Fixing the Appeals Process at the Department of Veterans Affairs

An Applied Policy Project by
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Executive Summary

In his second inaugural address, President Lincoln articulated America’s responsibility “To care for him who shall have borne the battle, and for his widow, and his orphan.” This report provides a detailed analysis of one aspect of this duty to our veterans, namely fixing the Department of Veterans Affairs (VA) appeals process. This report—which was prepared for the veterans advocacy group Iraq and Afghanistan Veterans of America (IAVA)—begins by examining the VA appeals problem using empirical and historical approaches. The contention that increased appeals are exclusively a byproduct of increased claims is addressed and the political and practical reasons why appeals deficiencies have not been remedied are explored. The report then examines the three root causes of systemic failure in detail; namely an inherently flawed process, inadequate veteran representation, and the VA’s inability or unwillingness to employ effective data analytics, which prohibits a complete understanding of the issue and impedes efforts to formulate and build support for reforms. Finally, the report closes by introducing evaluative criteria, recommending a series of proposals to improve the appeals system, and discussing how best to implement these initiatives.

Veterans are entitled to disability compensation for service connected medical conditions and have the right to appeal if they disagree with any aspect of the VA decision on their claim. The veterans affairs community has focused its efforts in recent years on the high-profile claims backlog but experts predict that the “spotlight will shift from the claims backlog to the appeals process” within a year, given the increasing number and duration of veteran appeals.

Since March 2013, when the VA implemented aggressive policies to address the claims backlog, the number of appeals has increased by over 10% from 247,523 to 274,181 and the VA estimates that this number is likely to grow dramatically to over 500,000 pending appeals by 2017. Similarly, since 2010, the average length of an appeal has more than doubled. On average, it now takes over 4 years for veterans to receive a formal decision on an appeal and if the case is remanded or pursued through the courts, appeals can take over 6 years to reach resolution. Not factored into these figures is an average wait of 260 days for veterans to receive a decision on their claim before even initiating an appeal. Most significantly, the duration of the process can result in serious economic and health consequences—such as homelessness and suicide—for veterans left without benefits due to bureaucratic delays.

President Obama, Congress, and senior VA officials have referred to the VA appeals system as “broken” and “unacceptable.” However, the appeals process itself and the key drivers of its systemic failure are not well understood, the VA remains hesitant to take the appeals problem seriously, and there is no consensus within the veterans affairs community regarding reforms. In recent years, efforts to address VA shortfalls have focused on treating the symptoms rather than the disease. Since 2010, when the VA’s workload increased dramatically, IT solutions, more resources, and more man-hours have been embraced as the answer. Although the claims backlog has decreased, quantity was prioritized over
quality and VA appeals specialists were diverted from their mission.\(^1\) As a result, the VA has run the risk of transferring much of the claims backlog horizontally into the cumbersome appeals process. Efforts to improve the appeals system have focused largely on improving training programs or other peripheral issues rather than addressing the root causes of the problem. As a result, these efforts have largely failed.\(^2\) Commonly discussed initiatives—such as redesigning the entire appeals process, implementing “express lanes” for certain types of appeals, or curtailing the appellant’s right to submit new evidence at any time—all have merit but under current circumstances are unrealistic, unlikely to significantly improve the appeals system, or both. This report evaluates potential reforms on the basis of their feasibility, impact, cost, and timeliness with an eye toward recommending a handful of solutions that IAVA could pursue immediately to address this problem before it becomes a crisis.

Specifically, IAVA should pursue a package of process-related reforms that would transform the way appeals are adjudicated at VA regional offices. Currently, appeals spend 1245 days moving through redundant procedures at the regional level only to have 75% of cases emerge as incomplete or incorrect.\(^3\) Eliminating the Notice of Disagreement, providing the Statement of Case concurrent with the notification of the claims decision, introducing mandatory de novo reviews by appeals specialists, and embracing VA proposals to shorten deadlines and leverage technology to increase efficiency would decrease the number of new appeals by at least a third and the length of an average appeal by over 3 years. More simply put, the steps in the process with little to no value should be eliminated and steps that have significant value should be made mandatory and occur earlier. Also, because these reforms focus on the early steps of the process, by law, the VA could implement them under the Administrative Procedure Act (APA) without Congressional action.

Despite a statutory obligation to assist veterans, the VA’s practical ability to do so is severely limited and the VA instead relies heavily on volunteer or hired representatives to help veterans.\(^4\) Although some representatives who assist veterans with their appeals are excellent, many lack the ability to identify and collect the evidence needed to win an appeal and offer only minimal assistance because they lack the time, expertise, and resources to be more effective.\(^5\) To best address this issue, IAVA should propose that the VA hire recently retired appeals experts as contractors to counsel veterans on what is needed to win or to advise them when they do not have a case. Separately, IAVA should lobby for new regulations that require the VA to provide appellants and their representatives with copies of all records related to their appeal. Currently, veterans are entitled to these records, but few realize it and request them. Experts believe that providing these case files to veterans would streamline the entire process, increase the chances that an appeal will be successful, and add little time to the process given the VA’s new IT systems.

Lastly, IAVA should request Government Accountability Office and VA Inspector General audits of the appeals process as a means of generating information internal to the VA that cannot be found elsewhere and conduct surveys of its members to collect independent data. If nothing else, these efforts would pressure the VA to release its own figures related to appeals and respond to concerns raised by these watchdog organizations. IAVA should also capitalize on growing frustration with VA metrics within Congress by supporting efforts to require the VA to produce reports on a quarterly basis.
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Introduction

In his second inaugural address, President Lincoln articulated America’s responsibility “To care for him who shall have borne the battle, and for his widow, and his orphan.” This report provides a detailed analysis of one aspect of this duty to our veterans, namely fixing the Department of Veterans Affairs (hereafter referred to as the “VA”) appeals process. This report begins by examining the problem using empirical and historical approaches. The VA contention that increased appeals are exclusively a byproduct of increased claims is addressed and the political and practical reasons why appeals deficiencies have not been remedied—to include past initiatives—are explored. The report then examines the three root causes of systemic failure in detail; namely an inherently flawed process, inadequate veteran representation, and the VA’s inability or unwillingness to employ effective data analytics, which prohibits a complete understanding of the issue and impedes efforts to formulate and build support for reforms. Finally, the report closes by introducing evaluative criteria, recommending a series of proposals to improve the appeals system, and discussing how best to implement these initiatives.

This report was prepared for Iraq and Afghanistan Veterans of America (IAVA), a veterans service organization (VSO) founded a decade ago to serve the over 2.5 million veterans of our two most recent wars. IAVA has over 300,000 registered members and supporters and is led by an Iraq veteran. The IAVA’s mission is to “improve the lives of Iraq and Afghanistan veterans and their families” and the organization has distinguished itself from other VSOs by identifying emerging issues and maintaining an assertive public profile to advocate for the new generation of veterans.

Over the past two years, IAVA and other VSOs have focused their efforts on the VA disability claims process, particularly the high-profile claims backlog. This report does not attempt to duplicate the in-depth analysis that has already been done on the topic. Since claims and appeals are inextricably linked, however, this study is based on an understanding of the claims adjudication process and considered remedies for VA appeals that are rooted in improving the preceding claims process. For more information on the VA claims process, see “The Battle to End the VA Backlog”, published by IAVA in February 2014.

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1 For consistency with other works on this topic, this paper adopts the grammatically incorrect convention of using veterans as the plural, singular possessive, and plural possessive forms of the word, rather than employing veterans, veteran’s, and veterans throughout paper.
Methodology

This report is based on three primary avenues of investigation:

1) **The Process.** The main effort of this project was to map out the VA appeals process step by step and determine how long on average each step takes and how effective it is at adjudicating appeals. This effort also analyzed the reasons why each step is relatively efficient or inefficient compared to the rest of the process to identify potential reforms. Ultimately, this effort produced the majority of recommendations.

2) **Systemic Issues.** This aspect focuses more on “the big picture issues” that affect VA appeals, such as how the VA’s effort to rapidly decrease the disability claims backlog leading to increased appeals. This effort was limited by the VA’s failure to provide necessary data; for example, information on which medical conditions are most commonly appealed was unavailable. Veterans representation and the VA data analytic sections were the primary fruits of this effort.

3) **Comparative Approach.** This approach examined other government appeals and bureaucratic processes, such as Social Security disability appeals, to identify lessons learned and develop applicable solutions to improve the VA appeals process. For example, the idea of a triage system was sparked by an analysis of the Equal Employment Opportunity Commission. Overall, however, this report found that many of the solutions applied in seemingly analogous situations did not fit well with the unique elements of the VA appeals process; ultimately, this effort generated more ideas that were unrealistic or unlikely to work than useful solutions.

Analysis of these core questions was based on a traditional literature review and a series of expert interviews.

**Literature review.** Books written to help veterans navigate the appeals system were helpful in mapping out the process and specialized academic and media articles helped identify key issues, such as shortcomings in veterans representation. VA and government reports were invaluable in analyzing data analytics shortfalls and were also helpful in establishing basic elements of the appeals problem. Below is a brief description of the materials reviewed:

- **VA Reports**—to include the annual report of the Chairman of the Board of Veterans Appeals, Secretary Shinseki’s annual Performance and Accountability report to the President, and over 100 weekly reports on the status of VA claims and appeals dating back to 2011. All of the reports published by the VA’s Office of the Inspector General in the last two years—to include 26 audits of VA regional offices—and the wealth of information provided on various VA websites were also reviewed.

- **Other Government Reports**—to include Congressional testimony and committee reports and all relevant reports produced by the Government Accountability Office (GAO), and Congressional Research Service (CRS) in the past two years.

- **Media and Academic Sources**—to include relevant academic and law journals, major media outlets (particularly the New York Times and Washington Post), and six books written on the VA claims and appeals processes—several of which are designed to help veterans.

**Interviews.** This report is also based on a dozen interviews with a diverse range of experts, some of which were conducted off the record at the request of the interviewee. VSO and VA officials provided a more comprehensive understanding of the process, generated interesting proposals, and crystalized key systemic shortcomings. Experts on bureaucratic reform and veterans law also helped brainstorm potential solutions. Expert interviews were most helpful in determining the feasibility and impact of the various solutions raised during the course of research, which was critical in separating the “chaff” from the “wheat” in terms of recommendations. In order to provide the most candid analysis possible and disseminate this report widely, the identities of interviewees are protected whether sessions were “on the record” or not. These interviews included discussions with:

- Senior VA officials at the Veteran’s Benefits Administration and at the Board of Veteran Appeals
- VA employees that adjudicate claims and appeals at the Regional Office level
- VA employees responsible for managing data and statistics requests related to claims and appeals
- Experts with insight into the inner workings of the House and Senate Committees on Veterans Affairs in the United States Congress
- Experts on bureaucratic processes and reforms and administrative or veterans law
- Journalists with years of experience covering veterans issues
- Senior leaders of numerous Veterans Service Organizations, such as the VFW and the American Legion
Part I: Understanding the Problem

President Obama in 2008 publicly referred to veterans’ efforts to secure disability benefits as “navigating the broken bureaucracy of the VA” and congressional leaders believe that the VA faces not only a near-term appeals crisis but also a longer-term challenge of reforming an inherently flawed system. As the VA has instituted reforms to reduce the claims backlog, its appeals backlog is growing. From March 2013—when VA policies to address the claims backlog were implemented in earnest—to March 2014, appeals increased over 10% from 247,523 to 273,235. For comparison, from March 2012 to March 2013, appeals actually decreased 2.3%, from 253,355 to 247,523. As of late April 2014, the number of pending appeals had reached 274,181.

Experts believe that within a year’s time, VA appeals will become the primary focus of the Veterans Affairs community. The VA appears to agree, with the Board of Veterans Appeals (BVA) anticipating a significant increase in the number of appeals in coming years. In fact, the number of appeals in the VA system has more than doubled since 2008 and the BVA last year estimated that pending appeals would double again in four years. If correct, this means the VA will have over 500,000 pending appeals by 2017.

Concerns regarding VA appeals are related not just to the increasing number of appeals, but also the growing length of time that veterans must endure for appeals to be resolved. On average, it currently takes an appeal 1,496 days—over 4 years—to move through the process to a BVA decision. Remanded appeals on average take an additional 445 days and appeals pursued through the Court of Appeals for Veterans Claims (CAVC) take on average an additional 321 days. Appeals that are remanded and pursued to the CAVC on average take over 6 years to resolve. Not factored into these figures is an average wait of 260 days for veterans to receive a decision on their claim before even initiating an
Moreover, these are averages; it is not uncommon for appeals to take even longer. Since 2010, the average length of an appeal has more than doubled. By law, appeals must move through the process “expeditiously” but clearly this is not happening. In 2013, the VA informed an Iraq War veteran that it was focusing on appeals from 2010.

VA appeals shortfalls directly cause serious economic and health consequences for veterans who are left without benefits for an extended period of time. These wait periods are significant because during this time veterans with serious conditions do not receive the government support that they and their families have earned and desperately need. Experts have linked the growing problems of veteran homelessness and suicide to the long wait periods that veterans must endure for their claims to be decided and for appeals to be resolved.

Publicly, the VA does not dispute that a serious problem exists with respect to VA appeals, publicly admitting that the current state of appeals is “unacceptable.” Similarly, VA websites and internal documents describe the appeals process as “extremely complex...confusing, and quite stressful.” However, within the Veterans Benefits Administration (VBA) there is reluctance to take appeals seriously. A former VA employee summarized the VBA’s attitude toward appeals, as “that’s not our problem.” This mindset ignores the fact that over 80% of the time that it takes for the VA to process an appeal occurs at regional offices (ROs) under VBA supervision.

Senior VA officials reportedly are hesitant to view appeals shortfalls as an issue because they believe that only 1.2% of all claims are appealed to the BVA. Experts believe this statistic is misleading and almost certainly too low—estimating that 10-15% of claimants file an appeal. Also, statistics focused only on how many veterans pursue an appeal to the Board ignore the fact that many veterans have appeals pending at ROs and some give up out of frustration. Regardless, the large and rapidly growing number of veterans forced to endure a 4-year long process is quite significant.

The Basics of VA Appeals
In recent testimony before Congress, the US Government Accountability Office (GAO) cited “inefficient processes” as one of the primary reasons for the excessive length of VA appeals. The ever-increasing complexity of the appeals process has caused experts in the field to refer to it as the “DaVinci Code” and experts agree that although all parts of the process are designed to be veteran friendly, the sum of the parts is veteran unfriendly. Veterans can appeal disability compensation determinations on one of three grounds. The first is if their claim is denied. Secondly, when the VA grants a claimant disability compensation it assigns a percentage award that ranges from 0% to 100%, in 10% increments, to reflect the severity of the veteran’s disability. If veterans disagree with the percentage award determined by the VA, they can appeal it. The third issue that is appealable is if the veteran agrees with the VA percentage award but contends that the VA

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\[\text{footnote: The only data provided by the VA regarding the duration of appeals is the average length of each step. No ranges or standard deviations are provided largely because the VA does not conduct such detailed analysis of its processes.}\]
determined effective date of benefits is inaccurate. According to experts, the vast majority of appeals relate to claim denials or disagreements over percentage awards—with the relative number of these two types of appeals estimated as roughly equal. Although effective date appeals are fairly rare, this seemingly minor issue can be financially significant to the tune of tens of thousands of dollars.

A disability compensation award requires evidence to prove three elements: an in-service occurrence, a current medical condition, and a link between the first two, commonly known as “service connection.” Although data on the subject are not available, experts generally agree that the most common reason why appeals are denied is a lack of evidence proving service connection. Of all the benefits offered by the VA, disability compensation cases account for 96% of appeals because of their complexity.

The appeals system is designed to be “non-adversarial” but in reality, the burden of proof is on the veteran and evidence is critical. Generally speaking, veterans who win on appeal draw attention to or submit evidence that proves entitlement for service-connected injury, demonstrate faulty conclusions or flawed actions on the part of the VA, or cite legal references or medical studies.

In 2000, Congress passed a law establishing the “Duty to Assist,” which requires the VA to “obtain evidence, ensuring the claimant has the necessary forms and instructions, and notifying the claimant if additional information is needed.” Despite this statutory obligation to assist veterans, the VA’s practical ability to do so is severely limited. The VA instead relies heavily on VSOs and other representatives to help veterans. The VA’s role is largely limited to gathering records, an effort that has become the most time consuming aspect of the claims and appeals process, in part because of delays caused by other agencies. According to GAO, this aspect of this problem affects IAVA’s members disproportionately; 43% of Afghanistan and Iraq war veterans served as reservists or members of the National Guard, which further complicates efforts to gather their medical and military records, given these veterans typically served “multiple, non-consecutive deployments with different units.”

Estimates of non-meritorious appeals vary widely. Experts estimate that less than 1% of all claims received are fraudulent, VSO officials report it is “not uncommon” for appeals without legal merit to move all the way through the process, and senior VA officials privately estimate the figure as high as 15-20%. There are also various estimates regarding the prevalence of “submit and forget” appeals—in which veterans “roll the dice” in the hopes of receiving more benefits, even if they do not believe they have a case. Certainly non-meritorious cases clog the appeals system to an extent, but without clear statistics it remains unclear to what degree this is a problem.

The most frequent criticism of the appeals process is that cases do not move forward in a unidirectional fashion toward resolution. Instead, procedural elements designed to protect veterans cause appeals to move backwards or get caught in bureaucratic loops. The feature of the process that most contributes to this cyclical inefficiency is the veterans right to submit new evidence at any time, triggering legally mandated VA reviews of each submission. For many appeals, submitting new evidence is the difference between winning and losing and experts argue that this right is an essential protection for individual veterans. It comes at the high cost, however, of making the entire process an inefficient,
Experts estimate that each submission of new evidence adds at least “several months to the process” and can delay cases “indefinitely.” Experts also report that the majority of “new evidence” submitted by veterans is irrelevant. For example, it is common for veterans to submit current treatment records when the reason the VA denied the claim is insufficient evidence of service connection. Put more simply, the VA requires proof that the medical condition was caused or exacerbated by military service but veterans often only submit medical reports that prove that they have the medical condition, a fact that is not disputed by the VA. Veterans also often resubmit evidence because chronic delays cause veterans to believe that the VA did not receive it. Ironically, this only causes further delays.

Overall, the VA appeals system is not the result of logical process design. Rather it is an amalgamation of numerous procedures and layers that have accumulated over the course of over 80 years unaccompanied by efforts to ensure all of the parts work together effectively.

**A Brief History and the Impact of Judicial Review**

The inefficiency of the VA appeals process in part has its roots in the evolution of the VA as an institution. Since the 1980s, well-intentioned legislation has made the appeals process overly complex. New statutes designed to reign in veterans programs perceived as overly generous or wasteful increased documentation requirements and scrutiny of veterans’ benefits. The negative implications of this increased regulation, however, did not fully manifest until recent years as veterans returned home from Afghanistan and Iraq. A Congressional study produced in 2007 concluded that legislative reforms since the late 1980s have resulted in an appeals process that both VA employees and veterans view as “broken.”

Problems caused by the reintroduction of judicial review in particular have done more harm than good. Although experts agree that judicial review improved the quality of appeals decisions and is here to stay, it also imposed new requirements on all involved to meticulously document all aspects of claims and appeals, complicated veterans law, and made the process of gathering and evaluating evidence far more lengthy. For example, according to the Board of Veterans Appeals annual report, the Federal Circuit’s recent decision in Bond v Shinsecki resulted in new, higher standards for detailed analysis and documentation that will further delay appeals.

The appeals process as a whole also has become more stove-piped and less efficient. Non-expert evaluations of formal reports have replaced conversations among doctors, lawyers, and adjudicators, with negative consequences on the accuracy and efficiency of VA decisions.

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iii The First Gulf War and US military interventions in Panama, Somalia, the Balkans, and Haiti were the only other major conflicts since 1988. None of these conflicts involved large numbers of US casualties, long-term or numerous deployments by large numbers of troops, or widespread “invisible wounds”, such as PTSD.
Battle of the Bulge: Effect of Increased Volume

VA reports suggest an institutional belief that the increased number and duration of appeals are attributable only to the overall increased volume of claims. Although it tempting to accept the VA’s assertion, evidence indicates that serious problems with the appeals system predate the recent increase in claims by a decade. In 2001, veterans’ advocates described the appeals system as a convoluted failure and the VA even then deemed the average length of an appeal (745 days) “unacceptable.”

Additionally, not all other variables were held constant. As the number of claims increased dramatically, so did the resources provided to the VA to deal with the problem. Since 2009, the VA budget has increased 40% to $140 billion.

Two Waves. It stands to reason that if the volume of claims increases, even if the percentage of claims that are appealed stays the same, the raw number of appeals will increase. To an extent, increased volume certainly did contribute to the problem. Following Secretary Shinsecki’s decision to recognize presumptive service connection for several medical conditions, veterans—particularly from the Vietnam generation—filed over a million claims in both 2010 and 2011. Throughout this period, veterans of the wars in Afghanistan and Iraq also inundated the VA with over 830,000 claims. The claims backlog peaked in March 2013 and has decreased significantly since then but experts have raised serious questions about the unintended consequences of the VA’s efforts to process backlogged claims, to include suggesting that the reduced backlog is nothing more than a “slight of hand” trick that will result in increased appeals.

Quantity Over Quality. Longstanding concerns regarding the VA’s emphasis on quantity over quality in claims adjudication were exacerbated by recent efforts to adjudicate backlogged claims at record speed. Although the VA has publicly denied it, VA employees and experts report that the numbers of claims decisions made without sufficient evidence or marred by errors have increased drastically and that backlogged claims have disproportionately resulted in low percentage awards. Experts are concerned that these factors risk transferring the claims backlog laterally to the more cumbersome appeals process and that the VA will not recognize the growing appeals problem until it becomes a full-blown crisis. The VA has yet to even define what constitutes a backlogged appeal, which was a key step in addressing the claims backlog.

Robbing Peter to Pay Paul. Some experts believe that the most significant cause of the appeals increase is that the VA shifted almost all its appeals personnel over to claims processing. This neglect of appeals has increased over the past 5 years and Secretary Shinsecki, VA employees, GAO, and veterans advocates have all acknowledged that the shift of resources and personnel away from appeals contributed heavily to both the increasing number and duration of appeals. Even as early as 2010, the VA Inspector General (IG) found that appeals were increasing at a significant rate because “regional office managers did not assign enough staff to process appeals, [and] diverted staff from appeals

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According to the Veterans Benefits Administration annual report, Afghanistan and Iraq veterans were a secondary cause of the VA’s increased workload; last fiscal year, 42% of new claims awards went to veterans over the age of 55 whereas only 28% went to veterans under the age of 34 and only 11% of total disability recipients were under the age of 34.
processing...because compensation claims processing was their highest priority.” According to GAO and IG data, for over a decade, only 8-10% of VBA employees have been assigned to work on appeals despite the fact that appeals comprised between 19%-30% of the VBA workload. In 2012, the few employees still working appeals on average spent 45% their time working on claims and since then GAO reported that RO employees were devoted “almost exclusively” to claims. This management directed shift is reinforced by performance incentives that encourage appeals specialists to process claims instead. Relatedly, claims adjudicator performance evaluations do not account for how frequently their decisions are appealed, remanded, or overturned. In essence, more water is leaking into the appeals deck of the boat but almost all of the employees responsible for bailing the water out have been diverted to another part of the boat.

**Political and Institutional Obstacles to Reform**

Veterans issues enjoy widespread public and bipartisan support but are no longer a high priority, as the political power of veterans has waned. The US military’s evolution into an all-volunteer force that relies heavily on technological superiority has enabled the US to wage wars without mobilizing the population. The net result is that veterans as a group now have a far more limited ability to mobilize votes or resources to garner influence.

The key stakeholders of the Veterans Affairs community are the VA, the VSOs, and Congress. Past reforms have succeeded because these entities were engaged in the process, tapped outside expertise, and committed to implementation. For example, in the early 2000s, the VA took steps to make its communications to veterans easier to understand, which required retraining of VA employees and veteran representatives. The VA meets with VSOs on a bi-weekly basis to discuss major issues and cooperation for reform is possible, as evidenced by recent efforts to tackle the claims backlog. However, the relationship between the VA and the VSOs can be volatile and has become increasingly adversarial in recent months.

Currently there are no bills under consideration in Congress related to VA appeals but discussion on the topic recently increased within the Senate and House Committees on Veterans Affairs, given concerns that efforts to address the claims backlog may cause an appeals crisis. Last year, the House Committee held hearings on appeals and the Senate Committee demanded that the VA develop a plan to deal with

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" Less than 1% of the US population served in the wars in Afghanistan or Iraq whereas roughly 10-12% of the US population served in uniform during World War II, with an even larger portion of Americans supporting the war effort in civilian roles.
In March 2014, the VA delivered an underwhelming response and has yet to respond to a congressional request to provide detailed data on appeals.\textsuperscript{88} Threatening VA’s budget or excoriating its performance publicly ultimately only hurts veterans. Recently, Congress tried pressuring the White House to hold the VA accountable, sending an open letter to President Obama signed by over 70 Senators.\textsuperscript{89} Even if consensus exists, the timeframe for Congress to pass even minor reforms is probably at least a year given the legislative process.\textsuperscript{90}

The VA, however, has considerable authority under the Administrative Procedures Act (APA) to implement reforms without Congressional action; the VA under the APA can implement any reforms that affect appeals prior to the case reaching the BVA, whereas changes at the Board-level or above reforms require Congress to act.\textsuperscript{91} Senior VSO officials report that the VA’s narrow focus on claims and meeting benchmarks set by Secretary Shinsecki at all costs, is currently a significant obstacle to appeals reform.\textsuperscript{92}

Several experts report, however, that the major VSOs—not the VA—are often the stumbling block to needed reforms.\textsuperscript{93} VSOs often refuse to prioritize what they want or acknowledge that tradeoffs are required to fix the process. Experts report that in the past Congress has been prepared to impose sweeping reforms on the VA appeals system but that VSOs were unwilling to give any ground regarding veterans rights. One interviewee went as far as to say that the some VSOs are unreasonable—“they want it all” and refuse to “compromise”.\textsuperscript{94}

Lastly, reform has also been stifled by a lack of trust. A common perception among veterans is that the VA is incompetent or ill willed, reinforced by public accounts of the VA being disrespectful, confrontational, or unresponsive.\textsuperscript{95} Although “horror stories” such as the alleged “secret waiting list” that allowed veterans in need of treatment to die in Phoenix are fairly rare, they are highly publicized and spread quickly by social media.\textsuperscript{96} Experts report that reforms are not likely to be effective unless veteran trust in the VA increases.\textsuperscript{95,96}

Within the Veterans Affairs community, there is broad agreement that the appeals system has significant flaws but agreement on what should be done to reform the process remains elusive. The next section of this report reviews a number of initiatives to improve appeals that have already been tried.

\textsuperscript{vi} For example, VA initiatives to improve the accuracy of claims determinations have failed because veterans and advocates alike do not believe the VA’s contention that over 90% of decisions are now correct.
Part II: Treating the Symptoms, Not the Disease

Although some initiatives to date helped improve VA appeals, most solutions have had a limited impact because they failed to address the root causes of the problem. Below is a brief discussion of these efforts.

Standardized Notice of Disagreement forms to initiate an appeal. Following a recent study on the appeals process, the VA implemented the use of VA 21-0958 standard forms for a Notice of Disagreement. VA employees report that these forms make it much easier for the VA to record, route, and begin processing an appeal and introduce an option for VA adjudicators and appellants to discuss the case directly. Although the VA predicted that this reform would reduce the length of appeals by 100 days, average processing times remain at any all time high and the VA-veteran conversations have been of limited utility.  

New Evidence Now Considered by the Board. In August 2012, Congress passed the “Honoring America’s Veterans and Caring for Camp Lejeune Families Act,” which allows the Board of Veterans Appeals to consider new evidence submitted by an appellant during that stage in the process. Prior to this new legislation, any new evidence submitted by a veteran while an appeal was before the Board resulted in the case being automatically remanded back to the RO. Generally this reform is seen by experts as having improved the process but the VA could not provide metrics to support this assertion. Whatever the impact, it apparently has been offset by other factors, given that the number and duration of appeals continues to increase.  

Transition from Paper-Based to Computerized System. Veterans Benefits Management System (VBMS) is the new system the VA uses to process claims and appeals electronically and eBenefits allows veterans to access an online account related to their benefits. VBMS has not yet been fully implemented but VA employees credit it for much of the progress made on the claims backlog and report that the new system has already made the appeals process much more efficient by eliminating errors and delays and facilitating more effective collaboration. The system, however, is still a work in progress. An audit of VBMS requested by Congress last year revealed that digitization had not yet resolved issues inherent in such a complex system. Digital claims and appeals folders remain disorganized and thousand of pages in length but are now more difficult for VA employees to manipulate. Adjudicators can only review a limited number of documents on screen at a time and as a result, it can take hours to page through electronic folders to find necessary documentation. The VA has yet to adapt business practices to capture the full potential of what technology can do and has tended to view IT solutions as a “silver bullet” rather than pursuing more foundational reforms. Other experts voiced concerns that the VA has foolishly “put all its eggs in the technology basket” hoping that increased automation will make up for decreasing levels of expertise and increased levels of process complexity. Ultimately, new IT solutions will do little to address systemic issues or bottlenecks in the process.
Increased Manpower and Training. A commonly raised solution is to throw more money and people at the problem. VA appeals specialists report, however, that an influx of new employees would actually do more harm than good in the near term because of the high expertise requirement needed to adjudicate appeals. In recent years, baby boomer retirements have caused a “brain drain,” in which the vast majority of expertise on appeals was lost, suggesting that these individuals could be hired back as contractors. Experts agree, however, that bringing back retired appeals specialists as line employees probably would introduce a host of problems, such as further attrition of staff employees that resent contractors’ higher salaries. A creative proposal to utilize these appeals experts as contractors while avoiding potential pitfalls is discussed later in this report. In terms of training, the VA has implemented new and bolstered existing programs to improve the appeals process for years without significant effect, in part because the “increasing complexity of disability compensation appeals” continues to outpace increased capacity.

Part III: Addressing the Root Causes
The focus of this report will now shift from examining the problem and past efforts to address it to an analysis of the three root causes of the failure of the VA appeals system:

1) The Process is overly complex, inefficient, and inherently flawed.

2) Veteran Representation is generally inadequate and does not provide what veterans need to win.

3) Data Analytics. The VA’s unwillingness or inability to track, analyze, and disseminate metrics related to appeals undermines efforts to develop and build support for reforms.

The Process—The Devil is in the Details.
This report has already provided an overview of the overarching flaws of the VA appeals process. To recap, its key systemic issues are:

- Complex to the point of being veteran unfriendly
- Burden of proof is on the veteran; evidence and documentation is critical
- The VA has a duty to assist but largely lacks the capability to do so beyond gathering records
- Cases do not move forward toward resolution; new evidence can delay an appeal indefinitely

The following section focuses on identifying the procedural weaknesses of each step in the appeals process.
As a point of departure, it is worth examining the linear and relatively simple image of the process (below) that the VA depicts on its website and in its literature.

In reality, the labyrinth-like process is far messier. A major effort of this report was to produce an original diagram of what the appeals process really looks like and identify inefficiencies. The graphic on the next page is the end result. Green circles depict actions taken by the appellant and blue squares depict actions taken by the VA or the Courts. The diagram also includes available data on the average length of each step highlighted in red.
Notice of Disagreement (NOD). This is the first step in the process. Once veterans receive notification of the VA’s decision on a claim, they have up to one year to file a NOD. NODs simply state that the veteran does not agree with some element of the claims decision, which triggers a review of the case by the VA.\textsuperscript{112} Experts report that it is not uncommon for the same VA adjudicator that processed the claim to provide this first “re-review.” For obvious reasons, this is problematic and makes it unlikely that such a review is objective or useful. Additionally, although VA data are not available, experts estimate that “very few” traditional reviews resolve appeals and an expert on bureaucratic processes added that rarely if ever are pro-forma reviews a worthwhile first step in an appellate process.\textsuperscript{113}

Veterans, however, have the right to request a \textit{de novo} review, which means that a Decision Review Officer (DRO)—the RO-level experts on appeals—reviews the case with fresh eyes and the authority to uphold an appeal without considering the original VA determination.\textsuperscript{114} Roughly 65% of appellants opt for \textit{de novo} review.\textsuperscript{115} In late 2012, the VA IG found that on average \textit{de novo} appeals were resolved 600 days earlier than traditional appeals and that DROs granted 29% of \textit{de novo} reviewed appeals—which is almost identical to the 28.4% of appeals granted by the Board.\textsuperscript{116} These findings are based on sampling during a series of IG audits but strongly suggest that \textit{de novo} reviews greatly improve the appeals process.

Veterans also have the right to request a hearing at the RO to explain their positions, seek clarification, and submit new evidence.\textsuperscript{117} One of the purposes of the hearing is for the VA to tell the veteran what is needed for the appeal to be successful, but this often does not happen. Experts disagree regarding the usefulness of local hearings; some view hearings as a chance to ask questions and believe these proceedings increase the chances of a successful appeal whereas others believe that in most instances hearings only serve to lengthen the process.\textsuperscript{118}

The average length of time it takes for veterans to file an NOD is not publicly available. During other stages of the process, veterans on average use about two-thirds of the time they are provided by law to respond to the VA in writing. Based on the assumption that veteran behavior is generally consistent throughout the appeals process, we can estimate the average time from the notification of the claims decision to the VA’s receipt of an NOD as approximately 243 days.\textsuperscript{119}

Statement of Case (SOC). If, after review of the case, the RO finds that the original claim decision was correct, the VA prepares and delivers to the veteran what is known as a SOC, which provides the veteran an explanation and justification of the claims decision, detailing the regulations and statues that underpin the VA finding.\textsuperscript{120} The veteran again has the right to request a local hearing\textsuperscript{121} or submit new evidence for consideration.\textsuperscript{122} If the VA does not find the new evidence compelling and reverse its decision, the RO will provide the veteran with a Supplemental Statement of Case (SSOC), which addresses the VA’s reasoning and statutes related to the new evidence.

Experts report that the issuance of SOCs has a significant impact. Many veterans appeal based on a misunderstanding of what they are entitled to but end their appeal after receiving a detailed explanation of the evidence and relevant statues.\textsuperscript{123} For example, by law, maximum disability compensation for hearing loss is 10%. Some veterans with hearing loss in both ears appeal their disability claim award because they believe they deserve a 20% disability award (10% for each ear). After receiving a SOC, however, almost all of these veterans understand what the law dictates per their
condition and decide not to pursue their appeal further. Many other veterans realize upon receipt of the SOC that they are unlikely to be able to produce the evidence necessary to meet the statutory burden of proof. Experts estimate that providing veterans SOCs earlier in the process would decrease the number of new appeals by approximately a third in a relatively short period of time.

The average length of time from when the VA receives an NOD to when the veteran receives a SOC is 270 days, a figure that has increased by 50% since 2011. This makes the cumulative duration of the average appeal up to this point 513 days and makes the total length exceed one year.

**VA Form 9.** If veterans wish to continue their appeals, the next new step in the process is for the veteran to submit a VA Form 9, colloquially known as the “substantive appeal.” In this standardized form, veterans must make their case for appeal, enumerating specific aspects of the VA’s argument that they disagree with or mistakes the VA has made during processing. As in previous stages, new evidence will again trigger a review of the case and the issuance of a SSOC, unless the VA reverses its decision. Veterans also retain the right to request a local hearing at this point. Successful appeals beyond this stage usually require a well-organized collection of supporting evidence to be submitted along with the VA Form 9. However, most veterans fail to read the fine print that informs them of their right to attach additional records. As a result, most veterans submit substantive appeals that provide only a short explanation of their argument. On average, veterans submit substantive appeals in 40 days, making the cumulative duration of the average appeal up to this point 543 days.

**Certification.** Upon receipt of a VA Form 9, the RO re-reviews the case. If the RO is satisfied that the case is sufficiently developed and the decision is correct, the appeal is certified and advanced to the BVA. The RO then informs veterans that their appeals are certified, giving veterans 90 days to request a hearing or submit new evidence. On average, certification takes 692 days. It is unclear why this process takes so long. This makes the cumulative duration of the average appeal up to this point 1245 days and makes the total length exceed 3 years.

Several experts raised the merits of limiting the role of ROs in appeals. ROs tend to view processing claims as their primary mission whereas appeals are a secondary priority. Since 2011, the VA IG audited roughly half of the ROs and found that most were unaware of or failed to adhere to guidance regarding the timely processing appeals. Many had “no controls...in place to monitor or track timeliness” or to “identify...potential problems or propose corrective actions.” In 2012, roughly 80% of new appeals sat for at least 225 days before being reviewed.

ROs also have significant variation in the levels of competence, experience, and legal and medical expertise needed to process appeals effectively. ROs frequently fail to address all of the evidence

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vi Veterans have 60 days or a year from the original claims decision notification to file a substantive appeal whichever is later.

viii For example, experts described the office in St. Paul, Minnesota as “a model” but characterized the RO in Baltimore, Maryland as “complete chaos” and “in complete disarray under the weight of low morale, high complaint rates, and constant criticism”.

that veterans submit or incorrectly ignore or dismiss critical documents, particularly external medical records. Both the BVA and the Courts have “hammered the ROs for two decades” regarding the poor quality of appeals processing without significant improvement.

In fairness to ROs, appeals adjudication requires extremely high levels of discretion and documentation and the complexity of cases and the law itself continually increase. That said, the results—or lack thereof—speak for themselves. Logically, an extremely lengthy process should produce high quality results and an extremely inaccurate process should be very quick. VA documents and experts indicate, however, that the appeals process up to this point is neither; it is both extremely inefficient—taking over 3 years—and inaccurate—nearly 75% of all appeals certified by the ROs are found to be deficient by the Board.

**Board of Veterans Appeals (BVA).** After certification, the BVA receives the appeal and assigns it a docket number. The BVA is composed of judges or attorneys with expertise in veterans law that function similarly to administrative law judges and produced 44,300 decisions in the last fiscal year, 9% of which were overturned on appeal. By law, the BVA must review appeals on a first come, first serve basis.

Veterans at this point can request a BVA hearing and have the option to travel to Washington, wait for Board members to hold a local hearing, or agree to a hearing via video-teleconference (VTC). Last fiscal year, 40% of hearings were conducted via VTC, shaving up to 100 days of the length of an appeal. x

Prior to 2011, if a veteran submitted new evidence at this stage, it would trigger an immediate remand of the case back to the RO for further development. As mentioned earlier, a new law passed by Congress changed this process, allowing the BVA to consider new evidence.

The next step is that BVA staffers review the case and conduct research. The BVA by law conducts a de novo review—including consideration of issues not previously raised by the veteran. The Board then decides the case, approving (28%), denying (22%), or remanding (46%) the appeal.

There are two types of remands. Avoidable remands—those that the BVA believes should have never been certified—are returned to the ROs for further development and unavoidable remands are sent to the Appeals Management Center (AMC), an entity created in 2004 to help process remands. Initially,
veterans’ advocates had high hopes that the introduction of the AMC would “improve the accuracy and timeliness of decisions” but this has yet to occur. ¹⁴⁷ That said, experts generally agree that the AMC is more efficient than the ROs at processing remands. ¹⁴⁸ The high rate of BVA remands has been a problem for over a decade and expert interviews suggest that identifying the reasons for this is largely a matter of perspective; ROs believe that BVA, in an effort to make the appeals process overly veteran friendly, remands cases that by law should be denied. ROs also claim that BVA performance evaluations that incorporate the rate at which decisions are overturned by the Courts incentivizes BVA to err on the side rather than risk reversal.¹⁴⁹

Conversely, experts with experience working at BVA attribute the high remand rate to poor case development at ROs.¹⁵⁰ Two of the most common types of remands are when ROs fail to consider secondary or aggravated conditions or when there is evidence that ROs ordered a medical exam, but the results are not included in the case file.¹⁵¹ Data on the breakdown of remands between avoidable and unavoidable are not available.

On average it takes 251 days from receipt of the appeal to a BVA decision. This makes the cumulative duration of the average appeal up to this point 1486 days and makes the total length exceed 4 years. Remands on average add 445 days to the process, raising the cumulative duration of the average appeal up to this point to 1931 days—over 5 years in length.¹⁵²

**Next Steps: Reconsider, Reopen, or Take it to Court.** If the BVA denies an appeal, veterans receive a Notice of Appellate Rights explaining three options available to continue the appeal. The first is a Motion to Reconsider, which gives the veteran 120 days from the date of the BVA decision to submit a written letter demonstrating an “obvious error of law or fact” on the part of the VA.¹⁵³ If the veteran fails to prove “an obvious error,” the motion will be denied. At that point, the veteran has the right to pursue either of the other two post-Board options. If the motion is granted, the case will be filed with the BVA under its original docket number for a second examination. The VA does not have publicly available data on how long a motion to reconsider adds to the process.

The second step a veteran can take following a BVA denial is to file a Request to Reopen, which requires the veteran to submit what the VA considers to be “new and material evidence” within 120 days from the date of the BVA decision. If granted, the appeal is returned to the RO for further development, essentially returning to the certification stage of the process. If denied, the veteran has the right to pursue either of the other two post-Board options. The VA does not have publicly available data on how long a request to reopen adds to the process but it almost certainly is considerable.¹⁵⁴

The third and final option is to appeal the decision to the US Court of Appeals for Veterans Claims (CAVC). Veterans must file a Notice to Appeal within 120 days of the BVA decision.¹⁵⁵ At this point, the

¹⁵¹ Veterans that filed a Motion to Reconsider have up to 240 days.
appeals process becomes much more akin to a traditional adversarial legal proceeding. The VA sends attorneys to oppose the appeal and almost all veterans—by necessity—hire a lawyer. For veterans that cannot afford an attorney, Congress funds a pro bono program. The CAVC, “one of the busiest federal appellate courts,” in most cases relies on written arguments because it is not permitted to perform a de novo review of the appeal. The case is considered “closed” and veterans cannot submit new evidence at this stage. As a result, all lawyers can argue is procedural error. One of the problems the CAVC often faces is the “inherent tension in veterans law” between deferring to the VA and the veteran. As a result, the CAVC remands a very high number of cases.

Both the veteran and the VA have the right to appeal a CAVC decision to the Federal Circuit or even the Supreme Court, but this happens relatively infrequently. The Federal Circuit is only permitted to hear appeals of CAVC cases if the decisions are deemed “arbitrary or capricious, unconstitutional, in excess of statutory jurisdiction, or procedurally deficient.” As discussed earlier, the main deficiency of judicial review is not that the courts are inefficient but that their decisions over time have created crushing demands on VA adjudicators and complicated veteran law.

**Takeaways**

The above analysis of the appeals process suggests that:

- NODs are redundant with the VA Form 9
- Pro-forma reviews are of little value
- De novo reviews significantly shorten the process and resolve appeals earlier on
- Almost half of all appeals do not receive de novo review
- Early SOCs would decrease appeals significantly
- ROs view appeals as a secondary priority and suffer from a number of shortcomings
- BVA remands nearly half of all appeals, ROs and BVA share responsibility for this high rate

Most appellants navigating this process have help but it is often inadequate. The next section examines this second root cause of the current state of VA appeals.

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The Veterans Consortium Pro Bono program is a non-profit organization that finds lawyers willing to represent veterans free of charge.
Veterans Representation: Something is Better than Nothing

One feature of the VA appeals system that is meant to address its complexity is the veterans right to representation. Roughly 85% of veterans that file an appeal receive assistance from a VSO representative (VSR), with another 5% receiving assistance from an attorney. Experts generally view the decision between hiring an attorney or securing the assistance of a VSR as a tradeoff between more attention at cost versus free representation from an individual that is swamped with other claims and appeals.  

As previously discussed, the difference between successful appeals and those that are denied is often new, relevant, convincing, and credible evidence. Experts report that what veterans need most from representatives is assistance in identifying and collecting this evidence to help win on appeal. However, many representatives lack the ability to identify appealable issues, gather the necessary documentation, or research court decisions. Although some representatives are excellent, numerous experts interviewed—to include senior VSO officials—agreed that most VSRs offer only minimal assistance, in part because they lack the time, expertise, and resources to effectively work more complex cases. In many cases, VSRs do little more than submit “worthless” pro-forma requests on behalf of appellants.

VSRs can also have a conflict of interest with veterans. VSOs are member driven organizations and one of their most important recruiting tools is advocacy for veterans regarding VA benefits. This self-interest in recruiting veterans can skew the way in which VSRs advise appellants, discouraging representatives from telling veterans their appeal lacks merit. Although VSOs cannot force veterans to withdraw an appeal unless there is clear evidence of fraud, experts generally agree that VSOs could do a better job of screening veteran appeals. VSR refusal to turn anyone away also contributes to the growing length of appeals. As VSRs become increasingly overworked, appeals spend more time languishing in their inboxes. Much of the delay in processing appeals occurs while the VA is waiting for VSRs to take action. For example, VSR related delays account for over 45% of the average time that an appeal is at the BVA.

In 2006, Congress removed the practical barriers to attorney representation for veterans. Although attorney representation has grown since then, the greatest challenges to lawyers providing effective assistance remain the dearth of lawyers with experience and the meager financial incentives offered by veterans law. Despite perceptions to the contrary, attorneys generally do not provide better representation than VSRs. Although there are many effective attorney representatives, veterans law is

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xiv VSOs train their own representatives with little to no oversight or assistance from the VA, relying instead on veterans law experts. Experts referenced limited training and resources as contributors to poor VSR performance.

xv Many VSOs strongly oppose attorney representation of veterans, in large part because they view lawyers as competition.
rarely profitable resulting in lower quality lawyers. Additionally, attorney incentive structures are misaligned with veterans’ interests. Getting a case remanded is considered a win for an attorney because they can collect their fee, but this is really a win not for the veteran because they must continue to slog through the process. Few lawyers that “win” a remand continue to assist the veteran. Despite the fact that expertise in veteran law takes years to develop, the VA presumes that “any attorney in good standing with the bar is qualified and knowledgeable enough to assist veterans.” Another reason for shortfalls in representation is that the VA has largely washed its hands of the responsibility to provide oversight or training for representatives or to assist veterans directly.

Despite shortcomings, evidence suggests that representation has a positive impact. Of appeals decided by the BVA, the major VSOs achieved success rates ranging from 25-31%, attorneys fared about the same, with a 30% success rate, and veterans representing themselves succeeded only 21.4% of the time. By comparison, the overall success rate of appeals heard by the Board was 28.4%. This all suggests that the current system of representation has value but that it could be greatly improved, particularly by addressing areas in which VSR and attorney interests diverge from those of veterans. Several experts suggest that this could best be achieved by injecting independent advice for veterans on how to win into the existing framework.

### Failure of VA Data Analytics: Basic Questions Remain Unanswered

The last root cause of the appeals problem is that it is difficult to fully understand the problem, fashion remedies, and build support for reform because the VA is either unable or unwilling to provide data on basic questions. For example, if veterans advocates or policy analysts cannot compare the success rates of appellants that request a hearing to those that forgo a hearing, it becomes exceedingly difficult to justify a recommendation that hearings should be mandatory or eliminated.

The lack of meaningful metrics and analysis also severely limits the VA’s ability to anticipate problems and develop proactive solutions or strategic plans. Instead, the VA makes decisions that affect millions of veterans “by the seat of their pants” in reaction to media and Congressional pressure. GAO testified to Congress last year that the VBA was considering “over 40 initiatives” to improve the claims and appeals processes but lacked an overarching plan for implementing, de-conflicting, or measuring the “subsequent impact on processing times” of these proposals. The VA IG found that the development and rollout of VBMS—which cost at least a quarter of a billion dollars—“was not based on an analysis of requirements” or “accompanied by a detailed plan”. Another example frequently cited by experts is Secretary Shinsecki’s decision to define a backlogged claim as a case lasting over 125 days, as this figure was arbitrarily “plucked out of midair”.

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xvi For a more detailed breakdown of VA statistics on advocacy, see page 26 of the BVA Chairman’s annual report.
When the VA does attempt to collect data on its programs, it does so in an ad hoc manner that inhibits the type of systematic or comprehensive analysis needed to draw generalizable trends, fails to make it a priority, and relies on subjective rather than objective standards. VA IG during audits used the national average processing time to conduct “pass/fail” evaluations of how effective ROs were processing appeals. In some cases, however, if these audits had been conducted even a few weeks later, ROs that had passed would have failed because the national average had shifted. Experts point out that the VBMS system should make tracking metrics much easier, but only if the VA builds robust capabilities into the system.

Numerous experts confirmed that detailed metrics, statistics, and raw data on appeals are difficult to obtain, even for them. A senior VA official explained that much of the information the VA does collect on appeals is stored in an archaic 20-year-old computer system that less than a handful of people know how to operate, making basics like figures on how many appeals are resolved at each step in the process hard to come by. The consensus is that annual reports are the best source of data on appeals but this limits available information to what the VA is required by law to report or chooses to present. This infrequent and opaque dissemination of data is inadequate because it prohibits independent analysis of VA data that is often suspect or contradictory. VSO officials generally agree that this failure to be transparent hurts the VA’s image—it is perceived as misinformed, incompetent, hiding something, or having their “heads buried in the sand.” Congress is also extremely frustrated, believing that the VA withholds information and continually changes its metrics to avoid being held accountable.

**Catch 22: No Reforms Without Data, No Data Without Reforms**

The VA’s failure to collect, analyze, and disseminate relevant data is critical because paradoxically, the VA cites such a lack of metrics and analysis as a justification for refusing to make reforms. In VA documents, the VBA stated that any reforms made “through rulemaking under the Administrative Procedure Act…must be based upon a rational connection between facts found and the policy choice.” Moreover, a “rational basis for proposed reforms” and “compelling evidence or data” in most cases appear to be a pre-requisite for congressional or VSO support for potential solutions. Overall, the implication of this lack of information is that reforms likely to gain support are limited to:

- VA proposed reforms
- Reforms for which there is general consensus on the facts despite a lack of specific data
- Reforms that are first tested on a small scale with pilot programs
Part IV: Recommendations

In terms of addressing the shortcomings of the VA appeals system, a wide variety and range of policies surfaced during the course of research. The following section attempts to accomplish two tasks:

1) **Provide a Laundry List.** Experts on VA appeals—either during interviews or in published works—suggested nearly 20 proposals, many of them based on initiatives that the VA considered or implemented to address the claims backlog. The following section enumerates all but the most unreasonable solutions uncovered during research as a means of laying out the pros and cons of each and stimulating discussion within the Veterans Affairs community.

2) **Separate the Best from the Rest.** To maximize the usefulness of this report evaluative criteria were applied to the full list of proposed solutions to identify a handful of recommended proposals that are likely to prove most effective and feasible. For more information on how this report separated the “chaff” from the “wheat”, please see the table below.

### Evaluative Criteria

Before reviewing specific recommendations, it is worth briefly discussing how this report arrived at the handful of remedies that are recommended for implementation. Given the lack of hard data, evaluative determinations relied heavily on the consensus of expert interviewees. Put more simply, this report renders a subjective determination regarding the feasibility, impact, cost, and time horizon of a given solution based on the views of interviewees rather than through any type of quantitative analysis. If a proposal was judged as low in either its feasibility or impact, this was sufficient to eliminate the initiative from consideration. Cost and time were of secondary importance. Recommendations that failed or succeeded on the primary criteria of feasibility and impact also tended to fail or succeed when judged against secondary criteria.

- **Feasibility** — The consensus among interviewees at the VA, the VSOs, and in Congress is that strong opposition by any one of these three key actors probably would be sufficient to scuttle a proposed reform. Many of the solutions raised during research are not recommended because they currently are unlikely to garner necessary support. Some remedies might become feasible in time—particularly if supporting data became available. Feasibility was judged as high, moderate, or low based on available evidence and input from interviewees.

- **Impact** — Put simply, this criterion asks, “Is the juice worth the squeeze?” Some proposed reforms could be successfully implemented but would fail to have a significant effect. Given IAVA’s finite political capital and resources, this report aims to weed out proposals that would have only a minor impact in favor of reforms that will return significant dividends, particularly in terms of shortening the length of the appeals process. Impact was judged as high, moderate, or low based on available evidence and input from interviewees with relevant expertise on the proposed reform.

- **Cost-Effectiveness** — In the current political environment, the costs associated with solutions for a veterans issue are not as central a factor in evaluating solutions as they might be for other public policy problems. That said, even the VA budget is susceptible to cutbacks and some proposed solutions simply would cost too much or more than a dominant alternative. Generally, this was based on the sense of experts regarding how much programs would cost in orders of magnitude relative to each other rather on precise dollar estimates. This was the least important of the criteria.

- **Time Horizon** — Recommendations are focused on solutions that could be implemented within an approximately one year time period because the number of backlogged appeals and the average length of an appeal will continue to increase unless shortcomings are addressed. Longer-term solutions are also worthy of attention, however, as they may ultimately prove the most effective. Proposals were categorized by those that could be implemented within approximately one year, proposals that would take between one to two years, and proposals that would take two years or longer primarily based on expert assertions regarding institutional redesign and previous reforms implemented at the VA. These estimates are based on the current state of the world. As seen with the VA’s effort to reduce the claims backlog, if institutional priorities shift or public pressure is brought to bear, change can happen more rapidly.
Below is a complete list of the solutions that surfaced during research for this report, followed on the next several pages by a matrix that arrays these proposals against the evaluative criteria discussed above. The color categories in the list below correspond to those used in the matrix. Systematic reforms are labeled purple, process reforms blue, reforms to veterans representation in brown, and reforms to VA data analytics in orange.

<table>
<thead>
<tr>
<th>Systemic Reforms</th>
<th>Process Reforms</th>
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<tbody>
<tr>
<td>• Overhaul the Entire System</td>
<td>• Eliminate Notices of Disagreement/Earlier Provision of Statements of Case</td>
</tr>
<tr>
<td>• DOD Options</td>
<td>• Mandatory de novo Reviews</td>
</tr>
<tr>
<td>• Shift VA Appeals or Disability Compensation to Social Security</td>
<td>• Create a Pilot Program to Triage Appeals Prior to Board Review</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Advocacy Reforms</th>
<th><strong>Data Reforms</strong></th>
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<tbody>
<tr>
<td>• Introduce “What You Need to Win” Counseling</td>
<td>• Push for a VA Inspector General or GAO Inquiry Focused on the Appeals Process</td>
</tr>
<tr>
<td>• Mandatory Provision of Case Files for Appellants</td>
<td>• Collect Data Independently of VA: “The Wait We Continue to Carry”</td>
</tr>
<tr>
<td>• Increasing the Quantity and Quality of Attorney Representation</td>
<td>• Back Congressional Push for Increased Accountability</td>
</tr>
<tr>
<td>• Create Online Tool to Promote Percentage Award Transparency</td>
<td>• Fully Developed Appeals</td>
</tr>
</tbody>
</table>

• Have Appeals Go Directly to the Board

• Decouple Secondary Disability Benefits from Milestone Percentage Awards

• Impose Strictly Enforced Deadlines on the VA

The matrix below employs an intuitive traffic light categorization method for each criterion. For example, feasibility was judged as high (green), moderate (yellow), or low (red). For a given proposal, high feasibility means that most key stakeholders are likely to support it, moderate feasibility means that some key stakeholders were supportive or at least open minded to it, and low feasibility means that key stakeholders have voiced their opposition to it. Similarly, high impact means there is evidence or compelling expert assertions to suggest that a policy would significantly shorten or improve the appeals process, moderate impact means that there is reason to believe it would have a positive affect worth the time it would take to implement, and low impact means that evidence suggests or experts were highly skeptical that it would make much of a difference. Cost and timeliness are similarly categorized.
<table>
<thead>
<tr>
<th>Recommendation</th>
<th>Feasibility</th>
<th>Impact</th>
<th>Cost Effective</th>
<th>Time Horizon</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overhaul of Entire System</td>
<td>The VSOs and Congress support the idea in principle but not under current circumstances.</td>
<td>In the long term, this policy arguably would have the greatest potential impact.</td>
<td>This process would likely be somewhat costly in that any major reform would probably require several in-depth and independent studies of the status quo and proposed options.</td>
<td>By all accounts, a systemic overhaul probably is not a possibility for several years and would likely take several years afterwards to arrive at a new process acceptable to major stakeholders.</td>
</tr>
<tr>
<td>Increasing DOD Efforts to Improve Claims</td>
<td>Although DOD has strengthened cooperation with the VA in recent years and has supported some veterans benefits programs, both the VA and DOD probably would oppose efforts to further institutionalize a veterans benefits role within DOD.</td>
<td>The effect of the DTAP, BDD, IDES, and Quick Start programs is unclear but DOD-based solutions would do little to address future waves of claims/appeals filed by already separated veterans</td>
<td>Ultimately, there is no reason why efforts to improve early intervention for veterans before separation could not be implemented after separation in a more cost-effective manner given the VA has the established infrastructure and relative expertise whereas DOD does not.</td>
<td>Any effort to shift a significant portion of the VA’s burden to DOD would require Congressional action preceded by considerable bureaucratic wrangling.</td>
</tr>
<tr>
<td>Abolish Veterans Disability Compensation or VA Appeals Process and Replace it with SSDI Options</td>
<td>The VA, the VSOs, and Congress would oppose such a reform.</td>
<td>Shifting all veterans over to the SSDI system probably would not shorten their wait times because such a large influx of cases for SSA probably would overwhelm that system. Also, veterans would be greatly dissatisfied waiting for benefits behind non-veterans.</td>
<td>This program would be extremely costly, because it would effectively eliminate the service connection requirement of veteran disability compensation, thereby increasing the number of veteran recipients.</td>
<td>Eliminating part of one agency and relocating it to another would almost certainly take several years.</td>
</tr>
<tr>
<td>Cut the ROs out of the Appeals Process Entirely</td>
<td>VSOs and the VA would vigorously oppose this proposal</td>
<td>This reform would overwhelm the BVA, increase remand rates, lengthen the process, and generally cause bureaucratic chaos.</td>
<td>This would be relatively cheap</td>
<td>This reform if implemented would represent a major change to the appeals process; as a result it would require Congressional action and significant debate.</td>
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<td>Eliminate NOD and Deliver SOCs Concurrent with Notification Letters</td>
<td>The VA and Congress have already taken steps in this direction and VSOs are likely to support this reform if accompanied by de novo also instituting reviews</td>
<td>High, would slash at least an entire year off the process with nothing of value lost given the NOD is redundant with the VA Form 9 and the initial review is redundant with review during certification</td>
<td>This change would would be relatively cheap given the VA already has pilot programs available to justify an administrative rule change.</td>
<td>The VA could do this in a reasonably short period of time, again because supporting evidence/proo of concept already exists.</td>
</tr>
<tr>
<td>Introduce Mandatory de novo Review</td>
<td>VSOs have voiced support for this feature of the process and the VA--although reluctant--offered to issue a rule change institutionalizing de novo reviews if proven</td>
<td>Initial VA studies suggest that de novo reviews could significantly decrease the length of the appeals process (by as much as 600 days)</td>
<td>The VA claimed a few years ago that mandatory de novo review would be expensive but the IG reported this was not the case.</td>
<td>The VA could implement by rule change in a relatively short period of time.</td>
</tr>
<tr>
<td>Triage Appeals Prior to BVA Review to Lower Remand Rate</td>
<td>The VA is already trying to do this (albeit ineffectively) both VSOs and Congress appear supportive</td>
<td>It is hard to judge how significant an impact this solution might have if done right. It is possible that the remand rate would decrease but at the expense of lengthening the pre-BVA process. This is why a pilot program is recommended.</td>
<td>The pilot program would be relatively cheap whereas long term implementation could be expensive as it would require retraining or hiring new employees.</td>
<td>A pilot program to test the impact of a triage system could be complete within a year's time.</td>
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<tr>
<td>Support VA Proposed NOD Deadline and VTC Reforms</td>
<td>Clearly the VA supports these reforms. Some VSOs oppose shortening the 365 day period but these concerns can probably be overcome and would be obsolete if NODs were eliminated.</td>
<td>These changes hold the potential to cut 285 days off of the appeals process.</td>
<td>These changes would actually save money, as the BVA would no longer have to travel to ROs to hold hearings and shortening a deadline has no associated costs.</td>
<td>The VA would likely act quickly, but the any reform at the BVA-level would require Congressional action.</td>
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<tr>
<td>Fast Track/Path Differentiation</td>
<td>VSOs and Congress are likely to oppose any policy that is seen as favoring</td>
<td>Without data or analysis, it remains difficult</td>
<td>This policy would be relatively inexpensive as all it would require is VA</td>
<td>Any change to the current &quot;first come, first serve&quot; process would require</td>
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<td>certain classes of veterans or pitting them against each other. VSOs and</td>
<td>to determine how effective creating express</td>
<td>reorganization and establishment of new procedures.</td>
<td>Congressional action at the BVA level. If the fast track process were only</td>
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<td>Congress might be more amenable if conclusive data was presented.</td>
<td>lanes for certain types of claims might be.</td>
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<td>implemented prior to the BVA stage, its utility would be greatly limited.</td>
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<td>Fully Developed Appeals</td>
<td>Such a program might gain support given it is based on an analogous</td>
<td>Very few appellants (probably &lt;4%) would opt</td>
<td>Establishing this program only requires adjusting VA work practices and would</td>
<td>VA already has a model in the Fully Developed Claims program that could be</td>
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<td>established claims initiative, but in the long run, VSOs might oppose its</td>
<td>into this program thereby ensuring it has very</td>
<td>not involve additional costs.</td>
<td>used to rapidly stand up a similar program for appeals.</td>
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<td>implementation</td>
<td>little impact.</td>
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<td>Decouple Secondary Benefits from Specific Percentage</td>
<td>VA and Congress would be unlikely to support this measure given the</td>
<td>Although this policy would have a significant</td>
<td>This reform would require Congressional action and would probably move slowly</td>
<td>This reform would require Congressional action and would probably move slowly</td>
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<td>Determinations</td>
<td>extremely high associated costs. Major VSOs in an ideal world would</td>
<td>impact on expanding veterans benefits, its</td>
<td>through the legislative process given its extremely high price tag.</td>
<td>through the legislative process given its extremely high price tag.</td>
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<td>welcome such a generous expansion of veterans benefits but would probably</td>
<td>effect on the VA appeals process would be</td>
<td>Similarly, the VA probably would drag its feet and conduct lengthy studies of</td>
<td>Similarly, the VA probably would drag its feet and conduct lengthy studies of</td>
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<td>realize such a policy shift is highly unlikely and irresponsible.</td>
<td>relatively minor.</td>
<td>the long term impact in order to defeat this measure.</td>
<td>the long term impact in order to defeat this measure.</td>
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<td>Introduce &quot;hammer&quot; deadlines</td>
<td>VSOs, Congress, and the VA would all oppose this option</td>
<td>This would probably lead to people inundating</td>
<td>In the implementation phase, this rule change would not cost much but in the</td>
<td>The VA could self-impose process deadlines on itself in a reasonably short</td>
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<td>the system with non-meritorious claims or</td>
<td>long term this would likely lead to exponentially increased costs as benefits</td>
<td>period of time.</td>
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<tr>
<td>Introduce &quot;What You Need to Win&quot; Counseling</td>
<td>There is precedent for such an initiative and the VA and the VSOs would find elements of it both appealing and unappealing. Overall, key stakeholders would be likely to support a pilot program.</td>
<td>Estimates regarding how significant this program could be range from shaving a few weeks off the process to potentially being the most significant reform possible to improve VA appeals.</td>
<td>This program would certainly be costly given it requires hiring back former VA experts as contractors but this amount would not be unreasonable, particularly if initially implemented as a pilot program.</td>
<td>VA has already tried similar efforts but this program would require organizing a new entity and hiring back former experts, which will take time.</td>
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<tr>
<td>Introduce Mandatory Sharing of Case Materials with Appellant</td>
<td>Indications are that VSOs and Congress would be supportive of this reform but it is unclear whether the VA would be supportive.</td>
<td>The impact of this proposal is difficult to quantify but the sense among experts is that it would help eliminate confusion and limit superfluous &quot;new evidence&quot; submissions while also discouraging baseless appeals and aiding meritorious appeals.</td>
<td>Given the VA's new IT systems, implementing this reform would be relatively costless to the VA, particularly if VBMS were synchronized to eBenefits to automate the process of providing veterans their records.</td>
<td>VA could institute this reform by rule change and could do so relatively quickly.</td>
</tr>
<tr>
<td>Increasing and Improving Attorney Representation</td>
<td>VSOs would fight such a policy, as they did when attorneys were originally introduced into the process, because they are against veterans having to pay for representation and have a self interest in maintaining status quo of VSR dominance.</td>
<td>According to senior VA officials, if done right, this could have a huge impact by providing more appellants with independent, expert representatives that are not overworked.</td>
<td>A pro-bono program would be prohibitively expensive and reforming incentives so that veterans law is profitable would impose a cost for service fee on appellants.</td>
<td>Implementation would require Congressional action and after that it would probably take several years until there were enough graduated from new training programs to meet demand.</td>
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<tr>
<td>% Determination tool</td>
<td>Increasing transparency by enhancing the VA website would be unlikely to draw significant opposition but some might raise concerns that this tool could do more harm than good.</td>
<td>Implementing this system would probably be relatively easy but probably would have little to no net effect on the appeals process.</td>
<td>Developing and posting this online tool would impose at most moderate costs on the VA given the standard evaluation builder already exists.</td>
<td>Developing and posting this online tool probably could be done in less than a year.</td>
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<td>Recommendation</td>
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<tr>
<td>Push for an IG or GAO Report on Appeals from Tooth to Tail</td>
<td>If IAVA can convince Congress to ask for an IG or a GAO report on appeals, these organizations are likely to be highly responsive</td>
<td>The impact of this proposal depends on how quickly GAO and/or the IG acts and what their findings are. If the investigations are too myopic, this effort could be of little value. However, even in a worse case scenario, these investigations likely will churn up useful data.</td>
<td>This policy is basically costless given that the VA IG and GAO exist to conduct such inspections/investigations and requesting one would not cost IAVA a dime.</td>
<td>The lag time between IG and GAO investigations and their published findings can be over a year in some cases.</td>
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<tr>
<td>Wait We Carry tool focused on appeals</td>
<td>IAVA can pursue this option independently and other VSOs probably would be willing to cooperate, given their stated frustration with VA data shortcomings.</td>
<td>The impact of this proposal depends on the number of respondents and what trends emerge from the data. If nothing else, it is likely to put pressure on the VA to provide better data and analysis.</td>
<td>Developing a &quot;sequel&quot; to the Wait We Carry tool should be relatively cheap</td>
<td>Developing the surveys, collecting the responses, and analyzing the results cannot be done overnight, but probably would take less time to complete than most of the other alternatives. This could take longer if VSO cooperation is pursued.</td>
</tr>
<tr>
<td>Push for VA Quarterly Reports to Congress</td>
<td>VA will likely drag its feet but VSOs and Congress would likely enthusiastically support</td>
<td>The BVA Chairman reports suggest that the best way to get the VA to provide data on appeals is by mandating by statute that this must be done. More detailed information is critical.</td>
<td>This option would result in increased costs associated with devoting VA resources and personnel to this task but these could be offset in time if the VA uses VBMS to improve its data analytics</td>
<td>This will likely require Congressional action but it appears as if both Veterans Affairs Committees would be eager to support such a measure.</td>
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The following section provides an in-depth discussion of the policies that are recommended for implementation based on the analysis presented in the matrix whereas policies not recommended by this report are discussed in greater detail in the Appendix on page 39.

**Process Reforms**

**Eliminate Notices of Disagreement (NOD)/Earlier Provision of Statements of Case (SOC).** Given that both the NOD and the traditional review are redundant with later stages in the process, these steps should be eliminated and the VA should deliver a Statement of Case to the veteran as part of the notification of the original claim decision. On average, this would immediately shorten the process on average by 513 days, nearly a year and a half. As mentioned, if SOCs were delivered prior to the appeals process being initiated, the number of new appeals would decrease by as much as a third. Delivering the SOC earlier in the process would not add any significant amount of time to the claims process because SOCs are now easily generated through VBMS. These reforms would also increase RO efficiency because eliminating the need to process NODs would substantially lighten the VA’s workload.197

Concerns that eliminating the NOD, the first RO review, and any new evidence submissions or hearings prior to the VA Form 9 would somehow curtail veterans’ rights ignore that all of these features are built into the process after the veteran files a substantive appeal.

**“Providing SOCs earlier in the process would make a huge difference. It would reduce the number of appeals by at least a third”**

Senior VSO officials signaled that they probably would support a proposal to eliminate NODs and have SOCs delivered along with the initial claim decision, terming it “an interesting suggestion” and explaining that this has already been done under very limited circumstances with some success.198 Recent efforts in Congress focused on “streamlining the appeals process”—specifically HR1405, which advocated for including “an appeals form in any notice of decision issued”—suggest that a proposal to eliminate the NOD and require delivery of the SOC and a VA Form 9 as part of a claim decision notification probably would have legislative support.199 Some experts indicated that elements within Congress strongly support the idea of SOCs delivered along with claims decision notifications.200 Since these reforms would take place prior to appeals reaching the BVA, they would not necessarily require Congressional action and could instead be implemented through VA rulemaking procedures.

**Mandatory de novo Reviews.** The primary objection raised by experts to eliminating the NOD and issuing the SOC earlier in the process is that this would eliminate the option of a de novo review.201 In September 2006, a VBA study group recommended that the Under Secretary for Benefits require a de novo review for all appeals based on the associated significant positive impacts discussed earlier. This

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xvii The VA office in the Philippines used to provide SOCs to accompany administrative decisions for Filipino WWII veterans.
reform could be instituted by a VA rule change rather than requiring an act of Congress, but experts prior to placing them on the docket. If framed as taking place prior to the appeal reaching the BVA, this reform could be instituted by a VA rule change rather than requiring an act of Congress, but experts
suggest that a triage system stands a good chance of garnering congressional support, if evidence existed that proved its effectiveness.\textsuperscript{210} Given uncertainty surrounding what impact a triage system would have on reducing the remand rate, the best way to institute this reform would be to create a pilot program in which a random sample of appeals is screened by the triage system and compared to appeals more generally to see if it significantly reduces remands.

**Support Recent BVA Proposed Reforms.** BVA recently proposed two reforms to Congress. The first initiative is to shorten the time that a veteran has to initiate an appeal from 365 to 180 days from notification of the claims decision. VSOs currently oppose it because it curtails veterans’ rights and fails to address the VA’s inefficiencies.\textsuperscript{211} The second proposal is to make it mandatory that Board hearings be conducted by VTC.\textsuperscript{212} Some VSO officials are open to the idea but viewed it as unlikely to have a significant impact, whereas others were opposed to the reform on the grounds that some veterans prefer a face-to-face interaction, which is their right.\textsuperscript{213}

Although the VA does not have data on the average length of time it takes veterans to initiate an appeal or what percentage of veterans initiate an appeal after 180 days, the research conducted for this report suggests that veterans failing to meet deadlines is not a pervasive problem. If the VA shortened the window, veterans probably would adjust accordingly. This is supported by the fact that currently veterans only have 60 days to file the VA Form 9 after receiving an SOC, a much more detailed and complicated step than submitting an NOD, and yet on average veterans submit VA Form 9s well under the deadline. For these reasons, this report recommends supporting this reform.

IAVA probably should also support the VTC rule, because the Board finds that on average VTCs shave roughly 100 days off of the appeals process. One way to offset concerns regarding in-person hearings would be to point out that a mandatory VTC policy for BVA hearings would not preclude veterans from receiving a face-to-face hearing earlier in the process.

Overall, these VA proposals probably would shorten the process on average by up to 285 days without significantly damaging veterans rights and would be quickly implemented if the VSOs offered their support, given the VA obviously also backs these reforms.

**Advocacy Reforms**

**Mandatory Provision of Case Files for Appellants.** Under the Freedom of Information and Privacy Acts, veterans are entitled to copies of all paperwork involving their case but very few are aware of these rights and request these records.\textsuperscript{214} Experts assert that veterans are much more likely to succeed on appeal if they acquire copies of their VA case file.\textsuperscript{215} These materials can be invaluable in helping veteran representatives understand the basis for VA decisions and the only way for a veteran to be certain a critical piece of evidence is in their case file is by requesting copies of all materials related to the appeal.\textsuperscript{216} If veterans know what is in their case file, the common problem of redundant submissions of “new evidence” would decrease and veterans could more frequently identify VA errors.\textsuperscript{217} In the past, the quickest way for veterans to get a copy of their case files was to contact their congressional representative to request the records on their behalf, but now that VBMS has come online, providing veterans their case files should no longer be a complicated and time-consuming process for the VA.\textsuperscript{218} Given that providing veterans with copies of their case files improves the chances of success and makes
the entire process more efficient, IAVA and the VSO community should pressure the VA to do so upon notification of the claims decision. In time, the VA could automate this process through eBenefits.\textsuperscript{219} Experts agreed that VSOs, Congress, and even the VA probably would support this simple, but potentially important reform.

\textbf{Introduce “What You Need to Win” Counseling.} Most experts agree that improving veteran representation “makes a lot of sense” but differ on how best to achieve this.\textsuperscript{220} One solution would be for the VA to hire recently retired appeals experts as contract advisors and train them to communicate clearly to veterans or their representatives regarding what is needed in the way of evidence to win on appeal. Counseling sessions with these advisors should be made mandatory at the beginning of the claims and appeals processes, with the option of follow-up consultations. This new “What You Need to Win” advisory body almost certainly would help screen non-meritorious appeals because advisors could frame the chances of winning an appeal in terms of required evidence, helping veterans realize whether they have a case or not.\textsuperscript{221} These advisors would also help make the entire appeals system more efficient by decreasing the number of times veterans submit new evidence and resolving more appeals earlier in the process. This proposal is consistent with the VA’s finding that “targeted communication with a specific message is a best practice for outreach to veterans.”\textsuperscript{222}

In terms of feasibility, there is already some precedent for such an effort. Several years ago, the VA experimented with special groups of employees that contacted veterans early in the claims process to discuss specifics of the case and advise what evidence was needed to be successful. This cut the development phase of claims on average by 20 days—which was significant at that time. Senior VSO officials state that a similar program almost certainly would help reduce appeal times.\textsuperscript{223} Last year, the VBA implemented an initiative that involved hiring contractors to help with claims development, suggesting such a proposal is practical.\textsuperscript{224} VSOs and the VA, however, may be hesitant to back a solution that acknowledges failure on their part to advise veterans more efficiently.\textsuperscript{225}

Some experts argued that if the VA were to hire retired appeals specialists, returning as DROs would be most helpful.\textsuperscript{226} However, as briefly discussed, simply hiring former DROs to do their old jobs would be problematic. The benefit to hiring back experts as contract advisors rather than as DROs is they would not be influenced by the incentive system under which DROs operate and would not be seen as competition by staff employees.\textsuperscript{227}

Despite the consensus among experts that a robust advisory function within the VA focused on developing winning appeals would have a significant impact, it remains unclear what effect such a program would have. As such, this proposal probably would be most effectively implemented if it were first rolled out as a pilot program and then expanded once its worth was supported by results. In the long-term, the VA could train a cadre of employees to serve in this function and transfer this from a contractor-provided to an in-house service.
Data Reforms

Push for a VA Inspector General or GAO Inquiry Focused on the Appeals Process. A review of all GAO and IG reports over the past two years suggests that these investigations, if nothing else, are a good way to dig up information internal to the VA that cannot be found elsewhere. As such, IAVA should push for both GAO and IG audits of the entire appeals process—from the ROs all the way up through the CAVC. This should be done as soon as possible because GAO and IG reports tend to be lengthy and published on a delay. One effective way to trigger an IG or GAO inspection of the appeals process would be for IAVA to use its allies in Congress to request one. This is certainly not a long-term solution but GAO and IG investigations almost certainly will result in new public information otherwise not available and would force the VA to respond to concerns raised by these watchdogs.

Collect Data Independently of VA: “The Wait We Continue to Carry” Another action IAVA should take to address data shortfalls is to expand its use of member surveys to collect detailed information related to appeals. The IAVA’s “The Wait We Carry” tool is an extremely useful, independent source of information on disability claims and constructing a similar database related to appeals will help inform the debate and arm IAVA with the hard data. If possible, IAVA should partner with other VSOs to collect standardized appeals-related information from a larger number of veterans. Interviews with senior officials at all of the major VSOs suggests a communal frustration with the VA’s lack of transparency and competency regarding metrics, suggesting other VSOs are likely to cooperate. With a sufficient sample size of veterans, the VSO community could draw sound conclusions without VA statistics and make the case for reform. If nothing else, such data would put considerable pressure on the VA to release its own figures related to appeals.

Back Congressional Push for Increased Accountability. Experts report that the House and Senate Committees on Veterans Affairs are frustrated and considering ways to compel the VA to improve its inadequate data analytics effort. IAVA and the VSO community should support these efforts in two ways. First by continuing to apply public pressure on the VA to reform its data analytics. Secondly, IAVA should work with its allies in Congress to draft legislation requiring the VA to publicly disseminate specific data on a quarterly basis. Limited information suggests that this is already being considered. Currently the best source of information on VA appeals is the BVA Chairman’s annual report, which is mandated by law, suggesting that statute may be the best way to compel the VA to be more transparent. IAVA should also recommend that Congress push for robust VBMS linked data analytics capabilities.

Prioritization and Implementation

The most effective strategy to improve VA appeals would be to prioritize the effort to eliminate NODs, have SOCs delivered concurrent with letters of notification, and introduce the de novo review as a required step in the process following the filing of a VA Form 9. IAVA should first use the argumentation

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xviii Appendix G provides a list of statistics and metrics that Congress and the VSO community should push to have included in these new quarterly reports; this list probably might also prove helpful in developing member surveys.
discussed in this report to secure VSO buy-in and then pressure the VA to make these changes by rule under the APA. One successful strategy might be to offer to back VA-proposed process reforms in exchange for VA supporting the NOD, SOC, and de novo review proposals. If VA refused, IAVA and other VSOs probably could garner support in Congress for this “compromise” by framing cooperation on VA proposed initiatives as part of a wider package of reforms. Together these reforms hold the potential of decreasing the length of an average appeal by over 3 years and could be implemented within approximately a year’s time.

The second priority should be to push for the mandatory provision of veterans’ records followed by IAVA simultaneously pursuing all three options related to reform the VA’s data analytics. That said, IAVA and other VSOs should be ready to “strike while the iron is hot” regarding increased information dissemination and accountability. If Congress decides to act or the issue reaches a tipping point during hearings, IAVA may want to make data reforms its top priority to avoid missing the window of opportunity. The data-related proposals could also be used to reinforce each other. For example, as GAO, IG, and independently collected information becomes available, IAVA can leverage it to further turn up the heat on the VA in Congress. Experts suggest that IAVA and the VSO community might have legislative success by tying the provision of case files for appellants to improved tracking and dissemination of metrics under the umbrella of increased transparency.

Lastly, IAVA should start building support for the “What You Need to Win” counseling program and BVA triage system. These initiatives—particularly counseling—hold the potential to have significant impact, but they almost certainly will take time, as they have not already been widely discussed among the VSOs as potential solutions and will require VA pilot programs to establish their validity. Thus, these are longer-term recommendations that can wait until the other reforms have been implemented.

Part V: Conclusion

Experts on veterans affairs predict that by 2015, the “spotlight will shift from the claims backlog to the appeals process” but also report that even within their own ranks the appeals process is not well understood and that senior VA and VSO officials fail to fully comprehend the root causes of the problem. The goal of this report is to provide a comprehensive analysis of the VA appeals system to fill this void.

President Kennedy once wrote, “We must never forget that the highest appreciation is not to utter words but to live by them.” This statement reminds us that our veterans—particularly those returning from service in Afghanistan and Iraq—need more than yellow ribbons and “Support Our Troops” bumper stickers. One way our country could demonstrate our gratitude goes beyond lip service would be to reform the VA appeals system to ensure that over a quarter of a million veterans—a figure that continues to grow—do not have to wait years for the benefits that they have earned.
Appendix: Proposals Not Recommended in this Report

Overhaul the Entire System. Most experts interviewed for this report when asked what changes they would make to the VA appeals system if they were “king for a day” replied that what is really needed is a comprehensive overhaul of the entire system. Interviewees argued that the best way to fix the appeals process is for the VA and the VSOs to collaborate to design a system that limits redundancy and new evidence submissions in exchange for an efficient, timely decision-making process.236 However, most also agreed that major structural reforms in the near term will be very difficult, if not impossible. Any systemic reform would require congressional action based on a common ground between the VA and VSOs, which at a minimum would take considerable time to achieve. Also, there is no real interest from any of the major stakeholders in “rebuilding the plane while in flight,” suggesting that support for major process redesign probably will be hard to find until the current claims and appeals crises subside, which is unlikely to occur for at least a few years.237

Explore Options for DOD to Do More. One approach to addressing VA appeals shortcomings is to take steps to improve the accuracy of the claims processing process. The VA has already given accuracy a great deal of attention and set goals and implemented programs to improve in this area. That said, IAVA and VSOs may want to further investigate ways to improve the claims—and by extension the appeals—process by shifting some of the VA’s burden to DOD. Several of the experts interviewed for this report suggested that the Disabled Transition Assistance Program (DTAP), Benefits Delivery at Discharge (BDD), Integrated Disability Evaluation System (IDES), and Quick Start initiatives hold the potential to educate and counsel veterans early in the process which could decrease the chances that claims are decided based on incomplete information and subsequently appealed.238 The problem with these programs to date is that the VA has not done any analysis to measure their impact, the quality of the VA employees providing these services to military personnel near separation varies widely, and there is no systematic way to ensure that all service members are attending or participating in these programs.239 DOD has promised to continue efforts to increase IT connectivity and make health assessments and DTAP briefings a mandatory part of separation but it remains clear that the number of military personnel receiving briefings or counseling on disability compensation or other VA benefits prior to separation is still far below 100%.240

The biggest challenge is feasibility as both the VA and DOD view veterans’ benefits as the VA’s purview and want to keep it that way. Particularly as DOD’s budget tightens, its appetite to take on more of a role in what the Pentagon sees as the VA’s job will only decrease.

Some experts agreed that increasing DOD’s role prior to separation might be helpful, but warned that achieving this will be difficult and cautioned that this solution is far from a silver bullet; recent experience illustrates that VA policy decisions regarding presumptive service connection can increase the volume of claims and appeals filed by veterans that have separated long ago and thus are unaffected by these programs.241
Shift VA Appeals or Disability Compensation to the Social Security Administration (SSA). This report surfaced proposals that the VA disability compensation program be scrapped in its entirety, instead having veterans apply for SSA assume this function, with an extra “veterans stipend” payment above and beyond what other Social Security Disability Insurance (SSDI) recipients would receive. Less drastic but similar, were proposals for the elimination of the VA appeals process, with all appealed claims being adjudicated by administrative judges under the currently far more efficient SSDI appeals process. \[^{242}\]

On their face, there are aspects of these proposals that have merit. For example, a brief analysis of benefits reveals that on average recipients of VA disability compensation receive less than SSDI recipients. \[^{243}\] For example, veterans with a spouse and two children would actually receive more per month on average from Social Security ($1148) than from VA disability compensation ($1135.09). \[^{244}\] Also, Social Security Disability is much simpler than its VA counterpart because all a claimant has to do is prove they have a disability, not service connection. \[^{245}\]

Ultimately, experts report that these proposals “do not have a snowball’s chance in hell” of becoming reality. VA and SSDI benefits comparisons are irrelevant given that veterans are eligible to claim both and these proposals ignore the facts that veterans law is extremely complicated and that the SSDI system is itself in dire straights and politically volatile. \[^{246}\] More importantly, shifting VA benefits to another agency would violate the established norm that veterans deserve special treatment from their own executive agency. For example, veterans are more willing to accept lengthy processing delays when they know they are in line behind other veterans. \[^{247}\] Lastly, shifting VA benefits or appeals to the SSA would probably increase delays and reduce veterans rights and would have almost no chance of passing through Congress. \[^{248}\]

Fast Tracking: Path Differentiation Makes Sense but is Impractical without Data. One of the reforms the VA instituted to try to tackle the claims backlog was the “segmented lanes” initiative, which prioritized cases into “express”, “core”, and “special” lanes based on the number of conditions claimed. \[^{249}\] Ultimately, the VA’s effort to prioritize claims ended up being consistent with the traditional principle of “first come, first serve” with a focus on processing the oldest standing claims. \[^{250}\] Metrics on the success of this initiative are not publicly available.

Regardless, the VA’s willingness to prioritize claims raises the idea of a similar system for VA appeals. Ideally, this report would provide a detailed analysis regarding what types of claims are more likely to be appealed, take longer to appeal, linger in the appeals process, etc. so that a clear recommendation based on trends and data could be made in support of “fast tracking” certain types of appeals. However, no such data is publicly available. That said, experts suggested two primary arguments in lieu of actual data.

The first argument for how to prioritize appeals is to give preference to the most recent class of veterans returning from Afghanistan and Iraq. Several experts mentioned that this argument is supported by the well-established importance of early intervention for returning veterans and the clear and direct relationship between time since separation and the time it takes to process a claim or appeal. \[^{251}\] OEF and OIF cases are generally easy to adjudicate whereas Vietnam era cases are extremely time consuming because proving service connection is far more difficult. \[^{252}\]
preference to more recently separated veterans is that VSO membership is overwhelmingly Vietnam-era or earlier and the VSOs largely control Congress when it comes to veterans affairs.253

The second common argument is to give priority to veterans with certain types of medical conditions or the complexity of their medical claims. Experts believe that claims for multiple injuries or difficult to prove injuries; such as post-traumatic stress disorder, military sexual trauma, or traumatic brain injury require significantly more time and effort to document and process.254 According to one senior VSO official, in recent weeks the BVA has begun to float trial balloons regarding a fast track program known as the “rocket docket” which would prioritize simpler cases that only involve 1 or 2 medical conditions or presumptive service connections.255 The problem with this prioritization scheme is that critics view it as a thinly disguised effort to prioritize cases based on the class of veteran, given that certain types of injuries or conditions are usually associated with certain wars. Also, critics point out that if the VA adjudicates the easy cases first, the tough one where often the veteran is most deserving or in need tend to gravitate toward the back of the line.256

Some experts suggested that prioritization should not be based on complexity of medical condition or number of conditions but instead the volume of evidence and size of the case file, given that a case claiming only one condition could have thousands of unmarked documents that take VA adjudicators “forever” to sort out.257

Regardless of how appeals processing might be prioritized, creating an “express lane” or path differentiation for appeals in the current climate will be difficult because moving away from the current “first come, first serve” model would raise equity issues. Almost all interviewees agreed that the VSOs and Congress would oppose any policy that pits subsets of veterans against each other and that creating express lanes for certain types of appeals would only be possible if supported strongly by evidence that demonstrates giving preference to certain types of appellants will result in quicker decisions for all appellants.258 However, as mentioned, no such data or analysis exists, making it hard to make justify any type of express lane. Lastly, once an appeal reaches the BVA, the “first come, first serve” system is dictated by statute, and thus would have to be changed by Congress.259

**Fully Developed Appeals.** Similarly to how VA’s “segmented lanes” program suggested an analogous program for the appellate process, several experts raised the idea of using the VA’s Fully Developed Claims (FDC) program as a model for reforming appeals. The FDC program requires veterans to certify that they willfully sacrifice their right to submit new evidence in exchange for the VA expediting adjudication.260 According to GAO, FDC worked relatively well, reducing the average time needed to adjudicate a claim by nearly 100 days. But the program had relatively little overall effect because only 4% of veterans opted to participate in the program.261 Experts estimate that even fewer veterans would opt for a Fully Developed Appeals program and predict that VSOs would oppose it, given submitting new evidence is often critical to winning an appeal. Thus this proposal would have little impact and might also be infeasible.
Have Appeals Go Directly to the Board. Some critics have called for the VA to cut the ROs out of the appeals process entirely. Beyond being impractical, VSOs would oppose such a move because the ROs are where veterans have the most contact and personal familiarity with the VA.262

Create Online Tool to Promote Percentage Award Transparency. Several experts discussed how it is common for veterans to view their VA determined disability percentage through a subjective lens that emphasizes what percentage awards other veterans they know received but ignores what statute dictates they should receive for their injuries. Many veterans feel percentage awards are arrived at arbitrarily but in reality, these decisions are very formulaic and are determined by an internal VA computer system known as the “standardized evaluation builder”. Adjudicators input veteran information and receive an automated percentage award based on the law.263 This suggests that another solution that might decrease the number of appeals filed is for the VA to increase transparency for veterans regarding how disability compensation percentage awards are arrived at. The VA might do this most effectively by posting a “dummy version” of the evaluation builder tool on the VA website so that veterans could input their conditions and receive back an estimated percentage award. VA regional office employees speculate that this would help many veterans realize that their initial claims ratings are fair. However, experts agree that the impact of this solution probably would be insignificant as it might encourage other veterans to appeal when they would have otherwise not have. Similarly, the tool might lead to veterans trying to “game the system”. Implementing this system would probably be relatively easy but probably would have little effect on the appeals process.

Decouple Secondary Disability Benefits from Milestone Percentage Awards. Some experts raised the idea that 30%, 50%, and 100% are the disability compensation “magic numbers” because these percentage awards make veterans eligible for other VA benefits—such as preferential consideration for Federal employment or free health care. As a result, some experts suggested that this creates an incentive for veterans to appeal when they might otherwise not. Indeed, the difference in monthly payment between 20 and 30% is marginal, but some veterans feel they “need to get to 30” to reap the extra rewards associated with such a percentage award. As such, delinking secondary benefits from specific percentages and making any veteran with disability eligible may eliminate those appealing only to reach certain benchmarks associate with extra services.264 However, several senior VSO officials and VA employees report that such a reform is unlikely to have a significant impact because there are not a large number of appeals related to meeting these “magic numbers”. More significantly, the VA would likely fight such a proposal because it would open the floodgates to a dramatic expansion of veterans collecting these additional benefits; an expansion that would be unlikely to gain the required political support given its limited utility to helping improve VA effectiveness and extremely high price tag.265

Impose Strictly Enforced Deadlines on the VA. One suggestion that surfaced was for Congress to impose hard deadlines—known as “hammers”—for the VA regarding the processing of claims and appeals. This establish a time limit on the VA for various stages of the claims and appeals process and in every case in which the VA goes over that time limit, the disability compensation award being sought by the veteran would be automatically granted. Implementation of “hammers” has been effective at making other executive branch agencies—such as the EPA and FDA—more effective under specific circumstances.266 However, this approach has many drawbacks. The first is that it probably would cause
the VA to make meeting these deadlines its top priority and “timeliness” would come at the expense of “accuracy and consistency”.267

The second is that there is no proof that hammers “provide an effective or efficient remedy for agency delay” and ultimately such a policy is unrealistic, as Congress has repeatedly rejected attempts to inject hammers into the Social Security disability system.268 Lastly, these deadlines would introduce “an unacceptable equity issue” among veterans and a host of perverse incentives. Implementation of hammer deadlines almost certainly would create a “gold rush of claims” and do more harm than good.269

Increasing the Quantity and Quality of Attorney Representation. According to senior VA officials and other experts, a program to increase the proliferation and effectiveness of legal representation for appellants could make a huge difference, but only if done right.270 Even if every veteran had a lawyer from the start of the process, currently attorney incentives are insufficient and misaligned with veterans’ interests. However, if attorney fees were conditioned on an appeal being upheld or the lawyer finding the evidence a veteran needs, the fees a veteran pays would be well worth it. Most lawyers, however, would need additional training on how to do this effectively.271 Expanding the current Congressionally funded pro-bono program would be prohibitively expensive and the VSOs are likely to oppose solutions that impose fees on veterans or threaten VSO primacy in veteran representation, as seen when attorneys first entered the VA appeals process.272
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Vogel, Steve. “VA’s Shinseki has his critics as he tries to remake agency, cut disability claims backlog”. Washington Post. 10 November 2014.

Interview with VA Decision Review Officer and Appeals Training Officer with experience working in numerous regional offices. DRO is considered an expert on appeals within current regional office. Interview was conducted on 5 February 2014.

Department of Veterans Affairs. Board of Veteran Appeals Annual Report to the Chairman. February 2013.

Department of Veterans Affairs. 2013 Performance and Accountability Report. 16 December 2013. pg. 22.


Interview with senior official at a Veterans Service Organization. Interviewee has extensive experience, formerly worked at the Board of Veteran Appeals, and has testified to Congress and met with the VA Undersecretary for Benefits to discuss VA appeals. Interview was conducted on 24 February 2014.

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Department of Veterans Affairs. 2013 Performance and Accountability Report. 16 December 2013. pg. 72, 178.

Department of Veterans Affairs. Board of Veteran Appeals Annual Report to the Chairman. February 2013.

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113 Interview with senior official at a Veterans Service Organization. Interviewee has over 30 years of experience, formerly worked at VA, and has assisted Congressional Committees formed to reform the Veterans Benefits Administration. Interview was conducted on 26 February 2014.

Interview with expert on bureaucratic processes that teaches a graduate level course with a focus on the performance of Executive Branch agencies. Interview conducted on 21 January 2014.


Interview with VA Decision Review Officer and Appeals Training Officer with experience working in numerous regional offices. DRO is considered an expert on appeals within current regional office. Interview was conducted on 14 March 2014.


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Fixing the Appeals Process at the Department of Veterans Affairs


132 Department of Veterans Affairs. *Board of Veteran Appeals Annual Report to the Chairman*. February 2013.

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Interview with senior official at a Veterans Service Organization. Interviewee has extensive experience and is considered an expert by their peers. Interview was conducted on 13 February 2014.

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Veteran Appeals.

Interviewee is also a published author in the field of Veterans law and is a veteran. Interviewee was conducted on 26 February 2014.

Interviewee worked at VA, and has assisted Congressional Committees formed to reform the Veterans Benefits Administration. Interview was conducted on 13 February 2014.


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as an expert on the VA appeals process by VSOs and has testified before Congress on the topic in the past. Interview was conducted on 24 January 2014.

190  Department of Veterans Affairs. *Board of Veteran Appeals Annual Report to the Chairman*. February 2013.

Interview with reporter for a major newspaper that has considerable experience covering veterans issues and has published articles focused on VA appeals. Interview was conducted on 3 February 2014.

Interview with senior official at the Court of Appeals for Veterans Appeals with past experience working at the Board of Veterans Appeals. Interviewee is also a published author in the field of Veterans law and is a veteran. Interviewee is recognized as an expert on the VA appeals process by VSOs and has testified before Congress on the topic in the past. Interview was conducted on 24 January 2014.


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