ("*Whatever its internal problems*, the Board has the power to implement regulations that would accelerate the agency review process. Four years is totally out of phase with the requirements of fairness." (emphasis added)). And Appellants have repeatedly identified the ministerial actions the VA can—and must—accomplish without unreasonable delay: issue an SOC, certify the appeal to the BVA,

deliver the appeal to the BVA for docketing, hold a hearing at the BVA, and decide the case.

Indeed, in several other places in the Secretary's Opposition, the Secretary complains (albeit incorrectly) that Appellants are being *too specific* in the relief they are requesting, and are thereby impermissibly asking this Court to "take on the role of the political branches," Opp'n at 34 (capitalization altered), and get embroiled in the inner workings of the VA's practices and policies. The Secretary cannot have it both ways: He cannot seek to deny relief to Appellants because they are not being specific enough about what the VA needs to do, while also seeking to deny relief to Appellants because they are being too specific about what the VA needs to do.

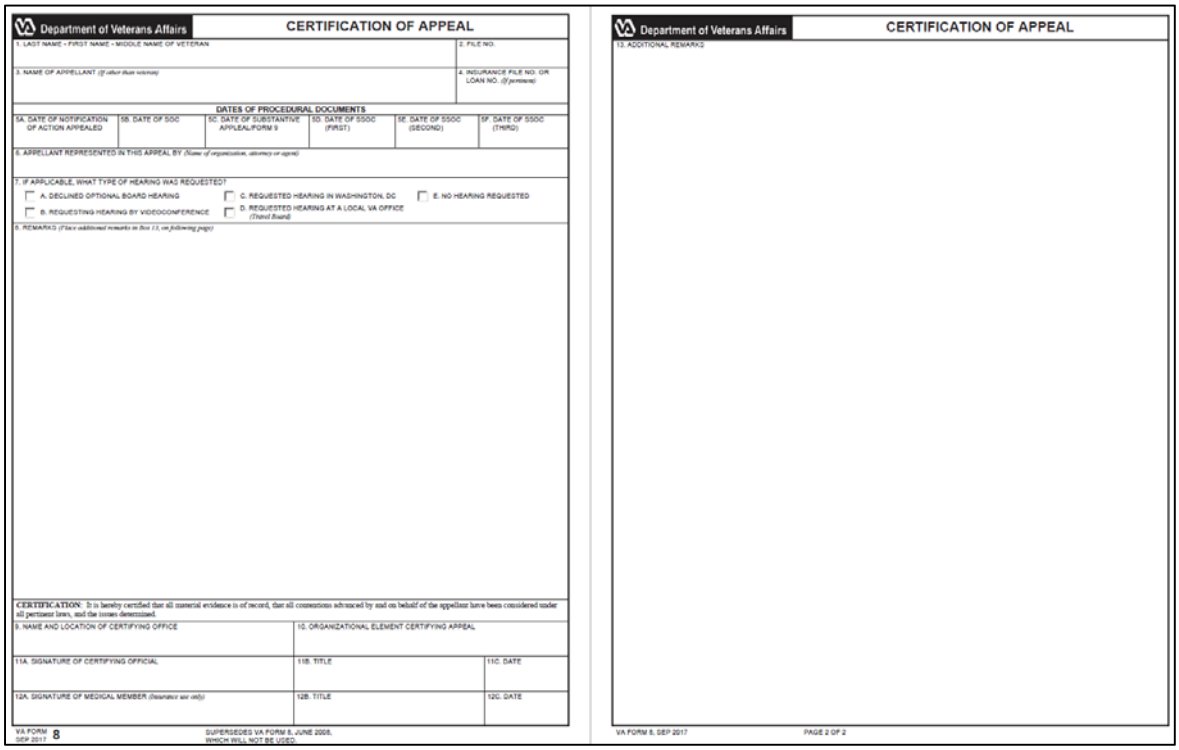
In another attempt to lay the delay at Appellants' feet, the Secretary argues that veterans themselves can be a source of delay. Opp'n at 21, 42–43. The Secretary does not, however, advance a single piece of evidence showing that Appellants contributed to the delays they experienced. This, alone, renders the Secretary's argument irrelevant.

And, regardless, the fact that the system permits veterans to submit evidence at different stages does not mean that Congress granted the

VA a blank check to violate veterans' procedural due process rights. Rather, the Secretary has a constitutional obligation to adjudicate veterans' claims in a timely manner and the CAVC is empowered to order actions that have been "unreasonably delayed." *Kraebel v. New York City Dep't of Hous. Pres. & Dev.*, 959 F.2d 395, 405 (2d Cir. 1992) ("[D]ue process requires that eligibility for a variety of benefits be processed within a reasonable time . . . . [D]elay in processing can become so unreasonable as to deny due process." (citations omitted)); *Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1990) ("[E]xcessive delay in the appellate process may also rise to the level of a due process violation.").

Nor do the statutory Duty to Assist or the open record appeal process begin to explain the multi-year delays Appellants have faced and continue to face. Neither factor explains, for example, the average delay of *759 days* between a claimant filing a Form 9 and the VA (1) certifying the appeal and then (2) delivering the case to the BVA for

docketing. Here is the simple form,[14] known as the "Form 8," the VA must complete in order to certify and deliver the appeal to the BVA:



Department of Veterans Affairs

CERTIFICATION OF APPEAL

1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN

2. FILE NO.

3. NAME OF APPELLANT (If other than veteran)

4. INSURANCE FILE NO. OR LOAN NO. (If pertinent)

DATES OF PROCEDURAL DOCUMENTS

5A. DATE OF NOTIFICATION OF ACTION APPEALED | 5B. DATE OF SOC | 5C. DATE OF SUBSTANTIVE APPEAL/FORM 9 | 5D. DATE OF SSOC (FIRST) | 5E. DATE OF SSOC (SECOND) | 5F. DATE OF SSOC (THIRD)

6. APPELLANT REPRESENTED IN THIS APPEAL BY (Name of organization, attorney or agent)

7. IF APPLICABLE, WHAT TYPE OF HEARING WAS REQUESTED?

A. DECLINED OPTIONAL BOARD HEARING
B. REQUESTING HEARING BY VIDEOCONFERENCE
C. REQUESTED HEARING IN WASHINGTON, DC
D. REQUESTED HEARING AT A LOCAL VA OFFICE (Travel Board)
E. NO HEARING REQUESTED

8. REMARKS (Place additional remarks in Box 13, on following page)

CERTIFICATION: It is hereby certified that all material evidence is of record, that all contentions advanced by and on behalf of the appellant have been considered under all pertinent laws, and the issues determined.

9. NAME AND LOCATION OF CERTIFYING OFFICE

10. ORGANIZATIONAL ELEMENT CERTIFYING APPEAL

11A. SIGNATURE OF CERTIFYING OFFICIAL | 11B. TITLE | 11C. DATE

12A. SIGNATURE OF MEDICAL MEMBER (Insurance use only) | 12B. TITLE | 12C. DATE

VA FORM SEP 2017 8 SUPERSEDES VA FORM 8, JUNE 2005, WHICH WILL NOT BE USED.

Department of Veterans Affairs

CERTIFICATION OF APPEAL

13. ADDITIONAL REMARKS

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The Secretary never disputes that filling out this form and delivering the case to the BVA are ministerial acts that together take only 2.6 hours to accomplish and yet take the VA on average 759 days—more than *two years*—to do.[15]

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[14] A copy of this certification form is available on the VA's website at https://www.va.gov/vaforms/va/pdf/VA8.pdf.

[15] This two-year delay for a 2.6-hour task stands in stark contrast to the examples of administrative bureaucracy marshaled by the Secretary. Arguing that courts should not intervene to fix delays attributable to mere agency "bureaucracy" resulting from a "burdened (continued...)

The delays do not stop there. Once the BVA dockets an appeal, the BVA's 2015 statistics show that, on average, the BVA takes another nine months to hear the case and render a decision. Opening Br. at 8. But more recent evidence shows that those two-year-old statistics are grossly understated. In August 2017, pursuant to a FOIA request, the BVA released a list stretching over 203 pages that identified 14,400 cases in which hearings had been held but no decision had been issued. *See* Appx1455–1657, BVA Hearings Held as of August 18, 2017 -- No Decision. Those hearings date back to July 2010. *Id.* Even eliminating as aberrations the 13 cases in which hearings were held in 2010 through 2013, this list indicates that what two years ago supposedly

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system," Opp'n at 20–21, 45, the Secretary points to various cases that dealt with delays far shorter than those here and rights of far less significance. For example, *City of Los Angeles* concerned a 27-day delay regarding whether to refund a $145 impoundment fee. *See* Opp'n at 45 (citing *City of Los Angeles v. David*, 538 U.S. 715, 717 (2003)). *Isaacs* concerned a four- to six-month delay in appealing the denial of a one-time Medicare payment. *See* Opp'n at 20 (citing *Isaacs*, 865 F.2d at 477, for the proposition that "certain delays are a 'natural concomitant of our administrative bureaucracy'"). The Secretary's other cases are to the same effect. *See, e.g.*, Opp'n at 20 (citing *Silverman v. Barry*, 845 F.2d 1072, 1084 (D.C. Cir. 1988), which concerned a delay of a few months for a permit to convert an apartment building to a condominium); *id.* (citing *Kuck v. Danaher*, 600 F.3d 159, 163 (2d Cir. 2010), which concerned a 20-month delay in getting a firearm permit).

was a nine-month process now takes three years or more. *See* Opening Br. at 10.

Based on this metric, Mr. Rose, whose hearing occurred in late July 2017, will not have to wait just nine months for a decision—he can expect to wait until at least *July 2020*. Mr. Daniels and Ms. Punt, neither of whom has moved even that far in the process, can expect their appeals to take even longer. And in all three cases, the BVA's decision could result in a remand to the VA to start the process all over again.

Unable to dispute these damning average-delay statistics, the Secretary wrongly criticizes Appellants for using them at all, arguing that they "ignore the particular facts of each case" and are speculative. Opp'n at 12. Those criticisms are misplaced. Appellants have provided the CAVC and this Court with detailed, specific information about the delays they already have suffered. *See* Opening Br. at 13–18. It is only as to future delays that Appellants rely on averages, and this Court approved the use of average delays as a measure of future delay still to be suffered in *Monk v. Shulkin*, 855 F.3d 1312, 1317–18 (Fed. Cir. 2017) (relying on average-delay statistics to conclude that "Mr. Monk . . . will

likely be subject to the same average delay" (emphasis added)). The Secretary's Opposition ignores this aspect of *Monk* altogether.[16] Additionally, Appellants supplemented those statistics with the VA's admissions in the underlying cases that the delays are, in fact, much worse than the averages indicate. *See* Opening Br. at 10–11.

Nor does Appellants' citation of average delays undermine their standing. Appellants are not, as the Secretary contends, seeking to adjudicate the claims of every veteran facing similar delays (*see* Opp'n at 10–11, 25–26), but rather have asked the CAVC—and now ask this Court—for a remedy that addresses the wrongs suffered *by them*, *personally*. Specifically, they ask this Court to vindicate their

[16] While ignoring *Monk*, the Secretary mischaracterizes *Vietnam Veterans of Am. & Veterans of Modern Warfare v. Shinseki*, 599 F.3d 654 (D.C. Cir. 2010). According to the Secretary, that case was "brought by two veterans." Opp'n at 27. That is not true. The *Vietnam Veterans* case was brought by two veterans *associations* that attempted to assert *associational* standing to complain about delay. 599 F.3d at 661–62. Those associations argued that the average delays were illegal, not that a particular delay suffered by any specific member of their association was illegal, and the associations "went out of their way to forswear any individual relief" for their members who provided affidavits about their pending cases. *Id.* As an associational standing case, *Vietnam Veterans* has no bearing here, where the Appellants seek individual relief for particular delays already suffered and rely on average-delay statistics, as this Court did in *Monk*, merely to project the future delays they likely will suffer.

individual constitutional due process rights and to rectify the CAVC's application of the wrong mandamus legal standard (the *Costanza* standard) in their cases. Those issues are expressly within the CAVC's and this Court's jurisdiction as determined by Congress, *see* 38 U.S.C. §§ 7252, 7261, 7292(d), and such relief is plainly warranted.

CONCLUSION

The VA's delays already have violated Appellants' due process rights, and the delays Appellants face going forward only exacerbate those violations. The CAVC never reached the due process issue because it applied an unfair and improper threshold mandamus standard that is contrary to settled All Writs Act jurisprudence as well as the CAVC's statutory mandate. The Court should enter an order finding that the VA has violated these Appellants' due process rights and/or directing the CAVC to apply the *TRAC* factors to evaluate Appellants' mandamus petitions.

Respectfully submitted,

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December 11, 2017

CERTIFICATE OF COMPLIANCE

I certify that this paper complies with the type-volume limitation of Fed. Cir. R. 8(b)(1) because it contains 5,747 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This paper complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point, proportionally spaced typeface using Microsoft Word.

December 11, 2017

/s/ *John A. Chandler*
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CERTIFICATE OF SERVICE

I certify that on December 11, 2017, I caused the foregoing to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record.

December 11, 2017

/s/ *John A. Chandler*
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