No. 20-1305

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CONLEY F. MONK, JR., TOM COYNE, WILLIAM DOLPHIN, JIMMIE HUDSON, SAMUEL MERRICK, LYLE OBIE, STANLEY STOKES,

Claimants-Appellants,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the U.S. Court of Appeals for Veterans Claims in Case No. 15-1280, Chief Judge Robert N. Davis, Judge Joseph L. Falvey, Judge Amanda L. Meredith, Judge Coral Wong Pietsch, Judge Joseph L. Toth, Judge Margaret C. Bartley, Judge Mary J. Schoelen, Judge Michael P. Allen, and, Judge William S. Greenberg.

CORRECTED UNOPPOSED BRIEF AND ADDENDUM OF AMICUS CURIAE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM IN SUPPORT OF APPELLANTS CONLEY MONK, Jr, JAMES BRIGGS, TOM COYNE, WILLIAM DOLPHIN, JIMMIE HUDSON, SAMUEL MERRICK, LYLE OBIE, STANLEY STOKES, and WILLIAM JEROME WOOD, II SUPPORTING REVERSAL

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CERTIFICATE OF INTEREST

FORM 9. Certificate of Interest **Form 9 Rev. 10/17**

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Monk v. Wilkie

Case No. 20-1305

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

Angela K. Drake

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
National Law School Veterans Clinic Consortium	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Monk v. Wilkie, No. 15-1280, United States Court of Appeals for Veterans Claims,

Monk v. Wilkie, No. 19-1094, United States Court of Appeals for the Federal Circuit.

3/16/2020
Date

/s/ Angela K. Drake
Signature of counsel

Please Note: All questions must be answered

Angela K. Drake
Printed name of counsel

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IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

The National Law School Veterans Clinic Consortium ("**NLSVCC**") submits this brief in support of the position of the Appellants, Conley Monk, Jr., James Briggs, Tom Coyne, William Dolphin, Jimmie Hudson, Samuel Merrick, Lyle Obie, Stanley Stokes, and William Jerome Wood, II. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.[1]

The NLSVCC is a collaborative effort of the nation's law school legal clinics and pro bono attorneys dedicated to addressing the unique legal needs of veterans on a pro bono basis. The Consortium's mission is to work with like-minded stakeholders to gain support and advance common interests with the VA, Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans.

Members of the NLSVCC work on a daily basis with veterans, advocating their claims in the backlogged VA disability system. Clients in the member clinics have suffered financially and died while waiting for a VA decision. Therefore, the

[1]This brief's author is identified above on the cover page; no party or party's counsel, or any other person, paid money relating to the filing of this brief. The NLSVCC wishes to thank and acknowledge attorney Ryan Redmon at the University of Missouri School of Law ("MU School of Law") for his research assistance. In addition, MU School of Law Veterans Clinic students Justin Brickey, Nathan Carroll, and Yao Li were instrumental in drafting this brief and preparing the Addendum.

NLSVCC is highly interested in seeing systemic change occur so that benefits are more quickly paid.

Counsel for Appellants and Counsel for the Secretary of the Department of Veterans Affairs consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court's decision in *Martin v. O'Rourke* established a broad and favorable standard for veterans claiming unreasonable delay. Many advocates hoped the decision would provide veterans with an effective tool to compel VA action where it has been inexcusably delayed. However, veterans seeking a writ due to unreasonable delay since *Martin* have not received relief. Their petitions were denied in every case, save one. What should have been a wave of veterans receiving assistance was not even a ripple.

Presented below is an analysis of the post-*Martin* cases in which the CAVC addressed unreasonable delay under the *TRAC* standard. The CAVC denied the requested writs in at least 100 cases. In many of these denials, VA successfully evaded judicial review by taking minimal ministerial action. The CAVC's rote denials harm veterans—many of whom are unrepresented—by failing to hold the VA accountable. If even experienced advocates cannot use writs to compel action in cases of extreme delay, unrepresented veterans are left with no recourse whatsoever.

This brief then discusses the CAVC's misinterpretation of the *TRAC* factors by reference to the *TRAC* analysis adopted by this Court and applied in other federal agency contexts. We conclude with a discussion of the harsh realities resulting from delays in the VA adjudication system.

ARGUMENT

The *Monk* litigation is a putative class action asserted by veterans who suffered from unreasonable delay in VA's disability benefits system.[2] In this segment of the litigation, the Appellants seek reversal of the Court of Appeals for Veterans Claims ("**CAVC**") dismissal of their petition for a writ of mandamus.

The CAVC historically used the standard first articulated in *Costanza v. West*[3] to measure the reasonableness of the VA's administrative delay. The *Costanza* standard required the veteran to demonstrate the alleged delay was so extraordinary that it was the equivalent to the Secretary's arbitrary refusal to act. 12 Vet. App. at 135-36.

In *Martin v. O'Rourke*,[4] the *Costanza* standard was challenged. This Court found the CAVC's *Costanza* standard was wrong and must be replaced with the test announced in *Telecommunications Research & Action Center v. FCC* (*"**TRAC**"*).[5]

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[2] In *Monk v. McDonald,* 2015 WL 3407451 (Ct. Vet. App. May 27, 2015) (*Monk I*), the CAVC denied the portion of the petition that sought class certification because it felt it did not have the power to certify classes. In *Monk v. Shulki*n, 855 F.3d 1312 (Fed. Cir. 2017) (*Monk II*), this court addressed the propriety of the class action device in veterans' benefits cases and found that the CAVC does indeed have jurisdiction to entertain class actions. On remand from this court, the CAVC declined to certify the class. *See Monk v. Wilkie*, 30 Vet. App. 167 (2018) (*Monk III*). This decision is on appeal in this court as Case No. 19-1094. The CAVC later dismissed the claims of the class representatives, *Monk v. Wilkie*, 32 Vet. App. 87 (2019) (*Monk IV*), bringing us to this appeal.

[3] 12 Vet. App. 133 (Ct. Vet. App. 1999).

[4] 891 F.3d 1338 (Fed. Cir. 2018).

[5] 750 F.2d 70 (D.C. Cir. 1984).

The multi-factor *TRAC* test is set out in the Appellants' brief and is not repeated here. The *TRAC* standard was meant to provide an effective way to compel action unreasonably delayed for veterans languishing in the VA appellate system. Our analysis demonstrates the CAVC's application of *TRAC* provides little or no additional relief than was available under *Constanza*.

I. Post *Martin*, Veterans Have Been Unable to Secure Relief for Unreasonable Delay

Since *Martin* was decided on June 7, 2018, the CAVC has granted a writ in only one case alleging unreasonable delay and denied writs at least 100 others.[6] The Addendum to this brief reflects the results of research into the CAVC's *TRAC* analysis, and provides the historical and contextual record for the issues raised in Appellants' Brief, beyond the individual Appellants' experiences. It serves as the foundation for the argument that the CAVC's misinterpretation of *TRAC* hurts veterans, contrary to this Court's intent to provide a "more balanced" standard, which requires consideration of veterans' interests. *Martin*, 891 F.3d at 1345 .

[6] See Addendum. This court has expressed its reluctance to rely on aggregated statistics when it comes to the delays in VA benefits cases because of the individualized nature of veterans' disability claims. *See Martin*, 891 F.3d at 1346 n. 10 ("With respect to Appellants' reliance on statistics regarding average delays… reliance on such statistics is merely speculative. Each mandamus petition should be based on the facts of that particular case.") However, the results presented in the Addendum do not address average delays in VA benefits cases. Rather, the results reflected in the chart represent the trend of highly disproportionate writ denials produced under CAVC's current approach to the *TRAC* analysis.

A. An Analysis of 100 Post-*Martin* CAVC Cases Reveals Veterans Are Afforded No Meaningful Relief After Years of Waiting for Benefits.

As fully reflected in the Addendum, for the time period June 7, 2018 through February 28, 2020, veterans petitioned the CAVC for writs of mandamus to address delay at least 100 times.[7] The petitions were denied in every case, save one. The exception, *Godsey v. Wilkie*, involved a putative class action brought by veterans whose cases had all been waiting two years or more for a single step in the appeals process known as "certification," a ministerial act following the timely filing of a Substantive Appeal to the Board of Veterans' Appeals. 31 Vet. App. 207 (2019). This Court in *Martin* highlighted certification as a particularly problematic step in the appeals process.[8] In this sole case, the CAVC found that petitioners demonstrated a clear and indisputable right to the writ of mandamus, and certified a class action. All other writs based upon unreasonable delay were denied.

[7] The Addendum only addresses those cases in which the CAVC cited *TRAC* factors. Other writs were denied, apart from the *TRAC* analysis and other writs, apart from those based upon delay, were filed.

[8] In her *Martin* concurrence, Judge Moore discussed the delays in the certification process which were ultimately held unreasonable in *Godsey*. *See Martin*, 891 F.3d at 1349-50 (Moore, concurring) ("[Certification of an appeal] is s a ministerial process that involves checking that the file is correct and complete and completing a two-page form which could take no more than a few minutes to fill out… Once the appeal has been certified (the two-page form which takes the VA on average 773 days to complete), a veteran must wait, on average, another 321 days for the appeal to be docketed by the Board.").

The CAVC opinions addressing *TRAC* follow a strikingly formulaic pattern. [9] In many cases, it appears the CAVC is engaging in rote application of *TRAC*, resulting in little more than a cursory analysis. For example, in *Howard v. Wilkie*, 2019 WL 5700582 (Ct. Vet. App. Nov. 5, 2019), *Casper v. Wilkie*, 2019 WL 5073585 (Ct. Vet. App. Oct. 10, 2019), and *Carter v. Wilkie*, 2019 WL 3333108 (Ct. Vet. App. Jul. 25, 2019), the CAVC uses surprisingly similar language in the analysis portion of each decision. In each case, the veteran petitioners had experienced delays longer than one year. In its analyses, the CAVC accepted that any action taken by the VA after the veteran files a petition for a writ weighs in favor of the VA (and in favor of denying the petition).[10] The CAVC's analysis for factors one and two often contains

[9] To be sure, sometimes a writ should not be granted. *See, e.g.*, *Rogers v. Wilkie*, 2019 WL 3225725 (Ct. Vet. App. Jul. 18, 2019) (denying petition where veteran experienced a three-month delay following Board remand). However, the overall denial rate, and the fact that only one writ has been granted, reflects that the more "balanced approach" which keeps veterans' interests in mind, as articulated in *Martin*, is not a reality.

[10] "Although VA delayed acting on Mr. Howard's claim until *September 2019*, the alleged delay is not a situation of 'complete inaction by the VA,' which the Federal Circuit explicitly contrasted against delays 'due in part to the VA's statutory duty to assist,' which at this point is what is delaying further adjudication of Mr. Howard's claim." *Howard*, 2019 WL 5700582 at 2 (emphasis added) (Mr. Howard filed his petition on *July 22, 2019*); "Some of the delay that Mr. Carter has experienced is because of VA's compliance with its legal duties, including its duty to develop the evidence needed to adjudicate issues reasonably raised on appeal." *Carter v. Wilkie*, 2019 WL 3333108 (Mr. Carter's appeal had remained unadjudicated for approximately seven years. The court explained "[t]he Secretary's response indicates that since October 3, 2018, VA has been associating medical records with the petitioner's claims file. The Secretary's response also states that VA sent the petitioner a notification letter on *September 16, 2019*,

only a few (sometimes less) truly unique sentences.[11] While factors three and five are almost always counted as weighing in favor of the veteran, no true analysis are conducted.[12] The CAVC is routinely deferential to the alleged strain on VA resources under factor four. However, the CAVC's cursory analyses allow the VA to continue its inefficient administration of appeals and essentially condones line jumping by accepting any VA action, however minimal, after the veteran files a petition.

In *Martin,* this Court recognized the first factor, the "rule of reason," was considered to be the most important factor in some circuits, but also quoted a Ninth Circuit case which stated, "*the first factor, like the other factors, is not itself determinative.*" *Martin*, 891 F.3d at 1345 (quoting *In re A Cmty. Voice*, 878 F.3d at 786 (9th Cir. 2017)) (emphasis added). Notwithstanding this holding, of the 100

informing him of the recent action to schedule a medical examination."); *Casper v. Wilkie*, 2019 WL 5073585 at *2 (emphasis added) [Mr. Casper filed his petition on *August 22, 2019*.]

[11] *See, e.g.*, *Schuss v. Wilkie*, 2019 WL 5700899 (Ct. Vet. App. Nov. 5, 2019)

[12] *See, e.g.*, *Sabir v. Wilkie*, 2018 WL 5096172 (Ct. Vet. App. Oct. 18, 2018) (noting that factors three and five "weigh" in favor of the veteran, without mentioning that the pro se veteran asserted the writ was his "only alternative to suicide and homelessness again and separation from my family.") See July 31, 2018 entry in CAVC Case No. 18-3606. As another example, *Curry v. Wilkie*, 2019 WL 6883840 (Ct. Vet. App. Dec. 18, 2019) and *Salter v. Wilkie*, 2019 WL 6483295 (Ct. Vet. App. Dec. 3, 2019) use identical boilerplate in discussing these factors.

CAVC denials in the Addendum, many cases were denied based upon the first factor—the "rule of reason"—without further discussion.

Undoubtably, the *TRAC* standard has five other factors. Factor two (the "timetable" factor), is said to be closely related to factor one, and therefore, the CAVC analyses often follow suit with their factor one analysis: in the majority of cases where the CAVC denied the petition for a writ of mandamus based on *TRAC*, the court found factors one, two and four all weighed against the granting of writ. Nearly all cases discussing factors three and five found that these two factors weighed in favor of the veteran. Although factor six (no need for impropriety) is often treated as a wash, providing no weight to either 'side,' few cases analyzed all six factors in reaching the decision to deny the writ.[13]

The CAVC's rote application of the *TRAC* analysis is inconsistent with this Court's holding in *Martin* and inconsistent with *TRAC* precedent arising from other agency contexts, as described more fully in Section II below.

B. VA Evades Judicial Review by Taking Some Action, However Minimal.

There is another important pattern in these denials: strategic mooting of veterans' cases as first identified in *Ebanks v. Shulkin*, 877 F.3d 1037 (Fed. Cir. 2017). In many of the 100 cases, and sometimes within weeks of filing the petition,

[13] *See* Addendum

the VA took action to schedule an exam, or otherwise act upon requests made in a writ petition.[14] For example, in *Lawson v. Wilkie*, 2020 WL 690657 (Ct. Vet. App. Feb. 12, 2020), the veteran filed a writ after waiting five years for a decision on his Notice of Disagreement submitted in February of 2015. The veteran asked the CAVC to order the VA to conduct an informal telephonic hearing. During the time period allotted to the Secretary to respond to the writ, the telephonic hearing occurred. The CAVC therefore dismissed the matter.

Short of mooting the requested the relief as in *Lawson* and other cases, the CAVC also favorably considers post-petition action by the VA in determining whether the delay is unreasonable under factor one.[15] For example, in *Yount v. Wilkie*, the Veteran filed his petition seeking an order directing the VA to issue a Rating Decision after it failed to schedule an exam within 18 months of his DRO hearing. 2019 WL 6622851 at *1 (Vet. App. Dec. 6, 2019). This petition was filed October 8, 2019. *Id*. On November 5, 2019, VA requested the veteran be scheduled for the exam. On December 6, 2019, the CAVC denied the petition, quoting the *TRAC* factors. *Id*. at *2-3. The CAVC noted the VA's post-petition request for the

[14] *See, e.g.*, *Tice v. Wilkie*, 2019 WL 2439070 (Vet. App. Jun. 12, 2019) (Board issued a decision approximately one month after Mrs. Tice file her petition); *Smith v. Wilkie*, 2018 WL 4444985 (Sep. 18, 2018) (VA issued a SSOC roughly four weeks after Mr. Smith filed his petition).
[15] *See supra* note 14.

exam as reasonable action by the agency. *Id*. at 2. VA's writ response strategy, however, does not always escape admonition, as shown in *Pough v. Wilkie*: [16]

> "So, to make the point entirely clear, after having done nothing for more than 3 years – that's over 1,095 days – VA was able to take the actions to which petitioner was entitled within 8 days of his filing his petition in this Court!"

Yet, the denial of writs occurs time and again. Why does this matter? It is simply not equitable or right as explained in the next section.

C. The CAVC's Denial of Writs Harms Veterans, Many of Whom Are Unrepresented and Benefit When Unreasonable Delays are Addressed by the Judiciary.

The sole case in which a writ was granted, *Godsey*, arose after this Court highlighted the ludicrous delay associated with the certification step in the appeals process. In her concurrence to *Martin*, Judge Moore explained that "certification" took 773 days and found the government had no explanation as to why the ministerial act took years. Her observation surely fueled the advocates in *Godsey*, who successfully secured a writ and class certification before the CAVC. As a result of the *Godsey* decision, countless veterans suffering from unnecessary systemic delay (and those who would suffer in the future) have now been helped.

One cannot overstate the beneficence arising from the proper application of a sound *TRAC* analysis. As a necessary corollary, the CAVC's unwillingness to grant

[16] 2018 WL 3694987 (Ct. Vet. App. Aug. 3, 2018).

writs stacks the odds against veterans seeking relief—many of whom have little or no access to counsel who know to file a writ in the first place. Writs of mandamus are supposed to be attainable for veterans, yet given the CAVC's misinterpretation of the *TRAC* factors, writs are nearly unattainable even for the few veterans with access to counsel.

BVA statistics demonstrate that many veterans are not represented by counsel and likely have no idea that a writ is even a viable option in the pro-veteran non-adversarial system. According to the Chairman of the Board of Veterans Appeals ("**BVA**"), the BVA expects 156,844 appeals to be filed in 2020, almost double the number from 2019. Department of Veterans Affairs, Board of Veterans' Appeals, Annual Report: Fiscal Year 2019 at 24. However, only approximately twenty-three percent of the veterans in the 2019 appeals were represented by an attorney. *Id*. at 32. Further, twelve percent of veterans proceeded completely on their own without the help of anyone. *Id*.

While it may well be presumed a competent lawyer knows about writs and is willing to file the petition for a writ when appropriate, legally unsophisticated veterans have no reason to know the option even exists. Compounding the matter, veterans in the VA benefits system seek compensation because they have some level of disability. A veteran's disability could affect his or her physical abilities, such as an amputation, or it could affect his or her mental capability, like symptoms arising

from traumatic brain injury. Expecting veterans suffering under these serious disabilities to possess the capacity to file petitions for a writ in order to compel the VA to do what it should have done anyway is directly counter to the purpose of the pro-veteran VA disability benefits system. All this is to say that a veteran should not be forced to file a writ before the VA will act on their claim.

The VA's reluctance to recognize systemic unreasonable delays in its administration, coupled with its strategic mooting of veterans' claims after a writ is filed, hurts veterans as a whole. Strategic mooting by post-writ action provides relief only to those veterans represented by savvy counsel, while other veterans must simply wait while systemic failures continue. For those fortunate enough to have counsel, the CAVC's current practice of accepting post-writ action and strategic mooting essentially condones the abhorrent 'line jumping,' which all agree is inequitable.

II. Post-*Martin* CAVC Unreasonable Delay Decisions Misinterpret the *TRAC* Analysis in Light of *TRAC*'s History and Application in other Agency Contexts

Appellants' brief describes the CAVC's misapplication of the *TRAC* factors in the veterans' benefits context, specifically regarding the Appellants' individual cases. As discussed below, the CAVC's analysis cannot be squared with the proper application of *TRAC* factors in light of the history of the *TRAC* standard and its application in other agency settings apart from VA.

In the long line of *TRAC* jurisprudence, no agency has received a more favorable application of the *TRAC* analysis than that which the CAVC consistently applies to the VA's delay. The CAVC's approach to the *TRAC* analysis has been so unfavorable to veterans that it has resulted in the issuance of a writ of mandamus in only one case since the *TRAC* standard was adopted as fully described above.[17]

The *TRAC* analysis emerged as a combination of factors providing a standard for evaluating petitions for writs of mandamus based on unreasonably delayed agency action. *See* 750 F.2d at 80. In *TRAC*, the D.C. Circuit described its analysis as "the hexagonal contours of a standard" but did not attempt to explain the relationship between the factors or their relative importance. *Id*.

A. The Holding in *Martin* Does Not Allow for the Rote Application of TRAC Factors

In abandoning the *Costanza* standard and adopting *TRAC*, this Court made plain that each of the six *TRAC* factors are "relevant." *Martin*, 891 F.3d at 1345. The court explicitly stated that each case must be analyzed based on its circumstances, and that the factors are a "starting point" for the analysis. *Id.*

As a result, no single factor is determinative, and each factor must be accounted for in the analysis. The factors cannot be considered in a disjunctive manner; rather, the entire "hexagonal" perimeter should be covered. However, a

[17] *See* Addendum.

review of CAVC opinions denying writs, as highlighted above, demonstrates the CAVC treats the *TRAC* factors as if they function in isolation, each one with a separate weight on a metaphorical scale, with some not even considered. *Martin* does not contemplate such an approach.

This Court's discussion of the *TRAC* factors in *Martin* describes a holistic approach where each factor informs a total analysis of whether delay in a particular case is reasonable. The *TRAC* factors act as guideposts for conducting a complete and comprehensive analysis; they are not independent variables meant to be entered into a formalistic equation. In *Martin*, this Court adopted the *TRAC* analysis as the proper standard because it "provides a more balanced approach" to the consideration of the interests of veterans against those of the VA. *See Martin*, 891 F.3d at 1345. As a result, a robust and complete analysis is required.

B. TRAC Precedent in Other Agency Settings Does Not Support the CAVC's Decision in this Case

Notably, the D .C. Circuit drew the *TRAC* factors from administrative law precedents involving an array of federal agencies. *Id*. The *TRAC* analysis's diverse origins and flexible nature provide a consistent framework to evaluate the reasonableness of an agency's delay. *Martin* supplies the starting point from which the CAVC should perform the *TRAC* analysis. However, *Martin* is the only occasion in which this Court has provided guidance on the proper application of the *TRAC* analysis in the VA context to date. Thus, *TRAC* analyses in other agency contexts

supply the best alternative authority to ascertain the propriety of the CAVC's application of the *TRAC* analysis. An examination of the CAVC's approach to the *TRAC* analysis reveals significant inconsistencies with *TRAC* precedent from other agency contexts. In turn, the CAVC's misinterpretation of *TRAC* degrades its reputedly balanced approach, reducing or eliminating its desired effect.

Those factors often leading to the CAVC's denial of the writ – factors one, two and four – are discussed below in light of *TRAC* decisions in other agency contexts.

1. First Factor

Under *Martin*, the first factor analysis should consider whether the VA's delayed action is complex and substantive or "purely ministerial." *Id*. at 1345-46. The CAVC may "consider whether the delays… are based on complete inaction by the VA, or… the delays are due in part to the VA's statutory duty to assist…" *Id*. at 1346. Additionally, the first and second factors are closely related, and the latter factor may "supply content" to the former. *Id*. (quoting *TRAC*, 750 F.3d at 80). *Martin* acknowledged that "[a]lthough no congressional timetable for handling these benefits claims currently exists… the statutory construction requires that cases on remand receive expedited treatment." *Id*. (citing 38 U.S.C. §§ 5109B, 7112).

While this Court mentioned some circuits consider the first factor to be the most important, "it is not *determinative.*" 891 F.3d at 1345 (citing *In re A Cmty. Voice*, 878 F.3d at 786 (9th Cir. 2017)) (emphasis added). The unique pro-claimant nature of VA disability benefits system and the VA's duty to assist require a stricter rule of reason analysis, not a more lenient one. Acknowledging the VA's strained resources, often without a fully developed record, cannot serve as *carte blanche* for a finding of "reasonable" VA action. This Court highlighted the VA's delay in ministerial tasks in *Martin*, setting the stage for the grant of class certification in *Godsey*. But is ordering a medical examination, as in *Yount*, so substantially more complicated that it justifies multi-year delays? Under the CAVC's analysis, the length of time for *any* action is seemingly reasonable so long as there is an action. At the very least, the unique attributes of the VA disability benefits system should make the third and fifth factors of the *TRAC* analysis of enhanced relative importance when compared to factors one and two.

While there is no "per se rule" addressing what amount of time constitutes an unreasonable delay, generally speaking, a "reasonable time for agency action is typically counted in weeks or months, ***not years***." *In re American Rivers and Idaho Rivers United*, 372 F.3d at 419 (D.C. Cir. 2004) (citing *MCI Telecomms. Corp. v. FCC*, 627 F.2d at 340 (D.C. Cir. 1980) In contravention of *TRAC* precedent, the CAVC has routinely held relatively simple (or negligent) acts resulting in delayed

VA action insufficient to warrant issuance of a writ of mandamus. *See Bankston v. Wilkie*, 2018 WL 4770887 (Ct. Vet. App. Oct. 2, 2018) (misplacement of the veteran's file by the VA did not require issuance of the writ); *Randolph v. Wilkie*, 2018 WL 4354559 (Ct. Vet. App. Sep. 12, 2018) (processing a NOD was not a ministerial act even though part of the delay was due to failures in communication on the part of the VA).

The CAVC's approach to the first factor, exemplified in *Bankston* and *Randolph*, seems to imply that only complete inaction is unreasonable. Such an approach is inconsistent with *TRAC* precedent in other agency contexts and deprives the *TRAC* analysis of its intended effect. For example, in *In re Core Communications, Inc*., the court found the FCC's delay unreasonable where it had taken only minimal, formalistic steps towards addressing the petitioner's request to explain the justification for its common carrier rules. 531 F.3d at 856-57. However, the CAVC's first factor analyses indicate that delay will be found reasonable so long as the VA has taken *any* steps towards an action, even if those steps are ministerial, are negligently performed, or result in even more delay.

2. Second Factor

The CAVC's interpretation of the second factor suffers serious flaws as well. A lack of a Congressionally mandated timetable does not grant the agency unlimited time to act. *See Kashkool v. Chertoff*, 553 F.Supp.2d 1131 (D. Arizona 2007) (citing

Chen v. Chertoff, 2007 WL 2570243 (W.D. Wash. 2007)). *Kashkool*, notes that where Congress expressed an intent for the agency to perform an action as quickly as possible, the agency must show that they are making their best efforts to meet that standard. *Id*. at 1145-46. Congress expressed just such an intent in the recent Veteran Appeals Improvement and Modernization Act, which unambiguously communicated Congress's expectation that the VA act expeditiously in the developing claims and adjudicating appeals. *See generally* Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (Aug. 23, 2017)

However, the CAVC repeatedly holds delays in the development of a veteran's claim reasonable so long as the VA asserts that the delay is in any way related to the VA's duty to assist. *See, e.g., Yount v. Wilkie*, 2019 WL 6622851 (Ct. Vet. App. Dec. 6, 2019) (the duty to assist justified a delay of more than 1.5 years following appeal of denial of service-connection for PTSD); *Martin v. Wilkie*, 2019 WL 2307493 (Ct. Vet. App. May 31, 2019) (finding the duty to assist justified a 3.5-year delay in response to the veteran's NOD). While the duty to assist may justify delay in the development of some claims, it cannot justify all delays and serve as the panacea for all writs.

3. Fourth Factor

In applying its fourth factor analysis, the CAVC automatically assumes that the fourth factor always weighs in favor of the VA, apparently because processing any claim is a burden on the VA's resources. *See, e.g.*, *Gonzalez v. Wilkie*, 2018 WL 5255167 (Vet. App. Oct. 22, 2018). However, other courts applying the *TRAC* analysis assert that the burden is on the agency to show the impact of an agency's limited resources in resolving the delay. *See Muwekma Tribe v. Babbitt*, 133 F.Supp.2d 30, 40 (D.D.C. 2000); *Doe v. Risch*, 398 F. Supp.3d 647, 558 (N.D. Cal. 2019).

The CAVC seemingly assumes this fourth factor always weighs in favor of the VA without requiring the VA to demonstrate how acting more expeditiously would be burdensome. By the CAVC's logic, the fourth factor is always inconsequential because any agency action necessarily requires the expenditure of resources.

The Secretary's responses to writs (when ordered) appear to routinely cite *Ebanks* for the proposition that line jumping will occur via the writ process, and the Administrative Procedures Act is not designed to allow veterans to end run administrative appeals. *See* Secretary's Responses in *Hall v. Wilkie*, 2018 WL 5701854 (Ct. Vet. App. Nov. 5, 2018) [CAVC Case No. 18-3384] and *Totzke v. Wilkie*, 2018 WL 5316462 (Ct. Vet. App. Oct. 29, 2018) [CAVC Case No. 18-5396].

These responses are ironic given that *Ebanks*'s rationale is that class actions should be certified in cases of unreasonable delay, because of line jumping. 877 F.3d at 1040.

Given that the Secretary's business is one of adjudicating claims, a more robust analysis should be provided by the Secretary and assimilated by the CAVC. Merely because there are many veterans with many claims is not a sufficient rationale to excuse delay, especially in light of the Chairman of the Board's recent explanation in the 2019 Annual Report. There, the Chairman announces that "the Board doubled its personnel strength during the past several years...[attracting] talented employees." Department of Veterans Affairs, Board of Veterans' Appeals, Annual Report: Fiscal Year 2019 at 13. A robust response to factor four from the Secretary would, at a minimum, identify those areas in the adjudicative process where quick systemic improvements could be made, as in *Godsey,* and likely lead to the grants of many more writs which may assist many more veterans, as the class action in *Godsey* did.

III. The VA's Unreasonable Delay Causes Veterans Substantial Harm

Other Amicus Curiae have provided testimonials relating the harm to individual veterans from VA's "sluggish" adjudicatory process, "discordant from

the accuracy one would expect from an agency devoted to veterans."[18] Below we highlight studies describing these effects, as well as the experience of a client of the University of Missouri Veterans Clinic, Doyle Shields, who honorably served in the United States Marine Corps.

A. Studies on the Effects of Delaying Veterans' Disability Benefits

Delays in the appeals process can result in disabled veterans "being re-traumatized by an overburdened and dysfunctional benefits system." Leo Shane III, *Watchdog Report: The VA Benefits Backlog is Higher Than Officials Say*, Military Times (Sept. 10, 2018). The effects of that re-traumatization have been wide-ranging and, in many cases, devastating to the veterans involved. As this Court has acknowledged, "many veterans depend on [their] disability benefits for basic necessities, such as food, clothing, housing, and medical care." *Martin*, 891 F.3d at 1347. It follows, then, that unreasonably lengthy delays in the processing of disability appeals can prejudice veterans in myriad ways. This is particularly problematic given that BVA anticipates the number of appeals in 2020 to nearly double.[19]

[18] *See Sabir*, 2018 WL 5096172, *supra* note 12, (denying the petition for a writ of mandamus).

[19] The report indicates that the BVA expects to receive 156,844 appeals this year, in contrast to 2019 when the BVA actually received 78,344. And in terms of legacy appeals only, the BVA is estimating 75,062 versus 54,737 in 2019.

Such delays threaten to deny veterans and their loved ones their benefits altogether, as many veterans die while they await a decision. A report by the Inspector General found that one in fourteen veterans dies while awaiting a decision on his or her disability claim appeal. Department of Veterans Affairs Office of the Inspector General, *Veterans Benefits Administration, Review of the Timeliness of the Appeals Process* at 12 (Mar. 28, 2018).

Experts have linked the growing problem of veteran suicide to the long wait periods that veterans must endure for their disability appeals to be resolved. Mark Lancaster, *Fixing the Appeals Process at the Department of Veterans Affairs*, UCLA Luskin School of Public Affairs Applied Policy Project at 8 (May 5, 2014). Such delays have also contributed to the growing problem of veteran homelessness. *Id*.

Even for those veterans who avoid the direst of outcomes, such as homelessness and death, these lengthy delays exact a significant human toll. For applicants who are eventually awarded disability benefits, having to wait a year or more for a decision "creates needless anxiety and financial insecurity." Jack Smalligan, *Improving the Social Security Disability Determination Process*, Washington, DC: Urban Institute (2019). For applicants who are eventually denied,

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Department of Veterans Affairs, Board of Veterans' Appeals, Annual Report: Fiscal Year 2019 at 24, 28.

the time waiting for a decision and not pursuing employment "can cause skills to erode," making it more difficult for those applicants to return to work. *Id*.

B. Testimonial from an NLSVCC Client, Doyle Shields

The NLSVCC witnesses the effects of unreasonable delay in disability compensation benefits firsthand. While empirical studies supply objective support for the effects of unreasonable delay in the VA disability system, they do not serve as a substitute for descriptions of the experiences of actual veterans. Our clients' experiences paint a vivid picture of the hardships faced by deserving veterans when seeking what they are rightfully owed by the country they served.

Doyle Shields served in the United States Marine Corps from December 1974 to December 1976 and again from May 1981 to May 1984. He was stationed at Camp Lejeune at a time when toxic chemicals made their way into the water supply.

Mr. Shields was honorably discharged from the Marine Corps and pursued a career in law enforcement as so many veterans do. In 2000, Mr. Shields was diagnosed with scleroderma, a rare autoimmune rheumatic disease associated with symptoms such tightening of the skin, joint pain, exaggerated response to cold, and heartburn. His symptoms worsened, forcing his retirement in 2012 because the debilitated state of his hands and wrists kept him from safely handling his service firearm.

Mr. Shields did not realize at the time of his diagnosis that his condition was related to his service at Camp Lejeune. Eventually he received a notice from the Marine Corps instructing him to report to VA clinic if he suffered from anything on a specified list of conditions, one of which was scleroderma. It was later revealed that the VA suspected that the water supply at Camp Lejeune was contaminated by harmful chemicals and that scleroderma was a condition associated with exposure to Camp Lejeune's contaminated water. In late 2009, he filed a disability compensation claim with the VA. His claim was denied in March 2010 and he timely filed his Notice of Disagreement in May 2010.

Over the next five years, Mr. Shields engaged in the arduous process of presenting expert medical opinions that his condition was related to his service, including one from his VA treating physician. However, as is often the case, the lethargic pace of the VA adjudicatory system did not yield a new decision until September 2015, nearly six years after Mr. Shields filed his initial claim.

Unfortunately for Mr. Shields, six years proved longer than his financial resources could support. After losing his job in 2012, Mr. Shields was forced to sell his house, as he could no longer afford the mortgage payments, and move in with his children. Mr. Shields could not afford a car and relied on his children for transportation and other basic needs. Mr. Shields was entitled to the benefits

eventually awarded to him and he was entitled to have them before his independence was destroyed.

Mr. Shields's case is not unique, nor is it the worst outcome of the VA's failure to process disability claims in a reasonable amount of time as reflected in the studies cites above. Mr. Shields was fortunate to have a supportive family when he lost his job due to his service-connected disability. Tragically, not all veterans are so fortunate, and many endure hardships much worse than those suffered by Mr. Shields. Without a writ process that is truly balanced, and a directive from this Court to weigh *TRAC* factors properly, more and more veterans like Mr. Shields will be irreparably harmed by systemic delay.

IV. Conclusion

For the foregoing reasons, the NLSVCC respectfully requests that the Court hold that the CAVC misinterpreted the TRAC standards as set forth above and reverse and remand the decision of the lower court.

Respectfully Submitted

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ADDENDUM

Citation	Facts	Relief/Application of TRAC	Reason for denial
Abdul-Aziz v. Wilkie, 2018 WL 4334220	It had been four years since veteran filed a NOD. He filed a writ asking the Court to compel the RO to decide his claim.	Before filing the writ, the veteran asked for a status update but failed to mention all pending appeals in his request. Court held he had failed to exhaust all administrative remedies.	Failure to exhaust all administrative remedies.
Abdul-Aziz v. Wilkie, 2019 WL 1523470	Submitted six inquiries between Sep.2018 and Oct. 2018; filed pet. For writ in Mar. 2019	DENIED. No legal or factual analysis under TRAC. Denied for the same reasons as his earlier petition. (See above).	Veteran relied on wrong standard.
Adamson v. Wilkie, 2018 WL 3689498	Veteran filed petition for writ after the Board had failed to take action following a remand from the CAVC. Approximately 260 days had passed.	DENIED. The court found the first factor weighed against granting a writ because developing the case was not a ministerial act and the VA had acted reasonably. The court followed the pattern on the rest: three and five weighed in veteran's favor but two and four	Factors 1, 2, and 4.

Addicks v. Wilkie, 2019 WL 438996	Nearly 2-year delay following Board remand. Petitioner was incarcerated, furthering delay	DENIED (with leave to supplement petition). VA had been actively developing the claim. Delay was in part due to duty to assist.	VA actively developing the claim. Delay was at least partially caused by Petitioner's incarceration Factors 1, 4 and 6.
Babb v. Wilkie, 2019 WL 4383989	Not clear from the opinion how long veteran's claim has been before the VA. However, the latest Board remand was only a few months before he filed a petition for writ.	DENIED. Court finds the delay is not so egregious as to warrant mandamus; notes also that the absence of impropriety weighs against writ under Factor 6.	Factor 1 and 6.
Bankston v. Wilkie, 2018 WL 4770887	Veteran filed a writ seeking the Court to compel an immediate rating decision and additional claim development. Court ordered a response from the VA 12 days later. The VA responded 11 days after the order saying it HAD LOST THE FILE.	DENIED. No application of TRAC/Martin. Found relief was not warranted because the VA has expedited redevelopment of the file.	VA expedited redevelopment of the file.
Banyash v. Wilkie, 2019 WL 4309768	Veteran alleges the VA ordered additional medical exams in order to delay adjudicating final appeal	DENIED. Court does not reach TRAC analysis, instead it found the petition failed under Cheney.	No TRAC analysis.

Bettis v. Wilkie, 2018 WL 4600907	Veteran filed a petition for a writ on 7/03/2018 to compel the RO to comply with a 2/10/2016 Board remand. The remand ordered the RO to obtain and consider additional medical records. The VA argued they had complied with the order by sending a few requests to the VA and the veteran over the past two years.	DENIED. The first factor weighed against the veteran because part of the reason for the delay was the VA's duty to assist. The court followed the pattern on the rest: three and five weighed in veteran's favor but two and four weighed against the veteran.	Factors 1, 2, and 4.
Bohanon v. Wilkie, 2019 WL 1087491	2-year delay following remand by the Board.	DENIED. Veteran failed to make an adequate argument under Martin and the TRAC factors.	Veteran relied on wrong timeframe to assert delay.
Bowlin v. Wilkie, 2019 WL 3307851	Several-year delay. Development was nearly complete and final hearing had been scheduled.	DENIED. Basically, the claim was moot. No TRAC application despite the multi-year delay.	Mootness.
Briggs v. Wilkie, 2019 WL 1119645	Veteran filed a NOD in 2014 requesting a hearing. Filed a writ in Nov. 2018. Board docketed the appeal in January 2019, with a	DENIED. Court found there was no unreasonable delay since the VA had moved forward on the case.	VA had moved forward on the case.

	hearing set for April 2019.		
Cantrell v. Wilkie, 2019 WL 2426166	Court finds that the veteran had not exhausted available remedies. He had filed a NOD on the most recent Board decision which was pending.	DENIED. Not entitled to a writ under Cheney. No TRAC analysis.	No TRAC analysis.
Carter v. Wilkie, 2019 WL 3333108	Appeal began in 2012 and various developments had taken place since that time.	DENIED. Delay was due in part to the VA's statutory duty to assist. Other factors follow the typical pattern.	Factors 1, 2, 4 and 6.
Casper v. Wilkie, 2019 WL 5073585	1-year delay following remand by the Board for further claim development.	DENIED. Delay is due in part to the VA's statutory duty to assist. They were attempting to schedule additional examinations.	Factors 1, 2, 4 and 6.
Cerminara v. Wilkie, 2020 WL 945376	February 2017 rating decision. Veteran filed NOD and RAMP opt-in in March 2017. VA responded he did not have a pending appeal. Delay of over two years.	DENIED. In this case, counsel for defendant cited Costanza instead of Martin in the petition for the writ. The Court found he had therefore failed to make an adequate showing. They list, but do not apply, the TRAC factors. Essentially, because the lawyer cited the wrong	Relied on wrong standard.

		standard, the Court denied the petition.	
Cook v. Wilkie, 2019 WL 4385517	Nearly 3-year delay on some of veteran's claims. VA issued a SOC but did not address all the veteran's claims.	DENIED. The Court seems to imply that the Veteran could have made additional inquiries with the RO to ascertain why the SOC did not address all issues. Alternative relief available.	Court holds that the veteran needs to request information from the RO regarding why the SOC did not address all the claims.
Curry v. Wilkie, 2019 WL 6883840	Spouse filed petition after her husband's claim had sat unadjudicated for over 2 years following a remand by the Board. When the veteran died, the RO initially found the spouse could not substitute, but later determined that she could and then reopened the claim.	DENIED. Court: "This case primarily turns on the first factor." Here, the delay was cause by the VA's attempts to determine petitioner's eligibility for DIC. Not unreasonable to take two years for that determination.	Factor 1.
DeFlanders v. Wilkie, 2019 WL 1893323	Veteran had failed to appear to several examinations, had been difficult to reach, and the VA issued an SOC after he filed the petition. Period of delay not clear.	DENIED. Delay caused by the VA's duty to assist. Other factors follow the typical pattern.	Factors 1, 2, and 4.

Dietrich v. Wilkie, 2018 WL 4603567	Various appeals were pending for several years. However, many were granted and there appears to have been consistent development with no long periods of complete inaction.	DENIED. First TRAC factor: Delay was in part due to VA's duty to assist. The other factors follow the typical pattern.	Factors 1, 2, and 4.
Dietrich v. Wilkie, 2019 WL 1436877	Less than 1-year delay since the Court denied his previous petition for writ. Part of the delay was attributable to his request for a hearing.	DENIED. Part of the delay was caused by the VA's duty to assist in further claim development.	Factors 1, 2, and 4.
Donohoo v. Wilkie, 2019 WL 6461297	Unclear period of delay. Claim concerns withheld attorney's fees but the veteran did not use an attorney during his appeal.	DENIED. Delay due to VA's legal duties.	Factors 1, 2, and 4.
Duncan v. Wilkie, 2018 WL 6175451	1-year delay following Board remand.	DENIED. Delay due mostly to the VA's duty to assist.	Factors 1, 2, 4 and 6.
Ehlert v. O'Rourke, 2018 WL 3202756	Veteran filed for a writ on 3/7/2018 to compel the RO to adjudicate his claims based on NODs from July 2015 and April 2016.	DENIED. The court found the first factor weighed against granting a writ because developing the case was not a ministerial act and the VA had acted	Factors 1, 2, and 4.

		reasonably. The court followed the familiar pattern on the rest: three and five weighed in veteran's favor but two and four weighed against the veteran.	
Elliott v. Wilkie, 2019 WL 4195897	Many years of delay. VA responded to writ by ordering an examination and promising to make a decision within two weeks of receiving the results.	DENIED. Delay due in part to VA's duty to assist. Note that part of the CAVC's factor one analysis relies on an examination the VA scheduled after the veteran filed the petition in this case; all factors considered.	Factor 1.
Figueroa v. Wilkie, 2018 WL 6802821	1.5-year delay following remand by the Board for additional development.	DENIED. Veteran did not apply TRAC analysis to his petition. Cursory statements relying on length of delay are not enough.	relied on wrong standard.
Foster v. Wilkie, 2019 WL 1141931	Delay less than one year.	DISMISSED in part/DENIED in par. Part of delay caused by veteran's incarceration.	Petitioner's incarceration.
Fuentes v. Wilkie, 2019 WL 4047616	1-year delay following remand by Board for further development.	DENIED. The Court lists the TRAC factors without analysis, finding delay is not	Most likely factor 1.

		egregious enough to warrant relief.	
Godsey v. Wilkie, 31 Vet. App. 207 (2019)	More than 3 year delay in transferring an appeal to the Board is unreasonable.	GRANTED.	Granted.
Gonzalez v. Wilkie, 2018 WL 5255167	Veteran's case was remanded by the Board on 2/08/2018 for additional development. Veteran filed a for a writ of mandamus on 9/13/2018 to compel the RO to complete the additional development.	DENIED. The Court held that 216 days is not an unreasonable delay under the rule of reason analysis (first prong) of TRAC. Second factor also against petitioner because Congress has not provided a schedule for VA adjudication. The third and fifth factors overlap (common for the CAVC to treat them as one) and are almost always found to favor the veteran. However, the court apparently places very little weight to these factors. Fourth factor weighed against granting writ because the delay	Factors 1, 2, and 4.

		were at least in part due to an over-burdened system. Ultimately veteran failed to demonstrate entitlement to the writ.	
Graham v. Wilkie, 2018 WL 4340493	Case involves delay caused by negotiations over a proposed greenhouse.	DENIED. The negotiations concerned contractor compliance with ADA and other issues.	Factor 1.
Greb v. Wilkie, 2019 WL 1233571	Claim pending for almost 10 years. Most recent remand was less than 1 year before the veteran filed a petition for writ.	DENIED. Difficulty obtaining outside records and other claim development tasks contributed to the delay, making it reasonable.	Factors 1 and 4.
Green v. O'Rourke, 2018 WL 3005944	1 year 5 month delay following a NOD.	DENIED. First TRAC factor: Preparing a SOC is a complex, substantive action that requires time. It is not a ministerial task. Other factors	Factors 1, 2, and 4.
Guy v. Wilkie, 2019 WL 150871	Less than 1-year delay following remand by Board.	DENIED. Delay was not egregious enough and the VA's duty to assist contributed to delay.	Factors 1 and 4.

Hall v. Wilkie, 2018 WL 5791854	2-year, 2-month delay following remand by the CAVC.	DENIED. VA actually misstated the record here regarding a hearing which did not occur. Somehow this is still not enough to find the first TRAC factor weighs in favor of the veteran.	Factors 1 and 2.
Hassan v. Wilkie, 2019 WL 1893326	Less than 1-year delay following a JMR.	DISMSSED. Delay of less than one year caused by the VA's duty to assist. Other factors follow the typical	Factors 1, 2, and 4.
Hill v. O'Rourke, 2018 WL 3005942	1.5-year delay following a remand by the CAVC.	DENIED. First TRAC factor: Delay was in part due to VA's duty to assist. The other factors follow the typical pattern.	Factors 1, 2, and 4.
Hill v. Wilkie, 2019 WL 4231233	1.5-year delay following a Board remand for further development.	DENIED. Veteran failed to argue unreasonable delay under Martin. Petition dismissed for failure to use correct legal standard.	Petitioner relied on wrong standard.
Hines v. Wilkie, 2019 WL 1474016	1-year delay following a Board remand for further development.	DENIED. Court finds that granting relief would simply result in line-jumping. Also notes that some of the delay was due	Factors 1, 2, and 4.

		to the VA's duty to assist and resource realignment in response to the AMA.	
Howard v. Wilkie, 2019 WL 5700582	2-year delay following remand by the Board for additional claim development.	DENIED. Delay was due in part to VA's duty to assist. Other factors follow the pattern (Good example of the court's typical TRAC analysis).	Factors 1, 2, and 4.
Hughes v. Wilkie, 2019 WL 2111526	2-year delay following remand by the Board for additional development.	DENIED. Delay was not unreasonable because the VA had been actively engaged in developing the claim. Other factors follow the typical pattern.	VA actively developing the claim. Factors 1, 2, and 4.
Jefferson v. Wilkie, 2018 WL 4781629	3-year delay following Board remand for further development.	DENIED. Veteran fails to make an adequate analysis under TRAC, instead relying on the length of delay alone.	relied on wrong standard.
Jenkins v. Wilkie, 2020 WL 54853	Veteran's counsel filed a NOD in 2013 but made various clerical errors (wrong claims number, three different decision dates).	DENIED. The Court lists the TRAC factors, then holds that the veteran failed to argue based on those factors. This case and the one above demonstrate that if counsel does	Relied on wrong standard.

		not argue for relief based on TRAC, the Court will not conduct the analysis. Question whether this is consistent with the "pro-veteran" mandate.	
Jeremiah v. Wilkie, 2019 WL 7205592	Veteran experienced over a year long delay in developing an initial claim. Most of the issues concern difficulties getting the veteran examined due to his incarceration for murder.	DENIED. Delay caused by non-ministerial actions. Third and fifth factors are neutral here because the veteran is incarcerated and the State is providing for his well-being.	Factors 1, 2, 4 and 6. Factors 3 and 5 neutral.
Johnson v. Wilkie, 2020 WL 34926	Request for SMC and TDIU filed on April 23, 2019. VA granted TDIU in June, 2019. SMC still pending as of Jan. 3, 2020.	DENIED. On the first factor, the Court finds part of delay is a result of the VA's duty to assist. The other factors follow the typical pattern.	Factors 1, 2, 4 and 6.

Johnson-Willis v. Wilkie, 2019 WL 2510708	Nearly 3 years of delay adjudicating veteran's claims.	DENIED. Court found that the VA was actively engaged in developing the claims and their behavior did not "amount to complete inaction." Other TRAC factors follow the typical pattern.	Factors 1, 2, and 4. Stated that petitoner's experience was "not comparable to 'complete inaction by the VA'" (citing *Martin*). Reflects use of wrong standard
Jones , III v. Wilkie, 2020 WL 498115	1.5-year delay following Board remand for further development.	DENIED. The VA completed the ordered development and the veteran submitted additional evidence one month before filing the petition. No unreasonable delay because the VA was actively working on the veteran's claims.	VA actively developing the claim
Jones v. Wilkie, 2019 WL 5485120	Veteran filed the petition after it took the VA nearly 4 years to issue a decision on his bi-lateral hand condition following a JMR.	DENIED. Many of the issues here were caused by the veteran. TRAC factor one weighed against the veteran since part of the delay was due in part to the VA's duty to assist.	Factor 1.

Jones v. Wilkie, 2020 WL 88803	1-year, 8-month delay following a Board remand for further development. However, there was evidence that the VA had been consistently developing the case.	DENIED. First TRAC factor: Delay was in part due to VA's duty to assist and the VA had been actively working on the case with no long periods of inaction. The other factors follow the typical pattern.	Factors 1, 2, and 4.
Kent v. Wilkie, 2019 WL 3559104	1-year, 3-month delay following remand by Board for further development.	DENIED. Veteran did not present an adequate argument under TRAC.	Relied on wrong standard.
Latham v. Wilkie, 2019 WL 2700125	Delayed adjudication of three NODs issued between 2016 and 2017 (Veteran had file 61 claims). VA mooted many of the claims and demonstrated continued development on the others.	DENIED in part and DISMISSED in part. Many claims mooted. The others were not unreasonable under TRAC factor one since the VA was engaged in substantive action. The Court follows the typical pattern on the other TRAC factors.	Mootness. Factors 1, 2 and 4.
Lawson v. Wilkie, 2020 WL 690657	Delay of nearly 5 years since the veteran had filed a NOD. VA mooted the claim by commencing the action requested.	DISMISSED as moot.	Mootness.

Laxson v. Wilkie, 2019 WL 2235151	Less than 1 year between VA actions(additional evid. Added to file in Oct. 2018;asked for decision in Nov. 2018; pet. For writ filed Apr. 2019).	DENIED. Delay caused by the VA's duty to assist. Other factors follow the typical pattern.	Factors 1, 2, and 4.
Legan v. Wilkie, 2019 WL 637803	Less than 1-year delay following Board remand.	DENIED. Veteran did not apply TRAC analysis to his petition. Cursory statements about length of delay are not enough.	relied on wrong standard.
Levao v. Wilkie, 2018 WL 6036453	Veteran filed writ to compel action on his appeal, his case was remanded to the Board, and the Board then remanded the claim three times, causing long delays in a five year span. (very long procedural history).	DENIED. Despite noting that two factors weighed in his favor, the court found the delay was not unreasonable.	Factors 1, 2, and 4.
Lile v. Wilkie, 2019 WL 3127074	10 month delay following a Board remand.	DENIED. Veteran failed to make an adequate argument under TRAC and 10 months is not per se unreasonable.	Petitioner relied on wrong standard.

Martin v. Wilkie, 2019 WL 2307493	Over 3.5-year delay in adjudicating a NOD. VA argued they were taking steps to develop the claim. (One of the steps was an examination they ordered after veteran filed petition).	DENIED. Delay caused by the VA's duty to assist. Other factors follow the typical pattern.	Factors 1, 2, and 4.
Mason v. Wilkie, 2018 WL 3831026	The VA granted an educational benefit that included payment during intervals between semesters and then inexplicably vacated its own decision. Not really an unreasonable delay case.	DENIED. Only one month had passed. Not long enough to constitute unreasonable delay. "Mere delay alone will not convince the court."	Factors 1, 2, and 4.
Mims v. Wilkie, 2019 WL 4740541	1-year, 5-month delay following remand by the Board for further claim development. Veteran died and spouse substituted. Part of the reason for delay was due to the petitioner's failure to deliver records.	DENIED. Part of the delay due to VA's statutory duty to assist.	Factor 1.
Mixon v. Wilkie, 2018 WL 3814904	More than 2.5-year delay following a Board remand for further development in an ALS case.	DENIED. First TRAC factor: Delay was in part due to VA's duty to assist. Factors	Factors 1, 2, and 4.

Morgan v. Wilkie, 2018 WL 6272447	1-year delay for spouse seeking a decision on her DIC claim.	DENIED. Veteran cited the wrong standard (Costanza).	relied on wrong standard.
Mote v. Wilkie, 2019 WL 1599447	Petitioner claiming for heart disease related to deceased spouse's Agent Orange exposure; claim filed in Nov. 2010; spouse dies in Apr. 2013; claim denied Jan. 2015; NOD filed Nov. 2015; SOC issued May 2016;	DISMISSED without prejudice for refiling.	Without prejudice.
Munden v. Wilkie, 2019 WL 5700587	Timeline is not clear in this case. Possible 1-year delay. Claims were all mooted by VA.	DISMISSED in part and DENIED in part. Court still applied TRAC, using the exact same template as the case above.	Mootness..
Norfleet v. Wilkie, 2019 WL 1065994	Delay less than 1 year following remand by Board.	DENIED. Part of delay caused by some confusion by the VA. The VA appears to have thought that the veteran's request for an informal hearing was a request to cancel their previously requested formal hearing. The Court found delay caused by this confusion was not unreasonable.	Delay caused by confusion not unreasonable. Factors 1, 2, and 4 weighed against issuance of the writ

Norris v. Wilkie, 2019 WL 5090495	Veteran filed writ to compel adjudication of his remanded claim issued in Nov. 2016. Service personnel records were obtained in Apr. 2018, veteran underwent examinations with a VA-contracted physician in Jun. 2018. Secretary is not sure why veteran receive Jun. 2018 examination records. The court found the TRAC factors weighed against granting relief.	DENIED. The court goes though a relatively thorough analysis of TRAC factors.	Factors 1, 2, 4 and 6.
O'Hara v. Wilkie, 2018 WL 5782901	2-year, 4 month delay following a Board remand for additional development.	DENIED. Veteran did not apply TRAC analysis to his petition. Cursory statements relying on length of delay are not enough.	relied on wrong standard.

Ohnstad v. Wilkie, 2019 WL 2618131	Self-represented veteran filed a writ venting his frustration with the VA. The Court read his petition could mean he was alleging unreasonable delay or that he was dissatisfied with VA assistance with developing his claim. The VA agreed that the Board decision denying his claim needed to be remanded so that a proper exam could be conducted.	Relief GRANTED, but not based on unreasonable delay. Board decision vacated and remanded	Granted.
Osteria v. Wilkie, 2018 WL 4673655	The veteran's claim was remanded for additional examinations. Due to a series of miscommunications and conflicting schedules, over a year had passed and no exam had been conducted.	Writ denied. The court found the first, second, and fourth factors all weighed against granting the writ. They combined three and five, finding they weighed in favor of the veteran.	Factors 1, 2, and 4.
Palmer v. Wilkie, 2018 WL 6442949	1-year delay following Board remand for further development.	DENIED. Delay was not egregious enough and the VA's duty to assist contributed to delay.	Factors 1 and 2.

Patterson v. Wilkie, 2019 WL 4647700	Spouse filed petition after being denied DIC and asserting delay on her husband's remaining claims. The VA issued a Rating Decision on a portion of the requested relief with 20 days of the filing of the Petition.	DENIED. Court found no delay and did not apply TRAC in light of Cheney.	No TRAC analysis.
Paxton v. Wilkie, 2018 WL 6006969	Many claims from an incarcerated veteran that appear to be less than 1 year delayed. VA argued that much of the delay was due to the difficulty of scheduling with the DOC.	DENIED. Delay due in part to the VA's duty to assist. VA had been actively working on the claims.	Factor 1.
Perez-Marrero v. Wilkie, 2019 WL 5485129	Over one-and-a-half-year delay following a Board remand for further development on 8 claims.	DENIED. Delay is due in part to the VA's duty to assist. Limited discussion of other factors. Notes the first factor is the most important. Even the Secretary's first response omitted explanation of the asthma claim; post petition VA action established activity under Factor 1.	Factor 1.

Pough v. Wilkie, 2018 WL 3694987	3-year delay after veteran appealed a RO decision. Board certified his appeal days after he filed the petition. Veteran filed a motion to dismiss his petition.	DISMISSED as moot. The Court expressed extreme disapproval. "So, to make the point entirely clear, after having done nothing for more than 3 years – that's over 1,095 days – VA was able to take the actions to which petitioner was entitled within 8 days of his filing his petition in this Court! The Court is left to wonder what could have happened that prompted such swift action when, as far as it can determine, the Agency did not feel it appropriate to respond to petitioner for more than 3 years." "To imagine that for Mr. Pough VA did nothing – absolutely nothing – for more than 3 years to provide him with a congressionally mandated procedural right	Mootness.

		that takes less than 3 hours to accomplish is truly incredible. The men and women who served our nation deserve better."	
Randolph v. Wilkie, 2018 WL 4354559	Veteran sought a writ to compel the RO to adjudicate his NOD. The VA responded that the veteran had not filed a NOD on the claims listed and had informed him of this through a letter. There was additional correspondence between the veteran and VA that led to further confusion. Ultimately, the veteran sought to withdraw his petition but the court instead "denied it as moot."	DENIED. The court found the first factor weighed against granting a writ because developing the case was not a ministerial act and the VA had acted reasonably. The court followed the pattern on the rest: three and five weighed in veteran's favor but two and four weighed against the veteran.	Mootness. Factors 1, 2, and 4.
Richardson v. Wilkie, 2018 WL 6313471	3-year delay in adjudicating veteran's NOD.	DENIED. First TRAC factor: Delay was in part due to VA's duty to assist by requesting records from his former employer. The other factors	Factors 1, 2, 4, and 6

		follow the typical pattern.	
Robinson v. Wilkie, 2019 WL 2345408	Less than 1-year delay following Board remand.	DENIED. Delay was not unreasonable since the VA was actively developing the claim.	VA actively developing the claim
Rogers v. Wilkie, 2019 WL 3225725	Veteran sought to compel the VA to assign him a VSO to help with his appeal following a March 5, 2019, Board decision. Additionally, there was only a three-month delay from the time of the Board decision to when he filed the petition.	DISMISSED in part and DENIED in part. No real delay and VA cannot compel a VSO (lack of jurisdiction).	Lack of jurisdiction/delay not unreasonable.
Sabir v. Wilkie, 2018 WL 5096172	Veteran filed petition for writ on 7/05/2018 asking the court to compel the VA to adjudicate his claim following a Joint Motion for Partial Remand granted on 8/02/2016, which followed a Board decision dated 11/28/2014. The VA responded by showing that they had been working on the case,	DENIED. The court found the first, second, and fourth factors all weighed against granting the writ. They again combined three and five, finding they weighed in favor of the veteran.	Factors 1, 2, and 4.

	requesting records and sending the veteran to exams.		
Sabir v. Wilkie, 2019 WL 4309767	Long complicated procedural history. The most pressing issue was probably the VA's delay in paying retroactive compensation for a claim from 2005.	DENIED. Partial TRAC analysis.	Partial TRAC analysis.
Salter v. Wilkie, 2019 WL 6483295	2-year delay following remand by the Board ordering the RO to grant entitlement to PTSD, right knee and TDIU. VA mooted the PTSD claim by issuing the rating decision. The VA failed to respond to five status requests.	DENIED. The Court notes frustration with VA's failure to respond to status requests but finds no entitlement to writ based primarily on the first TRAC factor. The delay was "due in part to the VA's statutory duty to assist." Court does not discuss the other factors in detail but notes concern about line jumping. Judge Pietsch had the following to say regarding factor 1: "This case turns primarily on the first TRAC factor. The Court is concerned by the fact that the	Factor 1.

		Secretary's documentation indicates that he took little action on this case for several months and that he did not resume his efforts until after the petitioner filed his petition. On the whole, however, the time the Secretary has spent developing this case is not unreasonable."	
Scarborough v. Wilkie, 2019 WL 3540072	Less than 1-year delay.	DENIED. Delay was not unreasonable since the VA had been developing the claim.	VA actively developing the claim
Schuss v. Wilkie, 2019 WL 5700899	Over one-year delay.	DISMISSED in part and DENIED in part. Part of the veteran's claim fell under the Wolfe decision. The Court found that he had an alternative means of relief as a member of the Wolfe class. The other claims were mooted.	Mootness.

Shannon v. Wilkie, 2019 WL 4892381	1-year delay following remand by the Board for further claim development. Veteran failed to respond when notified of scheduled examinations.	DENIED. Court applies its formulaic TRAC analysis (despite the fact that the real reason for delay was unrelated to the VA's duty to assist).	Factors 1, 2, and 4.
Smalls v. Wilkie, 2018 WL6567886	Board remanded in Oct. 2015, delayed for 2 years with no determination, veteran filed writ of mandamus in Nov. 2017.	Fed. Cir. Remanded since Martin was decided immediately following the CAVC's decision.	Remanded.
Smeltzer v. Wilkie, 2019 WL 4492531	Veteran argued 18-month delay in certifying her appeal for TDIU warranted relief under Martin.	DENIED. No application of TRAC. Veteran did not adequately allege unreasonable delay.	No TRAC analysis.
Smith v. Wilkie, 2018 WL 4444985	NOD filed in 1999. Three remands by the Board. Filed writ asking for immediate adjudication.	DISMISSED. Board issued a SSOC the same day the VA's response was due to the CAVC in this case. Court held the issue was dismissed as moot.	Mootness.
Sorkness v. Wilkie, 2019 WL 4231433	Delay of less than 1 month since last board decision cannot constitute unreasonable delay	DENIED. Only one month had passed since most recent Board decision.	Not long enough.

Steele v. Wilkie, 2019 WL 2455615	Over 2.5 years of delay following request for Board hearing.	DENIED. Delay was caused because Ms. Steele requested a Board hearing and the VA cannot act until the hearing has been conducted. Cannot engage in line-jumping.	Factors 1, 2, and 4.
Stelmaszek v. Wilkie, 2019 WL 3294586	Veteran filed a petition based on unreasonable delay and asking relief to continue his appeal for claims he failed to enumerate in a NOD. The VA corrected a filing mistake, mooting the unreasonable delay claim.	DISMISSED. IBS claim was dismissed as moot and the veteran's failure to specify which denials he disagreed with did not entitle him to relief from the court.	Mootness.
Sutherland-Aultman v. Wilkie, 2019 WL 2750589	Veteran filed petition after the VA failed to adjudicate a December 2015 NOD. The VA claimed the delay was due to their unsuccessful attempts to obtain records from the veteran's federal agency employer.	DENIED. Some of the delay was caused by the veteran. Some was attributable to the VA's duty to assist. Court follows the typical pattern on the other TRAC factors.	Factor 1.

Tanner v. Wilkie, 2019 WL 346133	Less than 1-year delay. Complicated claims, including one for apportionment, while veteran was incarcerated.	DENIED. Part of the delay was caused by the VA's duty to assist in further claim development.	Factors 1, 2, and 4.
Tarutis v. Wilkie, 2020 WL 203315	1-year, 1-month delay without a decision following a hearing before a DRO.	DENIED as moot. TRAC analysis not needed because VA acted post petition.	Mootness.
Thomas v. Wilkie, 2019 WL 3210103	Veteran experienced many delays during a 5-year appeals process. But that process ended in 2015 and the veteran did not appeal, rendering the decision final.	DENIED. Court notes the unfortunate delays but lacks jurisdiction to provide relief. "There have been periods of delay in the processing of petitioner's claim, some of which are of concern to the Court. For example, the RO's nearly two-and-a-half-year delay in complying with the Board's directive to issue an SOC is difficult to understand. Unfortunately, however, those delays are not something the Court can remedy at this point. After this delay,	Duplicative and repetitive petitions.

		appellant did not submit a Substantive Appeal, so that decision denying SMC based on A&A is final. Appellant's current claim for SMC based on A&A has only been pending since March 2019 and it appears VA is actively processing it. The time it has taken thus far to process the claim does not offend the "rule of reason." Accordingly, the first TRAC factor weighs strongly against the issuance of a writ."	
Tice v. Wilkie, 2019 WL 2439070	Spouse of deceased veteran filed writ after long delays. VA responded, showing that three days after she filed her writ, the VA realized they made a mistake in mailing a SOC three years earlier. They mailed the SOC and denied the other claims.	DISMISSED. No relief as claims were moot. It is clear the VA acted only after the writ was filed.	Mootness.

Totzke v. Wilkie, 2018 WL 5316462	Close to 2-year delay following Board remand for further development. NO action was for over 11 months and then suddenly the RO determined additional evidence was needed.	DENIED. Despite the erroneous claims processing, because the VA corrected the error, there wasn't unreasonable delay under the first TRAC factor. Factors follow the typical pattern.	Factors 1, 2, and 4.
Wells v. Wilkie, 2019 WL 4252815	Petitioner filed writ based on unreasonable delay. Veteran's claim had been remanded by the Board three years earlier. VA responded by issuing a SSOC, mooting his claim. Veteran then sought leave to amend his petition, adding a claim that the VA had removed his electronic claims files.	DISMISSED is part/DENIED in part. Judge Allen had the following to say re: the missing records: "Turning to the claim alleged in the amended petition concerning petitioner's electronic VA records, the Secretary reports that despite petitioner's assertions, his electronic records are not missing. Instead, it appears that VA cut off petitioner's counsel's access to the records through VBMS because VA did not have a legible copy of VA Form 21-22a (concerning a	Mootness.

		power of attorney). The Court confesses that it is confused why this issue came up apparently out of the blue in the middle of the claims stream. Nevertheless, the Secretary reports that access was restored when petitioner submitted a legible form." Part of petition concerning the August 26, 2016 remand dismissed as moot because RO issued SSOC on July 29, 2019, and remainder of the petition is denied.	
Williams v. Wilkie, 2019 WL 2093251	RO delayed its determination on whether Ms. Williams could substitute for her deceased husband.	DENIED. Delay was not egregious enough.	RO taking action regarding pending claims.
Williams v. Wilkie, 2019 WL 962627	Nearly 4-year delay following a Board remand for further development of multiple claims.	DENIED. The VA had been actively engaged in developing the claim by doing things like ordering additional exams. The delay here was due to the	VA actively developing the claim

		VA's duty to assist and was not unreasonable.	
Wingfield v. Wilkie, 2019 WL 4615853	1.5-year delay following a Board remand for further development.	DENIED. Delay was simply not so egregious as to warrant mandamus.	Factor 1.
Wright v. Wilkie, 2020 WL 378512	Writ based on unreasonable delay. However, veteran filed the writ 91 days after submitting his NOD.	DENIED. The court's decision turns on factors 1, 2 and 4, finding they all weigh against granting relief. (Delay was not significant).	Factors 1, 2, and 4.
Yount v. Wilkie, 2019 WL 6622851	Delay of roughly 1.5 years following DRO hearing regarding mental health. VA was attempting to schedule additional exams.	DENIED. Part of the delay is due to the VA's duty to assist. Other factors follow the pattern.	Factor 1.

CERTIFICATE OF COMPLIANCE

The undersigned states:

1. This brief complies with the type-volume limitation of Federal Rule of Circuit Rule 32(a). This brief contains 6821 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the Addendum.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word version 16.19 in 14-point Times New Roman.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2020, the NLSVCC Unopposed Brief in Support of Appellants was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

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