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PROGRAM ON LAW AND STATE GOVERNMENT FELLOWSHIP SYMPOSIUM

Maximizing Judicial Fairness & Efficiency: Should Indiana Consider Creating an Office of Administrative Hearings?

INTRODUCTION: EVALUATING STATE GOVERNMENT DESIGNS OF EXECUTIVE BRANCH ADJUDICATION

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Since its inception in 1997, the Program on Law and State Government has been dedicated to fostering the study and research of critical legal issues facing state governments. To that end, the Program on Law and State Government Fellowships offer an extracurricular academic opportunity for students interested in contributing to the contemporary scholarship of law and state government.[1] This year's Program on Law and State Government Fellowship Symposium, *Maximizing Judicial Fairness & Efficiency: Should Indiana Consider Creating an Office of Administrative Hearings?*,[2] culminated the ideas, research, and work of the 2004 Program on Law and State Government Fellows, Julie Keen[3] and Brian Berg.[4] Designed to challenge the participants toward a better understanding of the institutions of administrative adjudication within state government, the event ultimately invited those gathered to draw connections

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1. Awarded on a competitive basis, the Program on Law and State Government Fellowships allow two students the opportunity to work together for one year exploring a topic of their choice concerning a critical legal issue facing state governments in exchange for a tuition credit of up to $5000. Working with the Director of the Program on Law and State Government, Fellowship responsibilities include hosting an academic event and completing an academic paper.

2. The Program on Law and State Government Fellowship Symposium, *Maximizing Judicial Fairness & Efficiency: Should Indiana Consider Creating an Office of Administrative Hearings*?, was held on October 1, 2004, in the Wynne Courtroom of Indiana University School of Law—Indianapolis.

3. Program on Law and State Government Fellow, 2004. J.D. Candidate, 2006, Indiana University School of Law—Indianapolis; B.S., *with highest distinction*, B.A., *with highest distinction*, 2003, Indiana University.

4. Program on Law and State Government Fellow, 2004. J.D. Candidate, 2006, Indiana University School of Law—Indianapolis; B.S., 1994, Indiana State University; M.A., Public Policy, 2002, College of William and Mary.

between state government design, democracy, and justice.

Writing as Publius in Federalist No. 45, James Madison assured those wary of a strong federal government that, "[t]he powers reserved to the several States will . . . concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State."[5] State governments' unique positions of authority and responsibility with respect to the "lives, liberties, and properties of the people"[6] make states powerful examples of government design of the adjudicatory function within the executive branch. States' individual approaches to government design of the administrative function provide prisms through which we, as actors and recipients of the benefits and burdens of the modern administrative state, understand administrative adjudication. In keeping with the mission of the Program on Law and State Government, the Fellowship Symposium provided the over 100 law students, lawyers, and policymakers in attendance an opportunity to participate in the confluence of contemporary scholarship and state government policy. To do this, most of the attendees took a break from the administrative law culture with which they are familiar—Indiana's—to explore a variety of administrative adjudicative systems designed to reflect other states', and their respective citizens', expectations of democracy and justice.

With *Crowell v. Benson*, the U.S. Supreme Court essentially ratified the administrative branch.[7] Chief Justice Hughes, delivering the opinion for the Court, held that "the findings of [an administrative commissioner], supported by evidence and [acting] within the scope of his authority, shall be final."[8] Justice Hughes went on to say, "[t]o hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."[9]

More than seventy years of jurisprudence, state experimentation, and implementation of what has been called "rational democracy"[10] have passed since *Crowell*'s approval of the fourth branch of government.[11] The resulting modern administrative state has turned, in the minds of some scholars, the "prompt, continuous, expert, and inexpensive method"[12] described by Justice Hughes into

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5. THE FEDERALIST NO. 45, at 363 (James Madison) (John C. Hamilton ed., 1888).

6. *Id.*

7. 285 U.S. 22 (1932). *See also* David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI L. REV. 504, 514 (1987) (noting *Crowell* introduced "the most significant relaxation of constitutional obstacles to the modern administrative state").

8. *Crowell*, 285 U.S. at 46.

9. *Id.* at 46-47.

10. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 8 (1997).

11. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

12. *Crowell*, 285 U.S. at 46.

something quite the opposite.[13] Perhaps in response to the tensions between traditional principles of democracy and judicial efficiency, twenty-seven state governments have created centralized offices of administrative hearings. These offices, often called central panels, range in size, scope of authority, and relative relationship to the other branches of their respective state governments. In addition, they provided the cultural texts from which the 2004 Fellowship Symposium drew its lessons.

Featuring scholars and administrative law judges from Maryland, Missouri, North Carolina, Georgia, Ohio, Oregon, Minnesota, South Carolina, and Michigan, the symposium began with an introduction to the history of state central panels by Judge John W. Hardwicke.[14] Noting the similarities between ancient Roman executives and the modern executives in that they both "have a tendency to interpret the law in a way that is favorable to their policy positions,"[15] Judge Hardwicke pointed out practical and jurisprudential concerns weighing in favor of forming central panels at the state level. A presentation entitled, "The Landscape of Administrative Hearings in Indiana," by 2004 Program on Law and State Government Fellow Julie Keen followed Judge Hardwicke's remarks.

The first panel discussion, "Creation and Maintenance of an Office of Administrative Hearings: State Perspectives," featured Christopher Graham,[16] the Hon. Julian Mann,[17] the Hon. Lois F. Oakley,[18] and Professor Christopher McNeil.[19] Describing different state government cultures and central panel histories, each panelist contributed ideas about the creation and evolution of central panel systems and how they work today. Professor Christopher McNeil's article, exploring the executive and administrative branches' use of their

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13. *See* MASHAW, *supra* note 10, at 107 (describing the administrative state as "constitutionally unnecessary" and "governmentally dysfunctional"). Others have noted the "largely undemocratic mechanisms that characterize the modern administrative state." A. Michael Froomkin, *ICANN 2.0: Meet the New Boss*, 36 LOY. L.A. L. REV. 1087, 1087 n.1 (2003). Still others note the problems created by an administrative state they describe as balkanized. *See* Cass Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1188 (2002) (discussing "an enterprise as enormous as the national government," and noting that "[t]he administrative state is heavily balkanized, with largely independent institutions engaged in independent tasks"); Thomas E. Ewing, *Oregon's Office of Administrative Hearings: A Postscript*, 24 NAT'L A. ADMIN. L. JUDGES 21, 30 (2004) (describing Oregon's adjudicative system before the introduction of a central panel system).

14. Executive Director, National Association of Administrative Law Judges; Former Chief Administrative Law Judge, Office of Administrative Hearings, Maryland.

15. Judge John W. Hardwicke, Address at the Program on Law and State Government Symposium (Oct. 1, 2004).

16. President, National Association of Administrative Law Judges; Vice Chair, National Conference of Administrative Law Judiciary of the American Bar Association Judicial Division.

17. Chief Administrative Law Judge, Office of Administrative Hearings, North Carolina.

18. Chief Administrative Law Judge, Office of Administrative Hearings, Georgia.

19. Professor of Law, Capital University Law School; Administrative Hearing Examiner, Ohio; Former Chair of the Administrative Law Committee of the Ohio State Bar Association.

adjudicative powers in response to the terrorist attacks of September 11, 2001, is contained in this issue.

The Hon. Justice Frank Sullivan, Jr., Associate Justice of the Indiana Supreme Court, addressed the symposium attendees with remarks entitled, "Central Panels and Judicial Review." Justice Sullivan's article, also included in this issue, continues his response to the question presented by the title of the Symposium, "Should Indiana Consider Creating an Office of Administrative Hearings?" In doing so, Justice Sullivan presents several questions for Indiana to consider in light of the traditional prerogatives of the executive branch and traditional notions of judicial review of administrative action.

The second panel discussion of the day, "Fairness, Funding, and ALJ Finality," featured the Hon. Thomas J. Ewing,[20] the Hon. Bruce H. Johnson,[21] Professor James F. Flanagan,[22] and the Hon. Edward F. Rodgers, II.[23] This panel highlighted different states' approaches to the central panel concept with respect to the procedural due process questions that are inextricably related to questions of government design. Professor Flanagan's article, examining the consequences of providing ALJs with final authority over agency decisions, is also contained within this issue. Program on Law and State Government Fellow Brian Berg concluded the symposium with his presentation, "Policy Choices for Restructuring Indiana's System of Administrative Hearings: Keeping the Status Quo or Moving toward a Central Panel?"

The ineluctable question for all states—those with and without central panels—remains: how fair, fast, and cheap should the executive judiciary be?[24] It is my sincere hope that the pieces presented in this collection reflect the invitation of the 2004 Program on Law and State Government Fellows to look at both the heart and the skin of administrative adjudication—to define its purpose and shape our understanding of its possibilities. The Program on Law and State Government thanks the Indiana Law Review for continuing the dialog between state governments and the academic community by including the symposium pieces in this issue. The Program on Law and State Government also thanks all of those who made scholarly contributions to the 2004 Fellowship Symposium, especially those whose articles are published here. Finally, the Program on Law and State Government celebrates the work of 2004 Fellows, Julie Keen and Brian Berg.

Cynthia Baker,
Director, Program on Law and State Government
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20. Chief Administrative Law Judge, Office of Administrative Hearings, Oregon.

21. Assistant Chief Administrative Law Judge, Office of Administrative Hearings, Minnesota.

22. Oliver Ellsworth Professor of Federal Practice, University of South Carolina.

23. Administrative Law Judge and Director of the Commercial, Licensing, and Regulatory Services Division, Bureau of Hearings, Michigan.

24. *See* John M. Greacen, *How Fair, Fast, and Cheap Should Courts Be?*, 82 JUDICATURE 287 (1999).