FORUM ON FEDERAL ADMINISTRATION ADJUDICATION

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FORUM ON FEDERAL ADMINISTRATIVE ADJUDICATION
A-P-P-E-A-R-A-N-C-E-S

Panel I:
- RICHARD PIERCE, JR.
- RON CASS
- KIM HILDRED
- CHRIS WALKER (moderator)

Panel II:
- CARY COGLIANESE
- FREDRIC LEDERER
- GERALD RAY
- DANIEL SHEFFNER
- REEVE BULL (moderator)

Panel III:
- DAVID MARCUS
- NANCY GRISWOLD
- ADAM ZIMMERMAN
- MATTHEW WIENER (moderator)
MR. WIENER: Good morning. We are going to get started. I am the Vice Chairman and Executive Director of the Administrative Conference of the United States. And I am joined by several ACUS colleagues this morning. Among them who are on ACUS is the Dean Emeritus of Boston University Law School as well as a member of the ACUS Council.

And Ron will also as you can see, he’ll be sitting on our first panel this morning. ACUS and its cosponsor of this forum, the Adjudication Committee of the ABA's section of Administrative Law & Regulatory Practice are pleased to bring together some of the leading experts to share their perspectives and to answer your questions on an important, but often neglected aspect of the Administrative State, and that's Administrative Adjudication or what might be called more simply, Administrative Litigation.

No one knows exactly how many cases are adjudicate each year before administrative agencies. But surely, that number will exceed the number that the federal courts adjudicated each year. I won't stand between you and the panel any longer except: First, to know that ACUS has been at the forefront in efforts to improve the fairness and efficiency of Federal Administrative
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Adjudication across the government. Second, to encourage you to pick up materials on the table outside, which include ACUS's recent recommendations of the Administrative Adjudication stretching back to 2010. Third, to invite congressional staff to be call upon ACUS as a technical resource with respect to administrative law issues whenever they may arise. And fourth, to at last, recognize just a few people here. First and foremost, Kyle McCallum, counsel to the Senate Judiciary Committee, for helping to arrange for our use of this room and many other things this morning. Thank you, Kyle. Kyle, are you here? There -- I'm sorry -- thank you, Kyle; and thank you to your boss, Chairman Grassley, who we have been honored to count among ACUS's strongest supporters for many years.

I'd also like to thank or recognize -- is Judge Braden here from Court of Federal Claims -- she's not here; Kim Hildred, who is the recently appointed chair of the Social Security Advisory Board and also a good friend of ACUS, and finally, I'd like to thank Chris Walker to my left, your right, a law professor of Ohio state University, and a member of the ACUS, and along with being the co-chair of the ABA Administrative Law Sections Adjudication Committee.
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With that, I'll turn the podium over to Chris to introduce and then moderate our first panel. Thank you, Chris.

CHRIS WALKER: Great. So this is really exciting. When Matt and I were figuring out what to do this fall for the Adjudication Committee for the ABA, I wanted to bring it here to Congress. And I'm not going to speak for Matt or ACUS. But ACUS and the ABA Administrative Law Section have been doing a lot of really important work on how to think about and reframe and perhaps reform agency adjudication. And yet, in Congress most of the regulatory forum legislation has been focused on rulemaking. So we thought it would be fun to have a day, or morning, where we kind of bring the ideas forward that ACUS has been working on as well as other ideas that ACUS has been working on to help kind of focus on ways in which we rethink our approach to agency adjudication.

So we've got this terrific panel and, I guess, I kind of get us started off talking big picture of where adjudication fits in within the modern Administrative State. And I just want to kind of start that off -- a lot of times we fixate on rulemaking when we think of the Administrative Procedure Act and yet, the vast
majority of regulatory actions are taking place in adjudication. And even within adjudication, you have your classic Administrative Procedure Act Adjudication, which you might call formal adjudication, where others might not like that term "before." Before ALJ, that's a really, really small subset of adjudication. And ACUS has done some real pioneering over the last five or six years with the help of Stanford Law School to track all other types of agency adjudication, agency adjudication that occurred before Administrative Judges and not Administrative Law Judges, those that occur before for hearing examiners and others.

And I hope that's going to be featured somewhat in this first panel. The idea is that there's a vast diversity of types of agency adjudication that are happening across the Administrative State today. So with that, I'm going to introduce the panel very quickly. Two good friends and troublemakers, and hopefully a new friend, Kim, are on this panel. To my left, and really to my left on most things, is Dick Pierce from George Washington. He disagrees with me on almost everything, but he still said I should get a ten rating on my external reviews, so I'm grateful for that. We have Ron Cass -- I was going to call him the Dean of
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Administrative Law -- formerly the Dean of Boston University, fellow troublemaker with Dick at UVA, which I did not know you were officemates. He and I like to cause trouble together. So I'll have him to back me up when Dick disagrees. And then we actually have a real world perspective from Kim Hildred, who has mentioned the Social Security Advisory Board. We are going to go in this order and she's going to tell us why all her theories are great, but just not at all grounded in (inaudible). So we're going to start that way. And because we only have an hour, I'm actually going to keep track of the time. And I'll elbow Dick when it gets to ten minutes, because I want to leave enough time for questions and interactions with the panel. So I'll turn it over to Dick.

DICK PIERCE: Thanks, Chris. So I just want to kind of lay out the framework of what the Agency Adjudication System looks like. I'll start with what I consider the Mass Justice Agency, Social Security Administration and the contents of making disability decisions; VA primarily in the same context, SMS in the context of decision-making about eligibility for reimbursement for health procedures, and immigration, of course. These agencies differ tremendously in their decision-making
structures and the nature and the characteristics of the adjudicatory personnel that they rely on. But they have a bunch of common characteristics. They're all characterized by massive and growing case loads, long cues that produce long delays in decision-making. And they're characterized by some problematic, unexplained inconsistencies. So they share a lot of characteristics that cause them to be constantly studied, and House and Senate hearings. And wide variety of other forums including a lot of ACUS projects. And those have identified a lot of problems and not very promising solutions.

And then I want to segue to the role of the of Administrative Law Judge. And as Chris pointed out, they really account for a small and diminishing proportion of the total number of federal adjudicatory personnel, but they were always viewed as the gold standard. They are the only ones that are actually had a place in the Administrative Procedure Act. They're assured a greater degree of the decisional independence than are most other adjudicatory personnel.

Historically, when I used to practice law in this city in the 70s, every regulatory agency had lots of Administrative Law Judges. And most of the regulatory
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Adjudications were conducted. And trial-type hearings before Administrative Law Judges. Gradually over time, have most agencies have made the transition from oral adjudicatory hearings before ALJs to paper hearings, where it's an exchange of written documents as a principal basis for decision-making. And that's taking place with the acquiescence and in some cases, the encouragement. After the encouragement of the courts, the Supreme Court often referred to the traditional adjudicatory process. Regulatory adjudicatory processes were non-terminable. And I can vouch for that. I'm still waiting to receive the initial decision of the Administrative Law Judge in Central Power Commission Docket No. RP71-3, the first case I tried.

I don't think it's going to happen. He died about 35 years ago now, but it gives you -- it's an extreme example -- but it gives you an illustration of the advantages that most agencies have perceived as a result of this transition. Now, this takes place on winning the case of adjudication where the focus is on differences in opinion on issues of science and economics. And in that context, there is a pretty broad agreement among academics and among judges, and most agency heads. But the paper-hearing process makes more
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sense than the oral adjudicatory process.

So what's happened is the number of ALJs that adjudicate or preside over regulatory adjudications have gone down. The number of ALJ that preside in Social Security Disability cases has gone way up -- someone just gave me the number. It was 1,700 and some now -- by far the vast majority are involved in that one adjudicatory process.

I co-authored a long report for ACUS. I see one of my co-authors out there, Jeff Lubbers. Back in '92, were we devoted 200 pages in discussion of a very complicated tradeoff -- involving when you go the ALJ route or some non-ALJ adjudicator or other options -- very complicated tradeoffs.

Now, the major trend to the reduction of the use of ALJ's regulatory agencies has been the big increase in the SEC use of ALJs to replace Federal District Courts to adjudicate many disputes involved in the violations of the Dodd-Frank Statute. That countertrend has been very controversial. It has raised serious constitutional questions that have been resolved in different ways by Circuit Courts. It's on its way to the Supreme Court for sure. I don't know how it's going to be resolved, but it's interesting.
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I just add one other important point. To me, always the most powerful, most important law to keep in mind is the law of unintended consequences. It applies in all circumstances and can never be broken. It really applies in this context.

There is a lot of room for making beneficial changes to any of these systems of adjudication, but there's also a lot of room to make errors through well-intentioned changes that wind up having some bad unintended consequences. So just a note of concern -- a note of caution -- as you guys begin the process of figuring out what to do with these adjudicatory systems.

RON CASS: I am going to stand up here.

CHRIS WALKER: You get to do whatever you want to do. You're the boss.

RON CASS: First of all, let me express appreciation for the invitation to be here. Dick and I are amazed, but we're happy to be invited to be anywhere. And I do want to clarify: When Dick said he was practicing in the '70s, that was the 1970s.

I'm going to start with a story of a couple in their mid-60s where Dick and I would say, "young people." They were walking along the beach. And they stumbled upon something, picked it up, and as odds would have it,
it is a lamp. They brush it off together, and the genie pops out and says that he will give each one of them one wish. And because given the inflation, wishes aren't what they used to be, he says, we're reducing it from three to two. The wife says, I'll go first. I have a good life. I'm pretty happy, but I would like to have an all-expense paid luxury trip to Paris.

And the genie snaps his finger and there she is on the Champs-Elysees in a chauffeured limousine heading down Boulevard Haussmann where all the good shopping is. The genie turns to the husband and says, "What would you like?" The husband looks around just to make sure his wife is not there, he leans over and whispers to the genie, "I'd really like to be married to someone who's 30 years younger than I am. The genie snaps his fingers, and the guy turns 65.

So a lot of times people think they know what they want and can't quite say it right. We live with a constitution where people thought they knew what they wanted, and tried to say it in the clearest possible way. There were two things they did that are important to our conversation today. One, they divided up the powers of government. They divided up the legislative power, the judicial power, and the executive power.
They didn't talk in terms of adjudication rule-making.
They talk in terms of the power of the legislator. The
power of the judiciary. And what they understood by
that is the actual function that looks like
adjudication.

The actual decisions on facts and application of
rules to those facts is something that happens
everywhere. It happens in the administration. It
happens when anybody performs any function that has
real-world consequences. But what's different about the
judicial power is that it wasn't built with cases and
controversies involving the laws, involving the private
rights, involving private individuals, involving
important questions.

The exact way of cabining from the sort of
adjudication that takes place in administrative
exercises of authority is one that pops up every 50-75
years, and the courts try to give an answer.

In the 1850s, the answer was the dividing line was
between public rights and private rights. The cases
really had trouble trying to figure out how you divide
private and public rights. But the courts kind of
muddled through and it wasn't a big problem when
agencies were not doing that much -- when agency
activity consisted primarily of benefits administration, land management, and a variety of activities that did not look like they were regulating ordinary conduct of individuals who weren't doing business with the government.

The second crack at this was how Crowell v. Benson said the dividing line was between jurisdictional facts and routine facts. Administrators could find routine facts, they couldn't positively find jurisdictional facts. And that was a wonderful thing for administrative law books, and law classes because no one was ever able to determine where the dividing line was between jurisdictional facts and routine facts, which means we can still ask questions about relevance in Benson all these years later. The one thing that Crowell v. Benson did was it said, "There's a difference between the sort of decision-making, which is not a final adjudication of private rights and the sort that looks like advice to judges of what to do, where the administrator actually makes the decision, but it's not a final binding decision. That dividing line came back again in the 1980s with the decision of Northern Pipeline v. Marathon Pipeline case. That case shows you the court starting to take very seriously the question
of separation of powers between Article III Courts and administrative decision-making.

And in that case, they were dealing with the bankruptcy courts; they weren't dealing with what we would think of as ordinary administrative law cases, but what they said was if you have a decision that looks like it's a decision between private parties of a dispute that looks like a legal dispute, that has to be done like Article III Judges.

So in that case, the court drew a line, sent back to the Congress the rewriting the bankruptcy law, Congress did it, it came back to the courts in 2011, and again the Supreme Court said the same thing with an exclamation point. If you have things that look like a sort of adjudication that is between private parties, it's got to be done by Article III courts. You now have -- both Chris and Dick said -- you have a vast number of decision-makers in the federal sphere. You have ALJs who number about twice the number of Article III Judges. You have administrative Judges who number about twice the number of ALJs and Article III Judges. You have them making as a huge number of decisions.

Some of those, the vast number in Social Security, which takes up most of what ALJs do in the federal
government, look like their decisions of eligibility. And that looks like the old-line decision that was committed to adjudication by administrators.

You now have a separate set of questions, however, regarding what can the decision-makers and agencies like SSC do? Can they take the place of federal courts in handing out penalties? That is going to be on the Supreme Court's docket sooner or later. Before that, you have the question: If they can do this, how do the decision-makers have to be appointed?

And there's a series of cases from the 1970s forward that start to take the appointments questions seriously once again. So in Buckley v. Valeo, Freytag v. Commissioner, the Edman case, the Free Enterprise case, you have the Supreme Court striking down a whole series of appointments as inconsistent with the Appointments Clause of the constitution. They're two cases that Dick referred that are in the 10th Circuit, the DC Circuit -- last year and this year -- that evolve the SSC's processes -- that open the question whether the ALJ appointments there conform to the constitution. And you have a split between the two circuits. That is something that the is pending before the court as to whether we will grant Circuit.
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I think the odd-makers will say it will, of course, I have been a long-time rooter for the Washington Redskins, so I don't risk the odd-makers anymore. I will say for those of us in administrative law, it's a wonderful time for anybody given without administration adjudication, you have more than your typical share of problems on your plate. And like the couple on the beach, I think I know what I want, but I'm probably not going to say it that he gets informed. Thank you.

KIM HILDRED: Good morning. It's an honor to be here among my distinguished colleagues. I want to thank ACUS for the invitation to participate. The remarks I will make are my own and do not reflect the use of the Social Security Advisory Board, which I now chair. However, I want to assure you that the board is very concerned about the service being provided to those Social Security Disability Insurance and Supplemental Security Income claimants waiting to receive a hearing before an Administrative Law Judge. Today, over a million people are waiting an average of 600 days, almost two years, for a hearing with the Social Security Administration and Administrative Law Judge. The American people certainly deserve better. So I hope that this forum is the first of a number of steps towards needed reform.
I'd like to start with some basic information about Social Security, not knowing how familiar all of you are, but I think it's important to keep in mind the specifics of this particular program that is indeed complex and so vital to its beneficiaries.

The Social Security Act provides to benefits to those with disabling physical or mental impairments under the SSDI and SSI program. SSI provides benefits to workers who meet the Act's disability criteria and to their dependants and survivors.

On average, Social Security pays SSDI benefits each month to approximately 9 million workers with disabilities and 2 million of their dependents. Workers become insured for SSDI based on paying payroll taxes on their hard-earned wages and self-employment income.

In fiscal year 2017, SSDI benefit outlays will reach close to a $143 billion and are expected to reach $215 billion dollars in ten years. According to Social Security Trustees, by 2028, total revenues will be unable to cover full promised benefits.

The SSI program provides monthly benefits to people with limited-income resources who are aged, blind, or disabled. Adults and children under age 18 can receive payments based on disability or blindness. Social
Security pays approximately six million blind or disabled adults and over one million blind or disabled children in SSI benefits. General tax revenues fund the SSI program.

The benefits provided by this program are often the only resource of those with disabilities. The statutory definition of disability is used to determine whether an adult is disabled under SSDI or SSI. And the Act defines "disability" as the inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To make these determinations, the Act requires SSA to consider how a claimant's condition affects his or her ability to perform previous work or considering his or her age, education, and work experience, other work that exists in significant numbers in the national economy.

To carry out this definition, SSA has established hundreds of pages of regulations and internal procedures to describe how to evaluate medical evidence. Medical conditions that SSA considers severe enough to prevent work and how SSA assesses whether an adult can perform
other work that exists in the national economy.

The initial decision is made by employees of a hundred percent federally-funded state agencies, collectively known as Disability Determination Service. If denied benefits, an individual may apply for reconsideration by that state agency. Should an individual be denied at both the initial and reconsideration level, he or she can appeal that decision before an ALJ who conducts an impartial de novo hearing. The appeals counsel within SSA reviews ALJ decisions appealed by claimants are on its own motion and processes cases appealed to federal court. This fiscal year, SSA expected to receive 632,000 requests for an ALJ hearing. Currently, SSA has more than 1,600 ALJs on duty.

Before leaving the Hill in the beginning of 2015, I was privileged to serve the House Ways and Means Committee, the staff director of the Social Security Subcommittee. During a 112 Congress, the public was rightly raising concerns about the integrity of the Administrative Law Judges and the fundamental fairness of Social Security's appeal system, as numerous press articles then had highlighted judges awarding benefits 90 percent or more of the time in comparison to a
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national average that covered then around 60 percent. Judges who decided extremely in high number of cases in comparison to their colleagues and the assignment of cases outside random rotation raises the specter of inappropriate relationships with counsel.

At the time, SSA has all of a sudden conducted a number of audits at the request of subcommittee Chairman Sam Johnson and was also investigating allegations of fraud involving a certain office in West Virginia, which some of you may have heard about. In that case in West Virginia, an attorney ultimately pleaded guilty to paying doctors and an ALJ to rubber-stamp false disability claims using fake evidence.

At that time, under Chairman Johnson's leadership and that of a ranking member, Sarah, the Ways and Means Subcommittee and Social Security held a joint hearing with the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law -- on the role of Administrative Law Judges. Later, the subcommittee on Social Security had own hearing to further examine the appeals process in Social Security. These hearings explore the challenges of the ALJ hiring process where the office of personnel management accepts the applicants, administers the ALJ examination, and
maintains the register from which agencies hire their ALJs, including long-standing questions about the performance of OPM. In its testimony, then Social Security Commissioner, Mike Astrue, indicated that in 1977, commissioners appearing before the committee have testified about the difficulties they have faced with OPM and encouraged the committee to closely examine OPM's ability to consistently and timely provide quality judges to SSA and all federal agencies.

Also discussed was the fact that becoming an Administrative Law Judge is effectively an appointment for life. Although an ALJ can be removed for misconduct by the Merit Systems Protection Board. However, the process may take well over a year, in which the ALJ will continue to earn his or her full salary.

While under his leadership, SSA was able to successfully address certain misconduct cases through the MSPB. The commissioner asked to highlight that the SSA could not take action against judges based strictly on the allowance or denial rates because Congress had put great weight on ALJ's qualified decisional independence. The good news is since these and other hearings and investigations, most notably by Senator Coburn and his staff, some progress has been made.
Supported by a number of excellent reports by ACUS, SSA has published a number of rules to improve the efficiency and timeliness of the hearings process. These rules relate to the submission of evidence, nationally uniform procedures related to advance notice of the hearing, and the submission of evidence before a hearing of the treatment of treating physician's evidence.

Also, thanks in large part to the efforts of Judge Gerald Ray, who you will hear from shortly, SSA now has tools to train and counsel ALJs. Judges now have information about their Appeals Council remands, and their performance in relation to ALJs, and their office, their region, and the nation. There are enhanced quality reviews and focused reviews. They also focus on other participants in the hearings process. The number of ALJs with extremely high or low allowance rates has declined. However, while some members of Congress introduce certain legislative proposals and the President's fiscal 18-year budget request mentions a proposal that would amend the Administrative Procedures Act to create a probationary period for newly hired ALJs, the appeals process itself remains largely unchanged and wait times remain at unacceptably high
levels. And in my view, the time is now as Chairman Jackson has stated to ask the hard questions to determine if we can fundamentally do better to achieve a disability adjudication process that provides fair, accurate, and consistent outcomes while balancing the needs of claimants and taxpayers. Thank you.

CHRIS WALKER: Great. I want to open for the audience, but I want to get a little interaction here first. I want to start with Kim. And obviously, speaking in your personal capacity, not on your official role, but based on your experience, from a legislative prospective on Social Security, what do you think should be the key areas to spend more time thinking about a reforming? Do you have your wish list of things? Perhaps more money?

KIM HILDRED: Well, it's interesting. I'm not sure more money is necessarily the answer. As a matter of fact, the Social Security Subcommittee had a hearing just a few weeks ago where that question came up specifically. And the acting Chief of Staff there was talking about how they need to do more to increase efficiencies in the process itself.

I think part of the challenge for Members of Congress is number one, they are extraordinarily busy. Other issues sometimes take front-center attention. You
know, the hurricanes that we are dealing with today, tax reform, health care reform, these are major time takeaways for these members. And then, of course, when it comes down to it, most times they're more focused on the day-to-day wait times, the backlogs, the issues that are really effecting they're constituents.

So it's very hard for them to step back to take that more bigger picture role. I think that to help advise Members of Congress, I think, forums like this, I think other panel discussions, expert discussions can really help feed the public debate about these issues.

I would like to think that at some point with the support of ALJs -- of those experts here today, ACUS and others -- there could be an exploration of the process itself. And, you know, what is the appeals process? What is it's impact on claimants and taxpayers? Our modifications could be made that would provide better public service. I think those are some of the bigger questions that are out there for the Congress to address.

And I think that the more that we can help guide them with some of the dangers as some of the panel members discussed. Certainly, unintended consequences, I agree, is a huge one. I think that there might be a
better environment for begin to think about these taking on these questions

CHRIS WALKER: Ron, did you want to weigh in on the Social Security Administration?

RON CASS: Well, I don't want to say much about, as I said, because I think the real challenge in this is trying to take a system that is a constitutional system. And make it one that works in a way that is better. Everybody admits there are problems. Everybody sees there are issues to address. The difficulty is when your dealing with this large a caseload, this many different particular factual decisions, there is not an easy way to do it in a way that really gives attention to each and every claimant and that really looks hard at the facts and that doesn't have some sort of bell curve in terms of consistency.

When I was a faculty member, year after year, we would have debates over the grading system. And you would have the same debate every year. There would be one faculty member who was so inspirational in his own mind that all of his students were "A" students. There was a another faculty member, who since the 1820s had never seen a student who deserved more than a "F" plus. And in between was everybody arguing for the system they
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had when they were in law school.

Now, the truth is that you can name grades on it however you want. You can do it in terms of cherries and oranges and grapefruits and watermelons. You can do it in numbers, you could do it in letters. What really matters is the students is getting the grade that fits their performance and that is a fair relative to others. Social Security is dealing with that same problem just over a vastly larger number of cases than anybody else. And I think there will be always be ways of tweaking it, but you'll never quite get it right.

KIM HILDRED: The one point I that I would like to add: I've had the opportunity to do a little bit of work in the Veterans Affairs Disability taking a look at the Veterans Affairs Disability Program. And so far, the Congress has not actively achieve, kind of, a statute or operating -- the VA tends now to be operated by statute. Members of Congress have become so concerned about its operation that they're literally passing laws about how the program should actually be administered instead of letting the leadership of VA really makes some of those decisions.

I would certainly hate to see Congress get into that with the Social Security Administration. I think the
unintended consequence there would be very dire. And that's why I really believe the thoughtful people, you know, ALJs in the system today, expert, folks in ACUS, those are the types of people that should -- if they can get together and really debate and talk about some of these issues. I think it creates a much better environment and ultimately will produce far better thoughtful policy options that could be successful.

CHRIS WALKER: So what I'm trying to envision adjudication putting into a bucket. Sometimes it's mass adjudication versus not mass adjudication. Other times, I think it's helpful to think of it as public benefits, public enforcement, and private enforcement. And I want to talk a little bit more about private enforcement.

I've been thinking a lot about the pad panel and appeal board. Have you all been following the PAD Trial Appeal Board? This is a fascinating agency adjudication system, most of which was created by the American Invents Act in 2011 that provides a fast track administrative forum instead of going to court to challenge the vitality of.

It's not ALJs, they're padded Administrative Judges. So they're similar to a non-ALJ Administrative Judge. They hear a lot of cases, and they're going to hear more
case now that Supreme Court has ruled that every padded plaintiff can't go to judiciary of Texas. You actually got to go where the venue -- where there is context. So I am curious as I think about these private -- Ron kind of talked about this a bit -- these set up a certain amount of challenges to have an agency adjudicator. Some of them are constitutional challenges. And in fact, we have the Oils States case before the Supreme Court this term asking whether it's constitutional -- for the PTAB as we like to call it -- to adjudicate padded validity decisions.

But they always have some kind of interesting challenges. I mean, lots of interesting challenges. The PTAB -- there's not a lot of -- unlike a lot mass adjudication systems -- the head of the Pen and Trademark office does not have the final say, at least formally. She can't take the case and decide it like you could on some of the commission systems and like the Attorney General Graham with immigration, but she can order a hearing and re-stack the panels. There are some really fascinating issues. And I kind of wonder if folks have thoughts on these -- what I call "private enforcement" of agency adjudication.

DICK PIERCE: Let me take a crack at that. I think Ron
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did a good job of summarizing the issues in the case law. And I want to try and put them in a bit of context. One issue that the Supreme Court is almost certainly going to be deciding in the next couple of years has been chewed up by the desperate opinions of the two circuit courts on the appointment clause issue. And that certainly is a serious constitutional issue. And it could well be that ALJs, at least in this context, are inferior officers and have to be by their appointed by heads of agencies. That's a real serious question.

CHRIS WALKER: Some people argue that it should be appointed by the DC Circuit.

DICK PIERCE: It's very important to lots of law professors who have gotten ten years based on writing on it. But in terms of importance to the world, it's a "who cares". I was just talking to a couple of Social Security people about what changes -- well, instead of somebody at HR making the appointment decision, that person will recommend to the commissioner -- somebody for appointment in the commissioner -- and somebody will rubber stamp that and end of constitutional problem. So it's "who cares". In terms of practical affect as opposed to lofty, abstract constitutional issues.
Now, the other issue that both Chris and Ron talked about -- the dividing line between Article III courts and agencies, that is a big deal issue. And it's not raised in the context of mass justice agencies. No chance they are ever going to say -- for a lot of reasons -- part of the legal and part of the practical -- there's no way in hell that the federal judiciary -- "let's add a couple of million cases to our docket." That's not going to -- but in the context of these SCC enforcements that's is potentially a very big deal.

They're actually six appointments from the court opinions that address the question. And four cases the government loss. And the decision was that only Article III Judges could decide this class of private law disputes. And two of them, the government won. In every one, the court was divided either, five, four, six, three. That's the one consistency in all of it. The four where the government loss were all bankruptcy court decisions. The two were the government, one were agency decision.

And I don't think that's by accident. And indeed, the chief justice provided a bit of an attempt to explain why they're more sympathetic to the argument
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that agencies can decide some cases that are related to their missions than they are to the bankruptcy court context in which the same abstract issue arises.

So it's going to be very interesting to see how that one eventually is resolved as Chris noted. There is a case before the court right now. This term that raises that question again. And it's in an agency context as patent cases. I don't know how the court is going to resolve that, but that may give us a more idea. What surprises me a bit is that the people have been challenging the SSC's use of ALJs in this place of federal Judges. And this is not an SSC decision, it's actually a congressional decision -- Dodd Frank to give them that power and exercising it.

To my knowledge, they haven't challenged on that basis. They're challenging on the appointment clause basis, which to me is a "who cares", and not on this other one that have massive effect and say, "no, this whole class of cases has to be decided by Article III Judges." I don't know why they made that practical choice. But it hasn't been raised in any of them that I'm aware of.

RON CASS: The one thing on the patent front -- historically, patents have been viewed essentially as a
government benefit. It was not viewed as a matter of a project. It was something that the government handed out and gave a temporary monopoly in exchange for your putting something in a public domain. So the court -- if it wants to get formal about this -- may read that differently. You have to two sets of bonding right now -- two sets of perceiving -- that are really intriguing on the patent firm. One is the one, Chris, that you were mentioning, but I think it is actually problematic from a constitutional standpoint. If you don't put this in the box of, essentially, licensing and benefits administration.

The other is there is about one-sixth of patent trials in the United States take place at the United States Trade Commission. Now, the International Trade Commission is a formal matter is not resolving a private dispute. It's deciding a trade matter, and it's not deciding the patent matter except as an incident to the trade matter and the patent matter then doesn't stay formally decided by the ITC decision. But effectively, this is now a vehicle of choice for patent adjudication. In part, because you get experts who have decided a lot of patent cases. And if I got a good patent claim, I rather have somebody who knows a lot about patent law
and who only gets one episodically.

A series of interesting questions -- I don't agree with Dick, and I say that without regard to the subject -- but in this case, I don't agree with Dick and the dividing line between the bankruptcy cases and the two agency cases really is going to hold up as a difference between that set of proceedings in bankruptcy proceeding and any agency proceeding. I think that the agency proceeding had particularly the short case. I think those are going to turn out better in the long run. I think that what the court will do is ask the question whether the decision is on a subject that doesn't look like an Article III subject and looks like a matter of benefits and administration of management of one of the traditional functions of the executive branch outside the realm of the courts, or whether it looks like something courts do. And it's going to be the second -- I think we're going to have problems with taking those decisions in house.

CHRIS WALKER: I like Ron's clarification with the patented cases, I guess when I think of adjudication, I put things in the bucket of private enforcement thinking, you know, private parties going to an agency saying resolve this dispute. But you're right, the
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courts are deciding term as whether it is actually private property or not. And inside the ladder, we're probably going to continue as is in the constitutional world. If they decide the former -- I might be shocked if -- it just seems like a dramatic change on how the PTOs handling everything.

RON CASS: We should remember that when the bankruptcy cases were up, everybody was betting that there was no way that the court was going to throw out the system. Because there were too many cases, there was too much wrapped up in this. And I remember not just with American Pipeline case but Stern v. Marshall also. They already fixed it. Just live with the fix. And with the courts say is -- and there's a big change. Think we also have to say there's a big change in the years when you have justices on the court. Reenforcing the sense -- and we have to go back to a constitutional first principals. So the look at the appointment's clause questions, the division of separation of powers between courts and agencies. I think all of that got reinvigorated in a way that at least last for quite a few years now because you have a lot more people for the court who have embraced that way of looking at the constitution including it's most recent appointee.
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CHRIS WALKER: I want to switch to another topic on ALJs versus AJs, but I want to see are there any comments or questions from the audience?

UNKNOWN FEMALE: (Inaudible.)

MR. PIERCE: That, of course, is a whole different line of cases that the appointments laws cases are decided on the appointments laws. The removal cases are just -- take care costs. And the main precedent there is free enterprise fund. And it is certainly possible as Justin Breyer cautioned in the opinion of free enterprise that we could wind up with the court extending the reasoning to cover ALJs and to say that ALJs cannot be subject to a double for cause from presidential control, which if the court used the remedy applied in the free enterprise fund and arguably analogies context, the court would just say therefore, we eliminate all the fore cause -- all but one of the four cause limits. And in the ALJS, there's either two or three depending on the ALJ and the precise position in government. So the court could conceivable knock that out. You know, that would have more affect than the appointments clause decision, but not that damn much more. There not going to be very many removals whether it's limited by fore cause or not. I don't see agencies -- I mean I suppose before this
administration I could say this with greater
certainty -- I think it's unlikely that we'll see an
agency coming in and saying, "I hereby get rid of every
ALJ and I'll replace you." I think even if that were to
happen and the legal argument there gets very, very
complicated.

Particularly, in the context of Social Security.
But even if that were to happen, I'm not sure if that
would be in effect. Now what would have a big effect is
if anybody ever gave ALJ's the power to make final
decisions, they would no longer be talking about the
difference between employees and inferior officers.
We'll be talking about officers, and then they could be
appointed through the process of presidential
nominations subject to confirmation by the Senate. That
would be a very big deal, but I don't see Congress
giving ALJs final decision. If they did, that would
change everything and the whole ALJ structure would -- I
think everybody in this room knows there're some
problems, a bit of the logjam. And the process of
getting people nominated and confirmed for positions --
just imagine what that would like look in the context of
1,600-and-some Social Security ALJs. That would be a
nightmare if it ever happened.
UNTOWN FEMALE: I have some questions for Kim, but let me first advise the audience of my basis. I am Administrative Law Judge Marilyn. I have been working at the Social Security Program for 23 years. Also the President of the Association of the Administrative Law Judges, which represents 1,300 Administrative Law Judges.

And let me just make a few comments before I set up my question, and it's for the entire panel as well. First of all, the logjam in the 1.1 million people waiting for hearings and decisions was never created by the ALJs.

In fact, there's an inspector general out this month that it's a result of increasing case size. In fact, file sizes have gone up 55 percent in the last few years. Partly because of a poorly drafted regulation by the department. There has been a hiring freeze since May of 2016. We've have lost a enormous number of staff members who worked on the cases. Judges don't work alone. They need a staff to work with. So there's been drastic reduction in staffing.

And there has also been an increase in procedures that require us to more time adjudicating cases. Now my view, we have ALJs that average of 2.5 hours to fully
adjudicate the case. And that means opening a file and reading all of the medical records, which may be a thousand or two thousand pages of medical evidence, holding a hearing, and questioning the claimant and expert witnesses, which takes up some time; drafting instructions, and editing a decision. I defy any one to do that job well in 2.5 hours.

Also, with regard to outlier judges on too low or too high, I'd have to say, Dean Cass, you are exactly correct. It's a bell curve. And if there is some place in the world where everyone's perfect, please let me know where that is because I'm going to go there. But it's just a bell curve. That's just the natural order of things.

The other thing that was left out that less people get the impression that ALJs are stupid or corrupt is that the Huntington on scandal. And the scandal of the rubber-stamping "paid" on cases was created, promoted, and facilitated by management. They new when they shoveled cases to these Judges that no human-being would do a good job on two thousand cases a year. They knew it. And they facilitated it because it served their purpose of getting cases out the door. It's the Wells Fargo phenomenon. Make possible quotas, emphasize too
much numbers, and you will have people meeting those goals and not doing there job.

All of that being said, what do you think about having a separate ALJ core removed from the agency because, quit frankly, after 23 years, I see the agency and its procedures and its influence on the ALJs to be not good. What about the notion of putting ALJs in a separate core insulated from managements controls so that they can do their jobs and actually issue independent correct decisions.

MR. WILLIAMS: So we have the lady for the main event. Kim, do you want to say some thoughts on this. And Dick's "oh, it doesn't matter the appointments clause issues" seem to matter a lot more in this world. I don't know. Let Kim start us off if she wants to say something.

MS. HILDRED: I think that it would be important to explore that as one of many options to improve the process. And I want to thank you for make a number of points and a number of remarks to explain everything.

But, I guess, my thought would be any alternative, we need to be very careful to fully assess the pros and the cons. And I would personally just want to know more what could be. You know, more information about what
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that would mean in terms of management and process. You know, how things might be different, how things might be better, how things might be worse. So I don't know if I'm necessarily ready to take the formal stand at that the suggestion.

MR. WILLIAMS: Thank you.

MR. PIERCE: Actually, I wanted to start someplace else. I want to start by agreeing one hundred percent that it would be a terrible mistake to think of ALJs as dumb or incompetent or corrupt or any in the sort. And I agree with you that when you're talking about a population of one thousand or whatever we're talking about, there's always going to be bad apples. On the other hand, the problem in Huntington was not created by management. That was an ALJ that went from hearing room to hearing room taking people out of hearing rooms. He decided. Not the 680-some agencies said should be decided but 2,000. So what we're dealing with is bad apple. I agree the very, very rare to have a corrupt ALJ. Very rare to have an incompetent ALJ. But that's what we had in that case.

Now, I've addressed the ALJ panel or the ALJ court issue many, many times. And the testimony and articles and the like. And it's very complicated. And we don't
have time to go through much of it in the next two minutes, but I remain totally opposed to it. I think it's a terrible idea. It would have horrible consequences. But I am sympathetic with the problem that ALJs who are smart, hardworking people confront in deciding all of these cases under tremendous time pressure with very big resource constraints. That is a big problem with which I have great sympathy.

MR. CASS: I do think, however, the ALJ -- if you want to talk about constitutional problems -- that would be a constitution problem. So on every score, I think that's one that is going to stop shy of where recommendation will go to.

MR. WILLIAMS: You know, it's interesting to kind of go where we started. The ALJs, the minority of agency adjudicators these days. And the rest of them are far more under control of the agency that they work for than ALJs are. And if we had more time, we could talk about proposals to make AJs ALJs. But I think we are going to have more serious conversations about this. I think the court is going to flourish this through litigation to really get a better sense of the ALJs role in the administrative state, but also the AJs role. The federal circuit had a recent decision addressing the
appointments in the Veterans in context of Administrative Judges.

So there's lots of fun constitutional issues floating around with adjudication, but we've got to stop because we have now got E-Adjudication up next.

(Audience applause. Panel concludes at 10:01 a.m.)

PANEL II

REEVE T. BULL:

Excellent job. I am going to jump right in into the second panel. If people want to get seated. So our topic for this panel is E-Adjudication. We're going to be looking at some of the uses of technological and the adjudication space and how it can involve enhanced what agencies are currently doing, and also eventually trend new territories for fundamentally modifying how adjudication is done in agencies. So as I'm sure you are all likely aware intelligent is already being used very expensively in a support functions to improve how agencies are adjudicating.

So today we're going to here about things like video hearings, for instance, the use of video technological to allow remote adjudication to take place. We will hear about the use of agency websites to compile materials used in agency adjudications. And we'll also
hear about the use of algorithms to spot all of these errors or actually improve how adjudicators are doing their jobs, but in addition, we're also going to be looking at some new areas that are currently evolving. Specifically, we are going to be looking at this idea of adjudication by algorithm. An agency actually designed algorithms and machine learning that would actually conduct certain parts of the adjudications. We'll be looking at all sorts of theory errors from the judicial review implications and also practically how this would actually work.

So with that let me introduce our four panelists for today. So we'll first hear from Professor Cary Coglianese. He is a professor at the University of Pennsylvania Law School and he also directs the Penn Program on Regulation. He's an esteem public member of the Administrative Conference and indeed chairs our committee on rulemaking. And he wrote the definitive article on adjudication by algorithm.

We'll next be hearing here from Gerald Ray. He's the former administrative appeals judge and deputy executive director at the office of Appellate Operations in Social Security administration. He's also a friend to ACUS, and has helped us on a number of significant
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projects on agency adjudication. And indeed doing a progress for us on case management. And he's really probably the foremost expert in actually applying things like algorithms to adjudication.

Third, we'll hear from Professor Fred Lederer. He's at the William & Mary Law School. Also another friend to the administrative conference has assisted us, and has been a consultant on two projects at ACUS on the use of the video hearings.

And finally, we'll hear from Dan Sheffner, who is attorney advisor at the administration conference. And has done a very important project on the use of agency websites to compile adjudicator materials, wrote the report on it which ultimately was the support for ACUS recommendation 2017-1.

So with that, let me turn it over to Cary to start us off.

CARY COGLIANESE:

Thank you, Reeve. I am pleased to be hear and happy to talk about adjudicating by algorithm. And what I'll say draw as re-mentioned on a recent article that I published in the Georgetown Law Journal called "Regulating by Robotive Administrative Decision-making in the machine learning era." And I want to give due
credit to my co-author, David Ler, on that paper who is a student at Yale Law School. The paper -- and my remarks here today -- try to the imagine a world in which we substitute human decision-making for machine learning decision-making or algorithmic decision-making in a wide variety areas of government. And maybe it seems a bit fanciful to imagine such a world. But the reality is that in the private sector, robots, algorithms are replacing humans in a wide variety of areas. Some very common, machine-learning analysts is what drives Google and it's powerful search. It's what gives you recommendations on Netflix about what videos you might like to see. Or on Amazon about what additional books you might like to buy.

It's also the technological that underlies the developments of autonomist vehicles that will be emerging more and more on our streets. What about government? It's not, and shouldn't necessarily be, far behind with the taking advantage of innovations in technology to improve government services and government decision-making. And there are already some uses of machine-learning by government agencies. Many of them are uses to allocate discretionary resources so the -- to pick a local example -- the City Chicago is using
algorithms to determine where to send restaurant
inspectors or where to place bait for controlling
rodents in the city. Those kind of discretionary
allocation decisions are ones where I think there's a
great promise for using machine-learning, but also a
very few legal concerns as well. Especially, at the
federal level of Heckler v. Chaney -- the allocation,
for example, of reinforcement resources is largely
discretionary.

Another opportunity for using that machine-learning
would be to support government decision-making where
it's the results of an algorithmic calculation is one of
many inputs into human decision-making. And I think
there may be relatively few controversial legal
concerns. But, what about actually replacing humans and
having the algorithm itself make a decision that
actually has some legal consequence for individuals and
is subject under traditional judicial review principal
subject to law that the courts can review. Here, I
think, there are also opportunities for government to
use. Consider replacing our current licensing processes
for pilots rather than filing just a simple application,
suppose the federal aviation administration came up with
a complex big data informed algorithm that computed the
risk level for that individual applicant. And then granted the application based upon the risk level that the algorithm generated. Suppose the Department of Justice, or the federal Trade Commission, decided to approve mergers based upon what algorithm forecasted the effects would be on the economy. I think we'll hear a little bit more of all sorts of opportunities the more automated technologies for making benefits determinations.

There's two aspects of machine-learning that will make these kinds of applications worth are consideration and in all likelihood, there will be some litigation and judicial consideration. Two characteristics of machine-learning: One is there automation nature. So the substitution of human decision-making is something that is worth considering. The second is that machine-learning algorithms are what are referred to as black-box algorithms. They are not like other statistical techniques where it's easy to identify what the key determinant or variables that are effecting the decision. Rather the learning algorithm is going out and capturing and scanning a whole host of data and finding on its own and making a prediction. And it's never clear. Even to the designers of the algorithm
exactly why any decision is made the way that is made. That poses some challenges to a government under law and a government where reason is often required to justify decisions.

On the other hand, there's great potentially to improving accuracy and decreasing decision-making costs. And I think if government is to move forward in this area, it has to address the legal questions and concerns in the article David and I take up a variety of potential legal concerns, the delegation doctrine issues, anti-discrimination concerns, transparency issues, and for the context of adjudication by algorithm, due process concerns.

Here I think there is obviously going be some uncertainty as it will depend on how adjudicating by algorithm is structured and actually implemented. But I see no principal reason why government should not be able to withstand due process objections by its use of adjudicating by algorithm. It will if look through Matthews Vial (phonetics) test passed very well, I think, the government resources aspect of that. And in all likelihood, if adjudicated by algorithm leads to better, more accurate decisions, it will certainly fair very well on the factor dealing with procedural error.
and accuracy. There will be efforts and need to be efforts by government agencies to validate these techniques. It should not been used in a caviler way. But carful and appropriate use of adjudicating by algorithm, I think, should be able to withstand muster under most of our existing standard Administrative Law Doctrines. Thank you.

GERALD RAY:

Okay. So I'm currently working with Social Security Administration. I am going to talk mostly about my experiences in terms of developing and using algorithms for adjudication. I do want to express the view though that all of views expressed are my own and not intended to be those of the agency or commissioner. So with that disclaimer, I'll talk briefly about some of the algorithms that we've developed and what we've been trying to do with those algorithms.

So I've been particularly interested in just trying to improve the overall adjudicative process to try to get people faster decisions that are actually better, more policy compliant to get our staff to be as productive as we can be when times are tight, budget which have been ongoing for awhile now and probably continue to be ongoing. And so it's important that we
be as efficient as we can be.

So one of the first things that we did at the Appeals Council -- I worked at the Appeals Council for 37 years -- as we developed algorithms to disambiguate the time it take to do two different tasks. So our staff does different things, and develop an algorithm we can use to figure out how long those things take and then you can put a range around that, and then we developed a performance metrics.

This resulted in significant improvements in productivity. If you looked at our data, you'd see over the last few years, we are doing the same amount of work with about a third-less staff. So this is what enabled us to free up some staff and, of course, we did other things to enhance that productivity. We looked at how adults learned and changed our training techniques to give people better training with more hands-on type training that we had done in the past instead of talking about what the business rules were, we also described how it would apply those rules and use actual case exercises that trained the people so they actually reduced the training time from 18 months down to about five months before it came productive. So we did things like that to try and improve. But one of the things
that may be one of the most important things is we took a look at our business rules, the policies, procedures, and laws. And realized that these are largely bullion. They can be basically put into decision trees. You can sort of map the policy-compliant path to each of the two thousand decisions that would be issued in disability claim.

Having done that, we actually built a tool to capture structured data on how well people followed that path. And to the extent they don't follow that path, it often results in a remand from the Appeals Council from Federal Court back to the ALGs for re-adjudication. So we were looking to see how well people follow the policy-compliant path. And we captured structured data on reasons why cases were remanded. With that information, we set up a division to begin doing things like focused reviews. Once you found these problem areas, you can see what was causing that. And we sort of took a page from Professor Daniel Conrad, a noble prize winner in economics, who talked about how well people do in complex tasks. They develop a holistic model, which is sort of like shortcuts that they used to get through the complexity. And what we found looked like the holistics that some people used on occasion.
diverge from the policy-compliance, so if you can explain that to them, people are trying to do a good job, and so they'll learn from that and do a better job.

So we did start to see significant improvements in the overall quality of the work. And we saw review rate, the rate at which we send cases back to the review level. It has dropped to about twenty-five percent down to about ten percent by using these techniques. And so, you know, we thought we were progressing quite well. Some of them started thinking about using natural-language processing algorithms. And one of our attorneys, who is actually here in the room today, actually developed a mockup of a tool that would use these algorithms to basically read the hearing decisions and find some of the types things that generate remands. And so we brought him over to work on this, and we had other staff assisting him trying to build out these algorithms. I wouldn't necessarily agree with the characterization that this would be a black-box type algorithm. I think the black-box approach is more with deep learning and artificial intelligence and much less with machine-learning and natural-language processing that we're using. But we use basically, regular expression to pull down the language from these
documents, the way our program is structured, a lot of the language is used in terms of art and specific meanings related to our process. And so we understand what those are. So we can pull out the phrases that we thought we most important.

The things that really go to the heart of disability adjudication and that caused problems with adjudication. We use things like fuzzy matching to find, you know, were the things are misspelled or slightly different from the regular expression. We use co-reference resolution to find other terms that mean the same thing. And tying all those things together, then we brought in a staff of people to look at a bunch of decisions that have been written in the past to do sort of a disambiguation so that we can make sure that we're finding the specific things that we are looking for.

And with is that, we built a tool that now can basically read do the decisions in a matter of seconds and extracts a large number of the issues that result remand, and simply highlights what those problems are. It tells you there is a potential here. The tool offers the adjudicators an opportunity to give feedback to the creators of the tool. So if we have false positive -- If its identifying things that were not actually
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positive. It's actually highly accurate. And then we give it to adjudicators and they can decide what they want to do with the problems that have been identified.

Our plan is to rule this out to the hearing operation at some point so that Judges at the hearing level can run this before they issue decisions if they choose to do so.

FRED LEDERER: Good morning everyone. I'm Fred Lederer. And I have the honor to be the part of the Center for Legal & Court Technology at William & Mary Law School where you're going to see (inaudible) intentionally involved on issues dealing with machine-learning, algorithms, and the many other things.

However, my incentive today is to deal with our more traditional topic, which has been in the past, courtroom and hearing room related design and technology.

So I'm going to spend a few minutes talking about that mainstay of the number of agencies -- video conferencing -- or potentially remote everything.

Over the last, I don't know how much years, we've had the honor and the pleasure of being involved in a fair number of important federal agencies. Particularly, Social Security, Medicare, and Immigration Court. And I thought for purposes of analysis, it might
have been useful to start by trying to oppose a
government. I'm going to assume that at least in
theory, when it comes to adjudication -- and we're
talking about potential technology in particular --
we're looking for an efficient, inexpensive, fair
resolution of the dispute, which is excepted as fair and
accurate by both claimants and the public. And then the
next question, if we're dealing with technological and
particularly the video conference becomes "why would we
want to use it?" Or "why are we in fact using it?" And
as all of you know, we use a great deal of it. Then how
will we use it? And what are the consequences in
particular and what are the problems and opportunities?

So traditionally, the primary reason when we use
video conference -- and I would expect particularly in
social Security and because of the goal of efficiency.
If we going to be able to have experts in particular,
appear remotely, we save a tremendous amount of money
and time and effort.

But there are other things we can do with the
technology. At one point, we were very close in
launching a real-world test of permitting pro bono
lawyers to assist people pending deportation hearings
when they were detained in remote locations. And pro
bono lawyers were in places like New York City. Current technology would permit that very easily as a matter of fact. So depending upon the nature of the adjudication, we can supply counsel, or for that matter, we can supply the claimant or the petitioner. We have individuals who also have to travel depending upon the agency we receive. Sometimes it is expensive and difficult for them to do. And sometimes, particularly if we are dealing with the ADA, it is impossible for them to do so.

So there's absolutely no doubt that we have the ability to provide not only efficiency and economic operation, but also to enhance access to justice right to counsel. Then we deal with the issues of how. The fact that the technology potentially permits doing this well, of course it doesn't mean that it does do it well. In fact, sometimes it's doing especially badly. Part of that has been the types that technology used in the past. Often it's implementation of technology.

There's a very famous study, the Chicago Bell Project where the project was terminated in minutes because the results were terrible. Buried in a footnote is the possible explanation. The cameras were not inline with the displays. Based on years of experience,
suggest that that meant the individual, defendant, was never ever looking at the judge, which would almost certainly give rise to that type of result.

But there're other issues. Social Security Judges, not many, but a few who never learned how to work their equipment. Environmental issues, there's no light over the judge. The judge looks like he's in the dark or she's in the dark. And the immigration courts being entirely dependent on lower enforcement personnel who have received and incredible inadequate briefing on the very simple basic on how to operate the remote video conferencing.

There's some discussion with the first panel about unintended consequences. You can predict with absolute certainty that when you use technology, no matter how simple, some degree of people will not use it right. But then you have to ask yourself to what degree is that going to defeat the general purpose. Your technology also permits the uses of other forms of technology. In this case, it was simple no note that one week ago a court technology conference we announced the first open microphone automated transcription system, which will affect everything.

Finally, of course, there's a question of will the
public, will the claimants, except it? And that largely is going to depend on the implementation, but culture. Facebook generation is also the Facetime generation.

MR. SHEFFNER: Good morning. Thank you for being here. It's an honor to be on this panel with this distinguished group of scholars and experts.

My remarks, which are my own -- I don't necessarily represent the Administration Conference, except when they do -- are not about innovations so much. As they are about how agencies in existing technological to improve transparency in a very important way and a very important subject of federal material, which I call adjudication materials, which are just the orders, the opinion, briefs, hearings, and other materials and documents that are issued or filed in administrative proceedings.

Now, as Reed mentioned earlier, I recently wrote a report about this topic that supported a recent ACUS recommendation -- recommendation 2017-1 -- that urges agencies to accrue transparency in this regard. Well, quite simply, increasing the incomprehensibleness and accessibility of their collection of adjudication materials on their websites. I was being sarcastic there. This topic might seem kind of parvoviral.
Especially after we've heard about adjudication by robot and the courtroom hearing technology. It's not entirely groundbreaking, but it is worthy of close examination. In part, because agencies are required by law, or encouraged by law, to post specific types adjudication materials online. Specifically, the Freedom of Information Act, it's proactive disclosure requirements require that agencies make available electronically final opinions and orders, which generally interpreted to mean precedent decisions. No other law mandates disclosure in that regard. But there are many policy and laws such as the recent FOYA Improvement Act in 2016 that emphasizes that express a more expansive policy in favor of a affirmative disclosure of federal materials in general online.

But the problem is that there is no central repository for adjudication materials looking into pay certain federal court context or regulations dot gov and the rule-making context. And I don't know if there should be an adjudications dot gov. I don't know if that would be helpful. ACUS doesn't have a position on that. But to the extent that agencies attempt to comply with FOYA, this general policy in favor of disclosure, they do so by posting adjudication materials on their
individual federal government website.

Well, in my examination of these websites -- about 24 federal agency websites -- I found to no surprise that there is a wide array of their ability in both agency disclosure of practices on their websites as well as how effective those disclosure practices are. And that is to say some websites are maintained during comprehensive collections of ALJ under first line of adjudicator decisions, how a body orders an opinion of supporting briefs, witness lists and pleadings. Not all websites are as robust or not all materials are easily accessible. And in addition, agencies utilize navigation and organizational tools and techniques in various ways. But also to vary the reasonable effectiveness. So the report and ultimately, most importantly, the recent ACUS recommendation, lays out a series of best practices to encourage agencies to improve if they need their disclosure of adjudication materials.

The most prominent of those recommendations is that agencies disclose more than is required by FOYA. To disclose not just precedential or important decisions, but also non-precedential decisions and procedural decisions. And supporting adjudication materials to the
extent that it's not cost prohibitive. To the extent that agencies take into account practicing considerations. They're not issuing orders with sensitive information un-redacted. And other relevant factors. And while increasing your adjudication material footprint on your website will necessarily impose some kind of cost. Especially at the front end. Even from the agencies that maintain very robust decisional and material libraries on their websites, they all express a lot of benefits -- its harder to quantify -- but such as increasing public trust and increase in the state satisfaction. As well as a reduction in FOYA requests and printing costs. But most importantly, by increasing transparency in this way, agencies will become further in the growing policy and again, that's abiding by recent policies in favor of proactive affirmative disclosure of adjudication materials. And even more importantly than that they will insure that parties to adjudications proceedings and the general public, in general, have ready access to very materials that have a very important impact people's lives.

MR. BULL: Okay. First, let me thank all four of the panelists. I think this raises some very fascinating,
interesting issues. And I'd like to kick it off with framing advice. And I'll have a question for each of the four panelist. But, I think that you've made a very convincing case. These are very important invasions and hold great promise for substantially reducing efficiency between adjudications in the Administrative State.

What I'm interesting in exploring are -- and each of you sort of touched on this in remarks -- there are some concerns. First, with respect to judicial review. How the courts are going to insure that the agencies are meeting the requirements of due process and the constitution of the requirements of the ADA. And I think there's also some concern about fairness as well.

So let me start it off with a question -- I think Cary and Gerald and Fred might even want to jump in -- I think the types of things that Gerald described where you are using an algorithm to correct clear errors and relatively uncontroversial. But I think each of you suggested that there's more that can be done here. There is machine-learning or what Cary describes as a black-box system. So I'm interested in your thoughts on how a judge would determine if this meets the requirements of due process or the adjudicating by algorithm. Particularly, if the judge can't necessarily
fully understand what's going on in the algorithm. Does it require him or her to have some degree of faith that, you know, even if he doesn't fully understand the algorithm itself, does that include producing a reliable and accurate result?

MR. RAY: The way we are using algorithms is we are simply highlighting potential errors in the case. The adjudicator still looks at the case and makes the determination as to whether they want to take corrective action or not. So the adjudicator -- we're not trying to interfere with the adjudication of the case or tell the judge what action to take or what to even do with that particular type of concerns raised by the algorithm. The algorithms are using probability theory. And they're telling you there's a high probably that this wasn't done correctly. So even if the algorithm is 99.9 percent accurate, we're supposed to give individual adjudication to each individual. And so we need to do that. We can't simply write off that point one percent of the people and do those wrong. So it's really important, we think, to make sure adjudicator still does adjudication. This is simply a tool to the system.

MR. COGLIANESE: It's in that sense to I'm looking forward to a world in which we might substitute the
human decision for an automated decision-maker. And there could be many good reasons for doing that. Humans, we do know, make mistakes. And if an algorithmic artificial intelligence system can make fewer mistakes than humans, we ought to really take that pretty seriously. Humans have built-in biases and cognitive limitations. We're not perfect. We should, I think, as a society be open to the possibility that there may be instances in which we improve justice by moving to an automated world.

Now, there are going to be questions. How do we know we are actually improving justice? I think that's just the question that Reed has put on the table. The way an agency would approach this would need to first be to establish through a rule-making, the algorithm that's going to apply for some kind of automated systems that's going to be applied. And it's in that context that the agency would put forward -- carious validation efforts. It is a black-box technique when one is getting to machine-learning of the kind that I've been talking about. Now, listen algorithms are really old. Any mathematical problem is an algorithm. I'm talking about learning algorithms where humans are not specifying the values or parameters. They're not saying look for these
words or others, but saying, let's take a whole bunch of data. We're going to train our algorithm based upon the data. And based upon the data, the parameters, the values that the algorithms design to optimize. The forecast, the goals of the algorithms. Humans know what the goals are. And that would have to be disclosed. And then what an agency could do though a rule making is disclose some of the test runs and allow outside experts have an advisory committee review this. These would all be good best practices that would enable an agency to justify its structuring of a decision-making process through an automated way through an algorithm.

You know, the fundamental question really comes down to is it enough for a decision to be justified on the basis of the machine said so. Or the algorithm said so. And that certainly will seem problematic for a system of government that, you know, going back to Lincoln, it's supposed to be "of the people and by people." And where we expect on due process a hearing by a human decision maker. But again, if it can be shown that the algorithm is going to perform better, we ought to be open to it. And I think it's possible to show that it's better and in those cases where the algorithm is used, and it's been justified and shown, then I think, the Courts can
except that we're doing this because the algorithm said so just in the same way that the Courts have excepted that agencies will decide matters because the thermometer said so. These are machines. And if they're properly validated in the same way we validate other kinds of instrumentation that are used by government officials all the time -- think of the radar detectors that police officers use to detect speeding -- we're finding that person because the radar machine said so. It said they were violating the standard.

That's the way I would think about these systems. They would need a validation and effort going forward, but they can, I think, comfortably fit in with our existing notions of the legal constraints on Administrative Decisions.

MR. RAY: So I want to comment. I have a different view of what these algorithms actually are and what they actually do. The machines do something called supervised or unsupervised learning, but there are basing it off of patterns that people recognize and our programing into them.

It's something that might be called a basing in belief network, which is a series of tables or information that can put context to the language that's
being extracted. The machines itself simply use logic. They don't understand words in context as humans do when we use language. So when you say, "I ate pizza with Mary" or "I ate pizza with pepperoni," all of you understand what I'm talking about. The computer doesn't know whether Mary is simply just another ingredient or pepperoni is a person. So you have to write rules of all of the things that the computer does. Once you do that, the computer can exercise those rules faster and probably more accurately than you humans can. But despite that, they're not a hundred percent accurate. So in any case they are giving you probability. And the probability is essentially never a hundred percent.

So I think it's still good to have the individual involved to look to see whether this is one of the exceptions to what the algorithms define it.

So I don't really think it's black-box technology. I don't think the machine is actually doing it itself. It's basing it off the information the people programmed into it.

MR. LEDERER: I agree with everything that's been said. And I'd like to note, it depends on what level of technology we're talking about. IBM Watson is now doing a medical diagnosis. Partially on the grounds, as they
pointed out, the machine has access to thousands upon thousands of medical journals. And no single human being could possibly read all of that. If you are restricted to given data with a clear-cut algorithm that can be reviewed by a Court if it wonders off.

If you tell your deep-learning computer that is even potentially subject to modifying it's own programing go out in the worlds data pools and tell us where this claimant is likely to get a job with this condition, that might not be reviewable. And it that might not be desirable. It all depends on what level we're talking about.

There's an immense amount of things that we can do to make things better.

MR. BULL: Excellent. Let me ask another question of Fred: So the video hearing technology, I think, holds an enormous promise as you described. You sort of touched on this in your remarks, but if you can elaborate on if the technology is not used properly and how that can cause problems, but I'm wondering is it as robust as an in person hearing in terms of allowing the adjudicator to observe certain nonverbal cues or other things that might feed in credibility determinations or other important aspects of conducting adjudication.
LEDERER: As a classic court prospective as distinguished in administrative hearings, the fundamental elements of fact-finding often in adjudication is based upon demeanor evidence. Whether the individual witnessed or claimant appears to be telling the accurate truth. As I understand it, there is no scientific data to back that up anywhere. In fact, quite the opposite. So it appears in the entire legal system when it come to this comes from illegal fiction. So on one hand, I can pretty much guarantee you that you is I can create a hearing remotely, in which you will be able to as an ALJ or otherwise to have at least a good opportunity to determine demeanor evidence, and probably better, than you would if the person was in the hearing room on the other hand, we're apparently to duplicate a scenario where in fact, we get no reliable data at all.

MR. BULL: And finally a question for Dan on this topic and this really is a due process question, but I interested -- you discussed FOYS and the goal from the disclosure and making sure that information is as available accessible as possible. And I think what he described holds great promise fore that. What I am interested in though is there really a risk here perhaps
that the agencies will dump information on their websites. You know, put too many documents out there in a way that's not well organized that actually makes things less accessible. Is there sort of a trade off between comprehensiveness on one hand and usefulness on the other?

MR. SHEFFNER: Yes. In fact, that does happen with some agency website, but it doesn't have to necessarily be a tradeoff. It's not just comprehensiveness of decisional or other materials. It's also accessibility, as you know, does not matter if you have ever single order or opinion and brief. If know one can actually get to that from the homepage of the website. So there are a lot of different best practices that agencies can engage in. I would imagine similarly, such as enhancing search engines whether it be from the homepage or in a specific section of the website to allow users to narrow or focus their search on specific types of records or specific cases or to narrow by docket number or case number, etcetera. It's also very -- some of the most accessible agency websites actually will group their decisions -- not their decisions -- their materials by proceeding and individual docket pages.

So there is a lot of the different kind of
organizational and navigational techniques that agencies do use that other agencies could replicate if they have the resources to do so.

MR. BULL: Another question I have for all of the panelist is relevant to the idea of adjudication by algorithm as well as the use of the video technology is, you know, I think we can likely except that this should produce a result as accurate or maybe even more accurate in some cases as what a traditional adjudication would produce. I'm interested on your thoughts of how the actual litigants, if you will, perceive it themselves. Obviously, it's important they come away feeling they received a fair hearing. Could you offer your thoughts on that?

MR. COLIGANESE: I think this is one of the areas to be aware of moving to a totally automated artificial intelligent government would be what happens to the value of human empathy that comes from a system of government and adjudicatory systems where people hear from other people. They though know and can see they are being listened to. We have a great deal of social science research that indicates that people value the procedural fairness and justice and being listened to and is absolutely critical to that. I just point to a
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system that's being used in London for processing city permits that's been fully automated. And article in the guardian in 2016 reports that the bureau in London that's using this system has developed an artificially intelligent voice response system that can detect when the citizen speaking over the phone, their voice is indicating frustration. And that it moderates and adapts the voice of the artificial system and some of the language that it uses to respond to that.

I think this is clearly something that should be accompany any effort to fully automate decision systems. And it may also reinforce what you've been talking about, Gerald, where we don't actually substitute and fully automate, but we use human computer teams. And the humans can continue to provide that kind of empathy that people care about.

MR. BULL: Great. Dick?

MR. PIERCE: So there's one important context in which Supreme Court was already unanimously blessed with the transition from human decision-maker to algorithmic decision-maker. And that is the Social Security Administration vocational grid. So I wonder if Gerald Ray might be able to give us a little insight in to how that works and whether it works and what's good or bad
MR. RAY: Sure. I can talk about the grid a little bit. So we have business rules that sort of guide us toward conclusions. So you can flow chart to each of the 2,000 different types of decisions that can be issued in a disability claim. Back starting in the 1960's, there was a case that was brought back. I think, it was in New York that requires to give vocational or present evidence of jobs that people could do. And so we did that using vocational experts for a number of years. And then realized that the experts were typically giving us the same information over and over. And so as a result, somebody back in the late '70s developed a series of rule. And so we said well if the person has these limitations and this education and this work experience, we'll find them disabled or we'll find them not disabled. It wasn't really an algorithmic type approach, but it was a sort of standardized approach. And if the persons criteria exactly met that rule, just as if the exactly meet the criteria of our listings, we can find them disabled.

But what we often find though is people have other limitations that go beyond the grid rule. And then you got to figure out how those limitations intersect with
the persons capacity to work. But, you know, what I'm thinking down the road, we could build algorithms to read the medical evidence. And we can find the cases that could be paid or had a 99.9 percent probability of allowance that maybe would pay those cases. And the cases that were not obvious pays under those algorithms you would still want the people to get their due process come forward and have a meeting. You know, or at least have it decided that why a human at the initial set.

So it be sort of a screen mechanism to ease the burden of work that we have because we have high volumes of work and we only have so many people. So we need to find ways to go faster. I am all for doing things for support of the people ho are actually disabled and we want to find those people. You don't want to pay people who aren't disabled, but if the algorithms are 99.9 percent accurate, it would be good enough to award the benefits. You are not losing that much money as opposed to federal programs. Where as we probably have more errors now. I can't say that for certain.

So I think that's sort of where that goes. I think the opportunity to build those algorithms to read the medical exists today.

MR. COGLIANESE: I would just add one small thing, I
think there's many more than one decision that support the use of algorithms. All of rules are algorithms. If, then, that's an algorithm. So when the FAA sets a standard if an individual is over the age of 65, let's say they cannot have a commercial pilots license. That's an algorithm and that's acceptable. What I think is shifting here is the possibility that technology would move away from rules and in the lawyers lexicon towards standards and say you can have a commercial pilots license as long as you don't pose a safety risk above a certain threshold with a degree probability and. Now, we'll let the machine sort of figure this out and it may be that the patterns that it finds are that they having nothing to do with anything that you or I might think of about are much accurate in predicting the safety risk posed by an individual.

UNKNOWN MALE: (Inaudible question.)

MR. COGLIANESE: I think the you're exactly right. The point of the lawyers having the skills here to do this sort of thing. We are working into a new world of practice and a new discourse about thinking about government. It's sort of meadow world where we're analyzing the analysis of the algorithms themselves. And I think the picture you paint of algorithms versus
algorithms is to some people anxiety producing, but I think it's very much we're looking forward to.

MR. RAY: I also think that the algorithm dynamic will only occur if the policies themselves aren't drafted clearly enough. If you have policies that are clearly drafted, you really wouldn't really have an dispute as to what the answer was. So when you've got those, you have got scenarios where the policy can be interpreted in multiple ways. And that's were a lot of disputes actually arise. And what you can try to do is re-craft those policies so that there's less dispute and understanding of what those policies mean. We have actually been trying to do that using data to analyze where courts for instance, are remanding cases to us. And we think we've dont it right. You know, why are they thinking something different. We take a look at what they're saying, we take a look a the history, and we try to see if we can modify that so that everyone have a clear understanding of what the intent was that came out of context in the first place.

MR. COGLIANESE: I would also add to this brave new world, if you will, there has been some challenges and limits. These algorithms need precision in identifying the objectives. As Gerald talked about, can they
generate probabilities. There are possibilities of what statisticians would call Type 1 or Type 2 errors. Lawyers would say, what's the probability that we let a guilty person go free versus convict an innocent person. Right now, I think our legal system resolves those kind of tradeoffs between Type 1 and Type 2 errors. Tradeoffs between accuracy versus racial equity. I mean, these kinds of value tensions have to be resolved if the algorithms are going to be designed. And yet, we our legal systems does not have a clear fixed rigid firm standard about how many innocent people should be convicted in order to protect, you know, a criminal justice. We just don't have that. And we will need to move to a world in which we get much greater precision about this. And maybe our social systems are such that will actually be a limitation in using these systems in the government on context because we just can't find enough agreement about how to make tradeoffs.

MR. BULL: Okay. Well, excellent. That was a very engaging discussion. Please join me in thanking our four panelists.

(Audience applause. Panel concludes at 10:01 a.m.)

PANEL III

MR. WIENER: Just one quick announcement before we get
started, and I will turn this over to the panel without too much delay. Like ACUS programs of this sort, we are having today's forum transcribed. We have a court reporter right here. As soon as the transcript becomes available, we will post it on the ACUS website for your convenience and others and whatever value it may have to the academic community and congressional staffers and so forth.

Our next topic is mass adjudication. I think that we have three of the four most visible mass adjudication programs that we covered on this panel. And without any further delay, let me just very briefly introduce our panelists in the order in which they will offer remarks. We have Chief Judge Nancy Griswold, who is -- and I'm just going to read this because I always get the name wrong -- she is the Chief Administrative Law Judge for the Office of U.S. Department of Health and Human Service. And your agency is only second to the Social Security Administration in the number of the Administrative Law Judges employed. To Chief Griswold's left is Adam Zimmerman, who is a professor at law at Loyola Law School. And to his left is David Marcus from the University of Arizona School of Law. And you're joined this morning with your son. He's sitting in the
back and he's waiving. As you'll here in a minute, both Adam and Dave have been consultants for ACUS. Adam wrote the report that underlays one of the ACUS recommendations that you'll find on materials with the use of aggregation for class actions in agency adjudications. And that report, has recently bee forthcoming in the Yale Law Journal. Is that right?

MR. MARCUS: Yeah, it just came out in April.

MR. WIEBNER: And you had a co-author, Michael Sanabrosio from Michigan State University. Dave Marcus prepared an extraordinary good report with a Professor at the University of Pennsylvania Law School. That report Administrative Litigation underlies one of the recommendations that appears in the material. And that recommendation asks the federal courts, I particular, Judicial Conference of the United States, to divide special procedural rules in Social Security Disability Cases before Federal District Courts.

And I'm happy to report that recommendation has been taken up by the Judicial Conference of the United States. And it's on the agenda for the next meeting, which will be held sometime in November.

Let me turn it over to Chief Judge Nancy Griswold. Ms. GRISWOLD: So I actually have handouts. I think a
picture is worth a thousand words. If I could give those to you all and you could pass them around. When we talk about mass adjudication, it helps to kind of have an idea of the scope of the numbers. We have 92 ALJs right now. We have a pending backlog right now of over 600,000 appeals. It was approaching 900,000 at one point. And because of some of the things we are going to be taking about today, we've been able to bring that number down. During this period of time, we have always had fewer judge in terms of adjudication capacity than or receipt base. And sometimes in several years we received as many as four or five times the appeals we had adjudication capacity for.

One of the things that I think is important to note on that slide is how quickly the problem can arise. And this happened within the space of about two years in our case. In March of 2010, which is when I joined the agency, we had 68 ALJs. And that year, we received 44,361 appeals. In 2011 and 2012, we had sort of a predictable increase in appeals based on demographic changes. It's kind of what you anticipate in the medicare community, and we kept pace. In 2013, it became like a heart attack chart. It really spiked up. Our appeal recipients went up to 384,151 appeals that
year. And in '14, they went to their highest ever at 474, 063. We do still receive double the number of appeals that we have capacity for. And I think one of the points I wanted to make is when you talk about mass adjudication is the challenge for agencies in being resilient, being nimble in response. You know, the federal government works on a two-year budget cycle. So when something like this happens to an agency within a budget cycle, it's very, very difficult to react quickly. And before you know it, you look around and you've got this remarkable pending work load. And then you're trying to deal with the backlog of the appeals. I think every agency dealing with large adjudications, we hope we could get in front of those things. Instead of having to deal with the backlog on the back end.

The other thing that I would mention is that agency as a rule tend to be rather set in their ways, if I may. And I will tell you a story that my mother told me in childhood. It has to do with a mother and a daughter who are fixing Thanksgiving dinner. And the daughter is fixing a ham. And she pulls the ham out of the refrigerator and she walks over to the cutting board and she cuts both ends of the ham. And she puts it in a roaster. And the mother looks at her and says, why did
you do that. That is so wasteful. And she says, well, mama, you always did it that way. So I'm doing it that way. And the mother says, yes honey, but I had a smaller roaster.

So that story kind of exemplifies for me the way that agencies tend to deal with process. There is a lot of historical information that is present. And we've done it this way, we continued to do it that way. If there is a anything benefit to a backlog, and I think there is a very little, I would say that it forces agencies and has forced Medicare to look at things in different ways. The idea of settling a Medicare appeal through an alternate dispute resolution process was unheard of. There had to be many discussions to get that process in a process where it would be excepted by everyone.

Many of the appeals that came before us, CPMS did not participate as a party or as a participant. And so we had to figure out ways of making a settlement conference facilitate work within that context. Once we did that, it became a very, very was successful mechanism. Not only for resolving appeals or increasing capacity, but also takes them out of the system. With that sort of facilitated settlement, it doesn't go up to
the next level. So you're not creating a second backlog at the next appellant level. It's resolved and it goes away. We resolved through Settlement Conference Facilitation just around 70,000 appeals since that program started. The second that we have been working on in terms of Pilot Statistics Sampling. And that has been a little bit to get off the ground. We have very recently expanded that pilot to address some the concerns that appellants have raised with that. Particularly, the reluctance put all their eggs in one basket with one ALJ. And the most recent pilot is using a panel of ALJs based on the number of the claims or the number of appeals that are included in the universe. We have resolved around 500 appeals using statistical sampling. And essentially, for those who are not familiar with it, what we do is set up a universe of like appeals, and we pull from that universe random sample of appeals that are adjudicated on an individual case basis. Then we examine the results of those adjudications to the larger universe of like appeals. And so that's kind of how that process works.

Expanding the group of adjudicators that hear that sample universe is to where we have now have between four and six ALJs. Instead assigning them to one, we
think has made it more agreeable to appellants. And we have about 14,000 appeals that are in that process now and would be adjudicated using stat sampling.

The final thing I just want to mention is a challenge that doesn't directly relate to aggregating or grouping appeal for adjudication. But I think it's one that is phased by all agencies that our in our situation, Social Security included. And that is the balance between trying to do timely adjudication on large numbers of appeals and thereby serve the public. But also to balance that with quality adjudication.

MR. WIENER: Thank you, Judge Griswold.

MR. ZIMMERMAN: I'm Professor Zimmerman. I'm a Professor at Loyola Law School. And I tend to write about aggregation in unusual places. And for the past five or six years, I've been writing about the use of the arrogant litigation class actions, and other complex litigation procedures. Ordinarily associated with out federal courts and our agencies. It states back to an article I wrote and the one sentence summary that's about 70 page article would be something like this. Agencies should also have the ability to class actions. Agencies here, depending on how you measure it, anywhere to as many as ten times as many cases our federal
courts, but otherwise do not often use some of the same
types of tools that federal tools use to resolve
backlogs, to efficiently and consistently resolve cases,
and to accord legal access and pull information about
large groups of cases that parties might not otherwise
have. And so we've made arguments as to why agencies
should do that, we thought would be of practical
importance because there's so many cases heard by
agencies, but also theoretical importance, because often
times in civil procedure and class action law. We are
trying to learn lessons from administrative law.

So fast forward a couple years later, and we
performed the project with ACUS that studied the use of
aggregation and agencies. Interesting finding number
one was that we looked through the enabling statutes of
70 or 80 different federal agencies that performed
adjudication. We found that they have broad authority.
Interesting finding number two: About 70 agencies have
rules in the books. About eight or ten high class
action rules others had other types of complex
consolidation rules -- rules on the books to do this.
Not so interesting finding number three, was that many
agencies were not doing it. There were still a few that
did and so what the project ultimately entailed was
surveying adjudicators, staff, attorneys and others from agencies performing some detailed case studies, including of OMHA. Though, we've made a number of recommendations in a report that was adopted by ACUS last year. And among other things, we recommended creating infrastructure to kind of try to identify when this might be useful as opposed to using precedential decision-making and rule making to deal with large groups of cases.

And I think our two different ways in which class actions can be useful, and I think they might be illustrated by some developments that might have happened since our report has been issued.

One way it can sometimes be useful is for resolving a sudden influx of the claims. That is where these complex litigations that are raising the same type of issues can be useful. So shortly after, for example, the Department of Education created a rule to handle large groups of claims of students who were seeking debt relief.

My back of the envelope count right now there are 65 to 70,000 students awaiting debt relief. And a rule was created last October that would have given the Department of Education -- to group those cases together
and resolve the common questions that might arise from the students. That rule is now in litigation it's been suspend. There is some question about whether it will continue to be in effect, but I think the problem is still some of the Department of Education is going to have to confront. And whether it uses that formal rule to resolve those large groups of cases or reports to the use of a special master, which is what it did before the rule. They are going to have to deal with the fact that they have this large regroup of claims all raising the same question. And they're going to have to figure out a way to quickly deal with all of those claims. The second area where it could be useful as raising the questions that might not otherwise make it's way up into a court.

And shortly after, in February, the federal circuit rules that a court reviewing veteran's benefits claim for the first time in 30 years, can hear class actions. They held conferences back in June. And the first class action that was filed was on last year. And the claim is essentially that veterans service organizations, who are not lawyers, but represent veterans for the VA, have access to special kind of document of the disability. And the reason why they have that access is so they can
identify an error and told to the VA and fix the error before the veteran has to go through appeals to get their benefits.

Attorneys are not allowed access to that document. So the class action that was filed is on behalf of all attorneys saying that they should have access to the same document to save the veterans file. The government response is illuminative as to one other hurdle in considering whether or not to adopt class actions or procedures. The government response was, well, we have a rational basis for denying attorneys access to this document, and therefore you shouldn't even bother. Attorneys will ruin everything. We have designed this entire process to be at an informal non adversarial, quick and speedy way to kind of resolve things with this historic partnership. Lawyers are bounded different types of norms and ethics. "Attorneys like to be the sole representative are accustomed to receive informalities found in the federal rules of evidence, by their nature training and professional obligations. They are often adversarial -- pursuing a claims from benefits, this could include the many benefits possible starting only just before the pur. But the pre-decision is not intended as an opportunity for adversarial
argument. It's an informal process for identifying the states and seeking clarification.

MR. MARCUS: My name is Dave Marcus. It's an particular honor to share the program with Professor Pierce. When I began reaching administrative law. I co-authored the reports on Disability Benefits Litigation of federal courts.

There are several reasons to doubt that judicial review has much volume in this domain. Let me suggest a couple. First, the federal courts correct very few errors relative to the number of claims that agency adjudicators decide. In 2013, Social Security ALJs decided on something like 450,000 potential appealable decisions. Of these, the federal courts ultimately remanded only about 8,300. Does this contribution justify judicial review, especially in light of opportunity costs? In 2015, the agencies spent nearly 40 million dollars on equal access to payments to lawyers whose clients prevailed in the federal courts.

This sum only equals the salaries of about 240 ALJs, or maybe about 15 percent of the SSAs ALJ core. If the SSA could expand it's ALJ ranks by 15 percent, and thereby bringing the slopes down nationwide, adjudicators would likely make fewer errors than the
Second, institutional difference can give an agency reason to treat federal court feedback with some skepticism. One institutional difference that's involves the cold cases that the respective institution see. ALJs get cases far earlier in the process and see much wider array of alleged disabilities than federal Judges do. The two sets of judges have different perspectives on the population of people with disability in the country. And to an ALJ, it might look like a much closer case to a federal judge.

Another institutional difference involves resources. ALJs and their decision writers together have about ten hours to workup and write up a decisions denying benefits. Federal judges and clerks have much more time to review a case. A federal judge with all the time in the world can often find some shortcoming in an ALJ decision. Especially, if that judge has a quite different baseline for evaluating a disability. But any feedback might either seem nitpicking to an ALJ or might suggest unrealistic expectations case development.

My comments thus far, might prompt the conclusion that Congress could improve high quality of agency adjudication by scrapping judicial review altogether and
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investing the same resources. I don't think Congress has invested adequate resources either. This failure is obviously foolish as the 40 million dollars in agent fees attest.

But redirecting resources from judicial review, I think, would unwise. Article III involvement in high-volume agency adjudication is important. The federal courts offer a type of oversight of agency adjudicators that other institutions may not be as well positioned to provide.

MR. WIENER: Thank you, Professor Marcus let me just put one question or issue on the table given that we're holding this forum today.

To what extent should Congress attend to procedural reform with respect to mass adjudication programs. And to what extent should agencies be left with a lot of discretion with respect to design of adjudication problems. And may be you might address come at that from the VA perspective.

That's an area where to which Congress has intended recently, and legislation and perhaps, Judge Griswold you might also take the question. I know that your agency in particular operates under certain statutory mandates in particular with respect to decision
deadlines that have come before the courts recently.

MR. ZIMMERMAN: I mean I think that there's advantages and disadvantages to having Congress involved in the procedure. Maybe the most significant advantage is thinking from procedures from of -- where is the most democratic institution that you would want to flesh out and ventilate these issues you think would be Congress. But my experience with the federal rules that exists for Courts as well as Administrative Adjudication is sometimes you get rules that lead to consequences and sometimes might be too high. Like if the congressional level.

So let me give you -- this is actually present right now with the VA. One of the things that the Court of Appeals for veterans is confronted is should it adopt a formal rule to hear class actions or should it on a case-by-case basis using its informal power.

MR. WIENER: So Congress will mess things up.

MS. GRISWOLD: I think agencies have a broad ability to do these things. If stay with my ham story, I think a lot of the limitations that agencies deal with are somewhat self-imposed. And it has to do with an institutional culture that says we've done it this way, we have to continue to do it this way. And if you can
get beyond that, the world kind of opens up. And you can do other things within the statutory framework that we have.

So, you know, we continue to explore that and we think we've made good progress within those boundaries.

MR. WIENER: Just to say a word about the difference in the judicial review that exists with respect to social security and VA. We have very limited Article II judicial review. We do have an Article I court where as the social security model is very different. Can you want to comment on that to which you are comfortable, which system you think is better and whether any changes or Congress might take up any changes to the existing judicial review structure with respect to either VA or Social Security Administration.

MR. ZIMMERMAN: Well, there is no Article III review. It's an Article I Court. And also certain decisions can also be appealed with the federal circuit but a very small number.

MR. WEINER: Are there any additional questions?

UNKNOWN FEMALE: I am just curious when you are creating the statistical sampling groups, how are you identifying those profiles before you sample them

MS. GRISWOLD: Are you talking about the profiles for
which claims are like claims? Yeah. They have either the same provider or they have a similar item of service that is at issue. So you may have one provider or supplier who has a hundred thousand appeals with us for the same sort of service and those would be eligibility.

MR. WEINER: Well, thank you Judge. This is contested territory to say the least and again, we will have a transcript of the discussion this morning put up on the ACUS website before not too long. Enjoy the remainder of your Friday.

(Audience applause. Panel III and meeting concludes at 12:01 p.m.)
FORUM ON FEDERAL ADMINISTRATIVE ADJUDICATION

CERTIFICATE OF REPORTER

I, SABRINA K. BELL, hereby certify that the foregoing proceedings were recorded by me in shorthand and electronically at the time and place mentioned in the caption hereof and thereafter transcribed by me; that said proceeding is a true record of the testimony given by said participants; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was taken; and further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

DATED: 9-29-2017

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Sabrina K. Bell