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Jim Flanagan

Jim Rossi

John Hardwicke

Tyrone T. Butler

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NCALJ Panel Discussion: ALJ Decisions - Final or Fallible?

I. DISCUSSION INFORMATION

Panel Participants:

Professor Jim Flanagan, Oliver Ellsworth Professor of Federal Practice, University of South Carolina

Professor Jim Rossi, Harry M. Walborsky Professor and Associate Dean for Research, Florida State University College of Law

Honorable John Hardwicke, Executive Director, NAALJ

Moderator:

Honorable Tyrone T. Butler, Chief Administrative Law Judge, District of Columbia Office of Administrative Hearings and President-Elect, NAALJ

Date and Location:

Friday, August 6, 2004

Georgia Office of State Administrative Hearings, Atlanta, Georgia

II. DISCUSSION

PROFESSOR FLANAGAN: I'm very pleased and happy to be here. For an academic, it's extremely important to have the opportunity to test the ideas we have in the crucible of reality, and this obviously is one of those times.

Now, let me define the terms. ALJ finality, in the sense that I talk about, is the ability of the administrative law judge to make a decision that is final for all purposes, subject only to review by the judiciary. ALJ finality occurs two ways. In some states, for example South Carolina and Louisiana, by statute the ALJ makes the final decision and it is appealable to the courts. In other jurisdictions, the ALJ's fact-finding is de facto final because the agency's ability to change a finding is very limited. North Carolina has de facto finality. If the agency alters the ALJ's decision in any way during agency

review, the disputed issue may be appealed to a trial court judge, who then decides the issue de novo.

The net effect is that it is very difficult for the agency to reverse agencies on findings of fact. By the way, I'm not suggesting that the traditional deference that ALJs are accorded on credibility determinations should be limited in any way. That makes a lot of sense. But when it is difficult or impossible for the agencies to review and modify a decision, there are problems. There are three or four major difficulties. One is that there will be inconsistent determinations on critical issues between the agency's view on a particular matter and what any administrative law judge decides. Since the administrative law judges are a trial bench, and there is no mechanism to reconcile the decisions of the various administrative law judges, there will be inconsistencies between ALJs on particular issues. There is evidence that these inconsistencies occur. There is some indication of this in the litigation in Louisiana involving its central panel. There are also inconsistencies in the federal system, when adjudication is separated from the agency under the split enforcement system.

This means that there is a significant problem of consistency in enforcement by the agencies, because the question will be, whose view is going to be the dominant, the agency's or the ALJ's? Those inconsistencies will lead to more litigation which, I believe, undermines the regulatory effort of the agencies.

I also think that it is likely to lead to a loss of expertise in analysis. The ALJs make final decisions based upon the information that is available to them. To the extent that the agency has institutional experience, it will be lost if there is no agency review.

Now, my view is that agencies should be able to review ALJ decisions, and in appropriate cases, consistent with the substantive law, be able to modify findings. I don't believe agency review is a criticism of what administrative law judges do. They have a very important, if not central, role. They certainly are responsible for ensuring procedural due process. They are certainly responsible for making an adequate record and an adequate basis for the decision. And certainly whatever fact-finding or judgments they make on

credibility are entitled to deference. They have an opportunity to identify circumstances where the existing law or policy should be changed. But I do believe that the agencies should have significant power to review and alter or amend those decisions under the law. Agency review has been a fundamental premise of administrative law, certainly since the passage of the federal APA, and I don't think that the ALJ, as an expert in procedural regularity, necessarily has the expertise to make those final decisions.

I'm going to suggest three issues that are emerging in the debate about ALJ finality. First, I want to be clear that the question of ALJ finality is absolutely independent of the question of whether or not central panels are an effective administrative procedure and device. There is absolutely no doubt that central panels are appropriate. My concern is only about ALJ finality.

One of the things that I am concerned about is that on reading the literature on central panels, it's hard to find any favorable word about the agencies' role in adjudication. Now, I'm not suggesting that there aren't problems with agencies. But what I am suggesting is that there is a perception in the literature that agencies don't do anything right. And that raises a significant concern. The agency is responsible for implementing and enforcing a statutory set of procedures. Those laws and regulations have been authorized by the legislature, and they represent significant values in the community. To the extent that there is an emphasis solely on the rights of the applicants or contestants in front of the administrative law judges, and the perception that agencies don't do anything right, we may run the risk of a distorted view of administrative adjudication.

The other question that I raise about ALJ finality is the consequence that it may have for the ALJs themselves. One of the disadvantages of ALJ finality is the loss of political accountability. Agencies are responsible for the enforcement scheme and they are politically accountable. That political accountability is going to go somewhere, and in those states where there is significant ALJ finality, some sort of political pressure is going to be exerted on administrative law judges.

Thank you.

HON. TYRONE BUTLER: Thank you, Professor Flanagan.

Professor Rossi?

PROFESSOR JIM ROSSI: I agree with a lot of what Professor Jim Flanagan has to say about the nature of finality in administrative law, particularly the impact that it might have on accountability in the administrative process. And, like Jim, I'm no fan of automatically granting ALJ decisions final status. I would emphasize that what we're talking about here is legal finality. To a degree, we are also talking about *de facto* finality – that ALJ decisions are frequently final because an agency with the authority to accept or modify ALJ findings does not do so – but I'm going to focus most of my remarks today on the legal finality of ALJ decisions, or when an agency does not have authority to reject or modify ALJ findings.

In my opinion, the state central panel concept allows ALJs to provide an efficient and independent adjudication forum, without making every ALJ decision final. And, as I'm going to suggest, I think there is little to be gained for administrative process values from ALJ finality. However, as someone who lives in a state which makes many ALJ decisions final – in Florida for instance, ruled validity challenges are heard by administrative law judges and they make final decisions in those contexts – I recognize that ALJ finality is a feature in many states' systems of administrative law. States like Louisiana, South Carolina, and many other states have adopted ALJ finality in certain contexts. And it's a feature within these state systems of administrative governance, perhaps even a permanent one. If Jim is correct, and I think he is, we have to contain the spread of finality. But where ALJ finality is already a feature of state administrative law, how should agencies and courts react to it?

What I want to focus on is what courts ought to do in states where ALJ finality already exists. What are the implications of finality for those systems of administrative law generally and for judicial review in particular? And what I want to emphasize is accountability is not some abstract value that we're pulling out of a hat in discussing administrative law. In fact, administrative law – and particularly doctrines of judicial review – are designed with a certain accountability structure, a decision-making structure, in mind. I want

to suggest that ALJ finality of the legal sort is not really compatible with that accountability structure. So, to that extent, states that have adopted ALJ finality, courts in those states must also adjust their approach to judicial review of ALJ decisions if they are to protect accountability. And I can distill my comments of today to two distinct and hopefully very brief steps. First, echoing Jim, I want to describe some institutional models of adjudication in order to focus discussion and to trace how finality can and should be disentangled from the central panel. And then, what I want to do is to flag how finality might have serious implications for judicial review, especially on issues of law and policy, and suggest what courts might be able to do about this, to the extent that state APAs allow it.

Now, in the materials that have been distributed and on the screen at the front of the room, I am presenting a figure that includes three models of agency adjudication which might lead to judicial review. These come from page fifty-six of the article in the materials that have been distributed.¹ The models are also drawn from an earlier article written by Professor William Anderson at the University of Washington.²

If you focus on Model One, Model One sees the investigative and prosecutorial, the initial judgment and the final decision stages of adjudication, as internal to a single administrative agency. An ALJ may make a decision, but this decision occurs within the administrative agency itself. The ALJ issues a recommended decision, which the agency may accept or reject before an agency decision becomes final and appealable to a reviewing court. This is the model that predominates at the federal level and in many states that don't have central panels.

1. Jim Rossi, *Final, But Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53, 56 (2004). This is an expanded and updated version of Jim Rossi, *ALJ Final Orders on Appeal: Balancing Independence With Accountability*, 19 J.NAALJ 1 (1999).

2. William R. Anderson, *Judicial Review of State Administrative Action – Designing the Statutory Framework*, 44 ADMIN. L. REV. 523, 555 (1992).

Model Two sees the investigative and prosecutorial decisions as occurring in a separate institutional entity, the administrative agency, then adjudication, which occurs typically in some sort of a central panel. This is the traditional central panel model. As we know, the central panel has some real advantages over Model One, efficiency among them, since, in many states, agencies cannot afford their own ALJs, let alone the internal safeguards and institutional constraint that they would need to place on them. Second, this ensures independence to the extent there is an institutional wall of separation, between the investigator and the prosecutor on the one hand, and the judge on the other, to protect fairness in the decision-making process. Note, however, that under Model Two, as in the federal system, the ALJ's decision is a recommendation. Of course, if the parties to a proceeding, including the agency, fail to exhaust remedies, the ALJ decision may become final, but exhaustion and finality are two different things. Normally, an ALJ decision must go through the agency head, who may or may not take action on it before a final and appealable decision occurs. This is the standard central panel model. Most states with central panels adhere to some variant of it. And it's the concept in the 1960 and 1981 MSAPAs, and will likely be the model for the upcoming MSAPA revision as well.

Now, Model Three is fundamentally different. Model Three separates entirely the ALJ and agency decisions. Here, the agency, not the ALJ, makes the recommended decision. The ALJ may make an entirely contrary decision. If the ALJ does so, this is immediately appealable as a final agency act or final action, without any opportunity for agency review of the ALJ's decision. In other words, here exhaustion is meaningless. The agency has basically relegated the status of any other party on appeal that files briefs before the court outlining why its position, rather than the ALJ, should prevail, to the extent they disagree. But the ALJ's decision becomes the status quo, which a reviewing court considers.

As Jim has suggested, the central panel can and should be disentangled from ALJ finality. For example, I think that all discussion of administrative law before NCCUSL, which is currently working on a new MSAPA project, has had Model One and Model Two in mind as background concepts. Under both of these models, the agency head has the power to make a decision that is immediately

appealable to the court. We're all taught administrative law with this model in mind – even those of us who studied state administrative law. And I think this is one reason why the distinction between exhaustion and finality is so important to administrative law and the administrative process.

Now I want to run my attention to the types of judicial review administrative law might afford final decisions made by ALJs. Administrative Law has designed its primary standards of review with Model One and Model Two in mind, not Model Three. Generally, under state APAs, reviewing courts apply somewhat deferential standards of review, such as substantial evidence and arbitrary and capricious. Judicial deference has a role in this context because of the assumption that a politically accountable and expert agency decision-maker has some authority to accept or reject final adjudication of decisions. For example, under normal standards of judicial deference to agency interpretations of law, courts do not upset agency interpretations of ambiguous statutory language. Also, in reviewing complex, technical agency policy decisions, a reviewing court normally does not generally substitute its judgment for the agency decision-maker. Instead, to promote expertise in the agency decision-making process, the commonly accepted role of courts, in reviewing both issues of law and policy, is one of deference. Although the label a court places on the standard of review certainly varies from state to state, the general attitude is consistently one of deference in those state systems.

The main rationales for deference by courts are premised on an administrative agency, which is politically accountable and possesses expertise for the decision that's being reviewed, having authority to make a decision. If, however, a state ALJ has made a legally final decision that is subject to review, this presents a problem for reviewing courts. If a final ALJ decision is contrary to the agency's initial decision, and the agency contests it, the ALJ decision subject to review before a court should not necessarily be afforded the same level of deference as an agency decision. The ALJ, of course, is a generalist adjudicator who can protect procedural fairness and is very adept at doing that, as well as adept at making credibility determinations – much like a trial court judge. But the administrative agency is comprised of specialists who are also more directly

politically accountable to elected officials; they will have an institutional advantage in making law and policy determinations. ALJ findings of fact present little or no problem under an adjudication system that affords ALJ decisions final status, and the substantial evidence test needs no medication in this context. However, at a minimum, I think that on appeal of final ALJ decisions, courts would need to give great weight to the legal and policy decisions presented by agencies and appellate briefs on issues of law and policy. Perhaps they should even subject ALJ decisions to a standard of review akin to what they afford trial court decisions on issue of law – clearly erroneous or de novo – rather than deferential review.

Briefly, I want to wrap up and save some of my additional remarks about standards of review for rebuttal. But, in sum, if we take finality to its extreme, we begin to treat ALJ decisions in a manner similar to a trial court judge. At some level, we might question whether this is compatible then to the values of administrative law. We learn administrative law with Models One and Two of agency adjudication in mind. To the extent that they allow accountability and independence to co-exist, they strike a balance. To the extent that administrative law is compatible with ALJ finality, and I'm not sure it is, there are some issues regarding what standard of review courts should apply to an ALJ final order that should be on the table for discussion. I think ALJ finality presents some accountability defects. These defects require us to pay attention to standards of review of final ALJ decisions. At a minimum, I think that to the extent ALJs and central panels want the sweet of ALJ finality, they might have to take some bitter as well with this, which would be decreased judicial deference to ALJ decision-making outside of issues of fact.

Thank you.

HON. TYRONE BUTLER: Thank you, Sir.

John?

JUDGE HARDWICKE: Mr. Moderator, I hope you will note that I only have ten minutes to rebut the twenty minute argument of the Professors, and my ten minutes may not suffice.

HON. TYRONE BUTLER: Judge Hardwicke, I'm moderating and keeping the time, also.

JUDGE HARDWICKE: My friends, the Professors, are trained so much in federal administrative law that I think that they lose track of the differences between state administrative law and federal administrative law. Everybody in this room is familiar with *Chevron USA v. the Natural Resources Defense Council*, which gives great deference to agency interpretation of ambiguous statutes. *Chevron* has been cited over 11,000 times in the literature and in law reviews 3,652 times. Typical of state citations, *Chevron* has never been cited in an appellate decision in South Carolina, once by an appellate court in Maryland, and once in an appellate decision in Georgia. Bearing in mind that *Chevron* was decided more than twenty years ago.

Now, to show the contrasting state interest in due process, consider widespread citations among the states of *Matthews v. Eldredge*, a 1976 case, cited 8,885 times and over 500 times in state courts. In other words, due process questions receive great attention in state courts, whereas federal statutory interpretation receives little or none.

Academics, with specialties in federal administrative law, I believe, misconstrue the nature of the central panel movement and the nature of state agencies. The state administrative function is more programmatic, and different programs may be loosely assigned to agencies, or not assigned at all. Consequently, a program may not be identified with an express mission or policy.

In Maryland, the Office of Administrative Hearings (OAH) hears over 600 different programs assigned to more than twenty agencies. The State Health Department alone provides hearings for more than 100 programs. There may be no such thing as a general policy position within many state agencies. This may or may not be true of the federal system where agencies are more monolithic with fewer

individualized programs – but with well-defined policy prerogatives for major mission assignments.

Professors Flanagan and Rossi fail to mention the American Bar Association's model OAH statute, which provides a menu for agency protection of its policy. In any given case, or class of cases, the agency may actually retain a case, or class of cases, for policy considerations, or send that case or class of cases to the OAH for either a recommended or final decision. Professor Rossi seems not to recognize that so called *de jure* delegations of final authority may actually be voluntary agency assignments to central panels within the menu concept. There is no truly granite approach to final decisional responsibility among the states.

What is called agency expertise is not so much agency expertise as it is agency culture. It has been written that agency expertise should be “on tap” but not “on top.” The head of the agency is generally not an expert, but relies upon the expertise of economists, lawyers, and other professionals employed on his or her staff. Generally, state agency heads and commissions are chosen for political reasons by Governors and they have the experts in their staff.

Agency expertise in support of agency decisions is placed upon the table at the hearing *qui audit decidet*. He who hears decides, is the key principle of our life and our law. To defer the final decision back to the agency is, in effect, to give the agency a second bite at the apple. In the central panel system and similar systems that we're familiar with, adjudicatorial process is adversarial. If the agency head gets a second bite, and if for any reason he or she is able to change the decision of the hearing judge under the rubric of “policy,” disagreeable results will be modified. Consequently, many states have placed a statutory limitation upon the agency's ability to overrule the judge except for limited specific reasons. Our academic friends treat these limitations as *de facto* finality.

The truth of the matter is that we are trying to prevent the agency head from overturning the decision with which he or she disagrees. Neither the agency nor the respondent may be agreeable losers; indeed the agency may believe that the action would not have been

pursued at all without justification. Consequently, when the agency loses, it may find reasons, or attempt to find reasons, policy reasons or whatever, for reversing.

As I have said, agency expertise is a derivative from agency culture; the agency head or the in-house hearing officer may be embedded in that culture which few members of the affected public can understand. It is only by taking the hearing responsibility away from the agency, and away from agency culture, that we can be assured of fair play. The ancient Greeks created the concept of "isonomy," equality through the law, recognizing that government action should take place in a citizen friendly culture in order to provide a balanced decision-making environment.

So what we have done in the central panel setup is to make the hearing the name of the game. Agency policy, as well as the agency's expertise, is put on the table at the hearing through its staff of experts. Agency policy is part of the law of the case and part of the assignment of the judge to apply in a given case. Consequently, the hearing, the centerpiece of all of the work, and the record of the hearing, is the final matter. Professor Flanagan argues that finality derived from ALJ decision-making results in lack of uniformity and hence lack of predictability of administrative decision-making. In most states the present system of appeal to circuit courts surely gives rise to lack of uniformity. And many times the agency will make sure that the appeal goes to the circuit court likely to be friendly to its position.

And one final word. When I established the Maryland system, I met with the Motor Vehicle Commissioner to urge that the OAH be delegated final decision-making power. During the meeting, he excused himself for a telephone call. Upon his return, he indicated that the call came from a Senator attorney making inquiry about a hearing. The Commissioner ultimately assigned finality of decisions to the new OAH. Clearly, fairness trumps expertise.

Thank you.

HON. TYRONE BUTLER: Thank you very much, Judge Hardwicke.

We'll have rebuttal now, or rejoinder.

Professor Flanagan?

PROFESSOR FLANAGAN: First, we have to get a handle on how often agencies disagree with ALJs. In the state system, that is difficult to determine. My guess, from looking at several reports, including Professor Daye's case study from North Carolina, suggests that agencies accept, on review, at least eighty percent of decisions by ALJs without any changes. It's likely that, excluding disagreements over the penalty, that the agreement between agencies and ALJs is in the neighborhood of ninety percent. Arizona, which has very good statistics, says that agencies and ALJs agree ninety percent of the time and ninety-five percent of the time if you exclude penalty issues. So, there is very high agreement between agencies and ALJs.

The second thing that I suggest is that in many cases the information, particularly in complex cases, increases over time. South Carolina, for example, has certificate of need cases, and Chief Judge Kittrell has heard several of them. The information that is presented to the agency on whether a certificate of need is appropriate may come on January 1, let's say, and the agency makes its initial decision. A year later, there may be a hearing before the administrative law judge and another party; typically a competing institution introduces additional evidence on the issue. In other words, what was presented to the agency when it made the initial decision is not the same information that is presented to the administrative law judge. My view is that with appropriate findings of fact based on a much fuller record, there is really a second opportunity to make a decision on more complete information. And the primary purpose of agency review is to be able to look at all the information after it has been presented to the ALJ.

So, the rate of agreement between ALJ and agency is high. The level of disagreement is not significant enough to go justify a change in agency review. Second, because information increases through the hearing process, agency review after a full hearing is important. And I believe this is true in the state system as well as the federal system. I don't think there is significant difference on this point.

HON. TYRONE BUTLER: Thank you.

Professor Rossi?

PROFESSOR ROSSI: Having taught both federal and state administrative law, and done so in a variety of states, I am aware of what many states do in the context of judicial review. Some states, of course, have an independent standard of review even in reviewing agency law and policy decisions. Most states though, I think it's fair to say, endorse a standard of review that affords some deference to law and policy decisions. Although few states adhere to *Chevron* explicitly, "some deference" or "great weight" are routine phrases uttered by state courts in reviewing agency interpretations of law. I'm not aware of any state court cases that clearly say that ALJ legal and policy determinations are reviewed in the same manner. So when I'm referring to "principles of administrative law," I am referring to principles of state administrative law, as well as consistent principles with federal administrative law, in this context.

I think that what Judge Hardwicke says about finality in the context of factual decisions makes a lot of sense in the context where the ALJ's ability to adjudge credibility is institutionally superior to the agency's – the DMV context in Maryland seems to me a good example of where an agency might voluntarily select to assign ALJ finality to a pool or a class of cases. That makes sense to me, especially in the context of certain factual adjudicative determinations.

Where I think I have the most problem, though, is in the context of ALJ final determination on issues of law and policy, especially on complex and controversial regulatory matters. Again, I ask the questions: How is this consistent with the values of accountability in the administrative state, in the sense of both politically and expert-based notions of accountability? How is it consistent with a state-based administrative process that values accountable, as well as fair and procedurally just, decisions?

Thank you.

HON. TYRONE BUTLER: Thank you.

Judge Hardwicke?

JUDGE HARDWICKE: I think Professor Rossi really touched upon the point, which is one of policy. According to various chief judges of the central panel states with whom I have discussed final decision-making, there is unanimity that they have not sought that authority. However, when agencies have voluntarily relinquished this finality to central panels, it has been welcomed as a sign of approval of the competence of the delegated hearing process. In other words, they consider that as a mark of approbation.

I do agree with Professor Flanagan that the incidence or coincidence of agreement with the agency decision is remarkably high when finality of decision is attained. Thus, when we achieved DMVA responsibility for drunk driving cases in Maryland, DMVA records proved that for over a period of years OAH decisions were compatible with agency decisions eighty-seven or eighty-eight percent of the time.

I have referred to the fact that agencies are, or may be, immersed in their own specialized culture, and that this culture is sometimes assumed to be the same as expertise. But, culture problems have yet another aspect in non-panel states where there may be a coziness, even marriage, by the agency to regulated businesses or interest groups. A state insurance agency charged with the regulation of the insurance industry, may become a protector of that industry. Commission authorities may become familiar with regulated officials and with their lawyers, creating a vulnerability to pressure. A citizen litigant may find himself confronted by a commonality of jargon, a patois, spoken only in the world of specialization.

We have a long way to go in the central panel system. I think we need some great improvement in both hearing technique and better mastery of jurisprudence. We need a certification program for ALJs, so that ALJs will be more uniformly capable and demonstrably qualified. We need to work more cooperatively with agencies, to attend public meetings with agency heads to discuss their policies – with such meetings attended by the public and by the Bar. Closer attention should be paid to the ABA model OAH statute by those states considering a central panel so that recommended versus final

decisions can be decided by a menu of agency choices. State administrative procedure acts should be amended better to reflect modern central panel jurisprudence. We must continue conscientiously to improve.

Thank you.

HON. TYRONE BUTLER: Now we'll address some of these questions. I will tell you that penmanship counts. So if your name isn't on here, I may have to ask you to kind of like straighten this out.

Professor Oakley, where are you? Your question: Should courts give more deference to findings/conclusions of ALJs than ALJs' policy function in levying civil fines? Is that your question?

PROFESSOR OAKLEY: Yes.

HON. TYRONE BUTLER: Okay, and I'll ask Professor Rossi to address that.

PROFESSOR ROSSI: If you'll allow me I'd like to reframe the question here: Should courts give ALJs more deference on general factual decisions and conclusions as opposed to policy decisions to levy fines. You know, I think it depends on the nature of the findings and conclusions. To some degree, the findings and conclusions could well be imbued with all sorts of policy determinations – so called “mixed” questions – including legal interpretations of the agency's regulatory programs and the agency's regulations. To the extent they are, I am not sure that if they are final ALJ decisions that they ought to be given the same amount of deference as purely factual issues. If, however, those findings and conclusions are more around a pure factual issue, deference may be appropriate by a reviewing court under the substantial evidence standard.

HON. TYRONE BUTLER: Judge Hardwicke, would you care to comment on that?

JUDGE HARDWICKE: I think sometimes the amount of deference is subject-matter driven. I heard your comment, Professor Rossi, about the amount of deference that's given by the various state

agencies to state ALJs. In Maryland, our courts give super deference in the judicial review of decisions of the Public Service Commission and of the State Board of Public Education, ostensibly because of their special expertise. However, statutory mandates for both boards indicate that they are comprised of ordinary citizens without any specially defined qualifications.

HON. TYRONE BUTLER: Do you want to weigh in, Professor Flanagan?

PROFESSOR FLANAGAN: No.

HON. TYRONE BUTLER: Well, the next question is addressed to you, anyway. It's regarding the inconsistency of ALJ decisions. Is there empirical data supporting your conclusion that there [are] these inconsistencies, and are inconsistent decisions more likely from boards, commissions and agencies that are chosen and change for political reasons?

PROFESSOR FLANAGAN: It is hard to find information on inconsistencies between ALJs and agencies. It's hard to find statistical support. What you have to do is look at all the cases and see what each ALJ decides and make judgments on how they differ. What is clear is that any time there is ALJ finality, you will find that different ALJs decide the same question differently. So inconsistencies occur. There's no doubt about that.

I'm sorry, what was the second part of that question?

HON. TYRONE BUTLER: Are inconsistent decisions more likely from boards, commissions, and agencies that are chosen, I guess politically chosen, and change for political reasons?

PROFESSOR FLANAGAN: Well, this brings up the idea of political accountability. We elect officials, and officials are appointed, because they represent various political views. The whole purpose of the elections that we are now going through is that they may change the officials in the federal system. So the fact that an agency decides something one day and there are different leaders later on who make different decisions, is a function of democracy.

But I believe that the same board or commission is likely to decide the same issue the same way, if they are the same decision-makers, more consistently than when there is a large central panel with several ALJs who hear the cases from the same agency.

JUDGE SCHOENBAUM: May I ask a follow-up to the first half of that question?

HON. TYRONE BUTLER: No. (Laughter)

Judge Hardwicke, would you like to weigh in on that one?

(To Judge Schoenbaum) I'll give you a chance. Write it down.

JUDGE HARDWICKE: The idea that agencies have policies, well-conceived distinct policies, which they follow in furtherance of their mission, is a misconception. Most agencies don't have well-defined policies. And what policies they do have may be developed as they go along. Now, it is true that the policy of, say, the Motor Vehicle Administration is, "let's get the drunks off the highway." And the judges that hear those cases know that's the policy. But our cause is not the substantive mission. Our cause is due process. Our goal is to decide the case fairly, in accordance with those principles. We are not interested in defeating the mission. We are interested in making sure that the mission is carried out in accordance with constitutional prerogatives.

HON. TYRONE BUTLER: Professor Rossi, do you care to weigh in?

PROFESSOR ROSSI: Again, I think that ALJ determinations on issues of regulatory policy are most difficult. It may well be that there some agencies – certainly agencies, even in Maryland, such as a state Department of Environmental Protection, have policies and interpret statutes under ambiguous grants of authority. Those policies are influenced by changes in the administration in a state, as well as by political influence and changes in science and technology. I know that's true in my home state of Florida, where our Department of Environmental Protection has taken very different positions on important regulatory issues under different administrations. The

extent to which this is the case may well just depend on a regulatory agency and its subject matter. If you take a decision by an environmental agency or a decision by an agency such as the Public Service Commission, it seems to be that agencies like those could be greatly influenced by political shifts and changes in expert knowledge, whereas some other agencies like DMV, may be less likely to change positions frequently. So I agree with Judge Hardwicke that the appropriateness of ALJ finality is largely a function of the subject matter. It varies with regulatory complexity, and to the extent a decision is intertwined with either science or politics, or both, ALJ finality and judicial deference to an ALJ is less appropriate, in my opinion.

HON. TYRONE BUTLER: As a follow-up to the question of inconsistencies, by Judge Schoenbaum, he asks of the inconsistency of ALJ to ALJ, isn't it more likely that this results in different facts in the record?

Professor Flanagan?

PROFESSOR FLANAGAN: Obviously it could, but I'm thinking more of those situations where the question is whether or not a certain level of activity justifies a finding on some particular point, or, how important is a particular factor in the analysis. If there is a multi-factored analysis on a point, in my opinion, different judges will accord different weight to the same factors. Whereas, one of the functions of agency review is to make sure that similarly situated individuals have similar results. One of the important functions of sentencing guidelines, for example, was to reduce the difference in sentencing among judges. My concern is that when ALJs make their final decision, subject only to whether or not that satisfies whatever the legal standards of review are, that different judges will view the same question differently and there will be different results.

The one example I can think of comes from Louisiana. In Louisiana, the Commissioner of Insurance takes the position that if a person is convicted of a felony that he will revoke the license. It doesn't make any difference what the felony is. The ALJs take the position that they will conduct a review to determine whether the

felony is related to the trustworthiness of the broker or the agent. Clearly, if you're an agent, you're much better off having the ALJ making the decision than the agency. And there is no way that anyone can anticipate how different ALJs will rule on this issue. There is a real loss of consistency in this approach.

HON. TYRONE BUTLER: That question started – the discussion came from a Louisiana judgment. We want to move on. I think this next question will take us on a different road to try to cover all the points.

Professor Flanagan, the question is, wouldn't training ALJs in agency policy provide appropriate expertise? Don't inconsistencies exist among the judicial branch of judges? And, finally, doesn't the ALJ provide the fairest forum for the complaining party.

So the first question, won't training ALJs in agency policy provide the appropriate expertise?

PROFESSOR FLANAGAN: I think the answer is no. On review, the agency has the institutional knowledge of the entire agency available to it, and I don't think there is any way that a particular individual can have that type of expertise. But, no, I don't think training is sufficient. It's certainly not sufficient to do away with all agency review.

HON. TYRONE BUTLER: Secondly, do inconsistencies exist among judicial branch judges?

PROFESSOR FLANAGAN: Absolutely. That, however, doesn't seem to me to be an argument for accepting inconsistencies among ALJs in administrative law, when the legislature has said that the agency has special expertise.

HON. TYRONE BUTLER: And, finally, doesn't the ALJ provide the fairest forum for the complaining party? And this is from Judge Greco in Chicago. The fairest forum for the complaining party, in other words, we've been doing a lot of talk about the agency's rights and the agency's position. What about the complaining party, the individual that comes from outside, that doesn't know how –

PROFESSOR FLANAGAN: Well, one purpose of the hearing is to provide procedural due process to the individual. And central panels help enormously in providing fair hearings. Moreover, the ALJ's factual findings, in the vast majority of the cases are what they are, and the agency accepts those in almost all of those cases. All I'm saying is that agencies should have the opportunity to look at the record as developed and have some ability and authority to review those issues that are policy-oriented.

HON. TYRONE BUTLER: Professor Rossi? Do you care to comment on this question?

PROFESSOR ROSSI: No.

HON. TYRONE BUTLER: Judge Hardwicke?

JUDGE HARDWICKE: I think the policy positions of the agencies should be put on the table at the hearing. One area that has always bothered me a lot is that of penalties. And if you have a polluter, for example, that has been a very bad apple, the local EPA has had trouble with this person for years, and so on the fifth offense, it seeks the maximum penalty, a fine of \$50,000 a day and \$50,000 for each offense. I want the agency to come before the administrative law judge, and detail this record and recommend the fine and penalty. It seems to me that those policy concerns must be put on the table and it is there that they must be dealt with. Give the malfeasant the opportunity to respond and deal with it in that manner. I think that's a far better and proper way to do it than by the in-house agency commission head.

HON TYRONE BUTLER: From South Carolina. Can an agency make policy in a decision or should they do it by regulation?

Professor Rossi?

PROFESSOR ROSSI: That's a good question. In Florida, agencies have to make almost all their policy in the context of notice and comment rulemaking, given that by statute we don't allow agencies to announce new policies in the context of adjudicative decisions or enforcement proceedings. Is that a good thing? Putting

on my “what is best” hat, I’m not sure that’s generally a good approach for a state to take. To the extent that agencies need a certain degree of flexibility in the implementation of regulatory programs – and particularly sophisticated agencies, where the stakeholders who are regulated are also very sophisticated and really might have quite a bit of capacity to understand where the agency might be going with the implementation of a new policy – such a rule may work to ossify agency regulation rather than make it better. The result will be less experimentation and less flexibility in regulatory implementation, and I think that adjudication is a far superior decision-making mode for pursuing experimentation and flexibility. Outside of states like Florida, which require rulemaking, I don’t think that regulation is the only context in which policy issues come up. It comes up in the context of adjudication, as well, and it should, in my opinion. In addition, mixed questions of fact and law or fact and policy are routine in the adjudicative context, even in states such as Florida which require rulemaking.

HON. TYRONE BUTLER: Professor Flanagan?

PROFESSOR FLANAGAN: I agree, particularly with regard to the sophisticated agencies and sophisticated and difficult problems. It’s much more likely that you will have identified a problem and fully developed a record when you go through a hearing than when you are trying to anticipate what all the problems are beforehand. The basic justification for agency review is that sitting here today, and drafting regulations, you simply can’t anticipate the problems or the responses that agencies will have after a full hearing.

HON. TYRONE BUTLER: Judge Hardwicke, would you care to address that?

JUDGE HARDWICKE: There is no question but that there is the loss of the opportunity of the agency to develop policy through the hearing process. And that’s something that has to be given up when we take that power away from the agency. But I think it’s a good trade-off. I think that the citizen coming to a hearing needs to know what the issues are and what the policy is before the hearing happens. I distrust a situation where the policy problem is not brought up until the hearing and decided by one of the litigants: As a matter of fact, I

think my academic friends will agree that policy cannot be made in the context of contested case hearings.

HON. TYRONE BUTLER: That was Judge Kittrell, South Carolina.

Judge Mann, North Carolina. The question is: In state adjudication of special education contested cases under federal law, that's IDEA, why does the federal law prevent the adjudicator who makes the final decision from being an employee of the state department of education?

Would you care to tackle that, Professor Flanagan?

PROFESSOR FLANAGAN: Obviously, that is one of the justifications for central panels. There is no doubt that there is great advantage in having the initial fact finder be someone separate from the regulated entity. I don't think there's any problem with that. My point is that once all the facts have been found, and they are more complicated, more developed than what was known at the initial decision, what justification is there for not having the agency review all of the evidence and decide whether or not this is a case that has been adequately dealt with under the law or regulations or whether there is some reason why the policy or the law or the interpretation ought to be changed?

One of the real questions, that I'm having a very difficult time getting a handle on, is: how many cases involve policy issues of this type? That is very difficult, and many ALJ cases in the state system may not generate these policy issues, and in those instances there may be some reason for saying it was just purely a factual decision, and it might be appropriate for ALJ finality. And it is appropriate for agencies to say we don't want this type of decision and hand it back. I'm just saying that as a principle, ALJ finality across the board, as it is in Louisiana and in South Carolina, has significant disadvantages to administrative law.

HON. TYRONE BUTLER: That's Judge Mann from [North] Carolina.

I have a question here from Professor Asimow, and it's an interesting question. Is there a better case for ALJ finality in mass justice situations where ALJs generally resolve only factual issues and no policy questions? For example, why not abolish the use of appeals counsel in Social Security, or give ALJs final decision powers in unemployment insurance cases in the states?

Professor Rossi?

PROFESSOR ROSSI: It's an interesting suggestion. Yes, I agree that there's a stronger case. Whether it's a convincing case, I think, would depend a lot on the context or the nature of the factual findings. I don't want to open up a whole new can of worms here, but today we've tended to accept the premise that on issues of credibility we ought to let the ALJs' findings of facts carry the day. But if the issues are the kinds of issues that we consider mixed questions – for instance, in the context of black lung disease, an adjudicative decision may involve complex causation questions that combine fact, law and policy – some of the same concerns I've raised today may come up even in a mass adjudication context. To the extent, the question is ultimately a “mixed” one, it begins to raise issues of law and policy. If an agency has institutional competence to make accountable decisions on such a matter, I do not know how we can reconcile judicial deference to an ALJ's final decisions with both expert and political notions of accountability in administrative law.

HON. TYRONE BUTLER: Judge Hardwicke?

JUDGE HARDWICKE: I'm reminded of a famous statement of Spiro Agnew. You remember him, a famous Marylander. He said, “if you've seen one slum, you've seen them all.” Such oversimplification may occur when executive agencies become hardened in their cultural approach and fail to recognize their own bias. Environmental agencies may become bogged down because of contending citizens and manufacturing forces so that the hearing responsibility may be better handled by a system of independent hearers able to make decisions quickly and efficiently.

HON. TYRONE BUTLER: This is from Judge Solomon. In the non-finality models, aren't the same agencies that are parties before the ALJ the same agencies that would review the decisions?

Professor Flanagan?

PROFESSOR FLANAGAN: Yes. But that ignores a very important issue. There is a very significant difference between what the staff's position is and what the agency board or executive may decide. There is some evidence that agency boards differ with the staff position on particular issues. So I think that they are not synonymous. I don't think that the leadership affirms the staff in all cases. Second, it also seems to ignore the procedural protections in the APA. That is, matters come up for agency review, not for a complete de novo review, but they typically come up as appeals on particular issues in the same way they come up in the judicial system. So the boards or commissioners are faced with deciding a much narrower issue, usually highly focused as a result of what has gone on before. So it is not entirely accurate to say that the staff and the agency are the same entity, when you are talking about what has been presented in front of the ALJ and the decision that is being ultimately made on review by the leadership.

HON. TYRONE BUTLER: Professor Rossi?

PROFESSOR ROSSI: I think Jim stressed a very important point in his comments – which we haven't discussed much here – which is that agencies are procedurally constrained in certain ways by the APA. For example, they have to give notice. They have to explain their decisions. And those requirements – procedural requirements and requirements of explanation – are subject to judicial review. So I think that's something important to take and keep into account here. Agencies themselves are not without constraint in their decision-making. The efficiency and procedural fairness provided by an ALJ, is of course, are extremely important; but so are other APA procedural protections, some of which may not apply at all in the adjudicative context before an ALJ unless a state APA makes this explicit - for example, does the definition of an "agency" in an APA include a non-agency ALJ?. If we move too far towards finality in a

central panel system, we could end up with even less procedural protection than is afforded when the agency makes the final decision.

HON. TYRONE BUTLER: Judge Hardwicke?

JUDGE HARDWICKE: I know my academic friends are well aware that ALJs must give reasoned decisions. We do not have the luxury of some of our constitutional judges who may check a block - Plaintiff, Defendant, Respondent, Guilty, Not Guilty. We must give a reasoned decision in every respect to support each conclusion of law. And I think that constraint gives a great deal of protection to the agency, to the respondent and to the public.

HON. TYRONE BUTLER: It's very interesting in all these questions I've received, the ones I can read, none are addressed to Judge Hardwicke. So I'm going to take this one that's not addressed to anyone, and I'm going to ask the Judge to start the discussion on this. Would an appellate tier of administrative review within a central panel improve accountability and provide more consistent policy? I don't think this means policy, it mean[s] consistent decision-making.

What do you think, Judge Hardwicke?

JUDGE HARDWICKE: I'm not quite sure I understand the question.

HON. TYRONE BUTLER: There's no name on this.

HON. STEVEN TEATE: It was mine.

HON. TYRONE BUTLER: By saying you write appellate tier of administrative review - in other words, the finality of the final decision by the ALJ would be subject to appellate review within the central panel, in other words, another group of judges that would act as appellate review. Would that improve accountability and provide more consistent policy, and I think you've got some views on that sort of thing. Would you like to share those?

JUDGE HARDWICKE: Chris McNeil has written an article in which he said that he thought the Chief Judge should be able to lay policy down within the central panel agency. I do not agree. I think the public would find this process suspect because outsiders who did not participate in the hearing process, could make changes in the decision. I think that the person who hears the case, who is in front of the parties, I think that's the person who should make the decision. I would not want a non-hearing judge in that agency to review the decision and have input into the result.

I remember my experience as a practicing lawyer who used to take cases to the agencies, including federal agencies, that I would tell my clients, "You know, you're going to lose this case. The agency is going to decide against you. We will participate in this proceeding to find out what is going on, and then we'll go before a real judge and get a decision."

HON. TYRONE BUTLER: Professor Flanagan?

PROFESSOR FLANAGAN: That raises a very interesting issue. My concern with ALJ finality deals with consistency of interpretations, and there has to be some mechanism to deal with that. In this context, I point out that in South Carolina, our central panel has a provision for en banc review of critical issues. It is a very interesting procedure. What I raise is that it is an extremely difficult thing to set up and do internally for several reasons what Judge Hardwicke has said. The whole question of internal quality control within central panels generates controversy, as we've seen, and I don't think there is any solution or resolution on the issue of internal quality control. All internal consistency controls are going to run into those organizational problems. It is not that I don't think it is a good idea. I have some questions about how to implement it at the present time.

HON. TYRONE BUTLER: Professor Rossi?

PROFESSOR ROSSI: I think it could be a good idea in a large central panel system. Ideally, such review would be limited to issues of general procedure, and issues of law and policy. I do not think it

should extend to issue of fact, outside of perhaps a clear error standard.

HON. TYRONE BUTLER: Professor Rossi, this is addressed to you, again something a little more geared to what we do every day. Agencies can offer expert witnesses from the agency to provide agency policy. Why does this not overcome your argument about ALJs being generalists? Judicial court judges are also generalists.

PROFESSOR ROSSI: That's a good question, to the extent we want to consider the agency adjudicative process the same as a trial in the judicial branch. However, I think there is something distinct and important about administrative adjudication that does not extend to the traditional trial. What I think is distinct about administrative adjudication is providing the final decision-maker – and ultimately the final decision-maker here is potentially a court – a record that includes a clear, crisp statement of the agency's policies and legal determinations. Providing expert witnesses on issues of policy, requiring them to prove up those things in the context of a hearing, certainly helps the record, but it doesn't provide the appellate reviewing court a crisp status quo that reflects the agency's political judgment and technical judgment on those issues. That is paramount, in my view, to preserving accountability in administrative law.

HON. TYRONE BUTLER: Judge Hardwicke?

JUDGE HARDWICKE: I agree with Professor Rossi's answer.

HON. TYRONE BUTLER: Professor Flanagan?

PROFESSOR FLANAGAN: I'm not going to disagree.

HON. TYRONE BUTLER: This question, I'll ask it, is if inconsistent decisions of different ALJs are a problem, can't this be dealt with through the promulgation of new regulations?

Is that the question?

UNIDENTIFIED: If you've got several inconsistent decisions, why not promulgate a new regulation?

HON. TYRONE BUTLER: Professor Flanagan?

PROFESSOR FLANAGAN: There is a certain level of Hell that Dante has set aside for those responsible for getting regulations through the state legislature, in my view. I think it is extraordinarily difficult to address issues through the regulatory process. By the time you've identified and solved one, you've got ten more. So, some can be, but I don't believe that the regulations are a particularly effective way for providing consistency on such issues.

HON. TYRONE BUTLER: Judge Hardwicke, how do you feel about it?

JUDGE HARDWICKE: I think it can be solved by publication of the *Federal Register*, whatever the publication or document is, I do think so. But I do understand the response that the Professor makes - that it's somewhat difficult. But, of course, you know, we have things like the *Skidmore* decision where you can have internal memoranda which do have some weight as to what the agency's policy is. And I think our judges would pay attention to a *Skidmore* type memorandum that would instruct the judges on what the agency wanted, so that the public would be aware of the memorandum, and we would not have to go through the formality of a published regulation.

HON. TYRONE BUTLER: Professor Rossi?

PROFESSOR ROSSI: There is an interesting irony here that the ALJ might be able to issue final decisions on issues of law that could constrain the agency's authority. Suppose an ALJ makes a finding in the context of a final adjudicative order that the agency doesn't have the authority to do something like adopt a rule. My view would be the agency should be able to come back and have to promulgate a rule. The agency's legal interpretation should override the ALJ's in that context, so long as an APA allows this. I'm not sure if that's where you're intending to go with the question.

HON. TYRONE BUTLER: If ALJ decision-making is afforded finality, can consistency and predictability be assured by measures that would not affect the independence of the decision-maker?

Judge Hardwicke?

JUDGE HARDWICKE: I'm not quite sure I understand the question. Do you want to rephrase it?

HON. TYRONE BUTLER: Judge Sharkey?

JUDGE SHARKEY: If in a central panel setting, where there is finality of decisions, but there is a decision to insure consistency, predictability of decisions so that to overcome the problem we've been discussing, are there specific measures or programs, et cetera, that would accomplish that, that would be consistent with the principle of independent decision-making?

JUDGE HARDWICKE: There should be an index of decisions within the agency so that when a judge has a particular question, that judge should be able to see how some other judge decided that case. We consider those other decisions to be persuasive, and frequently the lawyers appearing before us would cite those other cases. The judges would consider how those cases were decided. To answer your question, yes, there should be such a system.

HON. TYRONE BUTLER: Professor Rossi, how would you respond to that?

PROFESSOR ROSSI: Yes, I think there ought to be such a system of legal precedents to the administrative judiciary. The administrative judiciary begins in many states with the advantage of having written opinions, as trial courts frequently lack.

HON. TYRONE BUTLER: We're coming down to almost the end here, and we have a few questions left. This is from Judge McDaniel, Louisiana, regarding political accountability. Which, on balance, is more important to protect: political accountability, or the right to a due process hearing when private property is at stake? That's a loaded question.

PROFESSOR FLANAGAN: Political accountability means that the agency has to be responsible to the appropriate political authority for the broad policy direction and the results the agency achieves.

That is democracy. That is why we elect legislators. The agency has to be responsible that way. Does that mean that the trade-off is no procedural due process or fairness to the individual litigant? No, I don't think so. The ALJ finds the facts, establishes the record, develops an interpretation of the law, and to the extent that the interpretation of the law is consistent with the direction the agency is going, and what the agency has done in the past, that it will be accepted by the agency. If there is a change by the agency, then the question is whether the agency made the change consistently with the laws. Is there a basis in the record, subject to judicial review, for what it has done? So the due process comes at that point at the judicial level. The agency has got to conform to whatever those standards are.

HON. TYRONE BUTLER: Judge Hardwicke, do you agree?

JUDGE HARDWICKE: Judge Mann told me that I would have to read something from *The Federalist*, so I'll read you the first sentence of Madison, in *Federalist No. 48*, on the separation of power Madison says: "It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."

In other words, if there is a blend of responsibility of the political power that's assigned to one department, it is not necessarily exclusive of responsibility to other departments.

HON. TYRONE BUTLER: Professor Rossi?

PROFESSOR ROSSI: I agree.

HON. TYRONE BUTLER: We have five minutes to go, and we'll have one more question, and let's see who the winner is here. (Pause) Okay, this is from Judge Patrick Woodard, ALJ, Georgia.

Professors, wouldn't their concerns be properly addressed if ALJs issuing final decisions (a) were assigned cases based on expertise and experience, so generalist concern is lessened, and [b] internal review process at central panels insure procedural and substantive correctness of final decisions?

I think we somewhat touched on that area a little today. I guess I'll ask Professor Rossi if he cares to add any more to that.

PROFESSOR ROSSI: Sure. To take the second part first, in my opinion on issues of law and policy the notion of "correctness" is the wrong term to use in evaluating the decision. To the extent that there's a range of permissible interpretations in the statute – for example to the extent that there's a range of permissible models that might be used in understanding an environmental program – deciding the correct one should not be a non-agency adjudicator's role unless there is specific statutory regulatory criteria that ought to be applied to that question. But I agree that a lot can be gained through internal review within a central panel. I just would not want to see us set out to design a review system with the purpose of finding the "correct" policy or legal decision. Not even courts review their role in this manner where grants of authority to agencies are ambiguous.

HON. TYRONE BUTLER: Professor Flanagan?

PROFESSOR FLANAGAN: I think it is a question of legitimacy. The legislature has given the agency the authority to make that decision and then committed the enforcement scheme to that agency. Any time you have two different people looking at the same thing, there are going to be differences in the results. So, I don't think that compared to the agency, that the ALJ should have the final decision on all those issues. In my view, there should be some agency review.

HON. TYRONE BUTLER: Judge Hardwicke?

JUDGE HARDWICKE: I disagree.

HON. TYRONE BUTLER: Final word. Thank you very much.

