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# Congressional Intervention in Agency Adjudication: The Case of Veterans' Appeals

**ABSTRACT.** Conventional wisdom often portrays Congress's role as legislative. This view is incomplete. While Congress engages in general oversight and factfinding through hearings, reports, and the like to advance legislation, members of Congress also dedicate enormous amounts of time and energy to advocating on behalf of individual constituents in administrative proceedings. This is not legislating; it is the congressional bully pulpit, directed at the trenches of administrative adjudication. Described by Professor Jerry L. Mashaw as "mysterious," this activity throws into question textbook accounts of the modern separation of powers and the administrative state.

Our Feature is the first to examine systematically this form of congressional intervention in administrative adjudication. We make four contributions. First, we discuss the doctrinal landscape around congressional interventions and explain what administrative and constitutional law misses about congressional control by focusing nearly exclusively on judicial review as the predominant constraint on agencies. Second, using a unique and comprehensive dataset of over two million cases appealed to the Board of Veterans' Appeals (BVA) from 2003 to 2017, we provide an empirical portrait showing the scope and importance of congressional inquiries into pending veterans' appeals. Between 4-11% of cases advanced on the docket and resolved by BVA are subject to a congressional inquiry. Veterans are twice as likely to receive expedited treatment when a member of Congress inquires on their behalf. Third, we investigate the distributive consequences of this system, which deviates significantly from the neutral, rationality-based model envisioned by the Administrative Procedure Act. Fourth, we spell out the implications of our findings for contemporary separation-of-powers doctrine and administrative law. The model of Congress as a site for the resolution of individual grievances — often thought to be a bygone relic of the Constitution's Petitions Clause — remains alive and well.

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## INTRODUCTION

Oversight is central to the legitimacy of administrative agencies.[1] But for individual claimants before agency adjudicators, judicial review is often thought to be the only external check on agency action.[2] That understanding is wrong. Members of Congress play a role in the adjudication of individual cases before administrative agencies through what we call "congressional intervention": the inquiries that members of Congress submit to agencies advocating for their constituents to get a favorable or faster decision on a pending claim, or requesting a status update on one of these claims, of which there are thousands each year. Members of Congress collectively invest millions of dollars and thousands of hours into lobbying agencies on their constituents' behalf. We ask whether all that effort matters—and, given the distributive, democratic, and due-process consequences of congressional intervention, whether it should.

These questions are important. Administrative adjudications affect the fundamentals of life for the millions of people who file asylum claims, rely on federal-assistance programs like Social Security Disability Insurance to make ends meet, or otherwise find themselves interacting with a federal agency. In fiscal year 2023, the Executive Office for Immigration Review completed 526,382 immigration-court cases,[3] and the Social Security Administration (SSA) conducted 246,399 hearings for disability benefits before administrative law judges (ALJs).[4] In high-volume adjudication settings like these, delay is pervasive.[5] If congressional outreach influences how agencies treat otherwise-similar claims, then members' favored constituents might have a leg up in obtaining timely or favorable decisions. This means members may secure electoral advantage—courtesy of taxpayers—that degrades democratic competition, while agencies

1. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 64 (2009) ("[A]dministrative agencies can be seen as deriving their legitimacy from both the President and Congress." (emphasis omitted)).

2. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1099 (2018) ("For this reason and others, judicial review is thought to 'secure an imprimatur of legitimacy for administrative action.'" (quoting Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 942 (1988))).

3. Exec. Off. for Immigr. Rev., *Adjudication Statistics*, DEP'T OF JUST. (Oct. 10, 2024), https://www.justice.gov/eoir/media/1344796/dl?inline [https://perma.cc/4BYY-AME6].

4. SOC. SEC. ADMIN., PUBLICATION NO. 22-017, JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES: FISCAL YEAR 2025, at 153 (Mar. 11, 2024), https://www.ssa.gov/budget/assets/materials/2025/FY25-JEAC.pdf [https://perma.cc/LTV7-YHLL].

5. *See id.* at 1 ("The average wait time [at the Social Security Administration (SSA)] for a disability decision is nearly 8 months and an additional 7 months for those who have requested an appeal of the initial decision . . . .").

may open backdoor channels for currying favor with Congress. At a time when the vision of a civil service committed to procedural neutrality is in question,[6] this is the ideal time to interrogate the failures of agency adjudication—and Congress's highly personalistic, and even clientelist, role in correcting them after the fact.[7]

Congressional intervention in agency adjudication is conventionally seen as tremendously beneficial. Claimants may need all the help they can get to navigate complex bureaucratic processes. Members of Congress can be ideal conduits for information between constituents and agencies. After all, they are in the business of cultivating strong relationships with their constituents and might have stronger links to vulnerable populations in their districts than federal agencies do.[8] And because congressional offices have come to specialize in advocating for constituents before agencies, they may be able to package a claimant's narrative in a way that is easier for the agency to digest—for instance, by foregrounding the facts that are material to the agency's decision.[9]

What's more, many legislators view interceding with agencies and providing their constituents with a voice in the bureaucracy as central to their job descriptions.[10] Members of Congress make tens of thousands of inquiries to agencies

6. For instance, Elon Musk, head of the newly created "Department of Government Efficiency" (DOGE), criticized the administration of the Social Security program, alleging that "[t]here's crazy things . . . cross re-examination of Social Security, and we've got people in there that are 150 years old." *See* Jake Horton & Lucy Gilder, *Fact-Checking Elon Musk's Claims in the Oval Office*, BBC (Feb. 12, 2025), https://www.bbc.com/news/articles/cwyjz24ne850 [https://perma.cc/2YL9-LH8P].

7. *See, e.g.*, PAUL H. DOUGLAS, ETHICS IN GOVERNMENT 85 (1952) ("[T]he intervention of legislators corrects injustices in a large number of cases and also helps to check tendencies of administrators towards personal and class aggrandizement."). By "personalistic," we just mean that members of Congress engage in personal credit-claiming—a matter to which we return in Section II.A below.

8. *See, e.g.*, Suzanne L. Parker & Glenn R. Parker, *Why Do We Trust Our Congressman?*, 55 J. POL. 442, 450 (1993) (finding that personal contact improves trust in a member of Congress).

9. *See, e.g.*, Anne Meeker, *Casework Basics: Agency Correspondence*, POPVOX FOUND. 12, https://static1.squarespace.com/static/60450e1de0fb2a6f5771b1be/t/666c4a1c8514bf27bf0c2b3f/1718372898486/Agency_Correspondence_June_2024.pdf [https://perma.cc/69GE-FFC6] (advising congressional staff on how to communicate with agencies, for example by providing "[l]anguage that makes the constituent's version of the story clear").

10. *See* Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH L. REV. 1, 19 (1996) ("[Members of Congress] and other proponents of casework maintain that the ombudsman role is basic to the job of being a member of Congress—an essential aspect of what it means to 'represent' one's constituents, and a direct outgrowth of the constitutional right to petition Congress for redress of grievances.").

every year.[11] The collective effort expended on this task is enormous: one estimate is that some 20-30% of congressional office budgets can go toward constituent engagement,[12] and veterans' claims are commonly understood to comprise a significant part of that work.[13] While politicians rarely interface with agency officials themselves absent a compelling personal stake—they usually leave that to professional "caseworkers" in their offices[14]—legislators do manage their casework operations and intervene when problems filter up to them.[15] In other words, the rise of congressional interventions reveals an implicit understanding of what it means to represent constituents in government, with legislators spending their scarce energy and resources lobbying the executive branch on behalf of individual claimants, possibly at the expense of making law. Is that effort paying off—and should it?

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11. No hard data exist on the total number of congressional interventions, but one study that covers interventions at fifteen agencies documents, on average, more than 25,000 interventions at those agencies alone per two-year Congress. *See* Kenneth Lowande, Melinda Ritchie & Erinn Lauterbach, *Descriptive and Substantive Representation in Congress: Evidence from 80,000 Congressional Inquiries*, 63 Am. J. Pol. Sci. 644, 650 tbl.1 (2019). Given that this study excludes major agencies like SSA and the Department of Justice (which houses the immigration courts), we consider this a very conservative lower bound. *See, e.g.*, R. Eric Petersen & Sarah J. Eckman, Cong. Rsch. Serv., RL33209, Casework in a Congressional Office 1 (2023) ("In contemporary times, thousands of constituents seek assistance annually from Members of Congress . . . .").

12. *See Constituent Communications—How to Improve Your Correspondence System to Reduce Your Labor, Impress Your Boss, and Build Trust in Constituents*, Cong. Mgmt. Found., https://congressfound.secure.nonprofitsoapbox.com/news/blog/1412 [https://perma.cc/AH8L-DBEW] ("In many offices, managing and responding to constituent correspondence represents 20-30% of office resources.").

13. *See, e.g.*, Rochelle Snyder, Devin Judge-Lord, Eleanor Neff Powell & Justin Grimmer, Who Gets Constituent Service? 3 (2021) (unpublished manuscript), https://judgelord.github.io/research/correp/cr.pdf [https://perma.cc/MC92-BLAG] (explaining that constituent requests "often involve matters such as veterans' benefits, workers' compensation benefits, or Social Security payments").

14. Professor Morris P. Fiorina identified the rise of professional caseworkers nearly fifty years ago, noting that their duties include handling correspondence and managing outreach to petitioning constituents. *See* Morris P. Fiorina, Congress: Keystone of the Washington Establishment 58-62 (1977); *see also* Levin, *supra* note 10, at 16-17 (describing the rise of constituent casework). For a discussion of caseworkers' responsibilities, see Sean J. Kealy, *Congressional Constituent Service Inquiries*, Admin. Conf. of the U.S. 21 (June 5, 2024), https://www.acus.gov/sites/default/files/documents/24-6-5_Final%20Rpt_Cong.%20Constituent%20Svc.%20Inquiries.pdf [https://perma.cc/3T3J-CQH4], which notes that "a significant part of the congressional caseworker's job is to help constituents understand how long a case will—or should—take."

15. *See* Kealy, *supra* note 14, at 9.

The doctrinal and scholarly consensus is that congressional interventions in individual cases are rare and rarely change outcomes.[16] That view flows from the very foundation of the Administrative Procedure Act (APA). The APA was drafted with an eye to agencies' newfound powers to issue rules with the force of law, enforce those rules, and resolve claims through in-house adjudication. To counterbalance those powers, the APA required, among other things, that agency action be based only on the rational consideration of evidence collected on an open agency record—and it backed that requirement with judicial review.[17] The APA's requirement that agencies act only in response to their rational view of the evidence implies that legislative pressure cannot determine the outcome of any individual case. Deciding a case on the basis of political pressure would mean relying on an irrelevant factor outside the record.[18]

Because the APA treats courts as the main guarantors of agency rationality, it is no wonder that administrative-law scholars have fixated on judicial review while largely ignoring the role that members of Congress play in adjudication. Occasionally, scholars have acknowledged congressional interest in constituents' cases. As far back as 1983, Professor Jerry L. Mashaw noted the "mysterious" role played by congressional intervention in benefits adjudication.[19] Mashaw was skeptical that such interventions mattered, suggesting that members of Congress were mostly engaged in marketing when they "claim[ed] [to] have been effective in their intervention."[20] If interventions did have an impact, Mashaw

16. *See, e.g.*, Kealy, *supra* note 14, at 39 ("Another aspect is to continuously make clear to caseworkers and constituents that congressional intervention does not push a case 'to the front of the line' or ensure a positive outcome.").

17. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (discussing the requirement of agency rationality); Pro. Air Traffic Controllers Org. v. Fed. Lab. Rels. Auth., 685 F.2d 547, 561-64 (D.C. Cir. 1982) (discussing the limits on ex parte communications in certain agency proceedings). Some scholars argue that the requirement of agency rationality is a product of judicial activism rather than statutory language. *See, e.g.*, Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 491 (2010). However, to our knowledge, none has argued that the Administrative Procedure Act (APA) was intended to allow members of Congress to participate in agency action.

18. *See, e.g.*, Aera Energy LLC v. Salazar, 642 F.3d 212, 220 (D.C. Cir. 2011) ("[P]olitical pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker.").

19. JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 71 (1983) ("SSA has several hundred employees whose sole job is to respond to congressional inquiries about cases. In addition, the agency notifies inquiring congressmen of an award before it notifies the claimant. How does this activity promote any of the goals of the disability program? One would have to answer that the relationship is, at best, mysterious.").

20. *See id.* ("As one would expect, congressmen and congressional staffs claim that they have been effective in their intervention with SSA, which is to say that they have somehow managed to secure favored treatment for their constituents.").

thought it would mostly be to waste agencies' time writing letters back to Congress instead of resolving cases.[21] Other administrative-law luminaries, like Professors Thomas W. Merrill and Robert A. Kagan, have noted in passing the role of such congressional inquiries as external checks on agency behavior.[22] Professor Jack M. Beermann discussed constituency casework in greater depth as one mechanism of "congressional administration" among many, including Congress's appropriations power and other formal legislative powers.[23] The Administrative Conference of the United States (ACUS) recently recommended that agencies improve their procedures for handling congressional inquiries.[24] Despite this recommendation,[25] the supporting report stressed that congressional inquiries, while legitimate, by construction have a limited role in the adjudication of cases.[26] To our knowledge, no study has ever systematically assessed the law and empirics of such congressional interventions in agency adjudication.

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21. *See id.* ("Congressional inquiries almost never provide any information about claims, and response to them is pure cost. Indeed, there is some evidence that a congressional inquiry slows down the processing of a claim. And the practice of giving congressmen first crack at notifying successful claimants certainly does nothing for SSA's reputation for impartiality.").

22. *E.g.*, Thomas W. Merrill, *Jerry L. Mashaw, The Due Process Revolution, and the Limits of Judicial Power*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORKS OF JERRY L. MASHAW 39, 54-55 (Nicholas R. Parrillo ed., 2017) ("[T]here are important external checks on the system, including judicial review of ALJ decisions by federal district courts, and intervention by congressional staffers on behalf of individual constituents. In combination, the pressure for efficiency and the internal and external checks mean that examiners seek to resolve cases promptly and correctly . . . ."); Robert A. Kagan, *Varieties of Bureaucratic Justice: Building on Mashaw's Typology*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORKS OF JERRY L. MASHAW, *supra*, at 247, 255 n.24 ("Those dissatisfied with administrative case-by-case decisions sometimes appeal to their elected legislative representative, even though those officials have no legal or political authority to overrule agency decisions. The hope is that the representative will nevertheless have informal political influence. In the United States, most agencies will grant expedited consideration to 'inquiries' from elected legislative members on behalf of a dissatisfied constituent, even if agency officials feel secure in ultimately rejecting the politician's 'appeal.' Whenever, in the United States or elsewhere, the agency feels considerable pressure to accede to the politician's views, one might classify that as approaching a system of appeals based de facto on political judgment.").

23. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 71, 84-85, 138-39 (2006).

24. Administrative Conference of the United States: Adoption of Recommendations, 89 Fed. Reg. 56276, 56276 (July 9, 2024) (adopting Recommendation 2024-4, titled "Managing Congressional Constituent Service Inquiries").

25. *See id.*

26. *See* Kealy, *supra* note 14, at 10 ("Members and their staff cannot force an agency to expedite a case or decide a constituent's case favorably. Congressional staff, therefore, often see a primary function of their job to be managing constituents' expectations."). This observation is in no

We start to unravel the mystery of congressional intervention by focusing on the case of veterans' appeals. In recent years, the Veterans Benefits Administration (VBA) has decided a record number of claims for disability compensation.[27] Many of these decisions are subsequently appealed to the Board of Veterans' Appeals (Board or BVA). As the number of appeals to the Board has also steadily increased, overburdened Veterans Law Judges face pressure to issue hasty decisions to avoid adding to the backlog of cases.[28]

Unable — or perhaps unwilling — to give BVA the resources necessary to manage its growing backlog, Congress has supplemented its legislative efforts with more traditional forms of oversight. There have been angry speeches, as when Representative Morgan Luttrell, member of the House Committee on Veterans' Affairs, said in a hearing that the "Board leadership's primary concern is issuing a high number of decisions on veterans' claims on appeal" at the expense of "ensur[ing] that these decisions are correct and fair for each and every veteran."[29] There have been committee inquiries, like Senator Jon Ossoff's October 2023 letter to the Veterans Affairs Secretary demanding explanations for decision delays and condemning them as "betray[ing] the sacred compact we make with those who wear the uniform and undermin[ing] faith in our institutions."[30] And there have been reports, like the damning assessment issued by the Government Accountability Office in 2023 criticizing BVA's Quality Review Program after a study conducted by one of us documented the manipulation of that program to manufacture high accuracy rates.[31] We leave these traditional tools of oversight to one side.

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way to detract from Professor Sean J. Kealy's report, which uncovers valuable insights into how different agencies and congressional offices manage constituency service. We merely observe that the scope of the report differs from the study we undertake here.

27. Veterans Benefits Admin., *Veterans Benefits Administration Reports: Detailed Claims Data*, U.S. Dep't Veterans Affs., https://www.benefits.va.gov/reports/detailed_claims_data.asp [https://perma.cc/6MTK-KCR9].

28. *See* James D. Ridgway, Opening Remarks at the C. Boyden Gray Center for the Study of the Administrative State Conference, The Veterans Appeals Process: A Case of Administrative Crisis and Possible Reforms, Vimeo, at 18:48 (Oct. 17, 2018), https://vimeo.com/296406194 [https://perma.cc/9DC4-W4PT].

29. *Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans' Claims on Appeal: Hearing Before the H. Subcomm. on Disability Assistance & Mem'l Affs.*, 118th Cong. 1 (2023) (statement of Rep. Morgan Luttrell).

30. Press Release, Sen. Jon Ossoff, Sen. Ossoff Launches Inquiry into Lengthy Wait Times for VA Appeals Decisions (Oct. 11, 2023), https://www.ossoff.senate.gov/press-releases/sen-ossoff-launches-inquiry-into-lengthy-wait-times-for-va-appeals-decisions [https://perma.cc/9DNB-H4JN].

31. U.S. Gov't Accountability Off., GAO-24-106156, VA Disability Benefits: Board of Veterans' Appeals Should Address Gaps in Its Quality Assurance Process 13

We focus instead on members' responses to individual requests for help dealing with pending adjudicatory matters before administrative agencies—what others may call "casework" or "constituency service"[32] and what BVA attorneys refer to as "congressional inquiries."[33] We use the term "congressional intervention" to distinguish these actions from congressional involvement in nonadjudicatory proceedings (e.g., submitting a comment in a rulemaking). More specifically, we focus on the requests of individual constituents with cases pending before an administrative agency that involve evidentiary hearings.[34] Of course, members of Congress are also frequently recruited to help with "larger-scale matters," like local governments' grant applications or federal enforcement actions targeted at significant businesses.[35] And they routinely pursue constituents' particular interests through legislative efforts—that is, through pork-barrel politics. We set aside these grander kinds of congressional favors and concentrate only on interventions in routine, individual adjudications.

Legislators intervene in thousands of appeals to BVA on behalf of their constituents every year. We examine the effect of these inquiries by examining a procedural back door into the veterans' appeals process created by Congress's

(2023) (highlighting gaps in the Board of Veterans' Appeals's (BVA's) quality-assurance process and finding that "the Board lacked evidence to better understand and address these and other issues and set priorities to help improve its QA process"). *See generally* Daniel E. Ho, Cassandra Handan-Nader, David Ames & David Marcus, *Quality Review of Mass Adjudication: A Randomized Natural Experiment at the Board of Veterans Appeals, 2003-16*, 35 J.L. ECON. & ORG. 239 (2019) (demonstrating that a quality-review program had no appreciable effects).

32. *See* BRUCE CAIN, JOHN FEREJOHN & MORRIS FIORINA, THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE 2 (1987) (defining "service responsiveness" as "how assiduously . . . the representative respond[s] to individual and group requests for assistance in dealing with the government bureaucracy").

33. Bd. of Veterans' Appeals, *Operations Handbook, Version 2.0.0*, U.S. DEP'T OF VETERANS AFFS. 57 (Apr. 2020), https://asknod.org/wp-content/uploads/2021/10/board-operations-handbook.pdf [https://perma.cc/CFE6-6UEY].

34. Administrative-law scholars often refer to these proceedings as Type A or Type B adjudications. *See* Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act*, ADMIN. CONF. OF THE U.S. 1 (Nov. 10, 2016), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf [https://perma.cc/PP9T-B3KZ]. "Type A" hearings, which are colloquially called "formal" adjudications, must be heard before an administrative law judge (ALJ) and are governed by Sections 554, 556, and 557 of the APA. *Id.* at 2. "Type B" adjudications are those not governed by the statutory strictures of the APA, but for which some evidentiary hearing is required by statute, regulation, or executive order. *Id.* at 1. Hearings before BVA are Type B adjudications because they involve evidentiary hearings akin to those of ordinary courts but are not governed by the formal adjudication provisions of the APA. *Id.* at 34. In contrast to both of these categories, "Type C" adjudications do not involve evidentiary hearings. *Id.* at 2. In our study, Type C adjudications include the phases before a veteran's appeal makes it to BVA, in which the Veterans Benefits Administration (VBA) initially decides on a benefit award.

35. *See* Levin, *supra* note 10, at 17.

own short-term fix in 1994: the opportunity to request that BVA decide a particular veteran's case more quickly due to extenuating circumstances.[36] Under the 1994 Board of Veterans' Appeals Administrative Procedures Improvement Act, a case could be "advanced on motion for earlier consideration and determination" provided "the case involve[ed] interpretation of the law of general application affecting other claims or for other sufficient cause shown."[37] We ask whether congressional intervention succeeds in pressuring BVA to exercise its congressionally created discretion to decide cases more quickly in favor of legislators' favored constituents.

The example of BVA shows that congressional inquiries do matter in practice. They matter to the agency, which must handle thousands of incoming requests each year; to litigants, whose cases may be profoundly affected by them; and to the fairness of the system as a whole, conditioning timely justice on access to a channel of assistance that comes laden with many distributive imperfections. Given scarce adjudicatory resources, if decisions are expedited for some, costs of increased delay are left for others to pay.

We make four specific contributions to advance our argument. First, we highlight how administrative law's fixation on judicial review as the predominant constraint on administrative actions ignores important mechanisms of congressional control. And we interrogate the constitutional and administrative-law basis for this type of informal congressional oversight.

Second, we empirically document and assess congressional intervention, examining when members of Congress intervene and whether such inquiries have any effect on agency adjudication. We leverage a unique dataset of all appeals to BVA between 2003 and 2017 obtained through Freedom of Information Act requests. Our data cover nearly eighty thousand congressional inquiries on behalf of claimants into the status of a case and documents whether BVA exercised its procedural discretion to expedite. We provide new insight into the impact of congressional contact on procedural discretion. And we assess the extent to which congressional resources and attention augment BVA's capacity to address veterans' claims by providing information relevant to adjudication, or whether they simply provide a mechanism for members of Congress to claim credit for the actions and services of the bureaucracy. And we explore the relationship between congressional interventions and legislative behavior, including bill sponsorship and voting records.

Third, we assess how BVA's reliance on inquiries to inform advancement decisions affects fairness. Over our study period, a substantial number of cases

**36.** Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994, Pub. L. No. 103-271, § 7, 108 Stat. 740, 742-43 (codified as amended in scattered sections of 38 U.S.C.).

**37.** *Id.*

advanced on the docket involved congressional intervention; in 2017, the last year of our data, there were 1,720. Depending on the year, those cases constituted between 4-11% of advanced cases that BVA resolved. Moreover, for claimants who did not document one of the criteria for expedited treatment (e.g., financial hardship, terminal illness, advanced age), congressional intervention on their behalf doubled their likelihood of being advanced on the docket relative to similar cases without congressional intervention. The quantity of cases advanced with inquiries highlights their potential to displace adjudication of those claimants who have not sought congressional assistance or whose legislators lack a developed framework for making requests to the Department of Veterans Affairs (VA). We investigate the correlation between congressional intervention and demographic characteristics by combining data on inquiries with district-level census data. There is suggestive evidence that congressional intervention not only reduces decision wait times but also increases the likelihood of a favorable disposition.

Finally, we argue that these empirical findings yield important lessons for practice and theory. As a practical matter, our results suggest a serious gap in the legal framework governing congressional interventions and casework. While some agencies have formulated explicit rules on handling congressional contacts,[38] others—like BVA—have no explicit policy on how to reflect congressional inquiries in the administrative record. Agencies should fill that gap. They should work to learn as much as possible from inquiries, treating each one as a sign of potential systematic problems and a tool for proactively identifying process improvements. For example, if congressional inquiries indicate that veterans eligible for expedited processing because of their age are not receiving it, then BVA ought to view that as a signal to improve automated flagging of claims that meet advanced-age criteria. Agencies should also indicate inquiries on the public docket. Our results suggest that the lack of a transparent policy could be especially problematic in mass-adjudication agencies like BVA where adjudication resources are scarce. Relying on congressional inquiries creates a basic due-process concern that well-represented litigants may be in a better position to exploit unwritten levers like congressional interventions to avoid delay at the expense of veterans who lack these tools. Agencies ought to think carefully about how to make access to their attention fair. Indeed, given the statutory and constitutional frailty of such congressional interventions and the serious inequities they introduce, our results support improving safeguards on such contacts.

Our results also show the limits of a formalist view of the separation of powers. Judges tend to emphasize that Congress may only legitimately exercise

38. *See, e.g.*, *Summary of FCC Ex Parte Rules Governing Congressional Communications*, FED. COMMC'NS COMM'N, https://www.fcc.gov/reports-research/guides/summary-fcc-ex-parte-rules-governing-congressional-communications [https://perma.cc/M66Y-G5P9].

legislative power—which it can do only as a body.[39] In that world, individual members of Congress have no constitutionally recognized "power" of their own.[40] The formalist approach has a certain appeal. The involvement of individual members of Congress in the execution or interpretation of laws could breed unfairness, for instance.

At least as a descriptive matter, our results show that the formalist view is incomplete. Individual members of Congress are key to finding resolutions for constituents aggrieved by executive action. They do this mostly by unsticking bureaucratic processes plagued by delay. This problem-solving function is not, in the main, formally codified in statutes. But members of Congress see it as a core part of their jobs as representatives. So does the public. In short, an accurate picture of how mass-benefit programs are administered by the federal government must include members of Congress.

Our objection to a restrictive formalist view of the separation of powers turns out to be connected to a rich history. An emerging scholarship has sought to uncover the role Congress once played in resolving retail-level injustices, especially in the context of mass-benefit programs. As Professor Maggie Blackhawk has shown, from the Founding through the late 1940s, the right to petition Congress provided a mechanism by which the politically powerless could seek congressional assistance, and petitions were resolved in ways that "took many forms, not all of them clearly delineated as adjudicative, legislative, or executive."[41] At midcentury, Congress mostly replaced petitioning with executive bureaucracies fit for purpose. The establishment of the Court of Claims and the Pensions Bureau, and the implementation of the APA and the Legislative Reorganization Act of 1946, all but destroyed petitions as an avenue for Congress to right individual wrongs.[42]

But a form of petitioning survives. Our work suggests that the practice of legislators acting on the basis of constituent complaints to ensure the proper

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**39.** For an example of an opinion articulating this view in the distinct context of an executive-privilege assertion, see *Trump v. Mazars USA, LLP*, 591 U.S. 848, 863 (2020) (quoting Quinn v. United States, 349 U.S. 155, 161 (1955)), which explained that "Congress may not issue a subpoena for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'"

**40.** *See* Raines v. Byrd, 521 U.S. 811, 829 n.10 (1997) ("The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole." (quoting United States v. Ballin, 144 U.S. 1, 7 (1892))).

**41.** Maggie McKinley (Blackhawk), *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1586, 1602 (2018).

**42.** *See id.* at 1548 ("Together, [the APA and the Legislative Reorganization Act] dismantled the last vestiges of the petition process in Congress.").

execution of laws lives on today in the less glamorous incarnation known as casework. In effectively representing constituents before administrative agencies, members of Congress draw on an alternative vision of congressional representation that goes beyond roll-call voting or bill sponsorship—beyond a purely legislative role.

The normative implications of this revelation are complex. On the one hand, as political scientists have long understood, congressional interventions allow legislators to signal their responsiveness to constituent needs, improving their political standing.[43] In addition to amplifying the voices and concerns of their constituents, legislators provide constituents with a voice in otherwise-faceless bureaucratic processes, helping to legitimize and humanize them, and a lever of power for constituents who otherwise lack it in Washington. Their participation in administration may even help to constitutionalize the administrative state by ensuring congressional control after a statute is passed, even when the statute contains vast delegations to the executive branch.[44] On the other hand, the inequities introduced by congressional intervention might undermine the fairness and rationality values embedded in administrative law. Despite internal ethics rules forbidding such behavior, legislators may intervene to represent interests that may be politically problematic to represent publicly,[45] may intervene more on behalf of constituents belonging to certain demographic groups,[46] or—least

43. *See generally, e.g.*, DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974) (examining the role of reelection prospects on members' behavior); RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978) (arguing that members' strategies in their districts affect their behavior in Washington). Similarly, Bruce Cain, John Ferejohn, and Morris Fiorina discuss "service responsiveness," that is, "how assiduously . . . the representative respond[s] to individual and group requests for assistance in dealing with the government bureaucracy," as a measure of representation. CAIN ET AL., *supra* note 32, at 2.

44. In this sense, some scholars have portrayed congressional ex post control as a sort of "substitute" for a muscular nondelegation rule: both aim to put Congress in the driver's seat of policy. *See, e.g.*, David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 958, 982 (1999) (arguing that Congress may employ oversight as a substitute for narrow ex ante delegations as a means of controlling the bureaucracy).

45. Members of Congress may face fewer constraints in their interactions with the bureaucracy. *See* CHRISTIAN R. GROSE, CONGRESS IN BLACK & WHITE: RACE AND REPRESENTATION IN WASHINGTON AND AT HOME 27 (2011). As a result, members of Congress may use direct appeals to the bureaucracy to evade accountability for more controversial actions. *See* Melinda N. Ritchie, *Back-Channel Representation: A Study of the Strategic Communication of Senators with the US Department of Labor*, 80 J. POL. 240, 241 (2018) ("[O]ne important advantage of the bureaucratic back channel is that it allows legislators to advocate for groups that are costly for them to represent publicly.").

46. Lowande et al., *supra* note 11, at 645 ("[W]e find that in a given Congress, [veteran, female, or minority] legislators are around 6-9 percentage points more likely to contact federal

surprising of all—may simply structure their interventions to maximize their own political benefits. In this way, congressional interventions are a window into the tradeoff between expertise and democracy that pervades administrative law.[47]

This Feature is divided into six Parts. Part I lays out the doctrinal landscape. Administrative law as a field has fixated nearly exclusively on judicial review, with little attention paid to informal mechanisms of congressional control. We show that congressional intervention in agency adjudication lies in significant tension with the APA and a formalistic conception of the separation of powers. Part II synthesizes the theory and scholarship around congressional intervention. Members of Congress may want to boost their own popularity by helping constituents navigate the complicated federal bureaucracy. But if intervention does not in fact affect the process, as is commonly believed, congressional interventions may simply allow legislators to claim credit for an award of benefits even without exerting any real influence. Both explanations pose puzzles for the separation of powers. And an alternative theory that frames congressional inquiries as a means of gathering information to be used in legislation has never been empirically tested.

Part III articulates why veterans' benefits adjudication provides an important setting in which to unravel the mystery of congressional intervention. We first provide the legal and institutional context for veterans' adjudication at BVA, reviewing the origins of BVA's caseload crisis and explaining how BVA tracks and manages congressional intervention. Prior studies of congressional influence have not focused on more formal types of adjudication that require evidentiary hearings, and we know relatively little about the prevalence, distribution, and effects of interventions in these settings. Because our dataset was used by BVA itself to administer cases, it enables a comprehensive assessment based on what was known to the agency at the time of decision.

Part IV presents empirical evidence from our novel dataset of all two million veterans' appeals at BVA from 2003 to 2017, including nearly eighty thousand congressional inquiries. First, we show that congressional intervention is prevalent and still increasing, with thousands of inquiries per year. Second, we show that members of Congress take highly divergent approaches to constituency service, even adjusting for the veteran population. Broadly, congressional inquiries

agencies on behalf of constituents with whom they share background characteristics, when compared to nonveteran, male, or white colleagues.").

47. *See, e.g.*, Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 75-77 (2022) (arguing that Congress implemented notice-and-comment procedures in the APA as a compromise between "democratic participation and accountability" and the "expertise-based model of administration that embrace[s] the influence of regulated interests on agency decision-making").

favor relatively older, male veterans who have attorneys. Finally, we study the impact of interventions on procedural outcomes (e.g., whether a case is "advanced on the docket" to be decided earlier[48]) and substantive outcomes. BVA regulations allow a case to be expedited for any of the following three reasons: (1) the veteran is "seriously ill"; (2) the veteran is experiencing "severe financial hardship"; (3) or for "other sufficient cause,"[49] which includes, but is not limited to, "administrative error resulting in a significant delay," "administrative necessity," or the veteran being "75 or more years of age."[50] Adjudicators appear to possess substantial discretion when deciding whether a veteran has serious illness or financial hardship. As one congressional staffer opined, financial-hardship criteria are "up to who is reviewing."[51] We show that a congressional inquiry makes advancement twice as likely on average and translates into a 158-day reduction in wait times, and that such advancements are likely caused not merely by any marginal information the legislator provides to the agency. We also present evidence that congressional interventions may increase the odds of a favorable disposition on the merits.

Part V discusses the extent to which our empirical results may or may not generalize to other adjudicatory settings and discusses empirical limitations. While our results may not generalize to all forms of congressional intervention and we are unable to observe congressional screening of constituent requests, we offer institutional reasons to think that the selection of meritorious claims does not drive our findings.

Part VI draws out the implications for law and policy. We focus both on the lessons for the separation of powers and on potential policy interventions. We consider a range of interventions, including (1) transparency, namely requiring that congressional inquiries be disclosed or be entered into the formal record; (2) guidance, namely providing more precision around *when* a case may be advanced for undocumented reasons; (3) internal process improvements, namely

48. Bd. of Veterans' Appeals, *How to Request an Appeal Be Advanced on the Docket (AOD)*, U.S. Dep't of Veterans Affs. 1 (2022), https://www.bva.va.gov/docs/AOD_For_Website.pdf [https://perma.cc/UFM6-F6LL].

49. 38 C.F.R. § 20.902(c) (2024).

50. *Id.* ("A case may be advanced on the docket on the motion of the Chairman, the Vice Chairman, a party to the case before the Board, or such party's representative. Such a motion may be granted only if the case involves interpretation of law of general application affecting other claims, if the appellant is seriously ill or is under severe financial hardship, or if other sufficient cause is shown. 'Other sufficient cause' shall include, but is not limited to, administrative error resulting in a significant delay in docketing the case, administrative necessity, or the advanced age of the appellant. For purposes of this Rule, 'advanced age' is defined as 75 or more years of age.").

51. Interview with Anonymous Congressional Staff Member (Sept. 30, 2024) (on file with authors).

requiring agencies to treat congressional inquiries as performance indicators for systematic improvements of case review; and (4) restrictions on congressional inquiries.

The Feature thus aims to show that while Congress expressly provided for the judicial review of agency action through the APA's requirement of reasoned decision-making, that is not its only strategy for shaping the outcomes of administrative processes. Nor does Congress influence the executive branch only when acting as a collective body to pass legislation. Individual members of Congress shape the resolution of vast numbers of veterans' appeals using the congressional bully pulpit—members' power to cajole and persuade administrators to adopt the members' priorities as their own—in a manner that is arguably at odds with administrative-law and constitutional theory. The case of veterans' appeals demonstrates that constitutional and administrative law must grapple with the proper scope not only of judicialized administration, but of *legislative* administration as well.

## I. THE DOCTRINAL LANDSCAPE OF CONGRESSIONAL INTERVENTION

Both constitutional separation-of-powers doctrine and the APA have an uneasy relationship with the advocacy role that many members of Congress play in individual cases before administrative agencies. As we explain below, the dominant formalist approach to the separation of powers deems such advocacy to be beyond Congress's core job description, and generally denies the existence of properly "legislative" functions that can be exercised by individual members of Congress. Under the APA, congressional advocacy runs up against a variety of procedural guarantees, including the neutrality of adjudicators, the requirement that agencies rely on congressionally approved reasons to make decisions, and more specific requirements like the rule against ex parte contacts. Yet both separation-of-powers and APA doctrinal objections are disconnected from practice. As we describe in Part II below, members of Congress occupy a cultural and political role separate from their formal institutional role as lawmakers,[52] one that involves providing personal assistance to constituents dealing with administrative agencies.

52. *Cf.* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1133-39 (2020) (arguing that Presidents are both persons and institutions).

### *A. Separation of Powers*

The modern Supreme Court has taken a mostly formalist view of the separation of powers,[53] encapsulated by its approach in *INS v. Chadha*.[54] *Chadha* was about a statute that permitted either house of Congress to overrule the Attorney General's decision not to deport an immigrant.[55] The opinion rests on the premise that any action "essentially legislative in purpose and effect" is a legislative power.[56] The *Chadha* Court thought that the legislative power encompassed basically everything Congress does; it claimed that Congress's few nonlegislative functions, like its power to impeach and convict, are subject to "narrowly and precisely defined" exceptions in the text.[57] And the Court reasoned that any exercise of the legislative power is "subject to the bicameralism and presentment requirements of Art[icle] I."[58]

If Congress's role is essentially limited to legislation, and if its members have no power to legislate as individuals because of the requirement of bicameralism, then individual members of Congress are—under *Chadha*—basically powerless. As a matter of black-letter law, that results in a fairly narrow prohibition: *Chadha* only forbids giving a member of Congress (or a chamber of Congress) the formal power to take any legally binding step with respect to an administrative adjudication. But behind that doctrinal rule, the case's theory of Congress's proper role under the Constitution is clear. Congress's remit is to focus on legislating and stay away from the execution of the laws. While *Chadha* doesn't prohibit congressional efforts to influence executive officers through channels other than

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**53.** We focus on *INS v. Chadha*, 462 U.S. 919 (1983), but that opinion draws on a formalist jurisprudential tradition stretching back to Chief Justice John Marshall. For a more extended description of this history, see generally Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346 (2016), which traces shifting rules and standards in the Court's separation-of-powers jurisprudence.

**54.** 462 U.S. at 952. The formalist view of the separation of powers appears in other contexts too. The Court's jurisprudence on the Article III standing of members of Congress, for example, sings the same tune. *See* Raines v. Byrd, 521 U.S. 811, 830 (1997).

**55.** 462 U.S. at 924-25.

**56.** *Id.* at 952.

**57.** *Id.* at 955. A pithier summary of this view is that "Congress does not have the power to do anything but legislate, at least when it wants its actions to have legal effect." Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 478 (2011) (describing *Chadha*). For other descriptions of this formalist understanding, see, for example, Ilan Wurman, *Nonexclusive Functions & Separation of Powers Law*, 107 MINN. L. REV. 735, 737 n.4 (2022), which compiles such scholarship.

**58.** 462 U.S. at 952.

legislation, these are presumptively suspect—or are not real exercises of "power" at all.[59]

The Court itself has acknowledged in other contexts,[60] like many scholars,[61] that *Chadha*'s rigidly formalist approach does not capture all of Congress's tools for influence. For one thing, it fails to grapple with the many individual powers that, despite being unmentioned in the Constitution, members of Congress have exercised since the earliest years of the Republic. Start with oversight, among "the most important powers of Congress."[62] *Chadha* barely mentions it. No wonder: oversight is neither subject to bicameralism and presentment nor mentioned in the Constitution's text (let alone "narrowly and precisely" defined therein).[63] Doctrinally, that lacuna might be resolved by treating oversight as "an

59. *See id.* at 956 n.21 (describing "the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances"). Justice Powell's concurrence also suggests that Congress's central role is to enact "general rule[s]," in contrast to the application of law to facts in a particular case, which is "the type of decision that traditionally has been left to the other branches." *Id.* at 964-65 (Powell, J., concurring).

60. Although it is true that the Supreme Court has, in particular cases, adopted a more functionalist mode of reasoning, that flexibility has not extended to congressional efforts to take legal action while circumventing the requirement of bicameralism and presentment. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 660 (1988) (holding that Congress may restrict executive power if doing so does not "impermissibly interfere" with the exercise of core Article II prerogatives).

61. For example, many scholars have noted that coherently delineating the three formal categories of power at the heart of *Chadha*'s analysis is nearly impossible. *See, e.g.*, M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 612 (2001). For other functionalist critiques, see Wurman, *supra* note 57, at 752-53, which reviews the literature.

62. DOUGLAS L. KRINER & ERIC SCHICKLER, INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER 1 (2016) (quoting 90 CONG. REC. 6747 (1944) (statement of Sen. Truman)); *see also* Press Release, Sen. Chuck Grassley, Grassley Delivers Keynote Speech on Congressional Oversight at the Heritage Foundation (Apr. 9, 2024), https://www.grassley.senate.gov/news/remarks/grassley-delivers-keynote-speech-on-congressional-oversight-at-the-heritage-foundation [https://perma.cc/V6T2-F5WJ] ("[C]ongressional oversight is my top priority.").

63. Bicameralism and presentment are not required because the power to investigate inheres in each chamber of Congress individually. *See* Watkins v. United States, 354 U.S. 178, 206 (1957) (noting that congressional committees may only pursue "the missions delegated to them"); *see also* Requests by Individual Members of Cong. for Exec. Branch Info., 43 Op. O.L.C. 42, 43 (2019) ("The Supreme Court has defined the congressional oversight authority to consist of the inherent power of *each House* to 'gather information in aid of its legislative function' by means of compulsion, if necessary." (emphasis added) (quoting Auth. of Individual Members of Cong. to Conduct Oversight of the Exec. Branch, 41 Op. O.L.C. 76, 77 (2017))). Nonetheless, Congress has passed legislation regulating the oversight function via bicameralism and presentment. *See, e.g.*, Constitutionality of the OLC Reporting Act of 2008, 32 Op. O.L.C. 14, 14 (2008) (discussing legislation that would have required certain informational disclosures

adjunct to the legislative process."[64] But that is only partially plausible. Oversight is often not a prelude to legislation; Congress "investigate[s] when it cannot legislate."[65] More to the point, oversight's importance stems precisely from the fact that it can typically be exercised by any member of Congress on their own.[66]

Or think of the congressional frank, which once allowed members of Congress to send mail to constituents at the government's expense. Now obscure, franking was once a critical means of political outreach when communication was expensive and information was scarce.[67] In its earliest incarnation in 1775,[68] members could send letters about only legislative business, and only in the weeks surrounding legislative sessions.[69] These strictures loosened over time, however.[70] By the Civil War, members could send any government document to a constituent before or after legislative sessions, whether related to legislation or not.[71] The result was a watershed: "Congress had taken on a new function, the

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to Congress); Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, 28 Op. O.L.C. 79, 79-80 (2004) (describing multiple statutes purporting to authorize certain disclosures to Congress).

64. *See, e.g.*, Trump v. Mazars USA, LLP, 591 U.S. 848, 862 (2020) (quoting *Watkins*, 354 U.S. at 197). This position is shared by the executive branch. *See, e.g.*, Ways & Means Comm.'s Request for Former President's Tax Returns & Related Tax Info. Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C., slip op. at 20 (July 30, 2021), https://www.justice.gov/olc/file/1419111/dl [https://perma.cc/SC47-PGGE] ("[T]here is no congressional power to expose for the sake of exposure.").

65. KRINER & SCHICKLER, *supra* note 62, at 3; *see also, e.g.*, Grassley, *supra* note 62 (noting that the purposes of oversight are to "make sure the president faithfully executes the law" and "[l]et the sunlight expose . . . governmental wrongdoing," among others).

66. *See, e.g.*, Brian David Feinstein, Oversight, Despite the Odds: Assessing Congressional Committee Hearings as a Means of Control over the Federal Bureaucracy 129 (Aug. 26, 2009) (Ph.D. dissertation, Harvard University) (ProQuest) (quoting Senator Chuck Grassley as having said the following about oversight: "The thing about oversight is that you could do it yourself . . . . You don't need 51 votes to do it.").

67. *See* Roman J. Hoyos, *The People's Privilege: The Franking Privilege, Constituent Correspondence, and Political Representation in Mid-Nineteenth Century America*, 31 LAW & HIST. REV. 101, 107 (2013); *see also* Common Cause v. Bolger, 574 F. Supp. 672, 674 (D.D.C. 1982) (describing the nature and history of franking), *aff'd*, 461 U.S. 911 (1983).

68. Franking likely existed in Britain; its first incarnation in this country arose during the Continental Congress of 1775. *See* MATTHEW E. GLASSMAN, CONG. RSCH. SERV., RS22771, CONGRESSIONAL FRANKING PRIVILEGE: BACKGROUND AND RECENT LEGISLATION 1 (2016).

69. *See* Hoyos, *supra* note 67, at 107-09 (noting early restrictions on when members of Congress could exercise their franking privileges and what materials could be franked).

70. *Id.* at 107.

71. *Id.* at 107-09.

distribution of information."[72] This remained, with one short exception, a staple of legislators' roles until well into the twentieth century.[73] And it remained popular among legislators precisely because it seemed to work as a tool of political marketing.[74]

Separation-of-powers concerns about Congress's nonlegislative functions are particularly relevant to veterans' benefits. Congress has long immersed itself in veterans' pensions administration. As James D. Ridgway has written:

> Congress was deeply involved in the [veterans'] pension system. In 1880, the Bureau of Pensions received 40,000 inquiries from Congress regarding the status of pension claims. Not only were inquir[i]es common [but it was] not exceptional [to] receiv[e] a pension by special action. The tradition of private bills in Congress to add disappointed claimants to the pension rolls continued through the post-Civil War era. For example, during the first session of the forty-ninth Congress, 4,500 special pension

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**72.** *Id.* at 109. Significant resources were devoted to fulfilling that new function. *See id.* ("As early as 1828, government documents accounted for over 30% of the weight of mail leaving Washington, D.C. By the 1850s, 'laws, books, newspapers, periodicals, government documents, and the *Congressional Globe* poured through the mails in one mighty torrent, diffusing information certainly, if not knowledge or wisdom.'" (quoting WAYNE E. FULLER, THE AMERICAN MAIL: ENLARGER OF THE COMMON LIFE 109 (1972))).

**73.** Franking declined in part due to a perception that it was a vehicle for corruption. *See Common Cause*, 574 F. Supp. at 674 ("Other more flagrant abuses surfaced, among them the reported event of a member mailing his lawn furniture to Bimini in the Bahamas, under a frank with the tag reading 'Official Business.'"). But even absent statutory changes, the declining importance of mail as a medium for communication likely would have diminished the importance of franking as a prize for incumbents.

**74.** Indeed, as we discuss in Section VI.A.2, *infra*, franking has in common with congressional interventions that it lets incumbents exploit the work of the professional bureaucracy for their private ends. This has posed other constitutional problems apart from the separation of powers. In *Coalition to End the Permanent Congress v. Runyon*, a group of plaintiffs alleged that it was unconstitutional for incumbents to use their franking privileges to contact nonconstituents whom they sought to represent in future elections. 971 F.2d 765 (per curiam) (unpublished table decision), 1992 WL 181991, at *1 (D.C. Cir. 1992). Judges Silberman and Randolph agreed, although for differing reasons. Judge Silberman thought this practice violated the Free Speech Clause by favoring incumbents and therefore implicitly penalizing the speech of their opponents. *See* Coal. to End the Permanent Cong. v. Runyon, 979 F.2d 219, 225 (D.C. Cir. 1992) ("[The Supreme Court of Chief Justice Marshall's time] would have seen government support for one major-party candidate against the other, or direct subsidies to incumbents for campaign purposes, as threats to republican democracy itself."). Judge Randolph thought it violated equal protection. *See Runyon*, 1992 WL 181991, at *2. (The latter opinion was deemed "unpublished" because Congress repealed the statute being litigated between the entry of the judgment and the publication of the final opinions. *See Runyon*, 979 F.2d at 220.)

> acts were introduced in Congress. In the late 1880s, Grover Cleveland signed 1,453 such bills passed by Congress.[75]

Congress's involvement in the veterans' pension system highlights that Congress has never been content to leave veterans' benefits administration entirely in the hands of the executive branch.

The congressional inquiries on behalf of individual constituents we study fall within the same tradition as franking and, to a lesser extent, private members' bills and oversight. Although congressional inquiries have roots in the pension-claim inquiries that once dominated Congress's agenda, modern constituency service became a more dominant form of congressional intervention for constituents with the advent of the bureaucratized administrative state in the early twentieth century.[76] Just like franking, constituency service allows members of Congress to offer their constituents representation directly, even outside the legislative process.[77] This may be why members of Congress have quickly come to see casework as a core part of their job descriptions, even though it is separate from Congress's more traditional lawmaking function. Indeed, one member of Congress recently introduced a bill that would have permitted individual members of Congress to requisition space from the Department of Veterans Affairs from which to conduct casework.[78] The proposal would have granted individual members of Congress, or staffs they control, the power to utilize physical resources within executive agencies to meet with their constituents.[79] Congress would have literally been entering the executive space.

While constituency service does not involve the kind of "hard power" on which *Chadha* focused, a world in which members of Congress have offices within an executive agency would be at odds with *Chadha*'s vision. In the context of the Speech and Debate Clause, the Supreme Court has noted that legislative immunity does not extend to "'errands' performed for constituents, [like] the making of appointments with Government agencies, [and] assistance in

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**75.** James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 163 (2011).

**76.** *See* DAVID ROSENBLOOM, BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION 104 (2000). As part of the growth of government generally, Congress began allocating a much higher budget to congressional staff over the middle decades of the twentieth century, which in turn enabled the rise of professionalized constituency service as we discuss it here. *See* CAIN ET AL., *supra* note 32, at 99 (charting the growth in the staff a member of congress could employ from eight members in 1959 to eighteen in 1975).

**77.** *See* Lowande et al., *supra* note 11, at 649.

**78.** *See* Improving Veterans Access to Congressional Services Act of 2023, H.R. 562, 118th Cong. § 2 (2023).

**79.** *See id.* § 2(a).

securing Government contracts."[80] While *United States v. Brewster* acknowledged that such "errands" were "legitimate," it placed them outside the core legislative function.[81]

To be sure, as with oversight, one might argue that constituency service is inextricably connected to the legislative process and not a mere adjunct. Helping constituents navigate agencies might give legislators insights for drafting statutes.[82] We explore that claim empirically and find little support for the notion that constituency service assists, enhances, or correlates with legislative activity in an observable way.[83]

Moreover, members of Congress themselves do not see constituency service as legislative. To them and their constituents, casework is "political" only in the sense that it can burnish incumbents' reputations; it has little to do with partisan legislative politics.[84] One indication of casework's apolitical status is that it is almost all done by congressional staff, not the member themselves, making any influence on legislative initiatives highly indirect.[85] Another indication is found in the customary rules of the House of Representatives, which provide that even when a member vacates their office, casework continues under the supervision of the Clerk.[86] In other words, constituency service is a "good government" way

80. United States v. Brewster, 408 U.S. 501, 512 (1972).

81. *Id.*

82. *See* WALTER J. OLESZEK, CONG. RSCH. SERV., R41079, CONGRESSIONAL OVERSIGHT: AN OVERVIEW 13 (2010) ("Solutions to an individual constituent's problems can suggest legislative remedies on a broader scale. On occasion, constituents' casework requests may be used in oversight hearings by Members to highlight and lend support to a problem or shortcoming in the operations of a program or agency.").

83. We present our results on the correlation between congressional intervention at BVA and legislative activity on behalf of veterans in Section IV.B (Figure 5), *infra*.

84. *See* John R. Johannes & John C. McAdams, *Entrepreneur or Agent; Congressmen and the Distribution of Casework, 1977-1978*, 40 W. POL. Q. 535, 549 (1987) ("[C]onstituents perceive casework in nonpolitical terms. . . . [T]hey expect their representatives to provide these services. . . . " (emphasis omitted)); Emma Dumain, *Vacancy: Congressional Offices That Lose Members Still Function*, ROLL CALL (Mar. 27, 2012, 6:12 PM), https://rollcall.com/2012/03/27/vacancy-congressional-offices-that-lose-members-still-function [https://perma.cc/747C-GQPT].

85. *See* Kealy, *supra* note 14, at 22 ("A key takeaway is that the congressional staff are the intermediaries between the constituents and their government.").

86. *See* Dumain, *supra* note 84 ("[A]ll operations [of the former member's office] become focused on constituent services and handling casework requests. In this way, district offices experience fewer changes in the transition from political to nonpartisan office . . . .").

to help constituents out.[87] It is decidedly not a component of the legislative process.

In short, the formalist tradition *Chadha* represents sits uneasily with constituency service because it is both a widely accepted congressional function exercised by individual members and widely viewed as entirely divorced from Congress's lawmaking function, despite taking up an enormous share of congressional-staff resources.

### *B. Administrative Law*

The APA does not generally forbid congressional involvement in agencies' decisions. In certain contexts, political intervention is not only tolerated but tacitly protected by the judiciary. For example, the Supreme Court has generally forbidden judges from inquiring into an agency's political motivations when reviewing informal rulemaking, focusing instead on the agency's claimed apolitical rationale in all but the rarest circumstances.[88] The logic behind this rule seems to be that political interventions (by Congress, agency heads, or the White House) are part and parcel of the policymaking process, and therefore cannot be the basis for invalidating a legislative rule unless they so infect the agency's reasoning that the administrative record becomes a sham.[89]

Adjudication is different. When an agency acts with the trappings of judicial procedure in settings like benefits proceedings or formal rulemakings, parties to

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**87.** *See Reframing Casework as Oversight: Theory and Practice*, LEVIN CTR. (Sept. 28, 2023), https://levin-center.org/reframing-casework-as-oversight-theory-and-practice [https://perma.cc/KTZ7-DFG7] ("[C]asework embodies the very best of good government in a democracy."); *see also House Ethics Manual*, COMM. ON ETHICS 307 (Dec. 2022), https://ethics.house.gov/sites/ethics.house.gov/files/documents/Dec%202022%20House%20Ethics%20Manual%20website%20version.pdf [https://perma.cc/93F4-P7EE] ("[Casework] . . . plays a useful role in the governmental process by helping legislators and administrators perform their respective jobs adequately through the interest of the former in the work of the latter.").

**88.** *See* Dep't of Com. v. New York, 588 U.S. 752, 781 (2019) ("[A] court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities."); Sierra Club v. Costle, 657 F.2d 298, 408-10 (D.C. Cir. 1981) ("We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute . . . .").

**89.** *See* Dep't of Com. v. New York, 588 U.S. at 781 ("Agency policymaking is not a 'rarified technocratic process, unaffected by political considerations or the presence of Presidential power.' Such decisions are routinely informed by unstated considerations of politics . . . ." (quoting *Sierra Club*, 657 F.2d at 408)).

those proceedings are entitled to more procedural protections.[90] The APA itself reflects that fact through the procedural requirements it imposes on formal adjudications and rulemakings,[91] and to a lesser extent, on informal adjudications.[92] In these contexts, agencies may violate various provisions of the APA or due process if they permit themselves to be swayed by congressional pressure — and reviewing courts do not hesitate to seek out such improper influence.

To take one example, the APA forbids adjudicators presiding over formal adjudications from engaging in ex parte contacts, that is, communications in which the other parties to a proceeding are not given a fair opportunity to respond.[93] Many agencies voluntarily impose the same rule on their informal adjudicatory processes.[94] (The agency we study here — BVA — does not, which we discuss further below.[95]) The rule against ex parte contacts is not specific to congressional contacts, but it may operate to restrain members' off-the-record communications to agency adjudicators.

Relying on more general principles, courts have also found that, even absent direct ex parte communications, an agency adjudication may be arbitrary and capricious if "political pressure . . . shapes, in whole or in part, the judgment of the ultimate agency decision maker."[96] This rule is often invoked when agency

90. *See, e.g.*, Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46 (1915) (distinguishing an administrative decision that affects a "relatively small number of persons . . . in each case upon individual grounds," which must comply with due-process requirements, from one that lays down a "rule of conduct appl[ying] to more than a few people," which need not).

91. *See* 5 U.S.C. §§ 553(c), 554(c) (2018) (imposing, respectively, the procedural protections of 5 U.S.C. §§ 556 and 557 "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing" and in "adjudication[s] required by statute to be determined on the record after opportunity for an agency hearing").

92. *See id.* § 555.

93. *Sierra Club*, 657 F.2d at 400 & n.499.

94. *See* Asimow, *supra* note 34, at 21 & nn.68-69.

95. *Id.* at 21 n.69; *see also* Williams v. Wilkie, 32 Vet. App. 46, 54 (Vet. App. 2019) (describing BVA as a component of "the nonadversarial, ex parte adjudication process carried out on behalf of the Secretary" (quoting Kutscherousky v. West, 12 Vet. App. 369, 372 (Vet. App. 1999))).

96. Aera Energy LLC v. Salazar, 642 F.3d 212, 222 (D.C. Cir. 2011); *see also* DCP Farms v. Yeutter, 957 F.2d 1183, 1187 (5th Cir. 1992) (noting that circuit precedent "invalidate[s] adjudicative agency decisions whenever congressional contact with an agency creates the mere appearance of bias or pressure"); Radio Ass'n on Defending Airwave Rts. v. Fed. Highway Admin., 47 F.3d 794, 807 (6th Cir. 1995) (making a similar argument); Power Auth. of N.Y. v. FERC, 743 F.2d 93, 110 (2d Cir. 1984) (asserting that ex parte communications from Congress may require recusal if "the communications posed a serious likelihood of affecting the agency's ability to act fairly and impartially").

leadership appears to prejudge a case.[97] But it applies with equal force to political pressure brought to bear by Congress. So, for example, when members of the Senate Judiciary Committee publicly expressed strong views on an enforcement case pending before the Federal Trade Commission with which the agency complied, the Fifth Circuit vacated the agency's decision as arbitrary because of improper political pressure.[98]

Courts cite two reasons for this rule. One is that political pressure violates due process by interfering with the neutrality of a quasi-judicial decision maker.[99] Another is that political influence violates the decision-making process mandated by Congress or by agency regulations either by prompting the consideration of extrastatutory factors like the preferences of a politician,[100] or by effectively giving that politician decision-making authority and usurping the authority of the duly authorized decision maker.[101] Say an agency has by regulation delegated responsibility to conduct factfinding to an ALJ. Surrendering that factfinding power to a member of Congress would violate the regulation.

These rationales expose certain limits of the principle against congressional intervention. If political pressure is wrong because it makes the agency consider extrastatutory factors, then there is no problem with a member of Congress submitting relevant information to an agency on the record, even if that sends a subtle message to the agency.[102] One might even think that there is no problem with politicians pressuring an agency to decide a particular case faster—as long as the statute's decision criteria apply only to the merits of the agency's decision.[103]

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**97.** *See, e.g.*, Cinderella Career & Finishing Schs., Inc. v. FTC, 425 F.2d 583, 590 (D.C. Cir. 1970) (holding that a Federal Trade Commission (FTC) Commissioner's public remarks indicated prejudgment of the case); American Cyanamid Co. v. FTC, 363 F.2d 757, 763-68 (6th Cir. 1966) (disqualifying the FTC Chairman from an adjudicatory proceeding based on a previous involvement in an investigation into similar legal issues).

**98.** *See* Pillsbury Co. v. FTC, 354 F.2d 952, 965 (5th Cir. 1966).

**99.** *See* D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971).

**100.** *See, e.g.*, Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1543-48 (9th Cir. 1993).

**101.** *See, e.g.*, Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954) ("[W]e object to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations.").

**102.** *See, e.g.*, Off. of Legis. Affs., *Congressional Inquiries Refresher for Legislative Staff*, U.S. Citizenship & Immigr. Servs. [27] (Apr. 2021), https://www.uscis.gov/sites/default/files/document/guides/Congressional-Inquiries-Refresher.pdf [https://perma.cc/VEB9-4BAG] (providing guidance on what supporting documents should accompany a congressional inquiry, citing evidentiary documents to support constituents' claims).

**103.** The Third Circuit took that view in *Gulf Oil Co. v. Federal Power Commission*, where the industry plaintiffs argued that the Federal Power Commission's licensing decision was defective

The latter position is hard to defend in the context of BVA—or the many other agency settings where delay is a principal concern. Indeed, Congress and BVA have limited the agency's power to advance a case on its docket by making that power a kind of relief to be granted only on specific grounds.[104] These rules apply for good reason. At BVA, as in many mass-adjudicatory agencies, justice delayed really is justice denied; many veterans die or withdraw their claims after years of waiting for a decision,[105] so being forced to wait longer while higher-priority cases are resolved directly reduces a veteran's chances of getting a positive merits decision. Of course, political efforts to make agencies rush are not all the same. An agency that handles a small number of matters affecting highly resourced parties—say, a Federal Energy Regulation Commission review of a tariff affecting millions of electrical customers[106]—can look an awful lot like generalized policymaking. Plus, the parties' vast resources, and the public interest in each individual decision, might blunt due-process concerns with political intervention.

Those considerations, though, are simply absent when an agency's adjudicatory process employs many of the trappings of judicial procedure to ensure fairness for individual claimants, even if it is not technically subject to the formal rulemaking requirements of 5 U.S.C. §§ 554, 556, and 557.[107] In such settings, the generalized public interest in how or when a particular case is heard is minimal—and individuals' legitimate expectations of neutral procedure are weightier. For these reasons, we think it beyond question that, as a doctrinal matter, the due-process principles underpinning the APA would not permit political pressure to govern jumping a statutorily mandated queue.[108]

In short, many aspects of congressional interventions in agency adjudication are at least plausibly at odds with core administrative-law principles, including

because the agency had been subject to congressional pressure to render its decision quickly. *See* 563 F.2d 588, 610 (3d Cir. 1977). While acknowledging that "courts must not tolerate undue legislative interference with an administrative agency's adjudicative functions," the court nonetheless held that the congressional effort to "accelerat[e] the disposition and enforcement" of the Federal Power Commission's decision did not taint the merits of the decision itself. *Id.*

104. *See* 38 U.S.C. § 7107(b) (2018); 38 C.F.R. § 20.902(c) (2024).

105. David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 17 (2020) ("Thousands of veterans die while their appeals languish.").

106. *See generally* Transmission Access Pol'y Study Grp. v. FERC, 225 F.3d 667 (D.C. Cir. 2000) (per curiam) (discussing such a review).

107. 5 U.S.C. §§ 554, 556, 557 (2018). You might think of this as Type B adjudication within the framework of Asimow, *supra* note 34, at 7-13.

108. Perhaps for this reason, no other court that we are aware of has adopted the Third Circuit's reasoning in *Gulf Oil v. Federal Power Commission* across the board.

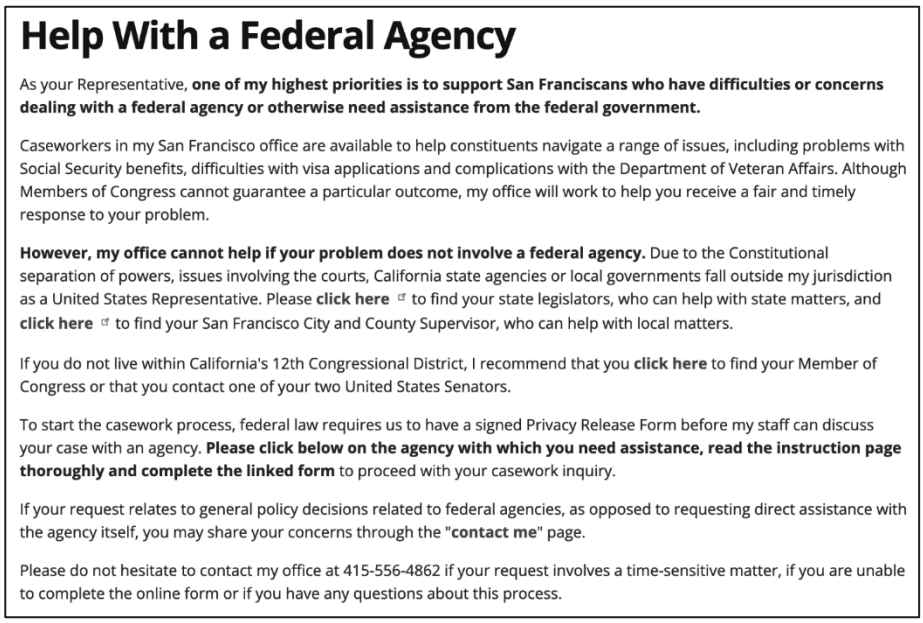
the open-record requirement, the due-process right to a neutral arbiter, internal agency procedural rules, and the agency's obligation not to surrender decisional authority to an unauthorized stranger to the case.

## II. ACADEMIC ACCOUNTS OF CONGRESSIONAL INTERVENTION

Unlike judges, the scholars we discuss below have more readily embraced constituency service as a key pillar of congressional work. Past writing has mostly asked why politicians engage in constituency service and what effect it has on their careers and policy goals. Despite some important recent exceptions, the literature has paid less attention to the effect of constituency service on agencies themselves. And we are aware of no work that closely examines this question in the context of mass-adjudicatory settings where members of Congress intervene on behalf of individuals, even though such requests constitute the overwhelming majority of congressional casework.[109] That relative silence is all the more surprising given its relevance to several broader conversations in administrative and constitutional law.

109. *See* Kealy, *supra* note 14, at 20 (noting that the agencies receiving the most requests were the U.S. Citizenship and Immigration Services, the Department of State, SSA, the Internal Revenue Service, and the Veterans Administration).

**FIGURE 1. EXAMPLE OF A MEMBER OF CONGRESS'S WEBSITE DESCRIPTION ADVERTISING CONSTITUENCY SERVICE**[110]



## Help With a Federal Agency

As your Representative, **one of my highest priorities is to support San Franciscans who have difficulties or concerns dealing with a federal agency or otherwise need assistance from the federal government.**

Caseworkers in my San Francisco office are available to help constituents navigate a range of issues, including problems with Social Security benefits, difficulties with visa applications and complications with the Department of Veteran Affairs. Although Members of Congress cannot guarantee a particular outcome, my office will work to help you receive a fair and timely response to your problem.

**However, my office cannot help if your problem does not involve a federal agency.** Due to the Constitutional separation of powers, issues involving the courts, California state agencies or local governments fall outside my jurisdiction as a United States Representative. Please **click here** to find your state legislators, who can help with state matters, and **click here** to find your San Francisco City and County Supervisor, who can help with local matters.

If you do not live within California's 12th Congressional District, I recommend that you **click here** to find your Member of Congress or that you contact one of your two United States Senators.

To start the casework process, federal law requires us to have a signed Privacy Release Form before my staff can discuss your case with an agency. **Please click below on the agency with which you need assistance, read the instruction page thoroughly and complete the linked form** to proceed with your casework inquiry.

If your request relates to general policy decisions related to federal agencies, as opposed to requesting direct assistance with the agency itself, you may share your concerns through the "**contact me**" page.

Please do not hesitate to contact my office at 415-556-4862 if your request involves a time-sensitive matter, if you are unable to complete the online form or if you have any questions about this process.

### *A. Congressional Intervention as Representation*

Contacting administrative agencies is a routine part of congressional life. Figure 1 provides an example of typical language advertising constituency service on a member of Congress's website. Between 2005 and 2013, around 95% of senators contacted the Department of Labor at least once with a constituent request.[111] It is little surprise, then, that most scholars who have examined constituency service in depth — many of whom are political scientists — are primarily concerned with understanding the implications *for politicians* of devoting so much time and energy into this decidedly unglamorous, nonlegislative task.

110. *Help with a Federal Agency*, CONGRESSWOMAN NANCY PELOSI, https://pelosi.house.gov/how-can-i-help-you/help-federal-agency [https://perma.cc/X5N2-S4N2].

111. *See* Ritchie, *supra* note 45, 242 ("During the 109th through the 112th Congresses, nearly all senators (95%) contacted the DOL about policy issues, with some frequently engaging the department.").

First, it is a form of representation. The thin legal scholarship linking constituency service to representation[112] largely lauds constituency service as a way to make voters feel heard and improve their satisfaction with their representatives, all without the pitfalls of polarizing party politics.[113] In the words of Professor Beermann, it is "pork barrel writ small,"[114] a form of "voice" in government that gives voters a tangible sense of the government in action.[115]

In the 1970s and 1980s, several studies by political scientists explained that constituency service was one reason congressional representatives seemed to be enjoying longer tenures and greater party independence on policy matters.[116] The theory was that the growth of the federal bureaucracy in the postwar period gave politicians a new way of building personal loyalty with voters: by supplying voters with "bureaucratic 'unsticking' services."[117] By flexing their "almost unique" power to "expedite bureaucratic activity," incumbent politicians could bond with voters in ways that their challengers could not.[118] Subsequent studies have elaborated on this idea; voters' loyalty and trust developed through

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**112.** *See, e.g.*, Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 788 n.80 (2021) ("This Article focuses only on legislators' lawmaking activities and brackets the many non-legislative activities that they regularly engage in."); Joshua Bone, Note, *Stop Ignoring Pork and Potholes: Election Law and Constituent Service*, 123 YALE L.J. 1406, 1409 n.9 (2014) (noting that several distinguished scholars of election law referred to constituent service "rarely and in limited contexts").

**113.** *See, e.g.*, Bone, *supra* note 112, at 1420 ("[I]gnoring constituent service means ignoring avenues for responsiveness that can enhance the quality of representation that constituents receive."); Robert Klonoff, *The Congressman as Mediator Between Citizens and Government Agencies: Problems and Prospects*, 16 HARV. J. ON LEGIS. 701, 705-08 (1979); *see also* Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1135 (2005) ("Whether one envisions constituent services as power or pork, individual election districts sometimes allow representatives to distribute political goods independently of one another.").

**114.** Beermann, *supra* note 23, at 139.

**115.** The idea that place-based representation is critical to providing citizens with "voice" in government is also commonplace in the new literature on federalism. *See, e.g.*, Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 45 (2010). *See generally* Gerken, *supra* note 113 (describing disaggregated democracy in electoral districts). While the new federalists often emphasize policy control in the more traditional sense, their insight that policy implementation can be a form of representation relates directly to the idea that members of Congress can improve representation by influencing particular benefits adjudications. *See* Gerken, *supra*, at 24-25 (discussing the importance of implementation power).

**116.** *See, e.g.*, Morris P. Fiorina, *The Case of the Vanishing Marginals: The Bureaucracy Did It*, 71 AM. POL. SCI. REV. 177, 177 (1977) ("We now are aware of a clear political trend: the decline of competition for House seats."); CAIN ET AL., *supra* note 32, at 7. *See generally* FENNO, *supra* note 43 (providing a study of how members of Congress view their constituencies).

**117.** Fiorina, *supra* note 116, at 179-80.

**118.** *Id.*

constituency service function as a "source of safety" for politicians when voters disagree with their policy.[119]

Some political-science literature and legal scholarship has portrayed constituency service positively through the lens of representation, mainly because it is incredibly popular. Constituents seemed to "want good access or the assurance of good access" to their representative's assistance "as much as they want good policy."[120] Or, more colorfully, voters liked seeing their representatives as "[e]rrand [b]oy[s]."[121] In contrast to the uneasy relationship between constitutional law and the extralegislative duties that politicians have embraced over time, political scientists in the 1970s and 1980s deemed "service responsiveness," or the "assiduous[ness]" with which a representative responds to requests for "assistance in dealing with the government bureaucracy," as a core feature of high-quality congressional representation.[122] And at least at that time, scholars believed that voters rewarded incumbents who invested in constituency service with higher chances of reelection.[123]

Constituency service continues to be viewed positively. While increasing partisan polarization and the dominance of the national media have probably weakened the connection between constituency service and electoral success,[124] members of Congress continue to treat "localism, access, constituency service, and trust" as the critical ingredients of a reelection campaign.[125] At the least,

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119. CAIN ET AL., *supra* note 32, at 8.

120. FENNO, *supra* note 43, at 240.

121. Fiorina, *supra* note 116, at 179 (titling a section "Better to be Reelected as an Errand Boy Than Not to be Reelected at All").

122. CAIN ET AL., *supra* note 32, at 2.

123. *See, e.g.*, *id.* at 3-4; Douglas Rivers & Morris P. Fiorina, *Constituency Service, Reputation, and the Incumbency Advantage*, *in* HOME STYLE & WASHINGTON WORK: STUDIES OF CONGRESSIONAL POLITICS 17, 25-29 (Morris P. Fiorina & David W. Rohde eds., 1989). *See generally* STEPHEN FRANTZICH, WRITE YOUR CONGRESSMAN: CONSTITUENT COMMUNICATIONS & REPRESENTATION (1986) (discussing how members of Congress engage in mail communications with their constituents). Note, however, that the empirical reliability of these claims has been contested. *See, e.g.*, Gary W. Cox & Jonathan N. Katz, *Why Did Incumbency Advantage in U.S. House Elections Grow?*, 40 AM. J. POL. SCI. 478, 492 (1996) ("[T]he bulk of the increase in the U.S. House incumbency advantage must be chalked up to partisan dealignment of one kind or another, rather than to a growth in resources and constituency service.").

124. *See, e.g.*, Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 ELECTORAL STUD. 12, 12 (2016) ("Recent elections in the United States have been characterized by the highest levels of party loyalty and straight-ticket voting since the American National Election Studies first began measuring party identification in 1952.").

125. SALLY FRIEDMAN, DILEMMAS OF REPRESENTATION: LOCAL POLITICS, NATIONAL FACTORS, AND THE HOME STYLES OF MODERN U.S. CONGRESS MEMBERS 223 (2007); *see also,*

constituency service remains an important part of voters' expectations.[126] This may explain why politicians themselves continue to value constituency service as a tool for political advancement.[127] For example, former Speaker of the House Jim Wright memorably intoned that "many millions of private citizens" see their elected representative as "the only person whom they remotely know in the federal government" and therefore as "their only intercessor when they encounter difficulties."[128] "This particular relationship between a congressman and the individual constituent, struggling for opportunity, is a very sacred one, not to be despised."[129] However, while constituency service may benefit voter perception of politicians, there is little empirical evidence that it helps politicians learn about their constituents' views on key issues.[130] We corroborate the weak link between constituency service and legislative performance below.

But constituency service can blur the line between representation and corruption and distract members of Congress from legislating. Take the Keating Five scandal, when five senators interceded to prevent a federal enforcement action against the failing Lincoln Savings & Loan Association before its collapse.[131] The senators had gotten over a million dollars in campaign contributions from Lincoln.[132] In some ways it was the ordinary nature of the Keating Five's conduct that impugned the broader concept of constituency service. After all, the Keating Five's quo to Lincoln's quid had simply been advocacy for a constituent before an administrative agency. Nobody alleged that the senators had done more than write letters and schedule meetings. While rendering that service *in exchange* for payment was obviously wrong, pressing a supportive constituent's concerns

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*e.g.*, Scott Ashworth & Ethan Bueno de Mesquita, *Delivering the Goods: Legislative Particularism in Different Electoral and Institutional Settings*, 68 J. POL. 168, 169 (2006) ("House members actually do *more* constituency service today than they did 40 years ago.").

**126.** *See, e.g.*, John Lapinski, Matt Levendusky, Ken Winneg & Kathleen Hall Jamieson, *What Do Citizens Want from Their Member of Congress?*, 69 POL. RSCH. Q. 535, 536 (2016) ("Providing services to the district . . . [is] simply part of the job of the member . . . .").

**127.** *See, e.g.*, FRIEDMAN, *supra* note 125, at 189-90 (quoting one newly elected member as saying that he "want[ed] to make certain that constituent service [was his] top priority").

**128.** *See* Levin, *supra* note 10, at 19 (quoting Thomas E. Mann, *Incumbency Advantage and Accountability: The Question of Campaign Finance, Congressional Perquisites, and Constituent Service*, 23 CUMB. L. REV. 61, 67-69 (1993) (remarks of Jim Wright)).

**129.** *Id.*

**130.** *See, e.g.*, Claire E. Abernathy, Legislative Correspondence Management Practices: Congressional Offices and the Treatment of Public Opinion 170 (Aug. 2015) (Ph.D dissertation, Vanderbilt University), https://www.vanderbilt.edu/csdi/AbernathyDissertation_Formatted.pdf [https://perma.cc/2EKK-B987] (describing no effect of better constituency service on the accuracy of politicians' perceptions of their constituents' views).

**131.** Levin, *supra* note 10, at 3-4.

**132.** *Id.* at 68-70.

before the administration was the routine stuff of representational politics. This was in fact what the Senate Ethics Committee's report into one of the Keating Five said: if a campaign donor "has a case which the Senator reasonably believes he or she is obliged to press because it is in the public interest . . . then the Senator's obligation is to pursue that case."[133] So while selling a representative's attention may be wrong, a representative has every right to advocate for their constituent's legitimate claims before administrative agencies, even if they only know about those claims because the constituent was a donor.

The thin line separating corrupt from ethical constituency service has inspired much academic writing.[134] Legal academics acknowledge that constituency service pits politicians' incentives to exploit their advocacy to maximize reelection against the basic expectation of fairness in administration.[135] And even when that conflict does not result in corruption, it may result in favored constituencies or demographics getting more or better attention.[136] Put another way, if legislators are tasked with fixing mistakes in the administrative state,[137] it is only

133. S. REP. NO. 102-223, at 12 (1991).

134. *See, e.g.*, James M. Falvey, Note, *The Congressional Ethics Dilemma: Constituent Service or Conflict of Interest*, 28 AM. CRIM. L. REV. 323, 323-34 (1991) ("It has been suggested that the interventions by Speaker Wright and the Keating Five did not constitute constituent service, but rather a 'quid pro quo' relationship in violation of House and Senate rules, and potentially in violation of the Federal Criminal Code."); Levin, *supra* note 10, at 2-3 ("The Senate Ethics Committee's decision in the Keating case . . . provides a fitting prologue for this article's theme.").

135. Levin, *supra* note 10, at 18 ("Senators and representatives spend relatively little time contacting agencies themselves. They do, however, spend time supervising and conferring with staff about how to handle cases, and intermittently they will participate personally. They are especially likely to do so on major cases . . . .").

136. *See, e.g.*, Lowande et al., *supra* note 11, at 645 ("We find significant differences in the intervention patterns of female, minority, and veteran legislators that suggest descriptive representation leads to substantive representation in Congress."); GROSE, *supra* note 45, at 110-18 (discussing a potential relationship between the race of a representative and the race of caseworkers in their constituency office — and the resulting difference in the quality of service experienced by constituents); *cf.* Daniel M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463, 472 (2011) (finding that state legislators are more likely to respond to requests for help with voter registration from citizens of the same race). *But see* Snyder et al., *supra* note 13 (manuscript at 1-3) (finding that legislators who represent districts with greater shares of veterans and seniors are more responsive to requests for constituency service from members of those groups).

137. THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 58 (1969) (describing the new "liberal" public philosophy: "[I]t expects to use government in a positive and expansive role, it is motivated by the highest sentiments, and it possesses strong faith that what is good for government is good for the society. It is 'interest-group liberalism' because it sees as both necessary and good that the policy agenda and the

natural that this error-correction function will be distributed to some degree by political logic rather than the merits of a claim. Perhaps, then, constituency service provides representation at the cost of fairness.

Another critique is that constituency service distracts from legislation. Echoing doctrinal concerns, some scholars argue that casework occupies time that could be spent writing statutes.[138] This may be especially true when constituency service has little to do with the merit of constituents' claims.[139] Professor Melinda N. Ritchie offers a counterpoint: maybe constituency service is a back door through which Congress lobbies executive agencies to accomplish policy objectives.[140] But that story is problematic, too. Congressional interventions would let members push their policy ideas in a less public forum, getting credit for turning the screws on bureaucrats without the pushback from the public or from colleagues that would come with a public vote.[141] In Ritchie's view, when lawmakers jawbone agencies, voters lose.[142] Both corruption and distraction undermine the view that constituency service allows members of Congress to represent their voters more effectively in government.

### *B. Congressional Intervention as a Means of Achieving Policy Goals*

Another lens through which scholars have approached constituency service is how it affects politicians' ability to deliver on policy objectives.[143] Members of Congress often have an objective to sniff out executive-branch misbehavior. Traditional oversight—calling witnesses, holding hearings—is one way to do

public interest be defined in terms of the organized interests in society."); William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165, 167 (1992) (highlighting the importance of considering the "political dynamics of lawmaking").

138. Joseph Cooper, *Strengthening the Congress: An Organizational Analysis*, 12 HARV. J. ON LEGIS. 307, 321 (1975) ("In the Congress, for example, time spent on constituency service and campaigning can seriously detract from committee work . . . .").

139. *See* Levin, *supra* note 10, at 52 ("Much of the literature suggests that members are not always so restrained—that many feel that their job is to advocate the constituent's cause, right or wrong.").

140. *See* MELINDA N. RITCHIE, BACKDOOR LAWMAKING: EVADING OBSTACLES IN THE US CONGRESS 16 (2023); Ritchie, *supra* note 45, at 241.

141. *See* RITCHIE, *supra* note 140, at 140; Kenneth Lowande & Rachel A. Potter, *Congressional Oversight Revisited: Politics and Procedure in Agency Rulemaking*, 83 J. POL. 401, 406-07 (2020) (discussing the ways that legislators use procedural objections in administrative processes to advance policy objectives).

142. Ritchie, *supra* note 45, at 241 ("Thus, legislators can use the bureaucracy as a way of quietly representing one interest without the knowledge of other groups and principals.").

143. This is in contrast with the goal of building a personalistic relationship with voters. *See supra* Section II.A.

that.[144] But traditional oversight costs precious time and may ultimately present a long road to political gain.[145] Constituency service offers an alternative.[146] As Professors Mathew D. McCubbins and Thomas Schwartz famously observed, rather than going out looking for misdeeds in the administration, constituency service gives legislators a "fire alarm" for problems; all they have to do is answer the phone and their constituents will tell them where the issues are.[147] For this reason, political scientists have long argued that Congress affirmatively structures agencies to permit congressional intervention—building in procedural steps where members can intervene so that members get calls when things go awry.[148]

The few empirical studies that attempt to corroborate these theories examine very informal adjudication that does not require an evidentiary hearing.[149] That distinction is critical: in the vast world of informal adjudication,[150] process exists on a continuum. At one end are agencies with highly streamlined practices.

144. *See* JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 130-44 (1990); Pamela Ban, Ju Yeon Park & Hye Young You, *How Are Politicians Informed? Witnesses and Information Provision in Congress*, 117 AM. POL. SCI. REV. 122, 124 (2023); Steven J. Balla & John R. Wright, *Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy*, 45 AM. J. POL. SCI. 799, 799-803 (2001).

145. *See* Ban et al., *supra* note 144, at 124 (describing the constrained decision of "who—which witnesses—to invite to testify and provide information").

146. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 172-73 (1984).

147. *Id.* For another invocation of the idea of fire alarms in the context of constituency service, see Beermann, *supra* note 23, at 66, which argues that "[t]he proliferation of congressional casework is . . . a reflection" of politicians' reliance on "fire alarm oversight."

148. *See* Beermann, *supra* note 23, at 139 ("Rather than appropriate sufficient funds for agencies to deal with their own problems or avoid them in the first place, Congress redirects funding to their own offices and then helps the squeaky wheel get the grease by acting when a constituent complains. Members of Congress would rather supply the grease themselves (and take the credit for doing so) than provide agencies with the resources to do so." (footnote omitted)). Political scientists have made this point more generally. *See, e.g.*, Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267, 278-79 (John E. Chubb & Paul E. Peterson eds., 1989); *see also* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1767-70 (2007) (summarizing the political-science literature); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440 (1989) (providing one of the earliest accounts of this view, although with a greater focus on rulemaking).

149. Melinda N. Ritchie & Hye Young You, *Legislators as Lobbyists*, 44 LEGIS. STUD. Q. 65, 71-72 (2019).

150. Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 741 (1976) ("[T]he phrase 'informal adjudication' describes about 90 percent of what the government does with respect to the individual . . . .").

Think of the Department of Transportation's review of highway-funding disbursements: these informal adjudications do not trigger individualized due-process concerns.[151] At the other end exist "formal-like" agency-adjudication processes that are "at least as formal as [APA-governed 'formal'] adjudication."[152] The Executive Office of Immigration Review, for instance, conducts immigration-court proceedings that are subject to many statutory, evidentiary, and due-process requirements.[153] More generally, participants have higher expectations of fairness, neutrality, and independence for proceedings *with* evidentiary hearings than those *without*. Unlike past studies, we focus on a setting with evidentiary hearings.

While some studies note the prevalence of congressional interventions, we know little about their impact. A recent ACUS study emphasizes that congressional intervention does not necessarily "expedite a case or ensure a positive outcome,"[154] but caseworkers and agency staff themselves have acknowledged that congressional intervention shapes agency responses.[155] Absent systematic assessment, it is unclear which account is right.

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**151.** Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 404-06 (1971). Specifically at issue in *Overton Park* was the informal adjudication by the Secretary of Transportation, who may not approve any highway project using parkland unless there is no "feasible and prudent alternative." *Id.* at 411 (quoting 23 U.S.C. § 138(a)(3) (1970)). In contemporary administrations, this has entailed an evaluation, and a legal review and concurrence in the evaluation, by the Federal Highway Administration's Chief Counsel Office (typically by an attorney in the division office where the project is proposed), but it does not involve adversarial hearings. *See* Fed. Highway Admin., *Environmental Review Toolkit: Section 4(f) Tutorial*, U.S. Dep't Transp., https://www.environment.fhwa.dot.gov/Env_topics/4f_tutorial/legal.aspx [https://perma.cc/4JVX-ACQA].

**152.** Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 Calif. L. Rev. 141, 147, 154 (2019) (quoting Adoption of Recommendations, 81 Fed. Reg. 94312, 94315 (Dec. 23, 2016)). Note that although more formal schemes might typically avoid procedural-due-process issues because they already have more guarantees built in, these schemes also create greater expectations of procedural regularity by raising individuals' expectations of a trial-like atmosphere. *Cf.* Ben Harrington & Daniel J. Sheffner, Cong. Rsch. Serv., R46930, Informal Administrative Adjudication: An Overview 12, 15 (2021) (noting that "formal-like" schemes typically do "not raise . . . procedural due process issues").

**153.** *See* Harrington & Sheffner, *supra* note 152, at 12. Equal Employment Opportunity Commission adjudication of discrimination claims is another example of adversarial, trial-like proceedings. *Id.*

**154.** *See* Kealy, *supra* note 14, at 8.

**155.** *See, e.g.*, Levin, *supra* note 10, at 20 ("Caseworkers and agency staff almost uniformly agree that a congressional inquiry will probably induce the agency to expedite the constituent's case and to give the case a closer look, perhaps at a higher level in the bureaucracy.").

One reason driving the lack of studies on impact is the lack of available data. One notable exception is a study by Professors Ritchie and Hye Young You,[156] which found that congressional inquiries to the Department of Labor on trade adjustment assistance (TAA) decisions increase the likelihood that a TAA petition is approved.[157] But these decisions hinge more on "legislative facts" than "adjudicative facts"; one such petition can affect upwards of 5,000 workers within a district.[158] And approval of the initial petition does not require an evidentiary hearing,[159] so it is a less formal process than subsequent appellate review. So the question about the impact of congressional interventions in more formal adjudications, requiring individualized (adjudicative) facts and decisions grounded in evidentiary hearings, has remained open.[160] Congressional inquiries into disability decisions at SSA,[161] patent decisions at the Patent and Trademark Office,[162] and veterans' appeals at BVA are thus different from congressional inquiries into the kinds of collective and class-based interests at stake in TAA petitions.

### *C. The Effects of Congressional Intervention on Agencies*

Less has been written on the effect of congressional interventions on agencies themselves. But scholars have addressed three debates relevant to that subject:

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**156.** Ritchie & You, *supra* note 149, at 67.

**157.** *Id.* Of the over 28,000 contacts between members of Congress and the Department of Labor (DOL) in their dataset, only 1,262 reference a specific trade adjustment assistance (TAA) petition number. *Id.* at 72. This contrasts with our dataset in which every contact in our data between a member of Congress and BVA is in reference to a specific case before BVA.

**158.** *Id.* at 67; *see also* Londoner v. City & County of Denver, 210 U.S. 373, 385-86 (1908) (holding that agency actions that affect a relatively small number of persons are more adjudicative in nature); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46 (1915) (holding that a more generalized decision affecting more people is more legislative in nature).

**159.** Benjamin Collins, Cong. Rsch. Serv., R44153, Trade Adjustment Assistance for Workers and the TAA Reauthorization Act of 2015, at 6-7 (2021) (describing the TAA group petition and certification process).

**160.** While Melinda N. Ritchie and Hye Young You focus primarily on approval of the initial TAA petition, the authors conduct additional analysis of the impact of congressional contact on behalf of petitions initially denied by DOL, restricting attention to a small subset of 2,334 petitions. Ritchie & You, *supra* note 149, at 82-83. The reconsideration process for the TAA program is relatively more formalized, although still within the universe of informal adjudication.

**161.** *See* Asimow, *supra* note 34, at 2-3 (noting that disability decisions at SSA are Type A adjudications and are therefore governed by the adjudication sections of the APA).

**162.** *See id.* at 1-2 (noting that patent decisions at the Patent and Trademark Office are Type B adjudications and therefore require evidentiary hearings).

the proper role of politics in administration, the importance of agencies' internal practices, and the history of the petitions process.

First, legal scholars have debated the proper role of politics in administration. As noted above, much of administrative-law doctrine seeks to shield the work of administrative agencies from excessive political influence. In the context of informal rulemaking, courts have transformed the doctrine so that it actually functions to protect agencies' ability to account for political goals. Courts have adopted a form of "don't ask, don't tell": as long as agencies cite apolitical reasons for their decisions, courts won't look behind them to see if politics is really involved.[163] Several legal scholars have called that pretense into question, arguing that political ends have a legitimate place in agency action.[164] Even so, those scholars have explicitly carved out adjudication from rulemaking[165] and agree with the doctrinal view that political pressure in adjudications is generally suspect.[166]

Political scientists, of course, think that agencies take every chance they can get to influence Congress. Agencies build relationships with members of Congress to boost their reputations;[167] they may even modulate the volume of administrative activity to match their understanding of congressional preferences.[168] To be sure, much like the legal literature, the political-science literature has not, to our knowledge, focused on adjudication as a means of agency influence. But one can easily imagine that adjudications offer agencies a chance to build contacts with congressional staff over the status of constituents' pending cases, offering a conduit for tacit communications about budget and staffing.

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**163.** Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1361 (2012) (discussing the Court's openness to agency policy change).

**164.** *See, e.g.*, Watts, *supra* note 1, at 8-9; Daniel Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 64-65 (2022) (endorsing Kathryn A. Watts's proposal).

**165.** *See* Watts, *supra* note 1, at 8 n.14 (justifying the choice to not address the role of politics in adjudication).

**166.** *See, e.g.*, Daniel B. Rodriguez, *Whither the Neutral Agency? Rethinking Bias in Regulatory Administration*, 69 BUFF. L. REV. 375, 399 (2021) ("Another serious threat to objective administrative decisionmaking is the specter of outside influence, typically by political officials, in agency adjudication or targeted rulemaking.").

**167.** *See* George A. Krause & Daniel P. Carpenter, *Reputation and Public Administration*, 72 PUB. ADMIN. REV. 26, 26 (2012).

**168.** At least one study suggests that agencies' investigative efforts are influenced by the composition of Congress and key congressional committees. *See* Charles R. Shipan, *Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence*, 98 AM. POL. SCI. REV. 467, 478 (2004).

Adjudication could be yet another way for agencies to advocate for themselves in Congress.[169]

Second, administrative-law scholars have debated the degree to which agencies' internal and often-informal practices matter to understanding agency behavior. Reacting against the traditional scholarly view that administrative law consists entirely of judicially enforced constraints on agency action,[170] scholars, beginning in the 1980s, called for a reframing of administrative law that was more attentive to how agencies actually work.[171] Recent work has refocused attention on the "processes and guidelines" that agencies use "to structure the actions of [their] own officials and employees."[172] Yet for all the focus on the informal processes agencies use to regulate the conduct of their own officials and employees, the unstated understandings governing agencies' interactions with Congress have merited little attention. Within veterans' law, discretion and indeterminacy abound,[173] creating room for line-level adjudicators to respond, whether consciously or unconsciously, to congressional pressures.

Finally, Professor Blackhawk's important work uncovering the history of petitioning has helped to highlight the roots of administrative error correction in the formal citizen-petition process in Congress.[174] Blackhawk shows how veterans' pensions were among the first subjects of petitions beginning in the Continental Congress of 1776.[175] Overwhelmed with the volume of petitions, however, Congress tried to shunt them onto the courts—but the Supreme Court declined on the ground that its adjudication would be subject to the ultimate

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**169.** Indeed, the Board itself has often struggled mightily with budgetary constraints—like when Congress decided to vastly expand the resources available to VBA (the decisions of which ultimately generate Board appeals) without providing additional resources to the Board to handle resultant appeals. *See* Ridgway, *supra* note 28, at 7-8.

**170.** For a description of this tradition, see, for example, Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 853-54 (2020). For a positive articulation of the theory that administrative law is defined by judicial oversight, defining as "legal black holes" those areas where judicial review is off-limits, see Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096-98 (2009).

**171.** *See, e.g.*, MASHAW, *supra* note 19, at 1-17; Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 446 ("Reacting against the output of the administrative state, we have been led to believe that the judicial process and its procedures, and their promise of insulation from at least some types of political pressure, are the answer to this crisis of confidence.").

**172.** Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1252 (2017).

**173.** *See* James D. Ridgway, Barton F. Stichman & Rory E. Riley, *Not Reasonably Debatable: The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 3 (2016).

**174.** McKinley (Blackhawk), *supra* note 41, at 1538-39.

**175.** *Id.* at 1586.

discretion of the Executive.[176] As the new nation began participating in larger-scale conflicts, the Executive's ability to administer the fast-growing pension system lagged behind veterans' needs, and "the congressional petition process served as a pressure valve for the Pension Bureau."[177] Congress stepped in, but resolving veterans' disputes was overwhelming: one representative estimated that he spent a quarter to a third of his time on veterans' petitions alone, and, by 1920, thousands of petitions would be resolved simultaneously in giant omnibus bills.[178] Congress's frustration with the crush of pensions petitions, and its effort to tamp down its own involvement in resolving administrative errors, resonates directly with the rise of congressional inquiries today.

These scholarly discussions inject needed nuance into the debate over congressional involvement in individual adjudication. Yet the policy world continues to treat constituency service in a surprisingly rosy manner. ACUS describes casework as "an important part of every member of Congress' time in office" and recommends that agencies "improve and strengthen" their capacity to respond to these requests.[179] The ACUS report glosses over some of casework's potential problems and emphasizes that members of Congress see the role as "important" and "even rewarding."[180] We aim to consider the question from a more neutral starting point. There is no doubt members of Congress like casework. They should: it is a lower-cost, apolitical way to make their constituents feel heard, collect information, and gain credit. Individual claimants fortunate to be aided by congressional interventions, too, should like such representation. But the bigger issue is whether casework is compatible with the fair and efficient functioning of adjudicatory systems as a whole. Central to that question is an empirical understanding of the prevalence, distribution, and impact of congressional interventions.

## III. THE IMPORTANCE OF VETERANS' ADJUDICATION

Veterans' adjudication provides a unique and suitable setting in which to assess both empirical and normative questions regarding the impact—or proper impact—of congressional intervention in agency adjudication. It sits on the formal end of mass agency adjudication involving evidentiary hearings.

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176. *See id.* at 1588 (discussing Hayburn's Case, 2 U.S. (2 Dall.) 409, 409 n.* (1792)).

177. *Id.* at 1590.

178. *Id.* at 1590-92.

179. Kealy, *supra* note 14, at 43; Administrative Conference of the United States: Adoption of Recommendations, 89 Fed. Reg. 56276, 56285-86 (July 9, 2024).

180. Kealy, *supra* note 14, at 18-20.

### *A. Institutional and Legal Context*

Established in 1933,[181] BVA provides the highest level of appellate review of claims for benefits within the Department of Veterans Affairs. First, one of 56 VBA Regional Offices (ROs)[182] makes an initial decision on a request for benefits.[183] Claimants can then file a notice of disagreement (NOD) to start an appeal to BVA.[184] In response, the RO files a Statement of the Case with a detailed explanation of the initial decision.[185]

The members of the Board, who are called Veterans Law Judges (VLJs), decide which benefits may be granted or denied on appeal, or remand the claim to the RO.[186] By statute the Board has jurisdiction to review "[a]ll questions of law and fact necessary to a decision by the Secretary of Veterans Affairs under a law that affects the provision of benefits by the Secretary to veterans or their dependents or survivors."[187] This jurisdictional mandate encompasses a wide range of issues, including but not limited to entitlements to "service-connected disability or death," "non-service connected disability pension," "benefits for survivors of certain veterans," and educational assistance and job-training benefits.[188]

Though adjudication within VA is nonadversarial,[189] the Board appeals process includes certain procedural requirements analogous to those in more formal

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**181.** Exec. Order No. 6230 (1933) (repealed 1957).

**182.** Veterans Benefits Admin., *About VBA*, U.S. DEP'T VETERANS AFFS., https://www.benefits.va.gov/benefits/about.asp [https://perma.cc/R9F2-5F48].

**183.** Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The "New Paternalism,"* 1 VETERANS L. REV. 2, 3 (2009).

**184.** *Id.* at 5. Our time period covers cases prior to the implementation of the Veterans Appeals Improvement and Modernization Act, so we describe details for these cases prior to February 19, 2019. These are now referred to as "legacy cases." *M21-5, Chapter 7, Section A — General Information on Legacy Appeals*, U.S. DEP'T VETERANS AFFS., https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000140915/M21-5-Chapter-7-Section-A-General-Information-on-Legacy-Appeals [https://perma.cc/3WH3-GR9V].

**185.** *The Veterans Appeals Process*, U.S. DEP'T OF VETERANS AFFS. 6 (Jan. 16, 2016), https://www.calvet.ca.gov/VetServices/Documents/USDVA%20Veterans%20Appeals%20Process%20Briefing.pdf [https://perma.cc/3LDC-WKTZ].

**186.** *Id.* at 8-9.

**187.** 38 C.F.R. § 20.104 (2024).

**188.** *Id.*

**189.** HARRINGTON & SHEFFNER, *supra* note 152, at 18.

adjudicatory proceedings.[190] The Board reviews most cases de novo.[191] While the Board does not in general give weight to conclusions reached by the RO during the appeals process, the Board is bound by any RO findings favorable to the claimant that are not the result of clear and unmistakable error,[192] a reflection of the "uniquely pro-claimant"[193] process within the VA adjudication system. In addition, new evidence may be developed by VBA (the front-line benefits adjudication agency) through a supplemental statement of the case on a claimant's behalf.[194] The Board makes a final decision based on the record and available evidence.[195]

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**190.** *See* Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 NOTRE DAME L. REV. 1873, 1878-79 (2023). Emily S. Bremer has argued that the existence of such quasi-formal adjudications is an anomaly under the APA, and that the APA's drafters intended to permit only adjudications governed by the APA's formal rules. *Id.* Bremer argues that such pockets of quasi-formal adjudication emerged in part because of Congress's failure to reform preexisting statutes that created alternative adjudicatory regimes. *Id.* at 1881. Indeed, as we discuss below, BVA's unique combination of procedural protections emerged from a patchwork of statutes layered atop one another over time. *See infra* notes 200-206 and accompanying text.

**191.** *See* DANIEL T. SHEDD, CONG. RSCH. SERV., IF12680, THE BOARD OF VETERANS' APPEALS: A BRIEF INTRODUCTION 2 (2024).

**192.** *See* 38 C.F.R. § 3.104(c) (2024) ("Any finding favorable to the claimant made by either a [Department of Veterans Affairs (VA)] adjudicator, as described in § 3.103(f)(4), or by the Board of Veterans' Appeals, as described in § 20.801(a) of this chapter, is binding on all subsequent agency of original jurisdiction and Board of Veterans' Appeals adjudicators, unless rebutted by evidence that identifies a clear and unmistakable error in the favorable finding. For purposes of this section, a finding means a conclusion either on a question of fact or on an application of law to facts made by an adjudicator concerning the issue(s) under review.").

**193.** *See* Reiss & Tenner, *supra* note 183, at 2 & n.5 (citing Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998); Hensley v. West, 212 F.3d 1255, 1262 (Fed. Cir. 2000)).

**194.** *See* VA News, *The Appeals Process: Appeals at the Regional Office Level*, U.S. DEP'T VETERANS AFFS. (Feb. 10, 2016), https://news.va.gov/25738/the-appeals-process-appeals-at-the-regional-office-level [https://perma.cc/Q3PC-3V39] ("Any time you submit more evidence after the [statement of the case (SOC)] or before the Form 9, VBA must conduct another review of the case and issue another SOC—this one called a supplemental statement of the case (SSOC) that includes the additional evidence—or a rating decision, if the additional evidence allows VBA to grant the appeal. This must be done each time you submit new evidence after the SOC.").

**195.** 38 U.S.C. § 7104(a) (2018) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.").

**FIGURE 2. EXAMPLE OF A CONGRESSIONAL INQUIRY WITH THE VETERANS BENEFITS ADMINISTRATION**[196]

**APPENDIX B — CORRESPONDENCE OF SENATOR TIM KAINE**

UNITED STATES SENATE
WASHINGTON, DC 20510-4607

COMMITTEE ON ARMED SERVICES

COMMITTEE ON FOREIGN RELATIONS

COMMITTEE ON THE BUDGET

SPECIAL COMMITTEE ON AGING

Mr. Rudisill states that the VA is only affording him Chapter 30 GI Bill benefits, when he wishes to utilize Chapter 33 benefits. He feels that he is entitled to this version of the GI Bill and had planned to use the benefits to attend Yale University. Your immediate attention and assistance with the concerns expressed in this case would be greatly appreciated.

I would also appreciate being provided a response that I may forward to Mr. Rudisill explaining the status of his concern. Please respond to my Staff Assistant, Evan McWalters. at 611 S. Jefferson Street, Suite 5B. Roanoke, VA 24011. You may also reach Evan by phone at [redacted] or by email at [redacted]

Thank you for your assistance to my constituent.

Sincerely,

/s/

Tim Kaine

The Board has maintained an internal process and staff to handle congressional interventions. Figure 2 presents an example of an inquiry on behalf of a veteran by Senator Tim Kaine. While this inquiry was issued to VBA (not the Board), it is characteristic of letters submitted by members of Congress. When BVA receives a congressional inquiry, first, it requires that all interventions be documented in the electronic-claims folder, which in principle contains all information relating to a claim (e.g., forms, medical records, and service records), although it is unclear whether interventions are a formal part of the claims

196. Joint Appendix at 8a, Rudisill v. McDonough, 601 U.S. 294 (2024) (No. 22-888).

record.[197] Second, as is common with casework, members must provide a signed privacy release from the claimant to engage BVA on case specifics, which may include detailed medical records.[198] Third, upon dispatch of the decision, BVA provides the congressional office with a copy of the Board decision.[199] Fourth, the Chairman of BVA signs all correspondence in response to congressional interventions, the White House, or the Secretary of the VA.[200]

While BVA's statutory mandate explicitly charges the Board with "conduct[ing] hearings and dispos[ing] of appeals properly before the Board in a timely manner,"[201] the churn of "legacy appeals" (those subject to procedures in place before the 2019 reforms)[202] through the VA adjudication system is responsible for much of the delay at BVA. The roots of the crisis of delay at BVA lie in congressional efforts to enhance veterans' due-process rights through an increasingly elaborate process of administrative and judicial appeals.[203] Before the Veterans' Judicial Review Act was enacted in 1988,[204] the system of veterans'

197. Bd. of Veterans' Appeals, *The Purplebook, Version 1.0.2*, U.S. DEP'T OF VETERANS AFFS. 246-47 (Sept. 2018), https://asknod.org/wp-content/uploads/2019/07/bva-purple-book-1.pdf [https://perma.cc/CLJ4-9QT5] (detailing procedures for customer support including instructions for staff to create an electronic record of congressional interest if it is not included in the electronic record).

198. *Id.* at 50, 228. Members of Congress typically make privacy release forms available on their websites and often include an appellant's privacy release with their correspondence. *See* PETERSEN & ECKMAN, *supra* note 11, at 13-14 (including sample documents referencing forms). Members on a Veterans Affairs committee may bypass the written-release requirement if a record is needed for committee activity. *See* 5 U.S.C. § 552a(b)(9) (2018) (providing for disclosure without prior written consent if the disclosure is within the jurisdiction of House or Senate committees).

199. Bd. of Veterans' Appeals, *supra* note 197, at 228 (detailing procedures for the dispatch of Board decisions).

200. *Id.* at 229.

201. 38 U.S.C. § 7101(a) (2018).

202. Legacy appeals are those with decisions dated prior to February 19, 2019, which are subject to the procedures that predated the 2017 Veterans Appeals Improvement and Modernization Act. *See M21-5, Chapter 7, Section A — General Information on Legacy Appeals*, *supra* note 184.

203. Scholars have noted that *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970), judicialized certain forms of agency adjudication. *See, e.g.*, Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1269, 1279 (1975). For the regulations spelling out the internal appeals process, see 38 C.F.R. § 3.2600 (2024). Title III of the Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4113 (1988), established the United States Court of Veterans Appeals. The Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341, later changed the Court's name to the United States Court of Appeals for Veterans Claims (CAVC).

204. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

benefits adjudication lived in "splendid isolation."[205] At the time, the Department of Veterans Affairs was the only administrative agency not subject to judicial oversight.[206] While Congress found "little evidence" that "the current preclusion of judicial review of BVA decisions" resulted in claimant dissatisfaction, it nonetheless determined that the "possibility of real injustices," combined with the dignitary harms of treating veterans' benefits as "mere gratuities," warranted a much more elaborate system of review.[207] To that end, the Veterans' Judicial Review Act permitted veterans to appeal adverse BVA decisions to a new Article I court, now known as the Court of Appeals for Veterans Claims (CAVC), and thereafter to the Federal Circuit.[208]

However laudable the goal of introducing judicial review, and whatever its potential dignitary benefits for some claimants, the resulting adjudicatory process "takes dramatically longer to complete without a corresponding increase in accuracy."[209] In fiscal year 1991—the first year for which data are available—a veteran waited just under one year (345 days), on average, between submitting their appeal papers and receiving a decision from BVA.[210] By fiscal year 2023, the

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**205.** Brown v. Gardner, 513 U.S. 115, 122 (1994) (quoting H.R. REP. NO. 100-963, pt. 1, at 10 (1988)).

**206.** *See History*, U.S. CT. APPEALS FOR VETERANS CLAIMS, https://m.uscourts.cavc.gov/History.php [https://perma.cc/B6DB-RP6B] ("Until CAVC was established in 1988, however, VA remained the only administrative agency that operated virtually free of judicial oversight. VA's Board of Veterans' Appeals . . . provided the final decision on a veteran's claim.").

**207.** S. REP. NO. 100-418, at 30 (1988); *see also* H.R. REP. NO. 100-963, pt. 1, at 26 (1988) (explaining that "the committee believes that veterans presently receive every possible consideration when the BVA reviews a case" but nonetheless concluding that review by a separate Article I court, and ultimately by Article III courts, would promote the perception of oversight by decision makers who have as their "sole function deciding claims in accordance with the Constitution and the laws of the United States").

**208.** Veterans' Judicial Review Act § 301(a), 102 Stat. at 1415 (codified as amended at 38 U.S.C. § 7261(a)(3)-(4)). One might wonder why Congress did not simply provide for de novo review in the federal courts, rather than creating a separate Article I tribunal to filter claims before they could reach an Article III courthouse; faster access to judicial review might be a position more consistent with the desire for effective review reflected in this legislation. (The authors thank Emily Bremer for this point.) The answer, apparently, is that Congress was worried about "the burden that this legislation [would] impose on the Federal court system." *See* S. REP. NO. 100-418, at 31. Just as was true in the background of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), the scale of the veterans' benefits system simply outstrips the capacity of the Article III courts to provide review in the first instance.

**209.** James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 268 (2010).

**210.** We obtain this quantity by adding the time elapsed between "Substantive Appeal Receipt" and "Issuance of BVA Decision." *Annual Report of the Chairman*, BD. OF VETERANS' APPEALS 8 (1992), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA1991AR.pdf [https://perma.cc/YUY4-8RT7].

average wait time at BVA had grown to more than two years (735 days) for legacy appeals.[211] In recent years, remand rates from BVA to VBA have ranged from 38.8% to 46.04%,[212] meaning that even a BVA decision does not end a case—the veteran must wait for the RO to reconsider its decision and may have to appeal again.

Policymakers became aware of this relationship almost immediately after the new procedural protections became law. In 1993, the Secretary of Veterans Affairs proposed the Veterans Appeals Improvement Act to Congress, pleading that changes were "urgently needed" because of the "growing demand for personal hearings" resulting from the 1988 reforms.[213] Congress acted on that request the following year, enacting a number of simplifying procedures in the hopes of better balancing procedural fairness with economy.[214] Congress also introduced one element that the executive branch had not requested in 1993. While the Act generally required appeals to be decided in the order received, Congress permitted the Board to "advance[]" a case on its docket for cause.[215] That provision, explained the Chairman of the Senate Committee on Veterans Affairs, was meant to provide faster hearings to appellants who were "seriously ill" or "under severe financial hardship"—one of several "immediate, short-term solutions to the ever-increasing average response time at the Board" meant as a bridge to "long-term, fundamental changes."[216]

Unsurprisingly, the promise of fundamental change was fleeting notwithstanding procedural reforms enacted by Congress to streamline the appeals process. Even major overhauls, like the Veterans Appeals Improvement and Modernization Act (AMA) of 2017, which expanded the set of initial review options available to claimants to reduce decision wait times,[217] have failed to alleviate the

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**211.** Similar to the 1991 data, we obtain this quantity by adding the time elapsed between "Board Receipt of Certified Appeal" and "Issuance of Board Decision." *Annual Report: Fiscal Year (FY) 2023*, Bd. of Veterans' Appeals 43 (2024), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/bva2023ar.pdf [https://perma.cc/S6XC-837K].

**212.** *Periodic Progress Report on Appeals P.L. 115-55, § 3*, U.S. Dep't of Veterans Affs. 39 & tbl.3 (Feb. 2024), https://benefits.va.gov/REPORTS/AMA/CMR/2024/appeals-report-cmr-202402.pdf [https://perma.cc/UFQ2-WJ7T].

**213.** *See* Gillespie V. Montgomery, Government Reform and Savings Act of 1993, H.R. Rep. No. 103-366, pt. 2, at 32-33 (1993) (reprinting Letter from Jesse Brown, Sec'y, Dep't of Veterans Affs., to Rep. Thomas S. Foley, Speaker, House of Representatives (Aug. 13, 1993)).

**214.** *See generally* Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994, Pub. L. No. 103-271, 108 Stat. 740 (enacting these simplifying procedures).

**215.** *See id.* § 7, 108 Stat. at 742.

**216.** *See* 140 Cong. Rec. 8400-02 (1994) (statement of Sen. Rockefeller).

**217.** Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. 115-55, sec. 2, 131 Stat. 1105, 1108-09 (codified as amended at 38 U.S.C. § 5104C).

burden of legacy appeals at BVA.[218] Despite early evidence of improvements related to the legacy appeals system, greater trust, and lower remand rates, veterans continue to endure long wait times.[219] Those who take advantage of the direct-review process under the AMA still wait 314 days on average to receive a decision following a notice of disagreement.[220] BVA struggles to issue decisions faster than new cases are filed.

Meanwhile, Congress continues to contemplate legislative reforms that would introduce additional procedural hurdles for BVA. Just recently, during the 118th Congress in 2023, legislators proposed a bill to improve the clarity of BVA decisions by requiring additional information and justification for evidence that was not considered.[221] This would almost certainly come at the expense of expedience. Recognizing the relationship between the creation of new procedural requirements and BVA's chronic backlogs, a recent Congressional Research Service primer cautions that "[w]hen considering new legislation that would impose additional procedural requirements on the BVA, Congress may wish to weigh the impact those additional requirements may have on the BVA's ability to efficiently conclude appeals presented to it."[222]

### *B. The Unique Setting of BVA Appeals*

Veterans' adjudication sits on the more formal side of the adjudication spectrum. Decisions must be grounded in the claims folder and an extensive body of veterans' law requiring factual and legal rationales for each decision, including

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218. *Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans' Claims on Appeal: Hearing Before the H. Subcomm. on Disability Assistance and Mem'l Affs. of the H. Comm. of Veterans' Affs.*, 118th Cong. 25 (2023) (statement of Michael Figlioli, Director, National Veterans Service, Veterans of Foreign Wars of the U.S.) ("Under the legacy appeal system, this is where the appeals often get stuck in the churn based on docket date, then awaiting assignment and review by their advocate . . . . [Veterans of Foreign Wars] has eliminated its excess workload of legacy appeals. For more than a year, we have been at functional zero, which means that legacy appeals continue to churn through the remand system, reappearing at the BVA at any time.").

219. *Annual Report: Fiscal Year (FY) 2023*, *supra* note 211, at 18.

220. *See id.* at 44.

221. Veteran Appeals Decision Clarity Act, H.R. 5891, 118th Cong. (2023). Current law requires BVA to provide a general statement "reflecting whether evidence was not considered in making the decision because the evidence was received at a time when not permitted." 38 U.S.C. § 7104(d)(2) (2018). The proposal would have added a requirement for BVA to identify "the time when such evidence was received and the provision . . . that establishes that such evidence may not be received at such time." H.R. 5891, § 2(a)(1)(C).

222. *See* SHEDD, *supra* note 191, at 2.

formal criteria for how and when cases are advanced on the docket.[223] Case volume and the number of errors are high, so congressional intervention is also likely to redistribute resources (e.g., ordering an additional diagnostic test at VA) across claimants. In contrast to TAA petitions, these are more formal judicial decisions and so provide an important test for congressional intervention and the separation of powers.[224]

BVA is an important and unique setting from which to understand congressional intervention. First, there are no existing studies of congressional interventions in more formal adjudications requiring an evidentiary hearing. Unlike previous empirical studies, the beneficiary of congressional intervention to BVA is, ultimately, an individual veteran. This contrasts with research that assesses the impact of congressional intercession with bureaucracy on behalf of broader constituencies,[225] where outreach more closely resembles policy advocacy and, therefore, may be construed as closer to Congress's legislative role.

Second, we rely on rich internal administrative data, used by BVA itself to administer its adjudicatory mechanisms. This provides us with rich information about individual appeals. What is particularly unique is that our dataset contains a comprehensive catalog of correspondence from members of Congress (as well as the White House and the Secretary of the VA) with BVA over an extended period. We are able to track procedural and substantive outcomes over time and employ empirical strategies that identify when BVA appears to exercise procedural discretion to advance a case.

Third, we assess the distributive consequences of congressional intervention across all cases pending before BVA. As noted earlier, Professor Mashaw characterized congressional interventions in agency adjudication as make-work that does not influence specific case dispositions but potentially worsens administration overall by draining resources.[226] Our data allow us to explore existing critiques that casework distorts agency resources and privileges certain constituencies over others.[227] Members of Congress have wide discretion in conducting

**223**. 38 U.S.C. §§ 7104, 7107(b) (2018); 38 C.F.R. § 20.902(c) (2024).

**224**. In the framework of Michael Asimow, *supra* note 34, at 1, these are Type B adjudications.

**225**. *See, e.g.*, Ritchie & You, *supra* note 149, at 66.

**226**. *See supra* notes 19-21 and accompanying text.

**227**. *See, e.g.*, Janet A. Gilboy, *Penetrability of Administrative Systems: Political "Casework" and Immigration Inspections*, 26 LAW & SOC'Y REV. 273, 274 (1992) (discussing legislative casework as possibly "result[ing] in special deference being paid to inquiries, particularly when the one initiating an inquiry is a powerful political actor on a substantive committee or appropriations subcommittee relating to agency business"). This suggests the potential for unevenness in the responsiveness of agencies based on the member of Congress inquiring.

casework,[228] and the extent to which members prioritize casework can vary tremendously.[229] Our setting allows us to characterize how congressional interventions reallocate resources across types of claimants and within the agency.

Last, VA is among the agencies most frequently contacted by members of Congress.[230] A commitment to ensuring that veterans have access to medical services or other benefits transcends party lines. Both Democratic and Republican representatives engage in veterans' issues. The 2024 Democratic Party platform included a vow to "meet[] our nation's sacred obligation to veterans."[231] Recent Republican Party platforms likewise expressed the importance of maintaining a commitment to care for veterans—though the 2016 platform also included pointed criticism of VA: "The VA has failed those who have sacrificed the most for our freedom. The VA must move from a sometimes adversarial stance to an advocacy relationship with vets. . . . We cannot allow an unresponsive bureaucracy to blunt our national commitment."[232]

Our work shifts the focus from VA to its appeals process, where we show that the volume of congressional intervention has increased sharply over time. By documenting the regularity of congressional contact during the appeals process, our study raises new questions about the proper influence of congressional inquiries in an important, nonadversarial adjudicatory setting where expectations of due process might be especially elevated.

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**228.** *See* Sarah J. Eckman & R. Eric Petersen, Cong. Rsch. Serv., R44696, Casework in Congressional Offices: Frequently Asked Questions, at i (2021) (referencing the "relative autonomy afforded to congressional offices regarding casework").

**229.** *See, e.g.*, Larry P. Ortiz, Cindy Wirz, Kelli Semion & Ciro Rodriguez, *Legislative Casework: Where Policy and Practice Intersect*, 31 J. Socio. & Soc. Welfare 49, 50 (2004) ("At the federal level, all congressional district offices engage in some level of legislative casework, but it varies significantly from one district to another. Some congressional offices place a high priority on direct constituent services, while others place less of a priority on it.").

**230.** *See* Kealy, *supra* note 14, at 20.

**231.** *2024 Democratic Party Platform*, Am. Presidency Project (Aug. 19, 2024), https://www.presidency.ucsb.edu/documents/2024-democratic-party-platform [https://perma.cc/84S6-498D].

**232.** *2016 Republican Party Platform*, Am. Presidency Project (July 18, 2016), https://www.presidency.ucsb.edu/documents/2016-republican-party-platform [https://perma.cc/8R5L-UYCU]; *accord 2024 Republican Party Platform*, Am. Presidency Project (July 8, 2024), https://www.presidency.ucsb.edu/documents/2024-republican-party-platform [https://perma.cc/QP7Y-NB4K] ("We will restore Trump Administration reforms to expand Veterans' Healthcare Choices, protect Whistleblowers, and hold accountable poorly performing employees not giving our Veterans the care they deserve.").

## IV. RESULTS

We present our results on the prevalence of congressional interventions, their distribution across districts and amongst the veteran population, and their impact on case outcomes. Finally, we assess possible mechanisms by which congressional intervention may impact individual cases.

We establish four key results. First, the *prevalence* of congressional interventions is high. Nearly all congressional districts have at least one congressional intervention in each congressional term during our study period. Second, the *distribution* of interventions varies widely across congressional districts, over time, and, most notably, across the veteran population. Third, we document evidence of substantial *impact* on procedural and substantive case outcomes. Congressional interventions increase the likelihood of (1) a case being advanced (i.e., accelerated) on the docket by a factor of two (and this acceleration occurs when no express statutory criterion is documented) and (2) a favorable disposition by 34%. Fourth, we offer evidence that one *mechanism* of the effect of congressional interventions is the increase in the number of issues documented.

While we describe our data and methods in greater detail in the Appendix, we provide a brief overview of our methods before presenting our results. Our results come from a dataset of all appeals to BVA with appeals originating between 2003 and 2017,[233] drawn from an internal database used to manage and track appeals to BVA. We restrict attention to appeals originating between 2003 and 2017 as criteria for docket advancement remained consistent following VA's 2003 final rule to explicitly include "advanced age" as a "sufficient cause" for advancement.[234]

The data contain detailed case information for the 2,233,128 unique appeals to BVA filed within our study period. For each of those appeals, the database records procedural updates (e.g., notice of disagreement filing date, hearing dates, final decision date, and advancement on the docket), appellant characteristics (e.g., service period, gender, and age), appeal outcomes (e.g., issues allowed, denied, remanded, or vacated) and, finally, documentation of correspondence with BVA regarding an appeal.[235] Because some veterans file multiple appeals, our data include actions filed by 1,429,504 unique individuals. We match appellants to congressional districts based on their zip code and state. We

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**233.** In BVA's terminology, an appeal originates when the veteran files a "notice of disagreement" (NOD) with a decision by VBA, so these are cases in which that notice was filed between 2003 and 2017. *See supra* note 194 and accompanying text.

**234.** See 38 U.S.C. § 7107(b)(3)(C) (2018); 38 C.F.R. § 20.902(c) (2024). The dataset is more fully described in Ho et al., *supra* note 31, at 248.

**235.** This is not an exhaustive description of the information in the BVA database, but we note here only the most salient variables for our empirical analysis.

exclude from our study appeals filed by veterans living in territories without congressional representation.[236] After imposing these restrictions, our study includes 1,947,007 unique appeals to BVA on behalf of 1,252,878 unique appellants and 79,032 inquiries by members of Congress about 45,266 unique appeals.

We combine our appeals data with biographical data for members of Congress and district-level demographic characteristics. We use the CQ Press database of member profiles for the 108th through 115th Congresses, which includes information on biographical characteristics of members of Congress (e.g., full names, chamber, district, birth date, party affiliation, gender, race, religion, military-service record, educational attainment, professional background, and dates of service in office).[237] We generate records of turnover by House seat using data from the MIT Election Data and Science Lab.[238] We obtain congressional-district-level characteristics, including median household income, educational attainment, employment, and population density,[239] and use veteran population estimates compiled by the Department of Veterans Affairs.[240] The Appendix provides a diagram of the data sources used in our analysis.

### *A. Prevalence of Congressional Intervention*

Congressional intervention is a common, increasing, and, in some instances, persistent feature of adjudication at BVA. Congress intervened in more than 3,250 appeals in the average year—just over 2% of all appeals. Given the effort required to seek congressional assistance, that is a significant number: it is almost as common for veterans to call on their members of Congress for help with

**236.** Only 3.45% of appellants resided in such territories during our study period.

**237.** *Congress Collection*, CQ PRESS, https://library.cqpress.com/congress [https://perma.cc/GD3Z-F2WC].

**238.** MIT Election Data & Sci. Lab, *U.S. House 1976-2022*, HARV. DATAVERSE (Mar. 8, 2024) [hereinafter MIT Election Data & Sci. Lab, *U.S. House 1976-2022*], https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/IG0UN2 [https://perma.cc/3H36-5KC5]; MIT Election Data & Sci. Lab, *U.S. Senate Statewide 1976-2020*, HARV. DATAVERSE (Nov. 27, 2023) [hereinafter MIT Election Data & Sci. Lab, *U.S. Senate Statewide 1976-2020*], https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/PEJ5QU [https://perma.cc/WX37-7XQS].

**239.** Ella Foster-Molina, *Historical Congressional Legislation and District Demographics 1972-2014*, HARV. DATAVERSE (Apr. 12, 2017), https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/CI2EPI [https://perma.cc/28QP-C9DD].

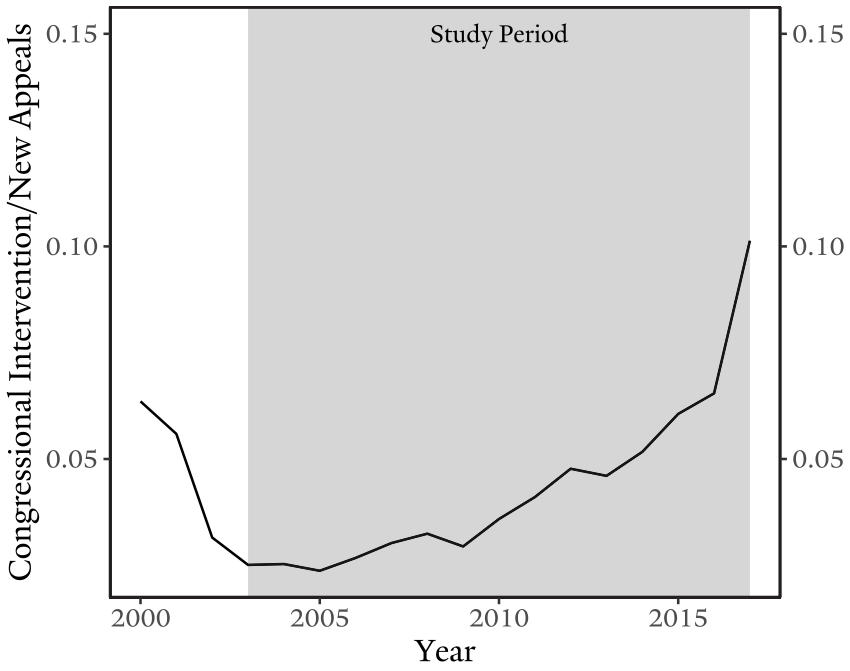
**240.** Nat'l Ctr. for Veterans Analysis & Stat., *Geographic Distribution of VA Expenditures (GDX) Reports*, U.S. DEP'T VETERANS AFFS. (May 30, 2024), https://www.va.gov/vetdata/expenditures.asp [https://perma.cc/XBN5-8HPZ].

BVA as it is for them to appeal BVA's decisions to the CAVC,[241] the legal body with exclusive jurisdiction to review BVA decisions.[242] The prevalence of congressional inquiries has also grown significantly. (Because VA internally refers to congressional "inquiries," we use the terms "intervention" and "inquiry" interchangeably here.) Figure 3 plots the number of congressional interventions relative to the number of new appeals on the y-axis by the year in which the congressional intervention is submitted, or the appeal is filed, on the x-axis. The rate of intervention nearly doubled between 2003 and 2017. That is all the more striking because the volume of new appeals grew sharply over the same period, indicating that congressional interventions have increased even relative to the growing caseload.

**241.** Specifically, whereas we observed approximately 3,250 congressional interventions per year in our study period, our calculations suggest that about 3,560 CAVC appeals were filed annually in the same period. For the number of CAVC appeals, see *Court Reports / Budget Submissions*, U.S. Ct. Appeals for Veterans Claims, https://www.uscourts.cavc.gov/report.php [https://perma.cc/V3EZ-PQXZ], which contains annual reports with data on appeals volumes dating back to 2000.

**242.** 38 U.S.C. § 7252(a) (2018) ("The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals.").

**FIGURE 3. RATE OF CONGRESSIONAL INTERVENTION PER NEW APPEALS FILED**




Moreover, congressional interventions comprised nearly 10% of all correspondence received between 2003 and 2017. That is more than it first appears: the most common category of correspondence is "evidence or argument," much of which consists of medical documentation submitted by a veteran or their advocate, as the vast majority of VA claims are for disability benefits.[243] Congressional interventions were far more frequent than correspondence recorded by BVA from elsewhere in the executive branch. Over 97% of "political" inquiries were from members of Congress, whereas only around 2% were correspondence from the Secretary of the VA or the White House.

Last, repeated inquiries on behalf of individual claimants are common. Nearly 40% of appeals with at least one congressional inquiry received multiple inquiries: almost 5% received at least five congressional inquiries, and 0.5%

**243.** *See* Asimow, *supra* note 34, at 84 ("Assessing claims for service-connected disability (by far the most common type of claim) require[s] complex medical judgments."); *Annual Report: Fiscal Year (FY) 2023*, *supra* note 211, at 43-44 ("The clear majority of appeals considered by the Board involve claims for disability compensation, and Veterans Benefits Administration (VBA) is the responsible party when these appeals are located at the [agency of original jurisdiction].").

received upwards of ten inquiries. Overall, only around 35% of congressional interventions represented first-time inquiries on behalf of an appeal. The bulk of congressional interventions arrived on behalf of appeals that had already received congressional attention.

### *B. Distribution of Congressional Intervention*

Do congressional interventions benefit all types of claimants? Or does this form of petitioning Congress help some veterans more than others? We begin to answer these questions by describing the characteristics of appeals that do and do not receive congressional interventions. Table 1 reports appellant and district-level characteristics for appeals with and without congressional intervention, with averages or proportions presented in the first two columns and a measure of statistical significance in the third column.[244] Due to the large number of appeals in our study, even small differences between appeals with and without congressional intervention are statistically significant.[245] Because of this, we highlight substantively significant differences in bold.[246]

We find that the appellants who benefit from congressional interventions are different along several dimensions than those who do not. They are about 50% more likely to be represented by an attorney; and on average, they are about a year and a half older and two percentage points more likely to be male.[247] We also observe differences in the characteristics of home congressional districts of appellants who do and do not receive congressional interventions. Appellants

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**244.** We rely on veterans' birth dates as recorded in BVA's data to calculate their age at the time of the appeal; we rely on the same source when studying formal advancement criteria for advanced age below. While birth dates are missing for 43% of appellants, using date of birth to construct a measure of advanced age yields more coverage than relying exclusively on BVA's advanced-age flags. We adjust *p*-values for the *t*-statistic using a Benjamini-Hochberg correction for multiple-hypothesis testing. *See generally* Yoav Benjamini & Yosef Hochberg, *Controlling the False Discovery Rate: A Practical and Powerful Approach to Multiple Testing*, 57 J. ROYAL STAT. SOC'Y SERIES B (METHODOLOGICAL) 289 (1995) (explaining the correction method).

**245.** The sampling variability decreases as the sample size increases – the larger the sample size, the more representative of the true population the sample is likely to be. We discuss the statistically significant differences between appeals with and without intervention. For completeness, we also use a Cohen's *d* test and highlight differences indicating "small," "moderate," or "large" effects. *See, e.g.*, Jacob Cohen, *Statistical Power Analysis*, 1 CURRENT DIRECTIONS PSYCH. SCI. 98, 98-99 (1992); Gail M. Sullivan & Richard Feinn, *Using Effect Size – Or Why the P Value Is Not Enough*, 4 J. GRADUATE MED. EDUC. 279, 279-280 (2012).

**246.** Because of the large number of data points, many of the differences we report are statistically significant even when they are tiny in fact. For this reason, we focus on practical rather than statistical significance.

**247.** While the latter might seem smaller, they reflect substantively important dimensions across generations of veterans and the integration of women into the military.

with inquiries are more likely to have legislators with military-service records and are more likely to come from districts with lower levels of unemployment, lower levels of educational attainment, and larger populations of both Black and white residents.[248] The proportion of appellants who do and do not receive inquiries does not substantively differ by representatives' political party or legal background.

**TABLE 1. CHARACTERISTICS OF APPEALS WITH CONGRESSIONAL INQUIRIES[249]**

| | No Intervention | Congressional Intervention | *p*-value |
|---|---|---|---|
| Appellant Demographic Characteristics | | | |
| Male | 0.93 | 0.95 | 0.00 |
| Age at NOD (Years) | 56.19 | 57.65 | 0.00 |
| Documentation | | | |
| **Issues per Appeal** | **2.30** | **2.97** | 0.00 |
| Financial Hardship | 0.00 | 0.02 | 0.00 |
| Terminal Illness | 0.00 | 0.00 | 0.00 |
| **Advanced Age** | **0.05** | **0.09** | 0.00 |
| **No AOD Criteria Documented** | **0.95** | **0.89** | 0.00 |
| Period of Service | | | |
| World War II (9/16/40-7/25/47) | 0.02 | 0.05 | 0.00 |
| Peacetime (7/26/47-6/26/50) | 0.01 | 0.03 | 0.00 |
| **Korean Conflict (6/27/50-1/31/55)** | **0.03** | **0.07** | 0.00 |
| **Post-Korea (2/1/55-8/4/64)** | **0.05** | **0.14** | 0.00 |
| **Vietnam Era (8/5/64-5/7/75)** | **0.21** | **0.47** | 0.00 |
| **Post-Vietnam (5/8/75-8/1/90)** | **0.15** | **0.31** | 0.00 |
| **Persian Gulf (8/2/90-Present)** | **0.11** | **0.19** | 0.00 |
| Representation at BVA | | | |
| Unrepresented | 0.09 | 0.09 | 0.00 |
| Attorney | 0.07 | 0.12 | 0.00 |

248. Other studies find that lower-income constituents are more likely to contact members of Congress on certain issues. *See* John R. Johannes, *The Distribution of Casework in the U.S. Congress: An Uneven Burden*, 5 LEGIS. STUD. Q. 517, 531 (1980) (finding that "[l]ower education respondents tended to make requests dealing with social security, jobs, military discharges," whereas "[b]etter educated respondents tended to contact Congress on tax matters, for information and documents, for appointments to military academies, and to express opinions").

249. Table 1 presents characteristics of appeals by congressional-inquiry status. Congressional inquiries represent appeals with at least one congressional inquiry. Note that for advancement on the docket (AOD) criteria, the shares do not sum to 1 due to rounding. *P*-values are adjusted for multiple-hypothesis testing using the approach by Benjamini & Hochberg, *supra* note 244. Bolded values correspond to Cohen's *d* effect size of at least 0.2.

| | No Intervention | Congressional Intervention | *p*-value |
|---|---|---|---|
| Service Org or Agency | 0.82 | 0.77 | 0.00 |
| House Representative Characteristics | | | |
| Veteran | 0.21 | 0.25 | 0.00 |
| Female | 0.14 | 0.13 | 0.00 |
| Incumbent | 0.79 | 0.79 | 0.02 |
| Republican | 0.57 | 0.57 | 0.01 |
| Legal Background | 0.35 | 0.35 | 0.00 |
| House Committee Membership | | | |
| Veterans' Affairs | 0.09 | 0.10 | 0.00 |
| Ways and Means | 0.08 | 0.08 | 0.00 |
| Appropriations | 0.14 | 0.16 | 0.00 |
| Budget | 0.10 | 0.11 | 0.00 |
| Congressional District Characteristics | | | |
| **Median Income** | **$52,517.82** | **$47,653.01** | 0.00 |
| Median Age | 37.22 | 37.55 | 0.00 |
| **Unemployment Rate (%)** | **13.04** | **9.92** | 0.00 |
| **Population Out of the Labor Force (%)** | **31.62** | **35.64** | 0.00 |
| High School Education (%) | 85.00 | 84.10 | 0.00 |
| College Education (%) | 25.73 | 24.10 | 0.00 |
| Black Population (%) | 14.56 | 15.70 | 0.00 |
| White Population (%) | 67.96 | 70.19 | 0.00 |
| Total | | | |
| Unique Appeals | 1,901,741 | 45,266 | |
| Unique Appellants | 1,242,789 | 31,703 | |

We also find wide variation in the congressional districts from which inquiries arise. In Table 2, we divide congressional districts in the 110th and 112th Congresses into two groups according to the number of inquiries for that Congress: one group contains the bottom three quartiles (i.e., the bottom 75%) of districts, while the other group contains the top quartile.[250] Comparing districts with the greatest number of inquiries with all others, we again find that they tend to have lower median incomes, lower levels of educational attainment, and higher shares of both Black and white residents, even after adjusting for veteran population.[251]

250. We focus on these sessions as they are representative of how district demographic characteristics are associated with congressional intervention. These two Congresses fall in the middle of our study period and span several years and shifts in the partisan composition of Congress.

251. Adjusting for veteran population ensures that high levels of inquiries are not simply an artifact of larger veteran populations at the district level. Without adjusting for veteran population

**TABLE 2. AVERAGE DISTRICT-LEVEL DEMOGRAPHIC CHARACTERISTICS BY NUMBER OF INQUIRIES**[252]

| | 110th Congress | | 112th Congress | |
|---|---|---|---|---|
| | Bottom 75% | Top 25% | Bottom 75% | Top 25% |
| Congressional Inquiries | < 19 | ≥ 19 | < 32 | ≥ 32 |
| Median Income | $57,008.00 | $45,761.00 | $57,472.00 | $45,953.00 |
| Median Age | 36.7 | 37.9 | 37.2 | 38.4 |
| Unemployment Rate (%) | 6.5 | 6.5 | 8.7 | 9.1 |
| Population Out of the Labor Force (%) | 33.2 | 36.6 | 34.2 | 38 |
| High School Education (%) | 84.8 | 84.5 | 85.5 | 84.1 |
| College Education (%) | 29.1 | 22.8 | 26.9 | 23.1 |
| Black Population (%) | 12.9 | 14.8 | 12.3 | 18.6 |
| White Population (%) | 62.2 | 74.1 | 61.1 | 69.8 |

Some districts have no inquiries, while other districts average between one to upwards of 3.6 inquiries *per week*—a particularly staggering number given BVA is just one agency with which members of Congress may have contact. Figure 4 displays the geographic distribution of inquiries adjusted by the veteran population for congressional districts of the 114th Congress, showing substantial variability.

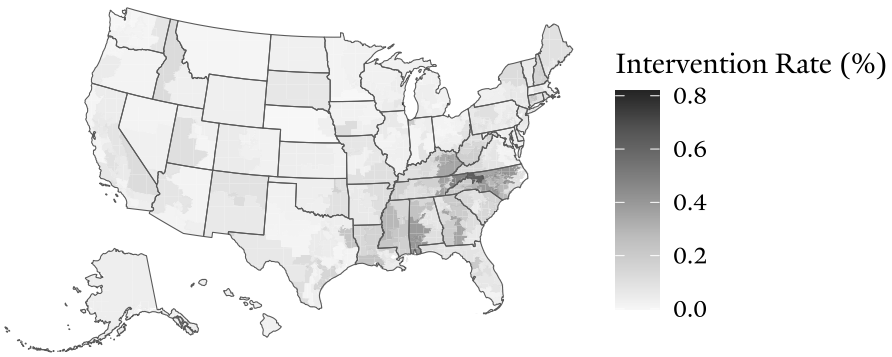
What explains this variance? Some members of Congress might care more about constituency service or have more effective staff. As casework management is left to the discretion of individual members, some congressional offices may simply have less robust casework practices—hiring fewer caseworkers, managing inquiries less efficiently, or possibly relying on less experienced caseworkers who have not forged agency contacts. Given the limited direct involvement by members of Congress in casework and the extensive reliance on staff, inquiries may well be driven by the idiosyncratic experience and expertise of the congressional staff that handle the bulk of casework. Similarly, at least in the case of BVA, the agency itself does not advertise congressional intervention; veterans must learn elsewhere that contacting a member of Congress can help with their

within a district, differences between high-inquiry districts and low-inquiry districts may simply be capturing differences between districts with larger and smaller veteran populations, rather than differences between districts with more and fewer inquiries. Furthermore, controlling for veteran population ensures that differences in inquiry behavior are not driven by vastly different opportunities for casework on behalf of veterans.

**252.** Table 2 displays average district-level demographic characteristics for districts in the bottom three quartiles of inquiries and districts in the top quartile of inquiries by congressional term. Districts with the highest inquiries are generally poorer, less educated, and have greater percentages of white residents.

case.[253] It may also be reasonable to think that there is considerable variance in the effectiveness of members' efforts to notify their constituents that interventions are available.

**FIGURE 4. CONGRESSIONAL INTERVENTION RATE BY DISTRICT (114TH CONGRESS)**[254]




An alternative possibility is that the differences in inquiry rates across districts reflect differences in members' policy priorities. That is, members who care more about veterans' issues might do a better job of intervening with BVA. To probe the extent to which inquiry rates capture differences in the pro-veteran priorities of individual members of Congress, we consider whether the legislative behavior of House representatives—specifically, bill sponsorship and voting behavior—bears any relationship to the number of inquiries submitted to BVA. To capture members' policy preferences, we rely on reports released in 2008 and 2010 by Iraq and Afghanistan Veterans of America (IAVA), an advocacy organization, which rates each member of Congress based on their support for pro-veteran bills over the prior two years.[255] We compare legislators' IAVA scores to the volume of congressional inquiries to BVA made on behalf of their

253. *See infra* Section VI.A.2 (discussing the policy problems associated with BVA not advertising its own reliance on congressional inquiries).

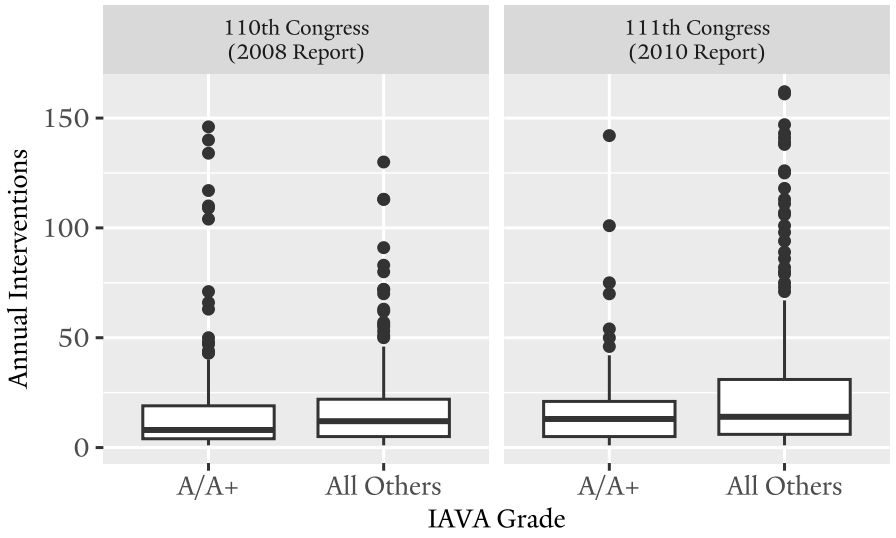
254. The inquiry rate is defined as the total number of congressional inquiries, divided by the district's veteran population.

255. *See generally 2010 Congressional Report Card*, IAVA ACTION FUND, https://www.politico.com/pdf/PPM170_iava_action_2010_report_card_emg.pdf [https://perma.cc/42GY-7JF8] (reporting the 2008 Report Card scores alongside the 2010 scores).

constituents. If inquiry rates reflect policy preferences or if requests for assistance inform members' legislative views, we should expect that higher IAVA scores correlate with higher inquiry rates.

We find that involvement in BVA casework has no significant correlation with legislative priorities on veterans' issues. Districts with high levels of congressional inquiries are not necessarily more likely to be represented by a member of Congress with a high IAVA mark. In the 111th Congress, members rated highest and lowest by IAVA were virtually indistinguishable in the degree of effort they put into constituency service: in the median district with a member of Congress rated "A" or "A+," constituents received 12.5 inquiries, compared with thirteen inquiries in districts with lower-rated members. Likewise, in the 110th Congress, members friendlier to veterans' policy priorities appear if anything less likely to attend to individual veterans' needs: while the difference remains statistically insignificant, higher-rated members' constituents received a median of 7.5 inquiries compared with eleven inquiries for lower-rated members' constituents.

**FIGURE 5. NUMBER OF INTERVENTIONS BY IAVA GRADE**[256]




256. Each plot divides legislators into those who received an "A" or "A+" rating in Iraq and Afghanistan Veterans of America's 2008 and 2010 scorecards, respectively, and those who did not. For each category, the box denotes the middle 50% of legislators and the thick middle line represents the median legislator.

The weak or nonexistent relationship between constituency service and policy suggests that these two kinds of representation are orthogonal to one another. Rather than using constituency service to inform, enhance, or complement legislation, members appear to treat these as different representational categories with little inherent relationship to each other. Indeed, there may even be a partisan dimension to this phenomenon: while Republicans were rated lower by IAVA, with only about 12% receiving an "A" or "A+" compared with 60.7% of Democrats, they were more engaged in constituency service, with the median Republican-represented district receiving thirteen inquiries compared with nine for districts represented by Democrats. While it remains possible that congressional interventions serve as a way for agencies to communicate information to Congress, we cannot detect the effect of any such informational transfer.

This observation heightens the tension between congressional interventions in agency adjudication and the formalist view of Congress as an exclusively legislative body, a point to which we return in Section VI.B below. While classic accounts of casework suggest that they are "fire alarms" that enable members of Congress to improve agency operations through legislation,[257] congressional interventions appear to be a different form of representation with little connection to the legislative process in practice.

### *C. Impact of Congressional Intervention on Case Outcomes*

We now assess whether congressional interventions impact individual case outcomes, either *procedurally* by accelerating case dispositions or *substantively* by affecting dispositions on the merits. We find, by examining a matched sample, that appeals with at least one congressional inquiry are *nearly twice as likely* to have been advanced on the docket than appeals without an inquiry. And substantively, we find that congressional intervention has a statistically significant positive effect on the resolution of the claims in a manner favorable to the veteran.

Recall that, while BVA is statutorily required to hear cases in the order they are received, Congress and BVA have permitted certain cases to be expedited, which is known as being advanced on the docket (AOD).[258] Cases may be advanced only for cause, and BVA has by regulation defined certain conditions that automatically qualify, namely documented financial hardship, terminal illness, and advanced age, although cases may also be advanced "if other sufficient cause

**257.** *See supra* note 147 and accompanying text.

**258.** 38 U.S.C. § 7107(b) (2018); 38 C.F.R. § 20.902(c) (2024).

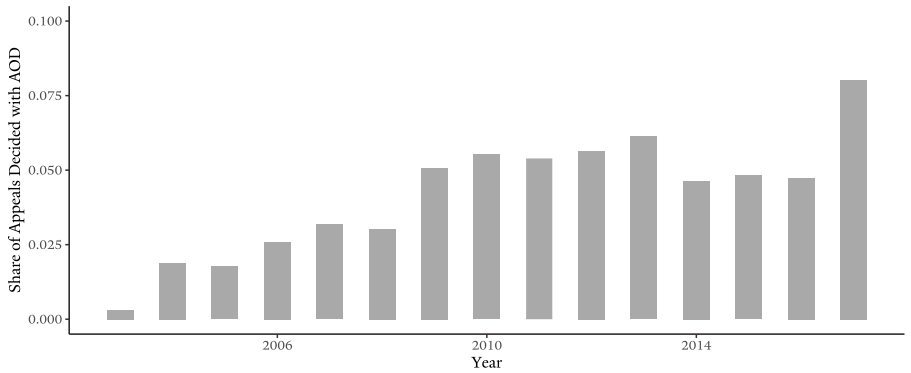
is shown."[259] Our dataset includes information about whether these criteria are flagged for consideration in each appeal.[260] We use these data to explore two potential causal mechanisms by which congressional intervention might formally expedite a case. Congressional interventions might result in higher AOD rates because they may alert adjudicators to the presence of one or more of the per se criteria for advancement. Alternatively, congressional attention might lead adjudicators to use their discretion to find "other sufficient cause" even in the absence of per se grounds for advancement.

In general, docket advancements are uncommon. Only about 4.39% of appeals in our study are advanced. Figure 6 plots the share of appeals decided in each year that have been advanced on the docket on the y-axis against time on the x-axis. The rate of AODs increases over time for two reasons. First, remember that appeals must be filed after 2003 to be included in our sample, but Figure 6 plots AOD rates among completed appeals. Given delays at BVA, few cases with notices of disagreement filed early in our study period are also decided early in the study period. Indeed, the average time from notice of disagreement to final decision across all appeals in our study is around 904.5 days—about two and a half years. Second, the longer an appeal languishes at BVA, the likelier it will be advanced on the docket. Appellants with cases that are resolved more quickly need not seek relief through advancement requests. In contrast, appellants whose cases remain at BVA for several years are more likely to seek and ultimately receive an advancement, which contributes to the higher proportion of appeals that have been advanced later in the study period.

**259.** *See* 38 U.S.C. § 7107(a)-(b) (2018); 38 C.F.R. §§ 20.800, 20.902 (2024).

**260.** Until approximately 2018, BVA did not automatically flag veterans seventy-five years of age or older. The development and introduction of Caseflow, a suite of web-service applications designed to replace the legacy appeals tracking system, integrated automatic advanced-age flags. While the GitHub has since been removed, the Caseflow GitHub documented this as the feature to "[a]utomatically mark cases AOD due to age." For the former link to the GitHub, which we have preserved via a screenshot, see *Automatically Mark Cases AOD Due to Age #6274*, GitHub, https://github.com/department-of-veterans-affairs/caseflow/issues/6274 (on file with authors). We have also confirmed the approximate date through correspondence. *See* E-mail from Anonymous Correspondent (Sept. 23, 2024) (on file with authors) (confirming that the automation started in "approximately 2018"); *see also U.S. Department of Veterans Affairs Budget Request for Fiscal Year 2018: Hearing Before the H. Comm. on Veterans' Affs.*, 115th Cong. 82-83 (2017) (discussing VA responses to questions for the record).

**FIGURE 6. SHARE OF APPEALS IN STUDY WITH ADVANCEMENT BY DECISION YEAR**[261]




A natural place to start answering the question whether congressional interventions affect claimants' chances of obtaining advancement is a simple comparison of AOD rates between appeals with and without congressional inquiries. That analysis suggests that congressional inquiries are highly correlated with docket advancement. Nearly 25% of appeals with at least one congressional inquiry are advanced on the docket, compared to only around 3.8% of appeals without a congressional inquiry.

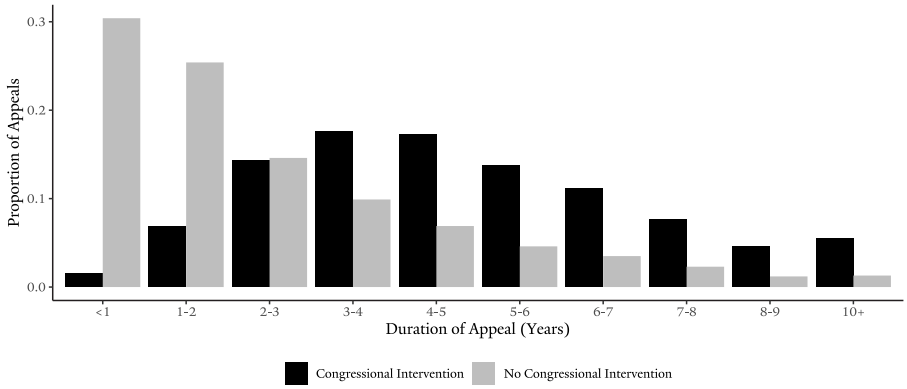
However, because cases subject to congressional intervention are fundamentally different from other cases as discussed in our distributive analysis, this simplistic comparison may not credibly capture the effect of congressional interventions. Based on an institutional understanding of BVA, we focus on several main dimensions that may confound a naïve difference. First, most congressional inquiries are made on behalf of appeals that have been with BVA for several years. The average first congressional correspondence occurs almost four years after an appeal is initially filed. So perhaps older appeals are more likely to receive *both* congressional inquiries and docket advancement, simply by virtue of their age. Indeed, members of Congress appear to intervene when there is already significant delay on an appeal: most cases with congressional inquiries have been at BVA for several years before ever receiving an inquiry. As Figure 7 shows, appeal durations are substantially longer for appeals that receive congressional intervention. In addition to the fact that a case's age may drive both inquiries and

261. Each bar represents the share of appeals decided in each year that have been advanced on the docket. That is, appeals appear according to the date they are resolved, not the date they are filed. We count only appeals filed between 2003-2017 on behalf of veterans residing in a state (i.e., excluding territorial and D.C. residents).

advancement decisions, such cases may have a longer average duration at BVA even if congressional inquiries substantially shorten the time to a final decision postinquiry; we discuss total appeal duration below.

Second, appellants with congressional inquiries are more likely to have one of the regulatory per se criteria for docket advancement, like age, financial hardship, or severe illness, documented in our data. This source of confounding is particularly challenging because we are unable to distinguish whether the significant differences in rates of documentation of AOD criteria are a result of congressional outreach or a cause of it. Specifically, appellants with established AOD criteria in their record (e.g., veterans who are very elderly) may be more likely to approach members of Congress for assistance. And outreach from a member of Congress might provide BVA with documentation relevant to AOD criteria or otherwise alert BVA that an appellant has characteristics in their file that would qualify them for advancement. In the latter case, congressional outreach could prompt BVA to note AOD criteria that might otherwise remain undocumented. We return to this issue below when we consider specific causal mechanisms.

**FIGURE 7. DISTRIBUTION OF APPEAL DURATION BY CONGRESSIONAL-INQUIRY STATUS**[262]




To construct a more credible test of the impact of congressional interventions, we employ a matched-sample design to adjust for observable differences between appeals with inquiries and those without. Our adjustments here may

**262.** Figure 7 presents the length of time to a final decision for appeals about which BVA's records do not indicate a per se rationale for expedited processing, like advanced age or severe illness, and that were not the subject of inquiries by the White House or Secretary of the VA. Appeals with congressional inquiries tend to have longer durations than appeals without congressional inquiries.

be plausible, as we have access to the same internal data BVA used for processing cases, but, as with all "observational" designs, we acknowledge that these cases may differ in unobservable ways.

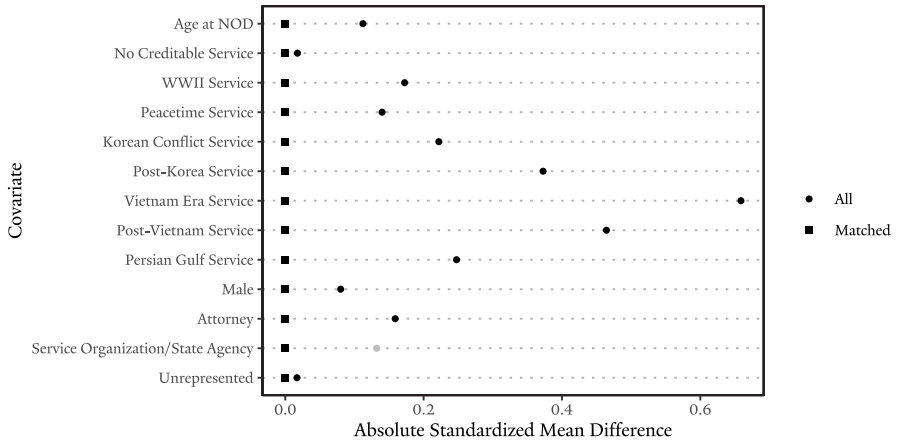
For every appeal with an intervention, we find the most similar appeal without an intervention to act as the counterfactual—a proxy for what would have happened to the case in the absence of intervention. (We call this the "control" appeal, because it is not "treated" with a congressional intervention.) To do this, we identify appeals without intervention that look the same in relevant observable ways as the appeal with an intervention: cases that have the same RO, same type of action, same quality-review eligibility status, same service period, same age at the time of filing, same gender, same type of appellant (veteran, widow, parent, or child), and same type of appellant representative (attorney, service organization or state agency, or unrepresented) as the appeal with the intervention.[263] We then select the control appeal filed closest in time to the appeal with the intervention, imposing the restriction that appeals be filed within a month of one another. Importantly, we require that these matched-control appeals be subject to essentially the same degree of "preinquiry" delay, so that the control appeals had no BVA decision at the time when the "treated" appeal received its first congressional inquiry. The result of this process is that we can compare appeals with and without congressional interventions that are nearly identical on every observable dimension. One might imagine that which case ultimately receives congressional intervention might have been essentially a coin flip conditional on similar case facts and time pending. That may be a plausible assumption, since we have access to the same internal data that BVA use for processing cases and because so much variation appears driven by congressional offices, not the merits of cases, but, again, cases with interventions may differ in unobservable ways.

The matched-sample design results in 5,245 matched pairs of appeals that satisfy the selection criteria. To assess covariate balance and verify that our matching procedure ensures balance on key observable characteristics, Figure 8 plots the absolute standardized mean difference between appeals with congressional intervention and those without. The circle icons represent differences in the raw data (i.e., without our matching procedure) and square icons represent differences in the matched sample. The exact match on service period, age at NOD, gender, and appellant representative ensures that there are no differences in those characteristics in our matched sample.

**263.** One of the earliest appearances and descriptions in the law-review literature of this form of exact matching is Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. Rev. 1, 62-69 (2005).

Notably, we do not match on two characteristics in our data that are likely to be affected by congressional interventions: number of issues documented and AOD criteria flags. First, adjudicators can enter the number of issues at stake in an appeal, which may act as a measure of case complexity. Second, our data include flags for each of the per se AOD criteria, like financial hardship or terminal illness. We do not include either of these characteristics in our matching process because they may result from congressional intervention: for example, BVA may add a flag for financial hardship, or add an issue to a case, because of information brought to its attention by the member of Congress.

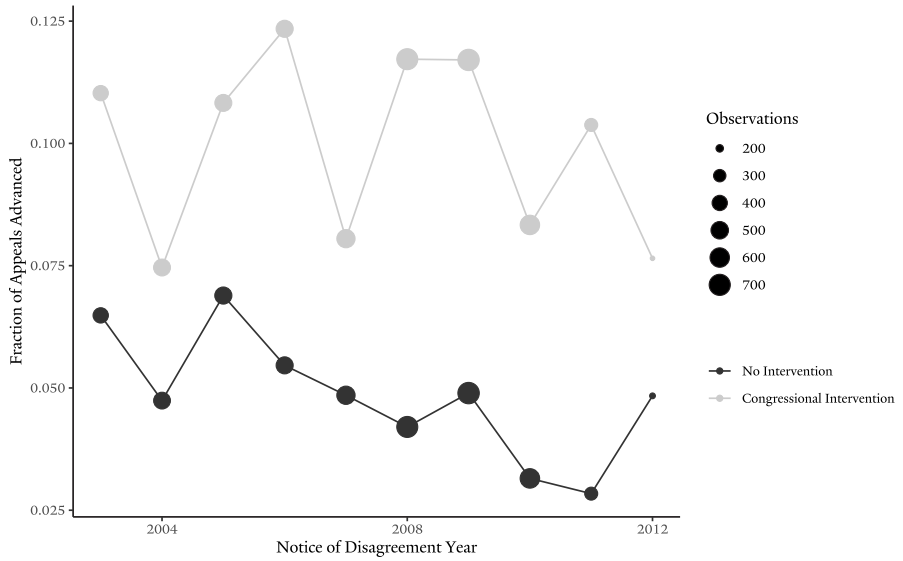
**FIGURE 8. ABSOLUTE STANDARDIZED MEAN DIFFERENCE FOR MATCHED SAMPLE COMPARED TO ALL OBSERVATIONS**[264]




What does this analysis reveal? Matched appeals with at least one congressional inquiry are nearly *twice* as likely to have been advanced on the docket as appeals without an inquiry. Only 6.6% of appeals without a congressional inquiry are ultimately advanced on the docket. In contrast, 12.4% of appeals with at least one congressional inquiry are advanced on the docket. Figure 9 depicts the fraction of appeals advanced on the docket by inquiry status for appeals in our matched sample during the 108th through 111th Congresses.

**264**. Figure 8 presents effect sizes for the *t*-test, a test of the statistical significance in the difference in means between appeals with congressional intervention and those without. For raw observations, the gray shaded circle indicates a negative difference between appeals with congressional intervention and those without (i.e., appeals with a congressional intervention have a smaller observed value of the covariate on average), while a black circle indicates a positive difference (i.e., appeals with congressional intervention have a greater observed value of the covariate on average).

**FIGURE 9. FRACTION OF APPEALS ADVANCED ON THE DOCKET WITHOUT DOCUMENTED CAUSE**[265]



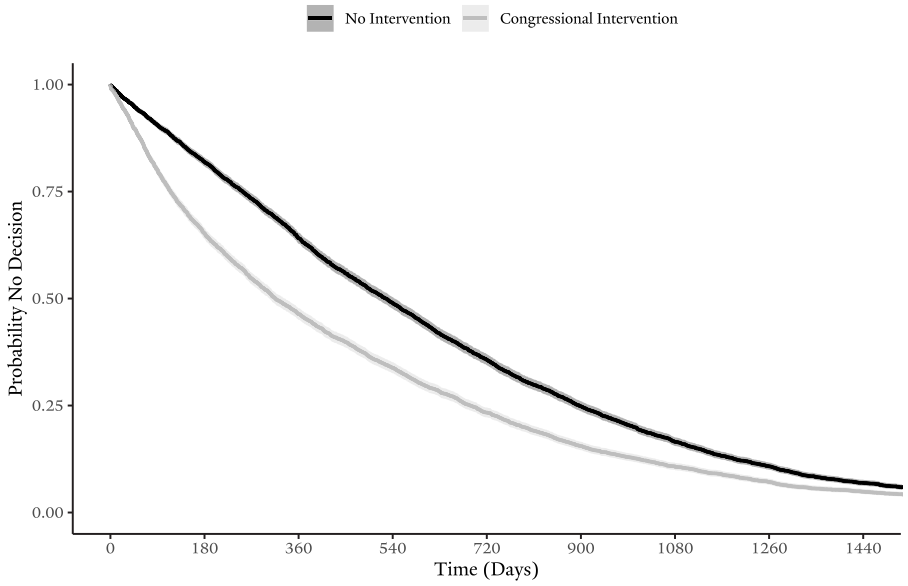

How much does being advanced affect appeal duration? For each matched pair, we construct a measure of postinquiry time to a final decision. We calculate days until a final decision from the date of the first congressional correspondence for both the treated and control case. Appeals with congressional intervention obtain a final decision around 158 days sooner on average than appeals without intervention—a significant reduction in wait times. Figure 10 plots the likelihood that a case has not been decided over time (otherwise known as the Kaplan-Meier survival curves) for cases with and without inquiries in the matched sample: each curve shows, for each of those two groups, the probability a final decision has not been reached by the number of days postinquiry.

Figure 10 reveals that from the day of inquiry, cases with an inquiry have a significantly lower probability of remaining outstanding than cases without an inquiry. The survival analysis suggests statistically significant differences in

**265.** The unit of analysis is the appeal, conditional on no documented cause, where advanced age is based on birth date. Each appeal with an inquiry is matched to an appeal without an inquiry with the same documented regional office, veteran service period, and type of appellant representative (e.g., attorney, service organization/state agency, or unrepresented), type of appellant (veteran, widow, parent, or child), type of action, and quality-review (QR) eligibility filed within thirty days of the inquiry appeal's NOD date that does not have a final BVA decision by the date of the first congressional inquiry.

decision wait times postintervention using a log-rank test ($p$-value < 0.001), a test for statistically significant differences in the distribution of time to final decision by treatment status. It is worth noting that given the significant delays across the board, speeding up cases with interventions necessarily means shifting adjudicative resources away from (and increasing delays for) all other cases. In other words, when treated cases jump the queue, control cases take longer to resolve.[266]

**FIGURE 10. KAPLAN-MEIER CURVE FOR ADJUSTED TIME TO FINAL DECISION FOR THE MATCHED SAMPLE**[267]




**266.** Strictly speaking, this means the "stable unit treatment value assumption" is violated, so the treatment effect may be slightly overstated. But because of the extremely high baseline case volume, this effect is negligible. *See* Daniel E. Ho & Donald B. Rubin, *Credible Causal Inference for Empirical Legal Studies*, 7 ANN. REV. L. & SOC. SCI. 17, 21 (2011).

**267.** Each appeal with an inquiry is matched to an appeal without an inquiry with the same documented regional office, veteran service period, and type of appellant representative (e.g., attorney, service organization/state agency, or unrepresented), type of appellant (veteran, widow, parent, or child), type of action, and QR eligibility filed within 30 days of the inquiry appeal's NOD date that does not have a final BVA decision by the date of the first congressional inquiry. The thin shading around each line indicates the 95% confidence interval for each subset.

We also consider the possibility that BVA is more responsive to intervention from members of Congress with oversight responsibilities. Within our matched subset, rates of advancement are 25% higher for appeals with congressional intervention in districts with congressional representatives serving on the House Veterans' Affairs Committee (HVAC). The difference is statistically significant ($p$-value = 0.05), with 15.1% of appeals with congressional intervention and HVAC membership receiving advancement compared to 12% of appeals with only congressional intervention.

Finally, we consider the relationship between congressional intervention and the disposition of BVA appeal decisions. Each issue in a case may be allowed, remanded, or denied by BVA.[268] If an issue is remanded, then the claim is sent to the RO to develop the issue further.[269] We assess whether there was a favorable resolution (e.g., whether the appeal is sustained or remanded) on at least one issue by congressional-inquiry status. As noted above, appeals with congressional inquiries tend to have more issues coded, including in our matched sample. Because the number of issues can be adjusted by adjudicators, they may represent one mechanism of congressional influence and hence should not be used for matching.

We find that 68.6% of appeals with congressional intervention include at least one favorable issue resolution (e.g., an issue is allowed or remanded) compared to 63.2% of appeals without a congressional inquiry ($p$-value < 0.001). This pattern persists if we further restrict our attention just to issues allowed: 27.1% of appeals with a congressional inquiry include at least one issue that is allowed, in contrast to 23.8% of appeals without an inquiry ($p$-value < 0.001). The differences remain statistically significant even when adjusted for the number of issues involved in each appeal: the share of issues either allowed or remanded is higher in appeals with congressional intervention, as is the share of issues allowed.

### *D. Understanding the Mechanisms*

We next consider the mechanisms by which congressional interventions affect outcomes—perhaps they provide relevant *information* to agencies or improve *documentation* thereof. To be sure, other mechanisms may also account for the effect of congressional intervention on case outcomes. Inquiries might play an "unsticking" function. As one source explained, congressional inquiries "prompt[] us to look at where the case is" and sometimes reveal that a case is

**268.** *See* SHEDD, *supra* note 191, at 2. The word "allowed" is a term used by BVA to indicate that an appeal has been successful. *See id.*

**269.** *Id.* at 1-2.

stuck in the wrong office or stage of adjudication.[270] Inquiries that appear on BVA's docket might also affect the behavior of other agencies.[271] But we leave those possibilities aside for purposes of the analysis below.

Appeals advanced on the docket with congressional interventions are, as a descriptive matter, more likely to have one of the per se advancement criteria (e.g., age or financial hardship) noted on the docket. Over our study period, in the dataset, 59% of appeals with congressional intervention that are advanced on the docket have recorded advancement criteria, compared with around 46% of control appeals that are advanced on the docket. Similarly, cases with congressional interventions have more issues documented compared to control cases, averaging around 0.67 more issues documented per appeal. The number of issues in an appeal refers to the number of unique claims, often for disability (i.e., each specific injury). These differences suggest that congressional intervention either triggers factfinding by BVA adjudicators or that the letters themselves offer new information.

It is important to understand whether congressional interventions affect outcomes exclusively by providing the agency with relevant information, like flagging a veteran's age. That kind of influence would be less normatively troubling than direct political influence that changes outcomes without providing the agency with new information. As a first approach, we use case information collected by BVA that expressly states whether any advancement criteria exist in the case. We ask whether the effect of an intervention persists even when no express advancement criteria are noted—that is, where BVA has not documented age, financial hardship, or any other ground for advancement—and where advancement is much more discretionary. We find that it does. Congressional intervention is associated with a 213% higher AOD rate for such cases of discretionary advancement.[272] Since BVA never documents additional information in such

270. Interview with Anonymous BVA Employee (Sept. 19, 2024) (on file with authors).

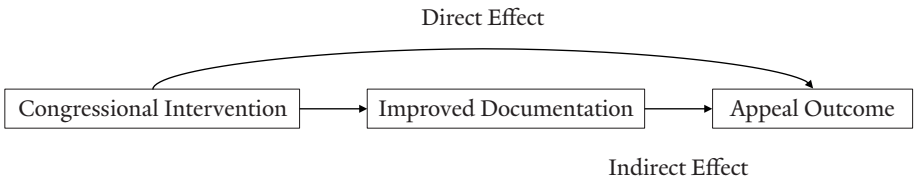
271. Specifically, one source noted that BVA's docket might reflect inquiries that arrive when a case is still technically under the jurisdiction of VBA, which the source suggested might be culturally more receptive to direct political pressure. In that way, inquiries might speed up VBA's work in a manner that shows up on the Board's docket. We explore this possibility in the Appendix, *see infra* Appendix Section M, but do not find empirical support for it.

272. We note that because AOD criteria are potentially affected by congressional intervention (e.g., a member of Congress may highlight the advanced age of a claimant), this figure represents a comparison of treated cases that filter out express AOD criteria with control cases that would have identified express AOD criteria if they had been subject to a congressional inquiry. This compositional difference means that we should not interpret the 213% finding as a causal effect, but under some assumptions, it may represent the lower bound on the causal effect on discretionary AODs. If congressional intervention improves documentation by BVA, then case records in the claims folder may more accurately reflect appellant conditions for those

cases, this suggests that congressional interventions do not merely offer marginal information on express statutory criteria to advance a case.

We also construct a more formal test of whether the effect of congressional intervention on appeal outcomes is due to improving documentation in the appeal record. We conduct a causal mediation analysis in our matched sample to decompose the *direct effect* of congressional intervention on appeal outcomes and the *indirect effect* via improved documentation or information, as depicted in Figure 11.[273]

**FIGURE 11. ILLUSTRATION OF ONE MECHANISM BY WHICH CONGRESSIONAL INTERVENTION IMPACTS APPEAL OUTCOMES**




This analysis requires us to assume that interventions are independent of the potential appeals outcomes and documentation. The credibility of this assumption hinges, as before, on exact matching per the prior analysis. In addition, we must assume that given treatment status and covariates, documentation can be considered as if randomized.[274] That is, that there is no factor we do not account for that influences both intervention and documentation, or intervention through documentation. This assumption is plausible if the number of issues documented in the appeal varies due to quasi-random assignment of adjudicators, but it is a strong assumption that may well be violated.[275] Because the assumptions of this kind of mediation analysis are nontrivial and untestable, we

appeals with intervention relative to those without intervention. In this case, the differences we present in discretionary AOD rates may be a lower bound on the true impact of congressional intervention, as cases without congressional intervention may be more likely to have unrecorded AOD criteria that increase the likelihood of advancement.

273. In the literature these are known as the average direct effect of the intervention on the outcome and the average causal mediation effect. *See* Kosuke Imai, Luke Keele & Dustin Tingley, *A General Approach to Causal Mediation Analysis*, 15 PSYCH. METHODS 309, 310-12 (2010).

274. This assumption is referred to as sequential ignorability. *See id.* at 310.

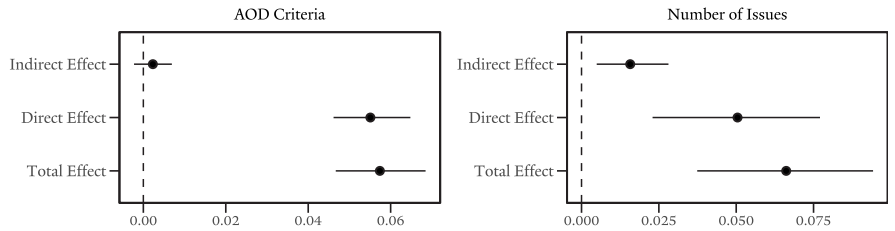
275. Unfortunately, we do not observe when certain fields are recorded or modified in our dataset. It could be that documentation is made prior to congressional intervention and unchanged because of outreach. Differences in documentation may not be driven by congressional intervention, but rather, the type of claimants that reach out to members of Congress may also seek to correct documentation with BVA.

also present a sensitivity analysis in Appendix Section N, which suggests that the indirect effect remains directionally the same if confounding is not too extreme.

First, we consider whether congressional intervention impacts advancement on the docket indirectly by improving documentation of advancement criteria in the appeal record. The left panel of Figure 12 presents this indirect-effect estimate in the top row, with direct effects and the total effect in the second and third rows, respectively. The indirect effect is not statistically significant ($p$-value = 0.35). This suggests that congressional interventions do not in fact provide additional information about express AOD criteria.

Second, we consider whether congressional intervention favorably affects dispositions by improving documentation of the number of issues involved in an appeal. The right panel of Figure 12 again presents the indirect, direct, and total effects in the first, second, and third rows respectively. The indirect effect of congressional intervention on the number of issues allowed through issue documentation is statistically significant ($p$-value < 0.001) and accounts for 23.7% of the total estimated effect of congressional interventions. This lends support to the conclusion that congressional interventions help to generate faster and more favorable outcomes in part by surfacing previously unflagged issues to BVA.

**FIGURE 12. ESTIMATES OF THE AVERAGE INDIRECT EFFECT, AVERAGE DIRECT EFFECT, AND AVERAGE TOTAL EFFECT FOR EACH MECHANISM DISCUSSED**[276]




Put simply, as the number of issues documented in a case increases, perhaps due to their being flagged by a congressional caseworker, VLJs may review a file in more detail or more slowly, leading to a greater likelihood of a favorable disposition on at least one issue. But congressional interventions speed up the disposition of cases without appearing to provide any comparable informational benefit to the agency.

276. The dots represent the point estimates for each effect. The lines represent the 95% confidence interval for the estimated average effects.

## V. LIMITATIONS

We have documented that congressional interventions are highly prevalent, shift resources across classes of veterans, and appear to have substantial effects on the timing and disposition of appeals. In contrast to claims that constituency casework augments oversight and legislation, we find that casework activity bears no correlation with legislative advocacy and does not appear to simply offer information on statutory criteria to advance cases. The real losers in this system appear to be (1) agencies that are required to set up processes for handling nontrivial volumes of congressional correspondence, and (2) claimants who do not have the resources or information to seek out members of Congress. And our empirical findings suggest that these effects are substantial. When constituency service can comprise 20-30% of the budget for congressional offices,[277] such activity is not merely information gathering: it matters. We highlight the broader legal and policy implications below in Part VI but spell out the limitations of our empirical account here.

First, while our case study provides a rich and institutionally informed analysis of veterans' adjudication, these findings may not generalize to all forms of congressional intervention. Nonetheless, there are many reasons to think that the effects of congressional intervention on BVA may inform other settings. Disability adjudication at SSA and immigration adjudication in the Department of Justice share similar attributes: all have high caseloads, and all are known recipients of congressional interventions.[278] Because such interventions have flown largely under the radar to date, we cannot know the extent of the applicability of congressional intervention on veterans' adjudication until there is more transparency, as we spell out in Part VI.

Second, while one of our novel contributions is assessing the impact of congressional interventions in a more formal (Type B) adjudicatory setting, it remains conceptually difficult to generalize to other levels of formality given the broad adjudicatory spectrum.[279] The effects of congressional inquiries could be

277. *See supra* note 12.

278. Off. of Legis. Affs., *supra* note 102, at [3] (describing the circumstances under which a congressional inquiry to U.S. Citizenship and Immigration Services might be appropriate); Lautaro Grinspan, *Is Your Immigration Case Taking Too Long? Your Congressional Representative Can Step In*, MIA. HERALD (Jan. 14, 2020, 7:39 AM), https://www.miamiherald.com/news/local/immigration/article239103788.html [https://perma.cc/9KUE-G336]. *See generally* Off. of the Deputy Comm'r for Legis. & Cong. Affs., *2024 Congressional Inquiries Guide*, SOC. SEC. ADMIN. (Feb. 26, 2024), https://www.ssa.gov/legislation/Congressional%20Inquiries%20Guide.pdf [https://perma.cc/6VMR-2M6D] (providing congressional offices guidance on Social Security matters).

279. *See* Verkuil, *supra* note 150, at 741 (describing the volume and distinctions between various types of informal adjudications).

different for formal (Type A) adjudication under the APA, given that the guarantees of decisional independence are so much stronger there than in informal proceedings. ALJ decisions at SSA, which constitute the vast majority of formal adjudications, are based on an exclusive record[280] and explicitly prohibit ex parte communications.[281] That said, House and Senate ethics rules themselves do not appear to draw sharp distinctions between formal APA adjudication and Type B adjudications.[282]

Third, the main empirical limitation is that cases that receive congressional interventions may be different from control cases in ways we cannot observe and address. Appellants who contact their representatives for recourse may have more capacity or savviness to navigate bureaucratic processes than control appellants.[283] Congressional staff might screen inbound requests and be more responsive to more meritorious appeals. These mechanisms could mean that our estimate of the impact of congressional interventions is inflated. At the extreme, congressional interventions may have no effect whatsoever, and casework is tantamount to pure credit-claiming. There are reasons to doubt this, however.

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**280.** 5 U.S.C. § 556(e) (2018) ("The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision . . . ."). Agency practice around formally entering congressional interventions into the record remains unclear.

**281.** 5 U.S.C. § 557(d) (2018). Whether a congressional intervention constitutes a violation of ex parte communications in nonadversarial proceedings is an open question. The Government in the Sunshine Act prohibited ex parte communications in formal adjudications but left unclear the prohibition in informal adjudications. *See* Government in the Sunshine Act, Pub. L. No. 94-409, sec. 4, 90 Stat. 1241, 1246-47 (1976) (codified as amended at 5 U.S.C. § 557(d)); 5 U.S.C. § 557(a) (2018) (noting that § 557 only applies to formal adjudications). Many agency hearings are nonadversarial, with no attorney representing the government (or other adversary), *see* HARRINGTON & SHEFFNER, *supra* note 152, at 18, so that the congressional intervention is presumably known to both the claimant and the adjudicator and notice exists, *see* 5 U.S.C. § 551(14) (2018) (defining "ex parte communications" as "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given"). Note that the APA also excludes mere "requests for status reports," so the nature of the congressional communication also matters. 5 U.S.C. § 551(14) (2018). Even so, if there is a further appeal (e.g., in the Court of Appeals for Veterans Claims), hearings do become adversarial. In an adversarial proceeding—not to mention in the Article III setting—such interventions could well be deemed ex parte communications. In the constitutional setting, ex parte interviews for new and material information can violate procedural due process by failing to provide notice and opportunity to respond to a party. *See* Young v. Dep't of Hous. & Urb. Dev., 706 F.3d 1372, 1376-78 (Fed. Cir. 2013).

**282.** *See, e.g.*, Comm. on Ethics, *Off-the-Record Ex Parte Communications*, U.S. HOUSE REPRESENTATIVES, https://ethics.house.gov/casework/record-ex-parte-communications [https://perma.cc/D7AU-KD3C].

**283.** Claimants might also be influenced by their perception of the efficacy of congressional intervention and the representative's effectiveness, specifically.

Claimant information around *when* to seek congressional inquiry is sparse. One guide for veterans states:

> [T]here is little chance that badgering VA or asking for a Congressional inquiry will be helpful. In many cases, a claim can be further delayed because VA may pull the claims file from the pile waiting for decision to prepare a response to the request for information, which is almost always "we are working on it" anyways.[284]

Moreover, as our evidence plainly shows, members' propensity to intervene varies dramatically. This is corroborated in online fora, where one user notes that whether an office will intervene "depends on the representative," and another says that "[s]ome will actually solve the problem, and sadly, some will just send you a basic 'form letter' that they send to everyone."[285] Congressional screening based on merit also seems rather farfetched, since staff members handle such inquiries across all agencies and may not have much ability to provide more than a surface-level assessment of the case. Along those lines, anecdotal accounts suggest that members of Congress intervene even when claims may be weak.[286] In short, there are reasons to find the matched-sample analysis to be credible based on how the institutions work in practice.

Fourth, while we have rich internal data from BVA, there are key factors we do not observe that limit our ability to draw certain inferences. We do not observe the content of congressional letters, so we cannot directly assess whether novel information (e.g., about claimant eligibility or advancement criteria) is provided to BVA on top of what exists in the claims folder, although our analysis above suggests this is not the case. We do not observe the specific identity of the member of Congress and hence cannot easily distinguish between Senate and

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**284.** *Veterans Guide to VA Benefits: 14.4 Obtaining a Decision*, ASK VETSFIRST, http://web.archive.org/web/20200815113337/https://helpdesk.vetsfirst.org/index.php?pg=kb.page&id=2777 [https://perma.cc/9F4P-E2AF].

**285.** Rosemary E. Williams, *What Happens if You Write Your Congressional Representative in Response to a Denial of Benefits from the Veterans Affairs for a Service-Connected Injury?*, QUORA, https://www.quora.com/What-happens-if-you-write-your-congressional-representative-in-response-to-a-denial-of-benefits-from-the-Veterans-Affairs-for-a-service-connected-injury/answer/Rosemary-E-Williams [https://perma.cc/R9GG-LWSS]; John Mooney, *What Happens if You Write Your Congressional Representative in Response to a Denial of Benefits from the Veterans Affairs for a Service-Connected Injury?*, QUORA, https://www.quora.com/What-happens-if-you-write-your-congressional-representative-in-response-to-a-denial-of-benefits-from-the-Veterans-Affairs-for-a-service-connected-injury/answer/John-Mooney-72 [https://perma.cc/D7XQ-NG5Q].

**286.** *See* Levin, *supra* note 10, at 52 ("Much of the literature suggests that members are not always so restrained—that many feel that their job is to advocate the constituent's cause, right or wrong.").

House influence or assess the incumbency advantage due to interventions. Nor do we observe the initial outreach by the claimant to the member of Congress, making it hard to attribute the extent of distributive effects to (1) selective intervention by members, or (2) differential outreach to members by constituents. And even where attributes are collected in BVA's internal data, it may have substantial measurement noise, which makes distinguishing mechanisms — and assessing which measures are themselves affected by congressional interventions — difficult.

Last, some might dispute the import of our finding that legislative advocacy appears to bear no correlation to casework. This finding is important, as it would undercut claims by members of Congress themselves that casework promotes oversight and legislation. The lack of a correlation does not necessarily mean that casework does not affect legislative advocacy, as we have not offered a causal assessment of the impact of casework on the quality of legislation. We acknowledge this limitation but offer two observations in response: (1) given the limited resources of a congressional office, casework can function as a *substitute* for legislative activity, which may explain why members who engage in higher levels of casework are less active on the legislative front; and (2) our findings on the distribution of casework strongly suggest that casework provides a limited and biased set of information to Congress, certainly compared to a well-functioning quality-assurance system.[287] In other words, while congressional interventions may be good for members of Congress and the represented claimants, they may come at the expense of unrepresented claimants and Congress's understanding of the overall health of the system.

Notwithstanding these limitations, our empirical investigation provides the most systematic examination of congressional interventions in agency adjudication of individual claims to date.

## VI. LEGAL AND POLICY IMPLICATIONS

As our study shows, the tens of thousands of interventions that members of Congress make in veterans' benefits cases every year do matter. Such interventions are pervasive, effective, and selective. Even if they provide an agency with relevant information about meritorious claimants — which does not appear to be

**287**. *See* Ho et al., *supra* note 31, at 240; Daniel E. Ho, David Marcus & Gerald K. Ray, *Quality Assurance Systems in Agency Adjudication: Emerging Practices and Insights*, ADMIN. CONF. OF THE U.S. 4-9 (Nov. 30, 2021), https://www.acus.gov/sites/default/files/documents/ACUS_QA_Report_Final_Nov30.pdf [https://perma.cc/U8KV-7846]; Administrative Conference of the United States: Adoption of Recommendations, 87 Fed. Reg. 1715, 1722 (Jan. 12, 2022) (adopting Recommendation 2021-10, titled "Quality Assurance Systems in Agency Adjudication").

the case for claimants requesting advancement on the docket—interventions may benefit only the select group of claimants who are able to avail themselves of congressional office help.

These findings carry significant implications for both policy and legal theory, which we canvass below. At their best, congressional interventions are a backstop for delivering valuable information to the agency. As a policy matter, then, agencies ought to orient their processes toward learning as much as possible from inquiries—ultimately making the vast majority of inquiries stemming from common issues obsolete. For legal theory, constitutional interventions present several conundrums, pitting formalism against tradition in the separation-of-powers context and pitting the potential representational and dignitary benefits of personalized service against the fairness and predictability of bureaucratic rationality. We discuss each of these areas in turn.

### *A. Policy*

Assuming that the tradition of congressional interventions remains vigorous, our results point toward a clear policy objective for agencies on the receiving end: to use the information from interventions to identify systematic improvements in case processing. Such learning would reduce the potential unfairness associated with relying on a selective, poorly advertised, highly informal, and inconsistently reported process. That objective translates into several specific recommendations for setting the rules around processing interventions, some of which align with the recommendation recently adopted by ACUS.[288] Pulling our lens back slightly, Congress itself should consider whether it might ultimately make sense to place more restrictions on such inquiries.

#### *1. Maximizing the Informational Value of Interventions*

When BVA set out to allocate its adjudicatory resources to the neediest claimants, it defined several substantive criteria—like age, the presence of terminal illness, and documented financial hardship—to guide that decision.[289] It said almost nothing about how claimants should communicate information to the agency beyond requiring that submissions be "in writing" and "specific."[290] In

**288**. *See* Administrative Conference of the United States: Adoption of Recommendations, 89 Fed. Reg. 56276, 56276 (July 9, 2024).

**289**. 38 U.S.C. § 7107(a)-(b) (2018); 38 C.F.R. §§ 20.800, 20.902 (2024).

**290**. *See* 38 C.F.R. § 20.800(c)(2) (2024); *see also* Bd. of Veterans' Appeals, *Customer Service*, U.S. Dep't Veterans Affs., https://www.bva.va.gov/CustomerService.asp [https://perma.cc

one sense, BVA's relaxed submission policy favors claimants by allowing them to submit information in whatever format they prefer.[291] But it comes at the cost of a much higher administrative burden to extract information from submissions in any number of formats. On top of that, motions to advance on the docket must ultimately be decided by the same overburdened corps of VLJs responsible for tackling the backlog of regular cases.[292] That onerous process makes it easy to imagine why BVA might miss meritorious requests for expedited treatment.[293]

Enter congressional interventions. At their best, congressional interventions provide BVA with two kinds of information for free. First, they give the agency a proxy for finding individuals who are entitled to relief through the signal a claimant sends by contacting their member of Congress, combined with any additional information that the congressional caseworker communicates. Second, they are a kind of "error message" indicating that BVA missed a good, or at least plausible, claim on its docket that should have gotten attention sooner. BVA, and other agencies that routinely receive congressional interventions, should work to maximize the value they can obtain from both kinds of information.

As suggested by the ACUS report, one lever to maximize informational value could be improving the quality of communications between congressional staff and agencies.[294] Clearer messaging about what information agencies want from congressional interventions, the legal prerequisites to using that information (e.g., "waivers, releases, and other documentation required by law"), and the kinds of relief offered could help congressional staff provide more relevant signals to the agency.[295] And better systems for tracking and processing

/8RMV-TDFH] ("Motions for advancement on the docket, along with supporting documentation, should be submitted to the Board in writing at the address or fax number listed below.").

**291.** The pitfalls of requiring applicants to fill out complex and specific paperwork are well documented. *See, e.g.*, Eric P. Bettinger, Bridget Terry Long, Philip Oreopoulos & Lisa Sanbonmatsu, *The Role of Application Assistance and Information in College Decisions: Results from the H&R Block FAFSA Experiment*, 127 Q.J. ECON. 1205, 1207 (2012).

**292.** *See* Bd. of Veterans' Appeals, *supra* note 33, at 24-25.

**293.** Indeed, it is a frequent enough occurrence that motions to advance are simply not addressed at all that BVA's operations manual explicitly accounts for that possibility. *See id.* ("If an AOD motion that has not been ruled on is discovered during file review, Counsel should consult with the VLJ to determine whether to grant the motion. The AOD motion may be decided in the decision document.").

**294.** *See* Kealy, *supra* note 14, at 33-34; Administrative Conference of the United States: Adoption of Recommendations, 89 Fed. Reg. 56276, 56276 (July 9, 2024).

**295.** *See* Administrative Conference of the United States: Adoption of Recommendations, 89 Fed. Reg. at 56285 (recommending that agencies develop standard operating procedures for "[t]he

congressional interventions could prevent that valuable information from going to waste.[296]

Ideally, though, agencies should go beyond simply fixing matter-specific mistakes and learn *why* those mistakes arose to begin with. At the individual-claimants level, a meritorious congressional inquiry should prompt agencies to investigate what else they may have overlooked about a claimant's entitlement to relief in the materials submitted through ordinary procedures. Beyond redress for individual claimants, congressional inquiries that result in changes to a record or identify processing errors could then be used to conduct quality audits. For example, it may be worthwhile to sample all cases with the same listed disability originating from the same RO to identify general processing errors that may apply to cases with similar facts or issues.

At the appeals level, agencies should use congressional interventions as data to predict where cases are falling through the cracks—systematically searching for the kinds of cases where congressional intervention is likely to be needed and addressing them in advance.[297] Consider the AOD criteria themselves: advanced age, financial hardship, and terminal illness. Advanced age is something that can be readily calculated from VA data, just as we did here. Agency-record linkage to other benefits claims (e.g., SNAP, TANF, and housing assistance) could systematically spot eligible cases based on financial hardship. And BVA could draw on VA hospital records to infer risk of a terminal illness. It should not take a member of Congress to identify these conditions. Instead, congressional inquiries should be conceived of as warning signals indicating the need for overall quality improvements.[298]

Alternatively, if congressional inquiries increase the likelihood of advancement by increasing the number of AOD motions to BVA, then BVA may not be

procedure by which congressional caseworkers should submit casework requests to the agency, including releases, waivers, or other documentation required by law" (recommendation (1)(b)); "[t]he procedure by which agency personnel receive, process, and respond to requests" (recommendation (1)(c)); and "[t]he kinds of assistance or relief that the agency can and cannot provide in response to a casework request" (recommendation (1)(i))).

**296.** *Id.*

**297.** For discussions of how predictive tools can be used to head off errors in mass-adjudication contexts, see generally Kurt Glaze, Daniel E. Ho, Gerald K. Ray & Christine Tsang, *Artificial Intelligence for Adjudication: The Social Security Administration and AI Governance*, *in* Oxford Handbook of AI Governance 779 (Justin B. Bullock, Yu-Che Chen, Johannes Himmelreich, Valerie M. Hudson, Anton Korinek, Matthew M. Young & Baobao Zhang eds., 2024). To be clear, this error-prediction process need not rely on advanced techniques, though it could; any systematic effort to glean insights from the kinds of cases where interventions are likely to be needed would be productive.

**298.** *See* Ho et al., *supra* note 31, at 268 (discussing the promise of a system-level focus in error correction); Ames et al., *supra* note 105, at 23 (similar); Administrative Conference of the United States: Adoption of Recommendation, 87 Fed. Reg. 1715, 1722 (Jan. 12, 2022).

effectively advertising advancement criteria. It may be that assistance from congressional caseworkers improves appellants' understanding of procedural options and criteria for relief. But claimants should easily understand and act on this information from BVA itself. In an ideal world, such efforts could obviate the need for claimants to seek outside assistance with their claims by proactively resolving problems before they arise and making veterans aware of the availability of docket advancement.

The recommendation to leverage congressional intervention to identify systematic process improvements applies to a wide range of agencies and types of adjudication. For instance, over the past several years, congressional offices have experienced a dramatic increase in the number of requests from constituents for assistance obtaining or renewing passports—with one office assisting with roughly four hundred passport-related requests during the summer of 2021.[299] Prompted by the surge in casework requests, over two hundred members of Congress sent a letter to Secretary of State Blinken in July 2021 expressing concern over passport-processing delays. The letter noted that congressional staff experienced lengthy delays when trying to contact the National Passport Information Center on behalf of constituents and explained that this "reduc[ed] [their] ability to help a greater number of constituents in need."[300] The State Department ought to have internalized the frequency of congressional contact to identify systematic problems, even in advance of the subsequent formal congressional outreach.

Similarly, an influx of casework requests from constituents citing lengthy delays in benefits determinations and difficulties corresponding with SSA[301] has prompted congressional calls to streamline the agency's administrative processes.[302] In response, SSA announced the digitization or removal of signature

**299.** *See* Kealy, *supra* note 14, at 20.

**300.** *See* Letter from Members of Congress to Antony Blinken, Sec'y of State 1 (July 22, 2021), https://houlahan.house.gov/uploadedfiles/2021-07-22_--_house_bipartisan_passport_letter_to_sec_blinken.pdf [https://perma.cc/7GH8-LHVU].

**301.** *See* Press Release, Rep. Abigail Spanberger, Spanberger Presses Social Security Administration to Address Backlogs & Delays Impacting Virginians (July 11, 2024), https://spanberger.house.gov/posts/spanberger-presses-social-security-administration-to-address-backlogs-delays-impacting-virginians [https://perma.cc/2NJV-SATH] ("Over the last two years, Spanberger's office has received a significant uptick in casework and heard from an increasing number of constituents reporting their inability to reach the SSA or receive disability determinations.").

**302.** *See* Press Release, Rep. Joe Neguse, Reps. Neguse, Moore Advocate to Streamline Social Security Administrative Processes (Oct. 3, 2022), https://neguse.house.gov/media/press-releases/reps-neguse-moore-advocate-streamline-social-security-administrative-processes [https://perma.cc/88KJ-TFBH].

requirements for many common forms.[303] Then-Commissioner of Social Security, Martin O'Malley, described the move as an effort to "eliminat[e] as many pain points as possible."[304] The change streamlines claims processing by reducing the time employees spend processing receipt of paper forms,[305] which will likely help applicants correspond with SSA more quickly and easily. While these reforms responded to explicit pressure from Congress, SSA could make routine use of congressional interventions to identify problems proactively. Streamlining processes can, of course, only do so much in light of resource constraints, but responding to inquiries piecemeal forecloses communicating such systematic causes of delay to Congress. Inquiries are symptoms, and agencies should address cause, not symptom, where feasible.

Last, leveraging information from interventions has implications for Congress's own work as well. As documented above, the nexus between interventions and legislation appears weak at best. Congress itself has failed to aggregate information on interventions from which to extract systematic lessons. In recent years, this has begun to change. In 2022, the House Select Committee on the Modernization of Congress released a final report recommending the creation of "an optional system to allow offices to share anonymized constituent casework data and aggregate that information to identify trends and systematic issues to better serve constituents."[306] The report acknowledged that casework requests have not been used in a systematic way to further congressional oversight,[307]

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**303**. *See* Press Release, Soc. Sec. Admin., Social Security Administration Digitizes or Removes Signature Requirements for Many Forms: Move Eases Burden on Millions of Customers (Sept. 5, 2024), https://www.ssa.gov/news/press/releases/2024/#2024-09-05 [https://perma.cc/J4LY-NHM6].

**304**. *Id.*

**305**. Jason Miller, *SSA Leaning into E-Signatures as a Way to Cut Mountain of Mail*, Fed. News Network (Sept. 4, 2024, 6:21 PM), https://federalnewsnetwork.com/it-modernization/2024/09/ssa-leaning-into-e-signatures-as-way-to-cut-mountain-of-mail [https://perma.cc/58QL-C58N] ("The Social Security Administration receives about 30 million letters and packages from the Postal Service each year with forms and evidence from citizens applying for services. Each parcel takes about four minutes to open, scan and process. If you do the math, SSA employees are taking 120 million minutes or 2 million person-hours opening up mail. SSA is about to take a big bite out of that time and effort by implementing e-signatures capabilities for more than 30 forms and removing the signature requirement altogether for 13 forms.").

**306**. H.R. Rep. No. 117-646, at 21 (2022).

**307**. *Id.* at 149 ("There is also no centralized, House-wide system for tagging or tracking casework, which makes it difficult for member offices and the House to know whether agencies are following through in a timely and sufficient way with casework requests and whether certain agencies or programs are receiving a high or unusual volume of requests.").

despite their value for congressional action.[308] Accordingly, recent prioritization of this recommendation by the House Administration Modernization Subcommittee[309] may broaden the scope of aggregated agency information for not only individual-constituent casework, but also for oversight and legislation, to address underlying issues.

### 2. *Safeguarding Fairness*

While congressional interventions may provide valuable signals to agencies, they also pose troubling implications for fairness, especially given scarce adjudication resources. The veterans who benefited from congressional interventions were different from veterans at large — older, more likely to be represented by an attorney, and from congressional districts with more white voters.[310] Moreover, while the internal rules of the House and Senate explicitly prohibit members from apportioning access to constituency services on the basis of a petitioner's "contribution[s] to the member's campaign or causes,"[311] they do not otherwise provide a formal guarantee of fair or equal treatment. As we noted above, a large body of social-science research persuasively documents that preferential attention to certain communities results from members' discretion.[312] Whether intentionally or not, members end up giving preferential attention to communities with which they share demographic or political characteristics.[313] So, maximizing the informational value of congressional interventions through formalization must come second to fairness demands, including a more rigorous set of guarantees for claimants and for the public.

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**308.** *Constituent Services: Building a More Customer-Friendly Congress: Hearing Before the H. Select Comm. on the Modernization of Cong.*, 117th Cong. 4 (2022) ("This data can be a valuable independent source of information to contribute to oversight plans or suggest areas for legislative action.").

**309.** *Roadmap for Casework Data*, POPVOX FOUND. 1, https://static1.squarespace.com/static/60450e1deofb2a6f5771b1be/t/64a84d03b8b30f3f04bb822a/1688751379971/Roadmap-for-Casework-Data.pdf [https://perma.cc/PH6J-YAB5].

**310.** *See supra* Table 1.

**311.** SELECT COMM. ON ETHICS, 108TH CONG., S. PUB. 108-1, SENATE ETHICS MANUAL 178-79 (2003), https://www.ethics.senate.gov/downloads/pdffiles/manual.pdf [https://perma.cc/N72H-79PS]; *accord House Ethics Manual*, *supra* note 87, at 322-23.

**312.** *See supra* Section II.A.

**313.** *See supra* note 136 (discussing, among other studies, Lowande et al., *supra* note 11, at 645, which finds that the race and especially gender of representatives is correlated with the likelihood of their submitting a request on behalf of a constituent who shares that demographic characteristic).

First, as we discuss below, administrative law's core prohibition is arbitrary decisions.[314] What could be more arbitrary than an agency relying on a source that prioritizes claimants on the basis of their demographic or political identities, as many congressional offices appear to do at least in the aggregate? Despite formal ethics rules that forbid preferential treatment on the basis of political affiliation,[315] evidence suggests that unequal treatment is substantial. The House and Senate's Ethics Committees should make clearer through their enforcement activities that the ethical obligation to provide equal treatment is not optional, that members of Congress must guard against the influence of demographic characteristics or political affiliation on the order in which they address casework requests or the effort put into resolving them. Along the same lines, the chambers' respective ethics manuals should adopt clearer, bright-line rules to root out such behavior, like forbidding caseworkers from inquiring into or otherwise determining the political affiliations of petitioners when handling requests for advocacy before agencies.[316] For their part, agencies should ask congressional staff to certify that their offices provide apolitical treatment of requests for assistance before beginning to work on congressional interventions. These changes may not eliminate the potential for political and demographic skew in the claimants helped by congressional interventions,[317] but they would go some way towards preventing the creep of demographic or political favoritism into administrative decisions.

Second, in addition to prohibiting unfair treatment as an ethical matter, the House, Senate, and agencies can enhance fairness by setting clear expectations around how and when requests for intervention will be addressed. A scan of online fora corroborates the evidence we present above: veterans have remarkably divergent experiences of service from their representatives. Recall one veteran's comment that "[s]ome will actually solve the problem, and sadly, some will just send you a basic 'form letter' that they send to everyone who has a

**314.** *See infra* Section VI.B.2; 5 U.S.C. § 706(2)(A) (2018).

**315.** *See House Ethics Manual*, *supra* note 87, at 160 ("A Member's responsibility . . . is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations.").

**316.** While our analysis in Section IV.B demonstrates that the number of interventions does not vary systematically by political affiliation of members of Congress, this does not imply that interventions do not vary based on the political affiliation of the claimant, as we do not have information on the latter.

**317.** That is, claimants might be more comfortable with or motivated to request assistance from a member who shares their demographic or political affiliations, which might in turn lead to demographic imbalance, even assuming the congressional office operates in a scrupulously fair manner.

problem."[318] Likewise, agencies send mixed messages about the kinds of relief they may offer in response to a congressional intervention.[319] These highly variable expectations require claimants to acquire specialized knowledge about their representatives and agencies to find out whether a request may help them, which independently contributes to the unfairness of relying on congressional intervention. Even more insidiously, the sense that congressional interactions with agencies are a highly variable "black box" can prevent constituents from knowing when they receive treatment that differs from that accorded to other petitioners. Crossed signals between agencies and congressional offices can also harm claimants directly, such as when one BVA claimant thought their congressional representative was submitting a claim on their behalf only to end up in years of litigation over whether the congressional inquiry in fact constituted a claim.[320]

It is true that current ethics guidelines contain some direction as to the manner in which members of Congress may communicate with agencies. Specifically, the guidelines forbid ex parte communications with adjudicators in formal adjudicatory proceedings and forbid improper attempts to pressure adjudicators to decide the merits of a case one way or another.[321] But the rules explicitly carve out communications in informal proceedings like BVA adjudications.[322] Our evidence suggests that the ethics rules' admonishment against the exercise of influence over the merits may be underenforced.

To level the playing field among constituents — and to give them the tools to identify unequal or inaccurate assistance — the House and Senate should publish clear guidelines around what kind of advocacy constituents can expect from their

318. Mooney, *supra* note 285; *see also, e.g.*, *Should I Write My Congressmen and State Representatives About My VA Claims?*, REDDIT (Sept. 7, 2021, 7:52 PM EDT), https://www.reddit.com/r/Veterans/comments/pjz2jv/should_i_write_my_congressmen_and_state [https://perma.cc/6M6P-K2PB] (soliciting community advice on whether to contact members of Congress); *If the VA Sucks Write Your Congressman*, REDDIT (June 28, 2023, 7:31 AM EDT), https://www.reddit.com/r/Veterans/comments/14l715u/if_the_va_sucks_write_your_congressman [https://perma.cc/6JSB-2P3B] (recounting an instance where a member of Congress expedited a delayed VA claim).

319. *See Veterans Guide to VA Benefits: 14.4. Obtaining a Decision*, *supra* note 284 ("Unless there is a significant delay on the order of a year or more without any correspondence from VA, there is little chance that badgering VA or asking for a Congressional inquiry will be helpful. In many cases, a claim can be further delayed because VA may pull the claims file from the pile waiting for decision to prepare a response to the request for information, which is almost always 'we are working on it anyways.'"); *see also* Kealy, *supra* note 14, at 22 ("[C]onstituents often have an unrealistic understanding of what Congress and an agency can and may do on behalf of a constituent and how long it will take.").

320. *See* Jacobs v. McDonough, No. 21-0578, 2022 WL 2229961, at *1 (Vet. App. June 22, 2022).

321. *See House Ethics Manual*, *supra* note 87, at 308.

322. *Id.* at 309.

representatives. They should also standardize at least certain minimum communications petitioners can expect and provide guidance on the timeliness of those communications. Agencies, too, should publish clear guidelines targeted at both politicians and the public explaining what kind of relief they can offer in response to congressional interventions. Such guidelines could have the salutary side effect of informing the public about the possibility of interventions in the first place. After all, while members of Congress advertise their casework services to constituents, BVA itself does not, so that a claimant merely following BVA's directions would have no idea that the agency could even entertain a congressional intervention.[323] Prominently publishing information on the possible benefits of congressional intervention could help inform claimants that this option exists.

Third, while some agencies managing informal adjudications have adopted the APA's prohibition on ex parte contacts in formal adjudications,[324] BVA has not. Having historically thought of itself as a nonadversarial body in which the government has an affirmative duty to assist claimants, BVA has never prohibited ex parte contacts.[325] In fact, not only has ex parte contact been allowed, but prior to 2015, VA regulations enabled members of Congress to initiate informal claims for benefits on behalf of constituents.[326] While allowing informal contact between members of Congress and BVA might make sense as a general matter, the particular context of congressional interventions—where the risk of improper influence is higher—demands that the parties and the public have ready access to information on congressional interventions. Indeed, the House Ethics Committee already recommends that members request that communications be open and on the record.[327] But ultimately the responsibility of maintaining a complete administrative record rests with the agency, not the requesting member. Agencies should adopt a uniform rule noting all congressional contact on the administrative record.

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**323.** *See, e.g.*, Bd. of Veterans' Appeals, *How to Request an Appeal Be Advanced on the Docket (AOD)*, U.S. DEP'T OF VETERANS AFFS. (May 2022), https://www.bva.va.gov/docs/AOD_For_Website.pdf [https://perma.cc/U24A-Y94Q] (making no mention of the possibility of congressional intervention).

**324.** *See* Asimow, *supra* note 34, at 11.

**325.** *See supra* note 95.

**326.** *See* 38 C.F.R. § 3.155(a) (2014) ("Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs, from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not sui juris may be considered an informal claim.").

**327.** Kealy, *supra* note 14, at 11 (citing Comm. on Ethics, *supra* note 282).

### *3. Should Congressional Intervention Be Constrained?*

The recommendations above assume that congressional interventions will continue to exist. But should they be more constrained? After all, one could easily imagine the functions that congressional offices perform today being performed by another organization, like a public ombudsman within the executive branch with a mandate to replicate the role that congressional staff currently perform. Call it the new front desk of government—the federal government's 311 line.

There would certainly be considerable advantages to that approach. First, replacing congressional interventions with a public advocate situated in the executive branch may restore the guarantees of equal treatment and against arbitrariness in administrative action by which all executive agencies are bound. For example, it would eliminate the high variability in the degree of assistance that claimants can expect from their representatives, which depends on whether their member of Congress is an incumbent or happens to invest in a quality constituency-service operation. For constituents with inexperienced representatives or representatives with underdeveloped casework practices, the public advocate could substitute for congressional assistance, enabling all constituents to access the benefits of knowledgeable advocates. And it would provide constituents a clear avenue for redress if their advocate refuses to assist with their claims—in contrast to the current system, where the only penalty for members of Congress who neglect their casework duties is political.

Second, it would eliminate the potential statutory and regulatory violations that may result from advancing cases simply because a congressional office called. As noted above, a case may be advanced for four criteria (age, illness, financial hardship, and other sufficient cause).[328] But BVA often advances cases in response to congressional interventions without documenting the presence of one of these reasons. Advancing a case solely because of a congressional call may violate these criteria and thus violate BVA's docket-order rules. Members of Congress intervening in individual cases may be undermining the very rules Congress enacted as a whole to ensure fairness in case processing.

Additionally, ending congressional interventions in more formal adjudications may promote electoral competition by weakening the connection between political power and the allocation of public resources, which may otherwise entrench incumbents further. Our results suggest that members of Congress can use their "soft power" to direct the resources of the government to particular constituents, even though no source of law formally gives them that authority. And, as noted above, there is growing evidence that members *do* use that power

**328**. See 38 U.S.C. § 7107(a)-(b) (2018); 38 C.F.R. §§ 20.800, 20.902 (2024).

to the benefit of constituents whom they favor in one way or another,[329] which is precisely what one would expect from politicians whose primary objective is securing reelection. These two findings make clear the democratic cost of the status quo. Members of Congress are able to exploit inefficiency in adjudicatory processes to curry favor with their own constituents. Put another way, congressional interventions in adjudication are just one more way in which the public pays to keep incumbents in office.[330]

This objection to congressional interventions recalls one leveled a generation ago against the franking system we described in Part I of this Feature. Recall that the franking privilege evolved from a limited right of correspondence with constituents about legislation to a virtually unlimited right to send literature about almost any conceivable subject.[331] In 1982, plaintiffs challenged the franking system as a violation of the First and Fifth Amendments on the ground that it deployed government funds to systematically disfavor challengers to incumbent politicians.[332] The court in that case disagreed, finding that franking was not generally "available and widely used for reelection purposes,"[333] but another set of plaintiffs later successfully challenged a more specific provision that allowed franked mailings to citizens slated to become part of the member's district in a future election due to redistricting.[334] The D.C. Circuit found that statute unconstitutional because it was incontrovertibly related to influencing a future election, since the recipients of the mailing were not currently in the member's district.[335] While an opinion for the court was never published, one member of the majority would have held that providing an advantage to incumbents that is so tied to the election cycle should receive heightened constitutional scrutiny.[336]

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**329.** *See* Lowande et al., *supra* note 11, at 645 ("[L]egislators are around 6-9 percentage points more likely to contact federal agencies on behalf of constituents with whom they share background characteristics . . . ."). Note that, as mentioned elsewhere in this Section, such unequal treatment is in violation of the ethics rules – but likely persists due to underenforcement. *See House Ethics Manual*, *supra* note 87, at 316.

**330.** *See* Beermann, *supra* note 23, at 139 (describing the theory that congressional incumbents leave such deficits intentionally to permit their own intervention into the process).

**331.** *See supra* notes 67-73 and accompanying text.

**332.** *See* Common Cause v. Bolger, 574 F. Supp. 672, 673 (D.D.C. 1982); *see also id.* at 674-76 (describing the provisions of what was then 39 U.S.C. § 3210).

**333.** *Id.* at 682.

**334.** Coal. to End Permanent Cong. v. Runyon, 979 F.2d 219, 219 (D.C. Cir. 1992) (per curiam) (finding 39 U.S.C. § 3210(d)(1)(B) unconstitutional), *rev'g*, 796 F. Supp. 549 (D.D.C. 1992).

**335.** See *id.* at 220 n.1 (Silberman, J., dissenting from the per curiam disposition).

**336.** *Id.* at 223 (Silberman, J., concurring in the judgment). The holding that the statute was unconstitutional was issued on an expedited and unpublished basis. *Id.* at 219 (per curiam) Judge Silberman issued a "summary form" of a concurring opinion, and the panel promised

In some ways, congressional casework is even more problematic than franking. While there are some restrictions on *how* a member may intervene in agency proceedings,[337] we are aware of no current restrictions on *whom* a member of Congress can advocate for before agencies, except that the member cannot be paid to do so.[338] For example, if a representative in the House wanted to run for Senate, nothing (except perhaps a vague ethics rule) would stop them from performing constituency services for citizens all over the state to gain a statewide following.[339] Moreover, whereas franking imposed considerable budgetary costs — over $100 million in 1988[340] — congressional inquiries burden the government in an even more pernicious way: by diverting legislators' attention away from legislative activities, reducing their capacity to engage with legislative projects at all, and redirecting resources from ordinary adjudications in the ways we have already described.[341] While we do not mean to suggest a position on whether a First or Fifth Amendment challenge to congressional interventions would or should succeed, the analogy to franking illustrates the democratic drawbacks of providing members with a nonlegislative means of currying favor inside and outside their districts on the government's dime. Using government

that opinions would follow. *Id.* at 220 n.1 (Silberman, J., dissenting from the per curiam disposition) (providing the full judgment that was issued by the court on July 30, 1992). But between the issuance of the judgment and the issuance of the extended opinions, Congress repealed the statute in question, see Legislative Branch Appropriations Act, Pub. L. No. 102-392, § 309, 106 Stat. 1703 (1992), and a per curiam court disposed of the underlying case, *Runyon*, 979 F.2d at 219-20. In the opinion disposing of the case, only Judge Silberman chose to publish an opinion justifying his initial vote.

337. *See supra* notes 93-95 and accompanying text (discussing existing limits on ex parte communications).

338. *See* Kealy, *supra* note 14, at 9-10.

339. The House Ethics Manual notes that the Members' Representational Allowance provides funding to represent "the district from which the member is elected." *House Ethics Manual*, *supra* note 87, at 317 (quoting 2 U.S.C. § 57b, now codified at 2 U.S.C. § 5341 (2018)). However, the Manual goes on to acknowledge that the statute "does not prohibit a Member from ever responding to a non-constituent." *Id.* So while the member ought not assist nonconstituents as "[a] general matter," that hazy standard is left entirely to the member's best judgment. *Id.*

340. *See* GLASSMAN, *supra* note 68, at 3.

341. One indication of this is the increasing share of congressional budgets allocated toward communications with constituents. *See, e.g.*, Jesse M. Crosson, Alexander C. Furnas, Timothy Lapira & Casey Burgat, *Partisan Competition and the Decline in Legislative Capacity Among Congressional Offices*, 46 LEGIS. STUD. Q. 745, 750-51, 750 fig.1 (2021) (showing that, by the 113th Congress, members spent about 50% more on constituency- and communications-staff salaries than on legislative-staff salaries).

resources for personal electoral gain, at the expense of Congress's principal legislative role, meets hallmark definitions of institutional corruption.[342]

Of course, congressional inquiries are unlikely to meet a wholesale ban anytime soon. The ease by which claimants can get lost in the bureaucracy is precisely the appeal of having a member of Congress in your corner. And congressional inquiries can serve legitimate purposes, both for augmenting an agency's error-correction capacity and for communicating information about agencies to Congress.[343] If inquiries improve downstream outcomes, then restricting congressional inquiries would only worsen agency performance, particularly in the short run. This may push in favor of doing more to explicitly inform appellants that their member of Congress can request a status inquiry from BVA on their behalf.

However, reliance on congressional inquiries should be viewed as a short-term "fix," not a long-term solution to case management. Given their significant drawbacks in terms of fairness and democratic values, we think that agencies ought to aim to end their reliance on congressional interventions as a principal error-correction mechanism in mass adjudication. Indeed, several of the interventions we propose above would have the salutary effect of making constituency service less necessary. To the extent that agencies can use congressional interventions to improve their internal processes, that should reduce the incidence of future errors that drive the public to seek congressional help in the first place. And to the extent Congress were to adopt ethics rules more clearly forbidding members from allocating constituency service on the basis of political or demographic preference, members might see less electoral upside to investing in congressional inquiries — and put less effort into the process as a result. Finally, fairly advertising the availability and nature of congressional interventions could probably drastically increase the volume of requests, which might further reduce the attractiveness of this option for members of Congress. So even if banning congressional inquiries is far off, reducing the need for them is indeed a feasible and legitimate goal.

### *B. Legal Theory*

Our findings also present important implications for both separation-of-powers and administrative-law theory. Our work challenges the formalist view that Congress simply has a legislative function. Further, our work bears directly

342. *See* DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION 7 (1995).

343. Indeed, as we note in Section II.C, *supra*, agencies themselves might resist the end of congressional inquiries, as it could rob them of an opportunity to build relationships with members of Congress outside of ordinary structures.

on the burgeoning debate over the legitimate role that politics may play in administrative processes.

### 1. *Separation of Powers*

This study sits at the intersection of three debates in structural constitutional theory. First, despite the modern Court's focus on formalism as exemplified in *Chadha*, our results show that a formalist conception of the separation of powers cannot fully explain all that Congress does in practice. Second, constituency service for veterans' benefits is distinct from, and not a mere corollary of, Congress's legislative power. And third, Congress's apparent influence over agency outcomes evinces a sort of soft power that affects the balance between the branches.

First, in the familiar divide between formalism and functionalism, formalists favor a "strict norm of separation"[344] between the branches on the assumption that "the Constitution's three 'vesting' clauses . . . effect[] a complete division of otherwise unallocated federal governmental authority among the . . . legislative, executive, and judicial institutions."[345] The formalist tendency is ascendant on the Supreme Court and is typified by *Chadha*'s mode of analysis.[346] There, the Court rejected the legislative veto and offered a literalist interpretation of Article I's Legislative Vesting Clause and its Bicameralism and Presentment Clause, rather than a broader view of balance between the branches.[347] By contrast, functionalists think that the metes and bounds of the branches' areas of responsibility should be shaped by a general policy of balancing power between the branches, especially as accreted gradually through the statutory process as Congress and the President negotiate how to share power.[348] Both of these camps, however, acknowledge that, especially when it comes to the balance of power between Congress and the Executive, longstanding practice must properly inform the meaning of the Constitution.[349]

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**344.** John F. Manning, *Separation of Powers as Ordinary Meaning*, 124 HARV. L. REV. 1939, 1959 (2011).

**345.** Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857-58 (1990).

**346.** *See supra* Section I.A.

**347.** INS v. Chadha, 462 U.S. 919, 954-57 (1983).

**348.** *See* Manning, *supra* note 344, at 1951-52. For a more recent argument that statutes ought to be viewed as constitutive of the separation of powers, see generally Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022).

**349.** Trump v. Mazars USA, LLP, 591 U.S. 848, 862 (2020); RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN, at x (1990) ("The President and Congress are at once so independent

Our results provide further evidence that the Legislative Vesting Clause does not exhaustively delineate Congress's job description. We strengthen the notion that congressional inquiries are a longstanding and influential component of Congress's role,[350] one that dates to the earliest days of the Republic.[351] This might build the case for recognizing Congress's role in disseminating information to the public and in redressing individual grievances. While these functions are not mentioned in the text of the Constitution, they are elements of Congress's job description that have become deeply entrenched through repeated statutory settlement. Congress disseminates information to the public about the workings of government; congressional interventions are a "means through which members of Congress inform their constituents about public policy."[352] This is a shared characteristic with the congressional frank, which also helped cement members of Congress as all-purpose explainers of the government to their constituents.[353]

Congressional interventions are also arguably part of the tradition of elected officials helping constituents solve retail-level complaints against the government. This idea dates back to the tradition of petitions directed to Congress for redressing grievances, as Professor Blackhawk has shown.[354] The congressional inquiries we document here do not typically land on so grand a stage; they are rarely, if ever, mentioned in legislative debates or indeed in public at all. Nonetheless, like petitions, they provide an opportunity for members of Congress to help claimants who lack formal knowledge about the workings of government. Importantly, neither of these functions – explainer or advocate – can be inferred from the constitutional text. Instead, they were accumulated from dozens of statutory enactments over the centuries.

Second, we show that the traditions of Congress acting as explainer and advocate are hard to justify as adjuncts to the legislative powers enshrined in the

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and so intertwined that neither can be said to govern save as both do . . . . All these are separate institutions sharing each other's powers.").

350. Both functionalists and formalists may acknowledge the relevance of historical practice to defining the current separation of powers, although in the case of formalists, the bar to finding a binding rule from the historical record may be higher. For some examples, see generally William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); and Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

351. *See* Kristin A. Collins, *"Petitions Without Number": Widows' Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements*, 31 LAW & HIST. REV. 1, 26 (2013).

352. *See* Lee H. Hamilton, *Constituent Service and Representation*, 21 PUB. MANAGER, no. 2, 1992, at 12, 12.

353. *See supra* notes 67-73 and accompanying text.

354. *See generally* McKinley (Blackhawk), *supra* note 41 (describing the historical development of petitions submitted to Congress).

Article I Vesting Clause. True, many members claim that their work resolving inquiries flows directly into legislative or oversight initiatives,[355] and it is plausible that agencies could try to exploit their staff-level contacts with congressional offices to communicate budgetary or other needs to Congress. But our results suggest that the quality of a legislator's BVA constituency service appears virtually uncorrelated with their propensity to legislate on veterans' issues, let alone in favor of veterans. That is consistent with the entirely apolitical way in which congressional inquiries are treated by the rules of the House and Senate, and the fact that this function continues to operate even when a member of Congress has left office. In any event, we think it highly unlikely that members of Congress would allocate 20-30% of their budgets to collecting information on the few mass-adjudicatory agencies to which most inquiries are directed if all that information was really meant solely to inform legislation. Instead, it is more likely that congressional power as used here is aimed squarely at expediting BVA's review to build support among constituents. That is a different form of power than the legislative authority Congress ordinarily exercises.

Congress's involvement in the distribution of veterans' benefits might therefore be a problem for formalists. There is another way to see it, though. As we note above, across America's history, Congress has tried to assign primary responsibility for adjudicating disputes over veterans' benefits to each of the branches of government—from its short-lived experiment with Article III that culminated in *Hayburn's Case*, to the heyday of congressional involvement in the late nineteenth and early twentieth centuries, to the purely executive system of the postwar era.[356] Over the past four decades, Congress has embarked on an effort to blend the Executive's primary control with Article III oversight,[357] a model in which (as we have argued) its own continued lobbying fits awkwardly. Rather than seeing this as an indictment of formalism, one might instead view the survival of congressional involvement as a failure of Congress to fully grasp the consequences of its own choice to return veterans' benefits to the control of the executive branch.[358]

The surprisingly robust effect of congressional inquiries on veterans' case outcomes connects to another dichotomy in structural constitutional law, one

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**355.** *See, e.g.*, *Trials in Transparency II: Is VA Responding to Congressional Requests in a Timely Manner?: Hearing Before the H. Comm. on Veterans' Affs.*, 113th Cong. 3 (2014) (statement of Rep. Mike Michaud, Ranking Minority Member, H. Comm. on Veterans' Affs.).

**356.** *See supra* text accompanying notes 174-178.

**357.** For accounts of why Congress has adopted this sort of system, see generally James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004); and William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511 (2020).

**358.** The authors thank Emily Bremer for this insight.

more often discussed in the context of federalism than in the separation of powers, between hard and soft power. Scholars of federalism have observed that the traditional obsession with hard-power concepts like sovereignty misses the forest for the trees: states and local governments exercise most of their influence over policy by exercising their power to participate in policymaking as "integrated components of a larger policymaking regime," as when a state administers a federal grant program and gets to decide on the particulars of implementation.[359] We tell a similar story here. Congress's power over BVA's adjudication of individual constituents' cases does not stem from the exercise of its "hard power," that is, its power to legislatively require particular actions by BVA. In fact, Congress's ethics rules prohibit members from even implicitly invoking the threat of legislative action to extract favorable outcomes in casework.[360] Rather, Congress's power seems to emanate from its ability to assist the agency in the nitty-gritty of adjudication—from its power to persuade BVA that it has useful information that can help BVA identify claimants entitled to meritorious treatment. Put simply, Congress influences BVA by offering to help execute the laws. We think that this example shows why studies of the separation of powers ought to attend more closely to "soft power" as a method by which the branches get what they want from each other, even when they lack the formal control that we ordinarily imagine as the bread and butter of constitutional law.

### 2. *Administrative Law*

Much ink has been spilled in recent years over the question whether politics can ever be a legitimate justification for policymaking under the APA.[361] The basic argument in favor of injecting politics into rulemaking—one that draws from a complementary emerging view in the Supreme Court's administrative-law doctrine—is that the executive branch is meant to be controlled by the President.[362] The President's legitimacy flows in part from a commitment to enact a policy agenda; the agencies, as subordinates controlled by the President, ought to participate in executing it. And while an earlier era in administrative law might have understood rulemaking as an exercise of a nonexecutive, quasi-legislative

**359.** Gerken, *supra* note 115, at 8.

**360.** *See, e.g.*, Comm. on Ethics, *supra* note 282; *House Ethics Manual*, *supra* note 87, at 177-85 ("Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representational role.").

**361.** *See supra* note 164 and accompanying text.

**362.** *See* Watts, *supra* note 1, at 37-38.

function, that conception has been thoroughly discarded in favor of seeing all policymaking as basically executive.[363]

Even though the Supreme Court has repeatedly questioned whether politically independent agency adjudicators are consistent with the Constitution,[364] few scholars have embraced the idea that adjudication should be explicitly influenced by politics. Our study shows why. As we demonstrate above, congressional interventions benefit the veterans who request them.[365] But in a world of scarce adjudication resources, they do so at the expense of other veterans. Even assuming that any intervention benefiting veterans must be beneficial—an idea implicitly and explicitly embraced by BVA[366]—the congressional interventions we study here cast doubt on this assumption. In a world of scarce adjudicatory resources, every veteran who benefits from congressional intervention means another veteran loses.

The Board's transition to the AMA process provides a stark illustration of how ostensibly pro-veteran interventions may undermine the fairness of the adjudicatory system as a whole. The AMA provided veterans with two streamlined processes for appeals, both meant to provide decisions faster.[367] But tens of thousands of appeals filed under the old system, known as legacy appeals,[368] remained pending at the Board. Since 2019, the Board has continued to prioritize these legacy appeals, devoting the vast majority of adjudication resources to

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**363.** Emily S. Bremer, *Presidential Adjudication*, 110 VA. L. REV. 1749, 1752-56 (2024).

**364.** *See* SEC v. Jarkesy, 603 U.S. 109, 140-41 (2024) (finding that the Seventh Amendment requires adjudication by an Article III court, while not deciding the constitutionality of the removal provision of Securities and Exchange Commission (SEC) ALJs); Lucia v. SEC, 585 U.S. 237, 258 (2018) (Breyer, J., concurring in the judgment and dissenting in part) (noting that by considering the Appointments Clause separately from removal "the Court risks . . . unraveling, step-by-step, the foundations of the Federal Government's administrative adjudication system"). In *Jarkesy*, Justice Sotomayor, in dissent, noted the "disconcerting trend" of questioning administrative arrangements, such as the SEC's form of agency adjudication. *See Jarkesy*, 603 U.S. at 201 (Sotomayor, J., dissenting).

**365.** *See supra* Section IV.C.

**366.** *See* Board of Veterans' Appeals: Speeding Appellate Review for Aging Veterans, 68 Fed. Reg. 53682, 53683 (Sept. 12, 2003) (to be codified at 38 C.F.R. pt. 20) ("Further, the number of exceptions to the general rule of 'first come, first served' has been kept to a minimum. By defining 'advanced age' as 75 or more years old, the narrow application of the advance on docket exception remains intact. We therefore make no change based on these comments."). BVA declined to modify proposed rules on the basis that docket advancement was narrow, in response to concerns that more expansive criteria for advancement might create delay for those ineligible under the new rules. *Id.*

**367.** For an overview, see Veterans Benefits Admin., *Appeals Modernization*, U.S. DEP'T VETERANS AFFS. (Jan. 12, 2024), https://benefits.va.gov/benefits/appeals.asp [https://perma.cc/6XXN-E3SP].

**368.** *See* 38 C.F.R. § 3.2400(b) (2024) (defining legacy appeals).

resolving them. In November 2022, for instance, over 70% of the appeals decided by BVA were legacy appeals, while only a little over 20% were appeals filed under the revamped process;[369] today, just 40% of pending appeals originate from the AMA process.[370]

Because relatively few adjudicatory resources are available to process AMA appeals, and because appeals must be adjudicated in docket order, the vast majority of AMA appeals decided today are those that have been advanced on the docket. In court filings, VA has acknowledged that, in November 2022, *all* of the AMA appeals decided by BVA were priority filings — cases either advanced on the docket or post-CAVC remands.[371] So the promise of a more streamlined appeals system has fallen flat: a veteran who today files an appeal under the "streamlined" AMA process faces greater delay because the agency's scarce resources have been exhausted by other congressional priorities.

In much the same way, congressional interventions may help the veterans who request them — but harm the veterans whose claims are pushed further back in the adjudication process. Indeed, concerns that greater latitude for docket advancements could infringe on some appellants' rights to swift review at BVA have surfaced in the past. When BVA proposed amending its AOD criteria in 2003 to include advanced age as a ground for advancement, at least one commenter argued it was "fundamentally unfair" to "advance[e] one case over another" on the docket.[372] As this pushback makes clear, claimants understand that advancing one case increases processing times for others, given docketing constraints. The due-process issue with congressional interventions relates not to their beneficiaries, but to everyone else.

Further, there is no inherent reason why the function of advocating for a timely decision necessarily ought to be performed by a member of Congress, with all the potential for political pressure that the current system brings. In fact, BVA intentionally limits the involvement of attorneys in appeals by capping fees to a "reasonable" amount, which is presumptively defined as 20% of the value of

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**369.** *See* The Secretary's Response to the Court Order Dated November 18, 2022, at 4, Gray v. McDonough, 36 Vet. App. 117 (Vet. App. Dec. 21, 2022) (No. 22-3933) ("For November 2022, 76 percent of all cases distributed to Board members were legacy appeals, and 23 percent were Appeals Modernization Act (AMA) appeals.").

**370.** Bd. of Veterans' Appeals, *Decision Wait Times*, U.S. Dep't Veterans Affs., https://www.bva.va.gov/decision-wait-times.asp [https://perma.cc/7X4T-X9SF].

**371.** *See* The Secretary's Response to the Court Order Dated November 18, 2022, *supra* note 369, at 4 ("Of the distributed AMA appeals, 100 percent were priority, and zero percent were nonpriority.").

**372.** Board of Veterans' Appeals: Speeding Appellate Review for Aging Veterans, 68 Fed. Reg. at 53683 ("Another commenter argued that the proposed rule fails to take into consideration the negative effect of advancing one case over another. The commenter felt allowing one claim to advance over another was fundamentally unfair.").

a claim.[373] The logic behind that rule is the government's interest in "manag[ing] [administering benefits] in a sufficiently informal way that there should be no need for the employment of an attorney" and to prevent veterans from losing their benefits to attorneys' fees.[374] Compelling though that idea might be, limiting attorneys' involvement in the process may be a result of the interest alignment between congressional oversight committees, Veterans' Service Organizations, and VA itself, sometimes dubbed as the "Iron Triangle" of veterans' law, at the potential cost to appellants.[375] Our study suggests a similar political-economy dynamic where the design of veterans' adjudication enables individual members of Congress to claim their success.

While vigorous representation by members of Congress may be a triumph of the democratic process, a surfeit of democratic influence may at core be incompatible with the neutrality that due process demands in an adjudicatory context. The reason is simply that adjudications deal with individual cases, where the line between personal favoritism and policy motivation is especially thin. Allowing the President to admit that an environmental regulation is changing because of a campaign promise is one thing. Forcing veterans with less zealous representatives to accommodate political favoritism is another thing entirely. Doing so transforms apolitical entitlements into essentially political benefits bestowed on a favored few. This notion of political interference is distinct from political representation: interference injects politics into a process designed to be neutral. In other words, due process cannot admit of the unitary-executive model on which so much modern administrative law is based.[376]

## CONCLUSION

We began our inquiry with the puzzle of congressional intervention in agency adjudication. While many have ignored congressional interventions

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**373.** *See* 38 C.F.R. § 14.636(f)(1) (2024) ("Fees which do not exceed 20 percent of any past-due benefits awarded as defined in paragraph (h)(3) of this section shall be presumed to be reasonable . . . ."). The other major target for congressional interventions—SSA—also presumptively caps fees at $7,200. *See* Maximum Dollar Amount in the Fee Agreement Process, 87 Fed. Reg. 39157, 39157 (June 30, 2022).

**374.** Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 321 (1985).

**375.** *See* Shaun Rieley, *Open Up the 'Iron Triangle' That Stultifies Vets Policy*, HILL (Sept. 4, 2019, 9:00 AM ET), https://thehill.com/opinion/national-security/459842-open-up-the-iron-triangle-that-stultifies-vets-policy [https://perma.cc/L3GX-CDLD] ("While this dominance has borne fruit in areas like extraordinarily generous G.I. education benefits, it has also suffocated desperately needed reforms.").

**376.** Bremer, *supra* note 363, at 1755-56.

entirely, or view them as an unalloyed good, we spell out reasons to question this view based on both theoretical and empirical analysis.

As a matter of theory, congressional interventions appear to be in tension with separation-of-powers principles and may represent undue interference in more formal adjudications that must be decided on neutral and objective bases in the record. Empirically, we show that congressional intervention is widespread and unequal. Further, it is impactful for those fortunate enough to have members of Congress on their side.

Members might assert, as they did in an amicus brief, that these functions have existed since the Founding: "[C]ongressmembers' role as constituent advocates is inherent in the constitutional structure, which contemplates that consistent communication and back and forth between the branches advances the public good."[377] This might well be so, but it would be in deep tension with a formalist strand of the separation of powers. One way to resolve this tension, of course, would be to embrace a more functionalist approach to the separation of powers that recognizes Congress's role in administration. The other would be for congressional interventions in formal adjudication to go the way of the franking privilege—that is, to be restricted and carefully circumscribed to avoid potentially improper behavior.

Either way, the sheer magnitude of congressional intervention highlights the ongoing quality crisis in mass adjudication. Fixing delays in agency adjudication only for those with the wherewithal to contact and get help from their elected representatives—at the direct cost of cutting everyone else in line—is an inferior, if politically convenient, solution.

Some theorists argue that congressional interventions act like "fire alarms" for agency performance, telling Congress when problems arise without the need for Congress to go looking for them.[378] But unless dysfunctional processes are reformed based on these alarms, for veterans, the current system of handling congressional inquiries is akin to helping some constituents escape the fire while confining the rest to an even more blazing heat as the fire burns on. The ultimate goal of congressional interventions, if they continue to exist, should be to make the vast majority of them obsolete. Legislators should use them primarily as performance indicators to improve the process for all claimants—in other words, to put out the actual fire.

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**377.** Brief for 35 Members of Congress as Amici Curiae in Support of Respondents at 10, Dep't of State v. Muñoz, 602 U.S. 899 (2024) (No. 23-334).

**378.** McCubbins & Schwartz, *supra* note 146, at 172-73.

## APPENDIX

### *A. Data Description*

Our main data source is the Veterans Appeals Control and Locator System (VACOLS), which is a database maintained by BVA.[379] This database includes data on all appeals to BVA and corresponding appellant information (date of birth, city and state of residence, zip code, and gender). The complete dataset includes information on 2,727,418 appeals labeled as filed between 1969 and 2018 on behalf of 1,634,253 distinct appellants. The complete dataset also includes data on 1,049,062 unique correspondences with BVA between 1969 and 2018 on behalf of 457,716 distinct appeals.

As previously discussed, we restrict our study to appeals with notices of disagreement filed between 2003 and 2017. To conduct our descriptive analysis, we further restrict observations to appellants with U.S. state address records to identify appellants with unique congressional representatives based on zip code. Of the 1,429,578 appellants with appeals filed during the study period, 94.11% include zip-code records that correspond to U.S. states.

We attribute correspondence to representatives based on the recorded correspondence date. In some instances, the correspondence date differs from the date recorded for mail receipt. These dates may also span two different Congresses for correspondence sent near the end of a congressional term. To address this issue, we assign the inquiries to congressional sessions based on the correspondence date.

We match appellant records for appeals initiated during the study period of 2003 to 2017 to congressional districts using the Housing and Urban Development (HUD) U.S. Postal Service (USPS) Zip Code Crosswalk. For zip codes that cross congressional boundaries, we generally allocate the record to the congressional district that contains the largest share of zip-code residents. A detailed description of the geographic mapping procedure is provided below.

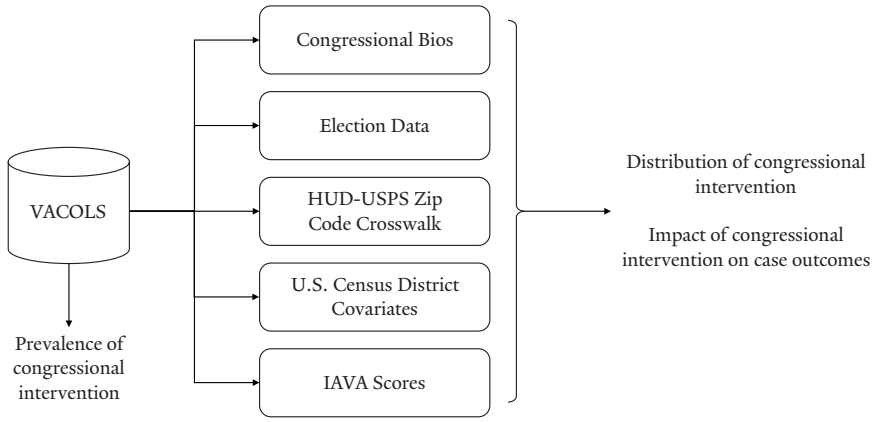
We then combine these data with demographic profiles of congressional districts compiled by the U.S. Census Bureau,[380] as well as biographical information on congressional representatives from each district from the CQ Press Congress

379. The Veterans Appeals Control and Locator System (VACOLS) is so named because it was originally designed to track the physical location of BVA claims folders as they traveled through BVA's offices. *See Veterans Appeals Control and Locator System (VACOLS)*, U.S. DEP'T OF VETERANS AFFS. 2 (Oct. 1, 2023), https://department.va.gov/privacy/wp-content/uploads/sites/5/2024/05/FY24VeteransAppealsControlandLocatorSystemVACOLSPIA.pdf [https://perma.cc/9XWN-Y4XG].

380. Foster-Molina, *supra* note 239.

Collection.[381] These data include records of the representative's gender, birth date, professional background, military service, and period of service. In addition, we use data from the MIT Election Studies[382] to construct measures of incumbency status as well as data compiled by Charles Stewart III and Jonathan Woon on standing-committee membership by chamber.[383]

The diagram below depicts the data sources for our project.




All replication materials are available at the *Yale Law Journal*'s Dataverse at the following link: https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/RCWAWE.

### *B. Study Time Period*

We restrict attention to appeals with notices of disagreement filed between 2003 and 2017 for two reasons. First, the VACOLS data appear less complete prior to 2000 or following 2018. Appendix Figure 1 displays the frequency of appeals by notice of disagreement year in the raw VACOLS data. Second, the criteria for advancement on the docket changed in 2003 to explicitly allow for

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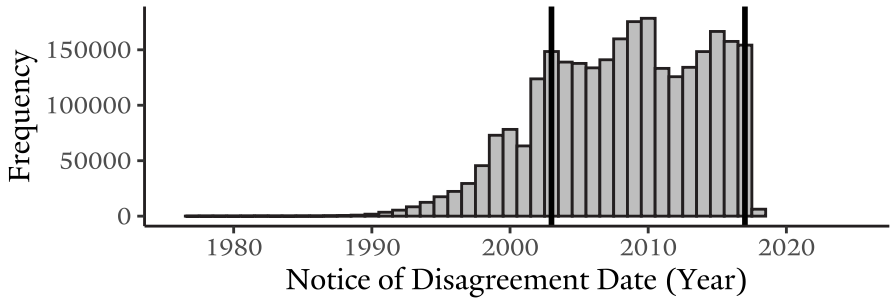
**381.** These are accessed through a library subscription, but the public version is available. *See Congress Collection*, *supra* note 237.

**382.** MIT Election Data & Sci. Lab, *U.S. House Constituency Elections Returns Data, 1976 - 2020*, HARV. DATAVERSE (2022), https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/QUUABJ [https://perma.cc/E2S3-DAZF]; MIT Election Data & Sci. Lab, *U.S. Senate Statewide 1976–2020*, *supra* note 238.

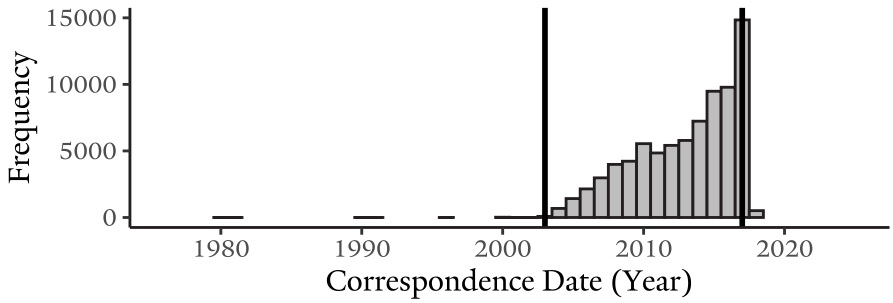
**383.** Charles Stewart III & Jonathan Woon, *Congressional Committees, Modern Standing Committees, 103rd-115th Congresses*, MIT (Nov. 17, 2017), https://web.mit.edu/17.251/www/data_page.html#2 [https://perma.cc/PH2L-EHSP].

advancement for appellants seventy-five years of age or older.[384] This changes the calculus for appellants seeking congressional intercession.

**APPENDIX FIGURE 1. FREQUENCY OF APPEALS BY NOTICE OF DISAGREEMENT YEAR IN VACOLS DATABASE**




**APPENDIX FIGURE 2. FREQUENCY OF CONGRESSIONAL INQUIRIES BY CORRESPONDENCE YEAR IN VACOLS DATABASE**




*C. Identifying Congressional Inquiries in Our Dataset*

Two entries in the VACOLS database include references to possible congressional intervention: mail type and mail source. Appendix Table 1 presents the mail type indicated for correspondence catalogued as originating from a

384. For more on this criteria change, see generally Board of Veterans' Appeals: Speeding Appellate Review for Aging Veterans, 68 Fed. Reg. 53682 (Sept. 12, 2003) (to be codified at 38 C.F.R. pt. 20); 38 U.S.C. § 7107(b) (2018); 38 C.F.R. § 20.902(c) (2024).

congressional mail source. Not all mail originating from a congressional source is classified as congressional-interest mail. For correspondence indicated as originating from a congressional source, 34% is classified as an inquiry into the status of a case, rather than as congressional-interest mail. Similarly, Appendix Table 2 demonstrates that not all correspondence indicated as congressional-interest mail is documented as originating from a congressional source. For correspondence indicated as congressional interest mail, around 76% is classified as originating from a congressional source.

To conduct our main analysis, we identify congressional inquiries as correspondence classified as either originating from a congressional mail source (email, phone, mail, or fax) or congressional-interest mail type. This encompasses all references to congressional intervention in the VACOLS correspondence data.

**APPENDIX TABLE 1. MAIL TYPE INDICATED FOR CONGRESSIONAL CORRESPONDENCE SOURCE**[385]

| Mail Type | Frequency | Percent |
|---|---|---|
| Congressional Interest | 40,768 | 61.14 |
| Status Inquiry | 23,060 | 34.58 |
| Evidence or Argument | 1,114 | 1.671 |
| Motion to Advance on Docket | 1,056 | 1.584 |
| Privacy Act Request | 161 | 0.241 |
| Motion for Reconsideration | 138 | 0.207 |
| Returned or Undeliverable Mail | 126 | 0.189 |
| Hearing Related | 124 | 0.186 |
| Attorney Inquiry | 47 | 0.0705 |
| Power of Attorney Related | 17 | 0.0255 |
| Change of Address | 15 | 0.0225 |
| Clear and Unmistakable Error Related | 15 | 0.0225 |
| Extension Request | 14 | 0.021 |
| Other Motion | 12 | 0.018 |
| FOIA Request | 11 | 0.0165 |
| Death Certificate | 3 | 0.0045 |
| Privacy Complaints | 2 | 0.003 |
| FOIA Request & Other Actions | 1 | 0.0015 |
| Withdrawal of Appeal | 1 | 0.0015 |
| Total | 66,685 | 100 |

385. Appendix Table 1 presents the frequency of correspondence type for correspondence classified as originating from a congressional source (email, phone, mail, or fax).

**APPENDIX TABLE 2. MAIL SOURCE INDICATED FOR CONGRESSIONAL INTEREST CORRESPONDENCE TYPE**[386]

| Mail Source | Frequency | Percent |
|---|---|---|
| Congressional Phone | 21,854 | 41.14 |
| Congressional Email | 14,592 | 27.47 |
| Claims Folder | 9,932 | 18.7 |
| Congressional Mail | 2,429 | 4.573 |
| Congressional Fax | 1,893 | 3.564 |
| Non-Congressional Mail | 1,709 | 3.218 |
| Non-Congressional Fax | 684 | 1.288 |
| White House Mail | 15 | 0.0282 |
| Secretary of Department of Veterans Affairs | 5 | 0.00941 |
| White House Fax | 2 | 0.00377 |
| Total | 53,115 | 100 |

*D. Matching Appellants to Congressional Districts*

We use the HUD USPS Zip Code Crosswalk to match appellants to congressional districts during our sample period. The HUD USPS Zip Code Crosswalk uses quarterly vacancy data compiled by USPS that include information on business and residential addresses within a zip code. The HUD Crosswalk file contains information on the ratio of addresses (residential, business, or other) in congressional districts that the zip code encompasses. The USPS vacancy data do not include zip codes exclusively associated with P.O. boxes.

In 2010, roughly 83% of zip codes with residential addresses in U.S. states were completely contained within a single congressional district, while 14% of zip codes included residential addresses in two congressional districts and fewer than 2% included residential addresses located in three or more congressional districts. Similarly, in 2012, 84% of zip codes with residential addresses in U.S. states were completely contained within a single congressional district, while 14% included two congressional districts and fewer than 2% encompassed three or more districts.

Appendix Table 3 and Appendix Table 4 indicate the frequency of zip codes that include multiple congressional districts. The tables display the percentage

386. Appendix Table 2 presents the frequency of correspondence source for mail classified as "congressional interest" mail.

of zip codes that contain residential addresses located in one or more congressional districts. Most zip codes with residential addresses only contain residential addresses in a single congressional district (83.68% in 2010 and 84.02% in 2012).

**APPENDIX TABLE 3. ZIP CODES THAT INCLUDE MULTIPLE CONGRESSIONAL DISTRICTS (2000 CENSUS GEOGRAPHY)**

| Number of Congressional Districts (2010) | Frequency | Percent |
|---|---|---|
| 1 | 29,814 | 83.68 |
| 2 | 5,171 | 14.51 |
| 3 | 599 | 1.681 |
| 4 | 41 | 0.115 |
| 5 | 5 | 0.014 |
| Total | 35,630 | 100 |

**APPENDIX TABLE 4. ZIP CODES THAT INCLUDE MULTIPLE CONGRESSIONAL DISTRICTS (2010 CENSUS GEOGRAPHY)**

| Number of Congressional Districts (2012) | Frequency | Percent |
|---|---|---|
| 1 | 32,244 | 84.02 |
| 2 | 5,464 | 14.24 |
| 3 | 630 | 1.642 |
| 4 | 34 | 0.0886 |
| 5 | 4 | 0.0104 |
| Total | 38,376 | 100 |

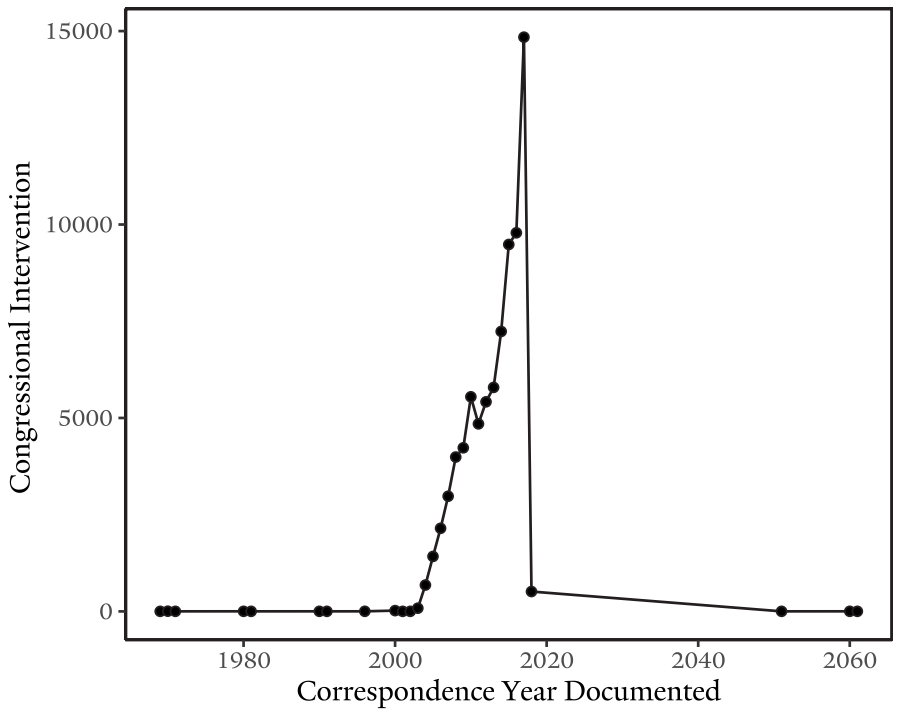
For zip codes that include residential addresses located in multiple congressional districts, we assign the zip code to a congressional district using the following procedure. For zip codes that include two congressional districts, we assign the zip code to the congressional district that contains the highest share of zip-code residences. Nearly all zip codes (99.61%) that straddle a congressional-district boundary contain residential addresses. The distribution of residential addresses between two congressional districts within a zip code is generally uneven: a large share of zip-code residential addresses tends to be located in one district, rather than evenly divided between the two districts. For zip codes with residential addresses, the mean maximum residency ratio is 0.8571 with a standard deviation of 0.14699.

For zip codes that include three or more congressional districts, we first assign the zip code to a congressional district if there is a district that contains a majority of zip-code residents. Over 90% of zip codes that include three or more congressional districts fall into this category.

*E. Cleaning Dates*

Among appeals with a notice of disagreement filed between 2003 and 2017 during the 108th to 115th Congresses, correspondences are recorded for 1969-2068 (see Appendix Figure 3 below). For our descriptive analysis, we attribute congressional inquiries recorded in the correspondence table in VACOLS to congressional terms based on correspondence date. This excludes correspondence recorded that falls outside our study period.

**APPENDIX FIGURE 3. NUMBER OF CONGRESSIONAL INQUIRIES BY DOCUMENTED CORRESPONDENCE YEAR IN VACOLS**



### *F. Identifying Inquiries with Members of Congress*

Congressional ethics rules generally prohibit a member of Congress from conducting casework on behalf of nonconstituents.[387] For mail classified as either congressional interest or originating from a congressional source, 70,089 interventions have no description of the correspondence recorded in VACOLS. Of the remaining 45,835 interventions recorded in the full VACOLS database that include mail notes, only 3,749 reference a senator, where 7,166, nearly double, reference a congressional office or correspondent.

### *G. Missing Data*

Appendix Table 5 presents the number and share of missing data in VACOLS for key variables used in our analysis: appellant birth date, gender, AOD criteria, address, period of service, representation at BVA, and regional office.

**387**. *See House Ethics Manual*, *supra* note 87, at 317 ("As a general matter, however, a Member should not devote official resources to casework for individuals who live outside the district. When a Member is unable to assist such a person, the Member may refer the person to his or her own Representative or Senator.").

**APPENDIX TABLE 5. FREQUENCY AND SHARE OF MISSING DATA IN VACOLS BY VARIABLE**

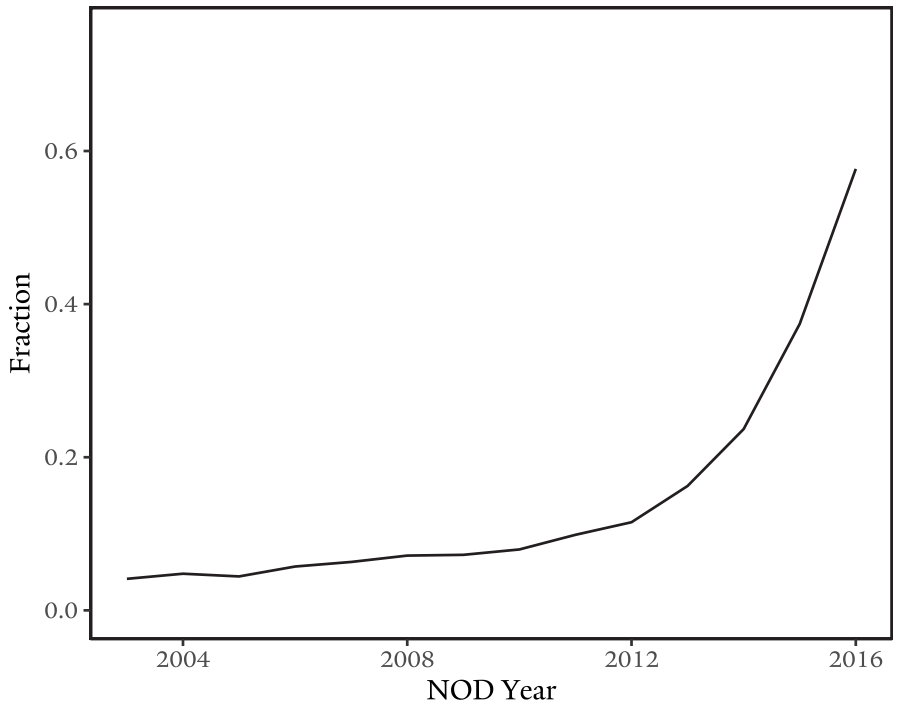
| | Description | Frequency | Share |
|---|---|---|---|
| sdob | Appellant Date of Birth | 933,926 | 0.480 |
| sgender | Appellant Gender | 924,463 | 0.475 |
| sfinhard | Financial Hardship | 1,937,131 | 0.995 |
| stermill | Terminal Illness | 1,944,654 | 0.999 |
| shomeless | Homeless | 1,938,753 | 0.996 |
| sadvage | Advanced Age | 1,935,529 | 0.994 |
| saddrstt | Address (State) | 0 | 0 |
| saddrzip | Address (Zip) | 0 | 0 |
| ctyp-ps3 | World War II (9/16/40-7/25/47) | 0 | 0 |
| ctyp-ps4 | Peacetime (7/26/47-6/26/50) | 0 | 0 |
| ctyp-ps5 | Korean Conflict (6/27/50-1/31/55) | 0 | 0 |
| ctyp-ps6 | Post-Korea (2/1/55-8/4/64) | 0 | 0 |
| ctyp-ps7 | Vietnam Era (8/5/64-5/7/75) | 0 | 0 |
| ctyp-ps8 | Post-Vietnam (5/8/75-8/1/90) | 0 | 0 |
| ctyp-ps9 | Persian Gulf (8/2/90-Present) | 0 | 0 |
| bfso | Appellant Representative | 104,271 | 0.054 |
| bfregoff | Regional Office | 0 | 0 |

*H. AOD Criteria by Inquiry Status and AOD Status*

**APPENDIX TABLE 6. SHARE OF APPEALS WITH AOD CRITERIA DOCUMENTED BY CONGRESSIONAL-INQUIRY STATUS AND ADVANCEMENT STATUS**

| | Inquiry Status | | AOD Status | |
|---|---|---|---|---|
| | 0 | 1 | 0 | 1 |
| **Terminal Illness** | | | | |
| No | 0.000 | 0.000 | 0.000 | 0.000 |
| Yes | 0.001 | 0.003 | 0.001 | 0.005 |
| N/A | 0.999 | 0.996 | 0.999 | 0.994 |
| **Financial Hardship** | | | | |
| No | 0.000 | 0.001 | 0.000 | 0.001 |
| Yes | 0.005 | 0.015 | 0.004 | 0.016 |
| N/A | 0.995 | 0.984 | 0.995 | 0.983 |
| **Advanced Age** | | | | |
| No | 0.000 | 0.001 | 0.000 | 0.001 |
| Yes | 0.005 | 0.013 | 0.004 | 0.045 |
| N/A | 0.994 | 0.987 | 0.996 | 0.953 |

**APPENDIX FIGURE 4. SHARE OF APPEALS WITH ADVANCED AGE DOCUMENTED IN VACOLS**



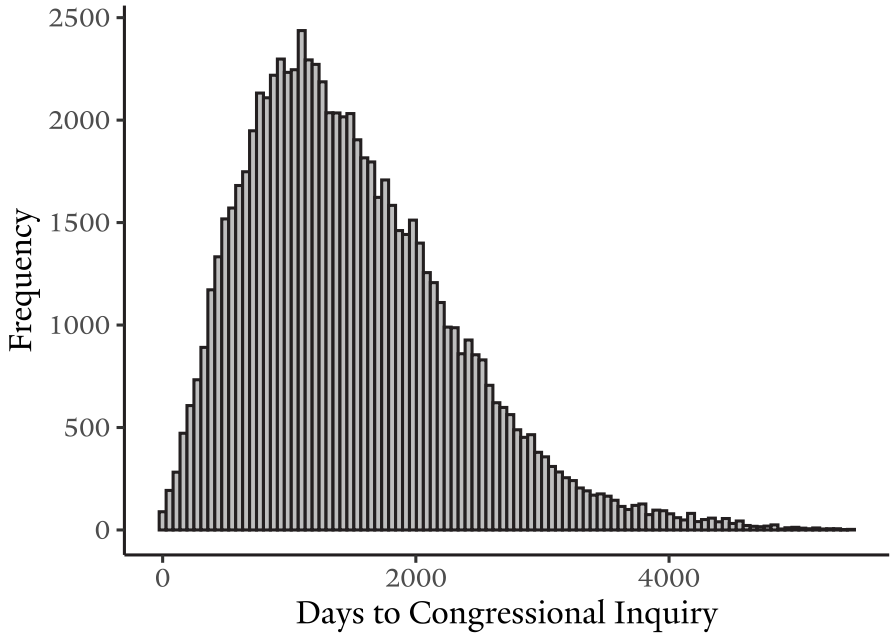

*I. Background on Congressional Inquiries in Study*

**APPENDIX TABLE 7. FREQUENCY OF REPEATED INQUIRIES**[388]

| | Number of Congressional Inquiries | | | | | |
|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 or more |
| Percent of Appeals | 63.710 | 19.670 | 7.825 | 3.867 | 2.145 | 2.784 |
| Number of Appeals | 28,839 | 8,904 | 3,542 | 1,750 | 971 | 1,260 |

388. The bottom row presents the number of unique appeals with the given number of congressional inquiries. The top row presents the distribution of the number of inquiries among cases that have at least one inquiry; cases without any inquiries are excluded.

**APPENDIX FIGURE 5. DAYS TO CONGRESSIONAL INQUIRY FROM NOTICE OF DISAGREEMENT DATE**[389]

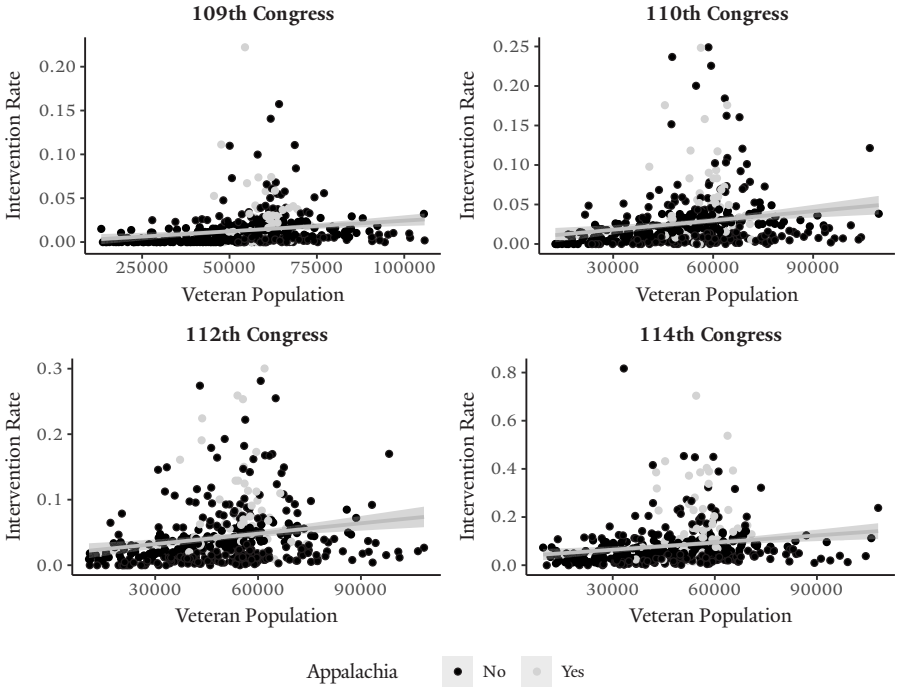



*J. Congressional Inquiry Rates by District Veteran Population*

Appendix Figure 6 displays the intervention rate by veteran population for each congressional district during the 109th, 110th, 112th, and 114th Congresses. Congressional districts in Appalachia are identified in light gray.

**389.** The notice of disagreement formally initiates the case.

**APPENDIX FIGURE 6. CONGRESSIONAL INTERVENTION RATE BY CONGRESSIONAL DISTRICT VETERAN POPULATION**[390]

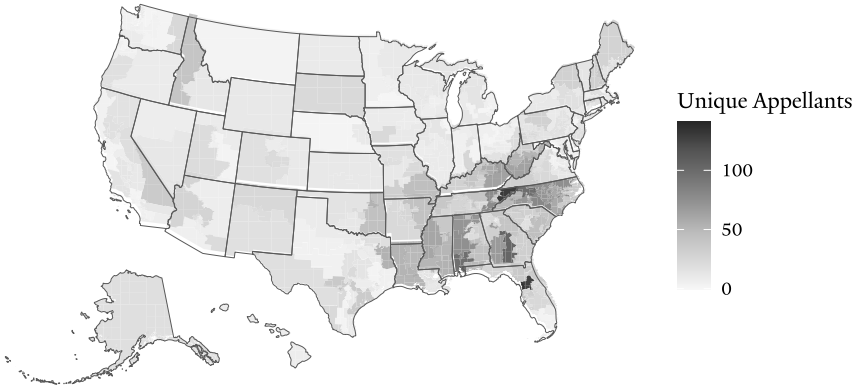



*K. Congressional Inquiries on Behalf of Unique Appellants by District*

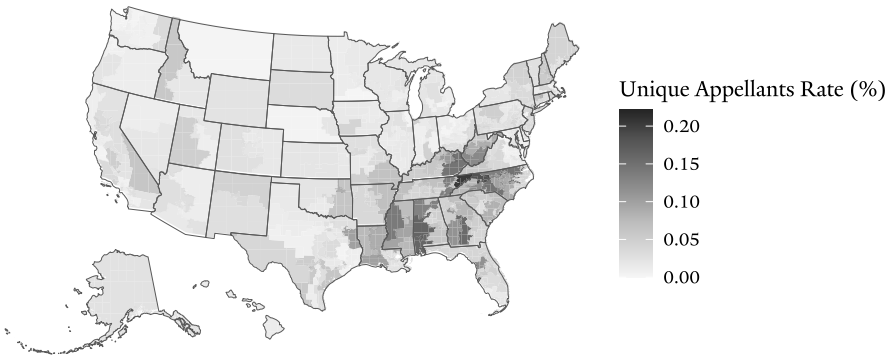
We now consider congressional intervention by district on behalf of unique appellants. Appendix Figure 7 and Appendix Figure 8 below present the spatial distribution of congressional intervention on behalf of unique appellants and the rate of intervention on behalf of unique appellants (i.e., intervention on behalf of unique appellants adjusted for district veteran population). The results are largely consistent with the results in Figure 4 of the main text.

390. The light gray dots identify Appalachian congressional districts.

**APPENDIX FIGURE 7. UNIQUE APPELLANTS BY CONGRESSIONAL DISTRICT FOR THE 114TH CONGRESS**




**APPENDIX FIGURE 8. UNIQUE APPELLANTS AS A PERCENT OF TOTAL CONGRESSIONAL DISTRICT VETERAN POPULATION FOR THE 114TH CONGRESS**




*L. Matching Analysis*

We now describe the matching process used to pair treated observations (appeals with at least one congressional inquiry) to control observations (appeals

that never receive a congressional inquiry during our study period).[391] To construct each match, we first define a set of potential matches for each treated observation. The set of potential matches are all appeals with notice of disagreement dates within a week (+/- thirty days) of the treated observation's notice of disagreement date that originate from the same regional office on behalf of appeals with the same age, period of service, gender, appellant type (veteran, widow, parent, or child), and type of appeal documented in VACOLS. We further impose the restriction that potential control observations do not have a final decision rendered before the first congressional correspondence date of the treated observation. This controls for preinquiry delay on an appeal that may be related to case difficulty or other unobservable characteristics.

We then perform a one-to-one match of the treated observation to a control observation based on propensity score matching for notice of disagreement date using the MatchIt package.[392]

*M. Robustness*

We conduct several exercises to determine the robustness of our descriptive results to various inclusion criteria. These exercises exclude appellants located in zip codes that contain multiple congressional districts.

*1. District Assignment*

First, we consider a natural alternative district-assignment procedure. Around 84% of U.S. zip codes are entirely contained in a single congressional district over our study period. A natural alternative assignment procedure would be to restrict attention to veterans living in such zip codes. This procedure has the advantage of eliminating incorrect district assignments. However, the drawback is that residents of zip codes that straddle multiple congressional districts may be different than residents of zip codes that do not.

Appendix Table 8 recreates Table 1 for appellants in the study with a documented zip code that is located entirely within one congressional district boundary. Imposing this restriction leaves 1,334,994 unique appeals on behalf of 868,865 unique appellants. This constitutes approximately 69% of the

391. We use the term "treated" to refer to appeals with at least one inquiry for expositional simplicity, whereas "control" refers to appeals without a congressional inquiry during our study period.

392. *See generally* Daniel Ho, Kosuke Imai, Gary King & Elizabeth A. Stuart, *MatchIt: Nonparametric Preprocessing for Parametric Causal Inference*, 42 J. STAT. SOFTWARE, no. 8, 2011, at 1 (describing the MatchIt program).

appellants and appeals, respectively, in the main descriptive analysis. The results are generally consistent with the descriptive patterns in the main text.

### APPENDIX TABLE 8. CHARACTERISTICS OF APPEALS BY CONGRESSIONAL-INTERVENTION STATUS FOR APPELLANTS WITH KNOWN CONGRESSIONAL DISTRICT

| | No Intervention | Congressional Intervention | *p*-value |
|---|---|---|---|
| **Appellant Demographic Characteristics** | | | |
| Appellant is Male | 0.94 | 0.96 | 0.00 |
| Appellant Age at NOD (Years) | 56.40 | 57.91 | 0.00 |
| **Advancement on the Docket Criteria** | | | |
| Issues per Appeal | 2.28 | 2.93 | 0.00 |
| Financial Hardship | 0.00 | 0.01 | 0.00 |
| Terminal Illness | 0.00 | | |
| Advanced Age | 0.05 | 0.09 | 0.00 |
| No AOD Criteria Documented | 0.95 | 0.89 | 0.00 |
| **Period of Service** | | | |
| World War II (9/16/40-7/25/47) | 0.02 | 0.05 | 0.00 |
| Peacetime (7/26/47-6/26/50) | 0.01 | 0.03 | 0.00 |
| Korean Conflict (6/27/50-1/31/55) | 0.03 | 0.07 | 0.00 |
| Post-Korea (2/1/55-8/4/64) | 0.06 | 0.14 | 0.00 |
| Vietnam Era (8/5/64-5/7/75) | 0.21 | 0.48 | 0.00 |
| Post-Vietnam (5/8/75-8/1/90) | 0.14 | 0.30 | 0.00 |
| Persian Gulf (8/2/90-Present) | 0.11 | 0.18 | 0.00 |
| **Veteran Representation** | | | |
| Unrepresented | 0.08 | 0.09 | 0.11 |
| Attorney | 0.08 | 0.12 | 0.00 |
| Service Org or Agency | 0.83 | 0.78 | 0.00 |
| **House Representative Characteristics** | | | |
| Veteran | 0.22 | 0.25 | 0.00 |
| Female | 0.13 | 0.12 | 0.00 |
| Incumbent | 0.78 | 0.78 | 0.06 |
| Republican | 0.60 | 0.58 | 0.00 |
| Legal Background | 0.33 | 0.34 | 0.00 |
| **House Committee Membership** | | | |
| Veterans' Affairs | 0.10 | 0.11 | 0.00 |
| Ways and Means | 0.08 | 0.07 | 0.00 |
| Appropriations | 0.15 | 0.17 | 0.00 |
| Budget | 0.10 | 0.11 | 0.02 |
| **Congressional District Characteristics** | | | |
| Median Income | $51,926.28 | $47,074.70 | 0.00 |

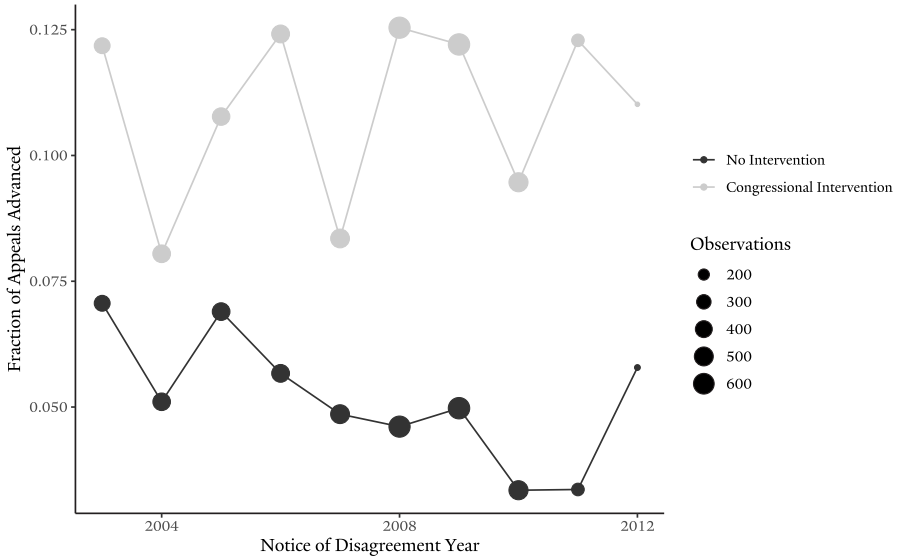
| | No Intervention | Congressional Intervention | *p*-value |
|---|---|---|---|
| Median Age | 37.52 | 37.83 | 0.00 |
| Unemployment Rate (%) | 12.86 | 9.77 | 0.00 |
| Population Out of the Labor Force (%) | 31.96 | 36.05 | 0.00 |
| High School Education (%) | 85.28 | 84.16 | 0.00 |
| College Education (%) | 25.31 | 23.60 | 0.00 |
| Black Population (%) | 13.09 | 14.37 | 0.00 |
| White Population (%) | 70.61 | 72.66 | 0.00 |
| Total | | | |
| Unique Appeals | 1,303,150 | 31,844 | |
| Unique Appellants | 861,450 | 22,437 | |

*2. Restricting Attention to Appeals with Form-9 Filings*

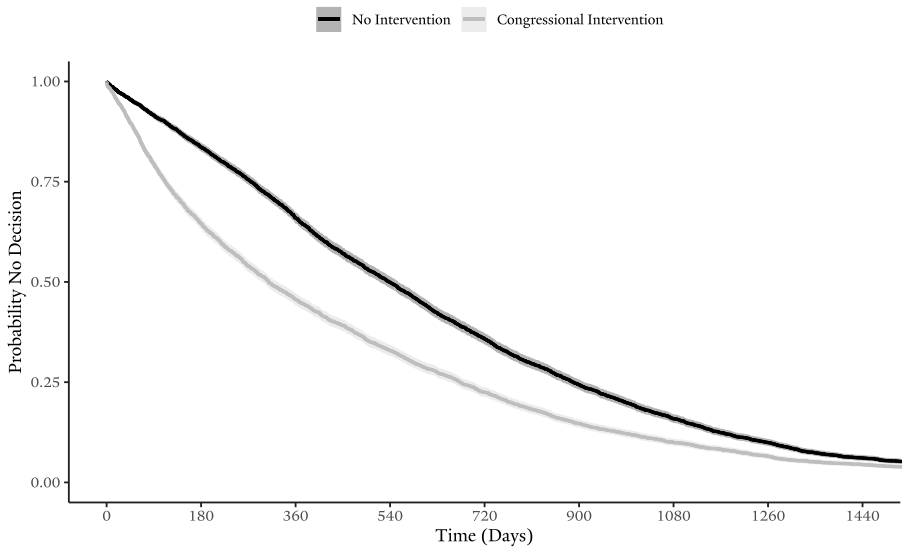
Second, we restrict attention to substantive appeals that have documented Form-9 filings. While the notice of disagreement initiates an appeal of a benefits determination, Form-9 creates notice of a substantive appeal to BVA, formally transferring jurisdiction from VA to BVA.[393] Most appeals in our matched sample include a filed Form-9 prior to the first congressional-inquiry date — approximately 85% of the full matched sample, or 8,962 observations. This alleviates concerns that our causal analysis captures fast-tracking occurring at lower levels of the appeals process, before BVA has formal jurisdiction over a case. Appendix Figure 9 and Appendix Figure 10 below present results restricting the sample to matched pairs of appeals over which BVA has jurisdiction before the first congressional-inquiry date.

**393.** *See* 38 C.F.R. § 19.22 (2024).

**APPENDIX FIGURE 9. FRACTION OF MATCHED APPEALS ADVANCED WITHOUT DOCUMENTED CAUSE WITH A FILED FORM-9**




**APPENDIX FIGURE 10. KAPLAN-MEIER CURVE FOR POSTINTERVENTION TIME TO DECISION (DAYS) BY INTERVENTION STATUS FOR MATCHED APPEALS WITH A FILED FORM-9**



*N. Causal Mediation Sensitivity Analysis*

Appendix Figure 11 presents the results of our sensitivity analysis graphically. The sensitivity parameter $\rho$ measures the correlation between the residuals of the mediator and the residuals of the outcome regressions. If there are unobserved factors that influence both the outcome and the mediator, then the residuals of these regressions should be correlated. The sensitivity analysis varies the degree of correlation and assesses the impact on the average mediation effect.

**APPENDIX FIGURE 11. SENSITIVITY ANALYSIS FOR AVERAGE CAUSAL MEDIATION EFFECT ESTIMATES FOR IMPROVED DOCUMENTATION OF AOD CRITERIA AND NUMBER OF ISSUES**