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SYMPOSIUM ON FEDERAL AGENCY ADJUDICATION
Managing Federal Agency Adjudication Programs

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TRANSCRIPT
(Not Reviewed for Errors)

Panelists

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James McHenry, Director, Executive Office for Immigration Review, U.S. Department of Justice

Christopher J. Walker, John W. Bricker Professor of Law, The Ohio State University Moritz College of Law

Melissa Feeney Wasserman, Charles Tilford McCormick Professor of Law, University of Texas at Austin School of Law

Moderator

Anna W. Shavers, Associate Dean for Diversity and Inclusion and Cline Williams Professor of Citizenship Law, University of Nebraska College of Law

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Transcription of Audio File:

Symposium on federal Agency Adjudication_ Managing
federal Agency Adjudication Programs

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1 (Beginning of audio recording.)

2 MR. MATT WIENER: Good afternoon. And thank you
3 for joining us. I'm Matt Wiener, the advisor and
4 executive director of the Administrative Conference,
5 United States, or just ACUS for short.

6 Welcome to the second of our four panels of this
7 virtual symposium which is sponsored by ACUS and the
8 Center for Progressive Reform and the C. Boyden Gray
9 Center for the Study of the Administrative State at
10 the Antonin Scalia Law School at George Mason
11 University.

12 Today's panel will address among other things,
13 appellate review case management, processes and
14 quality assurance programs. Like all the panels, this
15 one will be recorded and transcribed, and you'll soon
16 be able to find both the video and the transcription
17 on our website, as you will with all the rest -- all
18 of our programs at ACUS.

19 Our moderator today is Professor Anna Shavers,
20 who's the Klein Williams Professor of Citizenship Law
21 at the University of Nebraska School of Law or
22 (inaudible) Law School, I think it is. And
23 Professor's Shavers is also, I'm pleased to say, a
24 member of ACUS, and I'm also pleased to say that
25 Professor Shavers is joined on the panel by another

1 ACUS member, Professor Chris Walker, a distinguished
2 ACUS consultant, Professor Dan Ho, who's the author of
3 a recently published report that ACUS commissioned on
4 artificial intelligence in federal regulatory
5 programs, and two good friends of ACUS, Professor
6 Wasserman and Director McHenry.

7 So to introduce our -- to set the stage for our
8 panel discussion and introduce our panel analyst, I'd
9 like to turn it over to Professor Shavers.

10 Professor Shavers, the virtual podium is
11 yourself.

12 MS. ANNA SHAVERS: Thank you, Matt. First of
13 all, I wanted to thank ACUS for organizing this
14 symposium and for asking me to moderate. I think this
15 is going to be a really great panel. I just wanted to
16 say a few words about what I expect you will hear, and
17 then, I will turn it over to the panelists.

18 So our panelists this afternoon are Dan Ho is the
19 William Benjamin Scott and Lillian M. Scott professor
20 law at Stanford Law School. He's written quite a bit
21 and also studied this issue of federal Agency
22 Adjudications, looking at issues of quality assurance,
23 especially in the context of agencies that we're now
24 referring to as having mass adjudication, what quality
25 do you get.

1 One of those agencies is the Executive Office for
2 Immigration Review, and we're pleased to have with us
3 Director James McHenry of the Executive Office for
4 Immigration Review. I think most of us know that his
5 agency has considerable adjudications, and so one of
6 the questions is, of course, what Dan is thinking
7 about, what kind of quality can we assure comes from
8 these agencies in the context of mass adjudications.

9 After Dan and James have spoken, then, we will
10 hear from Professor Christopher J. Walker, who is the
11 John W. Bricker professor of law at the Ohio State --
12 The Ohio State University Moritz College of Law.
13 Chris has now become the chair of the ABA
14 administrative law section. He's a prolific scholar
15 with respect to all kinds of administrative law
16 issues, and he will turn our attention to the question
17 of appellate review, particularly in the context of
18 internal review in the agencies.

19 And then, we will hear from Professor Melissa
20 Wasserman, who's is the Charles Tilford McCormick
21 professor of law at the University of Texas at Austin
22 School of Law. She is currently writing and studying
23 the Penn Office Adjudication. In this context, what
24 the panelists will be speaking about, primarily, it
25 will be what Michael Asimow's referred as Type B

1 adjudications.

2 So if those of you who are familiar with Michael
3 Asimow's classifications, Type A are typically the
4 adjudications that are perform -- they're performed
5 consistent with the requirements of the Administrative
6 Procedure Act.

7 Type B adjudications often look very much like
8 formal adjudications, but they may not be heard by
9 administrative law judges, instead by administrative
10 judges, and they are many of the agencies that do fall
11 in this category of having mass adjudications. And
12 this is in contrast to the third category, Type C,
13 which are really more informal kinds of adjudications.

14 So I know you're very much want to hear from
15 them, so I just want to remind the audience that after
16 the panelists have spoken, then, we will have enough
17 time for questions and answers, so please, use the
18 question-and-answer box to record your questions, and
19 then, we will get to them after having a little bit of
20 discussion between the panelists about what they've
21 said.

22 So now, I will turn to over to Dan.

23 MR. DAN HO: Thanks so much, Professor Shavers,
24 and to ACUS and the Gray Center and the Center for
25 Progressive Reform for putting on this symposium and

1 this particular panel.

2 ACUS is no stranger to some of the real
3 challenges faced by mass adjudicatory agencies. By
4 the end of fiscal year 2017, at the Social Security
5 Administration, over a million claimants had appealed
6 and were awaiting a decision, with an average wait
7 time of around 20 months.

8 Going back to 1978, it was Professor Jerry Mashaw
9 (phonetic) who famously documented the very real
10 challenges in terms of the accuracy and inconsistency
11 of agency adjudications, coming to the conclusions
12 that outcomes depend more on who decides than on the
13 facts of the case.

14 And this panel is particularly timely because the
15 modern due process jurisprudence really turns on
16 decisional accuracy, and I think it's really -- it'll
17 be a really interesting discussion here to set the
18 stage a little bit between internal quality assurance
19 systems and forms of appellate review and what those
20 kinds of systems can achieve in terms of promoting
21 decisional accuracy.

22 Professor Mashaw was led to the conclusion that
23 individual appeals are actually extremely ineffective
24 at systematic error correction and pointed some
25 decades ago to the fact that due process really

1 requires a kind of management process to assure the
2 accuracy of claims adjudication and pointed to
3 internal quality assurance systems as really the kind
4 of prototype.

5 Let me highlight just a few things that I think
6 we do know, but I think we have a lot to learn in this
7 space. Some of this is based on joint work with David
8 Ames (phonetic), who was formerly the head of the
9 Office of Quality Review at the Board of Veterans
10 Appeals, Sandy (Inaudible) Nader, who's a PhD student
11 here at Stanford, and Dave Marcus, who's a professor
12 at UCLA, at UCLA's law school.

13 And I'll highlight just two things. One is in an
14 initial study of the history of quality assurance
15 systems at the Social Security Administration, the
16 Executive Office for Immigration Review, and the Board
17 of Veterans Appeals, we basically sort of some of the
18 highlights that we arrived at were number 1, there's
19 tremendous variation in the kinds of quality assurance
20 systems deployed by agencies and even within the same
21 agency over time.

22 Number 2, quality is incredibly difficult to
23 measure and highly contested, so look no further than
24 the 1980's contestation around the SSA quality
25 assurance programs, that, at that point of time, were

1 really perceived really to serve the goal of trying to
2 lower the number of individuals on the welfare rolls.

3 And third, the kind of standard program that has
4 emerged is one that randomly samples cases by line-
5 level adjudicators, has an additional layer of review,
6 and then, potentially provides feedback to those line-
7 level adjudicators as to potential errors in the
8 decisions.

9 And the kind of second sort of piece that I'll
10 highlight from this research is that we did actually
11 secure data from the Board of Veterans Appeals of all
12 of the cases that went through this kind of process.
13 So all cases, roughly 600,000 cases, 5 percent of
14 which were randomly selected for quality review, which
15 forms a really nice natural experiment to be able to
16 test for whether the impact of that quality review
17 program is consistent with its aims, mainly to reduce
18 reversals and remans when those cases go up for
19 appeal.

20 And the bottom line is pretty simple, which is
21 that the program didn't achieve its aims, regardless
22 of whether or not the case was selected for quality
23 review. There was an indistinguishable rate of
24 appeals and reversal and remands conditional on an
25 appeal.

1 And part of the tension that we highlight in that
2 work is really stems from the Government Performance
3 and Results Act, which is that the program really had
4 dual purposes. One was to report a performance
5 measure of the accuracy rate of those decisions, and
6 the other was to improve the quality of decision-
7 making.

8 And those dual objectives really led to a kind of
9 evolution in terms of the standard of review that was
10 applied by quality of reviewers, leading it to be
11 quite distinct from what an appeals court would
12 actually deploy to test for the accuracy of
13 adjudication.

14 I'll leave you with a couple of closing sort of
15 thoughts -- or at least opening thoughts, really, to
16 kick off the discussion. I think three last points
17 here, one is that there are real limits to external
18 law that is judicial review of agency action, I think,
19 will have limited ability to correct for systematic
20 errors, so in the BVA data, even cases that are not
21 appealed have pretty high rates of errors as called
22 internally by the quality review team.

23 Second, internal administrative law, which has
24 received a fair bit of attention recently among
25 scholars, alone will also not necessarily cure these

1 because of the potential for gaming these kinds of
2 accuracy metrics.

3 And the last point I'll leave you with is that
4 one of the areas that I think is particularly
5 interesting in terms of the future of quality
6 assurance and performance management lies in data-
7 driven and sort of interventions and forms of natural
8 language processing. So there's some recent evidence
9 that shows that forms of peer review that provide
10 feedback, based on existing data, can actually really
11 improve the quality of decision-making.

12 And at the Social Security Administration, it was
13 the appeals council that really developed something
14 really exciting which is a natural language processing
15 based tool called the Insight system that allows you
16 to upload a draft decision and check for around 30
17 quality flags that are suggestive of potential errors
18 in the draft decision.

19 So that's where I think a lot of the future lies
20 and with that, I'll turn it over to the next panelist.

21 MS. MELISSA WASSERMAN: So thank you. That was a
22 great introduction to concerns about quality
23 assurance. And I'm going to pick on Professor Ho's
24 remarks and focus more on the Patent and Trademark
25 Office.

1 So there's always a concern, I think, especially
2 with an agency that conducts mass adjudication, that
3 you're going to have inconsistent adjudicatory
4 outcomes, and the Patent and Trademark Office is no
5 different.

6 So the PTO makes close to half a million patent
7 ability determinations every year. And when a patent
8 application comes into the agency, an official known
9 as a patent examiner makes the first review of the
10 application. And if it meets the patent ability
11 standards, it's granted. If not, it's rejected. And
12 this occurs in a process that Anna was referring to as
13 a Type C or very sort of informal adjudication.

14 At the same time, the PTO makes close to 600,000
15 trademark registration determinations every year, and
16 it's very similar to the trademark registration comes
17 in and here, an official known as a trademark examiner
18 will review it. If it meets the registration
19 requirements, it's registered. If not, it's denied.
20 And again, that occurs in the Type C adjudication.

21 And so a number of scholars, including some joint
22 work with myself and Michael Fregs (phonetic), who's
23 at Duke Law School, have documented that patent
24 examiners have widely divergent inherent grant rates,
25 and trademark examiners also have systematically very

1 different registration rates, even though many of
2 these applications that come in are randomly assigned.
3 So you would expect them to have sort of a more
4 normalized grant rates.

5 And so, of course, there's concerns about this,
6 right? From a fundamental perspective, we'd probably
7 like to design an agency that's going to treat similar
8 applicants in the same way, but moreover, the patent
9 ability standards and the registration standards are
10 actually set to generally parallel the economic
11 reasons for why we want patents and trademarks. So if
12 examiners are systematically missing the mark and
13 getting this wrong, then there could be substantial
14 consequences.

15 So there's been a lot more empirical work on the
16 patent side than there has in the trademark side. So
17 I'm just going to spend the remainder of my time
18 discussing some of that.

19 So while I tried to document heterogeneity and
20 adjudicatory outcomes, the next step we really think
21 is to try to determine what are some of the causal
22 drivers for this inconsistent decision-making at the
23 agency. And so Michael and I have empirically
24 examined several different factors to see if they may
25 be contributing to these inconsistent decisions.

1 And so first we found that the GS level of the
2 patent examiner has an effect on the examiner's grant
3 rate, and this is because as you get promoted up the
4 pay scale, each promotion is associated with about a
5 10 to 15 percent reduction in the time that you're
6 given to review a patent application.

7 Because patent applications are presumed valid
8 when they're first filed at the PTO, if an examiner's
9 not given enough time to do a prior (inaudible)
10 search, to craft rejections, she may grant a patent
11 that she would have rejected if given more time.

12 And so we find evidence, as well, that as
13 examiners get promoted and get less and less time,
14 their grant rate goes up and the patents they're
15 allowing under margin are of lower quality and more
16 likely to be invalid.

17 Second, we also find that the year that patent
18 examiners are hired has a lasting effect on their
19 inherent grant rates. And so our theory is is that
20 examiners when they're first hired, are very
21 impressionable, right?

22 They have this kind of (inaudible) period where
23 they learn how to examine patent applications. And
24 the training and the culture of the agency at that
25 time seems to be really important in shaping their

1 behavior through their whole tenure at the agency.

2 So if the PTO -- some of the examiners hired
3 under a director that we say may have kind of an anti-
4 patent view, which just means someday the director
5 comes in and may think the patent is -- that PTO is
6 allowing too many patents, right, and they -- it ends
7 up sort of pushing back the grant rate of the agency.
8 Those examiners will tend to have lower grant rates
9 their whole tenure, even when other directors come in.

10 And the opposite, as well, if you get hired with
11 an examiner that may -- what we sort of say has a pro-
12 grants sort of tendency or view, then, your inherent
13 grant rate as a patent examiner is higher over time,
14 as well.

15 So where does this leave us? You know, once you
16 sort of document it, heterogeneity in outcomes and
17 several drivers that may be part of the underlying
18 reason why we have inconsistent decisions, the next
19 step is to think about how can be bring more
20 homogeneity, and this touches, in part, on what
21 Professor Ho's telling us about quality assurance.

22 So there's a number of classic ways, including
23 quality assurance, but another one, of course, is to
24 subject these initial decisions to higher level or
25 sort of appellate review within the agency.

1 And so one such example of that is that the PTO,
2 they have a patent trial and appeal board, which is
3 more like this Type B adjudication, right? It's
4 formal like, they sit in a body of three individuals,
5 and they can review the decisions of patent examiners,
6 both patent denials and now, patent grants, where
7 third parties can bring the patent back to the PTO and
8 say take a second look.

9 And so Michael and I looked to see if (inaudible)
10 had actually -- was performing any sort of
11 consistency-enhancing role, and so we looked at
12 examiners on a spectrum, and we look at the outliers,
13 those high granters and those really low granters.

14 And we find some evidence that it is working this
15 way. So these examiners that are both -- are really
16 outliers are more likely to have their decisions
17 appealed to the (inaudible) than examiners that are in
18 the middle. And really, more importantly, is once
19 (inaudible) reverses these examiners, they're more
20 likely, then, to move their grant rate at least
21 somewhat more towards the median grant rate of the
22 sort of technology area that they're in.

23 And we actually find this as a -- it's a more
24 dramatic effect for patent denials that are reversed
25 than patent grants that are reversed. But that's, in

1 part, I think, explained by the fact that patent
2 denials happen relatively quickly, right? If the
3 aggrieved applicant get their patents denied, then,
4 they immediately appeal, so there's more of a direct
5 feedback loop to the patent examiner.

6 Where the patent grants usually will go there,
7 and it may be eight years or four or five years down
8 the road before a third party brings it back. And so
9 that loop that you're looping that information back to
10 the patent examiner is a little more attenuate. And
11 the PTO, though, has been making efforts to shore that
12 up.

13 So with that, I'll turn it over to the next
14 speaker.

15 MR. WALKER: Great. Melissa kind of left it off
16 right where I think James and I were going to go,
17 which is we're going to focus much more on these
18 appellate bodies within the agencies or appellate --
19 agency appellate systems.

20 And Matt Wiener and I have been working on, over
21 the last couple year, an administrative conference
22 study on agency appellate systems, and we spent the
23 last year, year and a half, meeting with folks at 12
24 different agencies, the high-volume agencies to get a
25 better sense of what these appellate systems look

1 like, why they exist, what challenges they have, and
2 what way in which they can improve.

3 And just to kind of give you a sense of it, when
4 you think about institutional structures for agency
5 appellate review, there are three basic models. I
6 think the classic model is one where you think of
7 final direct review by the agency head, such as the
8 Securities Exchange Commission where Administrator
9 Blago's (phonetic) decisions go directly up to the
10 Commission for final review.

11 The second model is where you have final direct
12 review by a review board. This is similar to what
13 Melissa was just talking about with the patent trial
14 and appeals board. Social Security Administration's
15 another one where the head of the agency is delegated
16 that down to the Social Security appeal council, along
17 those lines.

18 And then, another model, which we'll kind of --
19 we'll get back to with Director McHenry in a minute,
20 is the intermediate review board where you have --
21 that then is subject to final decision by the agency
22 head. And I think one kind of big example of that
23 would be in the context of immigration where you have
24 the Board of Immigration Appeals reviewing decisions
25 that then could be reviewed by the Attorney General if

1 the Attorney General decides to exercise that
2 discretion.

3 So those are kind of the three models. And in
4 our interviews and in our review of the regulations
5 and statutes and guidance that kind of governs these
6 models of different agencies, I was surprised that,
7 you know, the objectives really vary about why they
8 have appellate review systems. I mean, obviously,
9 this conversation today is about quality assurance,
10 about kind of hoping to achieve some type of systemic
11 consistency and litigant equity within the system.

12 But there are a number of other objectives that
13 are different, that might actually shape these systems
14 a different way. So I thought I would just during my
15 time just kind of flag a few of these because when
16 we're designing a system of appellate review within an
17 agency, you might have different approaches.

18 Now, one would be kind of your classic judicial
19 review appellate model of correcting errors of fact
20 and law. And that actually seems to be quick a
21 predominant view of these agencies. In fact, I would
22 say that's more what most of agencies -- high-volume
23 agency adjudication systems are trying to achieve than
24 systemic consistency or quality assurance.

25 It's about deciding the cases that are brought

1 before them and dealing with those. And I think
2 that's one of the things that's kind of limited the
3 ability of appellate models within agencies to achieve
4 quality assurance is they're not actually aimed to
5 achieve quality assurance.

6 They only hear cases from people who lose, who
7 have the wherewithal to seek further review. You
8 don't have as many models as Dan mentioned, but such
9 as at Social Security, where they're actually
10 reviewing cases from folks who did it.

11 Other kinds of objectives that you might think of
12 in this area is to establish agency policy using
13 adjudication to establish policy for the agency is a
14 key objective. You might also have a row of
15 overseeing hearing level adjudication systems to make
16 sure that the hearing officers are performing their
17 role in a way that's, you know, fair and balanced;
18 it's separate from the outcomes.

19 You might be using these types to gather
20 information for organizational effectiveness and
21 systemic awareness to be able to kind of identify
22 bigger issues, perhaps for instance, in the patent or
23 the trademark context, you might be using these
24 appellate systems or you could use them to get a
25 better sense of what policies we should have when it

1 comes to training the lower-level adjudicators.

2 A number of different ones -- another that -- not
3 many of the agencies that we interviewed ascribed to
4 you what we thought as just providing for political
5 accountability with agency head, final decision-making
6 authority, making sure that whatever decisions come
7 out of the agency have that type of control.

8 And then, the last one that we didn't have on our
9 original list of six, but a number of agencies talked
10 about was just the role of being a gatekeeper to
11 federal courts, in other words, trying to reduce the
12 burden that federal courts have on these lines.

13 I think of immigration as a classic example of
14 that, not just Director McHenry's immigration, but
15 also USCIS on the benefits side. I think they view
16 their role quite predominantly as trying to help to
17 make sure that they can resolve the issues before they
18 actually make it to federal court.

19 So those are kind of the different reasons why
20 you might want to have an appellate model in addition
21 to just the quality assurance. And what's been
22 fascinating in doing these interviews and looking at
23 the publicly available information about these
24 appellate systems, the objectives that they have, one,
25 they don't actually -- most agencies don't even

1 provide the objectives. They don't have them publicly
2 available. This is why we have this system, and this
3 is why they designed it a particular way.

4 But when you talk to them, they know the
5 objectives, right? And so obviously, one of our main
6 recommendations that will come out of this report is
7 to publicly identify your objectives and so that you
8 can get feedback and kind of advance those.

9 But it is interesting, and maybe when we get back
10 to the Q&A, I can talk through some of the different
11 examples that you do have a number of just really
12 varied features of agency appellate review, whether
13 it's the standard review, whether it's the, you know,
14 how many cases sua sponte. There are a number of
15 different features of appellate review that just vary
16 dramatically among agencies.

17 I'll just kind of end by saying when I went into
18 this project, as an administrative law scholar, I
19 thought appellate review within the agency like
20 judicial review and very naively, and I think that Dan
21 put it really well at the very outset of this that
22 it's not at all like that. A theory of appellate
23 review within an agency needs to be dramatically
24 different than the theory of judicial review within
25 federal courts.

1 I think the agencies get that and understand that
2 quite well. I think scholars that study the
3 administrative state may not fully appreciate those
4 differences, and I think going there, I'll turn it
5 over to Director McHenry.

6 MR. MCHENRY: Sorry about that. I think the
7 organizer and I, we're trading off the mute button.

8 No, as Professor Walker mentioned and Professor
9 Shavers, my name's James McHenry. I'm the director of
10 the Executive Office for Immigration Review.
11 Obviously, I'm not an academic, so that means I'm the
12 least smart of this group here, also, means I have the
13 most to learn.

14 While I appreciate both my colleagues, my co-
15 panelists and ACUS for inviting me and for having me
16 here today, because one of the things both for
17 immigration in general and perhaps the government, as
18 well, I see we've kind of been lacking in the last few
19 years is more involvement and more engagement with the
20 academic community and with organizations like ACUS.

21 Immigration, for many years, has been sort of
22 siloed in its own little bubble, and people who are
23 scholars of immigration are rarely scholars of
24 anything else, even though it's very much an
25 administrative law area of concern, of interest.

1 Until recently, I would say, there hasn't been a lot
2 of sort of effort to try to bridge it or to link it to
3 other scholarship in the administrative law universe.

4 And from the director's perspective, from a
5 practitioner's perspective, it's also very helpful and
6 very interesting to me to see how other individuals,
7 how other agencies operate, but how other individuals
8 are approaching and analyzing how those agencies do
9 comport themselves.

10 Obviously, yours, as an administrative agency,
11 has some similarities with others, like, Social
12 Security Administration, like, the PTO. But we're
13 also different in our own right. Nevertheless, the
14 scholarship and the analytics that are applied here
15 may have some value to us.

16 In fact, I try to read as much of the scholarship
17 as I can, not only on immigration and immigration
18 courts, and not just because I wonder what people are
19 saying about us, but also to try to get ideas,
20 thoughts, perspectives on maybe how we can do things
21 better, and that's sort of what I want to open with
22 and maybe segue into the larger discussion to try to
23 tie together some of the things that my colleagues
24 have said to show you or to explain things that we
25 look for, that I look for as the director, and that

1 I'm looking for at the agency to try to make things
2 work better and to be better as an administrative
3 adjudicatory agency.

4 As a little bit of background, yours primarily an
5 immigration court system with an administrative
6 appellate body, the Board of Immigration Appeals. We
7 actually have another adjudicatory agency that has
8 sort of its own kind of Type B administrative
9 appellate structure and it's OAAHO, Office of Achieved
10 Administrative Hearing Officer, but they are far from
11 a mass adjudications type body, so I won't spend much
12 time talking about them.

13 Immigration courts in the last year, they
14 completed not quite 300,000 cases, about 276,000 until
15 COVID sort of disrupted our operations this year.
16 They were on pace to complete about 400,000. It's
17 still going to come in probably 220, 240,000. Those
18 cases, mostly, can be appealed to the Board of
19 Immigration Appeals.

20 You know, their numbers have been flat for many
21 years, but last year, we saw an uptick, a little over
22 60,000 appeals were filed. This year, the number, I
23 think is a little bit higher, and they're on pace to
24 complete roughly about 35 to 40,000 cases.

25 So obviously, immigration has been an issue, a

1 major concern in recent years. We definitely seen an
2 uptick in the volume, and as a result, it becomes even
3 more incumbent, it's even more important for us to
4 learn how to get it right. And the things that we're
5 looking at are things that my colleagues have touched
6 on already, and the four primary ones that we're
7 looking at are quality, accuracy, consistency, and
8 efficiency.

9 And they sort of speak for themselves. With
10 accuracy, obviously, we want -- as an administrative
11 adjudicatory body, we want to get the decision right.
12 It's difficult to measure accuracy other than through
13 sort of appellate reviews and how many cases get
14 remanded. But we want to make sure our adjudicators
15 are applying the law and that they're doing it
16 correctly. You know, sometimes, it may be a judgment
17 call, but to the extent that it's possible, we want to
18 make sure they get the decision right.

19 The quality of the decision as Professor Ho
20 alluded to earlier, quality is notoriously difficult
21 to measure. It's very difficult for a practitioner,
22 for someone on my side, to measure, as well, but we
23 want to make sure the decisions are good. You know,
24 we understand appellate bodies may take a different
25 tact, you know, the decision may be reversed simply

1 because somebody looks at it. But that doesn't
2 necessarily mean the decision was a quality decision.

3 By the same token, some decisions that you would
4 say are not quality get affirmed on appeal just
5 because of the way the appellate system works. What
6 we're trying to improve quality throughout the agency,
7 what the judges as well as the individuals at the
8 appellate level to make sure they're giving the
9 decisions they can.

10 The same way with consistency -- we've been
11 criticized by federal courts. We issue a lot of
12 unpublished decisions. We issue very few precedential
13 decisions. But a lot of unpublished decisions
14 sometimes reach inconsistent outcomes. And just like
15 at PTO, inconsistent outcomes for us, they create a
16 litigation headache, but they also create problems for
17 the individuals who use our services, the respondents,
18 the aliens who are looking for the correct decision.

19 You know, perfect consistency is probably
20 impossible, especially with the number of cases, the
21 number of adjudicators we have, but we're striving,
22 and we're looking for ways that we can improve that
23 and get better at that.

24 And the last thing is that none of these should
25 be considered sort of at the expense of efficiency.

1 And that's an issue that every mass adjudication body,
2 administrative adjudication body has to deal with.

3 I was with the Social Security Administration, I
4 was an ALJ before I came back to EOIR, you know, I
5 know about delays in proceedings, I know how long
6 proceedings can linger. We have some of the same
7 issues at EOIR, especially because some of our
8 individuals are in custody, so we have a strong
9 incentive not to have those cases last any longer than
10 absolutely possible.

11 And my goal, my project, and I've learned a great
12 deal from my colleagues from ACUS and from others, is
13 try to bring those four things together, to see areas
14 where we can improve, see if we can do things better,
15 you know, regardless of outcome, regardless of how
16 controversial immigration may be, I think there's
17 general agreement that those are sort of four goals,
18 four qualities that any administrative adjudicatory
19 system should strive for.

20 And that's what I'm hoping to do. That's what
21 I've been trying to do as director. And I look
22 forward to discussing more ways that we can do that
23 and taking any suggestions back and seeing what I can
24 do. With that, I'll turn it back our moderator.

25 MS. SHAVERS: Thank you very much. I thought

1 that was a very interesting presentation by all of the
2 panelists. Before turning it over for questions from
3 the audience, I want to give the panelists maybe a
4 chance to react to anything they've heard from the
5 other panelists.

6 MR. HO: I guess I'm happy to weigh in, just to
7 kind of tie together some of these different strands
8 that I think were alluded to by the various co-
9 panelists.

10 So I think one really nice framework for thinking
11 about the differences between these kinds of systems
12 was offered one of Stanford's wonderful JD, PhD
13 students, David Houseman (phonetic), who really
14 focuses us on three kind of basic institutional design
15 differences, that is, how are cases selected, either
16 for appeals or quality assurance systems, what format
17 does the decision take, and then, is there follow-up
18 given to provide feedback of the kind that Professor
19 Wasserman highlighted in terms of the amount of delay
20 between a patent denial and a patent grant.

21 And so (Inaudible) and David Marcus wrote a nice
22 ACUS report actually where one of the things that they
23 highlight that was really important for collecting and
24 aggregating the information out of remand orders was
25 that there was a SSA office that had staff attorneys

1 really synthesize all of the remand orders to identify
2 commonalities that were prevalent through the office,
3 so that you're not just looking at an isolated remand
4 that may be coming years after the initial decision to
5 really be able to kind of figure out what needs to be
6 improved.

7 And so I think once you break it down to these
8 different institutional design components, you can
9 start to think about, well, what are some of the
10 challenges of -- on the selection side, so if you're -
11 - if the selection of decisions for appeals are
12 completely asymmetric, that is it's only denials of
13 benefits in the BVA collects that may really be
14 appealed, then errors going the other way may not
15 really be subject to correction.

16 And so I think that's a nice kind of framework of
17 really thinking about three core institutional design
18 dimensions that span across appellate forms of
19 appellate review, internal quality assurance systems
20 and other kinds of improvement systems like peer
21 review systems, to kind of think in a unified way
22 across each different initiatives.

23 MS. SHAVERS: Actually, I do want to raise one of
24 the questions raised by the audience because it ties
25 directly into comments that Dan just made about

1 internal procedures to try to assure that there's
2 quality assurance.

3 I think it's okay for me to say who wrote this.
4 This from Jeff Lubbers (phonetic), who we all know,
5 and he has read your work, Dan, and says that, in
6 fact, you in some ways called out Director McHenry,
7 realizing that Director McHenry's only been on the job
8 for three years, but looking at the EOIR and you had
9 concluded that EOIR had not approached trying to build
10 in any quality assurance measures.

11 So I guess I'm asking you, Dan, is that a correct
12 assessment, and then, Director McHenry, how would you
13 respond to that?

14 MR. HO: Sure, I'm happy to elaborate on that a
15 little bit. So as I had mentioned in the piece that
16 we put on the Stanford Law Review, we looked at the
17 history of quality assurance initiatives, really over
18 the past number of decades, so we start off at SSA,
19 going back decades and decades.

20 And it is striking to see the sheer amount of
21 experimentation that an agency like SSA has engaged in
22 through various attempts to have the Belmont Review
23 Program to have the initial quality review system
24 instituted in 1976. And there's constant evolution to
25 try to figure out how to draw this quality, quantity

1 tradeoff, including most recently, the kind of insight
2 NLP, natural language processing-based system that SSA
3 came up with.

4 BVA's lands somewhere lower than that to have the
5 kind of quality review system. PTO has done a range
6 of initiatives, as well, with their second eye, I
7 think they called it the second eye kind of peer
8 review system and whatnot. And it is true that when
9 you look at the history of sort of quality assurance
10 programs at EOIR, it does not appear to have generated
11 nearly the amount of sustained attention as is the
12 case at these other agencies.

13 The closest we come to is sort of after the
14 streamlining of BIA, there was a kind of memo issued
15 by the Attorney General that provided a mechanism for
16 individuals to sort of issue complaints about a
17 conduct on the bench.

18 So I guess I'll turn that into a question rather
19 than putting Director McHenry on the spot, which is, I
20 guess, part of the interesting sort of thing I learned
21 about EOIR is really about the role that assistant
22 chief IJs play in sort of managing the different
23 offices. So I'd be curious to hear from Director
24 McHenry, you know, how that, you know, what role the
25 assistant chief IJs currently play in the system

1 because I know it's obviously a system that is
2 changing and what kind of onboarding, for instance, is
3 provided, given the significant amount of hiring that
4 has occurred over the past few years at your -- with
5 significant budget allocations to bring on new IJs.

6 MS. SHAVERS: Director McHenry?

7 MR. MCHENRY: Here I go again, still fighting
8 with the organizer over the mute button, sorry about
9 that. The short answer is stay tuned. Quality
10 assurance is, obviously, as I alluded to in my opening
11 remarks, something we've been looking at very closely
12 over the past couple of years since I've been
13 director.

14 We do have a couple of initiatives, one, I hope,
15 I very close to fruition. I can't -- unfortunately, I
16 can't really get into the details because it's still
17 sort of internal and (inaudible) the department, but
18 it's clearly on our radar.

19 A couple of other things to speak to a couple
20 points, it will become a lot easier, too, once we
21 switch to electronic files. Some of the uses, AI and
22 being able to sort of go back and look through
23 documents that other agencies can do, like Social
24 Security, is possible because they have electronic
25 files. We unfortunately are still many years, if not

1 decades, behind. But once we get to electronic files
2 and we've rolled it out on about 15, 20 courts so far,
3 it'll become a lot easier to do.

4 The same is true of ACIJ's, you alluded to that,
5 previously, up until about three years ago, we had
6 maybe four or five ACIJ's for the entire country.
7 Based on recommendations by the ABA and by former
8 Attorney General Gonzalez, we expanded the number of
9 field ACIJ's we have considerably nationwide. I think
10 it's approaching roughly 40 now.

11 That makes it easier for the ACIJ's to do quality
12 control, you know, to sit on a hearing, to observe a
13 judge, to listen to the recording, to listen to the
14 DAR. So it's much easier now, and it's one of the
15 initiatives that we're looking at and kind of pushing
16 forward is that we've been lagging both in technology
17 and personnel up until about two or three years ago.
18 We have those, and now, we're in the process of moving
19 forward.

20 So I know it's only a partial answer, and I
21 really can't dispute some of your conclusions about,
22 you know, what the agency has and has not done in the
23 past. But I would say see how things stand six months
24 from now. Maybe we'll have -- we have a follow up, a
25 reunion and talk about it and see if it's made much of

1 a difference.

2 MS. SHAVERS: Thank you. Let me remind the
3 audience to post your questions in the question-and-
4 answer box. It looks like people are trying to ask
5 question, but the most efficient way and then I can
6 see them is in the question-and-answer box.

7 So another question that we have -- this is just
8 really relating to what actually --

9 MR. WALKER: Anna --

10 MS. SHAVERS: Yes? Oh, you want to respond?

11 MR. WALKER: Do you mind if I jump in real quick?

12 MS. SHAVERS: Sure.

13 MR. WHITE: I'm not sure if this real (inaudible)
14 conversation and Director McHenry hit on something
15 that was actually not -- it was actually quite common
16 in our review of the different agencies (inaudible)
17 which is the lack of (inaudible). And at the
18 appellate level, even when there's electronic docket
19 at the file level in the agency, and that's going to
20 be a huge barrier to the types of quality assurance
21 that we want to have, if you don't have a way to kind
22 of sift through that.

23 The other kind of interesting thing from the
24 interviews that -- at least that I found interesting
25 along these lines, too, is a lot of agencies,

1 especially agencies that have administrative law
2 judges, there's a lot of sensitivity about quality
3 assurance and training and instructing administrative
4 law judges on how to do their job. And I think that's
5 fascinating, right, because administrative law judges
6 have a certain level of independence from the agency -
7 - the agency head.

8 And appellate structure often times be more
9 aligned as an actor or an agent for the agency head,
10 that you have this kind of this weird relationship
11 where often the agency head wants to provide
12 instruction and training or identify inconsistencies
13 more systemically among the trial level adjudicators,
14 the whole idea of ALJ independence makes it a little
15 bit more complicated, at least that was kind of some
16 of the feedback we got we got on the interviews.

17 MR. HO: Yeah, and EOIR, I think is a really
18 interesting example in terms of the decisional
19 independence. My understanding, at least of the
20 institutional history and Director McHenry, feel free
21 to jump here if it's wrong is that in the original
22 design, there was a question of whether or not there
23 would be performance reviews of line-level IJs and it
24 was an exemption secured through OPM letter to not
25 have IJs originally be subject to performance reviews.

1 And really it was in the last 2000s when that was
2 revoked. And so the kinds of the standard
3 arrangements that you see for ALJs in the ABA really
4 can vary significantly across different mass
5 adjudicatory agencies.

6 MS. SHAVERS: Director McHenry, two related
7 questions have come in regarding the more technology
8 and the personnel that are needed for these quality
9 assurance measures.

10 So one question that's related is with respect to
11 specifically to EOIR, the question has come up, well,
12 how do you go about, then, hiring the personnel? Are
13 there some metrics, criteria that are being
14 established, for example, for the immigration judges,
15 that are going to help assure that whatever quality
16 measures are put in place are not too politicized?

17 But also, once the agencies decide to try to
18 collect this data and create these measures, are there
19 really going to be adequate resources for each of the
20 agencies to put these in place.

21 So I guess I would start out with any of the
22 panelists that want to respond to this, but I think
23 most of those are directed to you, Dan, since you've
24 been doing these studies on quality assurance.

25 MR. HO: Well, I'm happy to lead off. I think

1 Professor Walker's right, which is that data
2 infrastructure is a really critical component to all
3 of this, to really understanding sort of the line-
4 level decision-making. And I think a really
5 interesting example that we highlight in the ACUS
6 report on AI and federal government agencies is that
7 the SSA appeals council made some very early moves
8 really to start to capture information in structured
9 format.

10 It was Gerald Ray, then, headed the appeals
11 council who kind of realized that by producing
12 discrete decision documents, the agency really wasn't
13 securing the kind of information necessary to
14 understand where there were sources of systematic
15 error.

16 And that was really the kind of foundation for
17 being able to do the kind of really interesting
18 prototypes that SSA has pioneered from sort of -- they
19 have used simple predictive analytics, for instance,
20 to predict whether a claim is really highly to be
21 granted so that you could actually expedite the
22 processing of this and skip resource-intensive hearing
23 so based on the structured information that is
24 captured.

25 So I do think that that's a really important

1 element. I'll make one more note on this, which is
2 that the kind of pervasive or one of pervasive
3 challenges when you think about quality management is
4 what a lot of public administration scholars have
5 referred to as the quantity/quality tradeoff, which is
6 it's really easy to count cases that are produced, and
7 so you get things like case quotas.

8 It's much harder as Director McHenry sort of
9 noted to really measure forms of decisional quality.
10 And so even if you build out the data infrastructure,
11 there is the challenge of somethings are really easy
12 to measure and quality is much more difficult because
13 not all cases get appealed, who knows whether the
14 appeal selection is really reflective of the
15 underlying error rate.

16 And so there are these kinds of challenges which
17 is why I think the Insight system that the SSA has
18 pioneered where you put in a draft decision, it'll
19 tell you 30 quality flags, like have you cited a
20 provision of the CFR that does not exist, down to
21 actual internal consistencies between the functional
22 impairment that was identified by the ALJ and is that
23 consistent with the conclusion reached when you
24 compare that to sort of the qualifications for a
25 particular occupation.

1 You know, that's the kind of system that really
2 starts to get a little bit more at decisional quality,
3 but it also harder to measure.

4 MS. WASSERMAN: And I just want to jump in after
5 that just to completely sort of echo that, essentially
6 through end quality sort of tradeoff because the
7 Patent and Trademark Office completely struggles with
8 that, as well.

9 And it sort of highlights just how important I
10 think it is set the performance criteria for the
11 adjudicators, whether it's the sort of Type B or even
12 the sort of examiner incentives because it is much
13 easier just to count how many applications you've
14 processed than to determine whether they are doing so
15 at a high quality.

16 And so you see this constant concern that you're
17 overemphasizing quantity and at the expense of
18 quality, which really kind of pushes more on making
19 sure you're setting the right, sort of incentives to
20 performance reviews for the agency officials.

21 MS. SHAVERS: Director McHenry, did you want to
22 respond specifically to the question about when you're
23 hiring these new personnel for EOIR, establishing
24 criteria, I guess, to make sure it's not over
25 politicized but also the kind of personnel that you

1 need to help with this quality assurance measures that
2 we're discussing.

3 MR. MCHENRY: There we go. Yeah, it's not clear,
4 honestly, that it would take additional personnel. We
5 have a statistics and analytics division already that
6 does a lot of our data analytics. It's a relatively
7 small shop, so we may need some additional help there.
8 But by in large, once we get to a system where the
9 files are electronic, everything can be looked at on
10 the computer, it shouldn't take that many more
11 additional people.

12 And although I recognize that many people think
13 everything that we do is political, this is not a
14 political project. We don't necessarily care what the
15 outcome is. We want the outcome to be correct,
16 whether it favors one side or whether it favors the
17 other. So I don't think politics really play any role
18 in it.

19 And you know, we have been fortunate to get
20 recent budget increases. We do have some additional
21 funding. We could get additional personnel if we
22 needed to, but I'm not sure that our existing people
23 can't handle it.

24 For us, the biggest issue is getting to an
25 electronic system, so that we can look at these, so

1 that we can scan things more quickly than having to go
2 through the paper like we do now.

3 MS. SHAVERS: Thank you. So Dan, back to your
4 study, so as I understand it, and one of the questions
5 presented says that the Veterans Appeals quality
6 assurance program completely failed, that -- why did
7 it fail?

8 MR. HO: Yeah, I mean, I think this ties back to
9 Professor Walker's point about stating clearly what
10 the objectives are of a program. And I think it also
11 highlights one of the challenges of really
12 understanding whether quality assurance program works
13 as billed.

14 So the program that we studied was a program that
15 was existence for about 15 years. The express purpose
16 of it was to reduce reversals of remands by the court
17 of appeals for veterans' claims. And at the time that
18 it was created, the standard of review was very much a
19 predictive one -- is this a reversible error by the
20 court of appeals of veteran' claims.

21 And while that formal standard remained on the
22 books for this entire 15-year period, what basically
23 our study shows started to happen is that that
24 standard of review by the quality review team really
25 became much more lenient over time. So much so, that

1 in some internal documents, you should -- it was
2 stated that you should call an error if it's
3 "undebatable," which is the not the standard of review
4 that the court of appeals for veterans' claims
5 employs.

6 So the result is that because errors are caught
7 so rarely, there is actually very little feedback
8 provided to the veterans' law judges or the staff
9 attorneys from that quality review process. And the
10 reason for it -- for that kind of morphing of the
11 standard of review that was, in fact, employed by the
12 quality review office really in our best sense due to
13 -- coming from a kind of range of interviews we did
14 stems from this pressure under the Government
15 Performance and Results Act, GPRA, to report annually
16 an accuracy metric in its budgetary request to
17 Congress.

18 And there, I think, is the real challenge which
19 is the agency had these dual objectives of do you want
20 to improve the quality of decision-making or would you
21 -- you'd really like to have -- be able to report a
22 high accuracy metric. And I think that's one of the
23 kind of challenges in terms of the dual objectives of
24 a quality review program like this.

25 And I think it also shows that it's really hard

1 just looking at the same formal standard of review and
2 how it's morphed over time to really be able to assess
3 what a quality review office like this is doing.

4 And it's one of the reasons that led Dave Marcus,
5 Sandy Hundonater, and Dave Ames and me to conclude
6 that really having a purely internal administrative
7 law solution is not going to be sufficient. There's
8 going to be -- need to be some level of oversight to
9 make sure that it's -- the program is being carried
10 out in a way that is faithful to the objectives as
11 originally stated.

12 MR. WALKER: I wanted to jump in on that real
13 quick, if that's all right. One thing that I found so
14 surprising in our interviews with the agency appellate
15 directors and leaders, others, is that the remands
16 from the federal courts matter a lot. They actually
17 do spark internal reforms and reflection and quality
18 controls measures and the like.

19 And you know, sometimes, we think when a court,
20 you know, remands and provides instruction or weighs
21 in on the issues about, you know, not necessarily
22 saying how it should be decided, but here's how it
23 shouldn't be decided, you know, kind of ordinary
24 remand case, I was somewhat struck by how much that
25 mattered to these agencies and trying to internalize

1 that. And it wasn't just a matter of, like, trying to
2 avoid judicial review again.

3 It was interesting to see just from a rule of law
4 perspective, a norms perspective, how much it mattered
5 that they trying to be in line with what that circuit
6 or that district court was kind of providing feedback
7 on.

8 The other thing to kind of echo what Dan said is
9 the standard of review matters a lot, and some of
10 these appellate systems have de novo review, and
11 others, of course, have, you know, much more
12 differential abuse of discretion and some of those
13 have -- some of the systems have expressly decided
14 that standard for reasons that advance their
15 objectives. And other just (inaudible) with them, you
16 know, and I think it's interesting to kind of work
17 through, talk through (inaudible). I don't want to
18 name any. They'll be in the report, but I just kind
19 of want to -- but it's interesting to see some of
20 these other ones.

21 They're, like, you know, this doesn't help us at
22 all, like, we want to just, you know, provide quality
23 assurance and (inaudible) review (inaudible) ends up
24 just doing everything over. They've got this huge
25 backlog of cases now, and so we're not even getting

1 through the cases that we have.

2 But it's interesting to kind of think about --
3 and I'd be curious, Dan and others, you know, what is
4 the optimal level of review, you know, if it's a
5 quality assurance perspective, you know, along those
6 lines. Agencies are struggling with this, at this
7 agency (inaudible) level.

8 MR. HO: Yeah, I think one of the real challenges
9 here is, I think as you put it earlier, the design of
10 a system for individual error correction versus
11 systemic error correction. The way put very vividly
12 by one long-standing person who worked at the BVA is
13 the way to think about this is that the front-line
14 decisions that the 58 regional offices that make
15 disability determinations when veterans apply, to use
16 kind of the battlefield analogy, those regional
17 offices are like the medic that is embedded within a
18 combat unit. You're just doing medical triage. It's
19 not really comprehensive medical care.

20 The Board of Veterans Appeals, on the other hand,
21 is like the MASH unit where you're doing a little bit
22 of field surgery. And then, once you get to the court
23 of appeals for veterans' claims, that's your full-
24 service Walter Reed Veterans Hospital. And that's
25 really challenging because what you observe if you're

1 a member of CAVC, the Court of Appeals for Veterans
2 Claims, is you may not be as aware of the kind of
3 systemic implementations of a particular decision. Or
4 if you get up to the federal circuit, if you order a
5 particular medical test for one particular veteran,
6 you might only see the facts of that case not
7 realizing the sheer magnitude of how you're shuffling
8 around healthcare resources at one of the largest
9 public health, you know, agencies in existence.

10 And so it's very -- it is informationally very
11 challenging in the sort of one-off appellate setting
12 to understand those systematic kind of benefits and
13 costs of the kind of decision that you're reaching.

14 MS. SHAVERS: Here's another question. Seems
15 like they're hitting you hard, Dan, with all these
16 questions because you've published a study. But this
17 questioner asked about your mention of peer review
18 systems. So can you tell us more about peer review
19 systems and how we can assess the effectiveness of
20 such systems regarding accuracy and quality assurance?

21 MR. HO: Sure. I'd love actually -- I mean,
22 Professor Wasserman has done amazing work at the PTO
23 and her work actually is a really interesting contrast
24 to what Director McHenry said in terms of the
25 necessary resources to run a kind of quality assurance

1 because one of her really amazing pieces shows just
2 how important it is to actually have the requisite
3 time for patent examiners to be able to do prior art
4 searches. So I'd actually love to get her perspective
5 in, as well.

6 I'll briefly answer the question you put here in
7 terms of peer review as a potential alternative. This
8 comes really from some of the work by Bill Simon that
9 suggests that peer review is kind of governance
10 alternative and is meant as a way to think about this
11 challenge of if you're only seeing highly selected
12 cases that go up on appeal, every now and then, you
13 see a remand order. How much does that really enable
14 you to learn about the kinds of systematic errors you
15 might be engaging in in your decision-making.

16 And peer review is designed to be a kind of less
17 sort of adversarial process, so there are patent
18 offices, for instance, that will pair up during a
19 training period, different examiners to learn from
20 each other, and some of the sort of emerging evidence
21 on this is positive, although we probably need more
22 studies on this subject.

23 So we did a study joint with public health in
24 Seattle and King County, where we did -- ran a peer
25 review program for a four-month period, where we took

1 half of their health inspectors, randomly enrolled
2 them in a peer review program, where for one day out
3 of the week, two inspectors were randomly paired up,
4 sent out in a county car, and did their inspections
5 jointly. They observed the same conditions,
6 individually cited health code violations, and 60
7 percent of the time, they disagreed on whether or not
8 to cite a major health code violation.

9 Then, we made them talk and develop some policy
10 documents based on those sources of inconsistency, and
11 we showed that that form of intervention for the peer
12 review group both improved the ability by inspectors
13 to be able to detect health code violations and
14 because those increases were disproportionately by low-
15 citing inspectors, actually improved the consistency
16 within that peer review group.

17 So that's one of the kind of studies Professor
18 Lisa Willet (phonetic) and I did a kind of different
19 peer review program for PTO examiners where we
20 provided forms of scientific peer review as third-
21 party submissions. And that also suggested that
22 examiners were able to better or spend -- spent more
23 time actually trying to make their way through non-
24 patent literature which has been a real sore spot for
25 the PTO.

1 So with that, I'd love to get Professor
2 Wasserman's perspective on this, as well.

3 MS. WASSERMAN: Well, so I think it's also really
4 important to think about what is the source of error.
5 So in some sense, I would think of giving an examiner
6 more time and peer review as kind of tradeoffs, right?
7 So you can imagine putting multiple examiners onto
8 make a decision and giving them both, you know, ten
9 hours each or you could imagine doubling the time of
10 one examiner, right? Which one's going to be better?
11 I don't really know but I think of some of those as
12 tradeoffs.

13 And I think it's important to keep in mind what's
14 actually driving the error. So for patent examiners,
15 I have a recent piece that looks at errors that are
16 being made in pharmaceutical patents because these are
17 patent applications that incredibly important, right?
18 So if these go and get listed in the orange book and
19 we have a drug that's approved by the FDA, we make a
20 mistake in this, we're essentially maybe blocking
21 generic entry for some period of time until they can
22 be litigated and validated.

23 So if it's really a time story, right, or they
24 just need more time or more minds, right, on the job
25 to review the application, then, I think peer review

1 or giving them more time may work. And I think that's
2 certainly -- our paper suggests that certainly driving
3 a number of sort of invalid patents being issued.

4 But you could also imagine for something where
5 you have this sort of (inaudible) adjudication that
6 occurs in Social Security or in the patent office
7 where it's just one agency official and one path of
8 the sort of interested party is adjudicating.

9 So for in the patent office, if some patent
10 applicant and somebody who really wants to get a
11 patent, so if it's pharma, and this is an important
12 patent application form, they may just throw money and
13 not give up and really sort of outmatch the examiner.
14 And it could be they're submitting declarations,
15 suggests this has sort of unexpected results and
16 should be patentable.

17 So you could give them more time, and that may
18 not solve the entire problem. If that's an issue,
19 then, you may need something like PTAB, right, a post-
20 grant sort of adjudication where you have adverse
21 parties sort of litigating it out to solve the issue.

22 So I think it's really interesting to think of
23 the panoply of different ways, right, in which we can
24 get at quality assurance, but it really, I think, is
25 important to start diagnosing what's actually causing

1 the low-quality decisions.

2 And so to the extent you know that, then, that
3 gives you the ability, I think, to more carefully
4 tailor the solution that will give you the biggest
5 increase in quality.

6 MR. HO: I think that's absolutely right, think
7 that's a really nice point to really know how to
8 actually tailor the intervention.

9 More maybe thing -- small thing to add to that is
10 that sometimes peer review can help you understand
11 what the sources of inconsistency might be, so one of
12 the things that really happened in this peer review
13 intervention was the realization that very line-level
14 inspectors read the 800-page model food code published
15 by the FDA and really referred to the kind of
16 inspection sheet.

17 And so there was a lot of discussion about just
18 understanding essentially sort of form of statutory
19 interpretation with the inspection staff to understand
20 what certain code items really meant. And so it was
21 only through that process that we were able to really
22 understand, oh, the real source of error is that there
23 are three violation types that could be cited and
24 everyone is interpreting differently because there's a
25 significant amount of overlap between these three

1 health code violations and let's figure out how to
2 formulate a kind of consistent sort of policy document
3 or guidance document around this.

4 And that's one of the things that, I think, Bill
5 Simon would point to as one of the epistemic benefits
6 of a form of peer review like this is that it promotes
7 the kind of learning as to what the sources of
8 inconsistency might be.

9 MS. SHAVERS: Thank you. Chris, here's a
10 question for you that really sort of ties in and is
11 related to the issue of peer review, but you talk more
12 about the study that you're engaged in regarding
13 systems for internal appellate review. And so this
14 question asks about in structuring the appellate
15 review within agencies, what should the agencies take
16 into consideration regarding the review that could
17 take place -- judicial review that could take place in
18 federal court, whether it is an agency that has a
19 direct appeal to the Court of Appeals or their direct
20 review is in district court, should that make a
21 difference? Should they think about what happens with
22 respect to appellate review in the agency in terms of
23 what kind of decisions they may get out of the
24 district courts? Are they going to engage in more
25 fact finding to beef up their kind of opinions that

1 they write in the internal review to try to influence
2 the courts more? Just so how do those two things work
3 together, internal appellate review and the judicial
4 review that they may be subjected to?

5 MR. WALKER: Yeah, that's a really good question,
6 and part of it, I'm not -- the question makes me
7 regret that we didn't ask as much about the district
8 court versus the appellate level in the federal
9 courts. Because I do think, I mean, just intuitively,
10 you would think that's -- there's a different calculus
11 there.

12 But we did talk a lot of the agencies about, you
13 know, how they handle judicial decisions and some of
14 that's a matter of whether they're going to acquiesce
15 or not in other circuits, right? So there's a big
16 debate there on acquiescence that a lot of these
17 agency appellate bodies have when they're thinking
18 through that.

19 And I think that's really fascinating to kind of
20 think through are we going to be, you know, adopting
21 that circuit court's decision across the whole nation
22 or are we just going to respond to them here but move
23 in a different direction? In some of the interviews,
24 they gave us examples where they had three different
25 circuits telling them to do things completely

1 differently on the same issue, right? And that's
2 fascinating where you have that kind of pressure.

3 My guess is that on the district court level,
4 they still care, they still think about it, but it
5 won't bind them, you know, going forward. And so it's
6 more of a persuasive way than, you know, than some
7 type of control. But I don't -- I'll have to go back
8 and compare my notes with Matt's from the interviews
9 to see if we did touch on that more with some of these
10 than others.

11 You can imagine some of these, you know, go,
12 like, all of Director McHenry's work goes straight to,
13 well, almost all of it goes straight to the circuit
14 courts whereas USCIS, Social Security are going
15 through those district courts first. And that is a
16 fascinating kind of aspect along those lines.

17 I would also say that remands back down to
18 administrative law judges have similar effects based
19 on some of the areas we did with the chief
20 administrative law judges, even if the agency
21 appellate structure can't command or play -- or they
22 don't want to play a heavy-handed role in how ALJs
23 act. Often times, you'll have the chief ALJ kind of
24 gathering that information together and doing some
25 informal training along those lines, as well.

1 MS. WASSERMAN: Can I just jump in and say one
2 more thing here? I think another thing, that question
3 brings up, like, when I think about the PTO or the
4 sort of design, it's, like, you have different places
5 that you can intervene to increase quality, right, for
6 quality assurance program. You can do it at the lower
7 level decision-makers, right? So and you could do it
8 for examiners, right? Make sure they're getting it
9 right.

10 You can allow some certain number of errors,
11 right, and beef up either a pre or sort of post-grant
12 opposition system, so this could be the sort of
13 (inaudible) licensing or Social Security
14 determination, et cetera, or we just rely on federal
15 courts to fix those particular errors.

16 And I think it's kind of important because we're
17 sort of dancing around and talking about quality
18 assurance at that sort of agency level, initial
19 decision-making as well as in this sort of
20 adjudicatory Type B as well as in the federal courts.

21 And it's all kind of linked, and it's a really
22 sort of interesting puzzle to think about how do you
23 for each agency determine that optimal mix, right?
24 How many resources should be put early on to get all
25 those decisions right versus how many -- is it fine to

1 rely on some intermediate adjudicatory board versus
2 the courts. And I think that's obviously going to be
3 different for every agency and what's at stake. But
4 it's also sort of an interesting part of the puzzle.

5 MS. SHAVERS: Speaking of the puzzle that you
6 have to put together, so you mentioned something about
7 this, Melissa, in terms of how much accuracy we can
8 get, starting at the beginning levels and then up to
9 the process.

10 So one of the questioners wants to hear from as
11 many of the panel as want to talk about this, so we
12 have mass adjudications in a number of agencies, and
13 so does it mean that the volume of these cases that
14 are coming through, that we're simply going to have to
15 just accept that there are different levels of
16 accuracy that will come out of this situation.

17 I know Dan in some of his writings has talked
18 about algorithms and how do you use algorithms to
19 maybe try to come up with the right response, and he
20 also mentioned collecting data. So where are we with
21 respect to these mass adjudications? Can we just no
22 longer expect the levels of accuracy that we would
23 hope we would achieve? Any of the panel.

24 MS. WASSERMAN: So I'll just jump in. I don't
25 know if I can -- I can speak more from the patent

1 (inaudible). I think this just goes back to this idea
2 between efficiency and accuracy, right, quality and
3 through put. And there's always going to be some sort
4 of tradeoff. And so it doesn't make sense for the
5 Patent and Trademark Office to spend 10,000 hours
6 reviewing every patent application, right, to make
7 sure it only grants completely valid patents because
8 there are a fair number of them that may not mean
9 anything in the end, right?

10 So for example, something like 50 percent of
11 patents don't -- they won't pay a couple thousand
12 dollars in renewal fees, something like seven, eight
13 years out. So you know, it's a really important
14 question. You know, my instinct right now is probably
15 with the Patent and Trademark Office. There's a
16 little bit too much focus on through put, and I'd like
17 to see a little bit more level increase in quality
18 even at the sort of initial examiner level.

19 But there's always going to be errors, right?
20 And so then, it's going to be -- we have to kind of
21 figure out how many we're willing to be able to live
22 with in order to keep some sort of, I think, through
23 put or efficiency, as well.

24 MR. WALKER: I would just add, it also just, you
25 know, depends kind of building on what Melissa's

1 saying, too, you know, from a quality assurance
2 (inaudible), how much do you want to -- what types of
3 errors do you care about, right, when you're combining
4 efficiency and -- I mean, is it the cases where
5 (inaudible) gets relief, you know. I mean, do you
6 really want to have kind of a sua sponte review
7 process of that or is it -- or a Social Security
8 applicant gets benefits granted, you know. I think
9 those are kind of questions that just from an
10 efficiency/cost-benefit perspective, is that what we
11 want?

12 And the flip side is -- and Dan's work's really
13 shown this, well, that -- if we don't kind of also try
14 to get quality there, there's overall systematic lower
15 quality. Decision-making, you want high quality
16 decision-making, but I do think some of it's just a
17 matter of which types of errors do we really care
18 about.

19 Maybe the traditional appellate model works in
20 that sense where those who lose can appeal and get the
21 relief -- challenge to get the relief they want and
22 those who win, even if they won in a way that probably
23 shouldn't have, and we just kind of -- have that cost
24 in the system.

25 MS. SHAVERS: (Inaudible).

1 MR. HO: I mean, I'll jump in. Part of the
2 reason, I think, why I offered that quote about the
3 differences between these different stages, the
4 regional office, the Board of Veterans Appeals and the
5 Court of Appeals for Veterans Claims, is that, I
6 think, you'll hear a number of folks who are in the
7 sort of lower-level decision-making say it's
8 impossible to judgement proof our decisions. That is,
9 we have a certain number of decisions that have to get
10 made, and then, the claimants can still appeal upward.

11 And I think that is sort of the institutional
12 reality of the differences in case processing volume
13 across these different levels is that the Court of
14 Appeals for Veterans Claims sees a much smaller number
15 of cases than Veteran Law Judge (inaudible) as a
16 result can spend significantly more time.

17 It does, I think, cause you to ask the broader
18 question of why did we create the Court of Appeals for
19 Veterans Claims in 1988. Prior to that, we didn't
20 have this additional vehicle for judicial review.
21 There's a kind of political economy explanation having
22 to do with emerging differences across veteran service
23 organizations that led to the kind of lobbying of the
24 Court of Appeals for Veterans Claims.

25 But I think it really -- there are at least some

1 who think that if you think about the veterans
2 population, the kind of collegial decision-making
3 system that existed prior to 1988, that much less
4 legal in orientation, where you had a one-page
5 decision that was with the kind of collegial panel
6 that existed at that point of time was not writing
7 with CVAC in mind may actually have served the
8 veterans population better than the current system
9 does.

10 A lot of folks from veteran service organizations
11 will tell you right now there's a huge amount of
12 translation that has to be done for the dense legally
13 reasoned decision by BVA when you're trying to explain
14 a particular kind of denial to a veteran. And so I
15 think that takes you back to this question that
16 Professor Walker started us off with of what's the
17 objective here when we're creating an institution like
18 the Court of Appeals for Veterans Claims when we
19 already had a different form of appellate review, the
20 Board of Veterans Appeals within the Veterans
21 Administration.

22 MR. WALKER: I just wanted to kind of jump in
23 real quickly and just -- I didn't want to suggest a
24 kind of a false dichotomy here, appellate review or no
25 appellate review. Another kind of key thing that a

1 lot of agencies are doing, innovating around, is
2 different tracks of appellate review and whether it's
3 a single-judge decision versus a three-judge decision
4 that we have in immigration, whether it's sent to a
5 staff attorney first to have it decided, whether,
6 like, at Social Security, you start with one -- you
7 have tracks where people specialize in different
8 things. You start with one judge or appellate judge
9 takes a look at it, and then, you have a second one
10 come in and if they agree, we're done, if not, you
11 bring someone else in.

12 I mean, there are lots of ways to kind of tailor
13 it, other than appellate review or no appellate
14 review, and it really does depend on what your
15 objectives are along those lines. But I do think
16 that's one area of the report I'm really excited
17 about, when it comes in a couple of months where we
18 kind of chronicle how internal the agencies have
19 structured this in different ways to address those
20 different concerns.

21 I do think the role of staff attorneys is really
22 fascinating. A lot of these appellate structures have
23 very skilled, trained staff attorneys that specialize
24 in common issues and play in role that is quite, I
25 think, quite important and different in different

1 agencies. And I think that's something that kind of
2 deserves more attention. Often times, we focus too
3 much on the person that has the title of judge or
4 adjudicator when the staff actually plays a really
5 important role.

6 MS. SHAVERS: Thank you. We're getting lots of
7 questions, and I'm afraid we're not going to be able
8 to get to all of them. But there are a few things
9 that a couple people wanted me to point out.

10 Chris, Adam Zimmerman wanted me to tell you that
11 he was the one asking the question about the judicial
12 review relationship to the appellate review.

13 Some other -- more people have commented on the
14 immigration process.

15 Director McHenry, you mentioned earlier about a
16 lot of the immigration scholars don't seem to write
17 more about the intersection of administrative law
18 generally and immigration. I actually was going to
19 raise a question, point out, at least, I'm quite
20 familiar with some scholars that do that. One of them
21 is Jill Family (phonetic). A lot of her writings have
22 done that, and others have raised the names of
23 Professors (inaudible) Nogales, Sean Holtz and
24 (inaudible). So there are more immigration scholars
25 that are focusing on this idea of how processes and

1 other agencies might have some relationship to what's
2 going on in the EOIR.

3 MR. MCHENRY: I hope I didn't give the wrong
4 impression. What I was saying is up until a few years
5 ago, I think that's true. I would certainly agree
6 that within the last five to seven years, there's been
7 an explosion, I think, for lack of a better word, of
8 scholars that are sort of looking at EOIR immigration
9 in the larger administrative law context.

10 MS. SHAVERS: Thank you. Others, circling back
11 to this question about maybe part of the issue is who
12 gets appointed initially to some of these positions,
13 like the immigration law judges, pointing out that
14 some recent appointees in EOIR, et cetera, seem to be
15 people who have high denial rates of number of
16 immigration claims, including asylum claims and what
17 does that do to the process of trying to have quality
18 decisions, quality assurance.

19 Care to comment, Director McHenry?

20 MR. MCHENRY: Sure. I'll come to that question
21 in a second, but I want to jump in on another point.
22 I hope -- as many people know, there was an Executive
23 Order a couple of years ago that changed the process
24 for how ALJs, administrative law judges, are selected,
25 and that's actually something that we're interested in

1 and we're looking at -- how much impact or effect
2 that's going to have? I mean, when I was selected as
3 an ALJ, I had to go through the comparative process,
4 take all the exams and that sort of thing, but I also
5 didn't have any sort of specialized training for where
6 I ended up being an ALJ.

7 Now that that's changed and the agencies are
8 going to have more impact, that would be my suggestion
9 for sort of future research to see if that's going to
10 make a difference in terms of agency adjudications.

11 To your question, again, this comes back to
12 something I said earlier, people sometimes do the
13 confirmation bias or whatever, I think sometimes see
14 politics or see issues where there aren't any issues.
15 The people that we've elevated to the board are
16 themselves immigration judges.

17 Most -- and the other panelists can correct me if
18 I'm wrong -- but it's not uncommon to see trial-level
19 judges elevated to an appellate body, particularly
20 administrative appellate body. We're not looking at
21 the outcomes. We're not looking at the outcomes.
22 We're not looking at, you know, any particular ideas
23 or thoughts. You know, we're looking at experience,
24 you know, knowledge of the law, background. Everyone
25 goes through a competitive interview process. It's

1 all on USA jobs, the same way that all the other
2 government positions are advertised.

3 So we're trying to get, you know, the most
4 quality people, and ultimately, the proof will be in
5 their decisions. As some of the panelists have
6 alluded to, you know, we look at the remand rates from
7 federal courts. If it turns out that the people we've
8 hired or that we've elevated, if their remand rates
9 turn out to be unacceptable, then, we'll look at that
10 more closely and maybe take action.

11 At the end of the day, you know, they're on the
12 hook for any sort of issues that the federal courts
13 identify or that we identify through our own internal
14 processes, and we'll address those if we need to. But
15 otherwise, we think we're hiring quality people,
16 though I'm confident that our critics as well as some
17 of the attorneys who represent the respondents will
18 tell us if they disagree.

19 MS. SHAVERS: Okay. I just want to refer the
20 audience, also, to the recording of the first panel.
21 They had a great discussion about the selection
22 employment process now for administrative law judges,
23 and that's on the ACUS website.

24 MR. HO: If I could say one thing, just on the
25 appointment effects stuff, not about the appointees,

1 like, ALJs or IJs, or administrative judges, but
2 actually one thing I just wanted to highlight is that
3 the selection for who conducts quality review is also
4 quite important. So there's an appointment dimension
5 to the design of quality review, as well.

6 The Government Accountability Office in 2002
7 issued a kind of critical report of the design of the
8 quality review program at the Board of Veterans
9 Appeals, and the critique was essentially that it was
10 staff attorneys reviewing VLJ decisions, and while
11 they were (inaudible) for, like, a two-year period at
12 that point of time, they were ultimately expecting to
13 go back and be assigned to work with those particular
14 VLJs and that made it really hard to have the kind of
15 decisional independence to call errors on those VLJs,
16 who you may ultimately be reporting to after you
17 finish your stint in the Office of Quality Review.

18 And that, I think, was one of the potential
19 weaknesses of how that system was designed whereas one
20 of the reasons why the appeals council has had
21 particular force in the SSA context is that it is
22 truly an independent kind of unit that does this form
23 of quality review. So there is an appointments
24 dimension embedded within the design of quality
25 assurance programs, as well.

1 MS. SHAVERS: As I said, unfortunately, we've run
2 out of time, won't get to all the questions, but maybe
3 this is a good last one for us to sort of think about.
4 We're talking about accuracy, having great decisions,
5 good decisions.

6 And so the question is raised about how do we
7 really define accurate decisions because there can be
8 a lot of disparity in what people think is an accurate
9 decision, and as the commenter points out, we often
10 have decisions from the Supreme Court which are five
11 to four.

12 And so can we say that based on that kind of vote
13 we get a more accurate decision than a decision that
14 six, two, for example.

15 So I guess the last words if anybody wants to add
16 is how do we know when we get accurate decisions?

17 MR. HO: I think as Director McHenry put it, it's
18 really hard to think about accuracy without some
19 judicial reference of what happens when this is
20 ultimately taken to an appeals court.

21 And this, of course, is the mystery under our
22 modern procedural due process doctrine, which is so
23 much under *Matthews versus Eldredge*, hinges on
24 decisional accuracy, but there can be significant
25 disagreements because it's a system that is

1 administered by humans. And there's no exogenous
2 definition of whether a case has really been
3 accurately decided. So I think that is one of the
4 profound challenges when thinking about accuracy and
5 performance management in the administrative state.

6 MS. SHAVERS: I think that's right, and you
7 probably brought a good point to end on, Matthew v.
8 Eldredge because one of those factors, of course, and
9 we're looking at accuracy, is the risk of erroneous
10 deprivation that we all try to convey to our students
11 and what that really means.

12 So I want to thank the panelists today. I think
13 it was a great panel. As I said, I'm sorry we didn't
14 get to all of the questions. We have 30 seconds if
15 anyone has a last comment.

16 Okay. Thanks to the audience, and thanks to the
17 panelists. It was a great discussion. I'm glad I got
18 a chance to participate.

19 MR. HO: Thank you.

20 MR. WALKER: Thank you.

21 MS. SHAVERS: Thanks. Bye.

22 (End of audio recording.)

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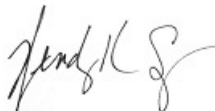
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12 WENDY SAWYER, CDLT
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