

## SOME QUESTIONS TO CONSIDER BEFORE INDIANA CREATES A CENTRALIZED OFFICE OF ADMINISTRATIVE HEARINGS

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One of the most interesting innovations in administrative law in the last two decades has been the emergence of centralized offices of administrative hearings, often referred to as “central hearing agencies” or “central panels.” This Article assumes a general degree of familiarity with the central panel concept on the part of the reader. For purposes of introduction, Professor James F. Flanagan’s description suffices:

A central panel of [administrative law judges (ALJs)] is a cadre of professional adjudicators who are administratively independent of the agencies whose cases they hear, and thus, they are removed from agency influence. The central panels are organized in several ways[; as] . . . an independent agency within the executive branch[; as a] . . . part of another agency for administrative support, but independent for all other purposes[; or with] . . . the ALJs in a separate organization, [assigning] each ALJ to a particular agency based upon expertise in the subject matter. Some panels rotate the agency case assignments of the ALJs.<sup>1</sup>

Professor Flanagan also points out that there is a related development in administrative law of “restricting or eliminating agency review of . . . [ALJ] decisions, thereby making them actually or effectively final and subject only to judicial review.”<sup>2</sup>

This Article addresses the question, “Should Indiana consider creating a centralized office of administrative hearings?” Implicit in this inquiry is the notion that administrative law judges are an integral part of the judicial enterprise. And indeed they are. One cannot work in government but for a short time without being enormously impressed with the critical contribution to the people’s business performed by administrative law judges. Government could not

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1. James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1356 (2002) (footnotes omitted).

2. *Id.* Flanagan notes that “ALJs support making their decisions more final.” *Id.* at 1360 n. 18.

function without them and improving administrative adjudication procedures is one good way to show our appreciation for their efforts.

Administrative law in general and the work of administrative law judges in particular is not an area in which I claim any particular expertise. But though I claim no special expertise in the subject, I do claim keen interest in it. This is for several reasons, some more obvious than others. First, of course, as an appellate judge, I see with some regularity in the course of my work the decisions of administrative law judges. While most of these cases follow the traditional model of judicial review of administrative decisions, several of our cases have had fact patterns if not issues relevant to the topic of this symposium.

One particular decision of our court eight years ago—authored by our Chief Justice—discussed the central panels movement and even cited an article by Judge John W. Hardwicke, one of the early leaders of the movement.<sup>3</sup> And our state does have, in its environmental management agency, an administrative adjudication office the decisions of which are subject to judicial review without agency intermediation.<sup>4</sup> Our court this year has rendered two decisions in appeals from that office.<sup>5</sup> And so the work of administrative law judges provides some of the subject matter of my own appellate work.

Second, prior to appointment to our court, I worked in the executive branch of state government as Governor Evan Bayh's State Budget Director. One of the great things about being budget director is that you have your hand in virtually every aspect of state government because all issues are budget issues. As a consequence of having to know quite a bit about the internal workings of the Family and Social Services Administration, Department of Natural Resources, Utility Regulatory Commission, Alcoholic Beverage Commission and the like, I came to understand the integral role that administrative law judges play in the business of each of those agencies.

Third, and this brings me closest to the principal thrust of this Article, the way in which government is organized to do the people's business, both as a matter of constitutional theory and as a practical matter, is something that has long interested me. As such, I am immediately drawn to examining the relationship to constitutional order and the practical effect of any innovation in the way in which government does its business—and "central panels" are certainly a significant and noteworthy innovation.

In terms of constitutional theory, the way in which government is organized to do the people's business implicates the constellation of issues that fall under

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3. *Peabody Coal Co. v. Ind. Dep't of Natural Res.*, 664 N.E.2d 1171, 1174 (Ind. 1996) (citing Hon. John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J. NAT'L ASS'N OF ADMIN. L. JUDGES 5 (1994)).

4. See Hon. Lori Kyle Endris & Hon. Wayne E. Penrod, *Judicial Independence in Administrative Adjudication: Indiana's Environmental Solution*, 12 ST. JOHN'S J. LEGAL COMMENT. 125, 126-27 (1996) (describing Indiana's efforts to create an office of hearings to adjudicate environmental matters).

5. See *Huffman v. Ind. Office of Env'tl. Adjudication*, 811 N.E.2d 806 (Ind. 2004); *Breitweiser v. Ind. Office of Env'tl. Adjudication*, 810 N.E.2d 699 (Ind. 2004).

the rubric of separation of powers or, to use Indiana constitutional terminology, separation of functions.<sup>6</sup> In terms of practical effect, the way in which government is organized to do the people's business is a question of performance—how well does government do what it is supposed to do?

It seems to me that the U.S. Supreme Court has been relatively absolutist on separation of powers questions in recent years. It has found in the Constitution bright and immutable boundary lines between the three branches of government. And it has struck down enactments or arrangements that appeared to it to transgress these boundaries.<sup>7</sup> A couple of well-known examples illustrate this point. In the first, Congress and the President had worked out an arrangement whereby executive branch regulations implementing statutes passed by Congress would be subject to disapproval by one—but only one—House of Congress. In the famous *Chadha* case, the Supreme Court held that this arrangement violated separation of powers.<sup>8</sup> The second example is the so-called “line-item veto” of particular appropriations in the federal budget. Congress and the President agreed that the President should have this authority but again, in *Clinton v. City of New York*,<sup>9</sup> the Supreme Court found a violation of separation of powers.<sup>10</sup>

I have been skeptical about decisions like *Chadha* and *Clinton*. If the two political branches of the government, fully accountable to the voters, want to experiment a little bit with the boundaries between their two branches, the courts should be reluctant to intervene.<sup>11</sup> After all, if the voters do not like the experiment, they can say so at the next election.<sup>12</sup> And if Congress and the President conclude that they do not like the arrangement, a simple act of Congress can restore the status quo ante.<sup>13</sup>

Given my skepticism of courts policing for constitutionality government innovations agreed to by the political branches, I do not question the

6. See *Buckley v. Valeo*, 424 U.S. 1, 112-41 (1976) (discussing the constitutional principle of separation of powers). See also IND. CONST. of 1851, art. III, § 1.

7. See *Clinton v. City of New York*, 524 U.S. 417, 449 (1998); *INS v. Chadha*, 462 U.S. 919, 922 (1983).

8. 462 U.S. at 922.

9. 524 U.S. at 419.

10. I acknowledge that the Supreme Court did not take an absolutist position on the separation of powers question of the constitutional boundary between the executive and judicial branches in *Morrison v. Olsen*, 487 U.S. 654, 696-97 (1988) (discussing “independent counsel” statute). But see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (finding a separation of powers violation in the Bankruptcy Act of 1978’s grant of jurisdiction to bankruptcy judges to decide contract claims arising under state law).

11. See *Bowsher v. Synar*, 478 U.S. 714, 776 (1986) (White, J., dissenting) (Congress and the Executive Branch should be permitted to negotiate the boundaries of their authority with only limited judicial oversight); *Northern Pipeline*, 458 U.S. at 113 (White, J., dissenting) (“[Article III] . . . should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities”).

12. *Bowsher*, 478 U.S. at 776 (White, J., dissenting).

13. *Id.*

constitutionality of central panels. Indeed, I express no view at all on their constitutionality.

Central panels are an extremely interesting and, judging by the number of jurisdictions that have embraced them, popular innovation.<sup>14</sup> Many credit central panels with better allocation of state agency resources, producing greater efficiency in administrative adjudication, considerable savings of money to the state, and also producing more systematic and uniform agency decisionmaking.<sup>15</sup> Others praise central panels with increasing the level of professionalism among administrative law judges, producing codes of ethics and standards of conduct for hearings and decisions.<sup>16</sup>

Perhaps the most persuasive argument made on behalf of central panels is that they increase public confidence in administrative adjudication.<sup>17</sup> Illinois Administrative Law Judge Ed Schoenbaum, one of the leaders of the central panels movement, has written “many people believe that [ALJs] who are not in a central hearing agency are biased in their adjudicative responsibilities . . . [because the] ALJs are hired, promoted, supervised, and paid by the very agency for whom [they] are [reviewing].”<sup>18</sup> The perceived conflict arises because an ALJ must decide whether the challenged decisions are correct and “[t]he public thinks this is unfair.”<sup>19</sup>

Under central panels, persons challenging an agency decision in an administrative proceeding no longer face the perception that their adversary in the proceeding is also the judge. Rather, such persons now appear before an administrative bench unbiased toward and detached from agency or executive influence.<sup>20</sup>

But I do want to raise some questions related to separation of powers and the

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14. To date, twenty-six states have established administrative central panels. See Jim Rossi, *Final, But Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53, 57 n.6 (2004).

15. See Thomas E. Ewing, *Oregon's Hearing Officer Panel*, 23 J. NAT'L ASS'N. ADMIN. L. JUDGES 57 (2003) (detailing the increased efficiency effectuated by adopting a central panel in Oregon); Flanagan, *supra* note 1, at 1383 (noting that central panels often render better decisions than those adjudicators employed by a single agency); Christopher B. McNeil, *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudication Under the Administrative Central Panel*, 18 J. NAT'L ASS'N. ADMIN. L. JUDGES 1 (1998) (advocating for the adoption of central panel systems for administrative adjudication); Karen Y. Kauper, Note, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judges Corps Statute*, 18 U. MICH. J.L. REFORM 537, 543 (1985) (applauding the benefits of the central panel paradigm).

16. *Supra* note 15.

17. *Supra* note 15.

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

19. *Id.*

20. See *supra* note 15.

performance of government that I think proponents of central panels need to be prepared to answer in advocating their adoption. I raise these, to repeat, not as constitutional questions but as policy questions that I think should be asked and need to be answered to the satisfaction of legislators considering the adoption of a central panels regime.

For purposes of my discussion of these questions, I assume that the central panels legislation under consideration has the following characteristics:

(1) Administrative law judges work in a central agency, separate and apart from the agencies with respect to which they adjudicate disputes.

(2) These ALJs are hired, supervised, compensated, and assigned cases in a manner not influenced by the agencies.

(3) The decisions of these ALJs are final decisions, subject only to judicial branch review.

I recognize that some of these characteristics, especially with respect to finality, do not exist in all central panel arrangements but these do seem to be the attributes preferred by advocates of central panels<sup>21</sup> and so I will proceed on this basis. And I will, at the end of this Article, examine the impact on my analysis of relaxing the finality characteristic.

#### I. QUESTION #1: ARE CENTRAL PANELS INCONSISTENT WITH THE TRADITIONAL PREROGATIVES OF THE EXECUTIVE BRANCH?

My first set of concerns is that central panels may be inconsistent with the traditional prerogatives of the executive branch. Let me start here by making a point with particular emphasis. I wholeheartedly and without qualification agree that the executive has a legal, indeed constitutional, indeed moral, obligation to execute faithfully the laws of the jurisdiction. I imply no suggestion that any executive branch official including, in particular, any administrative law judge, should at any time act contrary to the requirements of law.

But the nature of our government is that, within the parameters defined by law, the executive branch has latitude—sometimes considerable latitude—with which and in which to act. One example of this is in the setting of priorities. The legislature may dictate a range of responsibilities for the executive branch but leave it to the executive to prioritize the order and emphasis given to those priorities. Another example is in the setting of substantive policy. The legislature may dictate overall objectives but leave it to the executive to develop the policies necessary to achieve those objectives. Still a third example is in the development of new programs. The executive oftentimes has leeway to promulgate entirely new initiatives via executive order without any direction from the legislature whatsoever.

One of the inconsistencies between the use of central panels and prerogatives of the executive branch, it seems to me, is that it reduces the ability of the executive branch to set its own priorities. Let me give you an example. In our state, a new reassessment of the value of real property has, combined with other

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21. See Flanagan, *supra* note 1, at 1356 (discussing finality); Kauper, *supra* note 15.

factors, caused substantial increases in the property tax bills of many homeowners. There is a procedure for appealing such increases that utilizes administrative law judges.<sup>22</sup> The current state administration has announced a plan to increase substantially the number of administrative law judges handling property tax appeals.<sup>23</sup> This reflects the priority that this administration is giving to this particular matter.

Under a central panels approach, it seems to me that the governor might not have this flexibility. Cases could be assigned and ALJs allocated based on priorities established by the head of the central hearing agency,<sup>24</sup> not by the governor or an agency head.<sup>25</sup> But it seems to me that the executive branch might well want to retain the authority to decide that, and allocate resources to permit, certain types of cases to be handled on a priority basis.

A more important inconsistency between the use of central panels and the prerogatives of the executive branch, it seems to me, is that central panels can interfere with the executive's ability to set policy. It is for this reason, of course, that many advocates of central panels argue for them most forcefully.<sup>26</sup> The contention is that administrative law judges are neutral adjudicators and for them to do their duty properly, they must be independent of the policy-driven influences of the agencies with respect to which they adjudicate disputes.<sup>27</sup>

This is a highly nuanced subject. I trust the foregoing discussion shows the high degree of respect I hold for the work of administrative law judges as adjudicators, and that I recognize that ALJs play a distinct role in resolving disputes between agencies and those who challenge agency decisions. But I also think that the nature of many administrative adjudications cannot help but have policy-making implications. The following excerpt from a recent article by Professor Jim Rossi makes my point:

Not all policy judgments are of the sort that evidence alone can resolve;

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22. IND. CODE § 6-1.1-4-34 (2004).

23. See Petition for Writ of Mandamus and Prohibition, Exhibit C at 1-2, State *ex rel.* Atty. Gen. v. Lake Superior Court, 820 N.E.2d 1240 (Ind.) (No. 45D06-0505-PL-91), *reh'g denied*, 2005 Ind. LEXIS 239 (Ind. Mar. 15, 2005) (noting the Indiana Board of Tax Review's plan to supplement its fifteen administrative law judges and board members with five special masters to help adjudicate the additional tax appeals).

24. See MODEL ACT CREATING A STATE CENTRAL HEARING AGENCY § 1-5(a)(3), *reprinted in* National Administrative Law Judge Foundation, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 313 (1997) [hereinafter MODEL ACT].

25. Karen Y. Kauper has argued that one of the advantages of the central panel system is that ALJs would hear cases as they arise. Kauper, *supra* note 15, at 547-48. I infer from this that advocates of central panels consider it inappropriate for the governor or an agency head to be free to determine that some cases are more important or need more expedited attention than others.

26. See R. Terrence Harders, *Striking a Balance: Administrative Law Judge Independence and Accountability*, 19 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 4 (1999); Kauper, *supra* note 15, at 549-50.

27. See *supra* note 15.

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. Telling the difference between an issue of fact and an issue of policy is not always straightforward . . . .<sup>28</sup>

Here are a couple of examples of what I am talking about. Professor Rossi points to a Florida case in which an electrical utility sought a permit from the state environmental protection agency to construct power transmission lines across protected wetlands.<sup>29</sup> The governing statute authorized the agency to balance a variety of factors in the course of deciding whether the permit would be "in the public interest."<sup>30</sup> The proposed project would have destroyed forested wetlands by clear cutting of the trees but the habitat of plants and animals dependent on herbaceous wetlands would have been expanded.<sup>31</sup> The administrative law judge analyzed this trade-off and found that there would be no net adverse impact from the project and that it was in the public interest.<sup>32</sup> The ALJ recommended issuing the permit.<sup>33</sup> The agency rejected the ALJ recommendation, weighing the adverse impact of the clear-cutting of trees more heavily than the ALJ and concluding the permit was not in the public interest.<sup>34</sup>

My second example is more hypothetical. One could well imagine a tavern licensing régime in which the licensing agency was entitled to balance the economic and other benefits of awarding a license with any negative impact on the surrounding community in its decision. The licensing agency, perhaps on direction from the governor, might adopt a policy consistent with the statute to give considerable weight to the position of local community leaders in assessing impact on the surrounding community. To what extent is an administrative law judge reviewing a challenge to a decision denying a tavern license free to disregard the views of the local mayor and city council members on the permit application?

I think that executive branch officials might well be concerned that central panels will create a situation in which the legitimate—that is, the fully authorized by law—policy objectives of the administration will not be taken into account during administrative adjudication: that a wetlands permit, which an environmental protection agency's policy would deny, would instead be granted; or that a tavern license, which an alcoholic beverage commission's policy would

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28. See Rossi, *supra* note 14, at 70.

29. See *Fla. Power Corp. v. State Dep't of Env'tl. Prot.*, 638 So. 2d 545, 547 (Fla. Dist. Ct. App. 1994).

30. *Id.* at 548.

31. *Id.* at 546.

32. *Id.*

33. *Id.* at 556.

34. *Id.* at 561.

grant, would otherwise be denied.

Again to quote Professor Rossi:

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 non-political. 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.<sup>35</sup>

Professor Flanagan has written in a similar vein:

While administrative agencies are politically accountable through the appointment of their leadership, the authority of the chief executive, and the power of the legislative purse, central panels are not politically accountable in this sense. Neither the central panel nor the individual ALJ is responsible for the general enforcement of the statutory scheme, the orderly development of a regulatory effort, or the future consequences of a decision in situations yet to occur.<sup>36</sup>

## II. QUESTION #2: ARE CENTRAL PANELS INCONSISTENT WITH THE TRADITIONAL NOTIONS OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION?

Thus far I have discussed questions generated by the inconsistency of central panels with traditional prerogatives of the executive branch. I think questions are also generated by the inconsistency of central panels with traditional notions of judicial review of administrative action.

Trial and appellate judges show great deference to the decisions of administrative agencies. In an opinion for our court, I wrote that

The standard of review of an administrative agency decision is narrow. An agency decision may be reversed by an appellate court only where it is purely arbitrary, or an error of law has been made. An action of an administrative agency is arbitrary and capricious only where there is no reasonable basis for the action.<sup>37</sup>

As I have thought about administrative law during my judicial career, I have always thought that there are two distinct reasons for this deference. One, more

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35. Rossi, *supra* note 14, at 71.

36. Flanagan, *supra* note 1, at 1409.

37. *Ind. Civil Rights Comm'n v. Delaware County Circuit Court*, 668 N.E.2d 1219, 1221 (Ind. 1996) (citations omitted).



frequently cited, is agency expertise.<sup>38</sup> The second is separation of powers. Not only is the agency substantively expert, it is also the entity charged under the constitutional order with carrying out the matter at issue—it is the entity under the Constitution with primacy for executing policy on that subject.<sup>39</sup>

One of the arguments made with particular force by the advocates of central panels is that having administrative law judges who are generalists, rather than subject matter experts, will enhance the quality of administrative adjudication.<sup>40</sup> But one of the obvious implications of replacing specialists with generalists is that one of the two bases for judicial deference to administrative agency decisions—expertise—is, by definition, diminished. We have seen already that removing policy considerations from administrative adjudications strips those decisions of the separation of powers justification for deference: they are no longer the decisions of the entity under the Constitution with primacy for executing policy on that subject. Indeed, does the exhaustion doctrine—that a party must exhaust administrative remedies before seeking judicial review—have the same vitality under central panels if there is a non-deferential standard of review? Without a deferential standard of review I think the very legitimacy conferred on administrative law judge decisions by virtue of those judges being accountable within the executive branch is arguably removed.

Professor Flanagan has written about still a third reason for traditional deference. He points out that decisions coming from a single agency will have the additional virtue of consistency. But, he points out, central panels mean “multiple final decisionmakers and decisional variance because, without agency review, there is no method of insuring that the various ALJ decisions are consistent.”<sup>41</sup>

### III. QUESTION #3: CAN THESE QUESTIONS BE RESOLVED BY CHANGES TO THE WAY IN WHICH ALJ DECISIONS ARE REVIEWED?

My model of a central panel arrangement has assumed that the decision of the central panel ALJ is final, subject only to judicial review. Much of my critique has focused on the effects of such finality and it is therefore fair to ask whether the questions I raise can be resolved either by subjecting ALJ decisions to agency

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38. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 652 (1990) (citing *Chevron, U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984)).

39. *Chevron*, 467 U.S. at 866 (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, . . . the challenge must fail. . . . The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: ‘Our Constitution vests such responsibilities in the political branches.’”) (citing *TVA v. Hill*, 437 U.S. 153, 195 (1978)). *But see* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (1989) (rejecting separation of powers as a justification for *Chevron* deference).

40. *See supra* note 15.

41. *See* Flanagan, *supra* note 1, at 1389.

review, i.e., making them not final, or subjecting them to heightened judicial scrutiny, i.e., not affording them the deference historically given administrative agency decisions.

There is considerable variation among central panel arrangements in whether or not an ALJ's decision is final, subject only to judicial review. Professor Flanagan points out, in the course of detailing the evolution of central panel ALJ authority as to finality, that "until recently, . . . state agencies . . . had virtually unrestricted powers to review and modify the ALJ's findings."<sup>42</sup> Professor McNeil points out that the Model Act Creating A State Central Hearing Agency devised by the National Association of Administrative Law Judges<sup>43</sup> provides various options for agency review of ALJ decisions.<sup>44</sup>

I acknowledge that if a central panel ALJ's decision is subject to review by the agency prior to judicial review, some of my concerns about inconsistency and prerogatives of the executive are alleviated—but not entirely eliminated. I say this for two reasons. First, the acquiescence to agency review of central panel ALJ decisions is often accompanied by restrictions on the extent of that review, e.g., providing that "the decision of an ALJ is presumptively correct and an agency can set aside only those decisions not supported by substantial evidence."<sup>45</sup> To the extent agency review is restricted in this or similar ways, the concerns raised above are implicated.

Second, it may be inherent in central panel adjudication that the legitimate—fully authorized by law—policy objectives of the executive branch will not be taken into account during administrative adjudication. At least in complicated cases with mixed issues of law and fact, it seems to me highly desirable to have agency policy incorporated in the adjudication, rather than leaving it to agency review to impose (retroactively) policy considerations: it would be more efficient to incorporate policy considerations earlier in the process; and it would reduce the number of reversals.

Professors Flanagan and Rossi have both documented the growing trend to restrict or eliminate agency review of central panel ALJ decisions.<sup>46</sup> (In Indiana, the decision of an ALJ in our Office of Environmental Adjudication is final, subject only to judicial review.)<sup>47</sup> Professor Rossi proposes a solution to a set of concerns similar to those I express above about the inconsistency between central panels and traditional notions of judicial review of administrative action. He argues that the political accountability of agency decisionmaking can be protected by adjusting the standard of judicial review given central panel ALJ decisions. Rather than deferring to the decision of the central panel ALJ when it diverges from the position of the agency, Rossi proposes that courts "should defer to the

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42. *Id.* at 1364-65.

43. See MODEL ACT, *supra* note 21, at 316.

44. McNeil, *supra* note 15, at 28.

45. Kauper, *supra* note 15, at 561 n.128 (citing as examples Colorado, Florida, and Massachusetts).

46. Flanagan, *supra* note 1; Rossi, *supra* note 14.

47. IND. CODE § 4-21.5-7-5 (2004).

politically accountable decision-maker except where the issue is one of fact depending on the credibility of witnesses and other evidence.”<sup>48</sup>

A case raising just this issue made its way through the Indiana courts a few years ago.<sup>49</sup> Under the Indiana Surface Mining Control and Reclamation Act, an ALJ in the Indiana Department of Natural Resources (DNR) has final decision-making authority, subject only to judicial review, in cases involving alleged violations of surface mining regulations.<sup>50</sup> An ALJ exonerated a coal mining company of charges that the company was in violation of certain regulations concerning drainage of surface water.<sup>51</sup> The DNR director appealed the ALJ’s decision and the trial court held in favor of the director.<sup>52</sup> On appeal, the coal mining company argued that the trial court had not given proper deference to the decision of the ALJ.<sup>53</sup> Without explicitly indicating that it was giving deference to the position of the DNR director, the court of appeals affirmed the trial court, holding that the ALJ’s decision had been “arbitrary, capricious, and contrary to law.”<sup>54</sup>

Rossi’s approach satisfies some of my concerns about the inconsistency between central panels and traditional notions of judicial review of administrative action. But here, too, I have several lingering apprehensions. First, it seems inefficient for courts to have to deal with conflicting positions of two executive branch entities.<sup>55</sup> Second, it creates an extremely awkward position for the agency in situations where the agency concurs in the result of the central panel ALJ but not in the judge’s reasoning. To elaborate, suppose that in the surface mining case just described, the ALJ had ruled against the coal mining company but used an interpretation of the governing statute and regulations that the department believed wrong and problematic for future cases. Should the director seek judicial review in that circumstance? And suppose the coal mining company sought review. The DNR would be faced with the very real possibility that binding judicial precedent would be established as to the interpretation and

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48. Rossi, *supra* note 14, at 75.

49. *Peabody Coal Co. v. Ind. Dep’t of Natural Res.*, 629 N.E.2d 925, 929 (Ind. Ct. App. 1994) (“Peabody I”), *aff’d*, 664 N.E.2d 1171, 1174 (Ind. 1996) (“Peabody II”).

50. *Peabody II*, 664 N.E.2d at 1173.

51. *Id.* at 1172.

52. *Peabody I*, 629 N.E.2d at 928.

53. *Id.* at 930.

54. *Id.* at 931. The coal mining company also contended that the DNR director was not entitled himself to petition for judicial review under the Surface Mining Act. We took jurisdiction of the case to address solely that issue and, like the court of appeals, we resolved it against the company. *Peabody II*, 664 N.E.2d at 1174. We affirmed the decision of the court of appeals in all other respects as well. *Id.*

55. Rossi notes that Maine has dealt with this problem by establishing its central panel within the judicial branch itself as an “administrative court.” Rossi, *supra* note 14, at 12 n.34 (citing ME. REV. STAT. ANN. tit. 5, § 1151 (West 1964); ME. REV. STAT. ANN. tit. 4, § 1151 (West 1964); Richard G. Sawyer, 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)).

application of agency regulations for the agency in a case in which the agency is not even a party.

#### CONCLUSION

I think there is a lot to be said for the goals of central panels, not the least of which is the more tangible recognition that they give to the enormously important role played by administrative law judges in our system of government today. And I express no opinion on the constitutionality of such arrangements. I do think, from the standpoint of selling the concept to executive and legislative decisionmakers, however, that central panels raise some concerns. Those who make the case for central panels need to consider the inconsistencies between central panels and traditional prerogatives of the executive branch and inconsistencies between central panels and traditional notions of judicial review of administrative action. If these inconsistencies can be reconciled, it may very well be that Indiana will create an office of administrative hearings.