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

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Transcription of Audio File:

Symposium on federal Agency Adjudication_ Managing federal Agency Adjudication Programs

Audio Runtime: 1:29:53
MR. MATT WIENER: Good afternoon. And thank you for joining us. I'm Matt Wiener, the advisor and executive director of the Administrative Conference, United States, or just ACUS for short.

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

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

Our moderator today is Professor Anna Shavers, who's the Klein Williams Professor of Citizenship Law at the University of Nebraska School of Law or (inaudible) Law School, I think it is. And Professor's Shavers is also, I'm pleased to say, a member of ACUS, and I'm also pleased to say that Professor Shavers is joined on the panel by another
ACUS member, Professor Chris Walker, a distinguished ACUS consultant, Professor Dan Ho, who's the author of a recently published report that ACUS commissioned on artificial intelligence in federal regulatory programs, and two good friends of ACUS, Professor Wasserman and Director McHenry.

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

Professor Shavers, the virtual podium is yourself.

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

So our panelists this afternoon are Dan Ho is the William Benjamin Scott and Lillian M. Scott professor law at Stanford Law School. He's written quite a bit and also studied this issue of federal Agency Adjudications, looking at issues of quality assurance, especially in the context of agencies that we're now referring to as having mass adjudication, what quality do you get.
One of those agencies is the Executive Office for Immigration Review, and we're pleased to have with us Director Hames McHenry of the Executive Office for Immigration Review. I think most of us know that his agency has considerable adjudications, and so one of the questions is, of course, what Dan is thinking about, what kind of quality can we assure comes from these agencies in the context of mass adjudications.

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

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

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

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

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

So now, I will turn to over to Dan.

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

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

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

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

Professor Mashaw was led to the conclusion that individual appeals are actually extremely ineffective at systematic error correction and pointed some decades ago to the fact that due process really
requires a kind of management process to assure the accuracy of claims adjudication and pointed to internal quality assurance systems as really the kind of prototype.

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

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

Number 2, quality is incredibly difficult to measure and highly contested, so look no further than the 1980's contestation around the SSA quality assurance programs, that, at that point of time, were
really perceived really to serve the goal of trying to lower the number of individuals on the welfare rolls.

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

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

And the bottom line is pretty simple, which is that the program didn't achieve its aims, regardless of whether or not the case was selected for quality review. There was an indistinguishable rate of appeals and reversal and remands conditional on an appeal.
And part of the tension that we highlight in that work is really stems from the Government Performance and Results Act, which is that the program really had dual purposes. One was to report a performance measure of the accuracy rate of those decisions, and the other was to improve the quality of decision-making.

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

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

Second, internal administrative law, which has received a fair bit of attention recently among scholars, alone will also not necessarily cure these
because of the potential for gaming these kinds of accuracy metrics.

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

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

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

MS. MELISSA WASSERMAN: So thank you. That was a great introduction to concerns about quality assurance. And I'm going to pick on Professor Ho's remarks and focus more on the Patent and Trademark Office.
So there's always a concern, I think, especially with an agency that conducts mass adjudication, that you're going to have inconsistent adjudicatory outcomes, and the Patent and Trademark Office is no different.

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

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

And so a number of scholars, including some joint work with myself and Michael Fregs (phonetic), who's at Duke Law School, have documented that patent examiners have widely divergent inherent grant rates, and trademark examiners also have systematically very
different registration rates, even though many of
these applications that come in are randomly assigned.
So you would expect them to have sort of a more
normalized grant rates.

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

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

So while I tried to document heterogeneity and
adjudicatory outcomes, the next step we really think
is to try to determine what are some of the causal
drivers for this inconsistent decision-making at the
agency. And so Michael and I have empirically
examined several different factors to see if they may
be contributing to these inconsistent decisions.
And so first we found that the GS level of the patent examiner has an effect on the examiner's grant rate, and this is because as you get promoted up the pay scale, each promotion is associated with about a 10 to 15 percent reduction in the time that you're given to review a patent application.

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

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

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

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

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

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

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

So there's a number of classic ways, including
quality assurance, but another one, of course, is to
subject these initial decisions to higher level or
sort of appellate review within the agency.
And so one such example of that is that the PTO, they have a patent trial and appeal board, which is more like this Type B adjudication, right? It's formal like, they sit in a body of three individuals, and they can review the decisions of patent examiners, both patent denials and now, patent grants, where third parties can bring the patent back to the PTO and say take a second look.

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

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

And we actually find this as a -- it's a more dramatic effect for patent denials that are reversed than patent grants that are reversed. But that's, in
part, I think, explained by the fact that patent
denials happen relatively quickly, right? If the
aggrieved applicant get their patents denied, then,
they immediately appeal, so there's more of a direct
feedback loop to the patent examiner.

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

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

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

And Matt Wiener and I have been working on, over
the last couple year, an administrative conference
study on agency appellate systems, and we spent the
last year, year and a half, meeting with folks at 12
different agencies, the high-volume agencies to get a
better sense of what these appellate systems look
like, why they exist, what challenges they have, and what way in which they can improve.

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

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

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

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

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

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

It's about deciding the cases that are brought
before them and dealing with those. And I think
that's one of the things that's kind of limited the
ability of appellate models within agencies to achieve
quality assurance is they're not actually aimed to
achieve quality assurance.

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

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

You might be using these types to gather
information for organizational effectiveness and
systemic awareness to be able to kind of identify
bigger issues, perhaps for instance, in the patent or
the trademark context, you might be using these
appellate systems or you could use them to get a
better sense of what policies we should have when it
comes to training the lower-level adjudicators.

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

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

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

So those are kind of the different reasons why you might want to have an appellate model in addition to just the quality assurance. And what's been fascinating in doing these interviews and looking at the publicly available information about these appellate systems, the objectives that they have, one, they don't actually -- most agencies don't even
provide the objectives. They don't have them publicly available. This is why we have this system, and this is why they designed it a particular way.

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

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

I'll just kind of end by saying when I went into this project, as an administrative law scholar, I thought appellate review within the agency like judicial review and very naively, and I think that Dan put it really well at the very outset of this that it's not at all like that. A theory of appellate review within an agency needs to be dramatically different than the theory of judicial review within federal courts.
I think the agencies get that and understand that quite well. I think scholars that study the administrative state may not fully appreciate those differences, and I think going there, I'll turn it over to Director McHenry.

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

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

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

Immigration, for many years, has been sort of siloed in its own little bubble, and people who are scholars of immigration are rarely scholars of anything else, even though it's very much an administrative law area of concern, of interest.
Until recently, I would say, there hasn't been a lot of sort of effort to try to bridge it or to link it to other scholarship in the administrative law universe. And from the director's perspective, from a practitioner's perspective, it's also very helpful and very interesting to me to see how other individuals, how other agencies operate, but how other individuals are approaching and analyzing how those agencies do comport themselves.

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

In fact, I try to read as much of the scholarship as I can, not only on immigration and immigration courts, and not just because I wonder what people are saying about us, but also to try to get ideas, thoughts, perspectives on maybe how we can do things better, and that's sort of what I want to open with and maybe segue into the larger discussion to try to tie together some of the things that my colleagues have said to show you or to explain things that we look for, that I look for as the director, and that
I'm looking for at the agency to try to make things work better and to be better as an administrative adjudicatory agency.

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

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

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

So obviously, immigration has been an issue, a
major concern in recent years. We definitely seen an uptick in the volume, and as a result, it becomes even more incumbent, it's even more important for us to learn how to get it right. And the things that we're looking at are things that my colleagues have touched on already, and the four primary ones that we're looking at are quality, accuracy, consistency, and efficiency.

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

The quality of the decision as Professor Ho alluded to earlier, quality is notoriously difficult to measure. It's very difficult for a practitioner, for someone on my side, to measure, as well, but we want to make sure the decisions are good. You know, we understand appellate bodies may take a different tact, you know, the decision may be reversed simply
because somebody looks at it. But that doesn't necessarily mean the decision was a quality decision.

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

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

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

And the last thing is that none of these should be considered sort of at the expense of efficiency.
And that's an issue that every mass adjudication body, administrative adjudication body has to deal with.

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

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

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

MS. SHAVERS: Thank you very much. I thought
that was a very interesting presentation by all of the panelists. Before turning it over for questions from the audience, I want to give the panelists maybe a chance to react to anything they've heard from the other panelists.

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

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

And so (Inaudible) and David Marcus wrote a nice ACUS report actually where one of the things that they highlight that was really important for collecting and aggregating the information out of remand orders was that there was a SSA office that had staff attorneys
really synthesize all of the remand orders to identify commonalities that were prevalent through the office, so that you're not just looking at an isolated remand that may be coming years after the initial decision to really be able to kind of figure out what needs to be improved.

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

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

MS. SHAVERS: Actually, I do want to raise one of the questions raised by the audience because it ties directly into comments that Dan just made about
internal procedures to try to assure that there's quality assurance.

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

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

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

And it is striking to see the sheer amount of experimentation that an agency like SSA has engaged in through various attempts to have the Belmont Review Program to have the initial quality review system instituted in 1976. And there's constant evolution to try to figure out how to draw this quality, quantity
tradeoff, including most recently, the kind of insight
NLP, natural language processing-based system that SSA
came up with.

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

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

So I guess I'll turn that into a question rather
than putting Director McHenry on the spot, which is, I
guess, part of the interesting sort of thing I learned
about EOIR is really about the role that assistant
chief IJs play in sort of managing the different
offices. So I'd be curious to hear from Director
McHenry, you know, how that, you know, what role the
assistant chief IJs currently play in the system
because I know it's obviously a system that is changing and what kind of onboarding, for instance, is provided, given the significant amount of hiring that has occurred over the past few years at your -- with significant budget allocations to bring on new IJs.

MS. SHAVERS: Director McHenry?

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

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

A couple of other things to speak to a couple points, it will become a lot easier, too, once we switch to electronic files. Some of the uses, AI and being able to sort of go back and look through documents that other agencies can do, like Social Security, is possible because they have electronic files. We unfortunately are still many years, if not
decades, behind. But once we get to electronic files and we've rolled it out on about 15, 20 courts so far, it'll become a lot easier to do.

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

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

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

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

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

MR. WALKER: Anna --

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

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

MS. SHAVERS: Sure.

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

The other kind of interesting thing from the interviews that -- at least that I found interesting along these lines, too, is a lot of agencies,
especially agencies that have administrative law
to an agency head, there's a lot of sensitivity about quality
assurance and training and instructing administrative
ing judges on how to do their job. And I think that's
fascinating, right, because administrative law judges
have a certain level of independence from the agency -
- the agency head.

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

MR. HO: Yeah, and EOIR, I think is a really
interesting example in terms of the decisional
independence. My understanding, at least of the
institutional history and Director McHenry, feel free
to jump here if it's wrong is that in the original
design, there was a question of whether or not there
would be performance reviews of line-level IJs and it
was an exemption secured through OPM letter to not
have IJs originally be subject to performance reviews.
And really it was in the last 2000s when that was revoked. And so the kinds of the standard arrangements that you see for ALJs in the ABA really can vary significantly across different mass adjudicatory agencies.

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

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

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

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

MR. HO: Well, I'm happy to lead off. I think
Professor Walker's right, which is that data infrastructure is a really critical component to all of this, to really understanding sort of the line-level decision-making. And I think a really interesting example that we highlight in the ACUS report on AI and federal government agencies is that the SSA appeals council made some very early moves really to start to capture information in structured format.

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

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

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

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

And so there are these kinds of challenges which is why I think the Insight system that the SSA has pioneered where you put in a draft decision, it'll tell you 30 quality flags, like have you cited a provision of the CFR that does not exist, down to actual internal consistencies between the functional impairment that was identified by the ALJ and is that consistent with the conclusion reached when you compare that to sort of the qualifications for a particular occupation.
You know, that's the kind of system that really starts to get a little bit more at decisional quality, but it also harder to measure.

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

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

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

MS. SHAVERS: Director McHenry, did you want to respond specifically to the question about when you're hiring these new personnel for EOIR, establishing criteria, I guess, to make sure it's not over politicized but also the kind of personnel that you
need to help with this quality assurance measures that
we're discussing.

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

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

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

For us, the biggest issue is getting to an electronic system, so that we can look at these, so
that we can scan things more quickly than having to go through the paper like we do now.

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

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

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

And while that formal standard remained on the books for this entire 15-year period, what basically our study shows started to happen is that that standard of review by the quality review team really became much more lenient over time. So much so, that
in some internal documents, you should -- it was
stated that you should call an error if it's
"undebatable," which is the not the standard of review
that the court of appeals for veterans' claims
employs.

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

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

And I think it also shows that it's really hard
just looking at the same formal standard of review and how it's morphed over time to really be able to assess what a quality review office like this is doing. And it's one of the reasons that led Dave Marcus, Sandy Hundonater, and Dave Ames and me to conclude that really having a purely internal administrative law solution is not going to be sufficient. There's going to be -- need to be some level of oversight to make sure that it's -- the program is being carried out in a way that is faithful to the objectives as originally stated.

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

And you know, sometimes, we think when a court, you know, remands and provides instruction or weighs in on the issues about, you know, not necessarily saying how it should be decided, but here's how it shouldn't be decided, you know, kind of ordinary remand case, I was somewhat struck by how much that mattered to these agencies and trying to internalize
that. And it wasn't just a matter of, like, trying to avoid judicial review again.

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

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

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

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

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

The Board of Veterans Appeals, on the other hand,
is like the MASH unit where you're doing a little bit
of field surgery. And then, once you get to the court
of appeals for veterans' claims, that's your full-
service Walter Reed Veterans Hospital. And that's
really challenging because what you observe if you're
a member of CAVC, the Court of Appeals for Veterans Claims, is you may not be as aware of the kind of systemic implementations of a particular decision. Or if you get up to the federal circuit, if you order a particular medical test for one particular veteran, you might only see the facts of that case not realizing the sheer magnitude of how you're shuffling around healthcare resources at one of the largest public health, you know, agencies in existence.

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

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

MR. HO: Sure. I'd love actually -- I mean, Professor Wasserman has done amazing work at the PTO and her work actually is a really interesting contrast to what Director McHenry said in terms of the necessary resources to run a kind of quality assurance...
because one of her really amazing pieces shows just how important it is to actually have the requisite time for patent examiners to be able to do prior art searches. So I'd actually love to get her perspective in, as well.

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

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

So we did a study joint with public health in Seattle and King County, where we did -- ran a peer review program for a four-month period, where we took
half of their health inspectors, randomly enrolled them in a peer review program, where for one day out of the week, two inspectors were randomly paired up, sent out in a county car, and did their inspections jointly. They observed the same conditions, individually cited health code violations, and 60 percent of the time, they disagreed on whether or not to cite a major health code violation.

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

So that's one of the kind of studies Professor Lisa Willet (phonetic) and I did a kind of different peer review program for PTO examiners where we provided forms of scientific peer review as third-party submissions. And that also suggested that examiners were able to better or spend -- spent more time actually trying to make their way through non-patent literature which has been a real sore spot for the PTO.
So with that, I'd love to get Professor Wasserman's perspective on this, as well.

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

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

So if it's really a time story, right, or they just need more time or more minds, right, on the job to review the application, then, I think peer review
or giving them more time may work. And I think that's certainly -- our paper suggests that certainly driving a number of sort of invalid patents being issued.

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

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

So you could give them more time, and that may not solve the entire problem. If that's an issue, then, you may need something like PTAB, right, a post-grant sort of adjudication where you have adverse parties sort of litigating it out to solve the issue. So I think it's really interesting to think of the panoply of different ways, right, in which we can get at quality assurance, but it really, I think, is important to start diagnosing what's actually causing
the low-quality decisions.

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

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

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

And so there was a lot of discussion about just understanding essentially sort of form of statutory interpretation with the inspection staff to understand what certain code items really meant. And so it was only through that process that we were able to really understand, oh, the real source of error is that there are three violation types that could be cited and everyone is interpreting differently because there's a significant amount of overlap between these three
health code violations and let's figure out how to formulate a kind of consistent sort of policy document or guidance document around this.

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

MS. SHAVERS: Thank you. Chris, here's a question for you that really sort of ties in and is related to the issue of peer review, but you talk more about the study that you're engaged in regarding systems for internal appellate review. And so this question asks about in structuring the appellate review within agencies, what should the agencies take into consideration regarding the review that could take place -- judicial review that could take place in federal court, whether it is an agency that has a direct appeal to the Court of Appeals or their direct review is in district court, should that make a difference? Should they think about what happens with respect to appellate review in the agency in terms of what kind of decisions they may get out of the district courts? Are they going to engage in more fact finding to beef up their kind of opinions that
they write in the internal review to try to influence the courts more? Just so how do those two things work together, internal appellate review and the judicial review that they may be subjected to?

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

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

And I think that's really fascinating to kind of think through are we going to be, you know, adopting that circuit court's decision across the whole nation or are we just going to respond to them here but move in a different direction? In some of the interviews, they gave us examples where they had three different circuits telling them to do things completely
differently on the same issue, right? And that's fascinating where you have that kind of pressure.

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

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

I would also say that remands back down to administrative law judges have similar effects based on some of the areas we did with the chief administrative law judges, even if the agency appellate structure can't command or play -- or they don't want to play a heavy-handed role in how ALJs act. Often times, you'll have the chief ALJ kind of gathering that information together and doing some informal training along those lines, as well.
MS. WASSERMAN: Can I just jump in and say one more thing here? I think another thing that question brings up, like, when I think about the PTO or the sort of design, it's, like, you have different places that you can intervene to increase quality, right, for quality assurance program. You can do it at the lower level decision-makers, right? So and you could do it for examiners, right? Make sure they're getting it right.

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

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

And it's all kind of linked, and it's a really sort of interesting puzzle to think about how do you for each agency determine that optimal mix, right? How many resources should be put early on to get all those decisions right versus how many -- is it fine to
rely on some intermediate adjudicatory board versus the courts. And I think that's obviously going to be different for every agency and what's at stake. But it's also sort of an interesting part of the puzzle.

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

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

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

MS. WASSERMAN: So I'll just jump in. I don't know if I can -- I can speak more from the patent
(inaudible). I think this just goes back to this idea
between efficiency and accuracy, right, quality and
throughput. And there's always going to be some sort
of tradeoff. And so it doesn't make sense for the
Patent and Trademark Office to spend 10,000 hours
reviewing every patent application, right, to make
sure it only grants completely valid patents because
there are a fair number of them that may not mean
anything in the end, right?

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

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

MR. WALKER: I would just add, it also just, you
know, depends kind of building on what Melissa's
saying, too, you know, from a quality assurance (inaudible), how much do you want to -- what types of errors do you care about, right, when you're combining efficiency and -- I mean, is it the cases where (inaudible) gets relief, you know. I mean, do you really want to have kind of a sua sponte review process of that or is it -- or a Social Security applicant gets benefits granted, you know. I think those are kind of questions that just from an efficiency/cost-benefit perspective, is that what we want?

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

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

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

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

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

But I think it really -- there are at least some
who think that if you think about the veterans population, the kind of collegial decision-making system that existed prior to 1988, that much less legal in orientation, where you had a one-page decision that was with the kind of collegial panel that existed at that point of time was not writing with CVAC in mind may actually have served the veterans population better than the current system does.

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

MR. WALKER: I just wanted to kind of jump in real quickly and just -- I didn't want to suggest a kind of a false dichotomy here, appellate review or no appellate review. Another kind of key thing that a
lot of agencies are doing, innovating around, is
different tracks of appellate review and whether it's
a single-judge decision versus a three-judge decision
that we have in immigration, whether it's sent to a
staff attorney first to have it decided, whether,
like, at Social Security, you start with one -- you
have tracks where people specialize in different
things. You start with one judge or appellate judge
takes a look at it, and then, you have a second one
come in and if they agree, we're done, if not, you
bring someone else in.

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

I do think the role of staff attorneys is really
fascinating. A lot of these appellate structures have
very skilled, trained staff attorneys that specialize
in common issues and play in role that is quite, I
think, quite important and different in different
agencies. And I think that's something that kind of deserves more attention. Often times, we focus too much on the person that has the title of judge or adjudicator when the staff actually plays a really important role.

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

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

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

Director McHenry, you mentioned earlier about a lot of the immigration scholars don't seem to write more about the intersection of administrative law generally and immigration. I actually was going to raise a question, point out, at least, I'm quite familiar with some scholars that do that. One of them is Jill Family (phonetic). A lot of her writings have done that, and others have raised the names of Professors (inaudible) Nogales, Sean Holtz and (inaudible). So there are more immigration scholars that are focusing on this idea of how processes and
other agencies might have some relationship to what's going on in the EOIR.

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

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

Care to comment, Director McHenry?

MR. MCHENRY: Sure. I'll come to that question in a second, but I want to jump in on another point. I hope -- as many people know, there was an Executive Order a couple of years ago that changed the process for how ALJs, administrative law judges, are selected, and that's actually something that we're interested in
and we're looking at -- how much impact or effect
that's going to have? I mean, when I was selected as
an ALJ, I had to go through the comparative process,
take all the exams and that sort of thing, but I also
didn't have any sort of specialized training for where
I ended up being an ALJ.

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

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

Most -- and the other panelists can correct me if
I'm wrong -- but it's not uncommon to see trial-level
judges elevated to an appellate body, particularly
administrative appellate body. We're not looking at
the outcomes. We're not looking at the outcomes.
We're not looking at, you know, any particular ideas
or thoughts. You know, we're looking at experience,
you know, knowledge of the law, background. Everyone
goes through a competitive interview process. It's
all on USA jobs, the same way that all the other
government positions are advertised.

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

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

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

MR. HO: If I could say one thing, just on the
appointment effects stuff, not about the appointees,
like, ALJs or IJs, or administrative judges, but actually one thing I just wanted to highlight is that the selection for who conducts quality review is also quite important. So there's an appointment dimension to the design of quality review, as well.

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

And that, I think, was one of the potential weaknesses of how that system was designed whereas one of the reasons why the appeals council has had particular force in the SSA context is that it is truly an independent kind of unit that does this form of quality review. So there is an appointments dimension embedded within the design of quality assurance programs, as well.
MS. SHAVERS: As I said, unfortunately, we've run out of time, won't get to all the questions, but maybe this is a good last one for us to sort of think about. We're talking about accuracy, having great decisions, good decisions.

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

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

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

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

And this, of course, is the mystery under our modern procedural due process doctrine, which is so much under Matthews versus Eldredge, hinges on decisional accuracy, but there can be significant disagreements because it's a system that is
administered by humans. And there's no exogenous definition of whether a case has really been accurately decided. So I think that is one of the profound challenges when thinking about accuracy and performance management in the administrative state.

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

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

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

MR. HO: Thank you.

MR. WALKER: Thank you.


(End of audio recording.)
CERTIFICATE

I, Wendy Sawyer, do hereby certify that I was authorized to and transcribed the foregoing recorded proceedings and that the transcript is a true record, to the best of my ability.

DATED this 3rd day of September, 2020.

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WENDY SAWYER, CDLT