

January 2015

## Goals vs. Deadlines: Notes on the VA Disability Claims Backlog

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### Recommended Citation

Nagin, Daniel L. (2015) "Goals vs. Deadlines: Notes on the VA Disability Claims Backlog," *University of Massachusetts Law Review*: Vol. 10: Iss. 1, Article 3.

Available at: <http://scholarship.law.umassd.edu/umlr/vol10/iss1/3>

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# Goals vs. Deadlines: Notes on the VA Disability Claims Backlog

Daniel L. Nagin

10 U. MASS. L. REV. 50

## ABSTRACT

Drawing primarily on policy considerations, social science research, and the relevant statutory and doctrinal frameworks within veterans benefits law, this article argues that Congress should subject the U.S. Department of Veterans Affairs (VA) to a clear and enforceable deadline for making initial eligibility determinations on claims for service-connected compensation. Despite widespread media coverage of delays in VA's adjudication system and countless oversight hearings and congressional proposals for reform, this simple idea – to impose a hard deadline upon VA has either been overlooked entirely or drowned out by a preoccupation with other types of legislative responses to the VA claims backlog. This article seeks to enter the debate about remedying the backlog from a slightly different vantage point than the perspectives used to date, one that focuses on the nature of deadlines – including the psychology of deadlines, the enforcement of deadlines, and the role deadlines might play in promoting perceptions of agency fairness and legitimacy. Along the way, the article draws on VA's own data to reveal the long-standing gap between the agency's timeliness goals and its performance. The reform proposed here is admittedly modest in many respects; it is far from a cure all for delay. But it does reflect certain fundamental values that should animate any reforms to the VA system: expanding enforcement tools, applying lessons learned from past VA failures, and treating veterans with dignity.

## AUTHOR NOTE

Daniel L. Nagin is a Clinical Professor of Law and the Faculty Director of the Legal Services Center and Veterans Legal Clinic at Harvard Law School. The author would like to thank the University of Massachusetts School of Law and its Law Review for the invitation to speak at its Veterans & The Law Roundtable Symposium in spring 2014, Alan C. Battista of the Law Review for editorial support, Betsy Gwin and Tomiko Brown-Nagin for helpful comments, and Priyanka Gupta and Jaimie McFarlin for excellent research assistance.

I.	INTRODUCTION .....	52
II.	THE SERVICE-CONNECTED DISABILITY COMPENSATION PROGRAM ...	58
III.	THE VA BACKLOG .....	60
A.	Defining the Backlog .....	60
B.	Remedying the Backlog .....	71
IV.	EXTERNAL VS. INTERNAL DEADLINES .....	74
V.	ENFORCEMENT CHALLENGES .....	79
VI.	WHY A STATUTORY DEADLINE FOR DECIDING DISABILITY CLAIMS? ..	85
VII.	CONCLUSION .....	92

## I. INTRODUCTION

Picture an infantryman who has served two tours of duty, one in Iraq and one in Afghanistan.<sup>1</sup> He has borne the burdens of war in countless ways—by risking life and limb for his country, by absorbing the mental stresses of multiple combat deployments, and by enduring separation from his family and community.<sup>2</sup> The soldier recently completed his term of enlistment and received an honorable discharge from the Army. He returned to his home community—it could be any community, but, for our purposes, let's say it's in Massachusetts<sup>3</sup>—and tried to resume civilian life as best he could. But, like so many soldiers, sailors, marines, and airmen, returning from war, he had

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<sup>1</sup> Multiple deployments are one of the hallmarks of these recent conflicts. *See generally* VANESSA WILLIAMSON & ERIN MULHALL, *INVISIBLE WOUNDS—PSYCHOLOGICAL AND NEUROLOGICAL INJURIES CONFRONT A NEW GENERATION OF VETERANS* 6 (2009); Thom Shanker, *Army is Worried of Rising Stress of Return Tours to Iraq*, N.Y. TIMES, April 6, 2008, <http://www.nytimes.com/2008/04/06/washington/06military.html>. This vignette is a composite drawn from some of the client advocacy undertaken at the Veterans Legal Clinic of the Legal Services Center of Harvard Law School. The Clinic provides *pro bono* representation to veterans who have unmet civil legal assistance needs. For an example of the Clinic's work advocating on behalf of a veteran who completed multiple combat deployments in Iraq and Afghanistan, *see* *Ausmer v. Shinseki*, 26 Vet. App. 392, 395 (2013) (applying, in a case of first impression that cited the veteran's difficulty readjusting to civilian life, the Servicemembers Civil Relief Act to allow an otherwise untimely disability benefits appeal to the U.S. Court of Appeals for Veterans Claims to proceed on the merits).

<sup>2</sup> The example provided here happens to involve a male veteran. But it could just as easily involve a female veteran. Women make up an increasingly significant percentage of the active duty and veteran populations. *See generally* U.S. DEP'T OF VETERANS AFFAIRS, NAT'L CTR. FOR VETERANS ANALYSIS AND STATISTICS, *AMERICA'S WOMEN VETERANS: MILITARY SERVICE HISTORY AND VA BENEFIT UTILIZATION STATISTICS* 3, 8 (2011)(stating that by 2035 women will make up 15 percent of all living veterans); Joe Burris, *Fort Meade VA Outpatient Clinic Advances Effort To Serve Women Veterans*, BALTIMORE SUN, March 24, 2013, available at [http://articles.baltimoresun.com/2013-03-24/news/bs-md-ar-fort-meade-clinic-20130321\\_1\\_women-veterans-mental-health-clinics-million-clinic](http://articles.baltimoresun.com/2013-03-24/news/bs-md-ar-fort-meade-clinic-20130321_1_women-veterans-mental-health-clinics-million-clinic).

<sup>3</sup> U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* 340 (2012). There were nearly 400,000 veterans living in Massachusetts as of 2012; U.S. DEP'T OF VETERANS AFFAIRS, [http://www.va.gov/vetdata/Veteran\\_Population.asp](http://www.va.gov/vetdata/Veteran_Population.asp) (last visited Sept. 9, 2014).

difficulty adjusting.<sup>4</sup> The process of reintegrating into civilian life is not easy, and it is not linear.

Depending on circumstances, each individual may suffer from the visible, physical wounds of war or the invisible wounds of war or both.<sup>5</sup> All of these wounds require diagnosis, treatment, and support systems of various kinds in order for healing to occur.<sup>6</sup> And then there are the newly strange rhythms of civilian life that must also be negotiated.<sup>7</sup> Absent for the first time in a long while are the structure of military life, the mission-oriented focus, and the daily bonds forged with fellow servicemembers pursuing a common goal.<sup>8</sup> Because of these and other challenges, the term “reintegration”—the Army’s chosen vocabulary—is an imperfect concept for capturing the complexity of returning from war.<sup>9</sup>

As for this particular veteran returning home to Massachusetts, imagine that the barriers he encountered upon his return home also have a financial dimension.<sup>10</sup> The veteran—who was given a clean bill

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<sup>4</sup> Of course, the burden of “adjusting” to civilian life is not—and should not—be seen as solely falling on the shoulders of returning servicemembers. See Sebastian Junger, *U.S. Veterans Need to Share the Moral Burden of War*, WASH. POST, May 24, 2013, [http://www.washingtonpost.com/opinions/sebastian-junger-us-veterans-need-to-share-the-moral-burden-of-war/2013/05/24/726d7576-c3b9-11e2-914f-a7aba60512a7\\_story.html](http://www.washingtonpost.com/opinions/sebastian-junger-us-veterans-need-to-share-the-moral-burden-of-war/2013/05/24/726d7576-c3b9-11e2-914f-a7aba60512a7_story.html).

<sup>5</sup> See generally INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY (Territa Nielian and Lisa H. Jaycox, eds., 2008).

<sup>6</sup> *Id.*

<sup>7</sup> Ann Demers, When Veterans Return: The Role of Community in Reintegration, 16 JOURNAL OF LOSS AND TRAUMA: INTERNATIONAL PERSPECTIVES ON STRESS & COPING 2 (2011).

<sup>8</sup> *Id.*

<sup>9</sup> Army Community Service, *Rear Detachment Commander Computer-Based Training: Module 23: Redeployment, Reunion, and Reintegration*, available at [https://www.myarmyonesource.com/skins/aos2/q\\_mod\\_2a285ab0-5db1-4f36-9b91-f2263c973c32/q\\_act\\_download\\_resource/q\\_cat\\_40198439-d625-475a-8bea-d2b4cb797b34/q\\_obj\\_adf8a600-bbfe-4f4a-87d9-617082d8ff3a/display.aspx?ignoretimeout=true](https://www.myarmyonesource.com/skins/aos2/q_mod_2a285ab0-5db1-4f36-9b91-f2263c973c32/q_act_download_resource/q_cat_40198439-d625-475a-8bea-d2b4cb797b34/q_obj_adf8a600-bbfe-4f4a-87d9-617082d8ff3a/display.aspx?ignoretimeout=true). (last visited Sept. 19, 2014). For a searing account of the challenges servicemembers face when they return from war, see DAVID FINKEL, THANK YOU FOR YOUR SERVICE (2013).

<sup>10</sup> A. GLASMEIER ET AL., THE CURRENT AND FUTURE LONG-TERM CARE NEEDS OF MASSACHUSETTS VETERANS 45 (2013) (stating approximately one fifth of all veterans in Massachusetts living at or below 200% of the Federal Poverty Level).

of health during his Army exit medical exam—did his best to get back to work in the civilian world, but has been unable to find employment that suits him. Nothing seemed right. Instead of feeling more acclimated each week to being home, each week he felt more ill at ease. He was not sleeping much—and he was experiencing increased anxiety and hyper-vigilance. These stresses were compounded by deepening financial pressures. At the moment, the veteran—who is unmarried—has no income and is relying on support from extended family and friends. A friend, also a veteran, urges the veteran to receive mental health treatment and tells him he may have Post-Traumatic Stress.

As the veteran seeks out care, he finds himself meeting with an advocate to obtain guidance about his potential eligibility for various benefit programs and financial assistance. As for access to healthcare, the advocate and veteran discuss his options. The veteran states that he would prefer to see a local doctor with whom he had an existing relationship before his military service—and who is not affiliated with the U.S. Department of Veterans Affairs (VA). The advocate therefore provides information about the veteran's eligibility for healthcare coverage through the MassHealth program. As for financial assistance, the advocate and the veteran discuss various programs, including, among other things, the Supplemental Nutrition Assistance Program (SNAP) administered by the Massachusetts Department of Transitional Assistance; the Emergency Aid to Elders, Disabled and Children (EADC) program, also administered by the Massachusetts Department of Transitional Assistance; the Veterans' Services Benefits program administered by the Massachusetts Department of Veterans' Services; and the service-connected disability compensation program administered by the Veterans Benefits Administration of the VA.<sup>11</sup>

During the course of the discussion, the veteran asks a very simple and straightforward question that reflects his urgent need for financial assistance. The question is this: assuming that he applies to one or more of these programs, how quickly will he receive a decision approving or denying him benefits? The advocate answers that the deadlines are clear—but they vary by program. The advocate proceeds to explain that: (1) for the MassHealth program, the agency is required

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<sup>11</sup> Veterans' Compensation for Service-Connected Disabilities, [BENEFITS.GOV](http://www.benefits.gov/benefits/benefit-details/289), <http://www.benefits.gov/benefits/benefit-details/289> (last visited Sept. 19, 2014).

to make a decision within either forty-five days for most applications, or ninety days for applications citing disability as the basis for eligibility;<sup>12</sup> (2) for the SNAP program, the agency is required to make a decision within thirty days;<sup>13</sup> (3) for the EADC program, the agency is required to make a decision within thirty days;<sup>14</sup> (4) and for the Veterans Services' Benefits program, the local agency is required to make a provisional decision within ten business days.<sup>15</sup>

When the discussion turns to the VA service-connected disability compensation program, however, there is a very different response. The advocate tells the veteran that there is really no answer at all. VA's service-connected disability compensation program, unlike all of the other aforementioned programs, is not subject to any statutory or regulatory deadline for making initial eligibility determinations.<sup>16</sup>

The veteran next asks—mindful of the frequent media reports he has seen recently about a VA claims backlog and veterans waiting months and months, if not years, to receive a decision on a claim—how long, on average, it actually takes for VA to make an initial eligibility decision on a service-connected disability compensation claim? He is told that, as of January 2014, the answer is roughly six months—much longer than the deadlines for any of the other programs about which the veteran has inquired.<sup>17</sup>

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<sup>12</sup> 130 MASS. CODE REGS. § 516.004 (2014).

<sup>13</sup> 106 MASS. CODE REGS. § 361.700 (2014); 7 C.F.R. § 273.2(g) (2012). Certain applicants are entitled to “expedited” Food Stamps and must receive a decision on their application within seven days; 106 C.M.R. § 365.800 (2014); 7 C.F.R. § 273.2(i) (2012).

<sup>14</sup> 106 MASS. CODE REGS. § 702.160(A) (2014).

<sup>15</sup> 108 MASS. CODE REGS. § 4.02(5) (2014). The regulation requires that, within ten working days of an application being submitted, the local Veterans Services Officer (VSO) send the completed application, together with a recommendation for approval or denial, to the Department of Veterans' Services (DVS). Note, however, that the regulation does not specify a time period by which DVS must accept or reject the VSO's recommendation. Based on the experience of the Veterans Legal Clinic, in practice DVS accepts or rejects the VSO's recommendation very soon thereafter.

<sup>16</sup> *Vietnam Veterans of America v. Shinseki*, 599 F.3d 654, 657 (D.C. Cir. 2010) (“Congress has not, however, enacted any statutory deadlines that would require the VA to adjudicate *all* disability claims within a definite time period.”).

<sup>17</sup> VA MONDAY MORNING WORKLOAD REPORT, U.S. DEP'T OF VETERANS AFFAIRS (January 11, 2014) *available at* [http://benefits.va.gov/REPORTS/detailed\\_claims\\_data.asp](http://benefits.va.gov/REPORTS/detailed_claims_data.asp). (stating that, as of January 11, 2014, the figure was 175.2 days); Allison Hickey, *Balancing the Record on the Claims Backlog*,

The veteran then wonders, how is it that he is entitled to an eligibility decision within a defined time period for all of these other programs, but not for VA benefits? How is it that the federal agency charged with caring for veterans—and whose mission is “[t]o fulfill President Lincoln’s promise ‘To care for him who shall have borne the battle, and for his widow, and his orphan’ by serving and honoring the men and women who are America’s Veterans”<sup>18</sup>—is subject to no deadline whatsoever for making an initial decision on his claim for service-connected benefits?

This short essay, which expands on a talk delivered at the Veterans and the Law Symposium at the University of Massachusetts School of Law, uses this vignette as a jumping off point to argue that this should not be so. Drawing primarily on policy considerations, social science research, and the relevant statutory and doctrinal frameworks within veterans benefits law, this essay argues that Congress should subject VA to a clear and enforceable deadline—somewhere between 90 and 125 days—for making initial eligibility determinations on claims for service-connected compensation. Despite widespread media coverage of delays in VA’s adjudication system and countless oversight hearings and congressional proposals for reform, this simple idea—to impose a hard deadline upon VA has either been overlooked entirely or drowned out by a preoccupation with other types of legislative responses.<sup>19</sup>

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VANTAGE POINT: DISPATCHES FROM THE U.S. DEP’T. OF VETERANS AFFAIRS (March 19, 2013) available at <http://www.blogs.va.gov/Vantage/8995/balancing-the-record-on-the-claims-backlog/> (reflecting that, as recently as March 2013, the answer would have been nearly 100 days longer — 273 days on average); *see infra* Section III for a fuller discussion of VA’s struggle to reduce the wait veterans must endure after filing an initial claim for service-connected disability compensation benefits.

<sup>18</sup> U.S. DEP’T. OF VETERANS AFFAIRS, [http://www.va.gov/about\\_va/mission.asp](http://www.va.gov/about_va/mission.asp) (last visited May 7, 2014).

<sup>19</sup> For an early voice seeking the imposition of statutory deadlines, *see Battling the Backlog: Challenges Facing the VA Claims Adjudication and Appeal Process: Hearing Before the Senate Committee on Veterans’ Affairs*, 109<sup>th</sup> Cong. 40-42 (2005) (statement of Robert V. Chisholm, President, National Organization of Veterans Advocates)(stating that there “are no deadlines imposed on the VA to complete any of the steps in the adjudication of a claim” and urging Congress to “impose mandatory timeframes for each step in the VA adjudication process.”). One academic article that discusses numerous potential reforms to VA’s adjudication process also briefly addresses the utility of imposing a statutory deadline for deciding initial claims. Rory E. Riley, *Preservation, Modification,*



As discussed more fully below, imposing such a statutory deadline upon VA is a potentially useful reform because, among other things, it will: (1) enshrine in law VA's duty to provide veterans with timely eligibility decisions, as opposed to leaving timeliness to agency prerogative; (2) incentivize VA to extend, and then reinforce against future unknown contingencies, the recent progress it has made in reducing the claims backlog; (3) enhance political and judicial mechanisms for enforcement; and (4) accord veterans a greater measure of dignity during, and confidence in, the VA claims process.

To be clear, the purpose of this essay is not to analyze in depth the causes of the VA backlog, its consequences, or the myriad ongoing and potential reforms to VA's internal processing systems. These topics have been addressed extensively elsewhere at various levels of detail.<sup>20</sup> Nor are the ideas offered here proposed as a kind of panacea for VA's woes. Solving VA's systemic challenges requires insights and reforms from multiple disciplines and perspectives, and massive change implemented over an extended period of time. Rather, the limited purpose here is to enter the debate about remedying the backlog from a slightly different starting point, one that focuses on the nature of deadlines—including the psychology of deadlines, the enforcement of deadlines, and the role deadlines might play in promoting perceptions of agency fairness and legitimacy. Along the

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*or Transformation? The Current State of the Department of Veterans Affairs Disability Benefits Adjudication Process and Why Congress Should Modify, Rather than Maintain or Completely Redesign, the Current System*, 18 FED. CIR. B.J. 1, 13 (2008). As for Congress, one House bill does propose that VA be required to provisionally approve all initial claims not decided within 125 days. H.R. 1739, 113th Cong. (2013). However, to date, that bill has been languishing without any action since the day it was introduced, a period of well over a year.

<sup>20</sup> See, e.g., *A 21st Century System for Evaluating Veterans for Disability Benefits* (Michael McGearry *et al.* eds., 2007) (discussing potential reforms within VA's disability benefit system); *The Impact of Operation Iraqi Freedom/Operation Enduring Freedom on the U.S. Department of Veterans Affairs Claims Process: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs, of the H. Comm. On Veterans' Affairs*, 110<sup>th</sup> Cong. 48-51 (2007) (statement of Linda J. Bilmes, Faculty, Kennedy School of Government, Harvard University) available at <http://veterans.house.gov/hearing-transcript/the-impact-of-operation-iraqi-freedomoperation-enduring-freedom-on-the-us> (recommending, among other things, that in order to address systemic delays in adjudication processes VA should (1) grant all claims when filed and then audit, in manner akin to the IRS, a sampling of the claims to review for accuracy and (2) should simplify the disability rating categories to yield four basic levels of disability).

way, the essay draws on VA's own data to reveal the long-standing gap between the agency's timeliness goals and its performance.

The argument unfolds as follows. Part II provides a brief overview of the service-connected disability compensation program. Part III explores the nature of the VA backlog. Part IV argues that externally imposed deadlines can be more effective than internally imposed deadlines, specifically in the context of VA service-connected compensation benefits. Part V discusses questions of enforcement. Part VI explores the potential advantages and disadvantages of imposing a deadline upon VA, with particular emphasis on how a deadline might affect veterans' assessment of procedural justice at VA. Part VII concludes.

## II. THE SERVICE-CONNECTED DISABILITY COMPENSATION PROGRAM

While the roots of the service-connected disability compensation program stretch back to the nation's founding, the modern version of the program has its origins in World War I. In 1917, Congress amended the War Risk Insurance Act to allow veterans who incurred injuries, or aggravated pre-existing injuries, in the line of duty to receive ongoing payment as compensation, based on the severity of those injuries and the average loss of civilian occupational earning capacity.<sup>21</sup> The current iteration of the program—the service-connected disability compensation program—retains these basic elements.<sup>22</sup> Today, for an unmarried veteran without dependents, compensation payments range from \$130.94 per month (for disabilities rated as impairing civilian occupational earning power by 10%) to

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<sup>21</sup> War Risk Insurance Act, Pub. L. No. 65-20, S. 2133, 40 Stat. 102 (June 12, 1917); Pub. L. No. 65-90, H.R. 5723, 40 Stat. 398 (October 6, 1917); see also James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 VETERANS L. REV. 1 (2013) (discussing the history of the veterans benefits program); James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135 (2011).

<sup>22</sup> U.S. Dep't of Veterans Affairs, *Federal Benefits for Veterans, Dependents and Survivors: Chapter 2 Service-connected Disabilities*, available at, [http://www.va.gov/opa/publications/benefits\\_book/benefits\\_chap02.asp](http://www.va.gov/opa/publications/benefits_book/benefits_chap02.asp) (last visited Sept. 19, 2014).

\$2,858.24 per month (for disabilities rated as impairing civilian occupational earning power by 100%).<sup>23</sup>

The program is both enormous in scope and enormous in importance to veterans with service-connected disabilities. Last year, over 3.7 million veterans received service-connected compensation from VA.<sup>24</sup> In terms of the amount of total service-connected compensation paid by VA, the most recent public data, from fiscal year 2012, shows that VA provided over \$44 billion in compensation, or \$12,542 per eligible veteran.<sup>25</sup> Such payments play a significant role in ensuring that veterans who have lost earning capacity because of a service-connected disability can maintain financial stability and receive compensation—and recognition—for their sacrifice.

While there are altogether five steps before VA can issue service-connected disability compensation benefits to a claimant, there are three basic eligibility requirements at the outset: (1) status as a veteran; (2) existence of a current disability; and (3) a connection between the veteran's service and the disability.<sup>26</sup> Once these three requirements are met, VA must then (4) assign a rating to the disability—that is, determine the severity of the disability according to the standards set forth in the Schedule for Rating Disabilities.<sup>27</sup> Finally, VA must (5) determine the effective date of the claim—that is, determine as of what date the entitlement to compensation arose.<sup>28</sup> This five-step process

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<sup>23</sup> 38 U.S.C. §§ 1104, 1114 (2014). It is important to note that the increases in payment are not proportional to the rating percentage increase. For example, the present difference in compensation between a disability rated 10% disabling and 20% disabling is \$130 vs. \$258. Whereas the difference between a disability rated 90% disabling and 100% disabling is \$1,714 vs. \$2,858. For this reason, it can be especially important to ensure that veterans entitled to a 100% disability rating receive such a rating from VA. In addition, VA must pay higher monthly rates (known as “special monthly compensation”) to disabled veterans with certain specific, very severe disabilities or combinations of disabilities.

<sup>24</sup> U.S. DEP'T OF VETERANS AFFAIRS, PERFORMANCE AND ACCOUNTABILITY REP. I, 11 (2013).

<sup>25</sup> *Id.*

<sup>26</sup> *Dingess v. Nicholson*, 19 Vet. App. 473, 484 (2006).

<sup>27</sup> As described above, the rating assigned to the disability corresponds to a particular level of monthly monetary compensation. 38 U.S.C. § 155 (West 2014); see generally U.S. DEP'T OF VETERANS AFFAIRS, 38 CFR Book C, *Schedule for Rating Disabilities*, WEB AUTOMATED REFERENCE MATERIAL SYSTEM (Feb. 27, 2014) <http://www.benefits.va.gov/warms/bookc.asp>.

<sup>28</sup> 38 U.S.C. § 5110 (West 2014).

may seem simple. It is anything but. Each step—even a topic as seemingly innocuous as the very first step, which determines who meets the definition of a veteran<sup>29</sup>—is marked by enormous complexity.<sup>30</sup>

### III. THE VA BACKLOG

#### A. Defining the Backlog

Concerns about delays in the processing of claims at VA are nothing new.<sup>31</sup> However, these concerns have become much more intense and highly publicized over the last five years. What was once a relatively arcane subject became the focus of front page news,<sup>32</sup>

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<sup>29</sup> See VETERANS BENEFITS MANUAL, ch. 3 (Barton F. Stichman & Ronald B. Abrams eds., 2013) (providing an overview of the eligibility requirements for service-connected disability compensation benefits).

<sup>30</sup> See Robert N. Davis, *Veterans Fighting Wars at Home and Abroad*, 45 TEX. TECH L. REV. 389 (2013) (discussing the needs of disabled veterans and the veterans benefit adjudication system); James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of Veterans Benefits System*, 66 NYU ANN. SURV. AM. LAW 251 (2010) (discussing some of the inherent complexity in the existing system); William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA's Regulation Rewrite Project*, 61 ADMIN. L. REV. 407 (2009); and William A. Moorman & William F. Russo, *Serving our Veterans Through Clearer Rules*, 56 ADMIN. L. REV. 207 (2004). A sense of the program's complexity is reflected in the current 2204-page edition of the VETERANS BENEFITS MANUAL (Barton F. Stichman & Ronald B. Abrams eds., 2013), which is the desk bible for those who advocate for veterans within the VA adjudication system and on judicial review. Even the question of what constitutes a "claim" for VA benefits is not without dispute. See, e.g., *Cacciola v. Gibson*, 27 Vet.App. 45, 53 n. 2 (2014) ("Although there have been efforts to definitively define what is and is not a 'claim,' such efforts have not produced uniformity").

<sup>31</sup> See, e.g., VA BLUE RIBBON PANEL ON CLAIMS PROCESSING, PROPOSALS TO IMPROVE DISABILITY CLAIMS PROCESSING IN THE VETERANS BENEFIT ADMINISTRATION, 3 (1993) (stating that panel was established by the VA Under Secretary for benefits to "develop recommendations to shorten the time it takes to make decisions on disability claims and reduce the backlog of claims which has reached critical levels at many VBA regional offices").

<sup>32</sup> See, e.g., James Dao, *Veterans Wait for Benefits as Claims Pile Up*, N.Y. TIMES, Sept. 27, 2012 at A1.

editorials,<sup>33</sup> investigative reporting,<sup>34</sup> and a recurring topic on a cable television comedy show.<sup>35</sup> What once required lengthy explanations, now simply became known in the media and popular culture by its three-word shorthand: the VA backlog.

The current backlog at VA has its source in a number of factors, which combined to create a perfect storm that overwhelmed the agency and markedly drove up the time it took to decide claims over the last few years. A full excavation of the causes of the backlog is beyond the scope of this essay. For the moment, it is sufficient to note, in general terms, that VA ascribed the backlog to overlapping forces related to increased access to, and increased demand for, benefits. On the access side, VA has cited: greater awareness among the veterans community about VA benefits via social media; improved VA community outreach efforts; expanding numbers of medical conditions that are presumed by law to be service-connected; and more effective use of a VA and Department of Defense program that facilitates the submission of disability applications prior to discharge from military service.<sup>36</sup> On the demand side, VA has cited: the toll of the Iraq and Afghanistan Wars, the increased survival rates of servicemembers because of advances in medicine and battlefield protection, and the draw down from those conflicts; an aging population of veterans from earlier conflicts whose health is deteriorating; the recession that hit at the end of the first decade of the 21<sup>st</sup> century; and increasing complexity in deciding claims based on the average number of medical conditions contained in each claim.<sup>37</sup> Other factors that have been

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<sup>33</sup> See, e.g., Editorial, *VA backlog fails ailing veterans: Our view*, USA TODAY, Aug. 21, 2013, available at <http://www.usatoday.com/story/opinion/2013/08/21/va-veterans-disability-claims-backlog-editorials-debates/2683167/>.

<sup>34</sup> See, e.g., Aaron Glantz, *VA Backs Off Promise to Fix Veterans' Claims Backlog*, THE CENTER FOR INVESTIGATIVE REPORTING, (May 22, 2013) <http://cironline.org/reports/va-backs-promise-fix-veterans-claim-backlog-4571>.

<sup>35</sup> See, e.g., *The Daily Show: America's Heroes Return—Operation Enduring Wait* (Comedy Central Television Broadcast, May 20, 2013).

<sup>36</sup> See *infra* notes 37 and 38.

<sup>37</sup> U.S. DEP'T OF VETERANS AFFAIRS, 2013 PERFORMANCE AND ACCOUNTABILITY REP., PART II, 5, 85 (2013). For further background about the addition of medical conditions—including ischemic heart disease, Parkinson's disease, hairy cell leukemia and other types of chronic B-cell leukemia—to the list of conditions that are presumptively service-connected for Agent Orange exposure, see 75 Fed. Reg. 53, 202 (Aug. 31, 2010); see also VA CLAIMS PROCESSING

cited include internal VA challenges, such as delays accessing pertinent records held by other government agencies and process-related and technological inefficiencies.<sup>38</sup> Finally—and independent of these specific access, demand, and related considerations—the sheer complexity of veterans benefits in general no doubt plays an important role in the backlog too.<sup>39</sup>

While the VA backlog has attracted considerable attention, its precise meaning has proven more slippery. This slipperiness has two dimensions. First, what types of claims and what stages of the adjudication process should be included in the discussion of delays at VA? Second, when should a claim, assuming it is being considered in the assessment of delays at VA, be denoted as “backlogged?”

As to the first question, even within the category of service-connected disability compensation claims, there are multiple sub-categories of claims that may or may not be entitled to the same level of concern in evaluating processing delays at VA.<sup>40</sup> For example, one might attach different weight to timeliness concerns with respect to

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TASK FORCE, REP. TO THE SEC’Y OF VETERANS AFFAIRS 3, 10 (2001) (citing complexity as part of explanation of backlog in 2001).

<sup>38</sup> VETERANS’ DISABILITY BENEFITS: CHALLENGES TO TIMELY PROCESSING PERSIST, GENERAL ACCOUNTING OFFICE REPORTS & TESTIMONY GAO-13-453T 2 (March 13, 2013); see A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 169-80 (Michael McGeary et al. eds., 2007) (discussing some of the factors contributing to processing delays at VA as of 2007); see Rory E. Riley, *Preservation, Modification, or Transformation? The Current State of the Department of Veterans Affairs Disability Benefits Adjudication Process and Why Congress Should Modify, Rather than Maintain or Completely Redesign, the Current System*, 18 FED. CIR. B.J. 1 (2008) (discussing the factors contributing to the backlog as of 2009, including proposed reforms); THE VA CLAIMS BACKLOG WORKING GROUP REPORT (Mar. 2014) (discussing the factors contributing to processing delays at VA as of 2014); Emily Woodward Deutsch and Terrence T. Griffin, *Parsing the Paperless Push: A Study of the Latest Efforts to Automate the Veterans’ Claims Process*, 2 VETERANS L. REV. 117 (2010) (discussing the challenges of technological change at VA); Emily Woodward Deutsch & Michael Donohue, *The Role of the New Media in the Veterans Benefits Arena*, 1 VETERANS L. REV. 183 (2009).

<sup>39</sup> See, e.g., VA CLAIMS PROCESSING TASK FORCE, REPORT TO THE SECRETARY OF VETERANS AFFAIRS 3, 10 (2001) (citing complexity as part of explanation of backlog in 2001).

<sup>40</sup> See VETERANS BENEFITS MANUAL 933-55 (Barton F. Stichman & Ronald B. Abrams eds., 2013) (discussing the various claim types within the service-connected disability compensation system).

decisions on initial claims for service-connected disability compensation benefits, decisions on claims to increase the disability rating for a condition for which the veteran is already receiving service-connected compensation, decisions on claims to reopen previously denied claims based on the existence of new and material evidence, decisions on requests to revise previously denied claims based on clear and unmistakable error, and decisions on new disability claims where the veteran is already receiving service-connected compensation for a different disability or disabilities.<sup>41</sup>

Equally important, the VA service-connected compensation benefit program is just one of several claims-based monetary benefit programs administered by VA regarding veterans' disabilities. Other VA programs include the pension program (which is means-tested and provides benefits to wartime veterans who are over age sixty-five or are totally disabled for reasons unrelated to their military service)<sup>42</sup> and the dependency and indemnity compensation program (which provides benefits to qualified survivors of veterans whose service-connected disability played a more than de minimus role in their death, were rated as 100% service-connected disabled for the ten years preceding death, or meet another eligibility category).<sup>43</sup> These programs are not as large as the service-connected disability compensation program in terms of size and budget, but they are substantial programs that play a vital role in providing benefits to veterans and/or their survivors.

Finally, VA does not necessarily reach a final decision on a claim in any of these three programs in a single step at a single level of the agency. VA is composed of 57 regional offices<sup>44</sup> and a centralized Board of Veterans' Appeals in Washington, D.C.<sup>45</sup> The appropriate regional office is responsible for making the initial decision on a claim. Once the regional office makes the initial decision on a claim, there are multiple layers of administrative appeal—with the final

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<sup>41</sup> *Id.*

<sup>42</sup> 38 U.S.C. §§ 1501 *et seq.* (2014).

<sup>43</sup> 38 U.S.C. §§ 1301 *et seq.* (2014).

<sup>44</sup> See U.S. Department of Veterans Affairs, *Regional Benefit Office Websites*, VA.GOV (last visited Dec. 3, 2014) available at <http://www.benefits.va.gov/benefits/offices.asp>.

<sup>45</sup> U.S. Department of Veterans Affairs, *Board of Veterans' Appeals*, VA.GOV (last visited Dec. 3, 2014) available at <http://www.bva.va.gov/>.

appeal to the Board of Veterans' Appeals.<sup>46</sup> Judicial review of VA decisions is then available by appeal to the U.S. Court of Appeals for Veterans Claims.<sup>47</sup> Meanwhile, there are substantive variations in appeal types. Some appeals challenge a decision by VA to deny a claim. Other appeals involve claims that were granted by VA but the claimant disagrees with a portion of VA's decision, such as the rating assigned to the disability or the effective date assigned to the claim. In addition to these variables, remands from one level of appeal—whether from the U.S. Court of Appeals for Veterans Claims back down to the Board of Veterans' Appeals or from the Board of Veterans' Appeals back down to one of the 57 VA regional offices—occur with great frequency. In this way, claims—or parts of claims—are simultaneously climbing the appeal ladder and descending the appeal ladder, creating different pressure points in different kinds of ways on the VA system.<sup>48</sup>

In short, the original question—which kinds of VA claims, in what programs, at what layer of the adjudicative process, should be factored into defining the VA backlog—is enormously complicated. Unsurprisingly, there is no unified approach to date. This definitional instability has made it harder for various actors to corral the problems within VA's adjudicative processes and to construct remedies. It is far beyond the scope of this essay to examine the VA backlog from every potential angle. For present purposes, let us focus on the metric upon which VA itself has most focused in the backlog debate: the amount of time it takes VA's regional offices to make an initial decision on a new claim for service-connected disability compensation benefits. This is the metric that animated the vignette with which this essay began—

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<sup>46</sup> Board of Veterans Appeals, *How Do I Appeal?*, VA.GOV (last visited Dec. 3, 2014) available at <http://www.bva.va.gov/docs/Pamphlets/010202A.pdf>.

<sup>47</sup> See VETERANS BENEFITS MANUAL PART V (Barton F. Stichman & Ronald B. Abrams eds., 2013) (for an overview of the VA claims adjudication process); see Section V *infra* (discussing in greater detail the judiciary's role in policing VA decisions and processes).

<sup>48</sup> See, e.g., Michael P. Allen, *Commentary on Three Cases from the Federal Circuit and the Court of Appeals for Veterans Claims as We Approach Twenty-Five Years of Judicial Review of Veterans' Benefits*, 5 VETERANS L. REV. 136, 150-52 (2013) (discussing the role VA remands play in fostering delay); James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113 (2009).



and it is the metric that serves as the touchstone for the arguments that follow.<sup>49</sup>

As to the second question—which for the purposes of this essay is the much more salient question—VA has been permitted to define what counts as a timely decision on a claim, and hence to define the scope of its own backlog to a great extent.<sup>50</sup> As highlighted at the outset of this essay, VA is not subject to any externally imposed deadline for making initial decisions on new claims for service-connected compensation benefits. Despite VA's prerogative in this context—or perhaps because of it—VA has defined timely decision-making in different ways at different points in time.

For the years 1998-2015—an eighteen-year span—one can find no fewer than fourteen different timeliness goals reported by VA regarding the number of days in which VA intended to decide service-connected compensation claims. For 2011, VA even set two different annual goals for that year—a paradox revealed by a General Accounting Office report.<sup>51</sup> The report noted the overall goal in number of days set by VA for that year was shorter than the sum total of the number of days identified by VA as the goal for particular phases within the overall claims determination process.<sup>52</sup> In any event, during this eighteen-year span, one can find VA timeliness goals articulated by VA ranging from 90 days at the shortest to 250 days at the longest, with 157.66 days as the average annual goal. From shortest to longest, one can find the following timeliness goals identified by VA: 90 days,<sup>53</sup> 99 days,<sup>54</sup> 100 days,<sup>55</sup> 106 days,<sup>56</sup> 125

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<sup>49</sup> To be clear, virtually all of the points raised in this essay about delays in the service-connected disability compensation benefit program can apply equally to the VA pension and dependency and indemnity compensation programs. For the purposes of cabining the discussion, however, this essay focuses on the service-connected disability compensation benefit program.

<sup>50</sup> See U.S. GEN. ACCOUNTING OFFICE, GAO-12-89, VETERANS' DISABILITY BENEFITS: TIMELY PROCESSING REMAINS A DAUNTING CHALLENGE 8, fig. 4 (2012).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> U.S. GEN. ACCOUNTING OFFICE REP, GAO-02-645T, VETERANS' BENEFITS: DESPITE RECENT IMPROVEMENTS, MEETING CLAIMS PROCESSING GOALS WILL BE CHALLENGING (2002) at 1 (noting that this was the goal in 2003); VETERANS' CLAIMS ADJUDICATION COMM'N REP. (1998) at 186 (noting that this was the goal in 1998).

days,<sup>57</sup> 132 days,<sup>58</sup> 145 days,<sup>59</sup> 158 days,<sup>60</sup> 160 days,<sup>61</sup> 165 days,<sup>62</sup> 168 days,<sup>63</sup> 169 days,<sup>64</sup> 185 days,<sup>65</sup> 208 days,<sup>66</sup> 230 days,<sup>67</sup> and 250 days.<sup>68</sup> Table 1, below, reflects these changes by year.<sup>69</sup>

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<sup>54</sup> U.S. GEN. ACCOUNTING OFFICE, B-285520, COMM. ON GOVERNMENTAL AFFAIRS: OBSERVATIONS ON THE DEPARTMENT OF VETERANS AFFAIRS' FISCAL YEAR 1999 PERFORMANCE REPORT AND FISCAL YEAR 2001 PERFORMANCE PLAN 2 (2000).

<sup>55</sup> U.S. GEN. ACCOUNTING OFFICE REP, GAO-02-645T, VETERANS' BENEFITS: DESPITE RECENT IMPROVEMENTS, MEETING CLAIMS PROCESSING GOALS WILL BE CHALLENGING (2002) at 1 (noting that this was the goal in 2003).

<sup>56</sup> VETERANS' CLAIMS ADJUDICATION COMM'N REP. (1998) at 186 (noting that this was the goal in 1998).

<sup>57</sup> DEP'T. OF VETERANS' AFFAIRS, 2013 PERFORMANCE AND ACCOUNTABILITY REP., PART II at 3 (2013) (noting that this was the long-term goal identified for the period 2010 to 2015).

<sup>58</sup> The General Accounting Office noted that even though VA's 2011 goal was to decide claims within 125 days, when one added up the target number of days identified by VA for each step of the claims process, the total was 132 days.

<sup>59</sup> DEP'T OF VETERANS' AFFAIRS, 2004 PERFORMANCE AND ACCOUNTABILITY REP. (2004) at 62, 65; DEP'T OF VETERANS' AFFAIRS, 2005 PERFORMANCE AND ACCOUNTABILITY REP. (2005) at 60; BOOZ, ALLEN, HAMILTON, VETERANS' BENEFITS ADMINISTRATION AND PENSION CLAIMS DEVELOPMENT CYCLE STUDY (June 5, 2009) at 1. (noting that this was the goal in 2004, 2005, and 2009).

<sup>60</sup> DEP'T OF VETERANS' AFFAIRS, 2013 PERFORMANCE AND ACCOUNTABILITY REP., PART II (2013) at 28.

<sup>61</sup> This was VA's goal for timely decisions in 2000 and 2007. U.S. GENERAL ACCOUNTING OFFICE, B-285520, COMM. ON GOVERNMENTAL AFFAIRS: OBSERVATIONS ON THE DEP'T OF VETERANS AFFAIRS' FISCAL YEAR 1999 PERFORMANCE REP. AND FISCAL YEAR 2001 PERFORMANCE PLAN II, 2 (2000); U.S. DEP'T OF VETERANS AFFAIRS, 2007 PERFORMANCE AND ACCOUNTABILITY REP., 11 (2007).

<sup>62</sup> This was VA's goal for timely decisions in 2003 and 2010. U.S. DEP'T OF VETERANS AFFAIRS, 2003 PERFORMANCE AND ACCOUNTABILITY REP., 45 (2003); U.S. DEP'T OF VETERANS AFFAIRS, 2010 PERFORMANCE AND ACCOUNTABILITY REP., 14 (2010).

<sup>63</sup> This was VA's goal for timely decisions in 2009. DEP'T OF VETERANS AFFAIRS, 2009 PERFORMANCE AND ACCOUNTABILITY REP., 8 (2009).

<sup>64</sup> This was VA's goal for timely decisions in 2008 and 2009. DEP'T OF VETERANS AFFAIRS, 2008 PERFORMANCE AND ACCOUNTABILITY REP., 4 (2008); DEP'T OF VETERANS AFFAIRS, 2013 PERFORMANCE AND ACCOUNTABILITY REP. II, 28 (2013).

<sup>65</sup> This was VA's goal for timely decisions in 2006. DEP'T OF VETERANS AFFAIRS, 2006 PERFORMANCE AND ACCOUNTABILITY REP., 8 (2006).

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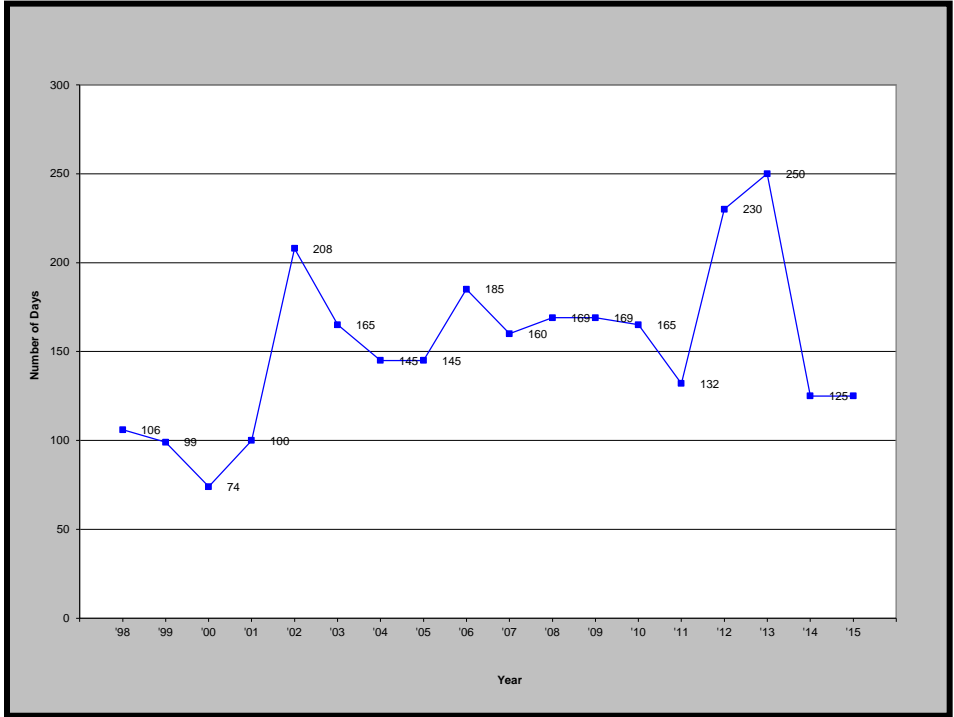
<sup>66</sup> This was VA's goal for timely decisions in 2002. DEP'T OF VETERANS AFFAIRS, 2002 PERFORMANCE AND ACCOUNTABILITY REP., 48 (2002).

<sup>67</sup> This was VA's goal for timely decisions in 2012. DEP'T OF VETERANS AFFAIRS, 2013 PERFORMANCE AND ACCOUNTABILITY REP., II, 28 (2013).

<sup>68</sup> This was VA's goal for timely decisions in 2013. DEP'T OF VETERANS AFFAIRS, 2013 PERFORMANCE AND ACCOUNTABILITY REP. II, 28 (2013).

<sup>69</sup> Not only has VA regularly revised its stated goal for timely decision making, but it has also revised its method of including or excluding certain categories of claims from the same timeliness goals. For example, for a period of time VA applied the same timeliness goal to original service-connected compensation claims and original pension claims and also claims to reopen. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE REPORTS & TESTIMONY T-HEHS/AIMD-00-146, VETERANS BENEFITS ADMINISTRATION: PROBLEMS AND CHALLENGES FACING DISABILITY CLAIMS PROCESSING, (May 18, 2000) at p. 3. n. 2 ("In its fiscal year 2001 performance plan, VBA did not establish separate processing-time goals for compensation and pension claims. Instead, [VA's timeliness goal] is a composite goal for all compensation and pension actions requiring disability ratings. Initial compensation claims, on average, require more time to process than initial pension claims."); U.S. GEN. ACCOUNTING OFFICE REPORTS & TESTIMONY GAO-05-749T, VETERANS' DISABILITY BENEFITS: CLAIMS PROCESSING PROBLEMS PERSIST AND MAJOR PERFORMANCE IMPROVEMENTS MAY BE DIFFICULT, 1, n. 1 (May 26, 2005). Later, VA created separate timeliness goals for service-connected compensation claims and pension claims. *See, e.g.*, DEP'T OF VETERANS AFFAIRS, 2013 PERFORMANCE AND ACCOUNTABILITY REP., PART II, 6-7 (2013)(setting forth separate timeliness goals for service-connected compensation claims and pension claims). In addition, in some instances—whether because of definitional instability or other factors—one can sometimes locate multiple VA timeliness goals for the same fiscal year. *Compare* U.S. Gen. Accounting Office Reports & Testimony T-HEHS/AIMD-00-146 VETERANS BENEFITS ADMINISTRATION: PROBLEMS AND CHALLENGES FACING DISABILITY CLAIMS PROCESSING, 3(May 18, 2000) (identifying 74 days as VA's timeliness goal for year 2000), *with* U.S. GEN. ACCOUNTING OFFICE, B-285520, COMMITTEE ON GOVERNMENTAL AFFAIRS: OBSERVATIONS ON THE DEPARTMENT OF VETERANS AFFAIRS' FISCAL YEAR 1999 PERFORMANCE REPORT AND FISCAL YEAR 2001 PERFORMANCE PLAN 2 (2000) (identifying 160 days as VA's timeliness goal for year 2000). Moreover, in 2009, VA shifted from assessing timeliness based on the average number of days it took the agency to decide claims to assessing whether all claims were decided within the target number of days. *See* Tom Philpott. *Shinseki: Backlog Goal Drew Fire, Also Dollars*, MILITARY.COM (May 14, 2014) <http://www.military.com/benefits/2013/07/18/shinseki-backlog-goal-drew-fire-also-dollars.html>. In these and other ways, there is admittedly a certain apples-to-oranges quality about charting the evolution of VA's timeliness goals over the years. That said, it seems more than justified to point to VA's own timeliness goals for the purposes of this essay's thesis. No matter how defined by VA over the years, VA has consistently applied the timeliness goals cited here to new claims for service-connected compensation benefits, which is the primary focus

**Table 1: VA's Goals in Number of Days to Make Decisions on Claims, 1998-2015**

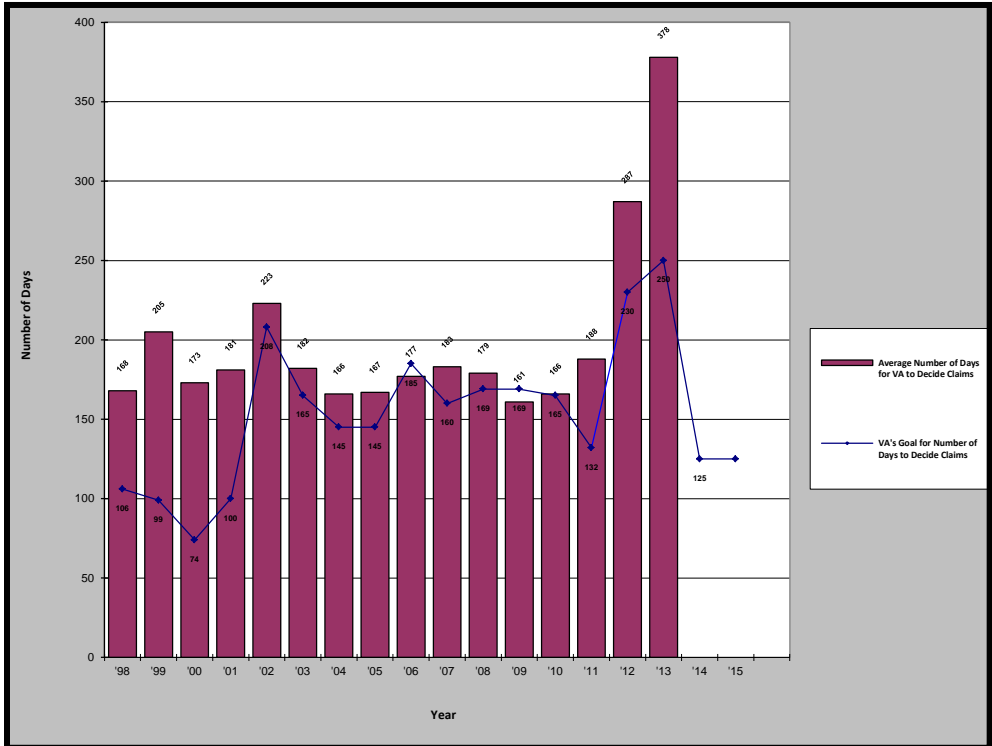


Of course, VA's fluctuating timeliness goals only tell part of the story. VA's timeliness goals must be considered against the backdrop of how long it actually took VA in a given year to decide the claims pending at the agency. Thus, Table 2 charts VA's timeliness goals against the actual number of days on average it took VA to decide claims in a given year.

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of this essay. And whether the timeliness goals have been described as the target average number of days for claims to be decided or as a deadline to decide all claims, by establishing such goals in the first place VA has acknowledged the general applicability and utility of these goals.

**Table 2: VA’s Goals in Number of Days to Make Decisions on Claims Charted Against Actual Number of Days on Average to Decide Claims, 1998-2015**<sup>70</sup>



<sup>70</sup> The cite for 205 average number of days to decide claims in 1999 is U.S. GEN. ACCOUNTING OFFICE REPORTS & TESTIMONY T-HEHS/AIMD-00-146 VETERANS BENEFITS ADMINISTRATION: PROBLEMS AND CHALLENGES FACING DISABILITY CLAIMS PROCESSING, 3(May 18, 2000) . Another source identified 166 days as the figure U.S. GEN. ACCOUNTING OFFICE, B-285520, COMMITTEE ON GOVERNMENTAL AFFAIRS: OBSERVATIONS ON THE DEPARTMENT OF VETERANS AFFAIRS’ FISCAL YEAR 1999 PERFORMANCE REPORT AND FISCAL YEAR 2001 PERFORMANCE PLAN 2 (2000). The first report was dated May 18, 2000; the second was dated June 30, 2000. The 205 figure has been used in this chart. For the actual number of days on average to decide claims for 1998, *see* S. Gen. Accounting Office Reports & Testimony T-HEHS/AIMD-00-146 VETERANS BENEFITS ADMINISTRATION: PROBLEMS AND CHALLENGES FACING DISABILITY CLAIMS PROCESSING, 4, fig. 2 (May 18, 2000); for 1999, *see id.*; for 2000, *see* DEP’T OF VETERANS AFFAIRS, 2002 PERFORMANCE AND ACCOUNTABILITY REP., 48 (2002); for 2001, *see id.*; for 2002, *see id.*; for 2003, *see* U.S. DEP’T OF VETERANS AFFAIRS, 2003 PERFORMANCE AND ACCOUNTABILITY REP., 7, 45 (2003); for 2004, *see* DEP’T OF VETERANS’

Table 2 confirms that VA has engaged in a constant game of catch up throughout this timeframe. In sum, VA set goals that shifted nearly every year and that, even then, it rarely met. Only twice—in 2006 and 2009—did VA meet its timeliness goals. Given that the agency’s timeliness goals changed from year to year, it is not precisely clear what can even be made of this putative achievement. The timeliness goals for those two years—185 days and 169 days respectively—were both above the average timeliness goal (157.66 days) for the period 1998-2015, not to mention substantially above the long-term timeliness goals (74 days and 90 days) that have been cited by VA at various points during this same period. Moreover, because VA set its timeliness goals before each year began, it repeatedly adjusted those goals from year to year based on the realities of the agency’s ever-changing actual and anticipated burdens.<sup>71</sup> Overall, aggregating the data for the period 1998-2013, and even with its continually shifting timeliness goals, VA still missed its goals by an average of 30.62 days.<sup>72</sup>

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AFFAIRS, 2004 PERFORMANCE AND ACCOUNTABILITY REP. 2, 6, 8, 13, 60, 62, 84, 139, 144, 156, 157 (2004); for 2005, *see* DEP’T OF VETERANS’ AFFAIRS, 2005 PERFORMANCE AND ACCOUNTABILITY REP. 6 (2005); for 2006, *see* DEP’T OF VETERANS AFFAIRS, 2006 PERFORMANCE AND ACCOUNTABILITY REP., 8 (2006); for 2007, *see* U.S. DEP’T OF VETERANS AFFAIRS, 2007 PERFORMANCE AND ACCOUNTABILITY REP., 11 (2007); for 2008, *see* DEP’T OF VETERANS AFFAIRS, 2008 PERFORMANCE AND ACCOUNTABILITY REP., 4 (2008); for 2009, *see* DEP’T OF VETERANS AFFAIRS, 2009 PERFORMANCE AND ACCOUNTABILITY REP., 8 (2009); for 2010, *see* U.S. DEP’T OF VETERANS AFFAIRS, 2010 PERFORMANCE AND ACCOUNTABILITY REP., 14 (2010); for 2011, *see* U.S. GEN. ACCOUNTING OFFICE, GAO-12-89, VETERANS’ DISABILITY BENEFITS: TIMELY PROCESSING REMAINS A DAUNTING CHALLENGE 7, fig. 3 (2012); for 2012, *see* DEP’T OF VETERANS AFFAIRS, 2013 PERFORMANCE AND ACCOUNTABILITY REP. II, 6, 28 (2013); for 2013, *see id.*

<sup>71</sup> For example, the General Accounting Office noted in 2002 that VA’s Strategic Plan for the period 2001-2006 set forth 74 days as VA’s goal for the number of days to decide claims by 2006. U.S. GEN. ACCOUNTING OFFICE REPORTS & TESTIMONY, GAO-02-645T VETERANS’ BENEFITS: DESPITE RECENT IMPROVEMENTS, MEETING CLAIMS PROCESSING GOALS WILL BE CHALLENGING, 5, n. 6 (April 26, 2002). Once 2006 arrived, however, VA revised its timeliness goal for that year to 185 days, more than double the original goal. DEP’T OF VETERANS AFFAIRS, 2006 PERFORMANCE AND ACCOUNTABILITY REP. 8 (2006).

<sup>72</sup> The years 2014 and 2015 have been excluded from this calculation because only VA’s timeliness goal for those years—and not its actual average number of days to decide claims—is known at present.

In 2009, then VA Secretary Eric Shinseki decided that VA needed to shed this habit of ever-changing timeliness goals.<sup>73</sup> VA therefore adopted 125 days as the agency's goal for deciding claims. This 125-day goal became the demarcation point of the backlog. Claims that were pending more than 125 days were part of the backlog. Claims that were pending for fewer than 125 days were not part of the backlog. In 2013, VA reaffirmed its goal—which it states it intends to reach by 2015—to make decisions on all service-connected compensation claims within 125 days.<sup>74</sup> That said, in 2013 VA also identified 90 days as a “strategic target” for making decisions on claims.<sup>75</sup> It is not clear when VA intends to apply or meet the 90-day “strategic target.” Notably, VA also identified 90-days as the “strategic target” in 2003, more than a decade ago.<sup>76</sup>

### **B. Remediating the Backlog**

Amid all of the fluctuations in VA's goals for timely claims processing, and the worsening of the backlog crisis in recent years, VA actually began to make meaningful progress in reducing the backlog in 2013. The number of claims that have been pending for more than 125 days without a decision fell significantly, from 611,073 claims in March of 2013 to 300,620 claims in May of 2014.<sup>77</sup> VA's success in reducing the claims backlog may have come with a price, however. Concerns have been raised that VA has sacrificed accuracy for speed,

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<sup>73</sup> See Tom Philpott, *Shinseki: Backlog Goal Drew Fire, Also Dollars*, MILITARY.COM, (May 14, 2014) <http://www.military.com/benefits/2013/07/18/shinseki-backlog-goal-drew-fire-also-dollars.html>.

<sup>74</sup> DEP'T OF VETERANS AFFAIRS, 2013 PERFORMANCE AND ACCOUNTABILITY REP., PART II, 3, 28 (2013).

<sup>75</sup> *Id.*

<sup>76</sup> DEP'T OF VETERANS AFFAIRS, 2003 PERFORMANCE AND ACCOUNTABILITY REP., 45 (2003).

<sup>77</sup> See *Veterans Benefits Administration Reports, Claims Backlog*, VA.GOV (last visited May 16, 2014) available at [http://benefits.va.gov/reports/mmwr\\_va\\_claims\\_backlog.asp](http://benefits.va.gov/reports/mmwr_va_claims_backlog.asp); Josh Hicks, *Veterans Affairs' Backlog of Claims Down 44% Since Peaking a Year Ago, Department Says*, WASH. POST (May 16, 2014) available at [http://www.washingtonpost.com/politics/federal\\_government/veterans-affairs-claims-backlog-down-44-percent-since-peaking-one-year-ago/2014/04/01/c4e496ae-b9d6-11e3-9a05-c739f29ccb08\\_story.html](http://www.washingtonpost.com/politics/federal_government/veterans-affairs-claims-backlog-down-44-percent-since-peaking-one-year-ago/2014/04/01/c4e496ae-b9d6-11e3-9a05-c739f29ccb08_story.html).

and that, by redeploying agency resources to battle the claims backlog, VA has permitted its administrative appeals backlog to grow.<sup>78</sup>

VA reports that it has used a number of strategies in its effort to combat the backlog. Among these are the decrease in paper claims filed and increased use of technology; streamlined processes; enhanced employee trainings; mandatory overtime; and prioritization of the oldest claims.<sup>79</sup> Many additional steps have been proposed. To cite just a few: extending VA's Fully Developed Claims Process;<sup>80</sup> improving the extent to which the Department of Defense and other federal agencies are responsive to VA records requests;<sup>81</sup> and increasing transparency about VA's internal processes and progress in meeting its goals.<sup>82</sup>

Even with VA's recent progress in reducing the backlog, the future is quite uncertain. The number of new service-connected disability compensation claims filed by veterans of the wars in Iraq and Afghanistan is predicted to increase in the coming years, not

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<sup>78</sup> In any event, given the recent scandal at VA about record keeping related to the timely scheduling of medical appointments, there may be good cause to be circumspect about progress related to the disability claims backlog. *See e.g.*, Katie Zezima, *Everything you need to know about the VA- and the scandals engulfing it*, THE WASHINGTON POST (May 30, 2014) available at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/05/21/a-guide-to-the-va-and-the-scandals-engulfing-it/>; Teresa Welsh, *Views You Can Use: Veterans Health Care Backlog Sparks a Scandal*, USNEWS, (May 20, 2014) available at <http://www.usnews.com/opinion/articles/2014/05/20/veterans-affairs-health-care-backlog-causes-a-scandal-commentators-react>; The Editorial Board, *VA backlog fails ailing veterans: Our view*, USA TODAY (Aug. 21, 2013) available at <http://www.usatoday.com/story/opinion/2013/08/21/va-veterans-disability-claims-backlog-editorials-debates/2683167/>.

<sup>79</sup> *See* DEPARTMENT OF VETERANS AFFAIRS (VA) STRATEGIC PLAN TO ELIMINATE THE COMPENSATION CLAIMS BACKLOG (2013) 5-10; *Disability Claims Backlog Reduced by 44 Percent since Peaking One Year Ago Lowest level since Agent Orange cases added in 2011*, VA.GOV (Apr. 1, 2014) <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2532>.

<sup>80</sup> THE VA CLAIMS BACKLOG WORKING GROUP REPORT 21 (Mar. 2014) . The Fully Developed Claims Process “rewards” a veteran with a year’s worth of additional benefits when the veteran files a claim that VA can grant within 90 days because the veteran has already developed and included all of the evidence necessary to decide the claim. *Id.* In this way, the Fully Developed Claim program is intended to relieve VA of the resource-intensive burden of gathering evidence. The program is not without controversy.

<sup>81</sup> *Id.* at 30-31.

<sup>82</sup> *Id.* at 28-29.



decrease.<sup>83</sup> Advances in science—including a deeper understanding of the health hazards posed by burn pits and other environmental exposures in Iraq and Afghanistan<sup>84</sup> and improvements in the diagnosis of traumatic brain injury<sup>85</sup>—may increase the number and complexity of claims made to VA. Unforeseen changes in veterans' benefits law may also lead to unexpected surges in claims and appeals. Finally, just as the wars in Iraq and Afghanistan—and the toll they would take on the nation's servicemen and servicewomen—could not have been predicted, the timing and toll of the next conflict cannot be predicted either.

In addition to all of these contingencies, VA's commitment to the 125-day timeline for deciding claims remains tenuous as well. The commitment is merely a matter of policy.<sup>86</sup> The 125-day timeline is not enshrined in statute or regulation. Indeed, it is not a deadline at all—it is only a policy goal. Another VA secretary under another administration could easily revisit the wisdom of the 125-day timeline. At the very least, even if another VA secretary did not formally abandon the 125-day timeline, it would be simple enough to soften the agency's policy commitment in light of any number of factors.

Against this backdrop of uncertainty and as debate continues to swirl about what must be done to tame the backlog once and for all, it is therefore appropriate to consider what additional tools might be available in this effort. Given that, at its heart, the backlog is a problem about time—about ensuring that veterans receive without delay the benefits they have earned—it is only sensible also to think of the backlog as raising important conceptual and practical questions about the relationship between administrative agencies and time deadlines.

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<sup>83</sup> JOSEPH E. STIGLITZ & LINDA J. BILMES, *THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT* 76-79 (2008).

<sup>84</sup> See Ken Bastida, *Veterans Returning Home From Iraq, Afghanistan Point To Open Air Burn Pits As New 'Agent Orange'*, CBS SAN FRANCISCO (May 20, 2014) available at <http://sanfrancisco.cbslocal.com/2014/05/20/veterans-returning-home-from-foreign-wars-falling-ill-dying-from-new-agent-orange-iraq-afghanistan-war-soldier-soldiers-chemical-cancer-garbage-incinerator-service-va/>; see also U.S. Department of Veterans Affairs, *VA's Action Plan: Burn Pits and Airborne Hazards*, VA.GOV (last visited Dec. 3, 2014) available at <http://www.publichealth.va.gov/exposures/burnpits/action-plan.asp>.

<sup>85</sup> See generally *TBI in the News*, BRAIN TRAUMA FOUNDATION (last visited Dec. 3, 2014) available at <https://www.braintrauma.org/tbi-faqs/tbi-in-the-news/> (noting advancements in traumatic brain injury research and diagnosis).

<sup>86</sup> See Philpott, *supra* note 73.

To date, VA has never been subject to an externally imposed deadline for deciding service-connected disability compensation claims.<sup>87</sup> As set forth in the sections to follow, that is a step worth taking.<sup>88</sup>

#### IV. EXTERNAL VS. INTERNAL DEADLINES

Unsurprisingly, psychologists have found that individuals are more likely to comply with time deadlines when the deadlines are externally imposed, as compared to deadlines that are internally imposed, or self-generated. In a 2002 study, psychologists measured the potential value of externally-imposed coursework deadlines compared to internally-imposed deadlines among a population of Massachusetts Institute of Technology students. The study showed that the externally imposed deadlines were more effective in inducing the study participants to complete the work in question.<sup>89</sup> This same dynamic also appears to apply with respect to agencies.<sup>90</sup> In sum, the odds seem strong that if

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<sup>87</sup> *Id.*

<sup>88</sup> It is worth pausing here before proceeding to underscore that delays at VA cannot—and must not—be understood in purely abstract terms or solely through the lens of administrative law and policy. The real-world harms occasioned by delay are felt everyday by individual veterans. These harms include, but are not limited to, deprivation of earned compensation, frustration and anxiety, and encountering barriers to other benefits—such as VA healthcare—the eligibility for which is often linked to antecedent eligibility for service-connected disability compensation benefits.

<sup>89</sup> Dan Ariely and Klaus Wertenbroch, Procrastination, Deadlines, and Performance: Self-Control and Precommitment, 13 *PSYCHOLOGICAL SCIENCE* 3 (2002). *See also* Dan Ariely and Dan Zakay, A timely account of the role of duration in decision making, 108 (2) *ACTA PSYCHOLOGICA* 187, 199 (2001) (discussing how decision makers alter their perspective based on their temporal orientation to the decision in question and noting that “[r]esearch indeed demonstrates that deadlines have a strong influence on behavior”); *but see* Alberto Bisin and Kyle Hyndman, Present-Bias, Procrastination and Deadlines in a Field Experiment, NBER Working Paper No. 19874 (January 2014) (questioning specific conclusions drawn by Ariely and Wertenbroch about ways in which deadlines affect behavior). Most of the research cited here studies deadlines within the context of concerns about persons who may or may not tend to procrastinate. My point is not that there is a VA backlog because VA employees procrastinate; rather, it is that studies of the use of deadlines in other contexts can be helpful to thinking about how individual humans assess deadlines within the context of a large and complex system subject to time and resource constraints.

<sup>90</sup> Jacob E. Gersen and Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 *U. PENN. LAW REV.* 923 (2008) (using empirical study to find that imposing

Congress were to impose a deadline upon VA for deciding service-connected disability compensation claims, on balance VA's compliance rate with that deadline would be greater than its compliance rate with a purely internal but otherwise identical deadline.<sup>91</sup>

To date, the idea of imposing such a deadline upon VA has received scant attention.<sup>92</sup> At first blush, this omission may seem strange. Congress creates statutory deadlines in all kinds of administrative contexts;<sup>93</sup> it would seemingly be simple enough to create such a deadline for decisions on claims for service-connected disability compensation. Although it is impossible to know with certainty, Congress may not have been well positioned to consider this option because of the conceptual frameworks most often used in discussions of VA programs. Specifically, VA's service-connected disability compensation program is frequently analogized to the Social Security Administration's (SSA) disability programs.<sup>94</sup> There are many similarities indeed.

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external deadlines upon agencies tends to increase the pace of the agency action in question); Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381 (discussing enforcement tools to police and remedy agency delay); Note, *Improving Statutory Deadlines on Agency Action: Learning from the SEC's Missed Deadlines Under the JOBS Act*, 92 TEX. L. REV. 995 (2014) (arguing that, depending on circumstances, statutory deadlines for agency action can help ensure agency acts timely where agency would not otherwise do so).

<sup>91</sup> Of course, efficiency is not—and should not be—the only consideration. Questions of accuracy are taken up in Section VI. *See infra* Section VI.

<sup>92</sup> *See supra* note 19; Riley, *supra* note 38 (briefly referencing the value of imposing a statutory processing deadline upon VA that would require VA to grant the claim if not decided by the deadline).

<sup>93</sup> Jacob E. Gersen and Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PENN. LAW REV. 923, 925 (2008) (“Deadlines requiring agencies to commence or complete action by a specific date are common in the modern administrative state.”).

<sup>94</sup> For examples of scholarship that invoke the VA/SSA comparison in one form or another, *see e.g.*, James D. Ridgway, *Why So Many Remands?*, *supra* note 48, at 162-65; Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388, 431-33 (2011). For an example of a judicial decision that does so, *see Henderson ex rel. Henderson v. Shinseki*, 131 S.Ct. 1197, 1204 (2011). For a broader discussion of the role agency and program analogies play in discussions of potential VA reforms, *see* Rory E. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans' Benefits Scheme*:

Both programs require the collection and analysis of enormous quantities of medical and other data. Both programs require a determination of disability. Both programs must make use of administrative systems to receive, process, and decide an extraordinary number of claims. Both programs are large and expensive. Both programs employ multiple levels of administrative appeal. Both programs interact directly with claimants, many of whom have serious health issues and/or financial distress. One could go on. Of course, there are also important differences. Whereas VA must determine whether a disability is or is not service-connected and must assign a percentage rating to each disability, SSA is not concerned with determining the origin of disability, nor is SSA concerned with the percentage gradations in disability so critical to the VA process. Moreover, VA's duty to assist claimants throughout the administrative process is much greater than SSA's duty. These are just a few of the many differences.

In any event, because SSA has served as such a powerful touchstone for discussions about VA's woes, it is perhaps understandable that Congress has not meaningfully considered the potential utility of imposing a deadline on VA for deciding service-connected disability compensation claims. For, SSA is not subject to any statutory deadlines for making decisions on disability claims. VA, as SSA's putative closest cousin among federal benefit programs, logically would be a poor fit for a statutorily-imposed deadline too.

Rarely, if ever, heard in discussions of VA are analogies to other benefit programs, including programs subject to formal—whether statutory or regulatory—deadlines for making decisions on applications. To return to one of the programs discussed in the vignette at the outset of the essay, the Supplemental Nutrition Assistance Program (SNAP)—also sometimes still known by its former name, the Food Stamp program—is one such example.<sup>95</sup> Pursuant to 7 CFR

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*A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 VETERANS L. REV. 77 (2010).

<sup>95</sup> At first glance, SNAP may seem like an improbable comparison to the service-connected disability compensation program. SNAP is a means-tested program for the general population that continues to be marked by the stigma of welfare. The service-connected disability compensation program reflects compensation that has been earned by veterans through the service and sacrifice in the armed forces. There are also important differences in basic structure. SNAP, though funded by the federal government, is administered by state and local government entities. The service-connected disability compensation program is a pure

§ 273.2(g), SNAP applications must be decided within thirty days.<sup>96</sup> We might call this an externally imposed deadline because SNAP is a program of cooperative federalism: the federal government provides funding and establishes the legal framework for the program's operations, but state agencies administer SNAP at the local level and are subject to this legal framework, including the thirty-day deadline for deciding applications set forth in federal regulations.

Not only is the thirty-day deadline for SNAP externally imposed, it is enforceable through at least four different mechanisms. First, SNAP is enforceable through administrative oversight. The Food and Nutrition Service, a unit within the U.S. Department of Agriculture, audits state agencies in order to monitor and enforce compliance with federal regulations, including the thirty-day deadline for deciding new applications.<sup>97</sup> Second, enforcement occurs via political oversight.

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federal program. Finally, determining eligibility for SNAP is a far simpler task compared to determining eligibility for service-connected disability compensation benefits. For these reasons and others, Social Security—not SNAP—has been the preferred comparison for VA. But, as discussed in greater detail below, SNAP may have a lot to teach VA about the utility of deadlines and conceptions of procedural justice. For a discussion of the veterans' benefits system as inheriting potentially contradictory attributes from two different public benefit traditions, see Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J. L. & PUB. POL'Y 303 (2004). Moreover, many low-income servicemembers and veterans are eligible for and receive SNAP benefits. Alan Pike, "Military Families' Reliance on Food Stamps Hit a Record High Last Year," THINKPROGRESS.ORG (Feb. 18, 2014) <http://thinkprogress.org/economy/2014/02/18/3299971/food-stamps-military/>.

<sup>96</sup> In some limited circumstances, SNAP applications must be decided more quickly (seven days). 7 C.F.R. § 273.2(i) (2012). In other scenarios, applications may be decided more slowly (sixty days) based on the fault of the applicant or the agency.

<sup>97</sup> Tyler Dukes, *Progress continues toward cutting food stamps backlog* WRAL.com (Feb. 4, 2014) <http://www.wral.com/progress-continues-toward-cutting-food-stamp-backlog/13355718/#S9jYC9eoL3U3kDzV>.<sup>99</sup> (stating that "Under the gun of a federal ultimatum, state and county health officials cut a longstanding backlog of food stamps cases nearly in half over the weekend"); *Feds say NC has cleared food stamp backlog*, NEWSOBSERVER.COM, (April 15, 2014), <http://www.newsobserver.com/2014/04/15/3787197/feds-say-nc-has-cleared-food-stamp.html> ("The state has adequately cleared a long backlog that was delaying food aid to North Carolinians, the federal government announced Tuesday"); Andy Miller, *Georgia officials say food stamp backlog over* ONLINE ATHENS, ATHENS BANNER-HERALD, (June 5, 2014) <http://onlineathens.com/local-news/2014-06-04/georgia-officials-say-food->

Congress monitors the work of the Food and Nutrition Service, including the extent to which the Food and Nutrition Service is fulfilling its obligation to ensure compliance with federal standards at the state and local level.<sup>98</sup> Third, there is enforcement at the individual level. An individual applicant for SNAP can pursue an administrative appeal.<sup>99</sup> And fourth, there is judicial enforcement at the group level. Where there are systemic failures by a state or local agency in complying with the thirty-day deadline for deciding SNAP applications, class action litigation can be pursued to enforce the agency's legal duty to decide applications by the deadline set forth in the regulation.<sup>100</sup> The potential availability of attorneys' fees in these suits helps ensure that private attorneys generally take on large and costly litigation of this kind.<sup>101</sup>

These four different enforcement tools—administrative oversight, political oversight, individual administrative appeals, and group-level judicial enforcement—have, at least on balance, proven effective in policing basic compliance with the thirty-day SNAP processing deadline in the aggregate across the fifty states. Maintaining a SNAP backlog is, simply put, unlawful under 7 CFR 273.2(g). By contrast,

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stamp-backlog-over (“After clearing a backlog of thousands seeking food stamps, Georgia officials now are waiting to find out if it might lose millions in federal funding.”)

<sup>98</sup> See *History of FNS*, USDA.GOV (last visited Dec. 3, 2014) available at <http://www.fns.usda.gov/sites/default/files/HISTORY%20OF%20FNS.pdf>.

<sup>99</sup> 7 C.F.R. § 273.15 (2014).

<sup>100</sup> See, e.g., *Briggs v. Bremby* 3:12cv324(VLB), 2012 WL 6026167, (D. Conn. Dec. 4, 2102) (issuing preliminary injunction requiring state agency to comply with federal application processing deadlines); *Booth v. McManaman*, 830 F.Supp.2d 1037 (D. Haw. Nov. 16, 2011) (issuing preliminary injunction requiring state agency to comply with federal application processing deadlines. For an excellent discussion of using litigation as a tool to enforce the federal timeliness requirements for SNAP, see Marc Cohan & Mary R. Mannix, *National Center for Law and Economic Justice SNAP Application Delay Litigation Project*, CLEARINGHOUSE REVIEW: JOURNAL OF POVERTY LAW AND POLICY 208-17 (Sept.-Oct. 2012). Many of the lessons learned described by Cohan and Mannix from the SNAP context can potentially apply to advocacy strategies for the VA context.

<sup>101</sup> See *Bracantelli v. Burns*, CIV 04-421 TUC CKJ (D. Ariz. Oct. 3, 2005) (reflecting that settlement agreement in Food Stamp delay case contains attorney fee provision for plaintiffs).

while the backlog at VA has been called “outrageous,”<sup>102</sup> “unconscionable,”<sup>103</sup> “a national disgrace,”<sup>104</sup> and other similar epithets, politicians, advocates, and members of the media have never called the VA backlog unlawful—because at present it is not. This basic fact produces second order challenges as well. Because VA’s deadline for deciding service-connected disability compensation claims is merely an internally generated policy goal, and because of some of the idiosyncrasies of veterans benefits law, the enforcement mechanisms currently available to police delays at VA have, like VA’s own timeliness goals, proven far too weak for the job. It is to these challenges that this essay next turns.

## V. ENFORCEMENT CHALLENGES

Compared to the tools available to police compliance with the thirty-day decision-making requirements imposed by federal regulations for SNAP, the enforcement tools to police VA’s policy goal for timely decision making are, not unexpectedly, far more limited. Congress does of course have oversight of VA, including oversight of VA’s paradigm for defining and meeting timely decision-making goals. As the discussion in Section IV illustrated, for more than a decade this oversight has not produced much consistency or clarity with respect to VA’s timeliness goals. Nor has congressional oversight produced much meaningful progress—at least until the very

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<sup>102</sup> Brendan Mosley, Roby and Rogers Critical of VA Backlog, ALABAMA POLITICAL REPORTER (May 6, 2014), <http://www.alreporter.com/in-case-you-missed-it-2/6220-robby-and-rogers-critical-of-va-backlog.html> (quoting Congresswoman Martha Roby as stating the VA claims backlog is “outrageous”).

<sup>103</sup> Leo Shane III, , *Skeptics doubt VA’s claim of breakthrough on claims backlog*, STARS & STRIPES (June 19, 2012), <http://www.stripes.com/news/skeptics-doubt-va-s-claim-of-breakthrough-on-claims-backlog-1.180811> (quoting Rep. Gus Bilirakis, R-Fla, as stating the VA claims backlog is “unconscionable”).

<sup>104</sup> Seth McLaughlin, *Sen. Mitch McConnell: VA disability claim backlog is ‘national disgrace’*, WASHINGTON TIMES, July 22, 2013 <http://www.washingtontimes.com/blog/inside-politics/2013/jul/22/sen-mitch-mcconnell-va-disability-claim-backlog-na/> (quoting Senator Mitch McConnell as declaring the VA claims backlog a “national disgrace”); USA Today Editorial Board, *VA backlog fails ailing veterans: Our view*, USA TODAY, August 21, 2013, <http://www.usatoday.com/story/opinion/2013/08/21/va-veterans-disability-claims-backlog-editorials-debates/2683167/> (describing the VA claims backlog as “a national disgrace”).

recent and still disputed progress—in reducing the claims backlog. So entrenched are VA’s woes that many are now declaring VA’s failures also Congress’s failures.<sup>105</sup>

It should come as little surprise that other actors in the veterans benefit system—namely, veterans and their advocates—have sought to fill the void. These actors have attempted to compel VA to make timely decisions on disability claims by means outside the realms of political and policy advocacy before Congress and VA. Whether at the individual or group level, they have found little success—for reasons mostly peculiar to veterans’ benefits law.

Because VA has no legal duty to decide claims within any particular length of time, individual veterans often find themselves in a kind of black hole when they try to pursue administrative appeals and seek judicial remedies for VA’s failure to make timely decisions.

For starters, the failure by a regional office to issue an initial decision—unlike the failure of a SNAP agency to issue an initial decision within thirty days—is not understood to give rise to a meritorious administrative appeal.<sup>106</sup> In essence, no matter how long a regional office might take to make an initial decision on a claim, there are apparently no grounds to pursue an administrative appeal for that delay. Nor can a direct appeal to the U.S. Court of Appeals for Veterans Claims (CAVC) necessarily be had in such circumstances. The Court’s jurisdiction on direct appeal is limited to reviewing final decisions of the Board of Veterans’ Appeals (BVA).<sup>107</sup> As a practical consequence, on direct appeal the CAVC can only review decisions by

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<sup>105</sup> See, e.g., Peter H. Schuck, *The Real Problem with VA? Congress*, WASHINGTON POST, May 29, 2014, [http://www.washingtonpost.com/opinions/congress-owns-a-part-of-the-vas-failures/2014/05/29/ab94248e-e5b0-11e3-8f90-73e071f3d637\\_story.html](http://www.washingtonpost.com/opinions/congress-owns-a-part-of-the-vas-failures/2014/05/29/ab94248e-e5b0-11e3-8f90-73e071f3d637_story.html) (stating that “Congress has held scores of oversight hearings about the VA but has failed to produce adequate VA performance” and that “Congressional self-scrutiny must also be a big part of any meaningful solution.”); Jordain Carney and Stacy Kaper, *Who Really Broke Veterans Affairs?*, NATIONAL JOURNAL, May 21, 2014, <http://www.nationaljournal.com/defense/who-really-broke-veterans-affairs-20140520> (stating that Congress “cannot claim clean hands” with respect to problems at VA, including the claims backlog, and that Congress’s “record of efficacy is mixed at best—especially in terms of eliminating the claims backlog.”).

<sup>106</sup> See 38 U.S.C. §§ 7105(a); (b)(1) (2014) (stating that appellate review is initiated by filing a “Notice of Disagreement” and that right to file Notice of Disagreement is triggered by the “mailing of notice of the result of initial review or determination”).

<sup>107</sup> 38 U.S.C. §§ 7252(a); 7266(a) (2014).



the BVA to grant or deny a claim—not a regional office’s failure to render an initial decision or the BVA’s failure to recognize a veteran’s claimed right to appeal administratively the delay at a regional office.<sup>108</sup> Apart from substantive barriers, the administrative appeal process itself is both exceedingly slow and complex. Furthermore, once on judicial review before the CAVC, the proceedings become both more complex and formally adversarial. Overall, trying to construct and pursue an administrative appeal and then direct appeal to the CAVC to challenge a delay at a regional office is a daunting, and perhaps hopeless, task.

At present, the only other viable mechanism for an individual veteran<sup>109</sup> to remedy delays in deciding his or her claim is to file an original petition for extraordinary relief at the CAVC pursuant to the All Writs Act.<sup>110</sup> The CAVC possesses jurisdiction under the All Writs Act to compel VA to decide claims “within a reasonable period of time.”<sup>111</sup> However, the elements necessary to prove entitlement to a writ are onerous: the right to the writ must be “clear and indisputable”; no alternative avenue can exist to obtain the relief sought; and the CAVC must be satisfied that, in the exercise of its discretion, issuance of a writ is appropriate.<sup>112</sup> Moreover, the CAVC has interpreted “reasonable period of time” at a high level of generality and in a manner reflecting significant deference to VA. According to the CAVC, “[w]hile there is no absolute definition of what is reasonable

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<sup>108</sup> *Maggit v. West*, 202 F.3d 1370 (Fed. Cir. 2000); *DeCarlo v. Nicholson*, 20 Vet. App. 52 (2006).

<sup>109</sup> This essay uses the term “veteran” to encompass not just those who meet the statutory definition within the veterans benefit system, but also survivors who are sometimes entitled to step into the shoes of a deceased veteran to pursue the veteran’s claim still pending for service-connected disability compensation benefits. This process is known as a claim for accrued benefits. Too often interminable delays in the adjudication of claims makes it more likely that a veteran will pass away before the claim is fully and finally decided.

<sup>110</sup> 26 U.S.C. § 1651(a) (2014). Of course, there are also numerous informal mechanisms theoretically available to veterans—such as seeking the intervention of an elected official, repeated calls, correspondence, and visits to the Regional Office or the BVA, community organizing and protest, and the like. Such efforts are sometimes productive. Then again, veterans should not have to go to such lengths merely to receive a timely—and accurate—decision from VA in their cases.

<sup>111</sup> *See Erspamer v. Derwinski*, 1 Vet. App. 3 (1990).

<sup>112</sup> *Id.* at 9-10.

time, we know that it may encompass ‘months, occasionally a year or two, but not several years or a decade.’”<sup>113</sup>

To illustrate the difficulties inherent in this framework, consider the following case decided by the CAVC. A veteran filed an original claim for service-connected disability compensation in 1998.<sup>114</sup> That claim was still pending and unadjudicated nine years later—in 2007.<sup>115</sup> In that year, the veteran filed a petition for extraordinary relief at the CAVC under the All Writs Act.<sup>116</sup> At the CAVC, the VA indicated that it was now taking steps to move adjudication of the veteran’s initial claim forward.<sup>117</sup> Importantly, the CAVC noted that in cases under the All Writs Act involving alleged delays in adjudicating claims, the CAVC must consider the existing demands placed on, and the resources available, to VA.<sup>118</sup> Given all of these considerations, and the elements necessary to establish entitlement to a writ, the CAVC found the lengthy delay in the case insufficient to justify issuance of a writ.<sup>119</sup> As the CAVC put it, “because [the veteran] has failed to demonstrate that any alleged delay in adjudicating his claim is so extraordinary that it is equivalent to an arbitrary refusal by the Secretary to act, he has not shown a clear and indisputable right to a writ, and the Court will deny the petition.”<sup>120</sup>

In many circumstances, the filing of a petition for extraordinary relief can spark VA to act on the underlying claim, even if it does not lead to a decision by the CAVC to issue a writ.<sup>121</sup> But that hardly addresses several underlying barriers to the use of the All Writs Act as a tool to remedy delays in individual cases. First, many veterans will be ill-equipped to file a pleading in federal court in the first instance, let alone to engage in ongoing litigation there against counsel for VA as part of an adversarial process. Second, securing representation in

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<sup>113</sup> *Chandler v. Brown*, 10 Vet. App. 175, 177 (1997) (quoting *Erspramer*, 1 Vet. App. at 10). These cases involved delays in adjudicating remanded claims at the agency level.

<sup>114</sup> *See James v. Nicholson*, No. 07-1750 2007 WL 2938179 (Vet. App. Sept. 21, 2007).

<sup>115</sup> *See id.*

<sup>116</sup> *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> *See id.* The *James* case is one such example.

such cases can prove difficult,<sup>122</sup> and the availability of *pro bono* assistance is necessarily limited. And third, with or without representation, time-consuming and repeated—albeit unsuccessful—efforts must typically be made to urge VA to act before one can file a well-pled petition for extraordinary relief with the CAVC.<sup>123</sup> In sum, the number of veterans who actually file petitions under the All Writs Act pales in comparison to the number of veterans who are harmed by delays at VA.<sup>124</sup> While the All Writs Act can provide an important mechanism for an individual veteran to seek a remedy for agency delays in his or her individual case, for the overall population of veterans harmed by delays at VA, the All Writs Act has proven a limited tool at best.

Against this backdrop, veterans have also sought legal relief at the group level using alternative vehicles.<sup>125</sup> But these efforts—though creative and bold—have, at least to date, unfortunately proven even less successful than individual petitions filed in the CAVC under the All Writs Act.

In *Veterans for Common Sense v. Shinseki*, two veterans' advocacy organizations filed a class action lawsuit against VA seeking to remedy systemic defects in VA's healthcare and service-connected

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<sup>122</sup> When a petition for extraordinary relief sparks VA to act, the case will generally become moot, the CAVC will either dismiss or deny the petition, and the veteran will be ineligible to recover fees and costs from VA under the Equal Access to Justice Act. *See* *Chandler v. Brown*, 10 Vet. App. 175, 177 (1997) (discussing mootness under the All Writs Act); *see also* *Buckhannon v. West Virginia Dep't Health and Human Resources*, 532 U.S. 598 (2001) (rejecting catalyst theory for attorneys' fees).

<sup>123</sup> *See, e.g.*, *Caprice v. Shinseki*, No. 12-1376 2012 WL 2339811 (Vet. App. Jan. 25, 2013).

<sup>124</sup> Consider that for the entirety of Fiscal Year 2013, only 193 petitions for writs were filed at the CAVC, of which 46% were filed *pro se*. ANNUAL REPORT, U.S. COURT OF APPEALS FOR VETERANS CLAIMS (2013). And not all of these petitions sought remedies for VA delays; some raised other issues. Altogether, when weighing the 100-plus petitions filed in the CAVC in FY 2013 against the 502,942 claims for benefits VA identified as backlogged at the end of Fiscal Year 2013, one can appreciate how few veterans are able to make use of the writ remedy for VA delay. VA MONDAY MORNING WORKLOAD REPORT, (June 24, 2013). Available at <http://benefits.va.gov/REPORTS/mmwr/historical/2013/index.asp>.

<sup>125</sup> There is no class action mechanism available at the CAVC. *See* *Lefkowitz v. Derwinski*, 1 Vet. App. 439 (1991).

disability compensation programs.<sup>126</sup> The case was filed in the U.S. District Court for the Northern District of California.<sup>127</sup> Among the many systemic defects cited in the complaint, the plaintiffs sought a remedy—declaratory and injunctive relief—for the widespread delays at VA in adjudicating claims for service-connected disability compensation.<sup>128</sup> The plaintiffs' causes of action were grounded in the Administrative Procedure Act and the Due Process Clause and focused on delays at the administrative appeal stage.<sup>129</sup> After losing on this issue in the District Court, the plaintiffs succeeded in obtaining a reversal from a panel of the Ninth Circuit Court of Appeals.<sup>130</sup> The panel, with one judge dissenting, found that the systemic delays in VA's adjudication of service-connected disability compensation claims did not violate the Administrative Procedures Act, but they did violate the Due Process Clause.<sup>131</sup> The panel remanded the case to the District Court for further evidentiary hearings to determine the appropriate remedies.<sup>132</sup>

That victory was short lived, however. In an *en banc* decision, the Ninth Circuit reversed the panel decision, finding that the District Court lacked jurisdiction in the first instance to adjudicate the claims regarding systemic delays.<sup>133</sup> According to the *en banc* decision, the only court with jurisdiction to hear challenges to VA's provision of benefits is the CAVC. That conclusion echoed the decision by the Sixth Circuit in an earlier class action lawsuit that also had sought relief from systemic delays in VA's adjudication of service-connected disability claims.<sup>134</sup> Like the Ninth Circuit, the Sixth Circuit had found that only the CAVC possesses jurisdiction over such questions.<sup>135</sup> Of

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<sup>126</sup> *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 849 (9th Cir. 2011).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 845.

<sup>129</sup> *See* Complaint at 278, *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 849 (9th Cir. 2011) (No.C 07 3758 SC), 2007 WL 4718845.

<sup>130</sup> *Veterans for Common Sense v. Shinseki*, at 851-852.

<sup>131</sup> *Id.* at 850.

<sup>132</sup> *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1016 (9th Cir. 2012).

<sup>133</sup> *Id.* at 1015.

<sup>134</sup> *Beamon v. Brown*, 125 F.3d 965, 972 (6th Cir. 1997).

<sup>135</sup> *Id.* The D.C. Circuit has done likewise. *Vietnam Veterans of America v. Shinseki*, 599 F.3d 654 (D.C. Cir. 2010) (citing lack of jurisdiction to dismiss lawsuit that challenged VA delays in adjudicating claims and requested injunction to require VA to decide claims within ninety days).

course, as we have seen, the CAVC has very narrowly interpreted its power to address delay at VA. And even then, individual veterans face enormous barriers to bring such a claim to the CAVC.

In the end, veterans have found that—at least to date—the courthouse doors have either been partially or completely shut to them when they seek to challenge delays at VA.<sup>136</sup> Whether at the individual or the group level, remedies for VA delay have simply not been forthcoming.<sup>137</sup> The absence of meaningful administrative and judicial enforcement both reflects and reinforces the lack of effective political oversight.

## VI. WHY A STATUTORY DEADLINE FOR DECIDING DISABILITY CLAIMS?

In response to this state of affairs—deeply troubling delays, year-to-year fluctuations in the agency’s timeliness goals, ineffective

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<sup>136</sup> That said, it would be overly simplistic to conclude that, in general, systemic reform litigation against VA is hopeless because of the jurisdictional and jurisprudential barriers. *See, e.g., Cooper-Harris v. United States*, 965 F. Supp. 2d 1139 (C.D. Cal. 2013) (striking down as unconstitutional VA’s ban on spousal benefits to same-sex couples). Indeed, in *Veterans for Common Sense v. Shinseki*, the Ninth Circuit held that the district court did have jurisdiction, because the plaintiffs were organizational parties and because of the manner in which some of their claims were framed, to entertain the plaintiffs’ challenge to “adjudication procedures in VA regional offices.” 687 F.3d at 1016. Even then, however, the Court rejected those claims on the merits. *Id.*

<sup>137</sup> For a nuanced discussion of the challenges of shaping judicial remedies for delays in the adjudication of claims within federal benefit programs, *see* James D. Ridgway, *Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies*, 64 ADMIN. L. REV. 57 (2012). Professor Ridgway’s article includes a detailed examination of the *Veterans for Common Sense* litigation and its potential impact upon delays at VA. *Id.* at 68-73, 114-119. Note, however, that the article was published before the Ninth Circuit issued its *en banc* decision finding that the court lacked jurisdiction to hear the case and reversing the panel decision favorable to the plaintiff veterans’ organizations. For another article published prior to the Ninth Circuit’s *en banc* decision in *Veterans for Common Sense*, this one arguing that the federal courts—if given an opportunity—should issue an injunction to remedy delays in the adjudication of VA disability claims, *see* Serota & Michelle Singer, *supra* note 94, 388. For the argument that agencies, including the VA, should incorporate aggregate litigation models into their administrative appeal systems in order to combat widespread delays and common legal questions, *see* Michael D. Sant’Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUMBIA L. REV. 1992 (2012).

oversight, and limited enforcement mechanisms—there are compelling reasons for Congress to create a statutory deadline (presumably somewhere between 90 and 125 days) for VA to decide initial claims for service-connected compensation benefits.<sup>138</sup>

The imposition of a statutory deadline upon VA would promote important procedural values that would benefit veterans. Numerous studies have documented that the experience persons have with a process is vitally important to their overall assessment of a system of adjudication—sometimes as important as, or even more important than, the substantive outcome of that process.<sup>139</sup> As one of the leading authorities on the social psychology of the law has put it:

The procedural justice literature has shown that people’s concerns about procedural values exist independently of whether they win or lose, that people look for more than winning in their interactions with the legal system, and that they evaluate the fairness of legal processes according to a large variety of criteria.<sup>140</sup>

Put another way:

What law has summarized under the ‘due process’ rubric, social scientists capture as a bundle of interests, needs, or wants described in a variety of ways—vindication, attention, accountability, information, accuracy, comfort, respect, recognition, dignity, efficacy, empowerment, justice. . . . Research on litigants . . . reveals a group of individuals who seek something in addition to money.<sup>141</sup>

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<sup>138</sup> See generally *supra*, note 69. It is beyond the scope of this short essay to parse out what specific number of days is the “correct” number for the purposes of setting a deadline for VA. The range of 90-125 days has been identified here because that is what VA has, at one time or another, identified as the appropriate number of days.

<sup>139</sup> Hon. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55, 72-75 (2013).

<sup>140</sup> Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L. J. 473, 482 (2010); see also Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 128 (1988) (concluding that perceptions of fairness are weighed more heavily than outcomes in participants’ views of the legal system).

<sup>141</sup> Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 363-64 (1996).

In light of these lessons from social science, imposing upon VA a clearly-established deadline for deciding claims can improve veterans' assessment of VA's procedural fairness because it can serve as a counterweight to the unidirectional way in which VA deadlines currently operate. At present, only veterans—not VA—are subject to deadlines within the disability adjudication system. To cite a few examples, veterans must file notices of disagreement within one year, substantive appeals to the BVA within ninety days, responses to BVA-obtained medical opinions within sixty days,<sup>142</sup> and appeals to the CAVC within 120 days. By contrast, VA is not subject to *any* deadlines in the adjudication of disability claims. There is no deadline to decide a claim, to issue a statement of the case in response to a notice of disagreement, or to decide an appeal at the BVA. According to data from fiscal year 2012, VA took on average 2,057 days to complete these steps.<sup>143</sup>

In this kind of legal environment—where all of the deadlines fall on the shoulders of the participant rather than on an administrative agency beset by intractable delays—it is little wonder that veterans have so little faith in the system. Imposing upon VA a statutory deadline for deciding claims can serve a valuable role in helping to promote the dignity of veterans who interact with this system.<sup>144</sup> A deadline would also promote a sense of the system's basic fairness and transparency.<sup>145</sup>

The prior sections previewed the additional justifications for imposing a statutory deadline. As discussed in Section IV above, externally imposed deadlines tend to be more effective than self-

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<sup>142</sup> 38 C.F.R. § 20.903 (2014).

<sup>143</sup> U.S. DEPARTMENT OF VETERANS AFFAIRS, FISCAL YEAR 2012 REPORT OF THE BOARD OF VETERANS' APPEALS, 19 (2012) This figure is tabulated by identifying the average number of days (287) in FY 2012 to decide a disability claim. That number has then added to the average numbers of days in FY 2012 to issue a statement of the case following receipt of a notice of disagreement (270 days), the average number of days to certify an appeal to the BVA following receipt of a substantive appeal request (692 days), and the average number of days for the BVA to issue a decision after receipt of a certified appeal (251 days).

<sup>144</sup> See generally *The American Legion Before the Committee on Veterans Affairs United States Senate on Pending Legislation*, 113th Cong. 19-21 (2013) (statement of Ian De Planque, deputy of American Legislative Commission on S. 928: Claims Processing Improvement Act of 2013).

<sup>145</sup> See generally *id.*

imposed deadlines because of basic human psychology. Moreover, the incentives created by externally-imposed rather than internally-generated deadlines can affect the behavior of agencies in similar ways. Even when external deadlines have the force of law, compliance does not reach 100%—a fact confirmed by looking to SNAP. But the point remains—and the VA experience bears this out—internal deadlines are too easily manipulated and evaded.

The external imposition of a clear and stable deadline for deciding claims can also encourage more effective long-range planning at VA. The backlog at VA grew because the agency suffered from long-simmering systems defects and was ill prepared for the perhaps predictable combination of factors that conspired to overwhelm the agency.<sup>146</sup> Knowing that it could always adjust upward its timeliness goals for a given year—something that the agency did with great frequency—no doubt influenced VA’s deployment of resources in one direction or another as it sought to put out various fires in the system. Adopting a firm deadline for deciding claims can provide a powerful framework for more effective long-range planning.<sup>147</sup> VA must apply lessons learned from the recent backlog crisis to avoid future backlogs in light of the growing needs of aging veterans, the likelihood of new conflicts, advances in medicine, greater understanding of environmental risks to servicemembers, and other contingencies.

A statutory deadline for deciding claims can increase Congress’s ability to conduct meaningful oversight of VA. Rather than the shifting agency-created timeliness goals of the past decades, Congress would have a single and stable benchmark by which to assess VA’s effectiveness over the long term and from administration to administration. To be sure, what Congress does with that information is critical; if VA does not meet its statutory obligations, Congress must do more than criticize VA in the media and during oversight hearings. But it seems only logical that—after years of wrestling with the VA backlog—the starting point for Congress should be declaring what it means for VA to make a timely decision on a disability claim.<sup>148</sup>

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<sup>146</sup> See generally DEPARTMENT OF VETERANS AFFAIRS (VA) STRATEGIC PLAN TO ELIMINATE THE COMPENSATION CLAIMS BACKLOG, *supra* note 79, at 3-4.

<sup>147</sup> See *Battling the Backlog*, *supra* note 19, at 40-42.

<sup>148</sup> This point echoes an argument advanced by James Ridgway that when courts are confronted with unconstitutional delays in the adjudication of claims by a federal agency, they should issue “blunt, timeline-based” remedies and then allow the agency to determine how it will comply using the expertise the agency



Congress would also expand the available tools for enforcement by establishing a statutory deadline for deciding service-connected disability compensation claims. As Section V above discussed, veterans have few, if any, meaningful mechanisms for policing delays at VA. At present, the primary tool for policing delays is political oversight, which has hardly been effective. If Congress created a statutory deadline for deciding claims, veterans could enforce that deadline through direct administrative and judicial appeals—much in the same way SNAP applicants can seek to enforce the thirty-day processing deadline to which SNAP is subject. Veterans could also presumably continue to seek relief in the CAVC via petitions for extraordinary relief under the All Writs Act.<sup>149</sup>

Even if one accepts all of these rationales for a statutory deadline at face value, numerous concerns can certainly be raised about the proposal's potential shortcomings. The service-connected disability

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already possesses. Ridgway, *Equitable Power in the Time of Budget Austerity*, *supra* note 137, at 129.

<sup>149</sup> One of the many paradoxes of veterans' benefits law is that the unidirectional flow of deadlines occurs within a system that is otherwise intended to be decidedly pro-veteran and non-adversarial—and where VA has a duty to assist veterans and must provide the benefit of the doubt when deciding claims. *See* Hayre v. West, 188 F.3d 1327, 1333-34 (1999) (affirming the “strongly and uniquely pro-claimant system of awarding benefits to veterans”); *see also* 38 U.S.C. § 5103A (2006) (imposing duty to assist upon VA); 38 U.S.C. § 5107(b) (2006) (setting forth benefit of the doubt requirement); *see also* 38 C.F.R. §§ 20.1500 Rule 1500 (2008); *see also* Marcy W. Kreindler & Sarah B. Richmond, *Expedited Claims Adjudication Initiative (ECA): A Balancing Act Between Efficiency and Protecting Due Process Rights of Claimants*, 2 VETERANS L. REV. 55 (2010). Notably, VA's Expedited Claims Adjudication Initiative Pilot Program experiments with timelines for decisions within the adjudicative process, but it also imposes shorter deadlines upon the veteran and contains no deadline for the regional office to issue an initial decision after receiving a claim. 38 C.F.R. §§ 20.15000-10; Marcy W. Kreindler and Sarah B. Richmond, *Expedited Claims Adjudication Initiative (ECA): A Balancing Act Between Efficiency and Protecting Due Process Rights of Claimants*, 2 VETERANS L. REV. 55 (2010). For the argument that additional deadlines should be imposed upon veterans in order to remedy the VA backlog, specifically, a statute of repose for filing VA claims in the first instance, *see* David Kimball Stephenson, Note, *Economics and Austerity Relative to Veterans' Claims and the Veterans Appeal Process*, 211 MIL. L. REV. 179 (2012). For the argument that veterans should be allotted less time to file a notice of disagreement, *see* Phyllis L. Childers, *VA Disability Appeals & 38 U.S.C. § 7105: Is the One Year Timeframe for the Filing of a Notice of Disagreement Excessive?*, 1 VETERANS L. REV. 242 (2009).

compensation program is exceedingly complex; it might simply be unrealistic to expect VA to decide all claims within a single deadline, especially when one factors in the necessity of obtaining sometimes far-flung and decades-old service and medical records and of having the veteran complete a compensation and pension exam (or even multiple exams) with an appropriate VA medical specialist. Moreover, the focus on efficiency—that is, requiring VA to decide all service-connected claims within a certain number of days—might cause accuracy to be sacrificed. Veterans would presumably prefer to receive a correct decision—especially if inaccuracy trends in the direction of denials rather than approvals of benefits—over a fast decision. Relatedly, one might argue that the focus on efficiency on the front end—that is, in decision making on initial claims—risks incentivizing VA to push the delays deeper into the adjudication pipeline at the appeal and remand stages. And if veterans are permitted to appeal a regional office’s failure to decide a claim by the statutory deadline, appeals and remands might simply further clog the system. Finally, creating an administrative appeal remedy will potentially render petitions under the All Writs Act no longer tenable because administrative remedies for delay will theoretically now exist. In short, the proposal offered here might make the situation at VA worse, not better.

These are legitimate concerns worth weighing, but they do not undermine the central logic of a statutory deadline. The concerns should be understood in context. VA has already identified 90-125 days as the appropriate period of time to decide not just some claims, but all claims. By imposing a statutory deadline, Congress would therefore give current agency policy the force of law. Moreover, by making the deadline statutory, Congress might help create a natural check against ever-increasing complexity in the VA system. Future changes in the system whether statutory or regulatory would need to take into account VA’s existing duty to decide initial claims by its statutory deadline. Moreover, VA has already announced that it can decide all claims not only within 125 days, but do so with 98% accuracy. It seems only logical that Congress could hold VA accountable to that determination.

The concern about clogging the system with appeals is at its root not really an argument *against* imposing a deadline on the front end; it is an argument *in favor of* imposing deadlines both at the front end and on the back end of the administrative process. To borrow again from the SNAP context, not only are state agencies required by regulation to

make decisions on SNAP applications within a certain number of days, but they are also required to make decisions on SNAP administrative appeals within a certain number of days.<sup>150</sup> For the purpose of clarity, this essay chose to focus on initial decisions on claims; but there are equally valid reasons for Congress to impose deadlines at other stages of the administrative process. Indeed, there may be compelling reasons to think imposing deadlines at multiple points in the system will be more effective than imposing deadlines at a single step.

And as to the final set of concerns, the burdens created by multiplying appeals should only be a decisive factor if the net result of having imposed a statutory deadline is greater delay, not less delay. So the question becomes one of degree, rather than whether more appeals will create *any* additional administrative burdens. Moreover, petitions for writs for extraordinary relief under the All Writs Act are not widely utilized by veterans at present because of the existing barriers to bringing such issues to the CAVC. So, perhaps not much will be lost theoretically if petitions for writs are more difficult to file or more difficult to win. More substantively, it may be possible to argue to the CAVC that the availability of an administrative appeal is not fatal to a petition either because such an appeal is inadequate given the underlying right at stake and/or that irreparable injury to the veteran would occur in the absence of writ.<sup>151</sup> One should think that with the

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<sup>150</sup> 7 C.F.R. § 273.15(c) (2014) (requiring state agencies to conduct appeal hearings, issue decisions, and notify affected parties *all* within sixty days of the date the appeal was filed). The point here is not that Congress should borrow the deadlines (including the specific number of days) applicable to SNAP and apply them wholesale to VA's service-connected disability compensation program. Rather, the point is that *the type* of deadlines applicable to SNAP should be considered as potentially valuable tools for the purposes of imposing discipline upon a poorly performing VA system. No doubt, VA's service-connected disability compensation program is substantially more complex than SNAP. But that does not mean VA should be exempt from any of the *types* of processing deadlines to which SNAP is subject. Instead, such processing deadlines should be re-calibrated to the VA context.

<sup>151</sup> *See Kaplan v. Brown*, 7 Vet. App. 425, 428 (1995) (*per curiam* order). With the establishment of a statutory deadline for deciding claims, it may also be possible to argue that VA's failure to meet that deadline violates the veteran's right to due process of law, which in turn would strengthen the argument that the veteran has suffered an irreparable injury. *See Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (holding that right to due process of law attaches to veterans benefits, including to applications for benefits). For a discussion of some of the implications of the CAVC's decision in *Cushman*, see Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell*

passion and creativity of veterans and their advocates, introducing a statutory deadline for deciding claims would not, in the end, operate to deprive veterans of remedies.<sup>152</sup>

## VII. CONCLUSION

Given how much frustration Congress has expressed about systemic failures at VA, it is appropriate to look anew to Congress—as opposed only to VA or the courts—for solutions at this particular moment in time. This is especially so, given the way existing statutes and doctrines have combined to deprive veterans of meaningful administrative and judicial enforcement tools to address delays at VA. Imposing statutory deadlines upon VA for issuing decisions in the service-connected disability compensation program is one potential reform Congress should consider. In doing so, Congress would be well advised to consider how and when deadlines are deployed in other large-scale government entitlement programs, including programs such as SNAP, that might otherwise appear too dissimilar to the VA disability program to warrant comparison. Taking into account social science research about the effect of different kinds of deadlines in different contexts and about participant assessments of procedural justice within adjudication systems can be valuable to this effort.

The reform proposed here has admittedly only been sketched out in broad strokes. Substantively, it is a modest reform in many respects; it

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*Us about the Veterans' Benefits System*, 80 U. CIN. L. REV. 501 (2012). For the argument that the Due Process Clause should not apply to applications for veterans benefits, only receipt of benefits, see Emily Woodward Deutsch & Robert James Burriesci, *Due Process in the Wake of Cushman v. Shinseki: The Inconsistency of Extending a Constitutionally Protected Property Interest to Applicants for Veterans' Benefits*, 3 VETERANS L. REV. 220 (2011).

<sup>152</sup> For a discussion of judicial remedies for agency failure to comply with deadlines in contexts outside of veterans' benefits, see Jacob E. Gersen and Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PENN. LAW REV. 923, 950-70 (2008). In considering how to enforce a statutory deadline against VA, the SNAP analogy certainly has its limits. Advocates for SNAP applicants can sue state agencies under 42 U.S.C. § 1983 for systemic violations of SNAP's timely processing requirements. Section 1983 is obviously not available for suits against VA. As discussed above in Section V, the current judicial enforcement tools in the VA context are much more circumscribed. Whether or not Congress imposes adjudication deadlines against VA, the time is also ripe for Congress to expand the CAVC's statutory authority to entertain enforcement suits, including aggregate litigation.

is far from a cure-all for delay. And it does not reflect a large-scale overhaul of the basic structure of a VA system that is antiquated in many ways. But it does reflect certain fundamental values that should animate any reforms to the VA system, whether large scale or small scale: expanding enforcement tools, applying lessons learned from past VA failures, and treating veterans with dignity.