

# Unreasonable Delay at the VA: Why Federal District Courts Should Intervene and Remedy Five-Year Delays in Veterans' Mental-Health Benefits Appeals

*Jacob B. Natwick\**

*ABSTRACT: As a result of modern warfare and the mental-health problems with which veterans return from Iraq and Afghanistan, a very serious problem has developed within the Department of Veterans Affairs ("VA"). An increasing number of veterans face Posttraumatic Stress Disorder and major depression and require benefits to assist them in seeking treatment. The Veterans Benefits Administration, however, has been unable to assist adequately veterans seeking benefits for these mental-health problems. On average, veterans who pursue an appeal of their benefits decision must wait five years before a decision is reached. This Note concludes that the five-year delay is unreasonable and the VA cannot remedy the problem. Therefore, federal district courts of general jurisdiction should intervene.*

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\* J.D. Candidate, The University of Iowa College of Law, 2010; B.A., University of Minnesota, 2007. I would like to thank my wife, Tova, for her constant encouragement; my parents, Brian and Julie, and siblings, Joe and Mari, for their love and support; and the editors and writers of Volumes 94 and 95 for all of their hard work on this Note.

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## I. INTRODUCTION

Sergeant Juan Jimenez served the United States in Iraq and held one of the most dangerous jobs in the war zone, escorting high-ranking officials through the streets of Baghdad.<sup>1</sup> He returned to the United States, having earned two Purple Hearts, with shrapnel lodged in his right arm.<sup>2</sup> In spite of his distinguished service in the most dangerous of circumstances, Sergeant Jimenez has been unable to prove that his nightmares, flashbacks, and acid reflux are service-connected and has, therefore, been waiting three-and-a-half years for the mental-health care he deserves.<sup>3</sup> Another distinguished veteran, Specialist Jon Town, received a Purple Heart for his service, and when he returned to the United States, the Veterans Benefits Administration (“VBA”) denied him benefits for Posttraumatic Stress Disorder (“PTSD”); his symptoms included headaches and hearing loss resulting from his close proximity to a rocket that knocked him unconscious, but he received no health benefits because his doctor determined those conditions were pre-existing.<sup>4</sup> For Specialist Town to receive the care he deserved, it took the intervention of an episode of *Law & Order*, the help of musician Dave Matthews, and, finally, an article in his local newspaper.<sup>5</sup>

A serious problem has developed within the Department of Veterans Affairs (“VA”) as a result of modern warfare and the mental-health problems with which veterans are returning from Iraq and Afghanistan. An increasing number of veterans face PTSD and major depression and require benefits to assist them in getting treatment. The VBA, however, has been unable to assist adequately veterans seeking benefits for these mental-health problems. The most striking example of this failure is found in the benefits-appeals process, under which veterans must wait an average of five years for a decision on their appeal. The majority of appeals result in decisions favorable to veterans, but, by then, it is often too late to remedy the damage resulting from PTSD and major depression.

This Note is separated into three substantive parts. Part II introduces the problem of PTSD among returning combat veterans and the process they must use to receive benefits. Part III provides background information on the statutes pertaining to judicial review of VA actions and of agencies’ actions in general. Part III also introduces a standard for judicial review of unreasonable delays of agency actions and presents accompanying case law. Part IV describes the failures of the VBA and the courts to remedy the

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1. Joshua Kors, *How the VA Abandons Our Vets*, THE NATION, Sept. 15, 2008, at 13, 13.

2. *Id.*

3. *Id.*

4. Joshua Kors, *Specialist Town Takes His Case to Washington*, THE NATION, Oct. 15, 2007, at 12, 12.

5. *Id.*

problem of unreasonable delays in mental-health benefits adjudications. Part IV then analyzes *Veterans for Common Sense v. Peake*, which recently addressed the issue of delays in mental-health benefits appeals, and concludes that the holding of the case was based on a flawed application of the law and inadequate attention to the problems facing veterans. This Note concludes that either district courts of general jurisdiction or Congress should step in and provide a remedy where the VA has shown that it is unable to do so on its own.

## II. BACKGROUND

Veterans returning from combat in Iraq and Afghanistan face many challenges when readjusting to life in civilian society. Many veterans return with physical wounds, and a growing number of veterans face serious mental-health problems. Both the veterans and their loved ones must learn to live with these injuries and mental-health disorders. This Part will discuss the problems facing combat veterans and their families, as well as the process through which veterans may try to obtain health benefits.

### A. *THE RISE AND CONSEQUENCES OF POSTTRAUMATIC STRESS DISORDER ON VETERANS RETURNING FROM COMBAT*

Since October 2001, the United States has sent more than 1.6 million men and women into combat in Iraq and Afghanistan.<sup>6</sup> A recent study conducted by the RAND Center for Military Research (“RAND Study”) found that 18.3% of returning veterans have PTSD or major depression.<sup>7</sup> That means that approximately 300,000 combat veterans must deal with severe mental-health problems when they return from Iraq or Afghanistan.<sup>8</sup> Factoring in other serious mental-health disorders, “[u]pward of 26 percent of returning troops may have mental health conditions.”<sup>9</sup> Perhaps more

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6. RAND CTR. FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 3 (Terri Tanielian & Lisa H. Jaycox eds., 2008), available at [http://www.rand.org/pubs/monographs/2008/RAND\\_MG720.pdf](http://www.rand.org/pubs/monographs/2008/RAND_MG720.pdf) [hereinafter RAND STUDY]. The court relied on the RAND Study in the *Veterans for Common Sense v. Peake* decision that this Note will focus on *infra* Part IV. This Note also heavily relies on this study, as it is a recent study about mental-health disorders in the U.S. armed forces. The study collected data from April 2007 to January 2008 from a sample of 1965 service members and veterans. *Id.* at iv, xx. The study focuses on PTSD, major depression, and traumatic brain injury. *Id.* The study bases its findings on the review of scholarship and literature regarding these mental-health disorders and their short- and long-term consequences. *Id.* The researchers collected the data on the numbers of veterans suffering from mental-health disorders from service members and veterans who served in Iraq or Afghanistan. *Id.*

7. *Id.* at xxi (calculating 18.3% from 300,000 individuals out of 1.64 million).

8. *Id.*

9. *Id.* at 3.

alarming is the rate at which mental-health diagnoses are increasing as compared to rates for other medical conditions.<sup>10</sup>

The problems resulting from PTSD<sup>11</sup> begin during combat and have very serious negative impacts on soldiers—not only on those who have returned from combat, but also on those in active duty.<sup>12</sup> For example, the Fort Carson Army Base currently has about 17,500 assigned soldiers and has sent 26,000 of its soldiers into combat in Iraq since the beginning of the war.<sup>13</sup> At the Base, 1703 soldiers have been treated for PTSD since 2003.<sup>14</sup> This number represents a much smaller percentage of soldiers than the RAND Study determined suffer from PTSD,<sup>15</sup> but this can perhaps be explained by the stigma facing veterans with PTSD.<sup>16</sup> Not only is this mental-health disorder very serious and life-threatening, but many soldiers with PTSD feel embarrassed by the condition.<sup>17</sup>

The consequences of PTSD and other mental-health disorders are dire, both in the short term and the long term. Suicide is perhaps the most well-known and widely documented consequence of PTSD and other mental-health disorders.<sup>18</sup> Among persons who have served in the armed forces, those with combat experience demonstrate an increased incidence of suicide.<sup>19</sup> In 2006, ninety-seven soldiers on active Army duty committed suicide, and two-thirds of these soldiers took at least one tour of duty in either Iraq or Afghanistan.<sup>20</sup> According to one study, suicide rates of veterans are approximately 3.2 times higher than in the general

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10. *See id.* (“[T]he frequency of diagnoses in this category is increasing while rates for other medical diagnoses remain constant.” (citing C.W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13, 13–22 (2004))).

11. The American Psychiatric Association defines PTSD as resulting from exposure to a traumatic event. The characteristic symptoms include “persistent[] reexperience” of the event accompanied with avoidance of triggering events and increased arousal (evidenced by insomnia, anger, difficulty concentrating, or jumpiness). AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81, at 424 (4th ed. 1994). PTSD is found where the disturbance lasts longer than one month and where the problems associated with PTSD interfere with the individual’s ability to function in society. *Id.*

12. *See* Dan Frosh, *Fighting the Terror of Battles that Rage in Soldiers’ Heads*, N.Y. TIMES, May 13, 2007, at A18 (discussing the prevalence of PTSD at the Fort Carson Army Base).

13. *Id.*

14. *Id.*

15. *See* RAND STUDY, *supra* note 6, at 7 (concluding that approximately half of the veterans who need treatment for PTSD seek it).

16. *See* Frosh, *supra* note 12, at A18 (discussing the stigma for soldiers with PTSD and how soldiers’ superiors treat persons with PTSD disdainfully).

17. *Id.*

18. RAND STUDY, *supra* note 6, at 129 (“Depression, PTSD, and TBI all increase the risk for suicide.”). TBI, or traumatic brain injury, is “a consequence of blast exposure” and is often hard to detect because it is invisible to the eye. *Id.* at xx.

19. *Id.* at 130.

20. *Id.* at 128–29.

population.<sup>21</sup> This can be attributed, in large part, to the high rates of PTSD among combat veterans.<sup>22</sup> For soldiers with depression and a history of depressive episodes, the risk of suicide attempts is eleven times greater than for the general population.<sup>23</sup>

There are other serious health consequences for veterans resulting from increased rates of PTSD. For example, not only do persons with PTSD face a higher risk of suicide, they also face a higher risk of death due to cardiovascular disease.<sup>24</sup> Along with these problems, PTSD often leads to or exacerbates substance abuse.<sup>25</sup> A study of Vietnam combat veterans found that seventy-five percent of soldiers with PTSD had substance abuse or other dependence problems.<sup>26</sup> These substance abuse problems primarily take the form of alcohol abuse but often occur along with other forms of substance abuse, such as drug abuse.<sup>27</sup>

Veterans with PTSD are also less likely to find and retain employment upon their return to the United States.<sup>28</sup> Marriages and intimate relationships are much more likely to suffer when a veteran returns from combat with a mental-health disorder.<sup>29</sup> For veterans with families and children, PTSD can result in long-term damage to the development of their children.<sup>30</sup> It is clear that veterans returning from combat with PTSD and other mental-health disorders face very serious challenges and require careful attention from mental-health professionals.

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21. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1063 (N.D. Cal. 2008) (citing the “Katz Suicide Study”).

22. RAND STUDY, *supra* note 6, at 3.

23. *Id.* at 129.

24. *Id.* at 131–32. The study focuses on the higher mortality rates resulting from persons with PTSD and major depression. The study notes the correlation between mental and physical health in concluding that persons with depression face a higher risk of death than similarly aged persons without those mental-health problems. *Id.*

25. *Id.* at 134. The study notes that “[s]ubstance use disorders often co-occur with other mental disorders” and “about 15–40 percent of people with a mental disorder have substance abuse.” *Id.*

26. *Id.*

27. RAND STUDY, *supra* note 6, at 134–36.

28. *Id.* at 137–40. The study looked at employment statistics of Vietnam veterans to conclude that veterans with PTSD were as much as three times less likely to be employed than veterans without a mental-health disorder. The study also concludes that veterans with PTSD are often less productive workers and earn less than veterans without a mental-health disorder. *Id.*

29. *Id.* at 141–46. The study examines the relationships of veterans who have PTSD and determines that intimacy and relationship satisfaction are negatively affected. The study further concludes that there is a higher risk of domestic violence for veterans returning with PTSD because veterans with PTSD often have problems restraining anger and aggression. *Id.*

30. *Id.* at 147.

### B. THE ADJUDICATION PROCESS FOR VETERANS' BENEFITS

In order to ensure the procurement of health benefits for treatment of PTSD and depression, a veteran must go through several complex and prolonged VA processes. Most benefits decisions fall under the service-connected disability and death compensation ("SCDDC") benefits category, which includes mental-health benefits for treating PTSD.<sup>31</sup> First, doctors at local VA hospitals make initial determinations about whether benefits are necessary.<sup>32</sup> Following the doctor's determination, the veteran may file a Notice of Disagreement ("NOD").<sup>33</sup> The NOD allows the veteran to appeal the doctor's determination to the Board of Veterans' Appeals ("BVA").<sup>34</sup> The BVA then issues a decision on the initial benefits determination.<sup>35</sup>

Following an adverse decision by the BVA, the veteran may choose to appeal the benefits determination to the U.S. Court of Appeals for Veterans' Claims ("CAVC"), an Article I court.<sup>36</sup> A veteran can pursue further appellate review to the Federal Circuit Court of Appeals and ultimately to the U.S. Supreme Court.<sup>37</sup> Most cases do not reach beyond the BVA level because many veterans give up their claims after long delays, and those veterans who choose to appeal the decision further face many obstacles and even longer delays.<sup>38</sup>

### III. REVIEWING VETERANS' BENEFITS DECISIONS AND DELAYS

Federal district courts can review agency actions in several different situations. Initially, however, the person challenging the agency action must determine whether a statute permits such a review. If the challenge is not explicitly unreviewable, most courts will allow, at the very least, facial constitutional challenges to the agency action. Additionally, the Administrative Procedure Act ("APA") provides a mechanism for reviewing agency action and inaction.<sup>39</sup> This Part focuses on the extent to which district courts may review veterans' benefits decisions.

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31. Plaintiffs' Trial Brief at 3, *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049 (N.D. Cal. 2008) (No. C-07-3758-SC), 2008 WL 1815754.

32. U.S. Dep't of Veterans Affairs, Gateway to VA Appeals, <http://www4.va.gov/vbs/bva/> (last visited Jan. 28, 2010) [hereinafter Gateway to VA Appeals].

33. BD. OF VETERANS' APPEALS, HOW DO I APPEAL? 4 (2002), available at <http://www4.va.gov/vbs/bva/010202A.pdf>.

34. Gateway to VA Appeals, *supra* note 32.

35. *Id.*

36. Plaintiffs' Trial Brief, *supra* note 31, at 4.

37. *Id.* at 4–5.

38. See *infra* Part IV.A (describing the problems with the VA appeals process).

39. Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2006).

A. REVIEWABILITY OF VETERANS' BENEFITS UNDER 38 U.S.C. § 511

Individual veterans' benefits determinations are generally unreviewable according to 38 U.S.C. § 511<sup>40</sup> but are subject to many statutory and judicially created exceptions, which will be discussed throughout this Subpart. Section 511 provides that “[t]he Secretary [of Veterans' Affairs] shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans.”<sup>41</sup> The Secretary's decisions in individual benefits determinations “shall be final and conclusive and may not be reviewed by any other official or by any court,” subject to specified statutory exceptions.<sup>42</sup>

Although it would seem that § 511 precludes review of veterans' benefits appeals in federal district courts, veterans have previously challenged benefits distribution and administration in federal district courts. They do so primarily under the exception that allows parties to bring facial constitutional challenges against the VA.<sup>43</sup> However, some circuit courts and federal district courts permit veterans to bring claims that are not facial constitutional challenges. For example, the Federal Circuit recently stated that § 511 does not render every challenge to an action of the VA unreviewable, even when the challenge is not a facial constitutional challenge.<sup>44</sup> Instead, § 511 “only applies where there has been a ‘decision by the Secretary’”<sup>45</sup> and only where the decision is a “*formal* decision by the Secretary.”<sup>46</sup> Further, the court noted that review may be available even when the Secretary has made a formal decision, provided that a statute confers jurisdiction upon that court for that particular claim.<sup>47</sup>

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40. 38 U.S.C. § 511 (2006). Congress renumbered § 211(a) as § 511, but all references to former § 211(a) “shall be treated as referring to the corresponding provisions of [§ 511].” *Id.*

41. *Id.*

42. *Id.* The exceptions listed in § 511 are: matters covered by 38 U.S.C. § 502 (promulgation of rules and regulations subject to judicial review); matters covered by 38 U.S.C. §§ 1975, 1984 (district courts have original jurisdiction over claims against the United States for Servicemembers' Group Life insurance); matters arising under 38 U.S.C. ch. 37 (housing-loan benefits subject to judicial review); and matters covered by 38 U.S.C. ch. 72 (judicial review of BVA available in the CAVC).

43. *See, e.g.,* *Hernandez v. Veterans' Admin.*, 415 U.S. 391, 393 (1974) (holding that former § 211(a) “does not bar judicial consideration of constitutional challenges to veterans' benefits legislation”); *Johnson v. Robison*, 415 U.S. 361, 367 (1974) (holding that former § 211(a) does not bar consideration of constitutional claims); *Larrabee v. Derwinski*, 968 F.2d 1497, 1501 (2d Cir. 1992) (holding that district courts may review “facial challenges of legislation affecting veterans' benefits” (quoting *Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs*, 962 F.2d 136, 140 (2d Cir. 1992))).

44. *Bates v. Nicholson*, 398 F.3d 1355, 1365–66 (Fed. Cir. 2005).

45. *Id.* at 1365 (quoting *Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000)).

46. *Id.* (emphasis added).

47. *Id.* The court cites contract and employment disputes as examples where Congress has conferred jurisdiction upon particular federal courts to review these issues in spite of the general rule of unreviewability of the Secretary of Veterans Affairs' decisions. *Id.*

Other federal courts adopt an even broader view that there must be a formal decision by the Secretary in order for § 511 to render the decision unreviewable; those courts allow plaintiffs to bring most claims, including claims that are not facial constitutional challenges. Those courts have determined that plaintiffs may bring claims against the VA in federal district courts of general jurisdiction.<sup>48</sup> Plaintiffs may also bring challenges to VA regulations and policies in district courts when the Secretary has not actually made a ruling on those particular regulations or policies.<sup>49</sup> The D.C. Circuit interprets § 511 as providing very limited means for revoking jurisdiction and applies it only in situations where the Secretary was presented with and has actually decided the question presented by the plaintiff in that particular case.<sup>50</sup>

In certain circumstances, some federal courts have found that § 511 does not deny district courts jurisdiction to hear claims relating specifically to veterans' benefits determinations. These situations include cases that involve benefits determinations that were not decided by the Secretary at the initial benefits-determination stage<sup>51</sup> and challenges to the process and procedures of the VA in benefits decisions.<sup>52</sup> In other decisions, district courts have had jurisdiction to review veterans' benefits claims in spite of § 511, even when those claims implicated individual benefits determinations, as long as the Secretary had not issued a ruling.<sup>53</sup>

Some courts, however, have been less willing to hear claims that are not direct constitutional challenges. Moreover, at least one court has refused, on jurisdictional grounds, to hear facial constitutional challenges to benefits determinations.<sup>54</sup> The Sixth Circuit read § 511 more narrowly than other circuits when it determined that the only available avenue for review of facial

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48. See *Broudy v. Mather*, 460 F.3d 106, 114 (D.C. Cir. 2006) (“[D]istrict courts have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding.”).

49. *McKelvey v. Turnage*, 792 F.2d 194, 198 (D.C. Cir. 1986), *aff’d on other grounds*, *Traynor v. Turnage*, 485 U.S. 535 (1988).

50. *Broudy*, 460 F.3d at 115.

51. *Id.*

52. See *Arnolds v. Veterans’ Admin.*, 507 F. Supp. 128, 131 (N.D. Ill. 1981) (holding that former § 211(a) did not bar judicial review of the plaintiff’s unreasonable delay and due-process claims).

53. See *Winslow v. Walters*, 815 F.2d 1114, 1117–18 (7th Cir. 1987) (stating that district courts have jurisdiction over challenges to VA hearing procedures as due-process claims); *Univ. of Md. v. Cleland*, 621 F.2d 98, 100 (4th Cir. 1980) (holding that former § 211(a) did not foreclose jurisdiction over claims of delays in receipt of benefits, which resulted from VA policy decisions); *Devine v. Cleland*, 616 F.2d 1080, 1084 (9th Cir. 1980) (stating that the court had jurisdiction over benefits claims because the “issue [was] not whether the Administrator ruled incorrectly on the class’ entitlement to benefits, but whether Due Process compels certain procedural safeguards in advance of such rulings”).

54. *Beamon v. Brown*, 125 F.3d 965, 974 (6th Cir. 1997).

constitutional challenges is in the CAVC.<sup>55</sup> The Sixth Circuit argued that the CAVC is an adequate alternate remedy to judicial review of the VA in district courts and read § 511 narrowly to preclude review of all claims brought in district courts that are not specifically provided for in the statute.<sup>56</sup> This narrow reading of § 511 has not been widely adopted by most courts, which continue to allow plaintiffs to bring claims for facial constitutional challenges.<sup>57</sup>

B. REVIEWING AGENCY ACTION AND INACTION UNDER  
THE ADMINISTRATIVE PROCEDURE ACT

The judicial-review provisions of the APA allow courts to review agency action and inaction.<sup>58</sup> The APA specifies that a court may only review *final* agency action, which includes a “failure to act.”<sup>59</sup> One court articulated the frequently cited rule that the APA does not contemplate pervasive oversight by district courts over actions committed within agency discretion and does not allow a court to substitute its discretion for the agency’s.<sup>60</sup> The Senate Judiciary Committee echoes this rule and has stated that the APA does not allow courts to strip agency discretion.<sup>61</sup> Rather, district courts may require an agency to take action when the agency has failed to act, so long as the court does not direct the agency on what action or process it must take.<sup>62</sup>

Congress lays out two available avenues for judicial review of agency action and inaction in the APA at 5 U.S.C. § 706 and allows courts to “compel agency action unlawfully withheld or unreasonably delayed” and “set aside agency action, findings, and conclusions” in certain circumstances.<sup>63</sup> It is more difficult for courts to assert jurisdiction under the

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55. *Id.* at 970.

56. *Id.*; see also *supra* note 41 and accompanying text (discussing the exceptions listed in § 511).

57. In 2008, the Northern District of California addressed the scope of the *Beamon* decision and determined that courts should view the holding narrowly. The court reasoned that the *Beamon* decision was based on the “lack of specificity of the plaintiff’s claims.” *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919, at \*11 (N.D. Cal. Jan. 10, 2008) (order granting in part and denying in part defendants’ motion to dismiss and granting plaintiff’s administrative motion to file veteran and family-member personal identifying information under seal).

58. 5 U.S.C. §§ 701–706 (2006).

59. *Id.* § 551 (defining “agency action”).

60. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66–67 (2004) (discussing the limitations of mandamus actions brought under the APA).

61. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG. (Comm. Print 1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944–46, at 36 (1949).

62. *Id.*; see also *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) (analyzing the APA and relevant case law and determining that “a court may require an agency to take action upon a matter, without directing how it shall act”).

63. 5 U.S.C. § 706 (1). Courts may set aside agency action when it is found to be arbitrary or capricious, contrary to the U.S. Constitution, exceeding statutory authority, or otherwise not

inaction portion of the APA because it requires courts to determine whether the agency has a clear and mandatory duty to act.<sup>64</sup>

Within the inaction portion of § 706 are two types of reviewable inaction. The first occurs when a statute imposes specific deadlines or timetables upon an agency and the agency fails to meet those deadlines.<sup>65</sup> The second occurs when there is no statutory deadline or timetable in effect for an agency's action, and the agency demonstrates "unreasonable delay."<sup>66</sup> When there is no deadline or timetable, courts may turn to another APA provision, codified at 5 U.S.C. § 555, which provides that agencies must conclude matters presented "within a reasonable time."<sup>67</sup> If agencies fail to resolve matters within a reasonable time, district courts may intervene and compel agency action pursuant to § 706(1).<sup>68</sup> Sections 555 and 706 "dovetail[]" one another as both apply the same reasonableness standard to the timing of agency action.<sup>69</sup>

A § 706(1) claim of unreasonable delay against an agency "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."<sup>70</sup> This rule satisfies § 704, which requires a "final agency action," while still allowing claims for an agency's failure to act.<sup>71</sup> Courts can only consider claims for unreasonable delay when agencies reach the point where their inaction is sufficiently "concrete" such that it equates to a final agency action or a failure to act.<sup>72</sup> This standard tends to favor agency discretion more than the APA calls for, but it still allows district courts to assert jurisdiction over agency inaction in many situations.

Perhaps the most difficult question facing courts that must determine the reviewability of the agency's inaction is what constitutes unreasonable

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in accordance with law. *Id.* § 706(2); *see also* Catherine Zaller, Note, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1550 (2001) ("Congress was concerned about lengthy delays resulting in a circumvention of legislation and intended section 706(1) to remedy the situation."). *But see* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 461–62 (2008) (arguing that "there is no fundamental difference between judicial review of agency inaction or action under the APA").

64. *See* Biber, *supra* note 63, at 465 (discussing the difficulties associated with bringing a § 706(1) claim).

65. *See* *Sierra Club v. Thomas*, 828 F.2d 783, 794–95 (D.C. Cir. 1987) (distinguishing between an agency's failure to comply with statutory deadlines and general unreasonably delayed action).

66. *Forest Guardians*, 174 F.3d at 1190.

67. 5 U.S.C. § 555(b) (2006).

68. *Id.* § 706(1).

69. *Potomac Elec. Power Co. v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

70. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004).

71. 5 U.S.C. § 704 (2006).

72. *See Ligon Specialized Hauler, Inc. v. Interstate Commerce Comm'n*, 587 F.2d 304, 314 (6th Cir. 1978) (discussing the "finality" requirement in the context of review of agencies).

delay. As one court stated, “the question of reasonableness is closely tied to the particular facts of the case.”<sup>73</sup> Unreasonableness often depends on the circumstances surrounding the delay; for example, when delays in agency action, such as benefits determinations, affect people with health problems or disabilities, courts require less time before compelling the agency’s action.<sup>74</sup> In the context of Social Security benefits determinations, courts have held unreasonable delays ranging from two hundred days to two years.<sup>75</sup> In determining what constitutes unreasonable delay, many courts have adopted the *TRAC* factors, discussed below.<sup>76</sup> However, precedent reveals that there is no set period of time beyond which a delay becomes unreasonable.

C. DETERMINING WHETHER AGENCY ACTION HAS BEEN UNREASONABLY  
DELAYED USING THE *TRAC* FACTORS

The predominant method for determining whether agency action has been unreasonably delayed is the six-factor test known as the “*TRAC* factors.”<sup>77</sup> Courts in many different circuits have adopted the *TRAC* factors; the court in the veterans’ case discussed *infra* Part IV.B relied heavily on *TRAC*-factor analysis.<sup>78</sup> Therefore, an analysis of the *TRAC* factors and courts’ interpretations of how to apply the factors is highly relevant to a discussion about unreasonable delay in veterans’ benefits proceedings.

The D.C. Circuit created the *TRAC* factors by compiling rules from prior case law.<sup>79</sup> The six factors for determining whether agency action was unreasonably delayed are:

- (1) [T]he time agencies take to make decisions must be governed by a “rule of reason”; (2) where Congress has provided a timetable

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73. *Air Line Pilots Ass’n, Int’l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984).

74. *See id.* (holding that a five-year delay is especially unreasonable when health and welfare are at stake); *Cockrum v. Harris*, 475 F. Supp. 1222, 1239 (D.D.C. 1979) (holding that because delays in supplemental security income benefits affected the “disabled, aged or infirm and the benefits constitute the principal means of subsistence for many,” the delays of around two hundred days were unreasonable).

75. *See Blankenship v. Sec’y of Health, Educ. & Welfare*, 587 F.2d 329, 334 (6th Cir. 1978) (holding that a median delay of 220 days in supplemental-security-income benefits decisions was unreasonable); *Caswell v. Califano*, 583 F.2d 9, 12 (1st Cir. 1978) (holding that the average waiting period of nineteen months between a request for a benefits hearing and a decision was an unreasonable delay).

76. *See Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 n.7 (9th Cir. 1997) (adopting the *TRAC* factors in determining unreasonable delay); *infra* Part III.C (describing the *TRAC* factors).

77. *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 770–71 (1990) (discussing the *TRAC* factors and noting that the *TRAC*-factor approach, created by the D.C. Circuit, is now the “prevailing approach” courts use to determine administrative delay).

78. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1084–85 (N.D. Cal. 2008).

79. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by the delay; and (6) the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’”<sup>80</sup>

Many circuits and district courts have adopted these six factors.<sup>81</sup> These factors have gained wide acceptance because they synthesize rules from prior cases in the area of unreasonable delay.<sup>82</sup>

The fourth factor is perhaps the most important because it is the factor most often used to uphold agency action; the Northern District of California used the fourth factor to find against the veterans’ claim of unreasonable delay in *Veterans for Common Sense v. Peake*, discussed below.<sup>83</sup> Courts are wary of compelling agency action when doing so would potentially undermine a competing agency priority and give agencies the opportunity to justify delays.<sup>84</sup> Courts, however, will not defer entirely to agencies that provide a potential agency priority.<sup>85</sup> Even when an agency asserts that it lacks the resources to carry out a judgment compelling agency action, a court may still compel the action if it finds that the other five factors outweigh the fourth factor.<sup>86</sup>

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80. *Id.* (citations omitted).

81. *See, e.g.*, *Brower v. Evans*, 257 F.3d 1058, 1070 (9th Cir. 2001) (applying the *TRAC* factors in an environmental agency action); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 (10th Cir. 1999) (concluding that the *TRAC* factors are appropriately applied in an unreasonable-delay case when there is no specific, non-discretionary statutory timeline); *Towns of Wellesley, Concord & Norwood v. Fed. Energy Regulatory Comm’n*, 829 F.2d 275, 277 (1st Cir. 1987) (applying the *TRAC* factors to agency action).

82. *See Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (describing the six factors in detail and applying them).

83. *Veterans for Common Sense*, 563 F. Supp. 2d at 1085; *see infra* Part IV.B (discussing the Northern District of California’s application of the *TRAC* factors in *Veterans for Common Sense*).

84. *See Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) (“The agency must justify its delay to the court’s satisfaction.”).

85. *See Brower*, 257 F.3d at 1070 (compelling agency action even though the agency asserted that there were competing priorities).

86. *See Xia v. Gonzales*, No. C07-728 MJP, 2008 U.S. Dist. LEXIS 3273, at \*7 (W.D. Wash. Jan. 15, 2008) (determining that an agency’s lack of resources cannot justify an unreasonable delay in an immigration case).

Courts often group factors one and two under the general question of whether a “rule of reason” governs the agency’s action.<sup>87</sup> Courts determine whether a rule of reason governs an agency’s action by first looking at whether, under factor two, Congress has issued a specific timetable under which the agency must operate.<sup>88</sup> Where there are specific statutory timetables to which an agency failed to adhere, it is much more likely that a court will find unreasonable delay, even where other factors weigh in favor of the agency.<sup>89</sup>

Courts also often group factors three and five together. The fifth factor states in broad terms that a court must consider “the nature and extent of interests prejudiced by delay.”<sup>90</sup> The third factor provides some guidance to courts applying the fifth factor by stating that delays in “economic regulation are less tolerable when human health and welfare are at stake.”<sup>91</sup> Courts view these factors as “overlapping” and potentially beneficial only to plaintiffs asserting delay and not to agencies.<sup>92</sup>

The sixth *TRAC* factor does not provide a rule to apply when determining whether an agency has unreasonably delayed its action; rather, the sixth factor instructs that courts need not apply a bad-faith test.<sup>93</sup> Courts still, however, take into account any bad faith or intentional delay, not agency action.<sup>94</sup> Indeed, the rule in the D.C. Circuit, which is still applicable after the *TRAC* case, is that a finding of bad faith should automatically render the delay unreasonable.<sup>95</sup>

The application of the *TRAC* factors requires a highly factual inquiry, and courts must apply these factors on a case-by-case basis. The court must

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87. See *Independence Mining Co.*, 105 F.3d at 507 (discussing *TRAC* factors one and two together and using the heading “Rule of Reason and Congressional Timetable” to describe them). *But cf.* *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1143–44 (D. Ariz. 2008) (separating the first and second *TRAC* factors and focusing on the presence or absence of a timetable under factor two).

88. See *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (“[W]here Congress has provided a timetable . . . that statutory scheme may supply content for this rule of reason . . .”) (citation omitted); see also *Independence Mining Co.*, 105 F.3d at 507 (grouping factors one and two together).

89. In fact, when a court finds that a statutory timetable is not being followed, the court probably should not apply the *TRAC* factors at all but should instead determine that the agency action is being “unlawfully withheld.” See *Zaller*, *supra* note 63, at 1570 (concluding that a court’s “use of the *TRAC* factors when dealing with statutory deadlines is misplaced”).

90. *Telecomms. Research & Action Ctr.*, 750 F.2d at 80.

91. *Id.* (citations omitted).

92. See *Independence Mining Co.*, 105 F.3d at 509 (applying the third and fifth factors together); *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) (applying these factors to determine the “consequences of the agency’s delay”).

93. *Telecomms. Research & Action Ctr.*, 750 F.2d at 80.

94. See *Independence Mining Co.*, 105 F.3d at 510 (noting that a court can take bad faith into account even though the sixth factor does not require it).

95. See *Cutler*, 818 F.2d at 898 (“If the court determines that the agency delays in bad faith, it should conclude that the delay is unreasonable.”).

consider all the factors and competing interests and weigh them to determine whether or not intervention is warranted.<sup>96</sup> To make this determination, the court must consider all relevant facts and circumstances of the case, which requires a different inquiry for every case.<sup>97</sup> Therefore, when applying the *TRAC* factors to determine unreasonable delay, the court must carefully consider all the facts of the case.

*D. THE COURT'S DUTY TO FASHION A REMEDY UPON FINDING UNREASONABLE DELAY*

Upon finding unreasonable delay, a court must fashion a remedy. Section 706 states that a court “shall” compel the agency to act.<sup>98</sup> When Congress uses the word “shall” in a statute, courts interpret it to impose a mandatory duty upon the court to act.<sup>99</sup> This mandatory duty may take the form of a mandamus action in situations where the agency’s action is a “nondiscretionary, ministerial duty.”<sup>100</sup> In other situations, such as Social Security benefits cases, courts have, instead, imposed judicial deadlines of 30, 90, and 120 days within which time an agency must make a benefits determination.<sup>101</sup> There are other remedies available to a court upon finding unreasonable agency delay, but the court’s action is mandatory upon such a finding.

IV. THE FAILURES OF THE VBA AND THE COURTS TO REMEDY  
UNREASONABLE DELAYS IN BENEFITS APPEALS

Recent studies have shown the VBA’s inadequacies in dealing with the serious problems raised by the influx of PTSD in combat veterans.<sup>102</sup> These problems are extensive and deprive many veterans of mental-health benefits that are necessary to ensure their safety and well-being. The most serious concern that has arisen is the length of time it takes for veterans to appeal adverse benefits determinations. The VBA has attempted to remedy this

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96. See *Independence Mining Co.*, 105 F.3d at 512 (concluding that a court must consider all competing interests before making a decision).

97. *Id.*

98. 5 U.S.C. § 706(1) (2006).

99. See *Pierce v. Underwood*, 487 U.S. 552, 569–70 (1988) (stating that “shall” imposes a mandatory duty and is not permissive language); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (concluding that Congress imposed a mandatory duty upon courts to compel the Secretary to act upon finding unreasonable delay).

100. *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991).

101. See *Pub. Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1159 (D.C. Cir. 1983) (imposing a thirty-day deadline for the Assistant Secretary to issue rulemaking); *Caswell v. Califano*, 583 F.2d 9, 17 (1st Cir. 1978) (imposing a ninety-day deadline from request to hearing); *White v. Mathews*, 559 F.2d 852, 855, 861 (2d Cir. 1977) (imposing a 120-day phased-in deadline from request to decision in Social Security disability benefits determinations).

102. See VA CLAIMS PROCESSING TASK FORCE, REPORT TO THE SECRETARY OF VETERANS AFFAIRS 14 (2001), available at <http://www.vba.va.gov/bln/21/cptf/Task%20Force%20Report.zip> (“Currently, both the time delays to handle appeals and then the time to correct remanded decisions are both unreasonable and unfair to veterans awaiting decisions.”).

problem but has been unsuccessful. Additionally, given the opportunity to intervene and compel agency action, the Northern District of California decided it had no jurisdiction to hear the veterans' case. The court based this decision on a flawed application of the APA and case law, specifically the *TRAC* factors. This Part will first examine the delays in mental-health benefits processing and will then consider the Northern District of California's dismissal of the veterans' case.

A. *THE INADEQUACIES AND DELAYS OF THE VETERANS BENEFITS ADMINISTRATION IN ADJUDICATING AND AWARDING MENTAL-HEALTH BENEFITS*

Despite the large number of soldiers returning from Iraq and Afghanistan with PTSD and other mental-health disorders, the VBA has been largely ineffective in addressing the issue. Following the process described in Part II.B above, 838,141 veterans filed claims for compensation and pension benefits in 2007.<sup>103</sup> The process to adjudicate a veteran's claim at the initial stage takes, on average, 183 days.<sup>104</sup>

Veterans who are denied benefits for one or all of their claims at this stage can pursue their claim through the prolonged and complex appeals process.<sup>105</sup> Of the claims filed by veterans with the VBA, eleven percent, or over 91,000, result in a Notice of Disagreement.<sup>106</sup> Only four percent of veterans pursue these claims to a final decision,<sup>107</sup> perhaps as a result of the extremely long delays in the appeals process. Of the persistent veterans who pursue their claims to a final decision by the BVA, the majority of them have their initial benefits decisions overturned or remanded.<sup>108</sup>

For those veterans who pursue their claims to a final decision by the BVA, it takes five years, on average, to receive a decision.<sup>109</sup> The VA recognizes and acknowledges that these delays are unacceptable and that it needs to remedy them.<sup>110</sup> Perhaps the most alarming statistic resulting from these long delays in benefits appeals is the number of veterans who die while

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103. *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1070 (N.D. Cal. 2008). The court also notes that, of these claims, 225,173 were "original" claims, or first-time requests, and the rest were "reopened" claims, or requests from veterans who had at least once previously sought benefits from the VA. *Id.*

104. *Id.*

105. See *supra* text accompanying notes 31–36 (describing the process for receiving benefits).

106. *Veterans for Common Sense*, 563 F. Supp. 2d at 1073.

107. *Id.*

108. See *id.* at 1075 (stating that the BVA, on average, overturns the benefits decision twenty percent of the time and remands the case forty percent of the time). Of the cases that are remanded by the BVA, somewhere between nineteen and forty-four percent are avoidable remands, or remands that could have been avoided, but for an error at the initial benefits determination. *Id.*

109. *Id.* at 1074.

110. VA CLAIMS PROCESSING TASK FORCE, *supra* note 102, at 14.

their appeals are still pending. Between October 2007 and March 2008, a six-month period, at least 1467 veterans died while waiting for a final decision on their mental-health benefits.<sup>111</sup>

The VBA attributes the unreasonable delays in benefits appeals to budgetary deficiencies and lack of personnel.<sup>112</sup> Another reason for the delays, as stated by the Deputy Undersecretary for Benefits of the VA, is that the VA gives priority to initial benefits adjudications to the detriment of the appeals process.<sup>113</sup> In the last few years, the VA's budget has increased significantly.<sup>114</sup> However, this has not resulted in a correlating decrease in length of mental-health benefits appeals.<sup>115</sup> Also, in 2007, Congress authorized the VBA to hire 3100 additional employees, 2700 of whom were to assist with the benefits determinations; as of spring 2008, the VBA filled only 2100 of these positions, and the new personnel have not alleviated the delays in benefits appeals.<sup>116</sup>

The problems within the VBA are extensive and most likely will not be solved with more money and more employees. However, the fact that Congress is putting more money into the VBA demonstrates that veterans' benefits adjudication needs to change. The fact that the VBA has been receiving larger sums of money and the delays remain unreasonably long also shows that the problem cannot be fixed within the VBA. The risks and problems resulting from unreasonable delay in benefits for veterans facing serious mental-health disorders such as PTSD warrant intervention, if not by Congress, then by courts of general jurisdiction.

B. THE NORTHERN DISTRICT OF CALIFORNIA'S OPPORTUNITY  
AND FAILURE TO REMEDY THIS DELAY

In June 2008, a district court in the Northern District of California decided a case on veterans' benefits and held that the court had no jurisdiction to hear claims brought on behalf of veterans.<sup>117</sup> Two groups of non-profit veterans' organizations, Veterans for Common Sense and Veterans for Truth, brought the case on behalf of veterans.<sup>118</sup> The

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111. *Veterans for Common Sense*, 563 F. Supp. 2d at 1075. When a veteran dies during his or her appeal, the VA extinguishes the claim. *Id.*

112. *Id.* at 1063.

113. *See id.* at 1074 (noting that one reason for delays in benefits appeals is that the VA has focused on adjudicating initial claims).

114. *Id.* at 1063. The VA spent approximately \$2.4 billion on mental-health care in 2006. *Id.* In 2007, the spending increased to \$3.2 billion. *Id.* The estimated budget for mental-health care in 2009 is \$3.9 billion. *Id.*

115. *Id.* at 1074 (noting that delays actually increased from 2005 to 2008).

116. *Veterans for Common Sense*, 563 F. Supp. 2d at 1076.

117. *Id.* at 1091-92 ("The remedies sought by Plaintiffs are beyond the power of this Court.").

118. *Id.* at 1049.

organizations asserted broad claims against the VA for veterans who served in Iraq and Afghanistan and who had filed disability claims for PTSD.<sup>119</sup>

The court was faced with a multitude of allegations, not the least of which was the claim for unreasonable delays, as described in Part IV.A above.<sup>120</sup> Perhaps one reason, but not an excusable one, for the court's dismissal of the § 706 claims for unreasonable delays in mental-health benefits appeals is the sheer abundance of causes of action. The court may have felt that in order to find in favor of the veterans, it would have to award them all the relief sought, which could lead to pervasive judicial oversight of agency action. The court did address the issue of unreasonable delay by applying the *TRAC* factors.<sup>121</sup> However, the court based its decision on an improper application of the *TRAC* factors and faulty assumptions about the ramifications of judicial review.

### 1. The Court's Application of the *TRAC* Factors

The Northern District of California erred in its application of the *TRAC* factors by failing to apply a balancing test to the unreasonable delay in benefits appeals. The court placed all the weight in this case on the fourth factor, which states that a court may consider a competing agency priority.<sup>122</sup> The Ninth Circuit adopted the *TRAC* factors in *Independence Mining Co. v. Babbitt*, where that court stated that the factors were to be applied as a balancing test.<sup>123</sup> The *Babbitt* court analyzed each factor and determined whether the factor favored the plaintiff or the defendant before coming to a conclusion as to whether or not there was unreasonable delay.<sup>124</sup> The *Veterans for Common Sense v. Peake* court applied all six *TRAC* factors in a similar manner, but then dismissed five of the six factors after determining that the fourth factor favored the VA.<sup>125</sup> A court should use the *TRAC* factors to consider all the relevant factors that may or may not warrant

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119. *Veterans for Common Sense v. Nicholson*, No. C-07-3758 SC, 2008 WL 114919, at \*11 (N.D. Cal. Jan. 10, 2008) (order granting in part and denying in part defendants' motion to dismiss and granting plaintiffs' administrative motion to file veteran and family-member personal identifying information under seal).

120. *See generally Veterans for Common Sense*, 563 F. Supp. 2d 1049 (illustrating the number of issues the court had to examine). The plaintiffs in this case, non-profit organizations suing on behalf of veterans, alleged problems, delays, and inadequacies with many different aspects of the VA's policies and practices, including benefits decisions and medical and mental-health care. *Id.*

121. *See id.* at 1083–85 (applying *TRAC* factors and other case law to the delays in benefits appeals).

122. *See id.* at 1085 (using the fourth factor to overcome all the other *TRAC* factors).

123. *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 512 (9th Cir. 1997).

124. *Id.* at 506–11 (applying each *TRAC* factor and concluding that the factors weighed in favor of the agency).

125. *Veterans for Common Sense*, 563 F. Supp. 2d at 1085 (“These factors [that favor Plaintiff] cannot overcome the fourth factor.”).

judicial intervention;<sup>126</sup> the *Veterans for Common Sense* court instead found the fourth factor, which weighed in the VA's favor, to be dispositive.

In applying the *TRAC* factors, the court determined that three of the factors favored the veterans, two of the factors favored neither party, and one factor (the fourth factor) favored the VA.<sup>127</sup> The court first determined that factors one and two favored neither party because there is no specific statutory timetable involved.<sup>128</sup> The court's analysis, however, failed to consider whether the agency's conduct was governed by a "rule of reason," and instead lumped this question in with the question of congressional mandate.<sup>129</sup> The court recognized that several statutes require the VA to act in a timely manner, but passed on the question of whether the VA's actions are governed by a rule of reason.<sup>130</sup>

The court's discussion of the three *TRAC* factors that favor the veterans—factors three, five, and six—was very brief and somewhat dismissive. This is especially true in light of the third factor, which states that "delays affecting health and human welfare are less tolerable" than delays in other contexts.<sup>131</sup> This factor strongly favors relief for veterans<sup>132</sup> in light of the severe and substantial hardships that veterans suffering from PTSD and other mental-health disorders face.<sup>133</sup> The fact that the *TRAC* decision includes two separate factors in the balancing test that deal with the nature of the interests prejudiced by delay also weighs in favor of the veterans.<sup>134</sup> Here, the court was faced with two factors weighing strongly in favor of compelling agency action, but the court brushed those issues aside and deferred to agency discretion.

The sixth *TRAC* factor also favored the veterans in this case because there was evidence of bad faith in the VA's actions toward veterans.<sup>135</sup> In this regard, the court surreptitiously stated that "the VA's track record . . . is

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126. See *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (compiling six different rules to form a standard for reviewing agency delay).

127. See *Veterans for Common Sense*, 563 F. Supp. 2d at 1083–86 (holding that factors three, five, and six favored plaintiffs; factors one and two favored neither party; and factor four favored defendant).

128. *Id.* at 1084.

129. See *supra* text accompanying notes 87–89 (discussing the first two *TRAC* factors).

130. *Veterans for Common Sense*, 563 F. Supp. 2d at 1084.

131. *Id.* at 1085; see also *Telecomms. Research & Action Ctr.*, 750 F.2d at 80 (describing the third *TRAC* factor).

132. See *Blankenship v. Sec'y of Health, Educ. & Welfare*, 587 F.2d 329, 334 (6th Cir. 1978) (holding that the agency's delay was unreasonable upon finding that substantial hardship resulted from delays in benefits that would be used for necessities).

133. See *supra* Part IIA (describing PTSD and its effects on veterans and their families).

134. *Telecomms. Research & Action Ctr.*, 750 F.2d at 80.

135. See *supra* notes 93–95 and accompanying text (stating that bad faith can be taken into account even though the *TRAC*-factor analysis does not require a finding of bad faith or intent).

troubling,” but then determined that there had been no bad faith.<sup>136</sup> It is unclear what troubled the court about the VA’s delays, but perhaps it has something to do with the fact that the VA knew about the unreasonable delays in the appeals process prior to the war in Iraq and has yet to address the problem.<sup>137</sup>

The fourth *TRAC* factor, on which the court bases its conclusion, favored the VA, but not as heavily as the court says it does. The fourth factor requires a court to determine whether some competing agency priority would be affected by compelling agency action.<sup>138</sup> In *Veterans for Common Sense*, the competing agency priority cited by the VA is its focus on initial benefits determinations.<sup>139</sup> The court agreed with the VA that this is a competing priority and used it to conclude that compelling the VA to remedy its delay was beyond the court’s jurisdiction.<sup>140</sup> In spite of the three *TRAC* factors weighing heavily in favor of the veterans, the court used the one factor in favor of the VA to find no unreasonableness.<sup>141</sup> The court, instead, should have applied the balancing test intended by the D.C. Circuit<sup>142</sup> and adopted by the Ninth Circuit.<sup>143</sup>

The court not only placed too much weight on the fourth factor, but it also departed from prior case law and misconstrued the facts in its application of the competing-agency-priority test. A bare assertion that the delay is due to a competing priority does not necessarily require the court to rule in favor of the agency.<sup>144</sup> If this were not true, in all cases, an agency could cite some priority in order to overcome unreasonableness. The *Veterans for Common Sense* court found that the competing priority of initial determinations over appeals controls this case, in large part due to the fact that only eleven percent of veterans appeal their decisions.<sup>145</sup> In reaching this conclusion, the court failed to mention that eleven percent in this case equates to over 91,000 veterans<sup>146</sup> and that, during a six-month period, at

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136. *Veterans for Common Sense*, 563 F. Supp. 2d at 1085.

137. See VA CLAIMS PROCESSING TASK FORCE, *supra* note 102, at 14 (recognizing that appeal times are unreasonable and unfair to veterans).

138. *Telecomms. Research & Action Ctr.*, 750 F.2d at 80; see also *supra* notes 83–86 and accompanying text (describing the fourth factor and cases that have considered the issue of competing agency priority).

139. *Veterans for Common Sense*, 563 F. Supp. 2d at 1085.

140. *Id.* at 1083–86.

141. *Id.* at 1085.

142. *Telecomms. Research & Action Ctr.*, 750 F.2d at 80.

143. *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 512 (9th Cir. 1997).

144. See *Brower v. Evans*, 257 F.3d 1058, 1070 (9th Cir. 2001) (compelling agency action even though the agency asserted that there were competing priorities).

145. *Veterans for Common Sense*, 563 F. Supp. 2d at 1085. The court rounded the numbers in favor of the VA, concluding: “Given that 90% of veterans depend solely on [initial determinations] for their benefits, the Court is wary of granting relief.” *Id.*

146. *Id.* at 1073.

least 1467 veterans died while waiting for their appeal to reach a final decision.<sup>147</sup> Given the seriousness of the problems many of these veterans face, the competing agency priority of initial benefits over appeals does not—or at least should not—favor the VA.

The Northern District of California also inappropriately applied the *TRAC* factors by relying solely on the factors as the means for deciding the unreasonable-delay issue. The D.C. Circuit envisioned the *TRAC*-factor analysis as a balancing test to “provide[] useful guidance in assessing claims of agency delay.”<sup>148</sup> The Northern District of California instead applied this test with far too much rigidity and found it dispositive on the issue of whether the VA had caused unreasonable delay.<sup>149</sup>

In *Veterans for Common Sense*, the VA asserted that it does not have the resources to focus both on initial benefits and on appeals, but this argument fails on both legal and factual grounds. Other courts have held that a party cannot use an agency’s lack of funding to justify an unreasonable delay.<sup>150</sup> Furthermore, considering the funding increases that Congress has allocated to the VA,<sup>151</sup> at the very least there should have been a decrease in appeals times. Congress has also directed the VBA to hire additional employees to cope with the volume of benefits requests and appeals.<sup>152</sup> In spite of these measures, a large number of the available positions remain unfilled, leading to the presumption that the VBA could begin to cope with the delay problem but has not.<sup>153</sup>

The court in this case could have ruled in favor of the veterans and should have done so for all the reasons described above. The court erred in relying only on the *TRAC* factors to determine unreasonableness and in applying the test improperly by placing all the weight on the fourth factor. The third, fifth, and sixth factors clearly cut in favor of unreasonableness<sup>154</sup> and, in spite of this, the court found the fourth factor weightier than all of

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147. *Id.* at 1075.

148. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). The *TRAC* court puts together the *TRAC* factors to create “the hexagonal contours of a standard.” *Id.* The court, however, continues to say that the standard is “hardly ironclad.” *Id.*

149. *See Veterans for Common Sense*, 563 F. Supp. 2d at 1083–86 (using only the *TRAC* factors to decide the issue of unreasonable delay under § 706).

150. *See Xia v. Gonzales*, No. C07-728 MJP, 2008 U.S. Dist. LEXIS 3273, at \*7 (W.D. Wash. Jan. 15, 2008) (determining that an agency’s lack of resources cannot justify an unreasonable delay in an immigration case).

151. *Veterans for Common Sense*, 563 F. Supp. 2d at 1063 (noting that the VA’s budget increased from \$2.4 billion to \$3.9 billion during the last three years).

152. *Id.* at 1076 (noting that Congress authorized 3100 new positions and one thousand of those remain unfilled).

153. *See id.* (stating that 600 of the 2700 new positions authorized by Congress for dealing with benefits determinations remain unfilled).

154. *See supra* notes 131–37 and accompanying text (discussing that although these factors weighed in the veterans’ favor, the court dismissed this in its analysis).

the other factors combined.<sup>155</sup> The court should have taken an approach grounded in prior case law and prior application of the *TRAC* factors. Further, the decision should have placed more weight on the serious consequences of the delay in mental-health benefits appeals.

## 2. The Court's Application of Other Sources of Law

The Northern District of California made two other brief arguments as to why it should not compel the VA to expedite benefits appeals.<sup>156</sup> The first was based on 38 U.S.C. § 502, which states that VA regulations are subject to judicial review only in the Federal Circuit.<sup>157</sup> The court found that because expediting appeals would implicate some VA regulations, the veterans' claims were beyond its jurisdiction.<sup>158</sup> When the court dismissed the veterans' assertion that their claims did not directly challenge § 502, the court dismissed a very strong argument.<sup>159</sup> If any claim that implicates (however slightly) a federal regulation must be brought in the Federal Circuit, all cases would be brought there. This is clearly not the type of jurisdictional pigeonholing that Congress intended in enacting § 502.<sup>160</sup>

The court's second brief argument in reaching its conclusion that it should not step in and expedite veterans' appeals is that "pervasive oversight [over agency action] . . . is not contemplated by the APA."<sup>161</sup> Fear of pervasive oversight, however, should not prevent the court from remedying a situation that the VA has demonstrated it cannot fix. Courts have come up with many different remedies for long delays in administrative procedures, any one of which would not require "pervasive oversight."<sup>162</sup> Merely providing a remedy to veterans who have had to wait many years for

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155. See *supra* notes 138–46 and accompanying text (describing the court's heavy reliance on the fourth factor in concluding that delays are due to competing priorities).

156. The court made a brief, final argument in its discussion of delay in benefits appeals, but it is not worth examining in detail; the court recognized, but quickly dismissed, the veterans' claims for due-process relief. *Veterans for Common Sense*, 563 F. Supp. 2d at 1085–86. The *TRAC*-factor analysis seems to envelop any claim for due-process relief.

157. 38 U.S.C. § 502 (2006); *Veterans for Common Sense*, 563 F. Supp. 2d at 1059, 1083.

158. *Veterans for Common Sense*, 563 F. Supp. 2d at 1084. For example, implicated regulations include the requirement that the VA assist the veteran in obtaining medical records, the requirement of notification, the time limit on filing an NOD, and the rule that a veteran's claim is determined to be invalid if not submitted within one year. *Id.*

159. *Id.*; see also *Preminger v. Principi*, 422 F.3d 815, 821 (9th Cir. 2005) ("Congress explicitly has provided for judicial review of *direct* challenges to VA rules and regulations only in the Federal Circuit." (emphasis added)).

160. See *Preminger*, 422 F.3d at 821 (holding that only facial challenges to VA regulations are barred outside the Federal Circuit by § 502).

161. *Veterans for Common Sense*, 563 F. Supp. 2d at 1085 (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004)).

162. See *supra* notes 98–101 and accompanying text (describing the various remedies available to courts in unreasonable-delay cases, including compelling the agency to act and imposing judicially created time frames).

their appeals to be decided does not necessarily require the level of judicial oversight that the court concludes it would.<sup>163</sup>

#### V. THE NEXT STEP FOR VETERANS IN FEDERAL DISTRICT COURTS AND CONGRESS

Failure by the courts to remedy what has become a very serious problem within the VA is a mistake that should be reconsidered. It seems unlikely that any district court in California will reconsider its decision given the extensive treatment the Northern District has given the problem and its unwillingness to grant any sort of remedy for the veterans.<sup>164</sup> Perhaps this case will be more successful at the appellate level in the Ninth Circuit, but that remains to be seen.<sup>165</sup>

Another possible option for veterans is to seek a district-court remedy in another circuit. The best circuits to bring suit in are those that have adopted the *TRAC* factors, including the Tenth Circuit, First Circuit, and the D.C. Circuit.<sup>166</sup> Applied correctly, the *TRAC* factors heavily favor veterans seeking relief. Perhaps one of these circuits would be more amenable to asserting jurisdiction over the veterans' claims of unreasonable delay.

The flaws in the reasoning of the *Veterans for Common Sense* court and its failure to give sufficient weight to the serious problems facing veterans whose appeals are delayed five years leaves open the possibility for another court to rule the opposite way. Another court could easily rule in favor of the veterans, either by applying the *TRAC*-factor balancing test or by looking at the length of delay to determine that the average five-year delay in appeals is unreasonable.<sup>167</sup>

The veterans could also try to lobby Congress to impose statutory deadlines on the VBA's benefits-appeals process. If Congress imposed statutory deadlines, courts would be able to step in more easily and compel agency action if the appeals process was delayed beyond the statutory

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163. See *Veterans for Common Sense*, 563 F. Supp. 2d at 1083–84 (listing reasons why the court believes that providing veterans with a remedy will require significant judicial oversight).

164. See *supra* text accompanying notes 117–21 (describing the court's opportunity to remedy the problems of the VBA and its unwillingness to do so).

165. Plaintiffs in the veterans' case are currently pursuing an appeal in the Court of Appeals for the Ninth Circuit. Appellants' Opening Brief, *Veterans for Common Sense v. Peake*, No. 08-16728 (9th Cir. Feb. 2, 2009).

166. See, e.g., *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 (10th Cir. 1999) (stating that the *TRAC* factors may be helpful for unreasonable-delay cases but declining to apply them in an unlawfully withheld case); *Towns of Wellesley, Concord & Norwood, Mass. v. Fed. Energy Regulatory Comm'n*, 829 F.2d 275, 277 (1st Cir. 1987) (applying the *TRAC* factors to agency action); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (creating the *TRAC* factors).

167. See *supra* Part IV.B.1 (analyzing the application of the *TRAC* factors to the veterans' case and determining that the balancing test, applied accurately, favors the veterans); see also *supra* note 101 (citing cases that have found agency delays unreasonable and imposed judicial deadlines).

deadline.<sup>168</sup> Then courts would not have to engage in the analysis of whether the delay was unreasonable; instead, courts could compel agency action unlawfully withheld.<sup>169</sup>

## VI. CONCLUSION

Veterans returning from Iraq and Afghanistan deal not only with the physical wounds of combat but also with very serious mental and emotional problems. Given the numerous policy choices made in favor of providing for veterans in return for their service to this country, the failure of the VA to provide mental-health care within a reasonable time is indefensible. The VA has attempted to implement new policies to relieve these delays but has been unsuccessful.

Either the courts or Congress must act to remedy this situation. The *Veterans for Common Sense* court seemed unconcerned with the fact that over 91,000 veterans face unreasonable delays in mental-health benefits appeals.<sup>170</sup> These veterans face five-year delays during which many of them suffer from PTSD and major depression, the consequences of which cannot be understated.<sup>171</sup> The VA cannot fix this problem internally, and Congress cannot fix the problem by throwing more money at it.<sup>172</sup> It is a problem that requires intervention by courts of general jurisdiction, who can act as unbiased outsiders to remedy a system that is facing serious internal problems. The District Court for the Northern District of California had the opportunity to remedy this problem, but instead dismissed the issue without really addressing the veterans' serious concerns. In the future, if faced with this situation of whether to use the *TRAC* factors or another test, a court should find unreasonable delay and fashion a remedy that ensures that veterans get the help they need when they need it and not force them to wait five years.<sup>173</sup>

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168. 5 U.S.C. § 706 (2006) (providing that a court may compel agency action "unlawfully withheld").

169. *See supra* note 89 (stating that upon a finding of delay beyond an explicit statutory deadline, a court must determine that the action has been unlawfully withheld).

170. *See supra* text accompanying notes 103–07 (stating the number of veterans that face the appeals process).

171. *See supra* Part II.A (describing PTSD and major depression and the resulting consequences).

172. *See supra* note 114 (detailing past and projected costs for mental-health care at the VA).

173. There are many different remedies that the court could impose, including mandamus and judicially imposed deadlines. *See supra* text accompanying notes 100–01. Another possible remedy is awarding interim benefits, whereby the court would compel the VA to provide some benefits to veterans whose appeals are delayed beyond a certain amount of time. *See Heckler v. Day*, 467 U.S. 104, 119 n.34 (1984) (declining to rule on the district court's interim-benefits remedy because the Court invalidated the injunction, rendering the interim-benefits remedy ineffectual).