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4   FORUM ON FEDERAL ADMINISTRATION ADJUDICATION

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1   FORUM ON FEDERAL ADMINISTRATIVE ADJUDICATION

2   A-P-P-E-A-R-A-N-C-E-S

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4   Panel I:

5   RICHARD PIERCE, JR.

6   RON CASS

7   KIM HILDRED

8   CHRIS WALKER (moderator)

9

10   Panel II:

11   CARY COGLIANESE

12   FREDRIC LEDERER

13   GERALD RAY

14   DANIEL SHEFFNER

15   REEVE BULL (moderator)

16

17   Panel III:

18   DAVID MARCUS

19   NANCY GRISWOLD

20   ADAM ZIMMERMAN

21   MATTHEW WIENER (moderator)

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2   MR. WIENER: Good morning. We are going to get started.

3   I am the Vice Chairman and Executive Director of the

4   Administrative Conference of the United States. And I

5   am joined by several ACUS colleagues this morning.

6   Among them who are on ACUS is the Dean Emeritus of

7   Boston University Law School as well as a member of the

8   ACUS Council.

9   And Ron will also as you can see, he'll be sitting

10   on our first panel this morning. ACUS and its cosponsor

11   of this forum, the Adjudication Committee of the ABA's

12   section of Administrative Law & Regulatory Practice are

13   pleased to bring together some of the leading experts to

14   share their perspectives and to answer your questions on

15   an important, but often neglected aspect of the

16   Administrative State, and that's Administrative

17   Adjudication or what might be called more simply,

18   Administrative Litigation.

19   No one knows exactly how many cases are adjudicate

20   each year before administrative agencies. But surely,

21   that number will exceed the number that the federal

22   courts adjudicated each year. I won't stand between you

23   and the panel any longer except: First, to know that

24   ACUS has been at the forefront in efforts to improve the

25   fairness and efficiency of Federal Administrative

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2 Adjudication across the government. Second, to

3 encourage you to pick up materials on the table outside,

4 which include ACUS's recent recommendations of the

5 Administrative Adjudication stretching back TO 2010.

6 Third, to invite congressional staff to be call upon

7 ACUS as a technical resource with respect to

8 administrative law issues whenever they may arise. And

9 fourth, to at last, recognize just a few people here.

10 First and foremost, Kyle McCallum, counsel to the Senate

11 Judiciary Committee, for helping to arrange for our use

12 of this room and many other things this morning. Thank

13 you, Kyle. Kyle, are you here? There -- I'm sorry --

14 thank you, Kyle; and thank you to your boss, Chairman

15 Grassley, who we have been honored to count among ACUS's

16 strongest supporters for many years.

17   I'd also like to thank or recognize -- is Judge

18 Braden here from Court of Federal Claims -- she's not

19 here; Kim Hildred, who is the recently appointed chair

20 of the Social Security Advisory Board and also a good

21 friend of ACUS, and finally, I'd like to thank Chris

22 Walker to my left, your right, a law professor of Ohio

23 state University, and a member of the ACUS, and along

24 with being the co-chair of the ABA Administrative Law

25 Sections Adjudication Committee.

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2   With that, I'll turn the podium over to Chris to

3   introduce and then moderate our first panel. Thank you,

4   Chris.

5   CHRIS WALKER: Great. So this is really exciting. When

6   Matt and I were figuring out what to do this fall for

7   the Adjudication Committee for the ABA, I wanted to

8   bring it here to Congress. And I'm not going to speak

9   for Matt or ACUS. But ACUS and the ABA Administrative

10   Law Section have been doing a lot of really important

11   work on how to think about and reframe and perhaps

12   reform agency adjudication. And yet, in Congress most

13   of the regulatory forum legislation has been focused on

14   rulemaking. So we thought it would be fun to have a

15   day, or morning, where we kind of bring the ideas

16   forward that ACUS has been working on as well as other

17   ideas that ACUS has been working on to help kind of

18   focus on ways in which we rethink our approach to agency

19   adjudication.

20   So we've got this terrific panel and, I guess, I

21   kind of get us started off talking big picture of where

22   adjudication fits in within the modern Administrative

23   State. And I just want to kind of start that off -- a

24   lot of times we fixate on rulemaking when we think of

25   the Administrative Procedure Act and yet, the vast

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2   majority of regulatory actions are taking place in

3   adjudication. And even within adjudication, you have

4   your classic Administrative Procedure Act Adjudication,

5   which you might call formal adjudication, where others

6   might not like that term "before." Before ALJ, that's a

7   really, really small subset of adjudication. And ACUS

8   has done some real pioneering over the last five or six

9   years with the help of Stanford Law School to track all

10   other types of agency adjudication, agency adjudication

11   that occurred before Administrative Judges and not

12   Administrative Law Judges, those that occur before for

13   hearing examiners and others.

14   And I hope that's going to be featured somewhat in

15   this first panel. The idea is that there's a vast

16   diversity of types of agency adjudication that are

17   happening across the Administrative State today. So

18   with that, I'm going to introduce the panel very

19   quickly. Two good friends and troublemakers, and

20   hopefully a new friend, Kim, are on this panel. To my

21   left, and really to my left on most things, is Dick

22   Pierce from George Washington. He disagrees with me on

23   almost everything, but he still said I should get a ten

24   rating on my external reviews, so I'm grateful for that.

25   We have Ron Cass -- I was going to call him the Dean of

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2   Administrative Law -- formerly the Dean of Boston

3   University, fellow troublemaker with Dick at UVA, which

4   I did not know you were officemates. He and I like to

5   cause trouble together. So I'll have him to back me up

6   when Dick disagrees. And then we actually have a real

7   world perspective from Kim Hildred, who has mentioned

8   the Social Security Advisory Board. We are going to go

9   in this order and she's going to tell us why all her

10   theories are great, but just not at all grounded in

11   (inaudible). So we're going to start that way. And

12   because we only have an hour, I'm actually going to keep

13   track of the time. And I'll elbow Dick when it gets to

14   ten minutes, because I want to leave enough time for

15   questions and interactions with the panel. So I'll turn

16   it over to Dick.

17   DICK PIERCE: Thanks, Chris. So I just want to kind of

18   lay out the framework of what the Agency Adjudication

19   System looks like. I'll start with what I consider the

20   Mass Justice Agency, Social Security Administration and

21   the contents of making disability decisions; VA

22   primarily in the same context, SMS in the context of

23   decision-making about eligibility for reimbursement for

24   health procedures, and immigration, of course. These

25   agencies differ tremendously in their decision-making

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2   structures and the nature and the characteristics of the

3   adjudicatory personnel that they rely on. But they have

4   a bunch of common characteristics. They're all

5   characterized by massive and growing case loads, long

6   cues that produce long delays in decision-making. And

7   they're characterized by some problematic, unexplained

8   inconsistencies. So they share a lot of characteristics

9   that cause them to be constantly studied, and House and

10 Senate hearings. And wide variety of other forums

11 including a lot of ACUS projects. And those have

12 identified a lot of problems and not very promising

13 solutions.

14   And then I want to segue to the role of the of

15 Administrative Law Judge. And as Chris pointed out,

16 they really account for a small and diminishing

17 proportion of the total number of federal adjudicatory

18 personnel, but they were always viewed as the gold

19 standard. They are the only ones that are actually had

20 a place in the Administrative Procedure Act. They're

21 assured a greater degree of the decisional independence

22 than are most other adjudicatory personnel.

23   Historically, when I used to practice law in this

24 city in the 70s, every regulatory agency had lots of

25 Administrative Law Judges. And most of the regulatory

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2   adjudications were conducted. And trial-type hearings

3   before Administrative Law Judges. Gradually over time,

4   have most agencies have made the transition from oral

5   adjudicatory hearings before ALJs to paper hearings,

6   where it's an exchange of written documents as a

7   principal basis for decision-making. And that's taking

8   place with the acquiescence and in some cases, the

9   encouragement. After the encouragement of the courts,

10   the Supreme Court often referred to the traditional

11   adjudicatory process. Regulatory adjudicatory processes

12   were non-terminable. And I can vouch for that. I'm

13   still waiting to receive the initial decision of the

14   Administrative Law Judge in Central Power Commission

15   Docket No. RP71-3, the first case I tried.

16   I don't think it's going to happen. He died about

17   35 years ago now, but it gives you -- it's an extreme

18   example -- but it gives you an illustration of the

19   advantages that most agencies have perceived as a result

20   of this transition. Now, this takes place on winning

21   the case of adjudication where the focus is on

22   differences in opinion on issues of science and

23   economics. And in that context, there is a pretty broad

24   agreement among academics and among judges, and most

25   agency heads. But the paper-hearing process makes more

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2   sense than the oral adjudicatory process.

3   So what's happened is the number of ALJs that

4   adjudicate or preside over regulatory adjudications have

5   gone down. The number of ALJ that preside in Social

6   Security Disability cases has gone way up -- someone

7   just gave me the number. It was 1,700 and some now --

8   by far the vast majority are involved in that one

9   adjudicatory process.

10   I co-authored a long report for ACUS. I see one of

11   my co-authors out there, Jeff Lubbers. Back in '92,

12   were we devoted 200 pages in discussion of a very

13   complicated tradeoff -- involving when you go the ALJ

14   route or some non-ALJ adjudicator or other options --

15   very complicated tradeoffs.

16   Now, the major trend to the reduction of the use of

17   ALJ's regulatory agencies has been the big increase in

18   the SEC use of ALJs to replace Federal District Courts

19   to adjudicate many disputes involved in the violations

20   of the Dodd-Frank Statute. That countertrend has been

21   very controversial. It has raised serious

22   constitutional questions that have been resolved in

23   different ways by Circuit Courts. It's on its way to

24   the Supreme Court for sure. I don't know how it's going

25   to be resolved, but it's interesting.

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2   I just add one other important point. To me, always

3   the most powerful, most important law to keep in mind is

4   the law of unintended consequences. It applies in all

5   circumstances and can never be broken. It really

6   applies in this context.

7   There is a lot of room for making beneficial changes

8   to any of these systems of adjudication, but there's

9   also a lot of room to make errors through

10   well-intentioned changes that wind up having some bad

11   unintended consequences. So just a note of concern -- a

12   note of caution -- as you guys begin the process of

13   figuring out what to do with these adjudicatory systems.

14   RON CASS: I am going to stand up here.

15   CHRIS WALKER: You get to do whatever you want to do.

16   You're the boss.

17   RON CASS: First of all, let me express appreciation for

18   the invitation to be here. Dick and I are amazed, but

19   we're happy to be invited to be anywhere. And I do want

20   to clarify: When Dick said he was practicing in the

21   '70s, that was the 1970s.

22   I'm going to start with a story of a couple in their

23   mid-60s where Dick and I would say, "young people."

24   They were walking along the beach. And they stumbled

25   upon something, picked it up, and as odds would have it,

2   it is a lamp. They brush it off together, and the genie

3   pops out and says that he will give each one of them one

4   wish. And because given the inflation, wishes aren't

5   what they used to be, he says, we're reducing it from

6   three to two. The wife says, I'll go first. I have a

7   good life. I'm pretty happy, but I would like to have

8   an all-expense paid luxury trip to Paris.

9   And the genie snaps his finger and there she is on

10   the Champs-Elysees in a chauffeured limousine heading

11   down Boulevard Haussmann where all the good shopping is.

12   The genie turns to the husband and says, "What would you

13   like?" The husband looks around just to make sure his

14   wife is not there, he leans over and whispers to the

15   genie, "I'd really like to be married to someone who's

16   30 years younger than I am. The genie snaps his

17   fingers, and the guy turns 65.

18   So a lot of times people think they know what they

19   want and can't quite say it right. We live with a

20   constitution where people thought they knew what they

21   wanted, and tried to say it in the clearest possible

22   way. There were two things they did that are important

23   to our conversation today. One, they divided up the

24   powers of government. They divided up the legislative

25   power, the judicial power, and the executive power.

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2   They didn't talked in terms of adjudication rule-making.

3   They talk in terms of the power of the legislator. The

4   power of the judiciary. And what they understood by

5   that is the actual function that looks like

6   adjudication.

7   The actual decisions on facts and application of

8   rules to those facts is something that happens

9   everywhere. It happens in the administration. It

10   happens when anybody performs any function that has

11   real-world consequences. But what's different about the

12   judicial power is that it wasn't built with cases and

13   controversies involving the laws, involving the private

14   rights, involving private individuals, involving

15   important questions.

16   The exact way of cabining from the sort of

17   adjudication that takes place in administrative

18   exercises of authority is one that pops up every 50-75

19   years, and the courts try to give an answer.

20   In the 1850s, the answer was the dividing line was

21   between public rights and private rights. The cases

22   really had trouble trying to figure out how you divide

23   private and public rights. But the courts kind of

24   muddled through and it wasn't a big problem when

25   agencies were not doing that much -- when agency

2   activity consisted primarily of benefits administration,

3   land management, and a variety of activities that did

4   not look like they were regulating ordinary conduct of

5   individuals who weren't doing business with the

6   government.

7   The second crack at this was how Crowell v. Benson

8   said the dividing line was between jurisdictional facts

9   and routine facts. Administrators could find routine

10 facts, they couldn't positively find jurisdictional

11 facts. And that was a wonderful thing for

12 administrative law books, and law classes because no one

13 was ever able to determine where the dividing line was

14 between jurisdictional facts and routine facts, which

15 means we can still ask questions about relevance in

16 Benson all these years later. The one thing that

17 Crowell v. Benson did was it said, "There's a difference

18 between the sort of decision-making, which is not a

19 final adjudication of private rights and the sort that

20 looks like advice to judges of what to do, where the

21 administrator actually makes the decision, but it's not

22 a final binding decision. That dividing line came back

23 again in the 1980s with the decision of Northern

24 Pipeline v. Marathon Pipeline case. That case shows you

25 the court starting to take very seriously the question

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2 of separation of powers between Article III Courts and

3 administrative decision-making.

4   And in that case, they were dealing with the

5 bankruptcy courts; they weren't dealing with what we

6 would think of as ordinary administrative law cases, but

7 what they said was if you have a decision that looks

8 like it's a decision between private parties of a

9 dispute that looks like a legal dispute, that has to be

10 done like Article III Judges.

11   So in that case, the court drew a line, sent back to

12 the Congress the rewriting the bankruptcy law, Congress

13 did it, it came back to the courts in 2011, and again

14 the Supreme Court said the same thing with an

15 exclamation point. If you have things that look like a

16 sort of adjudication that is between private parties,

17 it's got to be done by Article III courts. You now have

18 -- both Chris and Dick said -- you have a vast number of

19 decision-makers in the federal sphere. You have ALJs

20 who number about twice the number of Article III Judges.

21 You have administrative Judges who number about twice

22 the number of ALJs and Article III Judges. You have

23 them making as a huge number of decisions.

24   Some of those, the vast number in Social Security,

25 which takes up most of what ALJs do in the federal

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2 government, look like their decisions of eligibility.

3 And that looks like the old-line decision that was

4 committed to adjudication by administrators.

5   You now have a separate set of questions, however,

6 regarding what can the decision-makers and agencies like

7 SSC do? Can they take the place of federal courts in

8 handing out penalties? That is going to be on the

9 Supreme Court's docket sooner or later. Before that,

10 you have the question: If they can do this, how do the

11 decision-makers have to be appointed?

12   And there's a series of cases from the 1970s forward

13 that start to take the appointments questions seriously

14 once again. So in Buckley v. Valeo, Freytag v.

15 Commissioner, the Edman case, the Free Enterprise case,

16 you have the Supreme Court striking down a whole series

17 of appointments as inconsistent with the Appointments

18 Clause of the constitution. They're two cases that Dick

19 referred that are in the 10th Circuit, the DC Circuit --

20 last year and this year -- that evolve the SSC's

21 processes -- that open the question whether the ALJ

22 appointments there conform to the constitution. And you

23 have a split between the two circuits. That is

24 something that the is pending before the court as to

25 whether we will grant Circuit.

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2   I think the odd-makers will say it will, of course,

3   I have been a long-time rooter for the Washington

4   Redskins, so I don't risk the odd-makers anymore. I

5   will say for those of us in administrative law, it's a

6   wonderful time for anybody given without administration

7   adjudication, you have more than your typical share of

8   problems on your plate. And like the couple on the

9   beach, I think I know what I want, but I'm probably not

10   going to say it that he gets informed. Thank you.

11   KIM HILDRED: Good morning. It's an honor to be here

12   among my distinguished colleagues. I want to thank ACUS

13   for the invitation to participate. The remarks I will

14   make are my own and do not reflect the use of the Social

15   Security Advisory Board, which I now chair. However, I

16   want to assure you that the board is very concerned

17   about the service being provided to those Social

18   Security Disability Insurance and Supplemental Security

19   Income claimants waiting to receive a hearing before an

20   Administrative Law Judge. Today, over a million people

21   are waiting an average of 600 days, almost two years,

22   for a hearing with the Social Security Administration

23   and Administrative Law Judge. The American people

24   certainly deserve better. So I hope that this forum is

25   the first of a number of steps towards needed reform.

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2 I'd like to start with some basic information about

3 Social Security, not knowing how familiar all of you

4 are, but I think it's important to keep in mind the

5 specifics of this particular program that is indeed

6 complex and so vital to its beneficiaries.

7 The Social Security Act provides to benefits to

8 those with disabling physical or mental impairments

9 under the SSDI and SSI program. SSI provides benefits

10 to workers who meet the Act's disability criteria and to

11 their dependants and survivors.

12 On average, Social Security pays SSDI benefits each

13 month to approximately 9 million workers with

14 disabilities and 2 million of their dependents. Workers

15 become insured for SSDI based on paying payroll taxes on

16 their hard-earned wages and self-employment income.

17 In fiscal year 2017, SSDI benefit outlays will reach

18 close to a $143 billion and are expected to reach

19 $215 billion dollars in ten years. According to Social

20 Security Trustees, by 2028, total revenues will be

21 unable to cover full promised benefits.

22 The SSI program provides monthly benefits to people

23 with limited-income resources who are aged, blind, or

24 disabled. Adults and children under age 18 can receive

25 payments based on disability or blindness. Social

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2 Security pays approximately six million blind or

3 disabled adults and over one million blind or disabled

4 children in SSI benefits. General tax revenues fund the

5 SSI program.

6   The benefits provided by this program are often the

7 only resource of those with disabilities. The statutory

8 definition of disability is used to determine whether an

9 adult is disabled under SSDI or SSI. And the Act

10 defines "disability" as the inability to engage in

11 substantial gainful activity by reason of any medically

12 determinable physical or mental impairment which can

13 result in death or which has lasted or can be expected

14 to last for a continuous period of not less than 12

15 months. To make these determinations, the Act requires

16 SSA to consider how a claimant's condition affects his

17 or her ability to perform previous work or considering

18 his or her age, education, and work experience, other

19 work that exists in significant numbers in the national

20 economy.

21   To carry out this definition, SSA has established

22 hundreds of pages of regulations and internal procedures

23 to describe how to evaluate medical evidence. Medical

24 conditions that SSA considers severe enough to prevent

25 work and how SSA asseses whether an adult can perform

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2   other work that exists in the national economy.

3   The initial decision is made by employees of a

4   hundred percent federally-funded state agencies,

5   collectively known as Disability Determination Service.

6   If denied benefits, an individual may apply for

7   reconsideration by that state agency. Should an

8   individual be denied at both the initial and

9   reconsideration level, he or she can appeal that

10   decision before an ALJ who conducts an impartial de novo

11   hearing. The appeals counsel within SSA reviews ALJ

12   decisions appealed by claimants are on its own motion

13   and processes cases appealed to federal court. This

14   fiscal year, SSA expected to receive 632,000 requests

15   for an ALJ hearing. Currently, SSA has more than 1,600

16   ALJs on duty.

17   Before leaving the Hill in the beginning of 2015, I

18   was privileged to serve the House Ways and Means

19   Committee, the staff director of the Social Security

20   Subcommittee. During a 112 Congress, the public was

21   rightly raising concerns about the integrity of the

22   Administrative Law Judges and the fundamental fairness

23   of Social Security's appeal system, as numerous press

24   articles then had highlighted judges awarding benefits

25   90 percent or more of the time in comparison to a

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2 national average that covered then around 60 percent.

3 Judges who decided extremely in high number of cases in

4 comparison to their colleagues and the assignment of

5 cases outside random rotation raises the specter of

6 inappropriate relationships with counsel.

7   At the time, SSA has all of a sudden conducted a

8 number of audits at the request of subcommittee Chairman

9 Sam Johnson and was also investigating allegations of

10 fraud involving a certain office in West Virginia, which

11 some of you may have heard about. In that case in West

12 Virginia, an attorney ultimately pleaded guilty to

13 paying doctors and an ALJ to rubber-stamp false

14 disability claims using fake evidence.

15   At that time, under Chairman Johnson's leadership

16 and that of a ranking member, Sarah, the Ways and Means

17 Subcommittee and Social Security held a joint hearing

18 with the Judiciary Subcommittee on Regulatory Reform,

19 Commercial and Antitrust Law -- on the role of

20 Administrative Law Judges. Later, the subcommittee on

21 Social Security had own hearing to further examine the

22 appeals process in Social Security. These hearings

23 explore the challenges of the ALJ hiring process where

24 the office of personnel management accepts the

25 applicants, administers the ALJ examination, and

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2 maintains the register from which agencies hire their

3 ALJs, including long-standing questions about the

4 performance of OPM. In its testimony, then Social

5 Security Commissioner, Mike Astrue, indicated that in

6 1977, commissioners appearing before the committee have

7 testified about the difficulties they have faced with

8 OPM and encouraged the committee to closely examine

9 OPM's ability to consistently and timely provide quality

10 judges to SSA and all federal agencies.

11   Also discussed was the fact that becoming an

12 Administrative Law Judge is effectively an appointment

13 for life. Although an ALJ can be removed for misconduct

14 by the Merit Systems Protection Board. However, the

15 process may take well over a year, in which the ALJ will

16 continue to earn his or her full salary.

17   While under his leadership, SSA was able to

18 successfully address certain misconduct cases through

19 the MSPB. The commissioner asked to highlight that the

20 SSA could not take action against judges based strictly

21 on the allowance or denial rates because Congress had

22 put great weight on ALJ's qualified decisional

23 independence. The good news is since these and other

24 hearings and investigations, most notably by Senator

25 Coburn and his staff, some progress has been made.

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2   Supported by a number of excellent reports by ACUS, SSA

3   has published a number of rules to improve the

4   efficiency and timeliness of the hearings process.

5   These rules relate to the submission of evidence,

6   nationally uniform procedures related to advance notice

7   of the hearing, and the submission of evidence before a

8   hearing of the treatment of treating physician's

9   evidence.

10   Also, thanks in large part to the efforts of Judge

11   Gerald Ray, who you will hear from shortly, SSA now has

12   tools to train and counsel ALJs. Judges now have

13   information about their Appeals Council remands, and

14   their performance in relation to ALJs, and their office,

15   their region, and the nation. There are enhanced

16   quality reviews and focused reviews. They also focus on

17   other participants in the hearings process. The number

18   of ALJs with extremely high or low allowance rates has

19   declined. However, while some members of Congress

20   introduce certain legislative proposals and the

21   President's fiscal 18-year budget request mentions a

22   proposal that would amend the Administrative Procedures

23   Act to create a probationary period for newly hired

24   ALJs, the appeals process itself remains largely

25   unchanged and wait times remain at unacceptably high

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2   levels. And in my view, the time is now as Chairman

3   Jackson has stated to ask the hard questions to

4   determine if we can fundamentally do better to achieve a

5   disability adjudication process that provides fair,

6   accurate, and consistent outcomes while balancing the

7   needs of claimants and taxpayers. Thank you.

8   CHRIS WALKER: Great. I want to open for the audience,

9   but I want to get a little interaction here first. I

10 want to start with Kim. And obviously, speaking in your

11 personal capacity, not on your official role, but based

12 on your experience, from a legislative prospective on

13 Social Security, what do you think should be the key

14 areas to spend more time thinking about a reforming? Do

15 you have your wish list of things? Perhaps more money?

16 KIM HILDRED: Well, it's interesting. I'm not sure more

17 money is necessarily the answer. As a matter of fact,

18 the Social Security Subcommittee had a hearing just a

19 few weeks ago where that question came up specifically.

20 And the acting Chief of Staff there was talking about

21 how they need to do more to increase efficiencies in the

22 process itself.

23   I think part of the challenge for Members of

24 Congress is number one, they are extraordinarily busy.

25 Other issues sometimes take front-center attention. You

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2   know, the hurricanes that we are dealing with today, tax

3   reform, health care reform, these are major time

4   takeaways for these members. And then, of course, when

5   it comes down to it, most times they're more focused on

6   the day-to-day wait times, the backlogs, the issues that

7   are really effecting they're constituents.

8   So it's very hard for them to step back to take that

9   more bigger picture role. I think that to help advise

10 Members of Congress, I think, forums like this, I think

11 other panel discussions, expert discussions can really

12 help feed the public debate about these issues.

13   I would like to think that at some point with the

14 support of ALJs -- of those experts here today, ACUS and

15 others -- there could be an exploration of the process

16 itself. And, you know, what is the appeals process?

17 What is it's impact on claimants and taxpayers? Our

18 modifications could be made that would provide better

19 public service. I think those are some of the bigger

20 questions that are out there for the Congress to

21 address.

22   And I think that the more that we can help guide

23 them with some of the dangers as some of the panel

24 members discussed. Certainly, unintended consequences,

25 I agree, is a huge one. I think that there might be a

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2   better environment for begin to think about these taking

3   on these questions

4   CHRIS WALKER: Ron, did you want to weigh in on the

5   Social Security Administration?

6   RON CASS: Well, I don't want to say much about, as I

7   said, because I think the real challenge in this is

8   trying to take a system that is a constitutional system.

9   And make it one that works in a way that is better.

10   Everybody admits there are problems. Everybody sees

11   there are issues to address. The difficulty is when

12   your dealing with this large a caseload, this many

13   different particular factual decisions, there is not an

14   easy way to do it in a way that really gives attention

15   to each and every claimant and that really looks hard at

16   the facts and that doesn't have some sort of bell curve

17   in terms of consistency.

18   When I was a faculty member, year after year, we

19   would have debates over the grading system. And you

20   would have the same debate every year. There would be

21   one faculty member who was so inspirational in his own

22   mind that all of his students were "A" students. There

23   was a another faculty member, who since the 1820s had

24   never seen a student who deserved more than a "F" plus.

25   And in between was everybody arguing for the system they

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2   had when they were in law school.

3   Now, the truth is that you can name grades on it

4   however you want. You can do it in terms of cherries

5   and oranges and grapefruits and watermelons. You can do

6   it in numbers, you could do it in letters. What really

7   matters is the students is getting the grade that fits

8   their performance and that is a fair relative to others.

9   Social Security is dealing with that same problem just

10   over a vastly larger number of cases than anybody else.

11   And I think there will be always be ways of tweaking it,

12   but you'll never quite get it right.

13   KIM HILDRED: The one point I that I would like to add:

14   I've had the opportunity to do a little bit of work in

15   the Veterans Affairs Disability taking a look at the

16   Veterans Affairs Disability Program. And so far, the

17   Congress has not actively achieve, kind of, a statute or

18   operating -- the VA tends now to be operated by statute.

19   Members of Congress have become so concerned about its

20   operation that they're literally passing laws about how

21   the program should actually be administered instead of

22   letting the leadership of VA really makes some of those

23   decisions.

24   I would certainly hate to see Congress get into that

25   with the Social Security Administration. I think the

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2   unintended consequence there would be very dire. And

3   that's why I really believe the thoughtful people, you

4   know, ALJs in the system today, expert, folks in ACUS,

5   those are the types of people that should -- if they can

6   get together and really debate and talk about some of

7   these issues. I think it creates a much better

8   environment and ultimately will produce far better

9   thoughtful policy options that could be successful.

10 CHRIS WALKER: So what I'm trying to envision

11 adjudication putting into a bucket. Sometimes it's mass

12 adjudication versus not mass adjudication. Other times,

13 I think it's helpful to think of it as public benefits,

14 public enforcement, and private enforcement. And I want

15 to talk a little bit more about private enforcement.

16   I've been thinking a lot about the pad panel and

17 appeal board. Have you all been following the PAD Trial

18 Appeal Board? This is a fascinating agency adjudication

19 system, most of which was created by the American

20 Invents Act in 2011 that provides a fast track

21 administrative forum instead of going to court to

22 challenge the vitality of.

23   It's not ALJs, they're padded Administrative Judges.

24 So they're similar to a non-ALJ Administrative Judge.

25 They hear a lot of cases, and they're going to hear more

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2   case now that Supreme Court has ruled that every padded

3   plaintiff can't go to judiciary of Texas. You actually

4   got to go where the venue -- where there is context. So

5   I am curious as I think about these private -- Ron kind

6   of talked about this a bit -- these set up a certain

7   amount of challenges to have an agency adjudicator.

8   Some of them are constitutional challenges. And in

9   fact, we have the Oils States case before the Supreme

10   Court this term asking whether it's constitutional --

11   for the PTAB as we like to call it -- to adjudicate

12   padded validity decisions.

13   But they always have some kind of interesting

14   challenges. I mean, lots of interesting challenges.

15   The PTAB -- there's not a lot of -- unlike a lot mass

16   adjudication systems -- the head of the Pen and

17   Trademark office does not have the final say, at least

18   formally. She can't take the case and decide it like

19   you could on some of the commission systems and like the

20   Attorney General Graham with immigration, but she can

21   order a hearing and re-stack the panels. There are some

22   really fascinating issues. And I kind of wonder if

23   folks have thoughts on these -- what I call "private

24   enforcement" of agency adjudication.

25   DICK PIERCE: Let me take a crack at that. I think Ron

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2   did a good job of summarizing the issues in the case

3   law. And I want to try and put them in a bit of

4   context. One issue that the Supreme Court is almost

5   certainly going to be deciding in the next couple of

6   years has been chewed up by the desperate opinions of

7   the two circuit courts on the appointment clause issue.

8   And that certainly is a serious constitutional issue.

9   And it could well be that ALJs, at least in this

10   context, are inferior officers and have to be by their

11   appointed by heads of agencies. That's a real serious

12   question.

13   CHRIS WALKER: Some people argue that it should be

14   appointed by the DC Circuit.

15   DICK PIERCE: It's very important to lots of law

16   professors who have gotten ten years based on writing on

17   it. But in terms of importance to the world, it's a

18   "who cares". I was just talking to a couple of Social

19   Security people about what changes -- well, instead of

20   somebody at HR making the appointment decision, that

21   person will recommend to the commissioner -- somebody

22   for appointment in the commissioner -- and somebody will

23   rubber stamp that and end of constitutional problem. So

24   it's "who cares". In terms of practical affect as

25   opposed to lofty, abstract constitutional issues.

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2 Now, the other issue that both Chris and Ron talked

3 about -- the dividing line between Article III courts

4 and agencies, that is a big deal issue. And it's not

5 raised in the context of mass justice agencies. No

6 chance they are ever going to say -- for a lot of

7 reasons -- part of the legal and part of the

8 practical -- there's no way in hell that the federal

9 judiciary -- "let's add a couple of million cases to our

10 docket." That's not going to -- but in the context of

11 these SCC enforcements that's is potentially a very big

12 deal.

13   They're actually six appointments from the court

14 opinions that address the question. And four cases the

15 government loss. And the decision was that only Article

16 III Judges could decide this class of private law

17 disputes. And two of them, the government won. In

18 every one, the court was divided either, five, four,

19 six, three. That's the one consistency in all of it.

20 The four where the government loss were all bankruptcy

21 court decisions. The two were the government, one were

22 agency decision.

23   And I don't think that's by accident. And indeed,

24 the chief justice provided a bit of an attempt to

25 explain why they're more sympathetic to the argument

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2   that agencies can decide some cases that are related to

3   their missions than they are to the bankruptcy court

4   context in which the same abstract issue arises.

5   So it's going to be very interesting to see how that

6   one eventually is resolved as Chris noted. There is a

7   case before the court right now. This term that raises

8   that question again. And it's in an agency context as

9   patent cases. I don't know how the court is going to

10   resolve that, but that may give us a more idea. What

11   surprises me a bit is that the people have been

12   challenging the SSC's use of ALJs in this place of

13   federal Judges. And this is not an SSC decision, it's

14   actually a congressional decision -- Dodd Frank to give

15   them that power and exercising it.

16   To my knowledge, they haven't challenged on that

17   basis. They're challenging on the appointment clause

18   basis, which to me is a "who cares", and not on this

19   other one that have massive effect and say, "no, this

20   whole class of cases has to be decided by Article III

21   Judges." I don't know why they made that practical

22   choice. But it hasn't been raised in any of them that

23   I'm aware of.

24   RON CASS: The one thing on the patent front --

25   historically, patents have been viewed essentially as a

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2 government benefit. It was not viewed as a matter of a

3 project. It was something that the government handed

4 out and gave a temporary monopoly in exchange for your

5 putting something in a public domain. So the court --

6 if it wants to get formal about this -- may read that

7 differently. You have to two sets of bonding right now

8 -- two sets of perceiving -- that are really intriguing

9 on the patent firm. One is the one, Chris, that you

10 were mentioning, but I think it is actually problematic

11 from a constitutional standpoint. If you don't put this

12 in the box of, essentially, licensing and benefits

13 administration.

14   The other is there is about one-sixth of patent

15 trials in the United States take place at the United

16 States Trade Commission. Now, the International Trade

17 Commission is a formal matter is not resolving a private

18 dispute. It's deciding a trade matter, and it's not

19 deciding the patent matter except as an incident to the

20 trade matter and the paten matter then doesn't stay

21 formally decided by the ITC decision. But effectively,

22 this is now a vehicle of choice for patent adjudication.

23 In part, because you get experts who have decided a lot

24 of patent cases. And if I got a good patent claim, I

25 rather have somebody who knows a lot about patent law

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2 and who only gets one episodically.

3   A series of interesting questions -- I don't agree

4 with Dick, and I say that without regard to the

5 subject -- but in this case, I don't agree with Dick and

6 the dividing line between the bankruptcy cases and the

7 two agency cases really is going to hold up as a

8 difference between that set of proceedings in bankruptcy

9 proceeding and any agency proceeding. I think that the

10 agency proceeding had particularly the short case. I

11 think those are going to turn out better in the long

12 run. I think that what the court will do is ask the

13 question whether the decision is on a subject that

14 doesn't look like an Article III subject and looks like

15 a matter of benefits and administration of management of

16 one of the traditional functions of the executive branch

17 outside the realm of the courts, or whether it looks

18 like something courts do. And it's going to be the

19 second -- I think we're going to have problems with

20 taking those decisions in house.

21 CHRIS WALKER: I like Ron's clarification with the

22 patented cases, I guess when I think of adjudication, I

23 put things in the bucket of private enforcement

24 thinking, you know, private parties going to an agency

25 saying resolve this dispute. But you're right, the

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2   courts are deciding term as whether it is actually

3   private property or not. And inside the ladder, we're

4   probably going to continue as is in the constitutional

5   world. If they decide the former -- I might be shocked

6   if -- it just seems like a dramatic change on how the

7   PTOs handling everything.

8   RON CASS: We should remember that when the bankruptcy

9   cases were up, everybody was betting that there was no

10   way that the court was going to throw out the system.

11   Because there were too many cases, there was too much

12   wrapped up in this. And I remember not just with

13   American Pipeline case but Stern v. Marshall also. They

14   already fixed it. Just live with the fix. And with the

15   courts say is -- and there's a big change. Think we

16   also have to say there's a big change in the years when

17   you have justices on the court. Reenforcing the sense

18   -- and we have to go back to a constitutional first

19   principals. So the look at the appointment's clause

20   questions, the division of separation of powers between

21   courts and agencies. I think all of that got

22   reinvigorated in a way that at least last for quite a

23   few years now because you have a lot more people for the

24   court who have embraced that way of looking at the

25   constitution including it's most recent appointee.

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2 CHRIS WALKER: I want to switch to another topic on ALJs

3 versus AJs, but I want to see are there any comments or

4 questions from the audience?

5 UNKNOWN FEMALE: (Inaudible.)

6 MR. PIERCE: That, of course, is a whole different line

7 of cases that the appointments laws cases are decided on

8 the appointments laws. The removal cases are just --

9 take care costs. And the main precedent there is free

10 enterprise fund. And it is certainly possible as Justin

11 Breyer cautioned in the opinion of free enterprise that

12 we could wind up with the court extending the reasoning

13 to cover ALJs and to say that ALJs cannot be subject to

14 a double for cause from presidential control, which if

15 the court used the remedy applied in the free enterprise

16 fund and arguably analogies context, the court would

17 just say therefore, we eliminate all the fore cause --

18 all but one of the four cause limits. And in the ALJS,

19 there's either two or three depending on the ALJ and the

20 precise position in government. So the court could

21 conceivable knock that out. You know, that would have

22 more affect than the appointments clause decision, but

23 not that damn much more. There not going to be very

24 many removals whether it's limited by fore cause or not.

25 I don't see agencies -- I mean I suppose before this

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2   administration I could say this with greater

3   confidence -- I think it's unlikely that we'll see an

4   agency coming in and saying, "I hereby get rid of every

5   ALJ and I'll replace you." I think even if that were to

6   happen and the legal argument there get very, very

7   complicated.

8   Particularly, in the context of Social Security.

9   But even if that were to happen, I'm not sure if that

10   would be in effect. Now what would have a big effect is

11   if anybody ever gave ALJ's the power to make final

12   decisions, they would no longer be talking about the

13   difference between employees and inferior officers.

14   We'll be talking about officers, and then they could be

15   appointed through the process of presidential

16   nominations subject to confirmation by the Senate. That

17   would be a very big deal, but I don't see Congress

18   giving ALJs final decision. If they did, that would

19   change everything and the whole ALJ structure would -- I

20   think everybody in this room knows there're some

21   problems, a bit of the logjam. And the process of

22   getting people nominated and confirmed for positions --

23   just imagine what that would like look in the context of

24   1,600-and-some Social Security ALJs. That would be a

25   nightmare if it ever happened.

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2   UNKOWN FEMALE: I have some questions for Kim, but let

3   me first advise the audience of my basis. I am

4   Administrative Law Judge Marilyn. I have been working

5   at the Social Security Program for 23 years. Also the

6   President of the Association of the Administrative Law

7   Judges, which represents 1,300 Administrative Law

8   Judges.

9   And let me just make a few comments before I set up

10 my question, and it's for the entire panel as well.

11 First of all, the logjam in the 1.1 million people

12 waiting for hearings and decisions was never created by

13 the ALJs.

14   In fact, there's an inspector general out this month

15 that its a result of increasing case size. In fact,

16 file sizes have gone up 55 percent in the last few

17 years. Partly because of a poorly drafted regulation by

18 the department. There has been a hiring freeze since

19 May of 2016. We've have lost a enormous number of staff

20 members who worked on the cases. Judges don't work

21 alone. They need a staff to work with. So there's been

22 drastic reduction in staffing.

23   And there has also been an increase in procedures

24 that require us to more time adjudicating cases. Now my

25 view, we have ALJs that average of 2.5 hours to fully

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2 adjudicate the case. And that means opening a file and

3 reading all of the medical records, which may be a

4 thousand or two thousand pages of medical evidence,

5 holding a hearing, and questioning the claimant and

6 expert witnesses, which takes up some time; drafting

7 instructions, and editing a decision. I defy any one to

8 do that job well in 2.5 hours.

9   Also, with regard to outlier judges on too low or

10 too high, I'd have to say, Dean Cass, you are exactly

11 correct. It's a bell curve. And if there is some place

12 in the world where everyone's perfect, please let me

13 know where that is because I'm going to go there. But

14 it's just a bell curve. That's just the natural order

15 of things.

16   The other thing that was left out that less people

17 get the impression that ALJs are stupid or corrupt is

18 that the Huntington on scandal. And the scandal of the

19 rubber-stamping "paid" on cases was created, promoted,

20 and facilitated by management. They new when they

21 shoveled cases to these Judges that no human-being would

22 do a good job on two thousand cases a year. They knew

23 it. And they facilitated it because it served their

24 purpose of getting cases out the door. It's the Wells

25 Fargo phenomenon. Make possible quotas, emphasize too

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2   much numbers, and you will have people meeting those

3   goals and not doing there job.

4   All of that being said, what do you think about

5   having a separate ALJ core removed from the agency

6   because, quit frankly, after 23 years, I see the agency

7   and it's procedures and it's influence on the ALJs to be

8   not good.   What about the notion of putting ALJs in a

9   separate core insulated from managements controls so

10   that they can do their jobs and actually issue

11   independent correct decisions.

12   MR. WILLIAMS: So we have the lady for the main event.

13   Kim, do you want to say some thoughts on this. And

14   Dick's "oh, it doesn't matter the appointments clause

15   issues" seem to matter a lot more in this world. I

16   don't know. Let Kim start us off if she wants to say

17   something.

18   MS. HILDRED: I think that it would be important to

19   explore that as one of many options to improve the

20   process. And I want to thank you for make a number of

21   points and a number of remarks to explain everything.

22   But, I guess, my thought would be any alternative,

23   we need to be very careful to fully assess the pros and

24   the cons. And I would personally just want to know more

25   what could be. You know, more information about what

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2   that would mean in terms of management and process. You

3   know, how things might be different, how things might be

4   better, how things might be worse. So I don't know if

5   I'm necessarily ready to take the formal stand at that

6   the suggestion.

7   MR. WILLIAMS: Thank you.

8   MR. PIERCE: Actually, I wanted to start someplace else.

9   I want to start by agreeing one hundred percent that it

10 would be a terrible mistake to think of ALJs as dumb or

11 incompetent or corrupt or any in the sort. And I agree

12 with you that when you're talking about a population of

13 one thousand or whatever we're talking about, there's

14 always going to be bad apples. On the other hand, the

15 problem in Huntington was not created by management.

16 That was an ALJ that went from hearing room to hearing

17 room taking people out of hearing rooms. He decided.

18 Not the 680-some agencies said should be decided but

19 2,000. So what we're dealing with is bad apple. I

20 agree the very, very rare to have a corrupt ALJ. Very

21 rare to have an incompetent ALJ. But that's what we had

22 in that case.

23   Now, I've addressed the ALJ panel or the ALJ court

24 issue many, many times. And the testimony and articles

25 and the like. And it's very complicated. And we don't

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2   have time to go through much of it in the next two

3   minutes, but I remain totally opposed to it. I think

4   it's a terrible idea. It would have horrible

5   consequences. But I am sympathetic with the problem

6   that ALJs who are smart, hardworking people confront in

7   deciding all of these cases under tremendous time

8   pressure with very big resource constraints. That is a

9   big problem with which I have great sympathy.

10   MR. CASS: I do think, however, the ALJ -- if you want

11   to talk about constitutional problems -- that would be a

12   constitution problem. So on every score, I think that's

13   one that is going to stop shy of where recommendation

14   will go to.

15   MR. WILLIAMS: You know, it's interesting to kind of go

16   where we started. The ALJs, the minority of agency

17   adjudicators these days. And the rest of them are far

18   more under control of the agency that they work for than

19   ALJs are. And if we had more time, we could talk about

20   proposals to make AJs ALJs. But I think we are going to

21   have more serious conversations about this. I think the

22   court is going to flourish this through litigation to

23   really get a better sense of the ALJs role in the

24   administrative state, but also the AJs role. The

25   federal circuit had a recent decision addressing the

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2 appointments in the Veterans in context of

3 Administrative Judges.

4   So there's lots of fun constitutional issues

5 floating around with adjudication, but we've got to stop

6 because we have now got E-Adjudication up next.

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

8   PANEL II

9 REEVE T. BULL:

10   Excellent job. I am going to jump right in into the

11 second panel. If people want to get seated. So our

12 topic for this panel is E-Adjudication. We're going to

13 be looking at some of the uses of technological and the

14 adjudication space and how it can involve enhanced what

15 agencies are currently doing, and also eventually trend

16 new territories for fundamentally modifying how

17 adjudication is done in agencies. So as I'm sure you

18 are all likely aware intelligent is already being used

19 very expensively in a support functions to improve how

20 agencies are adjudicating.

21   So today we're going to here about things like video

22 hearings, for instance, the use of video technological

23 to allow remote adjudication to take place. We will

24 hear about the use of agency websites to compile

25 materials used in agency adjudications. And we'll also

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2   hear about the use of algorithms to spot all of these

3   errors or actually improve how adjudicators are doing

4   their jobs, but in addition, we're also going to be

5   looking at some new areas that are currently evolving.

6   Specifically, we are going to be looking at this idea of

7   adjudication by algorithm. An agency actually designed

8   algorithms and machine learning that would actually

9   conduct certain parts of the adjudications. We'll be

10 looking at all sorts of theory errors from the judicial

11 review implications and also practically how this would

12 actually work.

13   So with that let me introduce our four panelists for

14 today. So we'll first hear from Professor Cary

15 Coglianese. He is a professor at the University of

16 Pennsylvania Law School and he also directs the Penn

17 Program on Regulation. He's an esteem public member of

18 the Administrative Conference and indeed chairs our

19 committee on rulemaking. And he wrote the definitive

20 article on adjudication by algorithm.

21   We'll next be hearing here from Gerald Ray. He's

22 the former administrative appeals judge and deputy

23 executive director at the office of Appellate Operations

24 in Social Security administration. He's also a friend

25 to ACUS, and has helped us on a number of significant

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2   projects on agency adjudication. And indeed doing a

3   progress for us on case management. And he's really

4   probably the foremost expert in actually applying things

5   like algorithms to adjudication.

6   Third, we'll hear from Professor Fred Lederer. He's

7   at the William & Mary Law School. Also another friend

8   to the administrative conference has assisted us, and

9   has been a consultant on two projects at ACUS on the use

10   of the video hearings.

11   And finally, we'll hear from Dan Sheffner, who is

12   attorney advisor at the administration conference. And

13   has done a very important project on the use of agency

14   websites to compile adjudicator materials, wrote the

15   report on it which ultimately was the support for ACUS

16   recommendation 2017-1.

17   So with that, let me turn it over to Cary to start

18   us off.

19   CARY COGLIANESE:

20   Thank you, Reeve. I am pleased to be hear and happy

21   to talk about adjudicating by algorithm. And what I'll

22   say draw as re-mentioned on a recent article that I

23   published in the Georgetown Law Journal called

24   "Regulating by Robotive Administrative Decision-making

25   in the machine learning era." And I want to give due

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2   credit to my co-author, David Ler, on that paper who is

3   a student at Yale Law School. The paper -- and my

4   remarks here today -- try to the imagine a world in

5   which we substitute human decision-making for machine

6   learning decision-making or algorithmic decision-making

7   in in a wide variety areas of government. And maybe it

8   seems a bit fanciful to imagine such a world. But the

9   reality is that in the private sector, robots,

10   algorithms are replacing humans in a wide variety of

11   areas. Some very common, machine-learning analysts is

12   what drives Google and it's powerful search. It's what

13   gives you recommendations on Netflix about what videos

14   you might like to see. Or on Amazon about what

15   additional books you might like to buy.

16   It's also the technological that underlies the

17   developments of autonomist vehicles that will be

18   emerging more and more on our streets. What about

19   government? It's not, and shouldn't necessarily be, far

20   behind with the taking advantage of innovations in

21   technology to improve government services and government

22   decision-making. And there are already some uses of

23   machine-learning by government agencies. Many of them

24   are uses to allocate discretionary resources so the --

25   to pick a local example -- the City Chicago is using

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2   algorithms to determine where to send restaurant

3   inspectors or where to place bait for controlling

4   rodents in the city. Those kind of discretionary

5   allocation decisions are ones where I think there's a

6   great promise for using machine-learning, but also a

7   very few legal concerns as well. Especially, at the

8   federal level of Heckler v. Chaney -- the allocation,

9   for example, of reinforcement resources is largely

10   discretionary.

11   Another opportunity for using that machine-learning

12   would be to support government decision-making where

13   it's the results of an algorithmic calculation is one of

14   many inputs into human decision-making. And I think

15   there may be relatively few controversial legal

16   concerns. But, what about actually replacing humans and

17   having the algorithm itself make a decision that

18   actually has some legal consequence for individuals and

19   is subject under traditional judicial review principal

20   subject to law that the courts can review. Here, I

21   think, there are also opportunities for government to

22   use. Consider replacing our current licensing processes

23   for pilots rather than filing just a simple application,

24   suppose the federal aviation administration came up with

25   a complex big data informed algorithm that computed the

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2   risk level for that individual applicant. And then

3   granted the application based upon the risk level that

4   the algorithm generated. Suppose the Department of

5   Justice, or the federal Trade Commission, decided to

6   approve mergers based upon what algorithm forecasted the

7   effects would be on the economy. I think we'll hear a

8   little bit more of all sorts of opportunities the more

9   automated technologies for making benefits

10 determinations.

11   There's two aspects of machine-learning that will

12 make these kinds of applications worth are consideration

13 and in all likelihood, there will be some litigation and

14 judicial consideration. Two characteristics of

15 machine-learning: One is there automation nature. So

16 the substitution of human decision-making is something

17 that is worth considering. The second is that

18 machine-learning algorithms are what are referred to as

19 black-box algorithms. They are not like other

20 statistical techniques where it's easy to identify what

21 the key determinant or variables that are effecting the

22 decision. Rather the learning algorithm is going out

23 and capturing and scanning a whole host of data and

24 finding on its own and making a prediction. And it's

25 never clear. Even to the designers of the algorithm

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2   exactly why any decision is made the way that is made.

3   That poses some challenges to a government under law and

4   a government where reason is often required to justify

5   decisions.

6   On the other hand, there's great potentially to

7   improving accuracy and decreasing decision-making costs.

8   And I think if government is to move forward in this

9   area, it has to address the legal questions and concerns

10 in the article David and I take up a variety of

11 potential legal concerns, the delegation doctrine

12 issues, anti-discrimination concerns, transparency

13 issues, and for the context of adjudication by

14 algorithm, due process concerns.

15   Here I think there is obviously going be some

16 uncertainty as it will depend on how adjudicating by

17 algorithm is structured and actually implemented. But I

18 see no principal reason why government should not be

19 able to withstand due process objections by its use of

20 adjudicating by algorithm. It will if look through

21 Matthews Vial (phonetics) test passed very well, I

22 think, the government resources aspect of that. And in

23 all likelihood, if adjudicated by algorithm leads to

24 better, more accurate decisions, it will certainly fair

25 very well on the factor dealing with procedural error

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2   and accuracy. There will be efforts and need to be

3   efforts by government agencies to validate these

4   techniques. It should not been used in a caviler way.

5   But carful and appropriate use of adjudicating by

6   algorithm, I think, should be able to withstand muster

7   under most of our existing standard Administrative Law

8   Doctrines. Thank you.

9   GERALD RAY:

10   Okay. So I'm currently working with Social Security

11 Administration. I am going to talk mostly about my

12 experiences in terms of developing and using algorithms

13 for adjudication. I do want to express the view though

14 that all of views expressed are my own and not intended

15 to be those of the agency or commissioner. So with that

16 disclaimer, I'll talk briefly about some of the

17 algorithms that we've developed and what we've been

18 trying to do with those algorithms.

19   So I've been particularly interested in just trying

20 to improve the overall adjudicative process to try to

21 get people faster decisions that are actually better,

22 more policy compliant to get our staff to be as

23 productive as we can be when times are tight, budget

24 which have been ongoing for awhile now and probably

25 continue to be ongoing. And so it's important that we

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2   be as efficient as we can be.

3   So one of the first things that we did at the

4   Appeals Council -- I worked at the Appeals Council for

5   37 years -- as we developed algorithms to disambiguate

6   the time it take to do two different tasks. So our

7   staff does different things, and develop an algorithm we

8   can use to figure out how long those things take and

9   then you can put a range around that, and then we

10   developed a performance metrics.

11   This resulted in significant improvements in

12   productivity. If you looked at our data, you'd see over

13   the last few years, we are doing the same amount of work

14   with about a third-less staff. So this is what enabled

15   us to free up some staff and, of course, we did other

16   things to enhance that productivity. We looked at how

17   adults learned and changed our training techniques to

18   give people better training with more hands-on type

19   training that we had done in the past instead of talking

20   about what the business rules were, we also described

21   how it would apply those rules and use actual case

22   exercises that trained the people so they actually

23   reduced the training time from 18 months down to about

24   five months before it came productive. So we did things

25   like that to try and improve. But one of the things

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2 that may be one of the most important things is we took

3 a look at our business rules, the policies, procedures,

4 and laws. And realized that these are largely bullion.

5 They can be basically put into decision trees. You can

6 sort of map the policy-compliant path to each of the two

7 thousand decisions that would be issued in disability

8 claim.

9   Having done that, we actually built a tool to

10 capture structured data on how well people followed that

11 path. And to the extent they don't follow that path, it

12 often results in a remand from the Appeals Council from

13 Federal Court back to the ALGs for re-adjudication. So

14 we were looking to see how well people follow the

15 policy-complaint path. And we captured structured data

16 on reasons why cases were remanded. With that

17 information, we set up a division to begin doing things

18 like focused reviews. Once you found these problem

19 areas, you can see what was causing that. And we sort

20 of took a page from Professor Daniel Conrad, a noble

21 prize winner in economics, who talked about how well

22 people do in complex tasks. They develop a holistic

23 model, which is sort of like shortcuts that they used to

24 get through the complexity. And what we found looked

25 like the holistics that some people used on occasion

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2   diverge from the policy-compliance, so if you can

3   explain that to them, people are trying to do a good

4   job, and so they'll learn from that and do a better job.

5   So we did start to see significant improvements in

6   the overall quality of the work. And we saw review

7   rate, the rate at which we send cases back to the review

8   level. It has dropped to about twenty-five percent down

9   to about ten percent by using these techniques. And so,

10 you know, we thought we were progressing quite well.

11 Some of them started thinking about using

12 natural-language processing algorithms. And one of our

13 attorneys, who is actually here in the room today,

14 actually developed a mockup of a tool that would use

15 these algorithms to basically read the hearing decisions

16 and find some of the types things that generate remands.

17 And so we brought him over to work on this, and we had

18 other staff assisting him trying to build out these

19 algorithms. I wouldn't necessarily agree with the

20 characterization that this would be a black-box type

21 algorithm. I think the black-box approach is more with

22 deep learning and artificial intelligence and much less

23 with machine-learning and natural-language processing

24 that we're using. But we use basically, regular

25 expression to pull down the language from these

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2   documents, the way our program is structured, a lot of

3   the language is used in terms of art and specific

4   meanings related to our process. And so we understand

5   what those are. So we can pull out the phrases that we

6   thought we most important.

7   The things that really go to the heart of disability

8   adjudication and that caused problems with adjudication.

9   We use things like fuzzy matching to find, you know,

10 were the things are misspelled or slightly different

11 from the regular expression. We use co-reference

12 resolution to find other terms that mean the same thing.

13 And tieing all those things together, then we brought in

14 a staff of people to look at a bunch of decisions that

15 have been written in the past to do sort of a

16 disambiguation so that we can make sure that we're

17 finding the specific things that we are looking for.

18   And with is that, we built a tool that now can

19 basically read do the decisions in a matter of seconds

20 and extracts a large number of the issues that result

21 remand, and simply highlights what those problems are.

22 It tells you there is a potential here. The tool offers

23 the adjudicators an opportunity to give feedback to the

24 creators of the tool. So if we have false positive --

25 If its identifying things that were not actually

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2   positive. It's actually highly accurate. And then we

3   give it to adjudicators and they can decide what they

4   want to do with the problems that have been identified.

5   Our plan is to rule this out to the hearing

6   operation at some point so that Judges at the hearing

7   level can run this before they issue decisions if they

8   choose to do so.

9   FRED LEDERER: Good morning everyone. I'm Fred Lederer.

10   And I have the honor to be the part of the Center for

11   Legal & Court Technology at William & Mary Law School

12   where your going to see (inaudible) intentionally

13   involved on issues dealing with machine-learning,

14   algorithms, and the many other things.

15   However, my incentive today is to deal with our more

16   traditional topic, which has been in the past, courtroom

17   and hearing room related design and technology.

18   So I'm going to spend a few minutes talking about

19   that mainstay of the number of agencies -- video

20   conferencing -- or potentially remote everything.

21   Over the last, I don't know how much years, we've

22   had the honor and the pleasure of being involved in a

23   fair number of important federal agencies.

24   Particularly, Social Security, Medicare, and Immigration

25   Court. And I thought for purposes of analysis, it might

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2   have been useful to start by trying to oppose a

3   government. I'm going to assume that at least in

4   theory, when it comes to adjudication -- and we're

5   talking about potential technology in particular --

6   we're looking for an efficient, inexpensive, fair

7   resolution of the dispute, which is excepted as fair and

8   accurate by both claimants and the public. And then the

9   next question, if we're dealing with technological and

10 particularly the video conference becomes "why would we

11 want to use it?" Or "why are we in fact using it?" And

12 as all of you know, we use a great deal of it. Then how

13 will we use it? And what are the consequences in

14 particular and what are the problems and opportunities?

15   So traditionally, the primary reason when we use

16 video conference -- and I would expect particularly in

17 social Security and because of the goal of efficiency.

18 If we going to be able to have experts in particular,

19 appear remotely, we save a tremendous amount of money

20 and time and effort.

21   But there are other things we can do with the

22 technology. At one point, we were very close in

23 launching a real-world test of permitting pro bono

24 lawyers to assist people pending deportation hearings

25 when they were detained in remote locations. And pro

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2   bono lawyers were in places like New York City. Current

3   technology would permit that very easily as a matter of

4   fact. So depending upon the nature of the adjudication,

5   we can supply counsel, or for that matter, we can supply

6   the claimant or the petitioner. We have individuals who

7   also have to travel depending upon the agency we

8   receive. Sometimes it is expensive and difficult for

9   them to do. And sometimes, particularky if we are

10   dealing with the ADA, it is impossible for them to do

11   so.

12   So there's absolutely no doubt that we have the

13   ability to provide not only efficiency and economic

14   operation, but also to enhance access to justice right

15   to counsel. Then we deal with the issues of how. The

16   fact that the technology potentially permits doing this

17   well, of course it doesn't mean that it does do it well.

18   In fact, sometimes it's doing especially badly. Part of

19   that has been the types that technology used in the

20   past. Often it's implementation of technology.

21   There's a very famous study, the Chicago Bell

22   Project where the project was terminated in minutes

23   because the results were terrible. Buried in a footnote

24   is the possible explanation. The cameras were not

25   inline with the displays. Based on years of experience,

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2 suggest that that meant the individual, defendant, was

3 never ever looking at the judge, which would almost

4 certainly give rise to that type of result.

5   But there're other issues. Social Security

6 Judges, not many, but a few who never learned how to

7 work their equipment. Environmental issues, there's no

8 light over the judge. The judge looks like he's in the

9 dark or she's in the dark. And the immigration courts

10 being entirely dependent on lower enforcement personnel

11 who have received and incredible inadequate briefing on

12 the very simple basic on how to operate the remote video

13 conferencing.

14   There's some discussion with the first panel about

15 unintended consequences. You can predict with absolute

16 certainty that when you use technology, no matter how

17 simple, some degree of people will not use it right.

18 But then you have to ask yourself to what degree is that

19 going to defeat the general purpose. Your technology

20 also permits the uses of other forms of technology. In

21 this case, it was simple no note that one week ago a

22 court technology conference we announced the first open

23 microphone automated transcription system, which will

24 affect everything.

25   Finally, of course, there's a question of will the

2   public, will the claimants, except it? And that largely

3   is going to depend on the implementation, but culture.

4   Facebook generation is also the Facetime generation.

5   MR. SHEFFNER: Good morning. Thank you for being here.

6   It's an honor to be on this panel with this

7   distinguished group of scholars and experts.

8   My remarks, which are my own -- I don't necessarily

9   represent the Administration Conference, except when

10 they do -- are not about innovations so much. As they

11 are about how agencies in existing technological to

12 improve transparency in a very important way and a very

13 important subject of federal material, which I call

14 adjudication materials, which are just the orders, the

15 opinion, briefs, hearings, and other materials and

16 documents that are issued or filed in administrative

17 proceedings.

18   Now, as Reed mentioned earlier, I recently wrote a

19 report about this topic that supported a recent ACUS

20 recommendation -- recommendation 2017-1 -- that urges

21 agencies to accrue transparency in this regard. Well,

22 quite simply, increasing the incomprehensibleness and

23 accessibility of their collection of adjudication

24 materials on their websites. I was being sarcastic

25 there. This topic might seem kind of parvoviral.

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2   Especially after we've heard about adjudication by robot

3   and the courtroom hearing technology. It's not entirely

4   groundbreaking, but it is worthy of close examination.

5   In part, because agencies are required by law, or

6   encouraged by law, to post specific types adjudication

7   materials online. Specifically, the Freedom of

8   Information Act, it's proactive disclosure requirements

9   require that agencies make available electronically

10   final opinions and orders, which generally interpreted

11   to mean precedent decisions. No other law mandates

12   disclosure in that regard. But there are many policy

13   and laws such as the recent FOYA Improvement Act in 2016

14   that emphasizes that express a more expansive policy in

15   favor of a affirmative disclosure of federal materials

16   in general online.

17   But the problem is that there is no central

18   repository for adjudication materials looking into pay

19   certain federal court context or regulations dot gov and

20   the rule-making context. And I don't know if there

21   should be an adjudications dot gov. I don't know if

22   that would be helpful. ACUS doesn't have a position on

23   that. But to the extent that agencies attempt to comply

24   with FOYA, this general policy in favor of disclosure,

25   they do so by posting adjudication materials on their

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2   individual federal government website.

3   Well, in my examination of these websites -- about

4   24 federal agency websites -- I found to no surprise

5   that there is a wide array of their ability in both

6   agency disclosure of practices on their websites as well

7   as how effective those disclosure practices are. And

8   that is to say some websites are maintained during

9   comprehensive collections of ALJ under first line of

10 adjudicator decisions, how a body orders an opinion of

11 supporting briefs, witness lists and pleadings. Not all

12 websites are as robust or not all materials are easily

13 accessible. And in addition, agencies utilize

14 navigation and organizational tools and techniques in

15 various ways. But also to vary the reasonable

16 effectiveness. So the report and ultimately, most

17 importantly, the recent ACUS recommendation, lays out a

18 series of best practices to encourage agencies to

19 improve if they need their disclosure of adjudication

20 materials.

21   The most prominent of those recommendations is that

22 agencies disclose more than is required by FOYA. To

23 disclose not just precedential or important decisions,

24 but also non-precedential decisions and procedural

25 decisions. And supporting adjudication materials to the

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2 extent that it's not cost prohibitive. To the extent

3 that agencies take into account practicing

4 considerations. They're not issuing orders with

5 sensitive information un-redacted. And other relevant

6 factors. And while increasing your adjudication

7 material footprint on your website will necessarily

8 impose some kind of cost. Especially at the front end

9 Even from the agencies that maintain very robust

10 decisional and material libraries on their websites,

11 they all express a lot of benefits -- its harder to

12 quantify -- but such as increasing public trust and

13 increase in the state satisfaction. As well as a

14 reduction in FOYA requests and printing costs. But most

15 importantly, by increasing transparency in this way,

16 agencies will become further in the growing policy and

17 again, that's abiding by recent policies in favor of

18 proactive affirmative disclosure of adjudication

19 materials. And even more importantly than that they

20 will insure that parties to adjudications proceedings

21 and the general public, in general, have ready access to

22 very materials that have a very important impact

23 people's lives.

24 MR. BULL: Okay. First, let me thank all four of the

25 panelists. I think this raises some very fascinating,

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2 interesting issues. And I'd like to kick it off with

3 framing advice. And I'll have a question for each of

4 the four panelist. But, I think that you've made a very

5 convincing case. These are very important invasions and

6 hold great promise for substantially reducing efficiency

7 between adjudications in the Administrative State.

8   What I'm interesting in exploring are -- and each of

9 you sort of touched on this in remarks -- there are some

10 concerns. First, with respect to judicial review. How

11 the courts are going to insure that the agencies are

12 meeting the requirements of due process and the

13 constitution of the requirements of the ADA. And I

14 think there's also some concern about fairness as well.

15   So let me start it off with a question -- I think

16 Cary and Gerald and Fred might even want to jump in -- I

17 think the types of things that Gerald described where

18 you are using an algorithm to correct clear errors and

19 relatively uncontroversial. But I think each of you

20 suggested that there's more that can be done here.

21 There is machine-learning or what Cary describes as a

22 black- box system. So I'm interested in your thoughts

23 on how a judge would determine if this meets the

24 requirements of due process or the adjudicating by

25 algorithm. Particularly, if the judge can't necessarily

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2 fully understand what's going on in the algorithm. Does

3 it require him or her to have some degree of faith that,

4 you know, even if he doesn't fully understand the

5 algorithm itself, does that include producing a reliable

6 and accurate result?

7 MR. RAY: The way we are using algorithms is we are

8 simply highlighting potential errors in the case. The

9 adjudicator still looks at the case and makes the

10 determination as to whether they want to take corrective

11 action or not. So the adjudicator -- we're not trying

12 to interfere with the adjudication of the case or tell

13 the judge what action to take or what to even do with

14 that particular type of concerns raised by the

15 algorithm. The algorithms are using probability theory.

16 And they're telling you there's a high probably that

17 this wasn't done correctly. So even if the algorithm is

18 99.9 percent accurate, we're supposed to give individual

19 adjudication to each individual. And so we need to do

20 that. We can't simply write off that point one percent

21 of the people and do those wrong. So it's really

22 important, we think, to make sure adjudicator still does

23 adjudication. This is simply a tool to the system.

24 MR. COGLIANESE: It's in that sense to I'm looking

25 forward to a world in which we might substitute the

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2   human decision for an automated decision-maker. And

3   there could be many good reasons for doing that.

4   Humans, we do know, make mistakes. And if an

5   algorithmic artificial intelligence system can make

6   fewer mistakes than humans, we ought to really take that

7   pretty seriously. Humans have built-in biasses and

8   cognitive limitations. We're not perfect. We should, I

9   think, as a society be open to the possibility that

10 there may be instances in which we improve justice by

11 moving to an automated world.

12   Now, there are going to be questions. How do we

13 know we are actually improving justice? I think that's

14 just the question that Reed has put on the table. The

15 way an agency would approach this would need to first be

16 to establish through a rule-making, the algorithm that's

17 going to apply for some kind of automated systems that's

18 going to be applied. And it's in that context that the

19 agency would put forward -- carious validation efforts.

20 It is a black-box technique when one is getting to

21 machine-learning of the kind that I've been talking

22 about. Now, listen algorithms are really old. Any

23 mathematical problem is an algorithm. I'm talking about

24 learning algorithms where humans are not specifying the

25 values or parameters. They're not saying look for these

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2 words or others, but saying, let's take a whole bunch of

3 data. We're going to train our algorithm based upon the

4 data. And based upon the data, the parameters, the

5 values that the algorithms design to optimize. The

6 forecast, the goals of the algorithms. Humans know what

7 the goals are. And that would have to be disclosed.

8 And then what an agency could do though a rule making is

9 disclose some of the test runs and allow outside experts

10 have an advisory committee review this. These would all

11 be good best practices that would enable an agency to

12 justify its structuring of a decision-making process

13 through an automated way through an algorithm.

14   You know, the fundamental question really comes down

15 to is it enough for a decision to be justified on the

16 basis of the machine said so. Or the algorithm said so.

17 And that certainly will seem problematic for a system of

18 government that, you know, going back to Lincoln, it's

19 supposed to be "of the people and by people." And where

20 we expect on due process a hearing by a human decision

21 maker. But again, if it can be shown that the algorithm

22 is going to perform better, we ought to be open to it.

23 And I think it's possible to show that it's better and

24 in those cases where the algorithm is used, and it's

25 been justified and shown, then I think, the Courts can

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2 except that we're doing this because the algorithm said

3 so just in the same way that the Courts have excepted

4 that agencies will decide matters because the

5 thermometer said so. These are machines. And if

6 they're properly validated in the same way we validate

7 other kinds of instromention that are used by government

8 officials all the time -- think of the radar detectors

9 that police officers use to detect speeding -- we're

10 finding that person because the radar machine said so.

11 It said they were violating the standard.

12   That's the way I would think about these systems.

13 They would need a validation and effort going forward,

14 but they can, I think, comfortably fit in with our

15 existing notions of the legal constraints on

16 Administrative Decisions.

17 MR. RAY: So I want to comment. I have a different view

18 of what these algorithms actually are and what they

19 actually do. The machines do something called

20 supervised or unsupervised learning, but there are

21 basing it off of patterns that people recognize and our

22 programing into them.

23   It's something that might be called a basing in

24 belief network, which is a series of tables or

25 information that can put context to the language that's

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2 being extracted. The machines itself simply use logic.

3 They don't understand words in context as humans do when

4 we use language. So when you say, "I ate pizza with

5 Mary" or "I ate pizza with pepperoni," all of you

6 understand what I'm talking about. The computer doesn't

7 know whether Mary is simply just another ingredient or

8 pepperoni is a person. So you have to write rules of

9 all of the things that the computer does. Once you do

10 that, the computer can exercise those rules faster and

11 probably more accurately than you humans can. But

12 despite that, they're not a hundred percent accurate.

13 So in any case they are giving you probability. And the

14 probability is essentially never a hundred percent.

15   So I think it's still good to have the individual

16 involved to look to see whether this is one of the

17 exceptions to what the algorithms define it.

18   So I don't really think it's black-box technology.

19 I don't think the machine is actually doing it itself.

20 It's basing it off the information the people programmed

21 into it.

22 MR. LEDERER: I agree with everything that's been said.

23 And I'd like to note, it depends on what level of

24 technology we're talking about. IBM Watson is now doing

25 a medical diagnosis. Partially on the grounds, as they

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2   pointed out, the machine has access to thousands upon

3   thousands of medical journals. And no single human

4   being could possible read all of that. If you are

5   restricted to given data with a clear-cut algorithm that

6   can be reviewed by a Court if it wonders off.

7   If you tell your deep-learning computer that is even

8   potentially subject to modifying it's own programing go

9   out in the worlds data pools and tell us where this

10   claimant is likely to get a job with this condition,

11   that might not be reviewable. And it that might not be

12   desirable. It all depends on what level we're talking

13   about.

14   There's an immense amount of things that we can do

15   to make things better.

16   MR. BULL: Excellent. Let me ask another question of

17   Fred: So the video hearing technology, I think, holds

18   an enormous promise as you described. You sort of

19   touched on this in your remarks, but if you can

20   elaborate on if the technology is not used properly and

21   how that can cause problems, but I'm wondering is it as

22   robust as an in person hearing in terms of allowing the

23   adjudicator to observe certain nonverbal cues or other

24   things that might feed in credibility determinations or

25   other important aspects of conducting adjudication.

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2   LEDERER: As a classic court prospective as

3   distinguished in administrative hearings, the

4   fundamental elements of fact-finding often in

5   adjudication is based upon demeanor evidence. Whether

6   the individual witnessed or claimant appears to be

7   telling the accurate truth. As I understand it, there

8   is no scientific data to back that up anywhere. In

9   fact, quite the opposite. So it appears in the entire

10   legal system when it come to this comes from illegal

11   fiction. So on one hand, I can pretty much guarantee

12   you that you is I can create a hearing remotely, in

13   which you will be able to as an ALJ or otherwise to have

14   at least a good opportunity to determine demeanor

15   evidence, and probably better, than you would if the

16   person was in the hearing room on the other hand, we're

17   apparently to duplicate a scenario where in fact, we get

18   no reliable data at all.

19   MR. BULL: And finally a question for Dan on this topic

20   and this really is a due process question, but I

21   interested -- you discussed FOYS and the goal from the

22   disclosure and making sure that information is as

23   available accessible as possible. And I think what he

24   described holds great promise fore that. What I am

25   interested in though is there really a risk here perhaps

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2 that the agencies will dump information on their

3 websites. You know, put too many documents out there in

4 a way that's not well organized that actually makes

5 things less accessible. Is their sort of a trade off

6 between comprehensiveness on one hand and usefulness on

7 the other?

8 MR. SHEFFNER: Yes. In fact, that does happen with some

9 agency website, but it doesn't have to necessarily be a

10 tradeoff. It's not just comprehensiveness of decisional

11 or other materials. It's also accessibility, as you

12 know, does not matter if you have ever single order or

13 opinion and brief. If know one can actually get to that

14 from the homepage of the website. So there are a lot of

15 different best practices that agencies can engage in. I

16 would imagine similarly, such as enhancing search

17 engines whether it be from the homepage or in a specific

18 section of the website to allow users to narrow or focus

19 their search on specific types of records or specific

20 cases or to narrow by docket number or case number, et

21 cetera. It's also very -- some of the most accessible

22 agency websites actually will group there decisions --

23 not their decisions -- there materials by proceeding and

24 individual docket pages.

25   So there is a lot of the different kind of

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2 organizational and navigational techniques that agencies

3 do use that other agencies could replicate if they have

4 the resources to do so.

5 MR. BULL: Another question I have for all of the

6 panelist is relevant to the idea of adjudication by

7 algorithm as well as the use of the video technology is,

8 you know, I think we can likely except that this should

9 produce a result as accurate or maybe even more accurate

10 in some cases as what a traditional adjudication would

11 produce. I'm interested on your thoughts of how the

12 actual litigants, if you will, perceive it themselves.

13 Obviously, it's important they come away feeling they

14 received a fair hearing. Could you offer your thoughts

15 on that?

16 MR. COLIGANESE: I think this is one of the areas to be

17 aware of moving to a totally automated artificial

18 intelligent government would be what happens to the

19 value of human empathy that comes from a system of

20 government and adjudicatory systems where people hear

21 from other people. They though know and can see they

22 are being listened to. We have a great deal of social

23 science research that indicates that people value the

24 procedural fairness and justice and being listened to

25 and is absolutely critical to that. I just point to a

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2   system that's being used in London for processing city

3   permits that's been fully automated. And article in the

4   guardian in 2016 reports that the bureau in London

5   that's using this system has developed an artificially

6   intelligent voice response system that can detect when

7   the citizen speaking over the phone, their voice is

8   indicating frustration. And that it moderates and

9   adapts the voice of the artificial system and some of

10   the language that it uses to respond to that.

11   I think this is clearly something that should be

12   accompany any effort to fully automate decision systems.

13   And it may also reinforce what you've been talking

14   about, Gerald, where we don't actually substitute and

15   fully automate, but we use human computer teams. And

16   the humans can continue to provide that kind of empathy

17   that people care about.

18   MR. BULL: Great. Dick?

19   MR. PIERCE: So there's one important context in which

20   Supreme Court was already unanimously blessed with the

21   transition from human decision-maker to algorithmic

22   decision-maker. And that is the Social Security

23   Administration vocational grid. So I wonder if Gerald

24   Ray might be able to give us a little insight in to how

25   that works and whether it works and what's good or bad

2   about it.

3   MR. RAY: Sure. I can talk about the grid a little bit.

4   So we have business rules that sort of guide us toward

5   conclusions. So you can flow chart to each of the 2,000

6   different types of decisions that can be issued in a

7   disability claim. Back starting in the 1960's, there

8   was a case that was brought back. I think, it was in

9   New York that requires to give vocational or present

10   evidence of jobs that people could do. And so we did

11   that using vocational experts for a number of years.

12   And then realized that the experts were typically giving

13   us the same information over and over. And so as a

14   result, somebody back in the late '70s developed a

15   series of rule. And so we said well if the person has

16   these limitations and this education and this work

17   experience, we'll find them disabled or we'll find them

18   not disabled. It wasn't really an algorithmic type

19   approach, but it was a sort of standardized approach.

20   And if the persons criteria exactly met that rule, just

21   as if the exactly meet the criteria of our listings, we

22   can find them disabled.

23   But what we often find though is people have other

24   limitations that go beyond the grid rule. And then you

25   got to figure out how those limitations intersect with

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2 the persons capacity to work. But, you know, what I'm

3 thinking down the road, we could build algorithms to

4 read the medical evidence. And we can find the cases

5 that could be paid or had a 99.9 percent probability of

6 allowance that maybe would pay those cases. And the

7 cases that were not obvious pays under those algorithms

8 you would still want the people to get their due process

9 come forward and have a meeting. You know, or at least

10 have it decided that why a human at the initial set.

11   So it be sort of a screen mechanism to ease the

12 burden of work that we have because we have high volumes

13 of work and we only have so many people. So we need to

14 find ways to go faster. I am all for doing things for

15 support of the people ho are actually disabled and we

16 want to find those people. You don't want to pay people

17 who aren't disabled, but if the algorithms are 99.9

18 percent accurate, it would be good enough to award the

19 benefits. You are not losing that much money as opposed

20 to federal programs. Where as we probably have more

21 errors now. I can't say that for certain.

22   So I think that's sort of where that goes. I think

23 the opportunity to build those algorithms to read the

24 medical exists today.

25 MR. COGLIANESE: I would just add one small thing, I

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2   think there's many more than one decision that support

3   the use of algorithms. All of rules are algorithms.

4   If, then, that's an algorithm. So when the FAA sets a

5   standard if an individual is over the age of 65, let's

6   say they cannot have a commercial pilots license.

7   That's an algorithm and that's acceptable. What I think

8   is shifting here is the possibility that technology

9   would move away from rules and in the lawyers lexicon

10 towards standards and say you can have a commercial

11 pilots license as long as you don't pose a safety risk

12 above a certain threshold with a degree probability and.

13 Now, we'll let the machine sort of figure this out and

14 it may be that the patterns that it finds are that they

15 having nothing to do with anything that you or I might

16 think of about are much accurate in predicting the

17 safety risk posed by an individual.

18 UNKNOWN MALE: (Inaudible question.)

19 MR. COGLIANESE: I think the you're exactly right. The

20 point of the lawyers having the skills here to do this

21 sort of thing. We are working into a new world of

22 practice and a new discourse about thinking about

23 government. It's sort of meadow world where we're

24 analyzing the analysis of the algorithms themselves.

25 And I think the picture you paint of algorithms versus

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2   algorithms is to some people anxiety producing, but I

3   think it's very much we're looking forward to.

4   MR. RAY: I also think that the algorithm dynamic will

5   only occur if the policies themselves aren't drafted

6   clearly enough. If you have policies that are clearly

7   drafted, you really wouldn't really have an dispute as

8   to what the answer was. So when you've got those, you

9   have got scenarios where the policy can be interpreted

10   in multiple ways. And that's were a lot of disputes

11   actually arise. And what you can try to do is re-craft

12   those policies so that there's less dispute and

13   understanding of what those policies mean. We have

14   actually been trying to do that using data to analyze

15   where courts for instance, are remanding cases to us.

16   And we think we've dont it right. You know, why are

17   they thinking something different. We take a look at

18   what they're saying, we take a look a the history, and

19   we try to see if we can modify that so that everyone

20   have a clear understanding of what the intent was that

21   came out of context in the first place.

22   MR. COGLIANESE: I would also add to this brave new

23   world, if you will, there has been some challenges and

24   limits. These algorithms need precision in identifying

25   the objectives. As Gerald talked about, can they

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2   generate probabilities. There are possibilities of what

3   statisticians would call Type 1 or Type 2 errors.

4   Lawyers would say, what's the probability that we let a

5   guilty person go free versus convict an innocent person.

6   Right now, I think our legal system resolves those kind

7   of tradeoffs between Type 1 and Type 2 errors.

8   Tradeoffs between accuracy versus racial equity. I

9   mean, these kinds of value tensions have to be resolved

10 if the algorithms are going to be designed. And yet, we

11 our legal systems does not have a clear fixed rigid firm

12 standard about how many innocent people should be

13 convicted in order to protect, you know, a criminal

14 justice. We just don't have that. And we will need to

15 move to a world in which we get much greater precision

16 about this. And maybe our social systems are such that

17 will actually be a limitation in using these systems in

18 the government on context because we just can't find

19 enough agreement about how to make tradeoffs.

20 MR. BULL: Okay. Well, excellent. That was a very

21 engaging discussion. Please join me in thanking our

22 four panelists.

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

24   PANEL III

25 MR. WIENER: Just one quick announcement before we get

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2 started, and I will turn this over to the panel without

3 too much delay. Like ACUS programs of this sort, we are

4 having today's forum transcribed. We have a court

5 reporter right here. As soon as the transcript becomes

6 available, we will post it on the ACUS website for your

7 convenience and others and whatever value it may have to

8 the academic community and congressional staffers and so

9 forth.

10   Our next topic is mass adjudication. I think that

11 we have three of the four most visible mass adjudication

12 programs that we covered on this panel. And without any

13 further delay, let me just very briefly introduce our

14 panelists in the order in which they will offer remarks.

15 We have Chief Judge Nancy Griswold, who is -- and I'm

16 just going to read this because I always get the name

17 wrong -- she is the Chief Administrative Law Judge for

18 the Office of U.S. Department of Heath and Human

19 Service. And your agency is only second to the Social

20 Security Administration in the number of the

21 Administrative Law Judges employed. To Chief Griswold's

22 left is Adam Zimmerman, who is a professor at law at

23 Loyola Law School. And to his left is David Marcus from

24 the University of Arizona School of Law. And you're

25 joined this morning with your son. He's sitting in the

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2   back and he's waiving. As you'll here in a minute, both

3   Adam and Dave have been consultants for ACUS. Adam

4   wrote the report that underlays one of the ACUS

5   recommendations that you'll find on materials with the

6   use of aggregation for class actions in agency

7   adjudications. And that report, has recently bee

8   forthcoming in the Yale Law Journal. Is that right?

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

10   MR. WIENER: And you had a co-author, Michael Sanabrosio

11   from Michigan State University. Dave Marcus prepared an

12   extraordinary good report with a Professor at the

13   University of Pennsylvania Law School. That report

14   Administrative Litigation underlies one of the

15   recommendations that appears in the material. And that

16   recommendation asks the federal courts, I particular,

17   Judicial Conference of the United States, to divide

18   special procedural rules in Social Security Disability

19   Cases before Federal District Courts.

20   And I'm happy to report that recommendation has been

21   taken up by the Judicial Conference of the United

22   States. And it's on the agenda for the next meeting,

23   which will be held sometime in November.

24   Let me turn it over to Chief Judge Nancy Griswold.

25   Ms. GRISWOLD: So I actually have handouts. I think a

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2 picture is worth a thousand words. If I could give

3 those to you all and you could pass them around. When

4 we talk about mass adjudication, it helps to kind of

5 have an idea of the scope of the numbers. We have 92

6 ALJs right now. We have a pending backlog right now of

7 over 600,000 appeals. It was approaching 900,000 at one

8 point. And because of some of the things we are going

9 to be taking about today, we've been able to bring that

10 number down. During this period of time, we have always

11 had fewer judge in terms of adjudication capacity than

12 or receipt base. And sometimes in several years we

13 received as many as four or five times the appeals we

14 had adjudication capacity for.

15   One of the things that I think is important to note

16 on that slide is how quickly the problem can arise. And

17 this happened within the space of about two years in our

18 case. In March of 2010, which is when I joined the

19 agency, we had 68 ALJs. And that year, we received 44,

20 361 appeals. In 2011 and 2012, we had sort of a

21 predictable increase in appeals based on demographic

22 changes. It's kind of what you anticipate in the

23 medicare community, and we kept pace. In 2013, it

24 became like a heart attack chart. It really spiked up.

25 Our appeal recipients went up to 384,151 appeals that

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2   year. And in '14, they went to their highest ever at

3   474, 063. We do still receive double the number of

4   appeals that we have capacity for. And I think one of

5   the points I wanted to make is when you talk about mass

6   adjudication is the challenge for agencies in being

7   resilient, being nimble in response. You know, the

8   federal government works on a two-year budget cycle. So

9   when something like this happens to an agency within a

10   budget cycle, it's very, very difficult to react

11   quickly. And before you know it, you look around and

12   you've got this remarkable pending work load. And then

13   you're trying to deal with the backlog of the appeals.

14   I think every agency dealing with large adjudications,

15   we hope we could get in front of those things. Instead

16   of having to deal with the backlog on the back end.

17   The other thing that I would mention is that agency

18   as a rule tend to be rather set in their ways, if I may.

19   And I will tell you a story that my mother told me in

20   childhood. It has to do with a mother and a daughter

21   who are fixing Thanksgiving dinner. And the daughter is

22   fixing a ham. And she pulls the ham out of the

23   refrigerator and she walks over to the cutting board and

24   she cuts both ends of the ham. And she puts it in a

25   roaster. And the mother looks at her and says, why did

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2   you do that. That is so wasteful. And she says, well,

3   mama, you always did it that way. So I'm doing it that

4   way. And the mother says, yes honey, but I had a

5   smaller roaster.

6   So that story kind of exemplifies for me the way

7   that agencies tend to deal with process. There is a lot

8   of historical information that is present. And we've

9   done it this way, we continued to do it that way. If

10   there is a anything benefit to a backlog, and I think

11   there is a very little, I would say that it forces

12   agencies and has forced Medicare to look at things in

13   different ways. The idea of settling a Medicare appeal

14   through an alternate dispute resolution process was

15   unheard of. There had to be many discussions to get

16   that process in a process where it would be excepted by

17   everyone.

18   Many of the appeals that came before us, CPMS did

19   not participate as a party or as a participant. And so

20   we had to figure out ways of making a settlement

21   conference facilitate work within that context. Once we

22   did that, it became a very, very was successful

23   mechanism. Not only for resolving appeals or increasing

24   capacity, but also takes them out of the system. With

25   that sort of facilitated settlement, it doesn't go up to

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2   the next level. So you're not creating a second backlog

3   at the next appellant level. It's resolved and it goes

4   away. We resolved through Settlement Conference

5   Facilitation just around 70, 000 appeals since that

6   program started. The second that we have been working

7   on in terms of Pilot Statistics Sampling. And that has

8   been a little bit to get off the ground. We have very

9   recently expanded that pilot to address some the

10 concerns that appellants have raised with that.

11 Particularly, the reluctance put all their eggs in one

12 basket with one ALJ. And the most recent pilot is using

13 a panel of ALJs based on the number of the claims or the

14 number of appeals that are included in the universe. We

15 have resolved around 500 appeals using statical

16 sampling. And essentially, for those who are not

17 familiar with it, what we do is set up a universe of

18 like appeals, and we pull from that universe random

19 sample of appeals that are adjudicated on a individual

20 case basis. Then we examine the results of those

21 adjudications to the larger universe of like appeals.

22 And so that's kind of how that process works.

23   Expanding the group of adjudicators that hear that

24 sample universe is to where we have now have between

25 four and six ALJs. Instead assigning them to one, we

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2 think has made it more agreeable to appellants. And we

3 have about 14,000 appeals that are in that process now

4 and would be adjudicated using stat sampling.

5   The final thing I just want to mention is a

6 challenge that doesn't directly relate to aggregating or

7 grouping appeal for adjudication. But I think it's one

8 that is phased by all agencies that our in our

9 situation, Social Security included. And that is the

10 balance between trying to do timely adjudication on

11 large numbers of appeals and thereby serve the public.

12 But also to balance that with quality adjudication.

13 MR. WIENER: Thank you, Judge Griswold.

14 MR. ZIMMERMAN: I'm Professor Zimmerman. I'm a

15 Professor at Loyola Law School. And I tend to write

16 about aggregation in unusual places. And for the past

17 five or six years, I've been writing about the use of

18 the arrogant litigation class actions, and other complex

19 litigation procedures. Ordinarily associated with out

20 federal courts and our agencies. It states back to an

21 article I wrote and the one sentence summary that's

22 about 70 page article would be something like this.

23 Agencies should also have the ability to class actions.

24 Agencies here, depending on how you measure it, anywhere

25 to as many as ten times as many cases our federal

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2   courts, but otherwise do not often use some of the same

3   types of tools that federal tools use to resolve

4   backlogs, to efficiently and consistently resolve cases,

5   and to accord legal access and pull information about

6   large groups of cases that parties might not otherwise

7   have. And so we've made arguments as to why agencies

8   should do that, we thought would be of practical

9   importance because there's so many cases heard by

10 agencies, but also theoretical importance, because often

11 times in civil procedure and class action law. We are

12 trying to learn lessons from administrative law.

13   So fast forward a couple years later, and we

14 performed the project with ACUS that studied the use of

15 aggregation and agencies. Interesting finding number

16 one was that we looked through the enabling statutes of

17 70 or 80 different federal agencies that performed

18 adjudication. We found that they have broad authority.

19 Interesting finding number two: About 70 agencies have

20 rules in the books. About eight or ten high class

21 action rules others had other types of complex

22 consolidation rules -- rules on the books to do this.

23 Not so interesting finding number three, was that many

24 agencies were not doing it. There were still a few that

25 did and so what the project ultimately entailed was

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2 surveying adjudicators, staff, attorneys and others from

3 agencies performing some detailed case studies,

4 including of OMHA. Though, we've made a number of

5 recommendations in a report that was adopted by ACUS

6 last year. And among other things, we recommended

7 creating infrastructure to kind of try to identify when

8 this might be useful as opposed to using precedential

9 decision-making and rule making to deal with large

10 groups of cases.

11   And I think our two different ways in which class

12 actions can be useful, and I think they might be

13 illustrated by some developments that might have

14 happened since our report has been issued.

15   One way it can sometimes be useful is for resolving

16 a sudden influx of the claims. That is where these

17 complex litigations that are raising the same type of

18 issues can be useful. So shortly after, for example,

19 the Department of Education created a rule to handle

20 large groups of claims of students who were seeking debt

21 relief.

22   My back of the envelope count right now there are 65

23 to 70,000 students awaiting debt relief. And a rule was

24 created last October that would have given the

25 Department of Education -- to group those cases together

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2   and resolve the common questions that might arise from

3   the students. That rule is now in litigation it's been

4   suspend. There is some question about whether it will

5   continue to be in effect, but I think the problem is

6   still some of the Department of Education is going to

7   have to confront. And whether it uses that formal rule

8   to resolve those large groups of cases or reports to the

9   use of a special master, which is what it did before the

10 rule. They are going to have to deal with the fact that

11 they have this large regroup of claims all raising the

12 same question. And they're going to have to figure out

13 a way to quickly deal with all of those claims. The

14 second area where it could be useful as raising the

15 questions that might not otherwise make it's way up into

16 a court.

17   And shortly after, in February, the federal circuit

18 rules that a court reviewing veteran's benefits claim

19 for the first time in 30 years, can hear class actions.

20 They held conferences back in June. And the first class

21 action that was filed was on last year. And the claim

22 is essentially that veterans service organizations, who

23 are not lawyers, but represent veterans for the VA, have

24 access to special kind of document of the disability.

25 And the reason why they have that access is so they can

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2   identify an error and told to the VA and fix the error

3   before the veteran has to go through appeals to get

4   their benefits.

5   Attorneys are not allowed access to that document.

6   So the class action that was filed is on behalf of all

7   attornies saying that they should have access to the

8   same document to save the veterans file. The government

9   response is a illuminative as to one other hurdle in

10   considering whether or not to adopt class actions or

11   procedures. The government response was, well, we have

12   a rational basis for denying attorneys access to this

13   document, and therefore you shouldn't even bother.

14   Attorneys will ruin everything. We have designed this

15   entire process to be at an informal non adversarial,

16   quick and speedy way to kind of resolve things with this

17   historic partnership. Lawyers are bounded different

18   types of norms and ethics. "Attorneys like to be the

19   sole representative are accustomed to receive

20   informalities found in the federal rules of evidence, by

21   their nature training and professional obligations.

22   They are often adversarial -- pursuing a claims from

23   benefits, this could include the many benefits possible

24   starting only just before the pur. But the pre-decision

25   is not intended as an opportunity for adversarial

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2 argument. It's an informal process for identifying the

3 states and seeking clarification.

4 MR. MARCUS: My name is Dave Marcus. It's an particular

5 honor to share the program with Professor Pierce. When

6 I began reaching administrative law. I co-authored the

7 reports on Disability Benefits Litigation of federal

8 courts.

9   There are several reasons to doubt that judicial

10 review has much volume in this domain. Let me suggest a

11 couple. First, the federal courts correct very few

12 errors relative to the number of claims that agency

13 adjudicators decide. In 2013, Social Security ALJs

14 decided on something like 450,000 potential appealable

15 decisions. Of these, the federal courts ultimately

16 remanded only about 8,300. Does this contribution

17 justify judicial review, especially in light of

18 opportunity costs? In 2015, the agencies spent nearly

19 40 million dollars on equal access to payments to

20 lawyers whose clients prevailed in the federal courts.

21   This sum only equals the salaries of about 240 ALJs,

22 or maybe about 15 percent of the SSAs ALJ core. If the

23 SSA could expand it's ALJ ranks by 15 percent, and

24 thereby bringing the slopes down nationwide,

25 adjudicators would likely make fewer errors than the

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2   federal courts.

3   Second, institutional difference can give an agency

4   reason to treat federal court feedback with some

5   skepticism. One institutional difference that's

6   involves the cold cases that the respective institution

7   see. ALJs get cases far earlier in the process and see

8   much wider array of alleged disabilities than federal

9   Judges do. The two sets of judges have different

10 perspectives on the population of people with disability

11 in the country. And to an ALJ, it might look like a

12 much closer case to a federal judge.

13   Another institutional difference involves resources.

14 ALJs and their decision writers together have about ten

15 hours to workup and write up a decisions denying

16 benefits. Federal judges and clerks have much more time

17 to review a case. A federal judge with all the time in

18 the world can often find some shortcoming in an ALJ

19 decision. Especially, if that judge has a quite

20 different baseline for evaluating a disability. But any

21 feedback might either seem nitpicking to an ALJ or might

22 suggest unrealistic expectations case development.

23   My comments thus far, might prompt the conclusion

24 that Congress could improve high quality of agency

25 adjudication by scrapping judicial review altogether and

2 investing the same resources. I don't think Congress

3 has invested adequate resources either. This failure is

4 obviously foolish as the 40 million dollars in agent

5 fees attest.

6   But redirecting resources from judicial review, I

7 think, would unwise. Article III involvement in

8 high-volume agency adjudication is important. The

9 federal courts offer a type of oversight of agency

10 adjudicators that other institutions may not be as well

11 positioned to provide..

12 MR. WIENER: Thank you, Professor Marcus let me just put

13 one question or issue on the table given that we're

14 holding this forum today.

15   To what extent should Congress attend to procedural

16 reform with respect to mass adjudication programs. And

17 to what extent should agencies be left with a lot of

18 discretion with respect to design of adjudication

19 problems. And may be you might address come at that

20 from the VA perspective.

21   That's an area where to which Congress has intended

22 recently, and legislation and perhaps, Judge Griswold

23 you might also take the question. I know that your

24 agency in particular operates under certain statutory

25 mandates in particular with respect to decision

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2   deadlines that have come before the courts recently.

3   MR. ZIMMERMAN: I mean I think that there's advantages

4   and disadvantages to having Congress involved in the

5   procedure. Maybe the most significant advantage is

6   thinking from procedures from of -- where is the most

7   democratic institution that you would want to flesh out

8   and ventilate these issues you think would be Congress.

9   But my experience with the federal rules that exists for

10   Courts as well as Administrative Adjudication is

11   sometimes you get rules that lead to consequences and

12   sometimes might be too high. Like if the congressional

13   level.

14   So let me give you -- this is actually present right

15   now with the VA. One of the things that the Court of

16   Appeals for veterans is confronted is should it adopt a

17   formal rule to hear class actions or should it on a

18   case-by-case basis using its informal power.

19   MR. WIENER: So Congress will mess things up.

20   MS. GRISWOLD: I think agencies have a broad ability to

21   do these things. If stay with my ham story, I think a

22   lot of the limitations that agencies deal with are

23   somewhat self-imposed. And it has to do with an

24   institutional culture that says we've done it this way,

25   we have to continue to do it this way. And if you can

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2 get beyond that, the world kind of opens up. And you

3 can do other things within the statutory framework that

4 we have.

5   So, you know, we continue to explore that and we

6 think we've made good progress within those boundaries.

7 MR. WIENER: Just to say a word about the difference in

8 the judicial review that exists with respect to social

9 security and VA. We have very limited Article II

10 judicial review. We do have an Article I court where as

11 the social security model is very different. Can you

12 want to comment on that, to which you are comfortable,

13 which system you think is better and whether any changes

14 or Congress might take up any changes to the existing

15 judicial review structure with respect to either VA or

16 Social Security Administration.

17 MR. ZIMMERMAN: Well, there is no Article III review.

18 It's an Article I Court. And also certain decisions can

19 also be appealed with the federal circuit but a very

20 small number.

21 MR. WEINER: Are there any additional questions?

22 UNKNOWN FEMALE: I am just curious when you are creating

23 the statistical sampling groups, how are you identifying

24 those profiles before you sample them

25 MS. GRISWOLD: Are you talking about the profiles for

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2   which claims are like claims? Yeah. They have either

3   the same provider or they have a similar item of service

4   that is at issue. So you may have one provider or

5   supplier who has a hundred thousand appeals with us for

6   the same sort of service and those would be eligibility.

7   MR. WEINER: Well, thank you Judge. This is contested

8   territory to say the least and again, we will have a

9   transcript of the discussion this morning put up on the

10   ACUS website before not too long. Enjoy the remainder

11   of your Friday.

12   (Audience applause. Panel III and meeting concludes

13   at 12:01 p.m.)

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1   FORUM ON FEDERAL ADMINISTRATIVE ADJUDICATION

2   CERTIFICATE OF REPORTER

3   I, SABRINA K. BELL, hereby certify that the

4   foregoing proceedings were recorded by me in shorthand

5   and electronically at the time and place mentioned in

6   the caption hereof and thereafter transcribed by me;

7   that said proceeding is a true record of the testimony

8   given by said participants; that I am neither counsel

9   for, related to, nor employed by any of the parties to

10   the action in which this proceeding was taken; and

11   further, that I am not a relative or employee of any

12   counsel or attorney employed by the parties hereto, nor

13   financially or otherwise interested in the outcome of

14   this action.

15

16   DATED: 9-29-2017

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19   _____

              Sabrina K. Bell

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