Jim Edwards, Eagle Forum Education Legal Defense Fund
Jim: Well, welcome thank you for joining us this morning. I'm Jim Edwards I'm the Eagle Forum Education Legal Defense Fund patent policy advisor so going into the administrative state or as we've named the Maladministrative State is the topic. It's related but it's not an entire subject; so we're going to go a number of directions that I think you'll find of great interest and we have a stellar panel that I'm excited to introduce to you in a moment. First, I'd like to introduce the president of Phyllis Schlafly Eagles and Eagle Forum Education Legal Defense Fund, Ed Martin and Ed Martin has joined us; he's on the screen right there. Welcome this morning, Ed.

Ed Martin, Phyllis Schlafly Eagles and Eagle Forum Education Legal Defense Fund
Ed: Well thanks Jim and let me just say a few words of welcome to our participants on this zoom and especially those that are viewing this recording later. We're so excited to have these speakers and be diving into this issue with such depth. As Jim mentioned the late Phyllis Schlafly who began her work on public policy back in the mid 1940s. She lived for a brief time in Washington DC and worked there and then went home to the Midwest, but all those decades later she was certainly involved in politics but I think sometimes lost on many folks is her deep understanding and her affection and belief in understanding policy and really getting to know what works in America and what doesn't and what makes America so special and one of the things that she really came to both believe in early in her life was the patent system and America's system of property rights for those that invent and create and then later in her career the need to stand up and work together with allies to protect that system that's under assault from the globalist movement. It's under assault from other aspects of American life that are that are against it and she really came in the middle of the 1990s to get motivated by the Clinton administration's policies and the fears and then in these last 20 years since then we've had this wonderful relationship with Jim Edwards as our policy director so valuable and then expanding the community of folks one of the little understood and sometimes misunderstood aspects of Phyllis Schlafly leadership is she cared about parties in terms of politics she knew we had two parties and one of them she wanted to make better and better but she knew when it came to policy when you're in office you got to work with the people that understand the issue and on patents and patent protection there's lots of democrats that share our positions and we work with them, we gladly work with them so and same thing with Republicans and there's people in both parties and in no parties that misunderstand and really the enemy of America and America's Way of life on property rights and patent protection is a cross-section of big business and some libertarians and other people all sorts of groups so we're pleased to be here and in particular Phyllis understood that the administrative state and the growth in the administrative state was a threat to us and the sort of combining of the judiciary and the legislative and the executive in these unelected groups and unelected people that started to get real power is a threat to us so this is a great topic for us to talk about I'm encouraged that Jim Edwards is leading us so well. I'm also really encouraged at our friend Josh Malone who's really become a citizen leader or a inventor leader is with us to help us understand these issues and what I would just say is this is never going to end the fight to kind of protect these rights we're going to get more progress we're going to make more progress but what we need to do is get more and more of our friends and neighbors to understand the issue and

get more of our leaders in power to understand the issue and this is a great effort to do that so thanks Jim for organizing it and thank you to all of you participating if we can be of assistance Eagle Forum Educational Legal Defense Fund please let us know if our Phyllis Schlafly Eagles which is a term for our broader political efforts can be of assistance we want to do that too so thank you all for being with us I look forward to the program and I'll turn it back over to Jim, thanks Jim.

Jim Edwards, Eagle Forum Education Legal Defense Fund

Jim: Thank you, Ed. Well today's discussion examines issues at the nexus of administrative adjudications the Constitution's Appointment Clause, the constitutionality of administrative adjudicators' appointments and the legitimacy of ALJ's rulings when their appointments are deemed unconstitutional, the administrative agencies and their adjudicators today wield more power with less accountability. The founders divided power among three distinct branches of government. They did this to prevent tyrannical abuses and denial of rights. Instead of separation of powers, we now have commingled powers in the administrative state, but the administrative state faces increasing scrutiny recently an executive order established a regulatory bill of rights to inject fairness in regulatory adjudication and enforcement and the Office of Management and Budget directives curb this use of guidance documents for example to get around rulemaking and several courts have found administrative judges as not constitutionally appointed and that's where we'll focus today and again I mentioned our wonderful panel that we have assembled and I want to introduce them in the order in which they will speak so beginning with Professor Richard Epstein as a panelist today we welcome him. Professor Epstein is on the Law Faculty of New York University and also teaches at the University of Chicago. Professor Epstein is senior fellow with the Hoover Institution and visiting scholar with the Manhattan Institute. Professor Epstein was awarded the Bradley prize in 2011. A highly respected legal scholar, Professor Epstein is expert in and knowledgeable about a range of issues of law and policy, these include constitutional issues administrative law and electoral property and antitrust to name a few. His recent book is titled The Dubious Morality of the Modern Administrative State and he's got it right there for us. We welcome Professor Epstein. Peggy Little is senior litigation counsel with the New Civil Liberties Alliance. NCLA is a public interest law firm founded in 2017 and it challenges the administrative state. Miss Little formerly served as part-time director the Federalist society's Pro Bono Center. Miss Little has over three decades of experience as a trial and appellate litigator in complex high stakes litigation. She's involved in administrative law cases against the Federal Trade Commission the Securities and Exchange Commission and the US Department of Agriculture. With Miss Little's and NCLA's help the target of the administrative state in Lucia versus SEC prevailed at the Supreme Court. Josh Malone is the inventor of the top-selling summer toy, now that we're hitting the 90 degree mark, Bunch O Balloons. So that's my commercial plug for a book and now for toys product. Josh's patented invention fills and ties 100 water balloons in under a minute. Bunch O Balloons market success landed Mr. Malone in the Patent Trial and Appeal Board. PTAB is a quasi-judicial administrative body that uses flexible rules that favor patent infringes to wipe out issued patents administratively. Josh's odyssey through PTAB is told in the documentary Invalidated the Shredding of the US Patent System. Josh Malone has his own company and he is a fellow with the

independent inventors group US Inventor. Professor Adam Mossoff teaches intellectual property law at George Mason University's Antonin Scalia Law School. Professor Mossoff teaches a wide range of subjects in property and IP law. He's well-known for his historical scholarship on the patent litigation awards but Adam Mossoff's knowledge and reach and breadth is far wider and his understanding far deeper than just that historical patent wars section. He's a senior fellow at the Hudson Institute where he chairs Hudson's Forum for Intellectual Property. Professor Mossoff is also visiting intellectual property fellow at the Heritage Foundation. He founded and served as executive director of the Center for the Protection of Intellectual Property at George Mason Law. I welcome all of you and we'll begin with Professor Epstein.

Professor Richard Epstein, NYU Law and University of Chicago

Professor Epstein: It's a very great honor to be here to speak with my three distinguished code panelists and I think my job being the first speaker is to sort of set the table to figure out how it is that one wants to think about administrative law. An administrative law as a subject, which has many successes and many failures and it's not as though I think one can take the position that we can run a system in which no administrative law takes place the questions that we have to ask are what kinds of things do we want the administrative state to do and what are the various rules that we want to put into place to make sure that it does them well and it turns out that the great virtue associated with administrative state in most of the cases is to try to get a system of regular rules that limit the discretion that various people have in terms of the ways in which these system operate. So in the book that I talked about the Dubious Morality of the Modern Administrative State, dubious is designed to say that it's questionable not to say that it's simply unacceptable to have an administrative state and the stress is on the decline of administrative law in the modern period relative to what it was in earlier times and so if you start going back to the 19th century and tried to figure out how administrative law was organized essentially it had very powerful characteristics that are associated with well-developed systems of private law particularly the systems of property grants on the one hand through contract relationships under the other and the gate keep there is you have limited functions that the government is supposed to do and it turns out that it knows how to do them because it has an accumulation of large numbers of small cases which allows it aid to have some continuity in the way in which business works and then to evolve with changing circumstances by having a kind of incremental customary basis to what is going on. Patents are obviously the subject that we're most concerned about at this particular forum and it's interesting if you go back to look about the way in which the system worked, patents were a much smaller deal then in terms of the way in which the system was administrated than the way they are today and the basic argument that they make with respect to patents is that what you did is you didn't treat them as some kind of exotic beasts utterly unmoored from any other kind of social institution, what you did is you treated them as a species of property which could then be subject to the standard rules of property subject to the necessary modifications that were needed when it turned out that you were dealing with patents rather than some other kind of physical situation one does never wants to make under these circumstances the system unduly complex and as best I can tell the single theorem which kind of links property and intellectual stuff to property and physical stuff has to do with the duration of the interest. With physical property

generally speaking there's no reason not to make a physical grant of infinite duration because it's the easiest way to run and to manage but with intellectual property where it can use information without depriving other people from the use is a more complicated trade-off you need incentives at the front end to get the things developed, you may want to call this a form of artificial scarcity but unless you create the scarcity you'll never have the inventions at all but at the same point you don't want these things to be perpetually owned because the fact that others can use it and fall into the general stream of Commerce is a very, very good idea so what you want to do is to make sure that patents have only one difference from other kinds of properties namely in the question of their duration. It should be short but not wildly short probably twenty years is not a bad guess as to the way in which this thing ought to operate with certain adjustments and then what you do is you just apply the standard rules of property and the first of these rules is you have to figure out how you're going to start to get a grant and you then have to develop a series of rules which indicate how it is that you could demarcate by way of metes and bounds a particular patent. One never wants to be too clever about all of this generally speaking as with other contracts and other grants you start with the text and figure out what's going on but it is also very, very important when you're dealing with these kinds of grants to understand that all grants have a certain degree of looseness with respect to language it turns out that when you're dealing with the interpretation of grants with respect to land certain kinds of implied conditions have to be added and exactly the same thing starts to deal with intellectual property one notable application of this is the doctrine of equivalents which has a relatively early start which says that if you patent the particular advantage invention nobody can evade the path by simply making an insignificant change on some minor points in order to say that you're out from underneath the patent and thus the doctrine a patent equivalents is worn. Then there is the question about when is a grant final and this is an extremely important question to worry about today. The 19th century view best understood in a case called McCormick decided in about 1898 took the position that the patent office could spend as much time as it wanted to figuring out whether or not a grant ought to be made but once the grant was then made it was turned out to be final. Mr. Martin made I think the very clever, very not very novel point but nonetheless it is important to remember that we do have three branches of government there's an executive, there's a legislature and there’s a judicial and in the patent space what this means is within the executive branch before you decide on what grants should be given you could run examinations of one kind or another but once the grant is made that grant should be regarded as final and once that grant is then regarded as final it creates vested rights on behalf of its recipient and those rights can only be removed if at all can only be enforced if at all by going into the judicial forum hopefully before a neutral judge who can understand the way in which the particular system operates and what is to be done in these cases. The modern law in this particular point has become hopelessly garbled and just a couple of years ago we had the oil states case which gives me particular conniption because what it did in effect was to invert the appropriate system and to say that the administrative agencies that had granted these things can then start to take them back and to put it in front of a panel which at least in its earlier configurations had no respect whatsoever for the standard principles associated with due process. When you're going to court what you do is you have judges who are independently appointed, they are often assigned to particular cases by way of rotation

and hopefully what happens if they get the questions of fact right, the questions of law, and then there's an ordinary process for appeal. What happened with the more recent developments under the America Invents Act is that administrative [inaudible] after patents are vested takes place and at that particular point the process could become completely politicized inside the framework of the Patent Trial Appeals Board which is the kind of thing which nobody ever ought to kind of encourage you don't want the head of a particular board to be able to pick the judges on a particular case because they have a view as to whether or not the patent should be good or bad we don't want you to be able to change the panel in midstream if it turns out you think that the outcome is going to come in a way in which the patent board doesn't want to have and so what one learns in effect is that the protection of separation of powers as a kind of a constitutional ideal is extremely important because what it does in effect is it solidifies the substantive rights that we're going to be created by preventing various kinds of intrigue from taking place which can undermine and destroy those sorts of rights now the system with respect to the patent and tribunal and oil states and other cases is simply representative of a larger problem that arises in connection with the modern administrative stick and the problems here and I just have a couple of minutes that I want to sum up but some of them are substantive and some of them are procedural. One of the things that you discovered is if you create a set of sprawling and indefinite substantive standards in order to determine what rights are given away or not given away you make an administrative state much more difficult to do because the basic substantive law leaves so much discretion in the hands of the administrators that they're going to have a field day in deciding what should happen and what not and so what you need to do is to be much more limited in the kind of focus that you have so that when it comes to the discretion their particular task that can be discharged in a sensible way so let me just give you one example outside the path there which I think kind of illustrates the problem and it's the question of what do we mean by the public interest convenience and necessity when we decide to make grants not of patents but of another kind of funny sort of property to spectrum and it turns out there's a great case involving the NBC company in 1943 in which the overconfident Felix Frankfurter announced well they're two things that you can try to do with administrative system. One of them is to figure out what the delineation of the property rights turns out to be so you know whether or not you're trespassing on somebody else's frequency and that was very consistent with the [inaudible] conception very congenial to people here which says that when you're doing these things the function of the state is to determine the rules of the road so that people don't crash and burn on a regular basis but Frankfurter was a new dealer and what he thought was no it's not just setting the rules of world it's determining the composition of the traffic. He has no idea of how to concert the composition of the traffic so he decides to punt it back to an administrative agency which has the same kind of substantive shortfall so they develop lists of factors which allow anybody to win and anybody to lose, make judicial oversight almost impossible and so what you do is you find that the administrative state by trying to expand the scope of its operations tends to get things very, very wrong. The 19th century view which concentrated on contracts grants and used private law principles of contract and property in order to handle that by and large did a far better job and so the way in which we're going to have to deal with the administrative state is to curb its excesses by changing and limiting the kinds of functions it has and then by making sure that the people who run

these particular states are suitably bound in on questions of law that they cannot simply reminisce in ways that lead to the destruction of all sorts of property rights systems patent included so I think my time is now up and I turn the panel over I guess it's to Peggy, right?

Peggy Little, New Civil Liberties Alliance

Peggy: Thank you so much Richard. You've said a wonderful overview from say 10,000 feet up. I'm going to talk from the trenches, that's what I do and that's how NCLA operates we represent people who have then had the rights diminished or taken away altogether by the administrative state our first involvement with Ray Lucia's case was in writing and filing an amicus brief in his support at the US Supreme Court and our brief was unique and had a unique point of view in that we focused on the deficiencies of administrative law judges we pointed out that the Wall Street Journal had done a series of very influential articles that showed A) that the agency would win sometimes eighty or ninety or in the case of the FTC 100% of the time before the administrative law judges that there had been judges who were admonished by their employers for not ruling in favor of the agency and that judges who would admit that the burden of proof had been shifted to the respondents hauled into the administrative law courts rather than the burden of proof being upon the agency this is a predictable bias because the judge is employed by the very agency who is prosecuting you and I want to stress that point I think most Americans do not understand that they are 10 times more likely to be hauled in front of an administrative law judge than they are to be taken to court in a federal court so that means that a very large part of what goes on under the name of justice takes place before courts and I use that phrase cautiously where the judge you appear before is employed by your prosecutor and surely that's not the way the American judicial system was designed. Ray Lucia was prosecuted and earlier on someone had mentioned initiatives to stop people being prosecuted under guidance which is a sneaky way that the administrative state can regulate people without even there being a rule passed under their own system which provides for notice and comment or law passed by congress which in my opinion is far more important ray was prosecuted for the use of a word backtest that had never been the subject of any legislation any rulemaking even any guidance by the SEC they just decided in 2010 when doing a routine examination of Ray’s business which was a financial planning business that they did not like his use of the word backtest even though that word is used very commonly throughout his entire industry so Ray immediately stopped using the word he pulled all the slides that used it and also his publications nonetheless two years later he's prosecuted by the SEC in an administrative law proceeding that went on for six weeks of trial the trial took place over the course of six weeks with adjournments and of course the administrative law judge he got was a nightmare who not only allowed the SEC to engage in witness intimidation and I mean exactly that. Ray had customers willing to testify on his behalf and before they went on to testify the SEC served them with subpoenas that required them to turn over five years of all of their financial records in any form in any shape whatsoever under penalty of perjury before they could testify and so Ray of course did not want his health customers to testify so he went in without a single client who could to speak on his behalf. There are many other deficiencies with his trial. He appealed it to the commission which unsurprisingly affirmed the administrative law judges ruling. He appealed to the DC

Circuit, the three-judge panel affirmed the administrative law judges decision as well then it was en banc to the entire DC Circuit which split five to five and on the appointments question and finally and only when he got to the US Supreme Court was he able to prevail on the question that his judge had never been appointed lawfully in the first place and had no business hearing his case in the first place unfortunately the prize for a successful appeal of that nature is that you get to go back and do it all over again even though Justice Kagan did something very interesting which was to disqualify his ALJ which is highly unusual never done with the district judge and I think suggests the US Supreme Court had a sense that this was a fixed court nonetheless the court said he should be retried either before a properly appointed ALJ or the Commission itself. Here's the problem with that: all of the SEC ALJ's also have multiple layers of tenure protection which means they are unconstitutional under the free enterprise fund holding and other precedents but for some principally the free enterprise holding precedent rather than the Commission trying him themselves which they are permitted to do and statutorily, they sent him back to an administrative law judge. Here's the problem with that: the Solicitor General in Ray's own case argued that the removal protections were unconstitutional so you have an administrative agency retrying him before judge that the government admits is unconstitutional. We filed a motion for injunctive relief in the San Diego federal court predictably as Richard has noticed in some of his proceedings the judges all too often defer to agencies and did so in this case and we took his case up to the Ninth Circuit but I want to lay out for our listeners what the problem here is. Ray would have to go through and already went through layers of hearings before an ALJ, appeal to the Commission, appeal to the DC Circuit, en banc at the DC Circuit, appeal to the US Supreme Court, then he is sent back before a still unconstitutional judge, he still has to go through that same process again and if you win this at the US Supreme Court they're still going to assign him a third trial. No rational system of government would operate in that fashion and it is extremely important for people to understand the district court jurisdiction which was readily found in the free enterprise fund case on the exact same point which is removal of protections has to be found and found early to prevent this kind of truly Kafkaesque and Sisyphean trial by exhaustion. Ray Lucia's rights were taken away from him he lost everything he lost his business he lost his retirement savings he lost truly everything in trying to vindicate these rights to be tried before lawful judges and until district courts understand that they should exercise jurisdiction to review the constitutionality and the legality of what the administrative state is doing we are going to be, all of us Americans, are going to be subject to these Kafkaesque kinds of proceedings and it's a deeply disturbing thing especially when you consider that the crime of which he was accused was wrong speak using a word backtest in a way that did not lease the SEC. I will also note that his ALJ admitted as much in his initial decision. He said under the definition of backtest that I have found today he is in violation of the securities law; so it was admitted in the very documents that were created in his case that this was retroactive creation and application of the law. That should never happen in the United States and yet it did to Ray’s great detriment. NCLA has several cases that are dealing with this precise issue. We have a case in the Fifth Circuit for a woman named Michelle Cochran who had a similar experience with the SEC she's back on another one of these retrials. I'm pleased to report that we were able to get an injunction from a panel of the Fifth Circuit that stayed her administrate proceedings pending the Fifth Circuit's decision on the legality of

her SEC ALJ and that's a hopeful, small but hopeful development we are also going to be seeking en banc consideration in the case out of the Eleventh Circuit in a case called Christopher Gibson and we hope to get the United States Supreme Court's interest in this issue because one of the things the court said when the Solicitor General argued in the Lucia case that these removal protections were impermissible, the Supreme Court said we await lower court rulings on these questions and so we hope to create the lower court rulings that will get the US Supreme Court to pay attention to the essential interest of whether these administrative law proceedings are lawful in the first place and Ray Lucia did a very heavy lift and almost a decade of conflict with the SEC to vindicate these rights and unfortunately he has now settled because he can't fight anymore, he's 70 years old, everything was taken away from him. It's a cautionary tale and an important one for all of our listeners to consider when they contemplate these issues of whether administrative adjudication deprives them of their civil liberties and their constitutional rights under the United States Constitution.

Jim Edwards, Eagle Forum Education Legal Defense Fund
Jim: Thank you Peggy. Josh?

Josh Malone, U.S. Inventor
Josh: Thank you, it's good to be here and I was fortunate, I started my battle with administrative state when I was in my early 40s and my discussion will explain how to defeat the administrative state as an individual citizen that's caught up in it and I'm the existence theorem that you can come out the other side. I had no idea, I was an inventor an entrepreneur and in 2014 I launched my invention on Kickstarter and it was copied early on in the campaign. A large corporation from New Jersey, sent it to China, had it reverse engineered and imported it flooded the market and this company it turns out this is their business model and I learned that they had been sued over a hundred times for about that many stolen inventions and that they had never lost and so this is the strategy is to just take what they want and then good luck for the entrepreneur or the individual that wants to try to stop them in court and so in my case my patent issued and we took them to court and we actually went to an Article III court and sought a preliminary injunction and we prevailed so it was about a million and a half dollar prospect and we were fortunate to be able to fund it, go before an independent judge. He ruled on some issues and my story actually I ran these things in parallel so while we were in the sane world of the Article III Court where the rules and procedures are predictable the evidentiary burdens are predictable the outcomes are fairly predictable and when it comes to a patent there's things like presumption of validity but even the preliminary injunction they were able to make this really high standard where the infringer challenged the validity of the patent, arguing that no one knows when a balloon is substantially filled with water and so that fails to meet section 112 or indefiniteness. We prevailed on the argument and they appealed to the Federal Circuit, second highest court in the land. We won there the judges at Federal Circuit actually laughed at the attorney when he raised their defense and so here the system's kind of working right it's very hard to access for a small business or an individual fortunate enough to be able to go down that path about two years into it, meanwhile they go to the Patent Trial and Appeal Board, this administrative tribunal and they put forth the exact same arguments and in that case these

administrative judges who are supposed to be experts in the subject matter and they're supposed to be experts in patent law they ruled contrary to the district court in the Federal Circuit and said my patent was invalid. This happened in the same building that a few yards away the examiners had thoroughly examined and the director had put his signature on my patent just a few months before and these same judges took it away. And I ended up in the PTAB for about [inaudible] they invalidated initially four of my patents and at this point we had this crazy you know one result in the Article III court and it was completely being undone in the administrative tribunal and they were getting ahead I had a trial that was cancelled because the PTAB came in and invalided a patent that had already been preliminary confirmed in the district court so what we do is we were fortunate we keep selling lots of product and competing with these guys despite the intrusion on our patent rights and so we're paying the attorneys seventy-five thousand dollars every week motions you know could fill the room I'm in and the filings and we just kept plugging away and we're able to survive and meanwhile I'm still losing so I go to Washington DC and I meet with the head of the Patent Office and I confront the chief of staff for the director of the Patent Office who was employed by Google just a few months ago and was part of the Google campaign to capture the agency and eventually it gets through, we hold a protest we burn our patents on c-span I mean this is unbelievable in America that inventors are out burning their patents at the patent office and so what happened is and this was me out of desperation but the serendipitous result was I found the key so first of all I was able to pay the attorneys the legal bill of seventy five thousand dollars a week but the other key that I learned I stumbled upon is you have to have political influence to play this game and so by drawing attention to what was going on the abuses I won a reversal at the Federal Circuit which was a nine percent chance and I was able to prevail, we had a change in judges on my case at the at the PTAB and so the final result of those cases came out positive and I never did win they never did resolve this after four and a half years and a 20 million dollar litigation which was which was longer and more expensive because of the PTAB the complete opposite of the marketing propaganda for the PTAB it added cost it added delay. What happened is the other guy surrendered, we didn't win we got a jury verdict we got a final judgment they had a 31 million dollar bill due and they would have they would have liked to have appealed which means they had to post a bond and then they would have gone back to the PTAB over and over again they probably would have found a way to get some third party to take me back to the PTAB which is permitted and they finally looked at it since it was only a billion dollar corporation, I wasn't up against Apple I wouldn't be here today if I was up against a big tech company, their resources were so limited at only having a billion dollars in sales that they looked at the numbers and realized this was not economically viable to continue to try to intrude on my rights they would have had to pay their attorneys twenty thirty million dollars a year for the next ten years in order to pursue this behavior and so they finally came to us and said we give up we'll pay you and we'll exit the market and that was just about a year and a half ago and so my story is how you get through this and you prevail you have to have incredibly infinitely deep pockets. These guys are going and they're working on the next election and they're pursuing candidates on both sides whoever wins election the big corporations get to come in and choose the bureaucrats that run the agencies and now there's all these questions about whether they could be removed or not and what we're finding is unless you can target

them specifically, I know Peggy has a particular ALJ in their case that I don't know if he's still doing the things he does but it's like Peggy said a Kafkaesque system where we don't understand it. The entrepreneurs and the inventors they hit it the first time usually we figure it out way too late. We're not well represented, to be represented in these cases you need extremely high-end connected boutique law firms, mega law firms that know the games they know the judges they do these conferences with them and they've learned the ropes and so the problem is the little guy gets caught up in these things and you just get swamped and overwhelmed and I was fortunate to be able to come through that but what happened is I met a lot of inventors along the way and so I'm here today and I'm volunteering with US Inventor trying to bring attention to this because I meet inventors and entrepreneurs every week that get caught up into this system and they don't understand what hit them and they don't have good representation and this is basically it's become so disconnected from the purpose of the patent system which is you come up with something new the world's never seen before, wouldn't have thought of but for your ingenuity and your perseverance and all those failures and all that investment and you succeed and the bargain is you get exclusive rights to that for this 20-year period and inventors and entrepreneurs kinda are trying to operate on that basis but then the system has been so far removed from that that it's all about who can prevail in these disputes you know we've got a stack of patents of a thousand patents you've got a stack of 5,000 patents let's go nuclear for 18 to 24 months and see who's got more patents left after that and then we pay each other some money and it's very transactional professor Epstein talked about the unpredictability, these things are a hundred percent fluid it doesn't matter how thoroughly your patent is examined it doesn't matter how novel and inventive it is it's completely up for grabs under the current system and all that matters is you know can you out lawyer and out spend the other guys and come out with an edge and advantage at the end of this procedure and so that's what we have and I'm looking forward to talking to more of these experts about how to fix that.

Jim Edwards, Eagle Forum Education Legal Defense Fund
Jim: Thank you Josh. Adam?

Professor Adam Mossoff, George Mason University Scalia Law
Adam: Thank you, can you all hear me? Excellent, so thank you again for having me here today and I'm gonna be primarily talking about the Patent Trial Appeal Board the PTAB as a [inaudible] acronym as all administrative tribunals agencies go by and the various alphabet soup arrangements that we now have. When Richard provided a really excellent overview of what was a really key insight of the American founders in creating our Constitution which is it's not always about the substantive protection of rights, it's you have to create structural limitations within a government both separation of powers, division of powers, federalism, it's structural limitations that are ultimately key to the protection of the rights of citizens and their life, liberty, and property and what I've heard then from Peggy and Josh is I think Peggy's word is excellent Kafkaesque. These processes and procedures that people have to go through now where there are no longer any structural limitations that are imposed upon people who are adjudicating our rights as citizens with respect to our property and our liberty and our contract rights and other types of rights and this of course undermines our rights -- undermines our freedoms and

this is a serious problem and this is part and parcel the entire administrative state and the story of the PTAB really is a story of kind of the creeping expansion of the administrative state in the field of patent law over the past four decades. It's a little ironic. The Patent Office was in fact the very first administrative agency actually created in the federal government created in the early 19th century when they realized that issuing patents was not something that the secretaries could do under the President and had more important things they do in terms of international relations and maintaining the country but it was created within the context of a government of delegated powers, of rule of law, of institutions of the sort that Richard perfectly described that the Patent Office's job was to determine is this a legitimate property right per the requirements in the Patent Act in the same way that the Patent Office also determined whether people had a legitimate claim to a fee simple through the Homestead Act and once the property right issued then it was a property right on par with all their property rights and treated under the rule of law and the stable legal institutions and the courts that had to be adjudicated as such. Starting in the 1980s, there was an argument made to Congress that well sometimes patents are issued improperly. There's mistakes made by patent examiner's so there should be small minor processes by which examiners should have the ability to take a second quick look at a patent they issued. Maybe correct for defects and other types of issues. It's key to recognize that when this began in the 1980s it was explicitly promised to Congress at that time that this would not become an alternative adjudicative system for determining patent validity of issued patents but of course as I mentioned you have a creeping expansion the administrative state in the same way that you've had creeping expansion in the administrative state in all other aspects of our lives over the past now approximately century on since the early 20th century and through the 1990s and then ultimately through the early aughts and ultimately up through the America Invents Act of 2011. What you had was increasing growth of this Administrative Tribunal at the at the Patent Office until now it's called the Patent Trial and Appeal Board and it's a massive tribunal. There's over two hundred administrative patent judges they're not called administrative law judges because they had to add even further confusion and make it even more Byzantine. They gave them even their own unique administrative title but as the Supreme Court has recognized repeatedly in several cases that have already come out of the PTAB and it's [inaudible] decision and it's SAS Institute decision that the PTAB is really it's a hybrid institution it's a mixture of adjudicated responsibilities it runs and what sound like and appear to be trial like processes and procedure. The petitions filed to cancel patents with discovery with motions and things of this sort. It's an adversarial proceeding so a third-party independent party files a petition the APJ's are supposed to sit as a three panel judge to overhear the petition the claims and response from the inventor as you heard from Josh's describe it but really it's identified and as Josh described it this is a second-tier track of patent litigation and in fact it's referred to as Patent Office litigation and treatises that have been published in the past several years it's called Patent Office litigation and in the courses we teach in law school to teach how to appear before the PTAB in fact it's now identified as the most active court and I follow Peggy's great comments that we're using this term loosely "court" the same we refer these people as "judges" in the entire country you know and it's had a massive impact on innovators inventors and on the innovation economy. Tens of thousands of patents' claims have been invalidated at the PTAB the sole job at the PTAB is to invalidate patent claims and

so like most administrative agencies that people are hauled before, it's very much a heads I win tails you lose situation for these individuals because it costs almost nothing for large companies as Josh described to file petitions. It's several thousand dollars for companies that can afford one billion-dollar budgets for their legal departments like Apple Computer I mean they spend more money on coffee every day for their employees than they would on PTAB petitions. They file numerous petitions it's called serial petitioning where they just copy and paste the claims so they file five ten fifteen twenty petitions against the same patent because statistically it shows that your chances of having a petition approved go up even if it's the exact same petition that's being filed and of course why are they doing this? Because they don't lose anything if ultimately they lose, they spend a few thousand dollars but meanwhile they're litigating in court as defendants so they have they have a second bite at the apple in court but if they happen to win they get the patent owner's patent cancelled and they have a very high chance of having a patent cancelled depending upon which review program you're in, there's five or six of them at the PTAB, the patent cancellation rates range anywhere from approximately sixty six percent to ninety nine percent. Now any statistician or empiricist will tell you that in an adversarial proceeding where you have an institution is supposed to be neutrally hearing disputed claims, when you have that level of cancellation rates -- that level of decisions weighing in favor of petitioners, you have an institution that's out of balance. You have an institution that has been captured by its mission; it's been captured by special interest and it's exactly what we're seeing at the PTAB and it's very unfortunate because this has had tremendous negative impact as you heard upon Josh, it costs tens of thousands, hundreds of thousands, ultimately millions of dollars for patent owners to defend their patents with the PTAB and this it's devalued patents as an asset class, it's created a massive cloud on the title of patents, they're no longer you know reliable [inaudible] your property rights that serve as a basis for venture capitalists to make investments and for people to engage in licensing and it's incentivized widespread willful deliberate infringement of patents by companies that can afford the ability to do this. It's referred to by policy wonks and patent lawyers as efficient infringement. Historically courts called it piracy you know I'd be even more blunt and just called invention theft because it's the deliberate explicit business decision to steal inventions which is made possible by this, perfectly framed term, Kafkaesque processes and procedures that have been created at the PTAB in a very unbalanced way that has undermined the ability of patent owners to receive protection and this is in part because you have administrative patent judges who are not being held accountable -- that they have been loosened and let loose without these structural limitations that are normally imposed or should be imposed upon government officials who are deciding the validity of property rights in this country. This is what is at issue in Arthrex. It seems a very abstruse issue and highly technical and it is but it's fundamental to how we protect rights in this country especially property rights and innovation which has been a pillar of our innovation economy for two centuries so with that I'll yield the floor and hopefully we'll have some good discussion.

Jim Edwards, Eagle Forum Education Legal Defense Fund

Jim: Thank You Adam and thank you all. To our audience, I want to let you know that we're going to the next 15 minutes we're going to devote those to a discussion among our panelists so start to formulate your questions for them and you are invited to formulate your questions and type them into the Q&A function which is on the bottom right side of your screen so open the Q&A function and put in whatever questions you may have and you can send them to us there. The Q&A will follow this internal discussion or intramural discussion so if our speakers I think are all in muted let's have at it jump right in.

Professor Richard Epstein, NYU Law and University of Chicago

Professor Epstein: Yeah I want to start off with something which is I think the discussion here was a bit too anonymous and I take great pride in this, Peggy referred to a brief written in the Lucia cases by Jonathan Mitchell who was my student and was the classmate of my other student name Adam Mossoff and in fact your general counsel is Mark Chenoweth who was also my student and it was I who recommended him to Philip Hamburger [inaudible] general counsel and Noah Francisco was my student in Roman Law and why do I mention all of this stuff? I think the single most important function that you create as a professor is essentially a legacy of students who are committed intellectually to causes in which you believe, who are able to carry on the fight long after you're gone and that's always the way in which I've approached my teaching and it's just so nice on a case like this to see four people involved in key roles in this particular case. Now let me just say one thing about this, I mentioned that Noah was a Roman law student now why is that so important in a case like this? Well the first thing you have to know is that the principles of regularity that you start to talk about and the belief that there's a kind of an inner coherence and substantive organization with respect to the substantive law. These are both very shall we say traditional natural law values on both the substantive side and the procedural side. People who don't believe in either of these two things are going to say well isn't it just wonderful that we can start to invent all these new processes and these new rights with the drop of a hat and they don't realize that when they start to create some rights they necessarily infringe on other sorts of rights and then what you do is you get the kind of nightmare scenarios of that Josh and Peggy faced and I'm just gonna make one observation about this which is the remedies that they were able to achieve in their quote-unquote “victories” are utterly insufficient to the purpose and so Peggy basically announces poor Lucia has to die of prostration. Why is that? Because the Appointments Clause was a victory for a case but not for a cause so all you have to do if you believe in what's going on is the SEC finds the right person to make the appointments and you go through exactly the same thing. It's only an enduring principle due process which says that biased people like that even appointed by God himself should not be allowed to handle these cases and what was a terrible thing about the Kagan and the prior opinion. They sense the problem but they had no willingness to understand the enormity of the problem or the really powerful steps that they had to take in order to make this thing up and Josh of course he goes in and out of this thing and he wins the nine percent chance while the ninety one percent of these people are gonna be road kill because you're still gonna have to go back into this particular system or where the deck is loaded in the matter in which Adam has started to say. So one of the great tragedies that you have is that litigators rightly pick narrow defensible grounds on which

they can win but it's prone to forums like this one to indicate that we don't want to win narrow ad-hoc victories that have very little carryover to other cases. You really want to win systematic victories and that means going back to what Ed started to talk about. Taking rules of bias natural raw rules [inaudible] hear the other side seriously, take separation of powers seriously, take the sacredness of a grant seriously. If you don't do those kinds of things then it's just going to be putting out fires one after another all while the continuing smoldering will take place. So I really hope that everybody in the audience understands the enormity of the situation and the gravity of the situation and how the most ingenious lawyers and the most determined inventors possibly, have thus far only been able to make a dent because if you look at the Supreme Court justices are the ones who've made these decisions essentially start from a fundamentally different prescient about the legitimacy of the administrative straight Bryan and Kagan are very much in that camp and this is essentially a philosophy which is going to lead to constant fires and very little ability to essentially unleash the huge come shall we say creative capacities of American inventors and other private entrepreneurs.

Peggy Little, New Civil Liberties Alliance
Peggy: I'd like to respond to Richard, he's absolutely right to point out what an important influence his students have had on these questions and I might add in addition to Jonathan Mitchell writing the NCLA brief with Mark Chenoweth, Jonathan Mitchell is cited over and over again in justice Thomas' opinion in the Seila Law case that came down yesterday and that case is relevant to what we were talking about and I hope in the course of our discussions and in the Q&A section we can talk about Seila Law too because it's an important case as well. One of the things we cannot stress enough and Josh said it but I'm going to say it again because it is so important this maladministrative state, and I did love the title of this event, is built on a scaffolding of untruths and one of the great untruths is that it's somehow more efficient -- that if you go through the administrative process, yeah sure you don't get the procedural protections you do in federal court. Burdens shift and you don't get the rules of evidence and you don't get some of the procedure but you know you're going to get a fast decision that is a damned lie. That's the only way to put it. Ray Lucia went through years of proceedings within the administrative state and was then sent back to do it all over again and even if he won he'd have to do it a third time before the commission. Many of our clients are in exactly that situation. What it does is add a layer of in many cases, in ones we are interested, a layer of completely unlawful proceedings so the administrative state even with a SG as talented and insightful as Noel Francisco who argued that the removal protections for the administrative law judges of the SEC were unlawful, nonetheless the SEC under his administration went back and put Ray Lucia before a still unconstitutional administrative law judge and he'd have to do the whole thing all over again and this is what I would call annihilation.

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: And by remand right?

Peggy Little, New Civil Liberties Alliance

Peggy: And it would there be a third remand even if he got to the Supreme Court and won and that is no way to administer justice so Richard is absolutely the right. One of the things I want to just I want to mention a case because it's really important it's called Thunder Basin and it applies across administrative agencies but that case was taken very much out of its mind mine at context but it's now used today to force people to go through this administrative process even when the judges, these our circuit judges, admit that the administrative law judge cannot decide the constitutional question of their own competence and they are not competent to issue such a ruling. Nonetheless you have to go through that process which everyone knows is to be vacated because he can't rule in the first place an opinion that has that kind of terrible adverse consequences is right for a reversal.

Professor Adam Mossoff, George Mason University Scalia Law

Adam: I want to emphasize because there's a great question I was asked by our audience, "Is there any legal basis for establishing accountability in the administrative judicial proceedings?" Well there's two ways you can do this. One way is the way that a lot of them are defaulting to, like in Arthrex, where they say well we will remove the protections for the patent judges and make them directly removable by the director of the Patent Office but that just makes them politically accountable which is an important feature of our representative democracy -- of our republic but it still makes them accountable to the vicissitudes of political changes in administrations and when you're talking about property rights that span over decades but require billions of dollars investments people cannot do that if they don't know what will be the terms by which their property rights will be protected and this comes back to the fundamental insight of the founders which was an incredibly important insight which is that courts -- judges, as neutral arbitrators of disputes need to be distinct from the political system -- from the political actors. This was their recognition of one of the key systemic flaws in the British constitution is that the courts were not separated sufficiently enough from the crown or the Parliament for that matter and this is what we've lost with the creation of the administrative state in these administrative proceedings. Philip Hamburger, the founder of the NCLA, has this fantastic book *Is Administrative Law Unlawful?* and his answer is yes it's a return back to kingly prerogative and in the arbitrary decision-making processes that infected that type of decision-making and which we as an achievement in this country recognize should be not part of the stable protection of property rights in particular including patents and we've lost this and so we either need to return back to proper court administration with proper due process and protections of interests which by the way Congress recognizes can be done. You don't have to do an Article III. They did it at the International Trade Commission, they've done it at the court of claims, they've recreated courts following processes, due process, protection of rights, appeals, and things of this sort. They could have done this at the Patent Office but they didn't because as Peggy said we want to be quote "efficient" which efficiency is just a standing word for doing something quick here as opposed to doing something right.

Professor Richard Epstein, NYU Law and University of Chicago

Professor Epstein: It's also the case that huge American tech companies generally favor weak patent systems and organize themselves. There's a wonderful book coming out by

Jonathan Barnett which explains that large companies have multiple ways of defense and small companies and small inventors, if they have an invention they don't have a web of contracts and trade secret so that they can protect. It's patents or nothing. That's the position that Josh found himself in so if you weaken the patent system what you do is you give the incumbents a great advantage and the theory that patents are a barrier to entry has got it exactly upside down in all of these particular cases and what Adam said about this is essentially basically correct simple humble virtues of regularity and finality and organization really do it and you ask about the Supreme Court and so forth one of the things that's so tragic about this current Supreme Court is they are all simply lawyers who grow up within the legal system. None of them have any entrepreneurial system or any entrepreneurial instinct and so when somebody like Josh comes before them, he thinks everything he heard was from manna from heaven so that essentially why would you want to protect something through a patent system when we know that it took nothing whatsoever in order to create it? Just a lazy bunch of guys out there who trying to get [inaudible] that's what you are young men.

Josh Malone, U.S. Inventor
Josh: I have a question, I'm not sure who to direct it to but in working in the policy space and these stories that we're telling I think there's an acceptance that these are probably the accurate anecdotes but what if I mean I think the pushback is you know the administrative state yeah they make errors but so does the judicial system. There's always a balance between due process and getting the right. Can we make a case that these administrative tribunals are getting it wrong or it really is haphazard as we've described it. How do we prove our case?

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: Well just look at the outcomes in these cases when basically you have no separation. If you could be a judge in your own cause, you're always gonna rule in your own favor and these administrative judges who are appointed as pawns of the particular agencies that start to appoint them. The win rates, as Adam pointed out, is simply ungodly high. You could also say, "By god you know you've got a ninety nine percent criminal conviction rate under Stalin well that just simply proves that everybody is a wrongdoer and the state is always right." Generally speaking if you start getting unanimity and judicial outcomes you know that the system is rigged. It could be in one favor or another and let me do the political economy on this and you start to see who's doing it and for what. What you realize is that powerful American interests who profit from the fact that there's a weak patent system and they've done everything within their power to start to create that situation. It's not as though it's going to be the end of the world entirely. Adam, make a guess. I would say this is probably a 10% drag on the system, what would you guess?

Professor Adam Mossoff, George Mason University Scalia Law
Adam: It's hard to predict but it's a substantial drag. It's very hard to identify in specific numbers. You have of course self-interested parties so entire entities that have been created whose sole purpose is to file petitions at the PTAB on behalf of large interests that pay them to do so that they don't have to disclose and they say oh the PTAB's

working great and they publish reports to say this because of course they are self-interested. This is exactly the story of capture. This is exactly the story you see everywhere else in the administrative state which is made possible because of the lack of structural protections, the lack of due process protections, and substantive protections of individual rights.

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: And also Adam mentioned one thing which there's a very important elaboration because it takes place everywhere. What we start to do is to think about these campaigns as a company may want to bring a case back before the PTAB but what always happens in every administrative systems the class of intermediaries grow up in order to pull people on the outside and make them go so for example if you want to figure out why all the budgetary projections with respect to Obamacare turned out to be wildly optimistic, are there huge numbers of intermediate interest groups that can drive you into the system? So every disease has its own interest group. Every interest group will then hire people who will be able to tell people on mass how it is that it could maximize the benefits they start to get out of the particular system. These benefits will often inure to hospitals who are also partial beneficiaries of the situation so what it is it's important to understand that since you can amalgamate and organize on the outside, the effects are always going to be much larger and generally much more worse than you thought they would have been when you started out so this is not the lone person coming into one of these things to raise the protest. It's an organized movement and it's extremely powerful and in this particular case I think extremely deleterious. Star chambers are not to be welcomed. Essentially what you have to understand is the proposition that ordinary course litigation may sound very boring but it also turns out it's the only way in which you could be faithful to the creation of rights that are born and bred in another system i.e. the legislature.

Peggy Little, New Civil Liberties Alliance
Peggy: And Josh to answer your question, "Are these just stories or is there some sort of empirical support?" The statistics are very telling. For example the FTC, they win 100% of the time and the other ones are in the 90s or high 80s in the other agencies but here's the completely distorting thing: Those are only the people with the resources the time and the gumption to fight that we have those statistics. 98% of the people settle and cave. So even those disparities that you see in terms of the win rate is terribly misleading because the vast majority of people just settled because they want to get on with their lives I mean Ray Lucia is now a statistic and in that particular field and do not for one minute think that the agencies don't know that. They prolong the process and they sell to the public or to Congress or whoever that this is somehow a more efficient thing. It is not it is just as burdensome, costly and retracted as litigation and that is a big lie and one that needs to be exposed.

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: The power to investigate is the power to destroy and it turns out that if you have a bunch of committed partisans within agencies who have the initiation power, they can then put it to all sorts of dreadful purposes and the control of prosecutorial

discretion and the judicial system is a major problem. It's even more powerful inside an agency because all the people in the agency have the same commitment to aggressive enforcement. I'll ask you Peggy how many Republicans are on the staff of the SEC? I mean in ranks, in file, the administrators, their lawyers. What 1%?

Peggy Little, New Civil Liberties Alliance
Peggy: If, if.

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: That kind of tells you something about the sort of mix. The permanent bureaucracy in agencies can be picked for their loyalty to a particular cause if you go into a court people are gonna have to jump around from one area to another and it's much harder to typecast everybody and so it's the homogeneity that comes from the specialization of function and the appointments process that tends to create groups. It's a much [inaudible] then you are if you put them in a prosecutor office. To put it in another way one of the Roman principals of administration was rotation and office. It turns out when you have lifers inside any administrative agency with a particular cause then you don't get any rotation, you get intensification which makes things even worse.

Peggy Little, New Civil Liberties Alliance
Peggy: And they are compensated by the win rate now this would be…

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: That's what Bonham's case right?

Peggy Little, New Civil Liberties Alliance
Peggy: Absolutely and then they also go after low-hanging fruit which is the small inventor, the Ray Lucia of this world I mean the SEC notoriously ignored Bernie Madoff in the worst of his proceedings and goes after Ray Lucia for wrong speak on backtest which misled nobody. Not a single customer complained. Not a single person lost a dime because of his use of the word backtest yet this man is ruined because he was an easy target and that's true of small inventors and I'm sure it is true for many of the other objects of prosecution. It's so much easier to go after someone for a small unimportant technical violation and boost your compensation and your win rate than to really take on a serious case and I think the Madoff failure is one example.

Josh Malone, U.S. Inventor
Josh: Can I explained how that's worked out real briefly. So we have these 260 administrative patent judges and their primary job is to invalidate patents, as Professor Mossoff indicated, but the way the procedures and the unpredictability is written, they're not answering questions like did he check the box, did he meet the deadline, they're not doing administrative work, they're presented with a question of would it have been obvious ten fifteen years ago to have combined these things together and so they're given complete carte blanche to come up with a rationale to describe why it would have been obvious and so what you have is they have to institute these trials or they don't have a job

and they have to, once instituted, reach a conclusion that it was invalid more often than not or they're not doing their job in the first instance and so it's so fluid and malleable. If you had a thousand administrative patent judges, we'd have four times as many invalid patents because it's just completely balanced to keep their the workflow going and there's no predictability. I still can't get anyone in this industry to point to a patent that will pass its next challenge at the PTAB and so there's just no way to sort through this. You're in it and anyway it's very fluid how they're able to make these determinations and they're given these broad complex confusing procedures and they can cobble them together and reinterpret them and now they have guidance this and precedent this and all of it's just very subjective. Just throw it together and come out with the determination you prefer.

Professor Adam Mossoff, George Mason University Scalia Law
Adam: Josh what you're describing though at the PTAB, that's universalizable to every adjudicative agency. I mean in the Lucia case, the particular ALJ that she appeared for had a hundred percent, Peggy correct me if I'm wrong, had a hundred percent ruling rate in favor of the SEC over multiple decades.

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: And he wasn't an SEC lawyer.

Peggy Little, New Civil Liberties Alliance
Peggy: He was a former Social Security judge. This idea that these judges are experts is another untruth upon which the scaffolding of the administrative state is built. These people are cherry picked out of the administrative law judge pool and we filed a brief that showed that not one of the five SEC ALJ's had prior experience in securities law and so the expertise emperor has no clothes. I want to add one other point because if you get people before an Article III court sure they don't always get it right but remove an entire level of biased proceedings. If you do that and it's not gonna be that burdensome. SEC has five judges so what five more District Court judges to take up that workload and that's true across the various agencies. When you talk about judges that are deciding people's rights as opposed to dispensing benefits the addition to this district court judge pool is not very great at all. It would be very simple to do and it would respect the fact that the founders thought that justice was supposed to be handled in a separate branch of government.

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: Yeah, look there was a huge battle over the way in which you separate independent agencies from executive branch agencies which I think to be a second order problem. I think there should be a per se rule that no agency which has enforcement or rulemaking power shall ever have any power over adjudication period. That form of separation it seems to me is absolutely indispensable and I think what Peggy said is a hundred percent correct that the expertise claims are almost always phony in every given area. Most of the time if you have somebody who's educated in the basic principles of property, contract [inaudible] procedure, and so forth and you give them a new problem they can figure out on the basis of general principles how to deal with particular case. So if you look at Article III judges and their [inaudible] dockets, they are all over the lot and

it doesn't stop them, they hire clerks they get briefs they read. They're smart people and they can do it. The real danger is expertise is not what's at stake, it's bias and political commitment is what determines who gets appointed to an agency or not and Woodrow Wilson amongst his many sins this is by far I think the most important of them. It's the glorification of the administrative state on fake claims of expertise. You don't need it, you don't have to have it, it is just a kind of an argument, you read what these guys cite and what they do. Every competent judge of an Article III court can deal with the same materials in exactly the same kind of way. If you're talking about patent prosecution it's a different kind of issue and you don't need -- I think as Adam said Article III courts. Article I courts in many ways are much preferable because you get a shorter period of time 15 to 16 years long enough for political independence but not so long as to guarantee a kind of senility which could start to happen when you stay forever and that's I think is the way in which to go and the PTAB could be converted into an Article I court and it would be a vast improvement over the current situation. I see Adam is nodding I wonder why.

Professor Adam Mossoff, George Mason University Scalia Law
Adam: I mean you know people say what to do about the PTAB you know we're not breaking new ground here as Richard said. I agree with everything Richard just said. They can create an appropriate Article I court. They've done it before, they did it with Porter claims, they've done it with the ITC, they can do it again because we don't learn when we were kids the famous saying, "You can do something fast, you can do something right, you can't you do both," and this is the falsity of the efficiency argument in the expertise argument which we've seen in the PTAB's context especially in the patent context [inaudible] when you looked at the actual expertise level and the knowledge level and the experience level of the PTAB judges, very few years in actual experience very few years in actual patent prosecution if any and you really had fundamental problems here and it really explained a lot about the institutional capture both in terms of the mission creep of canceling patents as well as the larger institutional capture by interested large companies.

Josh Malone, U.S. Inventor
Josh: So an Article I court is one proposal, what about making these administrative tribunals more advisory where an individual could have a de novo hearing and before a regular….

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: No no no. Yes in the wrong direction. Another layer of inconclusive determinations is not what you need.

Professor Adam Mossoff, George Mason University Scalia Law
Adam: The general prohibition against advisory opinions from Article III courts I think was a legitimate wise understanding of what the implications of that has, cause you achieve all of the bad effects undermining the certainty and understanding and real reliability of rights without actually having a determinant concrete benefit…

Jim Edwards, Eagle Forum Education Legal Defense Fund
Jim: So it looks like the number of questions and I'm trying to combine some of them into where we are this point in the discussion. My thinking is we've eliminated a lot of the goals and a lot of the problems now it seems that they boil down to both quality of the quote-unquote judges, unfairness of the procedural, the open-endedness of the process and the standards. So you're looking at a lot of things, individual qualifications, you're looking at appointments of those individuals, you're looking at rule of law being absent because of the open-endedness and even unfairness of the rules implementing various of these administrative agencies and adjudicatory panels. In many instances and this is something that the regulatory bill of rights tries to address is the administrators, the internal rule makers, regulators being able to be also in part the judge and jury in many of these agencies so how do you get to fairness and due process protections either by the appointments clause route or by the procedural overhaul right route or is it all of the above?

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: All of the above is always the safe answer.

Jim Edwards, Eagle Forum Education Legal Defense Fund
Jim: Short and sweet answer. Well, let me ask one of the several that we have. I think it gets to the qualifications piece and that is expertise of kind of looking at real judges, Article III judges, versus the administrative judges and notably in the patent context and many of the other areas that Peggy works in as well where it's a niche area. It's a very technical area of the invention in this case. How do you ensure that because the Supreme Court as we've noted screwed it up many times including in Oil States, not understanding many of the nuances and very niche points of what we're looking at you know what they're looking at in cases.

Josh Malone, U.S. Inventor
Josh: My subject matter wasn't particularly technical but I've seen other high tech subjects go through the Article III courts and they're very capable of doing this. Maybe we don't have enough judges and maybe Congress isn't -- Senate isn't confirming enough judges and magistrates and technical experts but the system is in place as Professor Epstein noted, to handle all these diverse issues and what I've seen is the judge is really good at narrowing down where the factual disputes lie. He's very good at determining what sort of discovery is appropriate and evidence is appropriate and then you can put two experts in front of the judge or when appropriate in front of the jury and if it's a two-hour question then they have two hours of debate over this very narrow issue that the case turns on and if it's a bigger issue than they have -- all the parts are there and I went through it and it was very predictable, not entirely predictable but the parties kind of know what to expect procedurally and that the outcome is going to govern and then also we used to have I think some finality associated with this so when you're on the eve of a trial and you're going for a jury, if you win a verdict your position is now highly compromised -- I mean if you lose a verdict you're now in trouble and so it really motivates people to come to the table and resolve these disputes and under this current

system you never get a leg up and so I think these courts from what I've seen are capable of handling all these issues and focusing on the ones that are central to the dispute and they were able to do that in a variety of technologies.

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: There has been a huge development in Civil Procedure about pretrial practice settlement negotiations discovery and so forth and much of the operation of the Federal Rules has been vastly improved and what you can do is you could piggyback on that in patent cases. Before the PTAB they're always entitled to start over and they can rig the rules in whatever fashion they want to have and indeed in some cases when in the olden days when [inaudible] I guess his name was in charge of this thing if it turned out there was a two to one vote against him he put two more people on the panel to get it three to two to switch. That didn't work he put himself on the panel so that he could get the right kind of outcome. You don't want people to be able to romance procedures in any of these particular cases and that's what this peculiar version of the administrative state turns out to be. You don't want people to be able to pick judges and other by rotation and so forth. You want to have a very strong tradition of independence and you can't get that within the administrative agency so I mean everything that one points to says that this is just a horrific mistake but I'm making one other point then I think Adam will -- [inaudible] there are two major issues, at least where the Supreme Court has gone completely off the rails, or one, and it's definitions of patent eligibility. It is unduly narrowed patents that are associated with medical devices and financial treatments. The guy who understood this was the guy who drafted the 52 Act that was Charles Rich and he basically had pretty strong protections for both of these things in cases done in the 1990s. The Apple ad case in state street coming to the Supreme Court today. These things are routinely invalidated and that's a terrible mistake. The second thing is the weakened-ness of the injunctive remedy so that it becomes truly discretionary instead of following fixed rules for injunctions that are used everywhere else. Justice Thomas has a very large part to play in this particular situation. He wrote Oil States and this sort of indicates what the difficulty is. You really don't have an obvious liberal and conservative support on this stuff. There's a misguided libertarian conception that all patents ought to be bad in any particular case because they limit the freedom of action so property rights and land should be invalidated because it means you can't wander over hill and dale in exactly the same fashion and so what was said [inaudible] said this is not a left right issue in some cases much more complicated and on the political dynamics and unless you get the right substantive understanding you'll never get the right legal solutions.

Peggy Little, New Civil Liberties Alliance
Peggy: Josh is right that an Article III Court District Judge most of the time can get a patent case right. It doesn't take a rocket scientist to deal with a lot of this but the Article I solution seems good to me and those judges could be chosen with some -- but also that they have some background in engineering or science major. There is a problem back when I was a baby lawyer the joke was and I think that Abe Fortas said this "A federal judge looks at a patent case the way a city boy looks at a snake," and there are some judges who are technophobes and lawyers are famously generalists not necessarily a specialist but I think an Article I court that is designed to deal with patents and would

attract people with the left-brain right-brain or whatever side of the brain that can deal with technical issues would be a perfectly good solution to deal with that particular.

Professor Adam Mossoff, George Mason University Scalia Law
Adam: I mean just to generalize it a little bit more because what Peggy said and what Josh has said is exactly right that you know people talk about oh the technology today is so complex and people can't figure this out. This is true of technology at any point in history. In the 1830s and 40s when juries were being asked to decide is Samuel Morse's patent on the electromagnetic telegraph valid where we didn't even yet have an atomic theory of matter yet I mean we didn't know what electrons were yet, what electricity was yet, what caused magnetism. You had juries who could barely read if at all and if they did read they would read only one book in their entire life and that was the Bible and now they're being asked to decide very abstruse questions about technology and science. This is before we even have this phrase science, it was called natural philosophy. I mean and this is true for the sewing machining and the lightbulb and all the other 19th century inventions and all the way up to today and what's really impressive when you read these reports and I've read the entire case record from the Samuel Morse litigation in the 1840s and 50s is that the judges did a really good job and so did juries and getting at what were the foundational fundamental issues so again this is a great insight, I think, of the US and the Anglo-American system where generally it's distinguished from the Continental approach which is we should have these expert judges and experts officials and specialized courts and specialized juries deciding cases, all top down telling people what they can or can't do as opposed to the bottom-up approach which is people creating new values creating new interests, interacting with each other in society on the basis of their knowledge of the value and to themselves and to others of the their goods and when there are disputes they take them to disinterested neutral third party arbitrators who understand the general principles of how you adjudicate disputes according to fixed rules of procedure, fixed into the rules that govern them and history is our guide. This has been the key to success of the US system and we're throwing it out right now generally with the administrative state generally and with the patents in particular.

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: Let me give another illustration. I've spent a lot of time dealing with rate regulation because it's one of the major challenges to the notion that voluntary contracts and competitive markets work. These are natural legal monopolies and you have to talk about fair reasonable rates of return that are non-discriminatory. I've read most of the cases starting around 1890 [inaudible] through the beginning of the Second World War and the level of accuracy that these judges have and the way in which they deal with these issues is if anything greater than the kind of accuracy that we have today and it stems from a mental frame of mind. If you're a 19th century judge you believe that there are right answers and there are wrong answers. You believe that you have to have a substantive inquiry, what you do is you understand that there are dangers of monopoly power even though there's a necessity to create it and you start putting restraints on. If it turns out that you're a modern 20th century judge what you do is you become a substantive skeptic saying I don't know what in the world is going on here I have to trust the experts in order to do these things and then you get exactly the kind of downward

spiral that Josh talked about and that Peggy talked about with patents and so forth. So the law becomes much more they want to do it they can get away with it. What in the world do we know. There's the following relationship the less control that a judge is willing to assert the dumber the judge becomes. If you really believe that it's your job to make the right substantive decision on the basis of law and principle then you'll educate yourself up. Otherwise what you'll do is you'll get the frame of mind and say oh two plus two equals five finally you know why not dumb it could be three maybe it's four but we don't have to figure this thing out and so it's a kind of a sloppiness that gets to be introduced. The great mistake in modern constitutional law is the utter obsession over institutional competences and trying to figure out what they are and who ought to do what and for what instead of spending your time worrying about a substance of principles and trying to get them right and we pay a terrible toll for this. The Supreme Court, virtually all of its members in one way or another are children of the administrative state and one of the things that I find so troublesome about modern legal education is it starts to begin for most people around 1990 or 1984 or whatever modern case and if you don't go back further in order to see how these things have been done unto other ages you will repeat a set of mistakes that should be avoidable, legal business and legal insight is one of the few businesses in which the depreciation of intellectual ideas -- good ones -- is amazingly slow and so if you know the Roman precedents the medieval precedents, the early continental 19th century precedents. You're not talking about a bunch of Neanderthals. You're talking about people with immense sophistication and the modern administrative law gives you exactly the opposite assassin. We'll differ on everything the more you defer the less you know the less you know the worst job you do.

Josh Malone, U.S. Inventor
Josh: So the Supreme Court seems to -- so I'm looking for solutions out of this Supreme Court or the next one so the Liberals on the court seem okay with this entire system so it doesn't need any corrections and then the Conservatives seem okay provided the president can fire these guys -- what's the next step for the Supreme Court to say they need much more constraint dramatically more constraint?

Professor Richard Epstein, NYU Law and University of Chicago
Professor Epstein: The theme of the book is if you want to do administrative law and mass securities you better know something about securities law. You want to do it about patents, you better know something about patents. You want to do it about labor law you better know about labor law. You want to know about price controls you better know about price control. The problem with modern judges is they try to do in the public law framework the regulation of industries whose content they do not understand and what they don't -- I remember I was at a conference with Adrian who's one of the defenders of this system and we were trying to talk about a case called Hauer which had to do with the question of what kinds of police officers would be or would not be subject to the overtime provisions of the Fair Labor Standards Act and the way he began his presentation was to say I don't know anything about the way the police department works and frankly I don't want to learn anything about it. Well if you begin with that attitude you know it's gonna happen. You'll know nothing about the way in which the police department works and then when somebody wants to say a commanding officer is like a

patrolman for the purposes of executive function that's fine by you and this was Justice Scalia who wrote that particular position and seven or eight years later I was done in 1997 maybe 20 years later not quite 15 years later he said who wrote that crazy decision.

Jim Edwards, Eagle Forum Education Legal Defense Fund
Jim: Well, that's a great place for us to stop. I apologize that we didn't get to all of our questions. We had great interests and many questions but I think we covered the base of most of them. I want to thank each of our panelists for joining us today and the excellent job you've done discussing and illuminating this important and timely issue and in subject. We really appreciate you Professor Epstein, Peggy Little, Adam Mossoff and Josh Malone for being our panelists today. On behalf of Eagle Forum education and Legal Defense I want to thank our audience for joining as well and I would be remiss if I did not thank those who made this possible who are specifically Ryan Hight, Joana's Pilger and Rebecca Gartner at Eagle Forum Education who are the behind-the-scenes people who helped to execute this program; so thank you all for a wonderful discussion. Thank you, have a great day.

[Ends here]