ALJ Final Orders on Appeal: Balancing Independence With Accountability

By: Jim Rossi*

Independence is not the same as accountability.[1] Independence requires insulation and neutrality. A decision can be independent even though it is not supported by an explanation. Independence, ipso facto, eschews any type of external oversight or control. An accountable decision, however, requires a shared explanation, reason or justification. Judicial courts, for instance, enhance accountability through the reasoning in their written decisions or, in the case of appellate panels, through collaboration and interchange of ideas. In addition, when we evaluate the legitimacy of administrative agencies, we often value political accountability; for some issues, we forgo high degrees of insulation and neutrality, subjecting agency decisions to external oversights and controls to ensure that they reflect the will of the executive branch or the legislature.

In this paper, I argue that a system of judicial review of administrative decisions needs to protect both independence and accountability, including some notion of political accountability. As a practical matter, I suggest that standards of review provide courts with a way of balancing independence and accountability – especially political accountability – in the agency decisionmaking process. When independence and accountability converge in the lower decisionmaker, a reviewing court should defer to the final decision below. However, when the two diverge between different decisionmakers below, a reviewing court must decide between less deference or choose to whom

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[1] "[W]hile we want judges to be independent so that they can administer the law without fear of reprisal, we also want to find some way of controlling them." David P. Currie, *Separating Judicial Power*, 61 LAW & CONTEMP. PROB. 7 (1998) (contribution to symposium, *Judicial Independence and Accountability*).

to defer. If in reviewing agency action courts choose to whom to defer, they should defer to the politically accountable decisionmaker except where the issue is one of fact depending on the credibility of witnesses and other evidence.

Here I develop this thesis in the context of a movement towards enhancing the final order authority of state central panel administrative law judge (ALJ) and hearing officer orders, a trend that has potential to transform the administrative judiciary into a full-fledged administrative court. Although there are many benefits to ALJ finality, among them enhanced independence, in this paper I suggest that it also risks undermining core executive branch functions and thwarting accountability norms. Reviewing courts can restore accountability without sacrificing independence by paying attention to the standards of review they apply to ALJ final orders.

In part I, I describe how, following the proliferation of central panels, many states have increasingly given ALJ orders de jure or de facto finality by taking away an agency's opportunity to review ALJ decisions or requiring agencies to accept ALJ findings unless the agency overcomes a fairly rigorous evidentiary or reasoning burden. ALJ finality, whether de jure or de facto, has many benefits, among them independence of decisionmaking, enhanced efficiency, and accuracy. Despite these benefits, in part II I argue that, while it is difficult to generalize across the states, the trend towards finality is troubling under traditional notions of separation of powers. ALJ finality risks undermining core executive branch functions, and thus runs counter to separation of powers and accountability norms. Despite these accountability problems with increased finality of some ALJ decisions, states courts have generally avoided addressing the constitutionality of ALJ finality.[2]

In part III, I suggest that the best way for reviewing courts to

[2]As the U.S. Supreme Court has avoided addressing the constitutionality of the U.S. Tax Court. *Cf.* Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study of Applied Constitutional Theory*, 76 CORN. L. REV. 985 (1991) (arguing that the Tax Court raises serious Article III problems, but that the Supreme Court has avoided and will continue to avoid the issue).

correct the accountability deficiency with ALJ finality is to apply different judicial standards of review to ALJ final orders than agency final orders. With regards to issues of fact, independence and accountability converge in the ALJ so the rationales for deference to the ALJ are strongest, although the argument for a substantial evidence test is perhaps weaker than in other administrative review contexts. With issues of policy and law, however, the independent decisionmaker and the politically accountable decisionmaker diverge. To the extent accountability is also important in deciding issues of law and policy, courts should generally defer to the accountable decisionmaker. I recommend that reviewing courts give great weight to agency policy decisions and interpretations of law, despite ALJ order finality; in other words, to enhance accountability, reviewing courts should heighten the deference they give to the agency's legal and policy positions – giving little or no deference to the ALJ on these issues – even where the ALJ's decision is regarded as final.

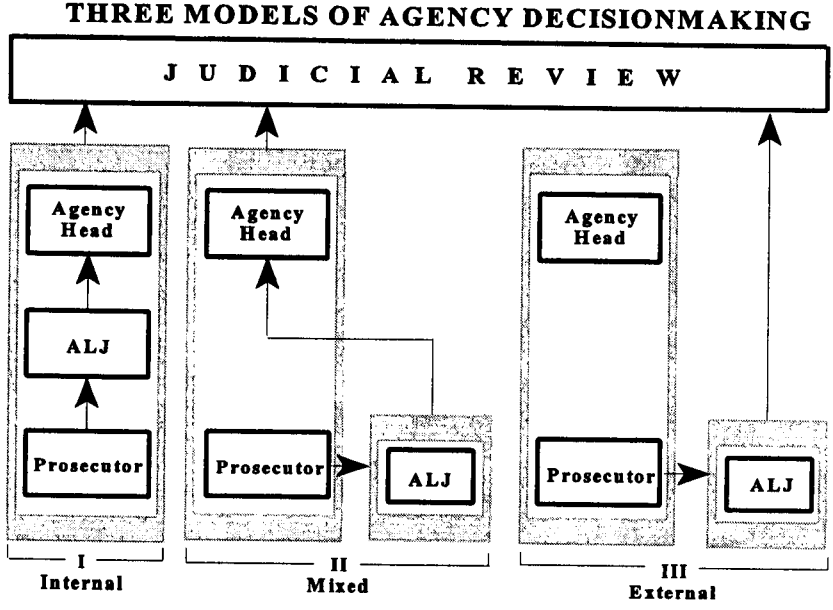
I. The Trend Toward Increased ALJ Finality

The federal APA and 1981 Model State APA (MSAPA) grant agencies de jure authority to consider ALJ "recommended" orders or decisions. Many state legislatures, however, have given ALJs "final" authority to decide a range of issues, from factual disputes to issues of policy and law. There are many advantages to enhanced ALJ finality, among them independence of decisionmaking, efficiency, and accuracy. Some states provide for de jure finality, making ALJ orders directly appealable to the courts without providing an intervening opportunity for agency review. Others provide for de facto finality, elevating the agency standard of review of ALJ decisions to level that effectively cloaks the ALJ decision with a presumption of correctness.

A. Three Conceptual Models of ALJ Adjudication

There are three distinct models of ALJ adjudication leading to judicial review. Following Professor William Anderson, I divide the models into the "internal," the "mixed" (traditional central panel) and

the "external" (central panel final order).[3] They are summarized in the diagram below.



Model I, the "internal" model, views the ALJ as operating entirely within the agency. For example, if a regulatory matter involves an investigation and decision to prosecute, when a hearing is requested under Model I an ALJ within the agency decides the relevant issues of fact and law. Following issuance of the ALJ's decision, the agency head is given an opportunity to review the ALJ's findings of fact and law. The agency head takes the final agency action, or the action that is appealable to and reviewable by a court. So, in applying the internal model, a reviewing court evaluates the agency head's reaction to an agency ALJ. The agency may have accepted the ALJ's order or allowed the time for rejecting or modifying the ALJ's order to pass, but the agency has the opportunity to reject or modify the ALJ's proposed findings of fact and law.

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[3]The classification and diagram are adapted from William R. Anderson, *Judicial Review of State Administrative Action — Designing the Statutory Framework*, 44 ADMIN. L. REV. 523, 555 (1992).

Under Model II, the traditional central panel model that many states employ, when a hearing is requested the matter is referred to an ALJ or hearing officer housed in a central panel outside of the administrative agency. The traditional central panel ALJ, like the internal ALJ, decides the relevant issues of fact and law, and the agency is then given an opportunity to consider the ALJ's recommended decision. As with the internal model, the agency, not the ALJ, takes final agency action. Thus, this model is "mixed," in that the final agency decision is a reaction to a non-agency ALJ. Here too, the reviewing court is evaluating an agency head's evaluation of an ALJ's order, albeit a non-agency ALJ. Although the ALJ under Model II may not necessarily possess as much expertise on technical issues as an ALJ under Model I, similar standards of review generally apply.

Under Model III, the ALJ is external in both form and function. The external model gives central panel ALJs the authority to issue final, not just recommended, orders. Although the central panel ALJ decides similar issues of fact and law, the agency has no legal opportunity to react to the ALJ's decision prior to appeal. Following the ALJ's decision, the matter is immediately appealable to a reviewing court. In contrast to Models I and II, under Model III the agency effectively submits to binding arbitration before the ALJ. Many state administrative law systems endorse this third model, although they do so in different contexts and to varied degrees. Even where the third model is not expressly present, modifying the presumptions applicable to agency review of ALJ orders may transform a central panel's ALJ decisions into de facto final decisions.

While accounts of the first and second models are well established, there is little discussion of the third model in the literature. Yet, this third model prevails in many states, most predominantly in Florida, South Carolina, Missouri and Louisiana. It exists in both de jure and de facto forms.

B. The Benefits of Enhanced Finality

ALJ final order authority has several advantages over other adjudication models, among them increased independence, efficiency

and accuracy.

Since with ALJ final order authority the agency does not have an opportunity to consider the ALJ's recommendations prior to appeal, ALJ finality protects independence better than Models I and II, each of which allows the agency an opportunity to take issue with the ALJ. Where an ALJ's factual or legal findings depart from the initial agency decision, the agency may be tempted to find a way to depart from the ALJ decision, especially where the agency's legal or policy agenda is at issue. The ALJ is a more independent decisionmaker than the agency, and thus the ALJ's decision will provide a reviewing court a more independent document for evaluation than an agency decision.

There is also an efficiency rationale for vesting finality with the ALJ. With respect to many issues, especially issues of fact, the ALJ's decision will reflect the result of an impartial evidentiary hearing, so allowing the agency an opportunity to modify the ALJ's findings introduces an inefficiency, especially if the agency is required to reevaluate some or all the evidence previously presented before the ALJ. ALJ final order authority enhances efficiency, by allowing the agency to focus on other cases rather than a matter in which an ALJ has already adjudicated the disputed issues. It also avoids needless duplication of evaluation of the record and other evidence.

In addition, where the ALJ is adjudicating programs with clear and precise statutory or regulatory criteria, ALJ final order authority enhances accuracy in decisionmaking. Since in an evidentiary hearing the ALJ will examine all the evidence, the ALJ is more likely to apply criteria without taking into account other regulatory or policy goals, as the agency might. If accuracy in the context of limited and predefined goals is a goal of the regulatory program, the ALJ's decision may be just as effective in pursuing this goal as the agency's.

C. De Jure Finality

Some state APAs provide that ALJ or hearing officer decisions are final, in the sense that they give agencies no legal opportunity to review the ALJ order and take action prior to appeal. While I have not

conducted a comprehensive survey of all state APAs, the phenomenon of ALJ order appears in more than just a few states.

Florida is one such state and, as the state in which I teach, it sparked my intrigue in the phenomenon. For example, in Florida, ALJ's issue final orders in challenges to administrative rules.[4] In this context, an ALJ operates in part as a hearing officer overseeing what is akin to a "formal" notice and comment rulemaking. Procedurally, with a rule challenge before an ALJ, rulemaking is transformed into litigation regarding whether a rule is an "invalid exercise of delegated legislative authority." While similar to a formal notice and comment rulemaking proceeding in our federal system – in the sense that an adjudicative record is developed during a hearing over which an ALJ presides – ALJ rule challenges in Florida involve a broader range of factual and legal inquiries. In a rule challenge proceeding, an ALJ makes legal determinations regarding the statutory authority for a rule and whether a rule is arbitrary and capricious.[5] In rule challenge proceedings, the ALJ's decisions regarding the receipt of evidence, statutory interpretation, and the arbitrary and capriciousness of the rule. The agency is bound to the ALJ's decision regarding issues of law and policy, since the decision is final and immediately appealable to a mid-level appellate court.[6]

In South Carolina, ALJs also play the role of the first level appeal of agency action, rendering final and immediately appealable decisions on a variety of issues. ALJs render final decisions in cases between a party and an agency where the agency has a single director.[7] The South Carolina approach effectively treats the central panel decisions like those of an administrative court. This follows the model

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[4]*See* Fla. Stat. Ann. §120.56 (1999).

[5]"Invalid exercise of delegated legislative authority" is defined in Fla. Stat. §120.52(8). It includes not only procedural flaws in the rulemaking process, such as failure to comply with APA requirements and arbitrary and capriciousness, but also several substantive grounds, such as lack of statutory authority and failure to adopt a less costly alternative to the rule.

[6]*See* Fla. Stat. Ann. §120.56(1)(e) (in rule challenges, "the administrative law judge's order shall be final agency action.").

[7]*See* William B. Swent, *South Carolina's ALJ: Central Panel, Administrative Court, or a Little of Both*, 48 S.C. L. REV. 1 (1996).

endorsed in Missouri, where orders of its Administrative Hearing Commission in non-licensing cases are immediately appealable.[8] Louisiana has also recently amended its APA, allowing ALJ's the authority to issue final and immediately appealable orders and precluding any agency opportunity to reject or modify ALJ orders on issues of fact, law and policy.[9]

Other state systems afford ALJs or hearing officers final order authority too, although often this occurs outside of a central panel system.[10] California considers central panel ALJ decisions final in cases regarding services for the developmentally disabled, such as audiology, and in cases involving discharge of tenured school teachers, in which the ALJ sits as a member of a 3-person panel.[11] Other states reporting final decisionmaking authority by central panels include: Colorado (Workers Compensation, Social Services); Maryland (Motor Vehicles, Human Resources, Personnel, Education); Massachusetts (Retirement Board, Rate Setting Commission, Veterans Benefits, Contract Disputes); Minnesota (Workers Compensation, Human Rights, Child Support); New Jersey (Special Education); North Carolina (Teacher Certification); Tennessee (Health, Environment, Commerce & Insurance); Washington (Special Education); Wisconsin (Natural Resources, Corrections, Health & Social Services); and Wyoming (Workers Compensation, Drivers' License).[12] In North

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[8]Mo. Ann. Stat. §621.189 (1988).

[9]Louisiana's amended APA states: "In an adjudication commenced by the division, the administrative law judge shall issue the final decision or order, whether or not on rehearing, and the agency shall have no authority to override such decision or order." La. R.S. 49:992(B)(2). For discussion of the Louisiana amendments, see 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).

[10]Sometimes, as Julian Mann suggested to me at the NAALJ conference, states grant ALJ final order authority with the approval – or at the suggestion – of federal agencies that oversee state regulatory programs. Federal regulators may value independence over political accountability within a state on certain issues, such as the implementation of federal human rights, welfare, environmental, and educational programs.

[11]Email from Michael Asimow, Professor of Law at UCLA, to Jim Rossi, Apr. 28, 1999 (on file with author). In addition, in-house ALJs in California have final order authority in certain cases, including welfare cases. Id.

[12]John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J. NAALJ 5, 84 (1994) (1994 survey by author). Recent results from a survey conducted by Edward J. Schoenbaum for the National Conference of Administrative Law

Carolina, elevating ALJ decisions to final orders was the topic of a recent reform proposal before its Legislature, but this was not adopted into law.[13]

D. De Facto Finality

In many states, ALJ decisions can become final if the agency does not reject or modify them within a specified time period. However, since the agency has the opportunity to make its own judgement on the ALJ decision, these systems do not provide for de facto finality, except in a very weak sense. In practice, agencies may modify or reject few ALJ decisions, but so long agencies have the discretion to do so there is no strong de facto finality built into the agency's review of the ALJ.

Yet some states go further, endorsing a strong form of de facto finality. Although an agency may have an opportunity to review the ALJ's findings, a state's APA may impose legal presumptions that, in effect, make the ALJ's recommendations final. An agency may be unable to reject the ALJ's findings, except in the rarest circumstances and only after overcoming a fairly rigorous burden.

Florida is a good example of a state where de facto finality applies as a matter of course to ALJ findings of fact. In Florida, even where an agency has the opportunity to evaluate an ALJ's recommended order (routinely the case in adjudication proceedings), an agency's ability to reject ALJ findings is seriously limited. For example, with respect to findings of fact, a Florida agency may only reject the ALJ's findings where "[t]he agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence. . . ."[14] At the same time, "Rejection or modification of

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Judges – Judicial Division, American Bar Association reports several other states with final ALJ order authority. *See* Schoenbaum draft results of survey, dated June 6, 1999 (on file with author).

[13]*See Bill Would Make Handling of Complaint Appeals Fairer to Residents*, ASHEVILLE CITIZEN-TIMES, Apr. 26, 1999, at B1.

[14]Fla. Stat. Ann. §120.57(l) (1999).

conclusions of law may not form the basis for rejection or modification of findings of fact."[15] Practically, this may mean that an agency is bound by the ALJ's characterization of fact and law and an agency can reject findings of fact only after making its own independent assessment of all of the evidence in the record. Presumptively, then, the ALJ's findings of fact are final, and the burden is on the agency to overcome this presumption. Montana follows a similar approach.[16]

II. Sacrificing Accountability for Independence

Despite its benefits ALJ finality also has some significant costs. Primarily, ALJ finality risks thwarting agency accountability, leaving law and policy decisions in the hands of ALJs. Since most ALJs operate as merit appointees, not subject to the same political accountability constraints as agency heads, the result of ALJ final order authority may be less political accountability for agency decisionmaking.

The Supreme Court has struggled to identify which adjudicative functions must remain in the courts, which may be placed in the executive branch, and which must be placed in the executive branch. Yet, the cases are decidedly unhelpful in addressing whether delegation of final order authority to an ALJ outside of a politically accountable agency is constitutional. The closest analogy to bolstering the status of a central panel to that of trial court is the establishment of the tax and bankruptcy courts in the federal system. In both instances, however, the courts are provided a higher degree of separation from the executive branch than most state central panels.

At least one state, Florida, has held that final authority by an ALJ located in a central panel does not violate state separation of powers doctrine. A Florida appellate court upheld its Division of Administrative Hearings' authority to issue final orders in rule challenge proceedings. The court rejected a constitutional challenge to ALJ final order authority, reasoning that the text of Florida's

[15]Id.

[16]Mont. Code Ann. §2-4-621.

Constitution recognizes the power of the legislature to place quasi-judicial functions in a board or agency.[17] While the court based its decision on constitutional text, it did not address an alternative functional argument: whether giving ALJ's the authority to issue final adjudicative decisions undermines core executive branch functions considered essential to accountability under separation of powers norms.

Functional analysis is indeterminate, but it does provide a useful framework for analyzing how well state administrative procedure mechanisms and reforms respect separation of power norms. Basically, a functional analysis of the problem will ask whether a legislative grant of power to an institution within a system of government somehow undermines the core powers of another branch of government.

The delegation of adjudicative authority to ALJs probably does not per se undermine the core functions of the executive branch. However, to the extent that a legislature has delegated to a central panel the authority to adjudicate issues of law and policy without also providing the agency an opportunity to review these findings, the core powers of the executive branch are in danger.[18] Among the core powers in danger are the agency's responsibility to provide explanations for its policy choices and the regulatory agency's responsibility to interpret statutes where the legislature has delegated under an ambiguous grant

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[17]Department of Administration v. Stevens, 344 So.2d 290 (Fla. App. 1 Dist. 1977). The court relied on Article V, Section 1 of Florida's Constitution, which states "Commission established by law, or administrative officers or bodies may be granted qausi-judicial power in matters connected with the functions of their offices." However, despite this court's decision, a textual reading of separation of powers in Florida's Constitution could raise problems for ALJ finality. Article IV, Section 6 of Florida's Constitution states "The administration of each [executive] department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor . . . ." The only function of DOAH, Florida's central panel, is adjudication; but if adjudication is a plausible function for an executive office Article V, Section 1 is meaningless. Moreover, as an independent adjudicative body, DOAH is not under the direct political supervision of Florida's governor and cabinet.

[18]*Cf.* Bybee, supra note 9, at 462-63 (observing that introduction of central panel final order authority in Louisiana poses potential separation of powers problems by depriving the executive of its authority).

of authority.

Although there is an argument that ALJ final order authority is unconstitutional, under existing cases central panel ALJ final order authority has been upheld. However, from a political accountability perspective ALJ final order authority is troublesome, especially where ALJs have the authority to decide issues of law and policy. By creating a central panel independent of the agency with regulatory jurisdiction, it splits the executive branch against itself under a guise of legitimacy. However, since independence is not the same as accountability, where issues of law and policy are at issue accountability may be sacrificed.[19]

III. Enhancing Accountability With Standards of Review

Since there are limits to APA-based appellate review standards,[20] appellate judges often will still need to decide how much deference to apply in reviewing final ALJ orders. As Professor Michael Asimow has observed, standards of review can be considered as one way of protecting accountability in the agency decisionmaking process.[21] Because of direct review of the ALJ's findings absent any agency opportunity for evaluation, ALJ finality focuses attention on the relationship between agency accountability and standards of review in a way that the internal and traditional central panel models of judicial review do not. This section argues that, properly applied, standards of review can restore the constitutional balance that may be lost by the increasing trend towards ALJ final order authority.

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[19]A constitutionally sounder approach than simply imposing finality on an executive branch central panel might be transform an executive branch central panel to a judicial branch central panel. Maine has created an "Administrative Court," which has jurisdiction in licensee discipline cases or where an agency refuses to issue or renew a license. In Maine, the administrative court is a part of the state's Judicial Department. 4 Me. Rev. Stat. §1151; 5 Me. Rev. Stat. Ann. §10051(1998). *See* Comment, *The Quest for Justice in Maine Administrative Procedure: The Administrative Code in Application and Theory*, 18 ME. L. REV. 218, 224-25, 241-43 (1966). However, even under this approach, issues regarding the standard of review for issues of law and policy, as are discussed below, arise.

[20]John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

[21]Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1189-90 (1995).

A. Substantial Evidence

On issues of fact, independence and accountability are likely to converge in the adjudicative decisionmaker, even where ALJs issue final orders. On pure issues of witness credibility or other evidentiary matters political accountability is least important. So long as there is evidence in the record to support findings the ALJ is both independent and accountable. Thus, on most issues of fact, the rationales for a standard of review that is deferential to the ALJ will be strongest. For this reason, de facto finality on issues of fact, as in Florida and Montana, poses a relatively small threat to agency accountability.[22]

Traditionally, findings of fact are reviewed under the substantial evidence test. This test is perhaps the most popular standard for reviewing agency action. When courts use the substantial evidence test, they invoke the same standard used by a federal court of appeals in reviewing the findings of a jury.[23] This is the standard that applies under §706(2)(E) of the federal APA ("the reviewing court shall . . . set aside agency action, findings or conclusions . . . unsupported by substantial evidence") and §5-116(c)(7) of the 1981 MSAPA (the court shall grant relief only if it determines an agency's finding of fact "is not supported by evidence that is substantial when viewed in light of the whole record before the court").

As standards of review go, substantial evidence is fairly deferential. Substantial evidence is "more than a mere scintilla," but it is less than a preponderance of the evidence.[24] Thus, in applying the test, to uphold the lower tribunal all that must be shown is *some* evidence supporting the decision. Under the test articulated in both the federal APA and the 1981 MSAPA, the decision of the tribunal below stands unless it is *not* supported by substantial evidence, suggesting that a presumption of correctness is implicit to application of the substantial

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[22]Florida's 1999 APA amendments also incorporate a weak type of de facto finality on issues of law. *See* 1999 amendment to Fla. Stat. §120.57 (requiring an agency to follow the ALJ's decision on issues of law or, if the agency reject's the ALJ's interpretation, to state why the agency interpretation is more reasonable).

[23]*See* Allentown v. Mack Sales & Serv. Co. v. NLRB, 522 U.S. 359 (1998).

[24]Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

evidence test. One rationale for the level of deference implicit in the substantial evidence test is that it preserves the fact-finding process before the central panel ALJ. To the extent factual issues can be resolved by credible witnesses and other evidence, the ALJ is the best decisionmaker to make the presumptively correct factual findings. In addition, there is an efficiency advantage to the substantial evidence test, as it discourages disappointed litigants from unnecessary appeals, thus saving judicial resources.

If we are concerned about accountability, however, substantial evidence may be of limited utility in review of ALJ final orders. One of the key rationales supporting the deferential substantial evidence test is that agencies possess expertise and accountability in the areas they regulate. Yet, since ALJs lack political accountability and do not possess as much expertise as do agencies, this is not a very persuasive reason for a court to apply a substantial evidence standard of review to final decisions of a central panel ALJ – particularly where issues of law or policy are at issue. As I argue below, to the extent that issues are less the sort that can be resolved purely on the basis of credible witnesses and other factual evidence, the substantial evidence test is an inadequate standard of review for ALJ final orders.

B. Clearly Erroneous

A matter is clearly erroneous, the U.S. Supreme Court stated in *United States v. U.S. Gypsum Corp.*, when "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."[25] In *Dickinson v. Zurko* the U.S. Supreme Court recently reaffirmed that clearly erroneous is less – not more – deferential to the lower tribunal than substantial evidence.[26] Although the Supreme Court reversed the lower opinion for misreading the review requirements of the APA, in *Zurko* the Federal Circuit observed that in contrast to arbitrary and capricious and substantial evidence,

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[25]333 U.S. 364, 395 (1948).

[26]119 S.Ct. 1816, 1818 (1999) ("Traditionally this court/court standard of review [clearly erroneous] has been considered somewhat stricter (i.e., allowing somewhat closer judicial review) than the APA's court/agency standards [substantial evidence and arbitrary and capricious].").

which require the reviewing body to consider lower tribunal decisions on the reasoning provided below, clearly erroneous requires a reviewing body to consider the lower tribunal's decision on the reviewing body's *own* reasoning.[27]

The interpretation of the clearly erroneous standard of review by the Federal Circuit in *Zurko* provides an accepted and useful test for courts reviewing ALJ final orders. It is also consistent with application of clearly erroneous outside of the agency context. According to Wright & Miller, in applying clearly erroneous to review of a jury findings (including jury verdicts) in criminal cases, courts will reverse

> [i]f the findings [by the lower court] . . . are against the clear weight of the evidence or [if] the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, . . . even though there is evidence [supporting the findings] that, by itself, would be substantial.[28]

The rationale for the distinction between substantial evidence, applicable to review of juries, and clearly erroneous, applicable to review of findings by judges, has been stated as follows:

> The judges [of both trial and appellate] courts are drawn from the same section of the populace. Except for the difference in numbers, one is no more representative of the community than the other. To the extent a group of men [sic] is more representative than a single person, the appellate court resembles the jury more than does the trial court. And both groups of men [sic] are skilled in the same field, neither ordinarily being specialists in anything but the law. Inasmuch as the appellate courts occupy a superior position in the judicial hierarchy, the appellate judges are certainly no less expert and able than the trial judges. And the decisions of the appellate

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[27] 142 F.3d 1447, 1449-50 (Fed. Cir. 1998) (en banc).

[28] 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2585.

> courts have the advantage of the collaboration and interchange of ideas of three or more men [sic].[29]

Thus, because trial court and appellate court judges share similar institutional capacities, there is no institutional reason why an appellate court should give the trial judge's findings of fact greater weight than legal conclusions. An appellate court applying clearly erroneous will reverse "if it is convinced in its own mind that the finding below is unquestionably wrong, even if a reasonable man might have made it."[30]

In terms of their institutional capacity, ALJs occupy a position similar to trial judges. In reviewing ALJ final orders, instead of accepting the ALJ's reasoning, which may jeopardize agency accountability, a reviewing court can substitute the agency's reasoning for the ALJ's under the clearly erroneous standard.

If courts can apply the test in a principled way, application of the clearly erroneous test in lieu of substantial evidence could help restore some of the accountability that is lost with central panel ALJ final orders. However, as many commentators – including Judge Leventhal and the U.S. Supreme Court — have suggested, there may be no difference in outcomes between the two tests when applied to issues of fact.[31] To the extent the clearly erroneous test further confuses courts, introduces new levels of judicial error, or does not differ

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[29]Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 82 (1944).

[30]Id. at 89.

[31]See International Brotherhood of Electrical Workers v. NLRB, 448 F.2d 1127, 1142 (D.C. Cir. 1971) (Judge Leventhal, speculating that he may have found the "case dreamed of by law professors," but later concluding no difference in outcome between clearly erroneous and substantial evidence). In *Zurko*, the U.S. Supreme Court noted that "the difference [between substantial evidence and clearly erroneous] is a subtle one — so fine that (apart from the present case) we have failed to find a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome." 119 S.Ct. at 1823. According to Frank Cooper, a draftsman of the 1961 MSAPA: "if the appellant can convince the appellate court that the administrative finding of facts is obviously just plain wrong, and if the appellant at the same time can arouse the court with a zealous desire to correct the error, the court can always find means to do so, whatever labels must be applied." Frank E. Cooper, *Administrative Law: The "Substantial Evidence" Rule*, 44 ABA J. 945, 947 (1958).

significantly from substantial evidence in outcome, the gains of a clearly erroneous standard of review to issues of fact may not justify its costs. Appellate courts can probably minimize their decisionmaking costs by applying substantial evidence to ALJ findings of fact. As I shall suggest, however, the method of inquiry of the clearly erroneous standard of review may have more practical relevance when appellate courts are reviewing policy and legal decisions in final ALJ orders.

C. Issues of Policy

Where ALJ final orders do not focus on issues that can be resolved based on credibility of witnesses and other evidence, deviating from substantial evidence can help preserve agency accountability. For example, in deciding issues of policy, unlike issues of fact, the ALJ is not concerned exclusively with the credibility of witnesses or other evidence. Not all policy judgements are of the sort that evidence alone can resolve; some are judgments that will depend for their legitimacy on a degree of political accountability. In addition, broader policy and regulatory goals may be implemented by an individualized policy judgment, so it will often be important to evaluate the relationship between the individual decision and the agency's other programs.

On issues of policy, something important is lost if the ALJ's decision trumps the agency's without providing the agency an opportunity to make the final decision. For example, if a system where the ALJ makes final decisions is in place, an ALJ evaluating wetland mitigation associated with the siting of a transmission line can rely on the admissible evidence the ALJ finds most credible and convincing. The ALJ can make policy decisions regarding what kinds of wetlands are important, and if the ALJ had final order authority these final decisions will then be reviewed by an appellate court without allowing the agency more than an opportunity to participate as a litigant in the adjudicative proceeding. The ALJ might decide that herbaceous wetlands are somehow equivalent to forested wetlands. Yet this is a policy issue that depends on broader state environmental protection

goals.[32]

From an accountability perspective, allowing a central panel ALJ to trump the agency on such an issue is problematic. Central panel ALJs often operate within the executive branch, but they are generally nonpolitical. Unlike the agency, which has substantive regulatory jurisdiction, the central panel has not been delegated the authority to regulate in a specialized area. Agency heads, unlike most ALJs, are political appointees, accountable (through appointments and removal, as well as budgetary oversight) to the executive branch and – perhaps to a lesser, but no less important, degree – the legislature (which writes and amends regulatory statutes). The political accountability of agency heads is important to ensuring the public legitimacy of agency action.

Advocates of central panel final order authority may respond with two arguments supporting reviewing court deference to ALJs. Yet neither argument is convincing to those who value political accountability in the agency decisionmaking process.

First, advocates of deference to ALJ final orders may argue that the agency has had the opportunity to decide policy issues prior to hearing, and that it is inefficient and biased towards the agency to allow agencies any advantage over other litigants later in the process. However, when agencies take positions on matters of policy prior to hearing, their explanations in support of these positions are often not as rigorous and developed as they would be after hearing occurs. As a practical matter, the agency head may not make pre-hearing decisions. Instead, pre-hearing agency decisions are often made by lower-level staff and not fully churned through the ranks of the agency and its experts. Further, because a hearing has not yet occurred and private litigants may be reluctant to fully "put on their case" prior to formal adjudication, the initial agency decision is often made based on more limited information than would be the case if all evidence were before the agency head. As to issues of policy, the agency must have the opportunity to fully develop and vet its rationales in order to allow the

[32]The problem posed here draws from the facts of Florida Power Corporation v. Department of Environmental Protection, 638 So.2d 545 (Fla. App. 1 Dist. 1994).

agency the opportunity to put forth the best explanation for a reviewing court and to ensure its policy choices are legitimate in the eyes of those it regulates and the legislature that oversees its activities. And, as to issues of law, the agency's fully developed explanation of its legal interpretation can also work to legitimize agency action below. Yet, if the ALJ's decisions on issues of issues of policy or law are final, fully developed explanations may only be made in appellate briefs.

Second, advocates of ALJ final order authority may claim that the ALJ is as capable as the agency head at making technical judgments on expert matters. Insofar as pure issues of fact are concerned, expertise may be nothing more than the credibility of competing agency and non-agency experts, and the ALJ will be able to contribute neutrality and efficiency to the resolution of such issues by evaluating evidence, witness demeanor, and cross-examination. In the central panel context, however, most ALJs are generalists, more like a trial judge than an agency member.[33] Further, on many issues, including issues of environmental science, judgments about competing policy or technical models often must be made. The agency head is in a better position than the ALJ to determine whether an individualized policy or technical judgment fits with the agency's broader policy agenda. Expertise depends for its legitimacy not just on credible factual findings or expert opinions, but on judgment and accountability for judgment.

These arguments against deference to ALJ final orders on issues of policy may not be convincing to those who doubt the political legitimacy of executive power and agencies within the executive branch. But to the extent we are committed to the principle that the executive branch should play an active role in modern governance, we may get more accountable executive decisionmaking if we give weight to the policy decision made by the executive branch agency responsible for implementing the statute or regulatory program as the independent ALJ.

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[33]An internal agency ALJ, who hears the same issues over and over again, such as an ALJ at the Federal Energy Regulatory Commission, may have a claim to technical expertise that is equal to a member of the agency.

In final orders, ALJs issue independent decisions about matters of policy, based on the credibility of witnesses and other evidence. However, accountability is sacrificed if courts simply defer to the ALJ, taking away the agency's opportunity to put its best foot forward after hearing and turning expertise into nothing but a contest over the credibility of experts. On review, the court may need to apply some version of the arbitrary and capricious test, evaluating the quality of reasoning below.

In doing so, however, the court should accept the agency's reasoning framework, not the ALJ's. While effectively this is what the clearly erroneous standard would allow a court to do, I am not advocating application of a clearly erroneous standard of review to issues of policy. Instead, I am suggesting that the theoretical distinction between substantial evidence and clearly erroneous is helpful in defining how courts should review ALJ final orders on issues of policy; when reviewing issues policy in final ALJ orders, appellate courts should borrow from the clearly erroneous method of inquiry, substituting the agency's reasoning framework for the ALJ's. In reviewing ALJ final orders, it is the relevant reasoning framework, rather than the level of deference, that is most important in defining the scope of the court's inquiry for issues of policy. In reviewing issues of policy, the agency's reasoning framework should trump the ALJ's or that of any competing expert witness. Beyond this, a court generally should apply a level of deference consistent with the other standards of review it applies in the jurisdiction, taking into account that independence and accountability are more likely to diverge in the decisionmakers below when issues of policy are appealed.

D. Findings of Law

As with issues of policy, on issues of law the independent decisionmaker is not the same as the politically accountable decisionmaker. Because political accountability is a primary value in rendering legal interpretations of statutes and rules, some level of deference to the politically accountable decisionmaker is the appropriate standard of review.

In the states, courts take a variety of approaches to reviewing issues of law. Some courts give agencies and ALJs no deference, instead reviewing all issues of law de novo. For example, in California, courts have exercised "independent judgement" in reviewing agency legal interpretations.[34] A failed 1999 Florida reform proposal would have amended its APA to state "judges hearing appeals of agency rules shall not defer, or otherwise give any special weight, to an agency's interpretation of a law or a rule."[35]

De novo review requires a court to effectively re-interpret the same statute the lower tribunal has applied. In terms of efficiency and accountability, this approach has little to commend. From an efficiency perspective, the court is asked to independently engage in the interpretive analysis a lower tribunal has already made, based on the arguments raised before it. From an accountability perspective, agency heads are more institutionally competent than state court judges in interpreting statutes. Although many state court judges are elected, agency heads are closer to the regulatory problems, have more expertise, and are more accountable to the legislature for their interpretations of statutes and regulations.

Recognizing the importance of political accountability in deciding issues of law, many courts apply one of the two deference approaches explicitly rejected by Florida's recent reform proposal. Some courts apply a "deference lite" approach, also known as *Skidmore* deference, giving greater weight to the agency's interpretation vis-a-vis alternative interpretations.[36] Still other courts apply a variation of the *Chevron* test, interpreting de novo "clear and unambiguous" statutory language, but deferring to agency interpretations that are subject to

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[34]Asimow, supra note 21, at 1193.

[35]*See* prefiled Fla. HB 107 (amending Fla. Stat. §120.68(7) (d)). Although Florida's APA was amended in 1999, this provision was not included in the APA amendments that were signed into law.

[36]The degree of weight may "depend on the thoroughness evident in its [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." Skidmore v. Swift, 323 U.S. 134, 140 (1944). The approach is used in many states. *See* William A. McGrath, et al., *Project: State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 768-70 (1991).

more than one meaning.[37] Often, at the level of step-two deference under the *Chevron* test, an arbitrary and capricious test is also applied to the agency's reasoning process.

When a court is reviewing a final ALJ order, however, the rationales for applying traditional deference standards of review to a lower tribunal's statutory interpretation are inapposite. One of the primary reasons for giving weight to the agency interpretation or deferring to the agency is enhanced accountability, to the extent the agency is responsible for enforcing the statutory scheme. Yet, deference to an ALJ final order on issues of statutory interpretation risks undermining agency accountability, particularly where the ALJ and agency do not agree on the merits of a policy choice or statutory meaning. Here, independence and accountability are in sharp tension.

As an alternative to deference to the ALJ, in reviewing final ALJ orders courts should modify the traditional rules of deference to lower tribunal statutory interpretation. At a minimum, reviewing courts should give strong weight to the agency's interpretation of law, regardless of how the ALJ has decided the legal issue. From an accountability perspective, the deference approach has much to commend, so long as reviewing courts defer to the agency – not the ALJ – on issues of law in final ALJ orders. Again, a clearly erroneous type of inquiry may be of some use for reviewing courts, especially if they substitute the reasoning framework of the agency's statutory interpretation for the ALJ's.

IV. Conclusion

ALJ finality raises a problem on judicial review because independence and accountability do not always converge in the decisionmaker whose order is subject to review. In enhancing the final order authority of ALJs, state legislatures have consistently failed to address this problem. There are many ways to enhance the

[37]Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). According to a 1990 study, eleven states had adopted tests that bear similarity to strong *Chevron* deference. McGrath, et al., supra note 36, at 763-66.

accountability of a central panel, among them allowing the central panel the full discretion a trial court has to write opinions. However, in context of judicial review of agency decisionmaking, political accountability also needs to be protected. Appellate courts have ways of balancing independence and accountability in standards of review. When state APAs take away this opportunity by defining a standard of review that requires either independent judgement by the reviewing court or strong deference to the ALJ's final decision on nonfactual issues, we risk turning our administrative judiciary into a constitutionally suspect institution. To protect accountability, reviewing courts need to carefully evaluate the level of deference they apply to ALJ final orders on issues of law and policy.