

AN UPDATE ON DEVELOPMENTS IN CENTRAL PANELS AND ALJ FINAL ORDER AUTHORITY

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I. THE STATE OF THE CENTRAL PANEL MOVEMENT

States are in the vanguard of a two-pronged revolution in administrative law. The first is the creation of central panels which separate ALJs institutionally from the agencies whose cases they hear.¹ The second is a challenge to a fundamental premise of administrative adjudication—the agency’s power to review the findings of the ALJ. Some states are providing ALJs with de jure or de facto authority to make the final agency decision, subject only to judicial review.² These developments are related only in the sense that the introduction

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1. There is a substantial body of work on central panels. Malcolm C. Rich and Wayne E. Brucer’s *The Central Panel System for Administrative Law Judges: A Survey of Seven States* is the original study of central panels. MALCOLM C. RICH & WAYNE E. BRUCAR, *THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES* (1983) (surveying California, Colorado, Florida, Massachusetts, Minnesota, New Jersey, and Tennessee). See generally Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana’s Administrative Procedure Act*, 59 LA. L. REV. 431 (1999); Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. REV. 1571, 1583-84 (2001); Thomas E. Ewing, *Oregon’s Hearing Officer Panel*, 23 NAT’L ASS’N ADMIN. L. JUDGES 57 (2003); Hon. John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419 (2001); David W. Heynderickx, *Finding Middle Ground: Oregon Experiments with a Central Hearing Panel for Contested Case Proceedings*, 36 WILLAMETTE L. REV. 219 (2000); Allen C. Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 78-90 (1994); Allen C. Hoberg, *Ten Years Later: The Progress of State Central Panels*, 21 J. NAT’L ASS’N ADMIN. L. JUDGES 235 (2001); Bruce H. Johnson, *Methods of Funding Central Panels: The Fiscal, Management, and Policy Implications*, 20 J. NAT’L ASS’N ADMIN. L. JUDGES 301 (2000); Jeff S. Masin, *New Jersey’s Office of Administrative Law: The Importance of Initial Choices*, 23 J. NAT’L ADMIN. L. JUDGES 387 (2003); Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475 (2001); William B. Swent, *South Carolina’s ALJ: Central Panel, Administrative Court, or a Little of Both?*, 48 S.C. L. REV. 1 (1996); *Recent Developments State Administrative Law Symposium*, 53 ADMIN. L. REV. 395 (2001) (several articles on central panels).

2. Some commentators have noted the trend toward restricting agency review. See Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 29 ADMIN. & REG. L. NEWS 2 (Spring 2004); Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 569-72 (2001) [hereinafter Rossi, *Overcoming Parochialism*]; Jim Rossi, *Final Orders on Appeal: Balancing Independence With Accountability*, 19 J. NAT’L ASS’N ADMIN. L. JUDGES 1, 3-10 (1999) [hereinafter Rossi, *Final Orders on Appeal*]; F. Scott McCown

of central panels has led to the issue of ALJ finality, while ALJ finality is neither inherent in, nor compelled by, the concept of centralizing ALJs in an independent agency. Central panels are an important innovation in state administrative procedure and are an effective, efficient method of providing administrative adjudication. The justifications for central panels, in terms of efficiency, cost savings, encouraging ALJ education and professionalism, and promoting a perception of fairness, however, do not address the key issue in ALJ finality: whether the agency or the ALJ is the appropriate final decision maker. My view is that the agency should be the final decision maker. The legislature has delegated this authority to the agency which has the knowledge and expertise to properly conduct agency review of ALJ decisions. In addition, I believe that ALJ finality has significant disadvantages. In particular, it creates a loss of political accountability for the decisions reached through administrative adjudication, and also adversely affects the agency's ability to develop and implement a consistent regulatory scheme.³

This is an appropriate time to review and update recent developments in central panels. Central panels have existed for almost sixty years, with eleven states adopting them since 1990.⁴ A Model Act provides framework for implementing a central panel,⁵ and there is a significant body of research and commentary on many aspects of central panels. Several broad themes can be observed.

First, central panels have proven themselves. No state that has adopted a central panel has returned to its previous practice. Furthermore, central panels in most states have gained jurisdiction through legislation or agreements with agencies. States also are taking advantage of the concept of central panels by consolidating adjudication services through executive action, rather than legislation.

Second, the experiences of individual states and their central panels provide

& Monica Leo, *When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?*, 50 BAYLOR L. REV. 65, 66-67 (1998).

3. James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355 (2002). A major study of federal administrative adjudication concluded that “[c]onferring a high degree of finality on ALJ findings of fact is virtually certain to create interdecisional inconsistency, costly and time-consuming battles for institutional hegemony, and policymaking cacophony.” Paul R. Verkuil et al., *Report for Recommendation 92-7, The Federal Administrative Judiciary*, in 2 ADMIN. CONF. OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 1040 (1992).

4. ALA. CODE § 41-22-16 (2000); ARIZ. REV. STAT. ANN. § 41-1092.08 (West 1999 & Supp. 2001); GA. CODE ANN. § 50-13-17(b) (1998); KAN. STAT. ANN. § 77-527,121 (1998 & Supp. 2001); LA. REV. STAT. ANN. § 49:991-997 (West 2001); N.D. CENT. CODE §§ 28-32-13, 28-32-14 (1991); OR. REV. STAT. § 183.470 (2001); S.C. CODE ANN. § 1-23-500 (Law. Co-op. 2003); WYO. STAT. ANN. § 9-2-2201 (Michie 2001).

5. See McNeil, *supra* note 1, at 541-49 (reprinting THE MODEL ACT CREATING A STATE CENTRAL HEARING AGENCY (1997)).

insight into many issues. For example, the Louisiana Supreme Court recently addressed the constitutionality of two statutes that significantly affect an agency litigating before its central panel.⁶ First, an ALJ has the authority to make a final decision without any agency review.⁷ Second, an agency cannot appeal any ALJ's final decision.⁸ The facts of the case, and the court's analysis of these statutes in the context of claims that they violated the doctrine of separation of powers, is important to all central panel states.

Third, the debate over ALJ finality has moved to a more sophisticated level as experience has been gained with this issue. This Article probes some of the arguments in favor of ALJ finality, including the need for ALJ independence, the claims that agencies misuse their review powers, and the need to address litigant dissatisfaction with administrative adjudication. In my opinion, neither ALJ independence nor the central panel concept requires ALJ finality. Data from an extensive study in North Carolina indicates that agency review is not being abused, nor will ALJ finality cure litigant dissatisfaction.⁹

Finally, proposals have been advanced to address some of the adverse consequences of ALJ finality. Some suggest that the agency should present its policies during the contested case to ensure that ALJs act in conformity with it.¹⁰ Professor Jim Rossi's proposal argues that enhanced standards of appellate review may restore the agency accountability that is lost when the ALJ makes the final decision.¹¹ Arguably, neither proposal overcomes the defects of ALJ final order authority. There are significant problems in formulating policy during a contested case. Likewise, there are significant limits on the judiciary's ability, on review, to guide the development of agency policy.

II. THE GROWING ACCEPTANCE OF CENTRAL PANELS

The growth of central panels has been described as the most significant development in administrative law,¹² and the number of panels created by cities and states in the past few years is a tribute to their success. Twenty-five states,¹³

6. *Wooley v. State Farm Fire & Cas. Ins. Co.*, 893 So. 2d 746, (La. 2005). See *infra* notes 62-86 and accompanying text.

7. LA. REV. STAT. ANN. § 49:992(A)(2).

8. *Id.* § 49:992(B)(3).

9. Daye, *supra* note 1.

10. The view that agencies can present policy during a contested case was raised during a panel discussion on ALJ finality at the 2003 Central Panel Directors Conference, Savannah, Georgia, September 19, 2003, in which the author participated. See also Hardwicke, *supra* note 1, at 437 (suggesting that policy be blended into the hearing process).

11. Jim Rossi, *Final, But Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53, 64-66 (2004) [hereinafter Rossi, *Problems with ALJ Finally*].

12. Michael Asimow, *The Fourth Reform: Introduction to the Administrative Law Review Symposium on State Administrative Law*, 53 ADMIN. L. REV. 395, 396-99 (2001).

13. Several states have central panels of ALJs as of January 1, 2002. See, e.g., ARIZ. REV. STAT. ANN. § 41-1092.01 (West 1999) (establishing an office of administrative hearings); CAL.

and three major cities,¹⁴ have established central panels thus far. Several other states have considered, but not yet adopted, central panels.¹⁵ Once established, they have proven popular. No state with a central panel has returned to its former

GOV'T CODE § 11370.2 (West 1992) (stating that office of administrative hearings is under direction of one director appointed by governor); COLO. REV. STAT. § 24-30-1001 (2001) (creating a division of administrative hearings in department of personnel); FLA. STAT. ANN. § 120.65 (West 2002) (creating Division of Administrative Hearings within Department of Management); GA. CODE ANN. § 50-13-40 (1998) (creating an independent administrative hearings agency within the executive branch); IOWA CODE ANN. § 10A.801 (West 2000) (creating Division of Administrative Hearings); KAN. STAT. ANN. § 75-37,121 (1997 & Supp. 2001) (creating office of administrative hearings); LA. REV. STAT. ANN. § 49:991-997 (West 2002) (creating division of administrative law); MD. CODE ANN., STATE GOV'T § 9-1602 (1999) (establishing office of administrative hearings as independent unit of executive branch); MASS. GEN. LAWS ch. 7, § 4H (1998) (creating a division of administrative appeals); MICH. COMP. LAWS § 445.2001 (2001) (merging Michigan Departments of Commerce and Labor to create Department of Consumer and Industry Services, and creating a central panel of ALJs by executive order); MINN. STAT. ANN. § 14.48 (West 1997) (creating administrative hearings office headed by chief ALJ appointed by governor); MO. ANN. STAT. §§ 621.015-.205 (West 2000) (creating an administrative hearing commission); N.J. STAT. ANN. §§ 52:14F-1-.14F-13 (West 2001) (establishing Office of Administrative Law and its duties); N.C. GEN. STAT. § 7A-750 (2001) (creating an independent, quasi-judicial office of administrative hearings); N.D. CENT. CODE § 54-57-01 (2001) (establishing and defining office of administrative hearings); OR. REV. STAT. § 183.605 (2003) (establishing hearing officer panel); S.C. CODE ANN. § 1-23-500 (Law. Co-op. Supp. 2001) (creating ALJ division); S.D. CODIFIED LAWS § 1-26D-1 (Michie Supp. 2002) (establishing an Office of Hearing Examiners); TENN. CODE ANN. § 4-5-321(a)(2) (1998) (creating the administrative procedures division); TEX. GOV'T CODE ANN. § 2003.021 (Vernon 2000 & Supp. 2002) (defining state office of administrative hearings); VA. CODE ANN. § 2.2-4024 (Michie 2001 & Supp. 2002) (establishing that Executive Secretary of Supreme Court maintains list of hearing officers to be appointed for formal hearings); WASH. REV. CODE ANN. § 34.12.010 (West 1990) (creating an office of administrative hearings); WIS. STAT. ANN. § 227.43 (West 2001) (providing duties of administrator of division of hearings); WYO. STAT. ANN. § 9-2-2201 (Michie 1995) (creating office of administrative hearings as a separate agency); State of Alabama, Office of the Attorney General, *An Overview of Divisions in the Attorney General's Office*, at http://www.ago.state.al.us/about_divisions.cfm (last visited Mar. 18, 2005) (describing Administrative Hearings Division in Alabama Attorney General's Office).

14. *E.g.*, D.C. CODE ANN. § 2-1831 (2001 & Supp. 2002) (enacting Office of Administrative Hearings Establishment Act); CHICAGO, ILL., CODE art. I, § 2-14-010 (2003) (establishing Department of Administrative Hearings); NEW YORK CITY, N.Y., CHARTER CODE ch. 45-A, § 1048 (2001) (creating Office of Administrative Trials and Hearings).

15. The legislatures of Hawaii, Illinois, Mississippi, and New York have considered a central panel but have not enacted legislation. *See* S.B. No. 1252, 20th Leg. (Hi. 1999); S.B. No. 561, 92d Gen. Assem. (Ill. 2001); H.B. No. 930, Reg. Sess., (Miss. 2000); Assem. B. No. 662, 224th Legis. Sess. (N.Y. 2001). The Program on Law and State Government at the Indiana University School of Law—Indianapolis recently sponsored a symposium exploring the desirability of central panels for Indiana. *See* Cynthia A. Baker, *Introduction: Evaluating State Government Designs of Executive Branch Adjudication*, 38 IND. L. REV. 385 (2005).

practice of decentralizing ALJs.

Most recently, Oregon created a pilot program for centralizing administrative hearings in a central panel.¹⁶ The panel began operating on January 1, 2000, subject to a sunset provision in June 2005.¹⁷ The panel's operations were reviewed by the Joint Legislative Audit Committee in 2002. The Committee's Report recognized that the relatively brief period of operation made evaluating the panel's effectiveness difficult. The Committee did note, however, that the appearance of fairness had been improved, agencies indicated that their staffs were better prepared for hearings, and some agencies found that the panel had exceeded their expectations.¹⁸ Acting on this favorable report, the legislature eliminated the sunset provision, renamed the panel the Office of Administrative Hearings, changed the adjudicator's title to Administrative Law Judge, and provided a four-year term of office for the chief administrative law judge who can be removed only for conduct rendering him unfit for the office.¹⁹ Oregon's Chief Administrative Law Judge, Thomas E. Ewing, has further documented the cost efficiencies that are generated by a central panel. He found that centralization enables a panel to handle more work than agencies with in-house ALJs. Agencies with few ALJs are inherently inefficient and costly because the staff is fixed while caseloads vary, creating wide fluctuations in the docket so that ALJs are alternately overburdened or underutilized.²⁰

Another indication of the success of central panels has been the gradual accretion of jurisdiction in many states. Legislatures have added issues and agencies to the panels' dockets,²¹ and other branches have become involved as well. In South Carolina, the state supreme court held that its central panel could hear appeals from the final decisions of the Department of Corrections in inmate grievance matters.²² Most importantly, agencies have negotiated with the panels

16. Heynderickx, *supra* note 1, at 239-40 (discussing the creation of the central panel); Ewing, *supra* note 1, at 57 (discussing the implementation of Oregon's central panel).

17. The original sunset date of January 1, 2004, was extended to June 30, 2004, to avoid requiring affected agencies to prepare two budgets, depending upon whether the panel was reauthorized or not. STATE OF OREGON JOINT LEGISLATIVE AUDIT COMMITTEE, REVIEW OF THE HEARING OFFICER PANEL, Report No. 02-4, at 1 (Dec. 2002). Chief ALJ Ewing commented on the Legislative Audit Committee Report in Thomas E. Ewing, *Oregon's Office of Administration Hearings, A Postscript*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 21 (2004).

18. STATE OF OREGON JOINT LEGISLATIVE AUDIT COMMITTEE, *supra* note 17, at 6.

19. H.B. 2526, 72d Leg. (Or. 2003) (signed by the Governor on May 22, 2003).

20. Ewing, *supra* note 1, at 87-89.

21. Texas, for example, originally heard only cases from agencies without ALJs, but the legislature gradually added other agencies, including the authority to arbitrate some health matters. TEXAS STATE OFFICE OF ADMIN. HEARINGS, AGENCY STRATEGIC PLAN FOR THE FISCAL YEARS 2005-2009 PERIOD, at 6 and Appendix H (June 18, 2004), available at http://soah.state.tx.us/AboutUs/strategic_plan_2005_to_2009.pdf. See also Sheila Bailey Taylor, *The Growth and Development of a Centralized Administrative Hearing Process in Texas*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 113 (1997).

22. *Al-Shabazz v. State*, 527 S.E.2d 742, 754 (S.C. 2000). See also *Slezak v. S.C. Dep't of*

to conduct contested case hearings.²³ This growth of panel jurisdiction reflects the willingness of agencies, ALJs, and executives to work within the central panel model.

Finally, state officials are gaining the benefits of centralizing ALJs without having to statutorily create a central panel. Michigan, for example, created its central panel by Executive Order.²⁴ The Attorney General of Alabama created the Administrative Hearings Division within his office to provide senior lawyers, experienced in administrative law, to serve as voluntary ALJs upon the request of the agencies.²⁵ The Governor of Indiana consolidated three administrative adjudicative agencies in the same location to provide interaction between ALJs as well as some cost savings.²⁶ Kentucky has created a central panel of ALJs in the Office of the Attorney General.²⁷ In Virginia, the Administrative Law Advisory Committee of the Code Commission is studying a proposal for a central panel to replace the state's existing system of independent hearing officers supervised by the Executive Secretary of the Supreme Court.²⁸ These events indicate that central panels are very successful, are perceived to be so by state officials, and that the concept is likely to be adopted by legislation or other appropriate methods in the future.

III. AN UPDATE ON ALJ FINALITY

Over the past ten years some states have granted central panel ALJs the authority to enter final orders that are not subject to agency review. Louisiana

Corr., 605 S.E.2d 506, 507 (S.C. 2004) (recognizing that ALJ Division has subject matter jurisdiction of all properly perfected inmate appeals); *Wicker v. S.C. Dep't of Corr.*, 602 S.E.2d 56, 58 (S.C. 2004) (recognizing ALJ Division jurisdiction over certain inmate claims of deprivation of property interest); *Sullivan v. S.C. Dep't of Corr.*, 586 S.E.2d 124, 128 n.5 (S.C. 2003) (recognizing ALJ Division jurisdiction over state-created liberty interests beyond sentencing credits and disciplinary issues).

23. Hoberg, *supra* note 1, at 238-39. Wyoming's central panel now conducts hearings for the Department of Family Services by agreement. E-mail from Lynne Kranz, Office Manager, Office of Administrative Hearings, to author (Nov. 10, 2003, 15:51:48 MT) (on file with author).

24. MICH. COMP. LAWS § 445.2001 (2001) (merging Michigan Departments of Commerce and Labor to create Department of Consumer and Industries Services, and creating a central panel by executive order).

25. State of Alabama, Office of the Attorney General, *An Overview of Divisions in the Attorney General's Office*, at http://www.ago.state.al.us/about_divisions.cfm (last visited Mar. 18, 2005) (describing Administrative Hearings Division in Alabama Attorney General's Office).

26. E-mail from Jon Laramore, Counsel to Indiana Governor Joseph Kernan to author (July 12, 2004) (on file with author).

27. KY. REV. STAT. ANN. § 15.111 (Banks-Baldwin 2004); *id.* § 13B.010. This has been viewed as a proto-central panel. Richard H. Underwood, *Administrative Adjudication in Kentucky: Ethics and Unauthorized Practice Considerations*, 29 N. KY. L. REV. 359, 362 (2002).

28. James R. Kibler, Jr., *Administrative Law, Annual Survey of Virginia Law*, 38 U. RICH. L. REV. 39, 40 (2003).

and South Carolina have adopted ALJ finality by statute,²⁹ and North Carolina and Oregon have adopted procedures which retain agency review but make it difficult for agencies to alter or amend ALJ decisions.³⁰ As discussed below, South Carolina is considering extending ALJ finality to the four agencies that review ALJ decisions so that all contested cases within the central panel's jurisdiction will have final orders entered by the ALJ.

In addition, agencies in some states have agreed to permit the panel ALJ to make the final agency decision without agency review. These agency decisions seem to be driven by external considerations. For example, in Tennessee, the Department of Health accepted a settlement agreement providing that if a Medicaid enrollee prevails at any stage in the appeals process, including before the state ALJ, the decision is binding on the state and its Medicaid contractors.³¹ This provision was part of a comprehensive settlement agreement to end litigation against the department.

In Washington state, the Department of Social and Health Services decided to accept the ALJ's decision in certain benefit cases as final and not subject to appeal to the agency's Board of Appeals. The agency, however, retains appellate jurisdiction of ALJ decisions involving licensing matters. Benefit eligibility cases are fact driven and have relatively clear standards.³² Health care licensing decisions are not only more important to the agency mission, but create more complex matters, making it more important, at least from the agency's perspective, to ensure the correct result. The agency's decision to forgo appeals in certain cases was the result of budgetary pressures that reduced the number of judges in the agency's Board of Appeals and forced it to reserve its manpower for more important and complex administrative decisions.³³

29. LA. REV. STAT. ANN. § 49:992(B)(2) (West Supp. 2002) (stating that agency does not have power to override final ALJ decision); S.C. CODE ANN. § 1-23-610(A), (B) (Law. Co-op. Supp. 2003) (providing for limited agency review only for agencies with boards or commissions, but not agencies with a single director). The statutes are discussed in Flanagan, *supra* note 3, at 1373-75.

30. N.C. STAT. § 150B-36(b) (2001) (providing that the agency must accept the ALJ's findings of fact unless clearly contrary to the preponderance of evidence); 1999 OR. LAWS ch. 849 § 12(3) (codified at OR. REV. STAT. § 183.650 (2003)) (providing that agency may change ALJ's finding of fact only if not supported by a preponderance of the evidence). The statutes are discussed in Flanagan, *supra* note 3, at 1377-81.

31. Order at 23, *Grier v. Wadley*, Comm'r Tenn. Dep't of Health, Civ. Action No. 79-3107 (M.D. Tenn. July 31, 2000).

32. See Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLAL. REV. 1067, 1109 (1992) (suggesting that agencies should accept ALJ decisions as final when cases are fact driven and do not involve matters of policy).

33. Telephone Interview with Brian Lingren, Manager, Washington Department of Social and Health Services Board of Appeals (Oct. 16, 2003).

A. *South Carolina's Expansion of ALJ Finality*

The only pending effort to adopt full ALJ finality is in South Carolina. The central panel in that state has been renamed the South Carolina Administrative Law Court, and it is now a court of record within the state's executive branch.³⁴ Presently, more than seventy-five percent of the panel's contested case docket results in a final decision by an ALJ.³⁵ The remaining contested cases are from four administrative agencies that, after a hearing before the Administrative Law Court, may be appealed to the agency under the restricted standard of review applied by the courts on appellate review.³⁶ Legislation was introduced in the South Carolina House of Representatives that would expand ALJ finality to all contested cases within the jurisdiction of the central panel. Although the bill died at the end of 2003-04 session, it is expected to be reintroduced in the 2005 session. In addition to the expansion of ALJ final order authority, the Administrative Law Court has appellate jurisdiction over the final decisions of some professional and occupational licensing boards.³⁷ The legislation would expand this appellate jurisdiction so that most administrative decisions by boards or commissions initially would be appealed to the Administrative Law Court before judicial review. Finally, judicial review of administrative decisions would be in the court of appeals rather than in the circuit court.³⁸

The decision to establish ALJ finality in all contested cases heard by the Administrative Law Court reflects the inevitable consequences of the limited agency review standard adopted in the original ALJ statute.³⁹ As originally

34. 2004 S.C. ACTS 202 (Apr. 26, 2004).

35. *See generally* S.C. ADMIN. LAW JUDGE DIV., ANNUAL REPORT 1999-2000, at 19-20 (May 22, 2001). The major agencies outside the jurisdiction of the Administrative Law Court are the Workers' Compensation Commission, as well as Public Service Commission, and the Employment Security Commission and most professional licensing boards, which hear cases as a body .

36. *See* S.C. CODE ANN. § 1-23-610(A),(D) (Law. Co-op. Supp. 2003) (stating relevant standard of review). The Department of Health and Environmental Control, which includes separate boards for the Coastal Zone Management Appellate Panel and the Mining Council, and the Department of Natural Resources are governed by boards. The South Carolina Supreme Court recently held that the standard of review applied by these agency boards was limited only to questions of law. *Brown v. S.C. Dep't of Health & Env'tl. Control*, 560 S.E.2d 410, 418 (S.C. 2002).

37. Professional and occupational licensing boards within the Department of Labor, Licensing and Regulation hear cases as a body. Final decisions are appealed to the Administrative Law Court, which applies the same standard to board decisions as courts apply when reviewing administrative decisions. *See* S.C. CODE ANN. § 1-23-600(D).

38. H.B. 4792, 115th Gen. Assem. (S.C. 2004).

39. There is no published information explaining why the legislature adopted ALJ finality for most agencies when South Carolina's central panel was established in 1994. The panel was part of a major restructuring of state government in 1994. Individuals involved in drafting the provision recalled that ALJ finality was an original provision in the bill. Prior to that time, the only full time administrative adjudicators were in the Workers Compensation Commission, the Employment

enacted, agencies applied the standard of review used by the courts and could alter the ALJ's decision only for violations of the constitution or statutes, if the order was in excess of statutory authority, made upon unlawful procedure, affected by an error of law, or clearly erroneous, or arbitrary and capricious.⁴⁰ The judicial standard of review was, however, inappropriate for agency review of ALJ decisions. Courts have a limited review standard because of the deference to agency expertise, and because of separation of powers concerns arising from the judiciary's review of executive action.⁴¹ These rationales for limiting judicial review do not apply to the agencies that themselves have expertise in the subject matter and are part of the executive branch.

The judicial review standard is also inconsistent with the agencies' statutory role of developing policy in a substantive area, as it inhibits the agency from exercising its expertise and policy functions. Under the standard, the agency may consider only questions of law.⁴² Any attempt to enforce agency policy requires an appeal to the judiciary or a remand to the ALJ.⁴³ Moreover, findings of fact by the ALJ are subject to the substantial evidence test and therefore cannot be altered unless there is no evidence in the record to support them even if reasonable individuals, including agency officials statutorily charged with the duty to enforce a statute, find other conclusions more persuasive.⁴⁴ This standard

Security Commission, and the Public Service Commission. In all other cases, the agency or board heard the case itself, or retained a private lawyer to conduct the hearing and make the report. The use of private lawyers as hearing officers was often criticized as expensive and prone to delay, and there were concerns about the selection of hearing officers and alternately, whether agencies would accept their findings. The defects of the prior system supported the creation of a panel, but not necessarily ALJ finality. Bybee, *supra* note 1, at 455 (stating that the concept of a central panel does not require ALJ finality).

40. Compare S.C. CODE ANN. § 1-23-610 (quasi-judicial and judicial review of administrative law judge), with S.C. CODE ANN. § 1-23-380 (judicial review upon exhaustion of administrative remedies).

41. See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (stating that the judiciary must defer to the statutory construction of Congress, or agencies delegated authority by Congress); *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619-21 (1966) (stating that the substantial evidence standard of review shows proper respect for agency expertise); *Guerard v. Whitner*, 280 S.E.2d 539, 540 (S.C. 1981) (declaring that separation of powers and expertise of agency justify limited judicial review).

42. The judicial standard of review has been criticized as depriving the agencies of any policy role and for limiting them to purely legal decisions. See Benjamin T. Zeigler, *The South Carolina Administrative Law Judge Division and the Limits of Central Panel Decision-Making Power* 48 (1997) (unpublished J.D. writing requirement, Harvard Law School) (copy on file with author).

43. *Dorman v. S.C. Dep't Health & Envtl. Control*, 565 S.E.2d 119 (S.C. Ct. App. 2002).

44. See *Reg'l Med. Ctr. of Orangeburg and Calhoun Counties v. S.C. Dep't Health & Envtl. Control*, Civ. Action No. 99-CP-40-0664, at 8 (S.C. Ct. of Common Pleas, Richland County Nov. 4, 1999) (stating that the agency must accept ALJ findings of fact, although reasonable persons could draw other inferences from the evidence); *Heifetz v. Dep't of Bus. Regulation Div. of Alcoholic Bev. & Tobacco*, 475 So. 2d 1277, 1281-82 (Fla. Dist. Ct. App. 1985) (stating that an

also prohibits the agency from reconsidering any important factual findings even when they were strongly controverted at the hearing or involved mixed questions of law and fact. Finally, the ALJ statute was construed to eliminate any agency fact-finding even when the ALJ had not made any findings on the issue. Rather, the agency was required to remand the case to the ALJ for fact-finding.⁴⁵

This form of de facto ALJ finality did not work.⁴⁶ As might be expected, a citizen board governing the agency had problems applying the limited standard of review for errors of law, and there was substantial litigation over the scope of the agency's authority.⁴⁷ The procedural tools available to the agency on review were limited and included only a reversal and remand for failure to find a fact, for an error of law, or for failure to enforce established agency policy.⁴⁸ Administrative adjudication was effectively turned on its head. The agency, knowledgeable and responsible in making policy, was forbidden to do so through adjudication. In its place, the ALJ, an expert in procedure and evidence, became the final word. This structure also made cases more complex and lengthy, often requiring multiple appearances before at least four tribunals, the ALJ, the reviewing agency, the circuit court acting in its appellate capacity, and the court of appeals or supreme court.⁴⁹ Remands to the ALJ for additional fact-finding or consideration of agency policy were particularly burdensome. In light of this experience, the elimination of the extremely limited, duplicative, and largely ineffective agency review recognizes that the original statute all but adopted de facto ALJ finality. The proposed changes make ALJ finality explicit, and the provisions authorizing direct appeal to the court of appeals or supreme court should significantly streamline the process by eliminating two levels of review.

IV. THE CHALLENGE TO THE LOUISIANA CENTRAL PANEL

There are no significant challenges to the concept of central panels. The Louisiana Supreme Court, however, recently faced and resolved some difficult questions generated by two provisions in Louisiana's central panel statute. Louisiana has ALJ finality and the agency does not review the ALJ's decision,⁵⁰ as do agencies in a few other states.⁵¹ Louisiana also has a unique provision that

administrative agency cannot reject the ALJ's ultimate finding of fact unless there is no substantive evidence from which the finding could reasonably be inferred).

45. *Brown v. S.C. Dep't of Health & Env'tl. Control*, 560 S.E.2d 410, 418 (S.C. 2002).

46. See James F. Flanagan, *Report to the Judicial Council on the Administrative Law Judge Statute*, 18 NAT'L ASS'N ADMIN. L. JUDGES 371, 378-86 (1998) (addressing preliminary review of the operation of the South Carolina ALJ statute).

47. See generally *Brown*, 560 S.E.2d at 410-18; *Marlboro Park Hosp. v. S.C. Dep't of Health & Env'tl. Control*, 595 S.E.2d 851 (S.C. Ct. App. 2004); *Dorman*, 565 S.E.2d at 119.

48. See *Dorman*, 565 S.E.2d at 119.

49. The courts have commented on the multiplicity of procedural steps. See *Brown*, 560 S.E.2d at 413; *Dorman*, 565 S.E.2d at 122.

50. LA. REV. STAT. ANN. § 49.992(B)(2) (West 2004).

51. See Flanagan, *supra* note 3, at 1373-82.

bars an administrative agency from appealing any ALJ decision adverse to the agency.⁵² The agency is limited to advocacy before the ALJ, without any appellate role, regardless of the consequences of a particular decision or the significance of the issue on appeal.

An insurer's attempt to win approval of a new form provided the vehicle for Louisiana's Commissioner of Insurance to challenge the constitutionality of both provisions. The Commissioner refused to approve the proposed form because he found that the representations and warranties did not comply with the applicable provisions of the Insurance Code.⁵³ The insurer appealed the denial to the state's central panel, the Division of Administrative Law.⁵⁴ After a hearing, the ALJ ruled that the Commissioner erred in denying approval of the form "as a matter of law" and ordered approval by the Commissioner.⁵⁵ The Commissioner appealed that decision to the state district court, but the appeal was dismissed because of a statute barring agencies from appealing final ALJ decisions. The court of appeals upheld the dismissal, finding that the Department, as a juridical person, did not have any greater rights than granted it by the legislature.⁵⁶ The court of appeals also upheld the trial court's refusal to permit the Department to amend its petition to challenge the constitutionality of the statute, but suggested that the Commissioner had a judicial remedy through a declaratory judgment

52. When Louisiana created its central panel in 1996, the definition of "person" in its Administrative Procedure Act did not include an agency, so an agency was not within the class of aggrieved persons who could appeal a final decision. The right to appeal was unnecessary when the agency reviewed the ALJ's decision and made the final agency decision, but the right to appeal became more significant when the ALJ made the final agency decision. *See* Bybee, *supra* note 1, at 458. In 1996, the legislature explicitly denied agencies the authority to appeal to the courts. LA. REV. STAT. ANN. § 49.992(B)(3).

53. Commissioner's Petition for Preliminary and Permanent Injunctions and Petition for Declaratory Judgment at 2, *Wooley v. State Farm Fire & Ins. Co.*, No. 50,2311 (La. Dist. Ct., Parish of E. Baton Rouge n.d.), available at <http://biotech.law.lsu.edu/la/briefs/LL03.pdf> [hereinafter La. Injunction Petition].

54. LA. REV. STAT. ANN. § 22.1351(2) of the Insurance Code provides for a hearing, "upon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the commissioner of insurance to act." Prior to the creation of the central panel the matter would have been heard in the agency. However, LA. REV. STAT. ANN. § 49.992 now gives the Division of Administrative Law exclusive authority to conduct such hearings. There is some dispute over whether this issue should have been subject to a hearing. For example, Professor Paul R. Baier, amicus curiae at the request of the court, maintained that the suitability of the form should not have been subject to adjudication by the ALJ when there is no statutory requirement for a "trial-type adjudication of the legal dispute between the Department and State Farm . . . [because] La. R.S. 22:1351(2) does not contemplate remitting the questions of law and policy involved in the underlying dispute to the Division of Administrative Law and its ALJs." Post Trial Brief of Amicus Curiae LSU Professor of Law Paul R. Baier at 2, *Wooley*, No. 50,2311, available at <http://biotech.law.lsu.edu/la/briefs/AMICUS-BAIER.pdf> [hereinafter Baier Amicus].

55. La. Injunction Petition, *supra* note 53, at 3.

56. *Brown v. State Farm Fire & Cas. Co.*, 804 So. 2d 41, 44-46 (La. Ct. App. 2001).

action, which soon after followed.⁵⁷

The legal positions of each party are easily sketched. The Commissioner argued that denying the agency the right to appeal unconstitutionally violated separation of powers because the statute vests judicial power in the executive branch, thus divesting the judicial branch of its inherent power to decide questions of law.⁵⁸ The Division of Administrative Law argued that it was not exercising judicial power, and that the legislature has plenary power to define the authority of state agencies unless specifically prohibited by the state constitution. The Division further argued that the Department, as a juridical body rather than an individual, has only the authority granted to it by the legislature, which has specifically denied agencies the right to appeal.⁵⁹

The Commissioner also argued that the Department of Administrative Law violates provisions in the state constitution by creating a court of non-elected judges exercising judicial power, which is not constitutionally authorized. While the action was pending, a constitutional amendment was proposed that provided explicit constitutional authority for the central panel and the limitation on agency appeals.⁶⁰ The proposed amendment was defeated on October 4, 2003. The trial court ruled in favor of the Commissioner on November 13, 2004, and declared that Acts 739 and 1332 were unconstitutional and violated the separation of powers.⁶¹ The matter was appealed directly to the Louisiana Supreme Court which reversed the trial court.⁶²

The supreme court first reviewed the history of the office of the Commissioner of Insurance. The 1921 constitution authorized its creation but it was not established by the legislature until 1956. A subsequent constitutional amendment made the commissioner an elected officer of the executive branch in 1960.⁶³ The Constitutional Convention of 1973 maintained it as an elected constitutional office, but the delegates were strongly divided on whether its

57. *Id.* at 46-47.

58. La. Injunction Petition, *supra* note 53, at 6.

59. Post-Trial Memorandum of the Division of Administrative Law at 9-12, *Wooley v. State Farm Fire & Cas. Ins. Co.*, No. 50,2311 (La. Dist. Ct., Parish of E. Baton Rouge n.d.), available at <http://biotech.law.lsu.edu/la/briefs/LL67.pdf> [hereinafter Post-Trial Memo]; see also Brief of Amicus Curiae on Behalf of the Louisiana House of Representatives at 3, *Wooley*, No. 50,2311, available at <http://biotech.law.lsu.edu/la/briefs/LL18.pdf>.

60. Act No. 1298-2003 provided for a constitutional amendment to add Art. XII Section 15 to create authority for the legislature to provide for a system of administrative law and the qualifications, authority, and appointment of administrative law judges. In addition, the constitutional amendment sought specific authority to control agency appeals. Section 15(c) provided: "The legislature may provide by law for access to courts by a governmental agency or public official seeking judicial review of an administrative agency determination." House Act No. 1298 (La. 2003).

61. Act 739 created the Division of Administrative Law in 1995, Act 1332 deprived agencies the right to appeal.

62. *Wooley v. State Farm Fire & Cas. Ins. Co.*, 893 So.2d 746, (La. 2005).

63. *Id.* at 758.

duties should be defined in the constitution or by statute. They rejected proposals that would have given the commissioner specific powers and duties. Ultimately, the constitution did not specify the powers of the office which were left to be established by the legislature.⁶⁴ The primacy of the legislature in defining the powers of the office was a significant factor in the court's rationale.

The court then addressed the constitutionality of Act 739 of 1995 which created the Division of Administrative Law. The Commissioner argued that Act 739 vested judicial power in the Division and violated several constitutional provisions.⁶⁵ The supreme court, however, found that the adjudicative and fact-finding powers exercised by the Division were quasi-judicial, rather than judicial powers.⁶⁶ Therefore, the Act did not vest judicial power in the executive branch, or create a non-elected judiciary. The court also found that the Act did not divest the district court of its original jurisdiction authorized by article V, section 16(A) of the Louisiana Constitution.⁶⁷ The approval of insurance forms was not a matter traditionally litigated in the original jurisdiction of that court so their adjudication by the Division did not affect the trial court's jurisdiction.⁶⁸ The Commissioner's claim that the creation of the Division, with final order authority, unconstitutionally usurped his authority to regulate insurance was also rejected. The court inferred that the Commissioner's lack of constitutionally specified powers and duties meant that defining the scope of the office was the legislature's prerogative. The court recognized that eliminating agency review was a significant change but concluded that the legislature clearly had the authority to subordinate the Commissioner's decisions to that of the ALJs.⁶⁹

The court then addressed the constitutionality of Act 1332 of 1999 which specifically deprived agencies of the authority to appeal any ALJ decision. The court found that the constitution protected persons, but not state agencies from the laws passed by the legislature. Consequently, a state agency has no due process rights, and no right of access to the courts. Lacking a constitutional right to appeal, the agency must depend upon statutory authority, which clearly does

64. *Id.* at 759-61. The provision ultimately adopted provided: "Commissioner of Insurance: Powers and Duties. There shall be a Department of Insurance, headed by the commissioner of insurance. The department shall exercise such functions and the commissioner shall have such powers and perform duties authorized by this constitution or provided by laws." *Id.* at 761. The only duties prescribed by the constitution authorize the commissioner to dissolve or otherwise terminate a private, nonprofit corporation established to deliver workers compensation insurance. *Id.* at 767.

65. The Commissioner asserted that the Act vested judicial power in executive branch employees, provided for non-elected judges in the executive branch and divested the judicial branch of its power to decide certain questions of law, as well as violating the doctrine of separation of powers. *Id.* at 762.

66. *Id.* at 763.

67. *Id.* at 764.

68. *Id.*

69. *Id.* at 767.

not exist in this case, and the court was unwilling to infer such authority.⁷⁰ The court concluded by noting that the Commissioner did have a judicial remedy. While he could not appeal the final decision of an ALJ, he could file a declaratory judgment action in district court seeking a determination of whether the ALJ's decision was decided properly. The district court would not have to defer to the decision of the ALJ and would be free to decide the issue according to the substantive law. Thus, the Commissioner had a procedure for establishing that the ALJ's decision was not a correct statement of the law, although the declaratory judgment was not likely to change the result of the particular case.⁷¹

The *Wooley* opinion is correct on several issues. The creation of the Administrative Law Division is presumptively constitutional and ALJs do exercise quasi-judicial, rather than judicial power. That administrative adjudication can be split between the agency and a central panel without violating separation of powers is also acceptable.⁷² Certainly this method has been used in some federal agencies without controversy.⁷³ How the issue will be resolved by other states is dependent upon each jurisdiction's view of the doctrine, which can be significantly different from the federal view.⁷⁴ Although the issue is controversial and complex, especially when ALJ finality is involved, the opinion is persuasive that a legislature may allocate administrative adjudication between different entities within the executive branch without offending the separation of powers doctrine.⁷⁵

70. *Id.* at 767-70.

71. *Id.* at 770.

72. Several commentators have raised the separation of powers issue in the context of ALJ finality. *See* Rossi, *Final Orders on Appeal*, *supra* note 2, at 10-12; Bybee, *supra* note 1, at 462-63 (commenting on the Louisiana statute); *see also* McNeil, *supra* note 1, at 501-06 (discussing administrative adjudication that interferes with the prerogatives of the judicial branch). The separation of powers issue was one consideration in the enactment of the North Carolina statute that led to authorizing the courts to resolve factual disputes between the ALJ and agencies. Mary Shuping, N.C. Gen. Assem. Research Div., *Contested Cases Under Article 3 of the APA: Background Information & Opinions on the Constitutionality of OAH Final Decision-Making Authority*, Presented to the Joint Legislative Administrative Procedure Oversight Committee 11-50 (Feb. 17, 2000) (copy on file with the author). Two memoranda by officials in the Office of the Attorney General argued that ALJ finality violated the separation of powers doctrine while a memorandum by committee counsel argued to the contrary.

73. *See infra* note 121 and accompanying text.

74. For example, in South Carolina, the State Budget and Control Board has broad authority over state employment, procurement, and fiscal matters, and is governed by a board composed of the Governor, State Treasurer, State Comptroller General, Chair of the Senate Finance Committee, and the Chair of the House Ways and Means Committee. The South Carolina Supreme Court has found that the legislative participation is not a violation of the state doctrine of separation of powers. *State ex rel. McLeod v. Edwards*, 236 S.E.2d 406 (S.C. 1977).

75. Rossi, *Problems with ALJ Finality*, *supra* note 11, at 63-66. The question is made more complex because the executive branch does not have appointment power over ALJs, rendering them independent of direct executive influence.

The court's handling of the issue of judicial review however, is unconvincing, and a close reading of the opinion suggests that many issues remain to be finally resolved. Three aspects of the opinion merit comment. First, the opinion may be very narrow. The court carefully notes throughout the opinion that the issue involves the approval of an insurance form.⁷⁶ The constitutional and statutory history of the Office of the Commissioner of Insurance also played a key role in the court's analysis.⁷⁷ An opinion analyzing the approval of insurance forms, in the context of the commissioner's lack of constitutional authority and clear subordination to the legislature for a definition of his duties, suggests that different facts might lead to different results.

More significantly, the opinion directly addresses the separation of powers issue only from its effect on the Commissioner, and its effect on the original jurisdiction of the trial court. The court only obliquely faces the Commissioner's argument that the statutes combine to deprive the judiciary of *its* right to decide certain questions of law.⁷⁸ A substantial and important class of cases cannot be reviewed because one party is deprived of the ability to appeal the ALJ's decision. On this critical point the court states: "We discern no violation of the requirement of separation of powers. Instead of viewing the Commissioner's lack of a right to appeal the ALJ's adverse decision as a usurpation of judicial power, we view it as a lack of procedural capacity on the part of the Commissioner."⁷⁹ The court implicitly recognizes that it is deprived of jurisdiction of a class of cases but chooses to attribute the loss to a technical issue of capacity, thereby avoiding the important issue of the statutes' impact on its power. This also explains the court's discussion of declaratory judgment as a way for the Commissioner to seek a judicial determination of the legal correctness of the ALJ's decision. Declaratory judgment arguably provides a procedural way for the court to hear these legal question, although it is one with significant limitations. As the court notes, any declaratory judgment is not likely to affect the underlying result.⁸⁰ If the rights of the parties are fixed, nothing hinges on the outcome of the declaratory judgment. The only dispute is between the Commissioner and the ALJ on a question of law, and this may be viewed as only an advisory opinion.⁸¹ As Chief Justice John Marshall said, "[i]t is emphatically the province and duty of the judicial department to say what the law

76. *Wooley*, 893 So.2d at 763, 765.

77. *Id.* at 758-61, 766-67, 769-70.

78. *Id.* at 764-65. The court is aware of the larger issue because it notes that the trial court declared Act 739 unconstitutional because it divests "the judicial branch of its inherent power to decide matters involving questions of law." *Id.* at 762. Later it notes that Act 1332 "precludes judicial control or oversight" of the ALJ and that it is "the ultimate function of the courts to determine the legality of an ALJ's administrative decisions." *Id.* at 768.

79. *Id.* at 769.

80. *Id.* at 770.

81. *Edwards v. Parker*, 332 So.2d 175, 180-81 (La. 1976) (refusing to render advisory opinion on issues in declaratory judgment); LA CODE CIV. PROC. ANN. art. 1876 (West 2003) (court may refuse to enter declaratory judgment when it would not eliminate the controversy).

is.”⁸² On some decisions rendered by the Division, however, it appears that the Louisiana courts are not able to exercise this function.

The opinion raises as many questions as it answers. The separation of powers issue, as it affects the judiciary, may not be resolved. The use of declaratory judgment is problematic. The court ruled that ALJ decisions are not entitled to *res judicata* effects, raising questions of their impact in related litigation.⁸³ Further, the court carefully noted that the ALJs do not enforce their own orders, which is a judicial function.⁸⁴ This raises interesting questions about how ALJ decisions are to be enforced. The First Circuit Court of Appeals in Louisiana recently faced this problem.⁸⁵ In that case, the ALJ overruled the Department of Insurance’s decision to deny the petitioner renewal of his bail bond agent’s license. The Department refused to issue the license, and petitioner sought mandamus to compel it to grant the license to him. The trial court granted mandamus but the court of appeals reversed, finding mandamus an inappropriate remedy, leaving the petitioner to an uncertain procedure and future in the trial court, which includes intervention in the Commissioner’s declaratory judgment action.⁸⁶ The use of an independent action for declaratory judgment is a consequence of eliminating agency review and the agency’s right to appeal adverse ALJ decisions, as well as the limited quasi-judicial power of the Division. This suggests that deviating from the traditional model of agency review and appellate review generates unintended consequences yet to be resolved.

Finally, the underlying issues in the *Wooley* case raise significant issues in administrative adjudication and central panels. There is the question of whether this is the type of matter that should be adjudicated by an ALJ. The issue in dispute concerned the language of an insurance form and whether it satisfied the Insurance Code, which is either a pure question of law, as found by the ALJ, or a question of policy in interpreting the statute. By any standard, the agency is in the best position to make a decision, subject to judicial review about the suitability of an insurance form. The ALJ has nothing to contribute to the issue because the facts are conceded, the decision does not hinge on the credibility of the witnesses, and the ALJ does not possess any special knowledge that provides a superior basis for the decision. Nonetheless, under the central panel statute the matter was heard by an ALJ.⁸⁷ At the very least, this case suggests that great care

82. *Marbury v. Madison*, 5 U.S. (1Cranch) 137, 177 (1803).

83. *Wooley*, 893 So.2d at 771.

84. *Id.* at 764.

85. *Bonvillian v. Dep’t of Ins.*, __So. 2d__, 2005 WL 362495 (La. Ct. App. Feb. 16, 2005).

86. The Department argued that the petitioner had alternate remedies and could have intervened in a declaratory judgment action brought by the Department, or could have sought injunctive relief. The Department also argued that the ALJ might not have the authority to grant the waiver required to issue the license. *Id.* at *2.

87. The Commissioner argued, and the Division of Administrative Law apparently agreed, that the relevant statutes required that it be submitted to an ALJ. Louisiana statute requires the Commissioner to provide a hearing when demanded and requires all hearings to be conducted by

must be taken in developing the central panel's jurisdictional statutes to avoid unintended consequences. effect

The dispute also illustrates that final order authority generates inconsistent positions between the agency and the ALJs. In this case, it was a fundamental difference about the acceptability of an insurance form. The ALJ's decision replaces the agency's regulatory view with that of the particular ALJ. The ruling against the agency undoubtedly lessens the agency's ability to negotiate and resolve similar disputes without litigation. The pleadings and motions filed in the case also reveal other more fundamental differences between the agency and the ALJs. Professor Baier, as amicus, reported that the agency and ALJs differ substantially on a major enforcement issue. The Department strictly enforces a regulation authorizing the suspension of a license when the licensee has plead guilty to a crime. However, the ALJs have rejected the Commissioner's position and apply an alternative standard that considers whether the criminal conviction affects the licensee's ability to perform as an agent,⁸⁸ and have reversed license revocations based upon guilty pleas.⁸⁹ Although reasons can be advanced for either position, the ALJs and the Department differ significantly on a major enforcement issue.

Denying an agency the right to appeal an adverse decision only exacerbates the potential for conflicts between the agency and ALJ-created law because there is no effective mechanism to resolve the differences and achieve a uniform standard on any particular question.⁹⁰ Moreover, as Professor Bybee noted in the

a member of the Division of Administrative Law. LA REV. STAT. ANN. § 22.1351 (West 2004); LA. REV. STAT. ANN. § 49.992. Professor Baier, amicus curiae appointed by the court, argued that a hearing before the ALJ was not required. Baier Amicus, *supra* note 54.

88. See *In re Youree Jean Anderson*, Docket No. Ins 95-2170 (La. Div. Admin. Law Mar. 13, 1998) (conviction for bankruptcy fraud insufficient to suspend license); *In re Homer E. Parker*, Docket No. 2000-2306-Ins. (La. Div. Admin. Law May 26, 2000) (plea of guilty to misdemeanor involving moral turpitude is insufficient to suspend license under the facts of the case); *In re Claude D. Leger*, Docket No 99-5823-INS (La. Div. Admin. Law Apr. 14, 2000) (plea to misprision of a felony insufficient to support revocation of license).

89. Baier Amicus, *supra* note 54, at 11 (citing *In re Youree Jean Anderson*). I am told that Louisiana's Insurance Department makes exceptions to its stated policy of revoking licenses for felony convictions but does not publish its actions. Interview with R. Bryan McDaniel, Administrative Law Judge, Louisiana Division of Administrative Law, Atlanta, Georgia (Aug. 6, 2004).

90. The legislative history suggests that the motivation for limiting judicial review for agencies was to prevent successful litigants from being overturned by the ALJ because the agency's greater resources allowed it to continually appeal the decision. Post-Trial Memo, *supra* note 59, at 7 (citing minutes of the May 6, 1996 meeting of the House Committee on House and Governmental Affairs). A comparison was made to the criminal law where the state is barred from challenging a finding of not guilty. "[The] people who are regulated by the state should not be treated any worse than is a person who is acquitted of a crime at a lower court level, the state should not have a right to come back and appeal that acquittal." *Id.* (citing minutes of June 9, 1999 meeting of Senate committee on Senate and Governmental Affairs). This rationale is an unjustified

first article discussing Louisiana's statute, the legislature created a structure that strips agencies of any policy-making authority through adjudication and gives it to ALJs "whose judgment must be so valued that the court must not even see any competing vision offered by the agencies."⁹¹

Louisiana's statute preventing an agency's access to the judicial process is fatally flawed. Even if it is constitutional and does not violate separation of powers, as a practical matter there is no justification for granting judicial preference to the opinions of an ALJ over that of the agency legislatively charged with the responsibility of implementing a statutory scheme. That this procedure inevitably will generate conflicts between agencies and ALJs, and there is no effective way to resolve them only makes the problem worse. Declaratory judgment actions will only complicate and delay resolution of these cases. Even with ALJ finality, the agency should have the ability to challenge the decision in the courts. Despite these serious challenges, none are directed at the concept of a central panel, or the advantages in efficiency, perceived fairness, and professionalism that are associated with the panels.

V. A REVIEW OF ARGUMENTS IN FAVOR OF ALJ FINALITY

The agency's authority to establish policy through agency review of administrative action is a long-standing principle of administrative law that has continually been affirmed by the Supreme Court.⁹² Given the strong history of agency review, and its justifications, it is surprising that ALJ finality has emerged as a trend in state administrative law. Part of the reason is that ALJ finality is developing in the shadow of the central panel movement. The success of central panels in providing efficient and professional fact-finding in administrative adjudication, and addressing the perceived unfairness of having the ALJ employed by the agency, plays a key role in the adoption of ALJ finality. The efficiency and fairness rationales for centralizing ALJs have been uncritically extended to give the ALJ final order authority without considering either the evidence or the consequences of this radical change in administrative adjudication.

This approach is wrong for two reasons. First, the issues in ALJ centralization and final order authority are fundamentally different. The finding of facts is not the same as making the final decision, which often depends upon broader issues of policy, statutory construction, and consistency of the enforcement efforts. Second, posing the issue as one of fairness or efficiency conceals the key issues, which are who is the more appropriate decisionmaker, and what are the consequences of replacing the agency with the ALJ?

extension of a principle of constitutional criminal law to civil law, as well as a profound distrust of agencies, and the judiciary, and their responsibility to affirm ALJ decisions that are consistent with the law.

91. Bybee, *supra* note 1, at 459.

92. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); Koch, *supra* note 2.

Experience shows that agencies are the more appropriate final decisionmakers because of their greater knowledge and expertise in the subject matters, as well as the severe consequences ALJ finality would produce by dividing policy development into two arms and necessarily generating inconsistencies between the approach of the agency and the ALJs.

Nevertheless, the argument that ALJs in central panels make administrative adjudication more fair, and that this fairness justifies final order authority, is intuitively appealing and must be addressed in any discussion of ALJ finality. As a preliminary matter, central panels address the *perception* of unfairness in fact-finding arising from the agency's employment of the ALJs that hear their cases.⁹³ To change administrative adjudication on perceptions is unjustified. The process of developing facts by the ALJ and having the agency make the final decision based on the record, is the central principle of modern administrative adjudication in the federal system, and overwhelmingly in the state systems. The key question is whether there is sufficient support for the proposition that agency review is unfairly exercised. Any experienced administrative lawyer may be able to cite examples, usually from lost cases, that support a person's view that agency review is flawed, but is there more than anecdotal support for this view?

A. *The Statistics on Agency Review*

The available data strongly supports the proposition that agencies are not systematically abusing their power to find facts, nor are they acting contrary to the law and the facts during their review of ALJ decisions. The most complete data were collected by Professor Charles Daye of North Carolina who studied all available administrative cases heard by North Carolina's central panel from 1986 until 2000, when the statute was substantially amended to adopt a form of ALJ finality.⁹⁴ Professor Daye's study consisted of two parts. The first examined all ALJ decisions and determined whether the ALJ's decision was accepted or rejected by the agency.⁹⁵ The second part of the study examined all appellate cases deciding substantive (rather than procedural) issues and determined whether the outcome in the North Carolina Court of Appeals and Supreme Court was affected by whether the decision on review was one made by the ALJ and

93. Hon. Edward J. Schoenbaum, *Improving Public Trust & Confidence in Administrative Adjudication: What Administrative Law Practitioners, Judges and Academicians Can Do*, 53 ADMIN. L. REV. 575, 579 (2001).

94. Daye, *supra* note 1.

95. *Id.* at 1615. The Office of Administrative Hearings, by statute, received the final agency decision and compared the final decision with the agency decision to develop these statistics. Judge Julian Mann, III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C. L. REV. 1639, 1645 (2001). The cases were categorized as to whether the ALJ's recommendation was for the petitioner or agency and whether the agency accepted, rejected, or accepted or rejected in part, the ALJ's recommended decision. Thus, the data reflects the rates at which the petitioner or agency prevailed before the ALJ and after agency review.

accepted by the agency, or whether the agency had reversed the ALJ.⁹⁶ Professor Daye did not determine the legal accuracy of the ALJ's decision, or of any decision by the agency to reverse the ALJ, or of the courts in reviewing any of the final agency decisions.⁹⁷ Thus, the study identified whom the ALJ and the agency ruled for, but not why any change was made, nor the legal and factual sufficiency of any decision by any ALJ, agency, or court.

There are three central conclusions in Professor Daye's study.⁹⁸ First, ALJs ruled in favor of the agencies in seventy-six percent of the cases.⁹⁹ Second, agencies accepted eighty-two percent of the decisions rendered by ALJs.¹⁰⁰ This included almost all cases in which the ALJ found for the agency, although agencies did reverse a few cases when the ALJ had rendered a decision favorable to the agency.¹⁰¹ The agencies accepted slightly more than half of the decisions that favored the applicant and reversed the remainder.¹⁰² The third finding was that the North Carolina appellate courts affirmed the same percentage of cases when the agency adopted the ALJ's proposed order, as when the agency rejected it.¹⁰³ Thus whether the decision was made by the ALJ and adopted by the agency, or the agency rejected the ALJ's decision and made its own findings and final decision, was immaterial to the outcome on appeal.

In my opinion, Professor Daye's study supports the proposition that agencies are making reasonable decisions during agency review. In sum, ALJs and agencies agreed, in full, in eighty-two percent of the cases, and, in part, in an additional six percent of cases.¹⁰⁴ This suggests that the differences between ALJs and agencies arise in few cases. Moreover, the data does not indicate why

96. Daye, *supra* note 1, at 1633-37.

97. *Id.* at 1614.

98. The conclusions that follow are my own and are a summary of a more extended analysis in an earlier article. See Flanagan, *supra* note 3, at 1389-98. Additionally, readers are invited to review Professor Daye's groundbreaking study in detail.

99. Daye, *supra* note 1, at 1615 (displaying OAH Chart 1: Total Adoptions of Recommended Decisions with Proportion for Agency and Petitioner: Inception Through 1999).

100. *Id.* at 1616 (displaying OAH Chart 2: Total OAH Decisions with Proportion for Agency and Petitioner; Inception Through 1999).

101. *Id.* at 1619 (displaying OAH Chart 5: Total Agency Rejections with Proportion for Petitioner and Agency; Inception Through 1999).

102. *Id.* at 1618 (displaying OAH Chart 4: Number of ALJ Recommended Decisions for Petitioner with Agency Disposition; Inception Through 1999).

103. *Id.* at 1622 (displaying APA Study Chart 2B: Agency Adopted ALJ Recommendation—Superior Court Disposition) (Superior Court affirmed agencies adoption of ALJ decision in fifty-eight percent of cases, and affirmed agencies rejection of ALJ decision in fifty-three percent of the cases); *id.* at 1628 (displaying APA Study Chart 9: Agency Rejected ALJ Recommendation; Court of Appeals Disposition) (affirming fifty percent of cases); *id.* at 1629 (displaying APA Study Chart 10: Supreme Court Disposition) (Supreme Court affirms six of ten cases in which agency rejects ALJ decision).

104. *Id.* at 1616 (displaying OAH Chart 2: Total OAH Decisions with Proportion for Agency and Petitioner; Inception Through 1999).

the agency rejected the ALJ's decision, or the extent to which the ALJ and agency were otherwise in agreement, or whether the difference was one of law or fact. Reversals by the agency on questions of law are uncontroversial. Likewise, accepting the factual determinations but rejecting a proposed penalty, reflects a judgment on enforcement which belongs to the agency.¹⁰⁵ Only agency reversals of ALJ fact-finding may be questionable and that depends on whether the rejected facts are historical or mixed questions of law and fact which are generally subject to *de novo* review.¹⁰⁶ The bare statistic that agencies did not accept the ALJ's decision in eighteen percent of the cases undoubtedly overstates the differences between ALJs and agencies during agency review.

There is no evidence of agency abuse of review powers because the study only reported the outcomes of ALJ decisions and agency review and did not assert that any decision was legally correct or incorrect. The indirect evidence suggests that agency review was reasonable and that agencies are making principled decisions during agency review. Neither the high acceptance rate of ALJ decisions, including about one half of the decisions unfavorable to the agency staff's position, nor the reversal of some of the ALJ decisions favorable to the agencies, would have occurred if agencies were consistently abusing their power of review to make agency-favorable decisions. Further support comes from the appellate courts' review of the final agency decisions in North Carolina. Professor Daye's study shows that the agency's action in reversing or accepting the ALJ's proposed decision had no effect on whether the final agency decision was affirmed or reversed by the courts. Certainly, the decisions of the courts do not suggest that ALJ decision making has any advantage over agency decision making.¹⁰⁷

To my knowledge there has been no systematic study of agency review that provides evidence of an abuse of agency review powers. The argument for a misuse of agency review is based on anecdotal evidence only and it has several weaknesses. Such evidence applies only to the individual case and cannot support any generalizations, particularly about the extent of the problem in other cases. It often comes from interested sources, and is subject to equal and opposite anecdotal evidence of abuse of ALJ authority.¹⁰⁸ In sum, the argument

105. McCown & Leo, *supra* note 2, at 64, 91 (sanctions are a decision for the agency).

106. The deference agencies are required to give an ALJ's findings of fact and law on review is limited. Generally, state Administrative Procedure Acts provide agencies almost unlimited legal authority to alter or amend findings of fact and law, subject to the rule in most, but not all states, that the ALJ's credibility determinations are entitled to deference. A few states impose a higher standard than "substantial evidence" to support agency changes in the facts. Courts accord substantial deference to the agency's findings of fact and interpretations of law. *See* Flanagan, *supra* note 3, at 1364-73, 1403-04.

107. Daye, *supra* note 1, at 1626.

108. Many central panels survey the litigants and attorneys. These surveys show that the strong majority are satisfied, but litigants, perhaps, because of the nature of litigation, are not always happy with the ALJ. For example, attorneys in Minnesota rated 77.8% of judges as excellent or good at basing their decisions on the law or evidence, but 22.2% rated them as fair,

that agencies are unfairly using their powers of review lacks support, and provides no justification for replacing agency review with ALJ finality. The central issue in ALJ finality remains: who is the more appropriate final decisionmaker and what are the consequences of changing from the agency to a central panel ALJ?

B. Litigant Dissatisfaction as a Justification for Limiting Agency Review

Litigant dissatisfaction has been cited to support limiting agency review in North Carolina and Oregon.¹⁰⁹ Professor Daye established that the perception of agency unfairness is due largely to the fact that agencies generally prevail in administrative adjudication.¹¹⁰ In North Carolina, the agency prevailed in at least seventy-six percent of cases heard by the ALJs. Since these initial decisions are made by the ALJs before agency review, the results must be compelled by the substantive laws and regulations as applied by ALJs to the facts. The law is the critical factor in the agency's success, rather than whether the final decisionmaker is the ALJ or the agency. If litigants are frustrated in administrative adjudication it is because the laws and regulations prohibit the conduct under review. Moreover, a high agency success rate should be expected in an efficient enforcement system. An agency would be derelict in its enforcement and regulatory obligations if it routinely brought actions that failed when tested in a trial-type hearing. A low success rate indicates either poor preparation or an aggressive view of the law that is not supported by the facts proven at trial. A high success rate before ALJs indicates prudent selection of issues to litigate. Agencies do change some ALJ decisions during review, but the vast majority of applicant losses are at the ALJ level, and the final agency decisions are consistent with the laws or the facts, as seen by the affirmance rate before the courts.

There are two reasons why litigants blame agencies rather than the substantive law. First, a central panel changes the fundamental perception of agencies, and unintentionally, fosters a negative attitude toward them. Central panels clearly enhance the status of the ALJs as decisionmaker, and correspondingly reduce that of the agency. Before central panels, administrative adjudication was clearly the sole province of the agency. The contested case took place at the agency and fact-finding by the ALJ was a preliminary step to the agency's rendering the final decision. Neither the process nor an APA accorded the findings of the ALJ special status, and proposed decisions by ALJs were clearly subject to review and amendment by the agency. With central panels, adjudication becomes a two-step process with fact-finding now taking

poor, or very poor. MINNESOTA MANAGEMENT ANALYSIS DIVISION, OFFICE OF ADMINISTRATIVE HEARINGS, JUDICIAL DEVELOPMENT PROGRAM, OFFICE-WIDE SUMMARY 26 (1999). Wyoming attorneys rated 87.6% of hearings on driver's licenses and workers compensation matters as fair and impartial. WYOMING OFFICE OF ADMINISTRATIVE HEARINGS, ANNUAL REPORT 4 (2000).

109. Heynderickx, *supra* note 1, at 242; Mann, *supra* note 95, at 1645-46.

110. Daye, *supra* note 1, at 1611.

place before a trained adjudicator outside the agency who renders a preliminary decision. Agency review follows as a separate and distinctive step in which the case returns to the agency for another decision. From the participant's point of view, an agency that does not adopt the ALJ's decision favoring the litigant is biased, and if the agency affirms the ALJ's decision, its decision is irrelevant, and the process time consuming, and expensive. The creation of the central panel has transferred the focus of adjudication from the final agency decision to the fact-finding by the ALJ, and enhanced the latter's importance and status. Missing from this picture is any understanding of the traditional role of the agency as ultimate decisionmaker based upon the fact-finding by the ALJ, or the agency's responsibility for consistent enforcement and application of the statutory scheme.

Also leading to some muddling of the debate is that ALJ finality often appears as a choice between a final decision by a biased agency versus that of an independent ALJ. That inevitably colors the discussion and assumes its conclusion, for who can be in favor of a biased agency when an independent ALJ is available? Agencies certainly have a perspective on the law and regulations because they have been charged with the enforcement of a statutory scheme, and they have institutional knowledge and experience with the subject matter that may be considered in the final decision. The hidden assumptions, that independent ALJs in central panels are necessarily without views on the topic and that those views may affect the outcome, is not justified. In fact, all adjudicators, as humans, have their own predilections and preferences. It would be a strange individual who reached the position of ALJ or agency head that had not formed opinions on many issues. Lawyers exploit these aspects of the decisionmaker through forum selection, judge shopping, and advocacy designed to appeal to the particular judge. Rules that allow a party to seek recusal of a judge, or replacement by a different judge are a recognition of this problem as well as a partial solution.¹¹¹ Regardless of whether the decisionmaker is an ALJ or an agency head, that person will have a perspective on the law and facts that may differ from others.

There are three significant questions. What are the relative qualifications of the agency and ALJ to interpret and apply the law in administrative adjudication? What consequences flow from selecting either the agency or the ALJ? Should the final decisionmaker be one entity, the agency, or be one or more ALJs in a central panel who may have differing perspectives on the law and regulations? In my opinion, the perspective of the agency is more predictable than that of each of the ALJs on a central panel who may be assigned the case.

111. CAL. GOV'T CODE § 11425.40 (West 2001). The California Office of Administrative Hearings has implemented the procedure through regulation. CAL. CODE REGS. tit. 1 § 1034 (2002). See also OR. REV. STAT. § 183.470 (2001). ALJs are aware of these issues. See generally Hon. Bruce H. Johnson, *Strengthening Professionalism Within an Administrative Hearing Office: The Minnesota Experience*, 53 ADMIN. L. REV. 445 (2001); Schoenbaum, *supra* note 93, at 575 (discussing ways that public confidence in ALJs can be enhanced through education, training and explanations of the administrative process).

C. ALJ Independence and Morale

Another argument made in support of ALJ finality is that it protects ALJ independence.¹¹² ALJ finality obviously enhances ALJ independence because the only constraint on the ALJ's decision-making is judicial review. The argument, however, confuses the means with the end. The institutional independence of ALJs in central panels is a tool for improving administrative adjudication by eliminating the potential for improper agency influence. The goal of administrative adjudication, however, is not to give ALJs final order authority. This is true particularly when ALJ finality has significant detrimental impacts on one of the fundamental purposes of contested case adjudication, the ability of the agency to develop policy and enforce a consistent view of the statutory scheme.

Moreover, experienced ALJs have noted that central panels increase the desirability of the position because of much more tangible benefits. Central panels enhance the prestige of the ALJ, provide more prominence and visibility, and may lead to more uniform and perhaps enhanced pay, as well as opportunities for professional development.¹¹³ Any potential increase in the attractiveness of the position from ALJ finality is minor in comparison with what central panels already have achieved for ALJs.

A related argument is that ALJ finality is necessary for their morale and job performance, because a broad scope of review by agencies, and the inevitable rejection of some ALJ's findings and decisions, undermines the incentive to perform complex adjudication. This argument requires an assumption about the work ethic of ALJs that is not true for other adjudicators, and is not true of ALJs. Review of an adjudicator's findings of fact is commonplace without any effect on judicial performance. The trial judge's decisions, including findings of fact, are reviewed de novo in equity cases in some states.¹¹⁴ Federal magistrate judges¹¹⁵ and bankruptcy judges are subject to de novo review by a federal district judge, but there are no reported reductions of judicial productivity in those areas.

A useful analysis of judicial incentives and review is found in the appellate treatment of decisions committed to the discretion of the trial judge. The appellate courts accord such decisions by the trial judge substantial deference and accept them although the appellate court may disagree with the result. Judicial morale has been rejected as a rationale for this deference to the trial

112. Rossi, *Final Orders on Appeal*, *supra* note 2, at 6.

113. Several leading administrative law judges expressed this opinion at a symposium at which I was a panelist. The Program on Law and State Government Fellowship Symposium, *Maximizing Indiana Fairness & Efficiency: Should Indiana Consider Creating an Office of Administrative Hearings?*, at Indiana University School of Law—Indianapolis (Oct. 1, 2004).

114. See *e.g.*, OR. REV. STAT. § 19.415(3) (1999); *Townes Assocs., Ltd. v. City of Greenville*, 221 S.E.2d 773 (S.C. 1976).

115. 28 U.S.C. § 636(b)(1)(C) (2000).

judge because it does not identify which, of all of the decisions a trial judge makes, should be protected from searching review.¹¹⁶ In effect, arguing that the trial judge's morale compels deference by the appellate court proves too much. The argument always compels deference without any review of the trial judge's decisions.

Appellate courts defer to the trial judge regarding procedural decisions in two situations. The first involves those decisions where the issue arises in such a variety of fact situations and involves a multifactor analysis such that guiding principles and rules cannot be articulated. Many trial decisions, particularly those involving the admission or exclusion of evidence, fall into this category. The second occurs when the trial judge, by virtue of his position in the courtroom, is in a better position to assess the facts than an appellate court reviewing a cold record.¹¹⁷ Neither rationale for deferring to the trier of fact justifies the complete deference to ALJs and the elimination of agency review. The issues before the ALJ are not the type incapable of being guided by rules and principles, and the ALJ is not in any preferred position by reason of hearing the witnesses. Rather, the issues requiring agency review are primarily those of law, policy, and enforcement and are best made by the agency charged with developing policy and applying the statutory scheme.

D. ALJ Finality as a Mechanism of Agency Control

The Louisiana litigation may represent another facet in the relationship between agencies and other branches of state government. Conversations with ALJs suggest that some agencies are seen as resisting legitimate direction by the executive or legislative branches.¹¹⁸ Professor Jim Rossi explained why state agencies may become independent power centers. He noted that state governments have special characteristics that influence the development of state administrative law and central panels. As compared to the federal system, state legislative sessions are shorter, staff resources are fewer and special interests more prominent. The state executive branch is weaker and has less power to develop policy than the President.¹¹⁹ In a jurisdiction with a weak governor and a short legislative session, an agency with broad jurisdiction or important subject matter authority may be insulated from legitimate executive or legislative oversight by an independent political base. In this context, a central panel with ALJ finality becomes a legislative tool to counterbalance agency independence by transferring final adjudicative authority from the agency to the central panel ALJ.

ALJ finality also may be proposed as an expedient remedy for litigant

116. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 660-65 (1971).

117. *Id.*

118. This opinion was expressed by ALJs at the Central Panel Directors Conference held in Savannah, Georgia, on September 19, 2003 which I attended as a panelist.

119. Rossi, *Overcoming Parochialism*, *supra* note 2, at 557-59, 568-72.

frustration with agency adjudication. The literature discussing the adoption of versions of ALJ finality in North Carolina and Oregon often talks about leveling the playing field, which is another way of talking about curbing the agency's authority in an area of high visibility—administrative adjudication.

ALJ finality as a mechanism for controlling or restricting agency power or satisfying litigant frustration is not particularly effective and has all the disadvantage of using a sledge hammer as a fly swatter. If adopted as a general principle, as in Louisiana, it adversely affects all agencies regardless of their relationship to the executive and legislative branches, and seriously weakens any administrative enforcement mechanism. More important, ALJ finality is a negative and indirect means of forcing a more politically responsive agency. It reduces agency power in an unrelated area by creating an alternate power center in the central panel. Any perceived benefit from weakening the agency comes from the distractions created by the additional friction inherent in competing bodies.

Similarly, ALJ finality will not significantly change litigant frustration, which is based on the high agency success rate in contested cases. Changing the ultimate decisionmaker will not significantly affect this rate. ALJs in North Carolina decided in favor of the agency three quarters of the time before agency review. Thus, only a few cases will ultimately be different with ALJ finality. The real reason for litigant frustration is that agencies generally bring actions in which they are most likely to prevail. Only by changing the substantive law will litigants prevail more often in administrative adjudication. Even that is an indirect consequence. The more likely result is a reduction of agency actions. The agency will bring only actions that it can sustain before the central panel.

VI. ADAPTATIONS TO ALJ FINALITY

A. *Presenting Policy in a Contested Case Before the ALJ*

The major disadvantage of ALJ finality is the inevitable differences in policy and enforcement that occur when the agency is responsible for enforcement, but the final decision on any action is made by the ALJ.¹²⁰ This has occurred in the few federal agencies with split-enforcement models,¹²¹ as well as the more recent experience in Louisiana, where the ALJ makes the final agency decision without any agency review. There are procedures for identifying important policy issues before the hearing.¹²² Can the problem of inconsistent decision-making be

120. Verkuil et al., *supra* note 3, at 1040.

121. See, e.g., George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987); Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 59-62 (1989); Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1254-64 (1974).

122. See, e.g., TEX. GOV'T CODE ANN. § 2001.058(c) (Vernon 2001) (requiring the agency to

addressed by having the agency present its policy during the contested case so that the final ALJ decision will incorporate the agency's policy and enforcement view? For several reasons, I do not believe so.

The belief that policy can be articulated in a contested case assumes that the agency can anticipate, before trial, the policy issues to be resolved, and their proper resolution. That may be true for repetitive, routine cases but it is not true for many significant cases and issues for two reasons. First, it assumes that the policy articulated by the staff in making the initial decision that led to the contested case is the same as the policy that the leadership would apply. Second, it assumes that the facts reviewed by the staff in making the decision are the same facts that the ALJ will hear and determine in the contested case. Neither is entirely accurate, and the more important the case, the more likely it is that these assumptions are not true.

The decisions that lead to contested cases initially are made by low and mid-level personnel who decide, in the normal course of business, to grant or deny a license or a permit, or take other administrative action affecting legal rights. The policy they apply at that time is based upon precedent and prior experience and is entirely retrospective. Established policy reflects the last, best judgment of the agency, but not necessarily what the leadership would apply in a new case.¹²³

More difficult problems arise because information in administrative adjudication increases over time, and the agency does not possess all of the facts at the time of the initial decision. Obviously, the agency staff received some information from the applicant, and perhaps the agency, at the time of the initial decision. Prior to the final order in the contested case, however, this information is indefinite and incomplete. The information is indefinite because the facts have not been probed and proved in a trial-type proceeding, and are subject to qualification or modification by that process. The facts are incomplete because the information presented to the agency for its decision does not include all that is available to the applicant nor does it include any information or perspective from those, other than the applicant, who are affected by the decision and may intervene in the contested case. In many cases, the evidence presented in the contested case will be substantially more detailed and more recent than that evaluated by the agency.¹²⁴ To the extent that there are differences between what

provide statement on applicable rules and policies); CAL. GOV'T CODE § 11425.60 (West Supp. 2000) (permitting an agency to designate precedential opinions for guidance to lawyers and ALJs).

123. Professor Daye's study of North Carolina agency review established that the agency reversed a small, but significant number of cases in which the agency had prevailed before the ALJ. Daye, *supra* note 1, at 1619 (displaying OAH Chart 5: Total Agency Rejections with Proportion for Petitioner and Agency; Inception Through 1999). One explanation for this action is that the agency leadership, on review of the ALJ's decision, disagreed with the position taken by the staff before the ALJ.

124. Rossi, *Problems with ALJ Finality*, *supra* note 11, at 71 (noting that parties are reluctant to present full case to agency); *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Servs.*, 595 S.E.2d 851 (S.C. Ct. App. 2004) (holding that evidence presented at a contested case is not limited to that presented to the agency for initial decision).

was presented to the agency, and what was ultimately presented during the contested case, and recorded by the ALJ in the proposed order, there will be ambiguities in the policy to be applied.

Policy cannot be effectively changed in the middle of a contested case because facts must be established to understand the ramifications of the policy being applied. Any policy articulated before final decision is subject to alteration by the facts that eventually are found. Even assuming that the ambiguity in the facts can be overcome, policy is the province of the agency leadership, but typically, it is not involved in litigation because the volume precludes their active, in depth, participation at that time. The difficulty of matching the schedules of the leadership with the demands of the trial calendar preclude all but the rare occasion where the leadership can review the policy during the trial. The development of policy also demands time and careful consideration. The middle of a contested case, and the time pressures of a trial, make that the worst point to consider strategic changes in policy because there is neither the time to collect all relevant points of view, nor consider carefully their ramifications.

Moreover, policy is founded upon expertise. An understanding of the subject matter is a prerequisite to an understanding of rationale for selecting one option from among choices that otherwise appear reasonable. In the middle of the trial, not only are the facts unclear, but also the ALJ, as finder of fact, may not accept the testimony of the agency's experts, or may find that the applicant's views are better presented or more persuasive.¹²⁵ An ALJ with final authority may adopt his own view of the law and evidence, subject only to limited judicial review. With ALJ finality there is substantial uncertainty whether the policy articulated will be the policy accepted. The fundamental problem with presenting policy at the contested case is that it puts the proverbial policy cart before the factual horse. Requiring policy to be fully developed and articulated in the absence of a fixed set of facts is inconsistent with the general jurisprudential approach in our system that rejects the use of advisory opinions.¹²⁶

B. Altering Judicial Standards of Review to Restore Agency Accountability

Professor Jim Rossi has noted that ALJ finality makes the ALJ independent but also creates a loss of agency accountability because law and policy decisions are made by the ALJ without agency review. This splits executive authority between the agency and the ALJ, raising constitutional concerns, although probably not a constitutional violation. He proposes that agency accountability can be restored by altering the judicial standards of review so that the courts give greater weight to the agency's positions on law and policy than those reached by the ALJ in rendering the final decision.¹²⁷

125. Bybee, *supra* note 1, at 460 (describing potential conflicts between agencies and ALJs).

126. Among the reasons arguing against an advisory opinion is that it ignores the importance that specific facts have on the ultimate resolution of the issue. Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

127. Rossi, *Problems with ALJ Finality*, *supra* note 11, at 64-66.

I certainly agree that a final ALJ decision is not entitled automatically to the deference traditionally accorded a final agency decision on the facts and the law. Judicial deference to the agency is based upon its expertise, as well as a sensitivity to separation of power concerns when the judiciary reviews executive agency decisions. Neither argument applies to ALJs with final order authority. ALJs, as generalists, often lack the expertise found in the collective knowledge of the agency. The separation of power concerns arising from the judicial review of executive agency action seems muted when those final decisions are made by an ALJ independent of the agency and the executive branch, albeit still a part of the executive branch for administrative purposes.

Jim Rossi suggests that the judicial review of facts found by the ALJ should be governed by the substantial evidence test, or the clearly erroneous test, if it does not introduce too much complexity. Fact-finding presents the greatest need for an independent ALJ and has the least need for political accountability by the agency.¹²⁸ I suggest an important qualification. The substantial evidence test is very deferential to the initial fact-finder whose facts must be accepted so long as there is any evidence in the record to support those facts, even though others might find a different conclusion more reasonable. The clearly erroneous test is not significantly more stringent.¹²⁹ Both tests are minimal standards of accountability that only determine whether a particular fact falls within a broad range that could be found or inferred from the record. Only facts without any support in the record are rejected by these tests.

I would limit the judicial deference to historical or empirical facts, or those dependent upon credibility determinations by the ALJ. The argument for deference is strongest for these categories because they rely on the strengths of the ALJ who is the person who heard and saw the witnesses. Oregon uses this approach to insulate ALJ fact-finding from agency review for similar reasons.¹³⁰ There is substantially less justification for deference to facts found by the ALJ that are derived from the application of expertise, the evaluation of expert testimony, or are mixed questions of law and fact where statutory interpretation and policy judgments play a significant role. Those facts should be subject to, at least, *de novo* review by the appellate courts. Otherwise, some determinations that can reasonably be classified as factual or credibility-dependent, such as the weight of expert testimony, may undermine the agency's policy role.

128. *Id.* at 66-70.

129. William R. Andersen, *Judicial Review of State Administrative Action—Designing the Statutory Framework*, 44 ADMIN. L. REV. 523, 551-53 (1992). The Supreme Court held that the “clearly erroneous” test is less deferential to the lower court than the “substantial evidence” test, but noted that the difference between the tests was so subtle that no other court had found that the result would change if the other test were used. *Dickinson v. Zurko*, 527 U.S.150, 152-63 (1999). On remand, the Federal Circuit concluded that the outcome was not changed by applying the substantial evidence test rather than the clearly erroneous test. *In re Zurko*, 258 F.3d. 1379, 1381 (Fed. Cir. 2001). Likewise, Professor Rossi recognizes that the differences may not be significant in practice. Rossi, *Problems with ALJ Finality*, *supra* note 11, at 69-70.

130. 1999 OR. LAWS ch. 849 §§ 12(2), (3) (codified at OR. REV. STAT. § 183.650 (2003)).

The crux of Professor Rossi's proposal is found in his treatment of policy determinations made by the ALJ under final order authority. Here he looks to the theoretical distinction between the substantial evidence test and the clearly erroneous test. The former requires the reviewer to evaluate the lower tribunal's decision on the reasoning articulated by that court.¹³¹ The clearly erroneous test, however, "requires a reviewing body to consider the lower tribunal's decision on the reviewing body's *own* reasoning."¹³² The change of perspective is important. Rossi argues that when reviewing a final ALJ decision, the appellate court should not accept the ALJ's reasoning framework. Rather, the court should substitute the agency's framework for the ALJ's. The agency's framework is more important in defining the scope of the court's inquiry into policy decisions than the deference accorded the decision, and the agency's framework should not be "trumped" by an ALJ or any expert.¹³³ On questions of law, Rossi argues that, at the least, the reviewing court should give strong weight to the agency's interpretations of law and regulations regardless of how the ALJ decided the legal issue.¹³⁴

Professor Rossi's proposal requires the reviewing court to evaluate the ALJ's final decision, including its views on law and policy, against the agency's policy and legal framework, rather than evaluate it from the ALJ's perspective. Presumably, the agency's reasoning framework, broadly speaking, is the agency's perspective and includes the predicates for its positions, the agency goals, its regulatory values, and their relative weight when they conflict, as articulated in the record and agency briefs. The court would review the ALJ's policy decision in the context of the agency's decision framework and apply the appropriate standard of review to determine whether the ALJ's policy decision was arbitrary and capricious, or clearly erroneous. When the ALJ's policy decision deviated substantially from the agency's, the court would be free to overturn it in favor of the agency's position. Making the agency's policy the gauge in reviewing the ALJ's policy decisions restores the agency's role in policy development, provides it an incentive to carefully articulate the policy in the contested case, and ultimately makes the agency accountable for the decisions made by the ALJ, even though there was no formal agency review of the ALJ's decision.

Professor Rossi recognizes the emerging reality of ALJ finality, and has sought to develop a way to counter one of the adverse consequences of ALJ finality, the loss of agency accountability. I support his effort but I have doubts that it will effectively accomplish its goal. Two main problems appear to me. First, any proposal that depends upon judicial review works only through the few cases that reach the appellate courts. Generally, the first appeal in state administrative law is to a trial court, and only subsequent appeals are to appellate courts that are likely to produce widely available written opinions.¹³⁵ While

131. Rossi, *Problems with ALJ Finality*, *supra* note 11, at 68-69.

132. *Id.* at 68 (emphasis added).

133. *Id.* at 72-73.

134. *Id.* at 74.

135. See MODEL STATE ADMIN. PROCEDURE ACT § 5-104 (1981), 15 U.L.A. 5-104 (1990)

those cases may be the more important ones, they are likely to be too few to provide for a consistent and persistent articulation of any one agency's policy. Professor Daye's study of North Carolina appellate court decisions from its central panel over sixteen years reveals that there were 3470 administrative decisions made by central panel ALJs. Only 130 cases reached the appellate courts, of which eighty-four cases met his criteria for evaluation.¹³⁶ There are too few opportunities for a particular agency to correct or modify the ALJ's views on policy and legal issues. The appellate process, moreover, is particularly slow, and there may be months, if not years, before the appellate courts restore the agency's views.

At best, changing the standards of review will provide an opportunity in a few cases to reverse a particularly egregious deviation of policy. Such cases may stand for the general principle that agency policy should prevail, but these appellate proclamations will be so few that they will be only guideposts, and will not serve as an effective means of insuring that ALJs do follow the appropriate policy. The policy established by the ALJ will be dominant simply because few cases are appealed. Agency appeals of some cases are possible, but it is not practical or cost efficient to do so in every appropriate case.

The second problem with the proposal is that the reviewing court intervenes only if the ALJ's views on agency policy and law substantially deviate from that of the agency's reasoning framework. Again, few cases will present such a clear choice. More likely, the differences between the ALJ and the agency will be significant, but not so unreasonable as to compel the court to reject the ALJ's analysis and result. The agency will be in much the same situation as with pure ALJ finality. Certainly, different standards of review will provide the agency with another opportunity to articulate its views on law and policy, but ultimately the agency is dependent on the court accepting the agency's views.

Finally, there are other significant practical problems in altering standards of review of administrative action, particularly how the change will be made. Generally, standards of review of administrative action are established by statute, not by case law.¹³⁷ It is difficult to see how a legislature, having established ALJ finality, would subsequently reintroduce a significant agency role by altering the appellate standard of review. Similarly, the courts have little reason to alter their standards of review in favor of the agency in the face of a legislative preference

(initial appeal to the trial court level). This is the procedure in North Carolina. ALJ decisions in Oregon are appealed to the intermediate appellate court, and South Carolina may adopt the same procedure.

136. Daye, *supra* note 1, at 1619. The eighty-four appellate cases in the study had four characteristics: (1) a recommended decision by the ALJ; (2) the agency either accepted or rejected the ALJ's decision; (3) the case was appealed to the superior court; and (4) the case was then appealed to the court of appeals.

137. See the standards of judicial review in the MODEL STATE ADMIN. PROCEDURE ACT § 5-104, 15 U.L.A. 5-104, which many states have adopted; *see also* 5 U.S.C. § 706 (2000) (federal standards of judicial review).

for ALJ finality, and a diminished agency role.¹³⁸ Of course, this assumes that the change in the standards will be meaningful. While subtle distinctions can be advanced for different formulations, it is not clear that they actually produce significant differences in the results.

In the end, the change of the standards of appellate review affects too few cases to have any meaningful effect for a particular agency on the cumulative impact of all of the ALJ decisions reached without that agency's review. While the proposal provides a respectful ear at the appellate level, the agency remains dependent on two independent actors, the ALJ and the courts, for its views on law and policy to be enforced. This tenuous method of recognizing the agency's position creates sufficient justification for the agency to legitimately disavow responsibility for the law as independently articulated by the ALJ, and infrequently reviewed, and more infrequently reversed, by the courts.

C. *ALJ Finality After a Program by Program Analysis*

Another option, perhaps the best one, is to consider ALJ finality in the context of specific programs and specific contested issues. There are clear disadvantages to ALJ finality as a general proposition of administrative adjudication. Eliminating all agency review inevitably leads to inconsistent decisions between the agency and the ALJs, and among ALJs who hear similar cases, with a corresponding dissipation of the regulatory effort, and the loss of agency expertise and political accountability.¹³⁹ At the same time, ALJ finality helps to allocate scarce adjudication resources. State administrative law is characterized by a vast range of contested cases from the most complex multiparty environmental matters to simple hunting license revocations. ALJ finality may be appropriate for some types of cases. Recent history shows that some states have adopted it for a few programs, and agencies have relinquished their review authority for some matters.

The factors to be considered in making this decision are those that emphasize the strengths of the ALJ and at the same time, eliminate or moderate the adverse consequences of ALJ finality to the agency. The ALJ's strengths are in providing procedural regularity, evaluating factual evidence, resolving conflicting evidence, and determining credibility. The agency's contributions are its subject matter expertise, institutional experience with those regulated, and authority to make policy. The best cases for ALJ finality are those requiring

138. Addressing this point on the context of ALJ finality, the Louisiana Supreme Court stated: Essentially the legislature has chosen to allow the ALJs to adjudicate, and in some cases to finally adjudicate, various matters concerning the insurance industry in this state and to reduce the Commissioner's ability to regulate insurance by prohibiting him from overriding the ALJ's decision or order and from seeking judicial review of an adverse decision or order. While we recognize that one may question the wisdom of this decision, it is within the legislature's prerogative to make this change.

Wooley v. State Farm Fire & Cas. Ins. Co., 893 So.2d 746,769-70 (La. 2005).

139. Flanagan, *supra* note 3, at 1399-1411.

determination of well defined issues of historical fact (but not subject matter expertise), perhaps involving credibility determinations, where the ALJ applies (but does not make) established policies to those facts.¹⁴⁰

Driving license cases are one example of this class of cases and some central panels have final order authority over them. Wyoming's ALJs have the authority by statute,¹⁴¹ and Maryland's ALJs obtained it by agreement with the agency.¹⁴² Similarly, South Carolina's Administrative Court has final order authority over appeals of hunting and fishing licence revocations, among other matters.¹⁴³ These, and comparable cases, are primarily fact determinations of recurring enforcement scenarios where policy issues have long been identified and resolved through regulation and precedent. These cases do not have any significant need for agency review because they are unlikely to raise or to require the development or modification of agency policy. Agency review provides little additional benefits after a hearing before the ALJ and may delay any judicial review.

Conversely, the archetypal case for agency review involves multiparty litigation over issues dependent upon expertise that may require the development or modification of policy to accommodate the circumstances of the case. Often in these cases, the information improves over time. The agency staff may have received information from the applicant. In a contested case, however, interveners and other parties provide a different perspective or more recent or additional information to the ALJ. When the ALJ has received more evidence than was initially presented to the agency, review is appropriate for the agency to consider the implications of the more expanded record.

Identification of an appropriate class of cases for ALJ finality is not the only issue. In addition to policy development, agency review provides an opportunity for the agency to achieve a consistent application of the law in similarly situated cases. ALJ finality may generate inconsistent decisions when a single agency's cases are decided by several ALJs. The Social Security Administration is an extreme example, where some ALJs award benefits in only twenty-five percent of cases they hear and others consistently award benefits in seventy-five percent of their cases.¹⁴⁴ A system of adjudication which suggests that the outcome is

140. Asimow, *supra* note 32, at 1109 (noting that agency review is costly, time consuming, and it may be unnecessary when the issues are factual and unimportant in terms of policy and impact on the regulatory program). Cf. Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 261-62 (1999) (noting that central panels work best in cases that are relatively nontechnical, limited to two parties, present credibility conflicts and do not call for specialized knowledge).

141. WYO. STAT. ANN. § 31-7-105(b) (Michie 1999) (driver's licenses). ALJ final authority has existed since at least 1986 and in licensing cases since at least 1977.

142. E-mail from Hon. John W. Hardwicke, former Chief Administrative Law Judge of Maryland, to author (Aug. 11, 2004, 16:22:31 EDT) (on file with author).

143. S.C. ADMIN. LAW JUDGE DIV., ANNUAL REPORT 1999-2000, *supra* note 35, at 10.

144. Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 77 FLA. ST. U. L.

dependent upon the particular trier of fact creates problems of the perception of fairness as well as due process. Some method of addressing this issue is necessary. A formal appellate procedure within the central panel is one solution but creates the same concerns about the speed and efficiency of agency review. Another approach is to attempt to achieve quality control within the panel. That, however, is likely to be strongly resisted by ALJs as an improper interference with their decisional independence.

CONCLUSION

We are at a midpoint in the evolution of central panels and ALJ finality. Central panels have proven themselves. ALJ finality is more problematic. At most, it can be an exception to the general rule of agency review, adopted on a case-by-case basis for selected adjudications. Any decision to adopt it requires a careful balancing of the advantages and disadvantages, including the institutional considerations and the effects on the litigants and the agency.