THE ROLE OF COURTS IN ADMINISTRATIVE PROCEDURE: TWO STUDIES CONTRASTING GREAT BRITAIN AND THE UNITED STATES

by

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To my Father

and

In memory of my Mother

ABSTRACT

This thesis focuses on the creative role of the judiciary in two areas of administrative procedure. More particularly, it compares the responses of British and American courts to two discrete problems. The first, the subject of Part One, is that of prescribing minimum procedures for decisions involving the planning or regulation of a scheme - called "policy" decisions in Britain and "polycentric" decisions in America. The second, treated in Part Two, which is much shorter, concerns the enforcement of procedures that have already been prescribed by the administration for itself.

The overall approach in each part is similar. Introductory chapters (Chapter 1 and Chapter 9) present each problem in general terms and analyze the values that judges must keep in mind. The ensuing chapters in each part treat the British and American experiences in turn. They examine what the courts have done, how they have approached the problem, and how they have interacted with other bodies concerned with administrative procedure. From this it is possible to project a future role for the courts.

Part One, covering the judicial creation of procedures for "policy" or "polycentric" decisions, is by far the greater in scope and length. Chapter 1 begins by explaining that a "policy" or "polycentric" decision involves the planning or regulation of a distinct scheme - for example, a network of roads, a system of land use restrictions, or a pattern of airline licences. After briefly discussing British and American perceptions of these decisions, the chapter focuses on what will be the chief concern of judges in each country - the participation to be afforded citizens. Depending on the scope of the matter and the precise issues, the proper format

may be trial, oral argument, a conference, or written comments, singly or in combination. The courts ensure adequate participation by prescribing minimum procedures, through natural justice in Britain and constitutional due process in America.

Chapter 2 sets out what British courts have done. For reasons given, they have not applied natural justice extensively to ratemaking or allocative licensing, both of which occupy American judges. Instead, they have concentrated on land matters, and specifically on the procedures attending inquiries. First and foremost have been the limits placed by natural justice on secret communications. The earliest cases involved communications between the Ministry of Health and local authorities which had made demolition or compulsory purchase orders against particular parcels of land. Later the focus shifted to consultations with other central departments and to advice from in-house experts. Over a number of years the courts moved hesitantly toward a solution until in the early 1960's statutory instruments settled matters. The second occasion for applying natural justice to land inquiries has been to compel adequate notice. The courts have made their presence felt, although other bodies have been more systematic in their treatment of the subject. The third natural justice issue concerns disclosure of the inspector's report. After judges declined to institute a broad rule of disclosure, other bodies took the initiative and made what is now accepted as a healthy innovation. The last problem is the requirement of reasons following an inquiry. Again natural justice demurred, and other bodies, led by Parliament, took the lead.

Chapter 3 turns from actual holdings to consider directly the role of British judges as creators of minimum procedures for land inquiries. The first half analyzes the way they have approached the

problem, and from this infers a role for them. In the past they have been prone to confine their activity to what most resembled an adversary proceeding in a court of law. In small-scale inquiries (for example, those into compulsory purchase orders and planning appeals), this led them to concentrate on the lis, or contest between parties. In large-scale inquiries (for example, those into development plans and the siting of new towns), this meant adherence to approaches that appeared to leave ministers free of procedural restraints. The second half of Chapter 3 considers the role played by other bodies and the effect on the courts. Parliament has provided overall initiative by prescribing hearings and by creating the Council on Tribunals and the Parliamentary Commissioner for Administration. It has also influenced particular natural justice decisions to the extent that judges infer results from the language and logic of statutes. Departments, aided by the Council on Tribunals, now promulgate statutory instruments embodying broad standards of fairness, which may in turn influence the content of natural justice. The Council and the Parliamentary Commissioner entertain complaints about specific instances of procedural unfairness in inquiries. Together, the two bodies are performing functions once exclusively reserved for the courts. Judges, more than ever, are part of a group effort.

Chapter 4 projects a future role for British courts in land inquiries, specifically those into the creation of an overall scheme. It begins by explaining the need to involve the public in the formulation of large-scale plans from beginning to end, rather than just at the single instant allowed by the traditional hearing. The answer is public consultation, which is now undertaken voluntarily in the case of trunk road schemes and pursuant to statute in the case of structure and local plans. With the public participating from the start, there is less pressure on the eventual hearing, which in the case of

structure plans has become a relaxed affair, more like a discussion than a trial. Within this framework created by other bodies a place for natural justice is suggested, using the lessons learned in prior chapters.

The next four chapters examine the American side of the problem. Chapter 5 explains the shift in focus from polycentric decisions involving land to those involving economic activity - the setting of rates that businesses can charge customers, and the allocation of licences among rival applicants. From earliest times American judges have required that a trial precede ratemaking. This thinking was eventually enshrined in the Administrative Procedure Act. Not until the early 1970's did the courts begin to draw back, when they allowed agencies to use relaxed procedures for ratemaking involving many businesses and for rent-setting involving whole housing projects. Allocative licensing, the second class of polycentric decision, has traditionally followed in the steps of ratemaking. Accordingly, the courts have required that rival applicants for a licence receive a trial, something confirmed by the Administrative Procedure Act. In the past two decades they have exerted pressure on these proceedings to expand to include other interests in the scheme. This has forced them to reassess the value of the trial as sole format for participation, much as they have had to do in ratemaking. Although land matters have never received quite the same attention as in Britain, the courts have required a trial in zoning cases involving a single parcel of land. Recently they have begun to show interest in prescribing procedures for hearings instituted by Congress into highway and urban renewal plans.

Having investigated the general character of the hearing that must attend various polycentric decisions in America, the thesis then turns to particular procedures. Chapter 6 is thus closely analogous

to Chapter 2 on Britain. American courts are more active than the British in requiring adequate notice. The problem of secret evidence, although not occupying the same central place as in Britain, has occasioned various due process rulings. Here, even more than elsewhere, results depend on the overall format that the hearing must take. The American judiciary has been almost as wary as the British about compelling automatic revelation of examiners' reports, although most are disclosed anyway. Lastly, agencies have traditionally been compelled to make findings and give reasons to aid courts in their reviewing function. In addition, recent decisions require reasons for the sake of procedural fairness in a narrow class of cases.

Chapter 7 parallels Chapter 3 on Britain in that it considers directly the role of the courts. It investigates judicial methods of approach and finds that the courts are not so much confining the scope of their activity as indicating precise sets of procedural results. The chapter then examines the role played by other bodies. Congress has not taken the same part as has Parliament: the courts regularly require hearings on their own, they interpret the Administrative Procedure Act (which was a distillation of judicial holdings in the first place) to accord with their evolving ideas of procedural fairness, and they rarely pay heed to the language or logic of particular statutes. However, while the courts retain the broad initiative, Congress and the agencies have made limited contributions on their own. More noteworthy are some unique types of interaction based on the fact that the courts hold predominance. First, judges may decline to base their holdings on constitutional due process in order to retain flexibility and to encourage input from other bodies. Second, they may borrow procedures pioneered by others. Finally, they may adopt suggestions in scholarly articles emanating from the Administrative Conference of the United States, a new body entrusted with investigating

and improving administrative procedures.

Chapter 8, the counterpart of Chapter 4 on Britain, projects a future role for American courts as creators of minimum polycentric procedures. It suggests that they make explicit what they have in fact been doing all along: prescribe a general format for participation and then require particular procedures within it. It then considers the problem of continuous participation in large-scale polycentric decisions. America trails Britain in making consultation a legal requirement, although some academics and agencies have recognized its value. If the past is any guide, the courts will begin to make their weight felt soon. The chapter ends with the findings of Part One: American courts create an overall framework of fair procedures, whereas British courts confine themselves to policing a framework created by others.

Part Two consists of three chapters on the enforcement of procedures that have already been embodied in administrative rules. Chapter 9 presents the general values governing judicial decisions on enforcement. Administrative procedures that are meant solely to make a department or agency a more efficient organization should be waivable at will. Those designed to govern dealings with the outside public, especially those forming hearings, should be adhered to.

Chapter 10 investigates what British courts have done to force adherence to administrative rules of procedure. One is confronted at the outset with the distinction between "statutory" rules, which are enforceable in a court of law, and "non-statutory" rules, which generally are not. When the purpose is to guide or benefit citizens, Parliament usually grants an administrative body power to make procedures having the status of "law," and then, aided by the Council on Tribunals, sees that it is exercised. When the purpose is to regulate matters of internal management, the administration normally issues

procedures informally in circulars, which, despite possible pressure from the Parliamentary Commissioner for Administration, it has no legal obligation to follow. Although this system appears to leave no room for judicial creativity, British courts have enforced non-statutory procedures at various times. They have subjected the Criminal Injuries Compensation Board and its procedures to legal control, in spite of its lack of foundation in statute. They have in special circumstances redefined circulars as subdelegated legislation and hence subject to judicial enforcement. And more recently they have employed public law estoppel and hinted at using natural justice to force administrative bodies to adhere to promises, some procedural, with no basis in "law." As they did in Part One, British judges are acting as the final guarantors of procedural fairness.

Chapter 11 considers the response of American courts. It begins by noting the American failure to make enforcement or non-enforcement turn on the statutory or non-statutory background of a procedure. The reason apparently lies in the ability of the judiciary to use constitutional due process to force administrative consistency. Unlike in Britain, judges in America decide entirely for themselves which procedures they will enforce and which not. Despite some wavering, they have come to recognize that procedures designed solely to regulate internal housekeeping matters need not be enforced against agencies. On the other hand, they have usually enforced isolated procedures intended to guide or benefit the public, and even more so those that form part of a hearing. Agencies contribute to the extent that they make clear beforehand the purpose of a procedure. As in Part One, however, the courts remain the masters, retaining overall responsibility for ensuring procedural fairness, instead of simply moving in when other bodies have failed.

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APA-- Administrative Procedure Act

Acheson Committee Report-- Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. (1941)

Burroughes-- Burroughes, "Public Inquiries and Large-Scale Development: The Minister of Power and the Supergrid," [1970] Pub. L. 224

CPLA(IP) Rules 1962-- Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules 1962, S.I. 1962 No. 1424

Code of Practice-- Department of the Environment Booklet, "Structure Plans: The Examination in Public," part 3 (H.M.S.O. 1973)

Davis, Text-- K. Davis, Administrative Law Text (3d ed. 1972)

Davis, Treatise-- K. Davis, Administrative Law Treatise (1958)

Donoughmore Committee Report-- Report of the Committee on Ministers' Powers, Cmd. 4060 (1932)

Drapkin-- Drapkin, "Development, Electricity and Power Stations: Problems in Electricity Planning Decisions," [1974] Pub. L. 220

Franks Committee Report-- Report of the Committee on Administrative Tribunals and Enquiries, Cmnd. 218 (1957)

Fuller, The Morality of Law-- L. Fuller, The Morality of Law (rev. ed. 1969)

Ganz-- G. Ganz, Administrative Procedures (1974)

Revised Model State APA-- Revised Model State Administrative Procedure Act (1970)

Schwartz, Introduction-- B. Schwartz, An Introduction of American Administrative Law (2d ed. 1962)

Schwartz & Wade-- B. Schwartz & H.W.R. Wade, Legal Control of Government: Administrative Law in Britain and the United States (1972)

Skeffington Committee Report-- "People and Planning," Report of the Committee on Public Participation in Planning (H.M.S.O. 1969)

de Smith, Con. & Admin. Law-- S. de Smith, Constitutional and Administrative Law (2d ed. 1973)

de Smith, Judicial Review-- S. de Smith, Judicial Review of Administrative Action (3d ed. 1973)

T&CP Act 1947-- Town and Country Planning Act 1947, 10 & 11 Geo. 6, c. 51

T&CP Act 1968-- Town and Country Planning Act 1968, c. 72

T&CP Act 1971-- Town and Country Planning Act 1971, c. 78

T&CP(A) Act 1972-- Town and Country Planning (Amendment) Act 1972, c. 42

T&CP(IP) Rules 1974-- Town and Country Planning (Inquiries Procedure) Rules 1974, S.I. 1974 No. 419

T&CP(S&LP) Regulations-- Town and Country Planning (Structure and Local Plans) Regulations

T&CP(S&LP) Regulations 1974-- Town and Country Planning (Structure and Local Plans) Regulations 1974, S.I. 1974 No. 1486

TIA 1958-- Tribunals and Inquiries Act 1958, 6 & 7 Eliz. 2, c. 66

TIA 1971-- Tribunals and Inquiries Act 1971, c. 62

Wade, Admin. Law-- H.W.R. Wade, Administrative Law (3d ed. 1971)

Wade, Towards Administrative Justice-- H.W.R. Wade, Towards Administrative Justice (1963)

Wraith & Lamb-- R. Wraith & G. Lamb, Public Inquiries as an Instrument of Government (1971)

INTRODUCTION

Judges in Great Britain and the United States have been dealing with administrative procedures since the turn of the century. From the beginning they have compelled governmental bodies to observe certain minimum procedures as a prelude to taking legally valid action. More recently, courts have forced adherence to procedures promulgated by departments and agencies on their own. Part One examines the former undertaking with respect to what are called "policy" or "polycentric" decisions. Part Two deals with the latter activity, which is more limited in scope.

In neither country do judges exercise their creativity in a value-free way. They have a distinct vantage point from which they approach their work. In both Britain and America courts are entrusted with ensuring the basic fairness of the process. Their point of view really coincides with that of the citizen who is the object of the administration's attentions: their function is to guard his participation. To be sure, they must also have concern for the needs of the administration and of the public. Decisions that exalt private interests in total disregard of others may make the enterprise of administration impossible; they end by serving no one. Nonetheless, the courts in each country expend their creative energies in securing for citizens a certain place in the administrative process.

Yet this is only part of the story. Courts move within an institutional context. To ignore this is to risk distorting the choices available to them. When dealing with one legal system, context can be assumed with no danger of misunderstanding. But in a comparative venture the temptation is always to judge the results in one country in terms of conditions existing in the other. To avoid

this, differences must be made clear. One must understand how other bodies in each country limit the scope of judicial activity and contribute to individual decisions. The end is to see how British and American courts differ in the way in which they discharge their common responsibilities for procedural fairness.

PART ONE

THE CREATION OF PROCEDURES

FOR "POLICY" OR "POLYCENTRIC" DECISIONS

CHAPTER 1

THE GENERAL VALUES GOVERNING THE JUDICIAL CREATION OF PROCEDURES FOR "POLICY" OR "POLYCENTRIC" DECISIONS

Part One of the thesis deals with the creation by judges of procedures for one class of administrative decision. The first chapter will explain the peculiar characteristics of that decision, and hence the general values which courts must keep in mind. The next three will deal with the activities of British judges as they perform their institutional functions. The final four chapters of Part One will examine the reaction of American courts to their task, making comparisons to the British approach.

THREE TYPES OF ADMINISTRATIVE DECISION

Adjudicative

One may divide administrative decision-making into three rough categories. The first is adjudicative. Adjudication occurs whenever a legal rule or standard is applied to facts.[1] It is the normal mode of proceeding in a court of law. For example, did the defendant's actions constitute a larceny, or was one party to a civil suit negligent? It also occurs frequently in administrative law. Does an applicant qualify for payments under the national insurance Acts in Britain, or is the aspiring doctor in America competent enough to receive a licence to practise?

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1. This is the narrow definition of the term, used by Professor Fuller and others whom he has influenced. Fuller, "Adjudication and the Rule of Law," 54 Proceedings of the American Society of International Law 1 (1960). See also H.M. Hart & A. Sacks, The Legal Process 662-69 (tentative ed. 1958). The word has been used more broadly in American administrative law to denote simply the act of deciding a particular case, whether a standard is being applied or not. See, e.g., Administrative Procedure Act §§ 2(d), 5, 5 U.S.C. §§ 551(6),(7), 554 (1970) [hereinafter cited as APA]; K.Davis, Administrative Law Text § 4.01, at 88 (3d ed. 1972) [hereinafter cited as Davis, Text]. When used in this latter sense in later chapters, it will be set off with quotation marks and specially identified.

In Great Britain, the application of a legal rule to facts is commonly called a "judicial" decision, even when made by an administrative body. E.g., Wade, "'Quasi-Judicial' and its Background," (1949) 10 Camb.

The nature of an adjudicative decision defines the process by which it must be reached. First, the applicable standard must be known. This can normally be inferred from the situation itself. Occasionally, however, the decider must create or elaborate the standard himself. To do so, he will have need of general facts and arguments, much as does a legislature. But the case requiring this is unusual, as most standards are known well beforehand. Most effort in adjudication goes toward adducing facts about the particular case and arguing about their significance vis a vis standards. What is the situation here, and on which side of the line does it fall? Do these acts constitute larceny, is this applicant within the terms of the social security statute? These questions involve what Professor Kenneth Culp Davis calls "adjudicative" facts - facts dealing with a particular party and his situation. They stand in opposition to "legislative" facts, which are more general facts going to the content of a rule or standard.[2] A large part of a routine case of adjudication consists of establishing the existence or non-existence of "adjudicative" facts. The normal Anglo-American way of going about about this is trial - the process by which one side presents evidence and testimony, which his opponent then counters with opposing evidence, testimony, or cross-examination. The capstone of a trial will be arguments about the significance of the evidence presented, including the "adjudicative" facts proven and the application of standards called for. A trial is usually adversary in nature, each party trying to

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2. Davis, Text § 7.03, at 160; 1 K. Davis, Administrative Law Treatise § 7.02, at 413 (1958) [hereinafter cited as Davis, Treatise]. The distinction between "adjudicative" and "legislative" facts was first made in Davis, "An Approach to Problems of Evidence in the Administrative Process," 55 Harv. L. Rev. 364, 402 (1942). Its relevance for Britain was suggested in Davis, "English Administrative Law - An American View," [1962] Pub. L. 139, 151-55 and applied in H.W.R. Wade, Towards Administrative Justice 117-22, 126-28 (1963) [hereinafter cited as Wade, Towards Administrative Justice]. See also S. de Smith, Judicial Review of Administrative Action 160 n. 88, 182 n. 32 (3d ed. 1973) [hereinafter cited as de Smith, Judicial Review].

prove the opposite of his opponent. Most forms of adjudication in Britain and America are carried out in this way. To be sure, some proceedings are quite formal, with detailed rules of evidence and procedure; others may be extremely informal, consisting of no more than brief oral presentations. The hallmark, however, is the adversary clash over the existence and significance of particular facts.

The final decision will itself be a direct product of this process. Once the standard is known, one side or the other will elicit facts to "prove" his case. In short, participation will determine outcome. The person to be affected by an adjudicative decision is thus assured a critical role in its making. This has added significance in administrative law where it ensures that the state, which is usually one of the parties, acts only in predictable ways after demonstrating its precise authority.

Courts in Britain and America have traditionally protected the place of parties in adjudication. Their method has been to prescribe minimum procedures to guarantee the revelation of standards, the admission of relevant evidence, and the application of the standards to that evidence. Their general goal is procedural "fairness," which may be seen as a prerequisite to the validity of the ultimate decision.

Legislative

The legislative mode of decision-making is likewise well known. It involves the general prescription of rules or standards for the future. The focus is therefore not on particular parties, but on general classes of persons who will fall inside or outside of the rule. Although an adjudicating body will occasionally prescribe a new rule for the future, clearly most legislating is done by others.

The legislative mode of deciding is markedly different from the adjudicative. The rule ultimately promulgated is likely to turn

on general judgments and perceptions. Relevant facts are whatever the legislator uses to inform his judgment. Unlike "adjudicative" ones, these "legislative" facts have bearing on the result only at the discretion of the decider. Nor will there really be a single issue to which contesting parties can direct their arguments. The legislator's aim is to reach the best result, not to decide whether a standard does or does not apply. No matter how hard one tries to force a legislative decision into an adversary framework, it will inevitably slip out. The issue of whether or not this statute should be passed in this particular form is likely to turn into an investigation of numerous alternatives and compromises.

Participation in the legislative process will accordingly have a meaning totally different from participation in adjudication. Participants cannot prove, only persuade. And the proceeding will take the form not of an adversary clash on disputed facts or points, but of an exploration of views and alternatives.

British and American courts have historically done little to foster participation in the legislative process. First, as has been suggested, participation here does not have the same effect on the outcome as in adjudication. Second, legislative decisions are normally the responsibility of the legislature, which is in theory directly responsive to the wishes of those whom its decisions affect.[3] Added to this is a judicial hesitancy about giving directions to another branch of government.[4] The attitude of deference towards the legislative

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3. Obviously this no longer holds when the legislating body is an administrative agency, exercising its rule making powers. Davis, "The Requirement of Opportunity to be Heard in the Administrative Process," 51 Yale L. J. 1093, 1115-16 (1942).

4. This is especially true in Great Britain, where Parliament is sovereign. de Smith, Judicial Review 326-27, 414-16. See generally S. de Smith, Constitutional and Administrative Law c. 3 (2d ed. 1973) [hereinafter cited as de Smith, Con. & Admin. Law]. However, it is also evident in the United States, where the constitutional doctrine of separation of powers discourages the courts from investigating the internal workings of Congress. 1 B. Schwartz, A Commentary on the Constitution of the United States 142-45 (1963).

process has spilled over into administrative rule making, where the courts have always been loath to interfere on their own.[5]

Policy or Polycentric

The third type of decision is somewhat less known than the other two, since it appears mostly in administrative law. In Britain, it is customarily termed a "policy" decision, and in America a "polycentric" one.[6] The latter term will normally be used in this thesis for reasons set out below. Unlike adjudication, a polycentric decision does not involve measuring facts against a standard. Rather it consists of taking a problem and finding the best solution in the light of numerous shifting criteria. The decider must determine which factors or considerations are relevant and then balance them against each other to attain the result best calculated to achieve his ends. But if a polycentric task entailed no more than this, then legislation would fit the definition exactly. Certainly legislation involves balancing numerous criteria to arrive at the best solution. The difference is that a polycentric decision has as its end not the creation or prescription of general standards, but the adjustment of a situation for its own sake. The job is to solve a particular problem, not to guide conduct.

Some polycentric decisions share many characteristics of adjudication. They may have an "either ... or" quality about them. Should a special bus lane be put on this road? Should this house be demolished or not? Should this airline or its competitor receive the contested air route? Should a business be allowed to charge this price for its

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5. Occasionally American courts, at least, do guard participation in rule making via judicially created doctrines of fairness. E.g., Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697, 702-04 (D. Colo. 1972).

6. The term "polycentric" first appeared in M. Polanyi, The Logic of Liberty 170-84 (1951) and has since been taken up by Professor Lon Fuller. Fuller, "Collective Bargaining and the Arbitrator," 1963 Wis. L. Rev. 1, 33; Fuller, "Adjudication and the Rule of Law," 54 Proceedings of the American Society of International Law 1, 3 (1960).

services? But as with legislation, these choices will always tend to break down into compromises and adjustments. Unlike in adjudication, there is no real reason to force the decision to go all one way or all the other. The best solution may be to have a special bus lane only during certain hours, to restore a dilapidated house, to give one airline the route on certain days and its competitor the route on others, or to allow the price to be charged if certain added services are included. Because the number of possible solutions may be infinite, it is often unhelpful if adversaries simply join issue and oppose each other on one of them.

A polycentric decision may also resemble adjudication when it hinges entirely on findings of local fact. This occurs whenever one factor becomes important enough to dominate the entire decision. For example, suppose that three applicants for an air route are equal in all respects save financial integrity. This will then become the consideration upon which the award turns. Each party will offer proofs about his own situation, much as he would if financial integrity were a minimum standard to be met. The process will resemble adjudication to the extent that local facts have taken on decisive importance. Like a chameleon, the proceeding has temporarily adapted to special circumstances. But when conditions change, it will revert to its more normal appearance.

Most polycentric decisions in administrative law involve more than isolated instances of expediency. Normally they are made in reference to a larger pattern or network of relationships. This overall pattern determines what the possibilities are for each of its definable parts, and all of the parts come together to form the pattern. Thus, the bus lane will most likely be part of a larger traffic scheme. Whether it is adopted or not will depend upon and in turn influence the flow of traffic through the rest of the scheme.

The dilapidated house may be part of an urban renewal project. If it is torn down, then perhaps a park can be put in its place, thereby freeing existing open space for construction. Similarly, there will be a whole network of interlocking air route licences. Awarding a certain one to a certain applicant may allow it to connect the service with contiguous flights and to operate all of them at greater savings and convenience. Lastly, setting a rate that can be charged by one business will affect its position vis a vis its competitors and perhaps lead to changes in the entire industry. It is true that an adjudicative decision, no less than a polycentric one, can have far-reaching effects. The difference is that, where a standard is being applied to facts, these effects are logically irrelevant to the decision. But when the best solution is sought, the configuration that the entire pattern takes in the end will be of utmost importance.

There will be a continuum of polycentric decisions, ranging from an "either ... or" adjustment of one facet of a pattern (with the whole kept in mind) to an overall consideration of the entire system. For example, the task may become redesigning a whole traffic scheme, planning the renewal of an entire urban area, rationalizing a complete system of air routes, or fixing a schedule of prices to be charged by a whole industry. These latter functions will resemble legislation to the extent that they involve global matters, with local facts about individuals taking a secondary place. Yet they are closely related to the more limited type of polycentric decision. Indeed, the latter often have a way of expanding into more general considerations of a whole system as alternatives are suggested, affecting the pattern in other places and impinging on interests which in turn require consideration.[7] All polycentric decisions, then, share common

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7. There is a description of this process occurring in British planning inquiries in G. Ganz, Administrative Procedures 39-45 (1974) [hereinafter cited as Ganz]. It was fostered by judicial rulings in the field of allocative licensing in the United States. See pp. 206-19 infra.

characteristics. These characteristics - the search for the most expedient ad hoc arrangement within an overall pattern - make them a distinct class worthy of common treatment.

POLYCENTRIC DECISIONS IN ADMINISTRATIVE LAW

Some polycentric tasks were traditionally performed by the legislature and some by the courts. Ratemaking, for example, was long a legislative chore in the United States.[8] And the licensing of ale houses was, like many other administrative tasks in Britain, carried out by magistrates, even when the goal was to attain the best result rather than to apply a fixed rule to facts.[9] However, the normal practice has been to transfer these matters to administrative bodies. Ratemaking, licensing, and land planning are now for the most part accepted as administrative functions in both Britain and America.

The distinct character of this type of decision has long been recognized by administrative lawyers and commentators on each side of the Atlantic. In Great Britain the practice is to contrast "judicial" decisions with "administrative" ones. Administrative bodies may engage in both types of decision-making. The former involves applying a more or less fixed legal standard to facts; the latter, it is said, necessitates the exercise of a particular type of "discretion," namely making an ad hoc judgment of "policy" or "expediency."[10] Occasionally, other terms like "quasi-judicial" have

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8. See, e.g., Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 303-05 (1933); Chicago, Milwaukee & St. Paul Ry. v. Minnesota ex rel. Railroad and Warehouse Commission, 134 U.S. 418, 461 (1890) (Bradley, J., dissenting).

9. See, e.g., Boulter v. Kent Justices [1897] A.C. 556.

10. de Smith, Con. & Admin. Law 528-29, 555, 584; de Smith, Judicial Review 60, 64; H.W.R. Wade, Administrative Law 224-25 (3d ed. 1971) [hereinafter cited as Wade, Admin. Law]; Gordon, "'Administrative' Tribunals and the Courts," (1933) 49 L.Q.R. 94, 107-08; Wade, "'Quasi-Judicial' and Its Background," (1949) 10 Camb. L.J. 216, 223.

been used to denote the latter type of decision.[11] But generally, regardless of precise terminology, the difference between a decision based on a standard and one based on expediency is well understood in Britain.

One warning should be sounded, to prevent complacency if nothing else. The British habit is to distinguish "judicial" from "policy" decisions solely on the basis of what is being applied to the facts of a case. In the former the decider finds "law," which he then applies; in the latter he makes "policy," which he likewise applies. This is useful in differentiating what controls one type of determination from what controls the other. But it obscures differences in the way each decision is reached. It may be accurate to say that an adjudicator goes about his business by "applying" a standard to facts. It may not be entirely wrong to describe the maker of an isolated decision of expediency as "applying policy" to the situation before him - for example, where a board is considering a single application for what would be the only public house in town, or a local authority is deciding whether to tear down one building. In these situations, so common in Britain, the decider may indeed settle on policy and then apply it to the facts of the case before him. But when the proceeding expands so that a whole scheme is being considered or affected, then it is positively misleading to draw analogies to the judicial mode of going about things. The decider is still dealing with policy. But he does not proceed by simply finding and applying it. Rather he takes the situation and adjusts its many parts to get the best result, using various policies

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11. Report of the Committee on Ministers' Powers, Cmd. 4060, sec. III § 2, at 74, § 8, at 88 (1932) [hereinafter cited as Donoughmore Committee Report]. See de Smith, Judicial Review 64. The better approach in Britain is to say that a "quasi-judicial" decision is an "administrative" one which must be preceded by certain procedures resembling in some respects those of a court. Wade, "'Quasi-Judicial' and Its Background," (1949) 10 Camb. L.J. 216, 227.

in his decision. The most obvious instances are those of ratemaking or allocative licensing, which are common in America. But the same process occurs in Britain. If there are already many public houses in an area, the licensing body must consider the preexisting scheme for which it has responsibility. If a building is to be demolished as part of the overall redevelopment of a city, then the local authority must decide with reference to a larger plan. The maker of a polycentric decision is not so much applying anything as adjusting the parts of a whole. Any study of procedure must begin by recognizing the distinction. Until they do so, the British will not be out of the thicket.

Americans have their own special problems in distinguishing polycentric from adjudicative activities. They are likely to use the word "policy," so common in Britain, to denote simply the values which go into a decision. A court, for example, will make a "policy decision" whenever it chooses among values underlying a rule being applied. To Americans, then, an adjudicative decision may involve "policy" no less than a polycentric one.[12] They are accordingly mystified by the British habit of contrasting adjudicative decisions with "policy" determinations.[13] Sometimes writers in the United States fail to make the distinction between adjudicative and polycentric tasks altogether. Judge Henry Friendly, a keen observer of the administrative system, has in some of his non-judicial writings confused clearly polycentric decisions with adjudication.[14] Judge Friendly was a victim

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12. See, e.g., B. Schwartz, An Introduction to American Administrative Law 76-78 (2d ed. 1962) [hereinafter cited as Schwartz, Introduction]. Professor Davis speaks of courts "creating law or policy which will be applicable in future cases of the same sort ... ." Davis, "The Requirement of a Trial-Type Hearing," 70 Harv. L. Rev. 193, 202-03 (1956).

13. E.g., Schwartz, Introduction 77; Davis, "English Administrative Law - An American View" [1962] Pub. L. 139, 155 n. 39 (last paragraph).

14. H. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 11 (1962). This was criticized in L. Fuller, The Morality of Law 173-77 (rev. ed. 1969) [hereinafter cited as Fuller, The Morality of Law]. Judge Friendly subsequently accepted the criticism. H. Friendly, "Watchman, What of the Night?" in Benchmarks 151 (1967).

of the same trap that snared another distinguished student of administrative law, who characterized a polycentric undertaking as a type of adjudication involving a very general standard of public convenience or utility.[15] It is simply misleading to describe a decision of expediency in terms of the application of a standard of utility to facts.[16] Used in this sense, the word "standard" becomes meaningless.[17]

Americans have nonetheless always demonstrated some feeling for what goes into a polycentric decision.[18] Most often, the concept has lain buried in more general terms like "discretion."[19] It was Professor Lon Fuller who brought the label "polycentric" to administrative law,[20] and who indicated that distinguishing between adjudicative and polycentric decisions could be a useful way of approaching various problems.[21] Others have begun to build on this, so that the word "polycentric" is slowly finding its way into American

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15. Schwartz, Introduction 84. Professor Schwartz discusses allocative licensing undertaken by the Civil Aeronautics Board and adjudicative licensing undertaken by the Securities and Exchange Commission in almost the same breath. Id. 83-87. The two are quite different. See pp. 196-98 infra.

16. Cf. Fuller, The Morality of Law 3-15, 172-74.

17. Americans may have been encouraged in this misconception by the now discredited judicial insistence that congressional delegations of power to agencies be governed by a "standard" in order to be constitutional. E.g., United States v. Chicago, Milwaukee, St. Paul & Pacific R.R., 282 U.S. 311, 324 (1931). Since Congress inevitably directed regulatory agencies to act according to "public convenience" and the like, the temptation was to label this a "standard" in order to avoid having to strike down the delegation altogether.

18. E.g., Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. 12-13 (1941) (recognizing that ratemaking and allocative licensing do not involve the application of a standard to facts); J. Dickinson, Administrative Justice and the Supremacy of Law 216 (1927) (recognizing that economic regulation involves a subject matter so complex that the factors having determining effect in one case seldom repeat themselves in another).

In fairness, Judge Friendly and Professor Schwartz have also shown in other places that they are aware of the unique nature of polycentric tasks. See H. Friendly, Federal Administrative Agencies: The Need for Better Definition of Standards 54-56 (1962); Schwartz, Introduction 79-80.

19. See e.g., Davis, Text §§ 1.06-1.07, at 17-23.

20. See note 6 on p.8 supra.

21. Fuller, "Adjudication and the Rule of Law," 54 Proceedings of the American Society of International Law 1, 3-4, 7-8 (1960). See also Fuller, The Morality of Law 46, 172-73.

legal language.[22] The term is employed throughout this thesis in contrast to "adjudicative". Being fairly new and unused, it has not acquired a multiplicity of meanings that can lead to confusion. For British ears, it means the same decision according to expediency as is denoted by their word "policy." However, it lies shorn of the connotation acquired in the British context of an application of political values which is normally the ultimate responsibility of a minister answerable to Parliament.[23] The latter may in fact be part and parcel of a polycentric decision of the administration in Britain. But to insist upon it in the definition is to confuse one method of controlling a polycentric determination with the essential nature of the determination itself. It is of course these connotations which have led Americans to misunderstand British descriptions of the process. The word "polycentric" also emphasizes that more is involved than just a decision of ad hoc expediency. It points to the overriding importance of the "many-centered" scheme or pattern to which the decider must usually have reference. Agencies or departments will normally have permanent responsibility for the scheme, whether it be highway planning, land clearance, air route licensing, or ratemaking for an industry. Consequently, the single adjustment, which is the hallmark of the isolated polycentric decision involving a few people, will always be made with the design in mind.

PARTICIPATION IN A POLYCENTRIC DECISION

The different modes of participation open to those affected by

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22. E.g., H.M. Hart & A. Sacks, The Legal Process 662-69 (tentative ed. 1958); Boyer, "Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues," 71 Mich. L. Rev. 111, 116-20 (1972); Cramton, "A Comment on Trial-Type Hearings in Nuclear Power Plant Siting," 58 Va. L. Rev. 585, 589 n. 19, 592 (1972); Jowell, "The Limits of the Public Hearing as a Tool of Urban Planning," 21 Ad. L. Rev. 123, 147-51 (1969). Other terms, however, continue to be used. E.g., Reich, "The Law of the Planned Society," 75 Yale L. J. 1227 (1966) ("planning and allocation").

The word was introduced to British readers in Jowell, "The Legal Control of Administrative Discretion," [1973] Pub. L. 178, 213-15.

23. See Wade, Admin. Law 224-25.

adjudication and legislation have already been touched on. In adjudication, participation is critical because it determines results. Each party will try to prove his side. In legislation, it is usually less important. It can serve to advise those who are to create standards of possible pitfalls, and inform them of people's views. But participants can only persuade, not prove.

The question of participation in polycentric decisions is quite difficult. People can be drastically affected on individual grounds by them no less than by adjudication. The result is the same, for example, whether a citizen's land is taken against his will to serve as part of a trunk road or to satisfy a judgment in a dispute over who has title to the property. In each case one person is being singled out and made the particular object of governmental power. It is only natural, therefore, that the individual bearing the brunt of a polycentric decision should desire some role in its making. Unfortunately, participation simply cannot have the same significance here as in adjudication. Where a person's interests end up will by definition depend upon the overall scheme to be adopted. He must fit into it, and any variation in the way that he is treated may have profound effects on the entire pattern. If he addresses himself, as does a party in adjudication, solely to the disposition of his own case, he will be disregarding the very thing upon which that disposition depends - the overall result. If instead he argues for an overall result, he will be presenting only one of innumerable possibilities. A shift in the way that the decider views any one factor may render all of his arguments useless. Besides, as his interests are only one of the variables to be calculated, he is not really qualified (and perhaps disqualified by his involvement in the case) to recommend an optimum solution. An intelligent polycentric decision, in other words, unlike an adjudicative one, cannot be the end product of each affected person's

arguing his own side.

The challenge is to decide where a person's participation should be determinative, where it should be influential, and where it should make no difference whatever. It bears noticing as a preliminary matter that a polycentric function often contains within it subordinate adjudicative and legislative questions. There may be, for example, preliminary issues, often jurisdictional, which involve the application of a standard to facts. Thus, before a minister in Great Britain could in the past decide whether to confirm a land clearance order, he had to find that the buildings were "unfit for human habitation."[24] Similarly, in the United States the Federal Communications Commission must find that an applicant for a broadcasting licence meets certain minimum qualifications before deciding whether it would be expedient to grant him the licence in the circumstances.[25] The usual mode of participation in these preliminary decisions is trial and argument followed by a determination on the record, as in any adjudication. The courts can of course guarantee the integrity of this process. If the above standards need general elucidation - for example, what are the minimum qualifications for broadcasting licences - then there should be no more participation allowed than in any other type of rule making.

But determining the content and application of an adjudicative standard will form an insignificant part of most polycentric decisions. Once such preliminary matters are done with, one must face squarely the question of guaranteeing some sort of participation in the main process. Important to the ultimate outcome will be the choice of factors or considerations on the basis of which the decider will act. Is the demand for natural gas sufficiently great to make the need to

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24. Errington v. Minister of Health [1935] 1 K.B. 249 (C.A. 1934). See Donoughmore Committee Report sec. III § 8, at 92.

25. Johnston Broadcasting Co. v. Federal Communications Commission, 175 F.2d 351, 356-57 (D.C. Cir. 1949).

stimulate production a factor in setting gas prices charged consumers? Should a minister consider the architectural value of a building when deciding whether to have it torn down or restored? The choice of which considerations among a wealth of possibilities to give precedence to is more akin to legislation. Although the administration might wish to consult outsiders voluntarily on the matter, it should not be forced to do so by judges. If it is to be accountable for the decisions it makes here, it should be to the political branches of government.[26]

The considerations influencing a polycentric solution will identify certain relevant lines of factual inquiry. Often these relate to specific parties who will be affected by what the administration intends to do. To put it in another way, Professor Davis' "adjudicative" facts may be relevant to the decision. Examples are whether land to be taken from an owner for urban renewal can support the buildings planned for it, or whether an airline applying for a licence is in fair financial condition. Findings on these matters will certainly influence, and sometimes even determine, a polycentric solution. They are likely to be within the individual knowledge of parties. As in adjudication, then, trial and argument are suitable methods for approaching them. Courts can guarantee that the administration accords parties this type of participation on these issues, and that it decides them solely on the basis of what is presented at the hearing.[27]

A polycentric decision, unlike an adjudicative one, must also have regard to facts about the particular pattern or facet of a pattern being adjusted. These may not concern a specific party or his situation. But when they are peculiar to the case before the administration, they

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26. See Davis, Text §§ 7.05-7.06. This is of course the political, as opposed to the polycentric, side of a British "policy" decision.
27. Id. § 7.03.

must be ascertained before an adjustment is undertaken. Findings on them may well determine a citizen's place within the scheme. To illustrate, the number of accidents on a narrow street over a period of time may influence whether it is made one-way in a new traffic scheme, and consequently whether an adjacent street is made one-way in the opposite direction. Also, an air route licensing board may make use of data giving the past traffic on a route under consideration. The answer could well determine whether it will favour a small struggling airline or an established carrier that could absorb temporary losses, or indeed how it might divide the route among carriers. Local facts of this sort may not necessarily be within the personal knowledge of parties. But like the latter facts, they can be found on the spot through trial. Furthermore, unlike particular facts about individual parties, they will not diminish in significance as the number of people to be affected increases. The issue might be the location and configuration of a new airport. Numerous people could be involved. Yet facts about existing levels of noise and air pollution will still be of great importance in the ultimate decision.[28]

The elucidation of considerations and the finding of local facts do not take place independently of one another. Initial considerations will give rise to various lines of factual inquiry, which will in turn suggest new factors to be taken into account. This, added to the multiplicity of possible outcomes, means that the proceedings will have to be more fluid than in adjudication. The usual absence of a single issue to which parties can address themselves in an adversary manner renders trial an inappropriate overall format. The proceedings will

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28. Facts of this sort do not appear to come within Professor Davis' definition of "adjudicative" facts, which include only "facts about the parties and their activities, businesses, and properties." Id. § 7.03, at 160. Cf. Schwartz, "Administrative Law Cases During 1974," 27 Ad. L. Rev. 113, 120 (1975) ("adjudicative" facts are facts about individual parties and their property). This has led to criticism of the "adjudicative-legislative" fact distinction. See, e.g., Nathanson, Book Review, 70 Yale L. J. 1210, 1211-12 (1961).

also be different from the simple presentation of interests and views that often occurs prior to legislation. They will resemble more a conference.[29] There must be a process of give-and-take, as parties make suggestions, comment on the suggestions of others, and deal with proposals and counterproposals. In this way possibilities can be explored and compromises examined, with the ultimate power of decision resting in the administration. The greater the variety of possible outcomes, the more necessary this approach becomes. By way of contrast is the argument which attends adjudication or legislation, which can often be made in writing. But the fluidity of the polycentric process normally requires an oral proceeding.

Written comments may occasionally be the preferred form of participation.[30] They will be suitable where the decision is truly an "either ... or" one with no possibility of adjustment or compromise. The matter will have to be routine enough for all factors and considerations to be known beforehand. Written comments may also be the only means of allowing participation when there is need for expedition, and an oral proceeding would create intolerable delay. Some voice, however imperfect, is preferable to none at all. They may be the preferred form of participation for those who are being affected only indirectly by a polycentric scheme, but whose interests are a factor in the decision - for example, the competitors of an airline applying for a route who do not seek the route for themselves. Lastly, written comments may be sufficient when parties have been given a hearing and a preliminary plan has been adopted, but the ultimate decider wants fresh views before confirming or rejecting the plan.

Any polycentric decision will of course be a mixture of the

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29. The need for informal procedures of this type is explored in Ganz 3-13 and in Westwood, "Administrative Proceedings: Techniques of Presiding," 50 A.B.A.J. 659 (1964).

30. See generally Ganz 3-14.

above procedures. The precise mixture depends on what is involved. Those that turn on disputed facts about particular parties or the overall scheme will be dominated by the trial element. Those where no facts are disputed and the final outcome can only be one of a few possibilities will be decided after oral argument or perhaps even written comments. Those where a complete scheme is being created will become more like conferences, as parties find their interests being adjusted in relation to each other.

THE ROLE OF COURTS IN GUARANTEEING MINIMUM PROCEDURES

What role have British and American courts played in guaranteeing these various types of participation in polycentric decisions? Judges, like anyone else, tend to see the unfamiliar in terms of the familiar. Most of their experience has been with adjudication. Not surprisingly, they have used the same doctrines of procedural fairness developed in adjudication to protect participation in polycentric decisions. In Great Britain the tool has been natural justice, a series of judicially created presumptions about the procedures required by Parliament as a prerequisite of valid state action. Because Parliament is sovereign, it can overrule judicial judgments about what is essential to fairness whenever it chooses. After all, its intentions are what the courts are interpreting anyway. In the United States the usual method is to apply the due process clauses of the Constitution.[31] Because courts are the authoritative interpreters of the Constitution, their judgments about basic fairness have a potential permanence. In both countries, however, courts take the same general approach: they ask what is the sine qua non of a person's participation in the polycentric decision, using the experience they have gained in controlling adjudication.

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31. U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

The remainder of Part One sets out the results first in Great Britain, and then in the United States. In each case it examines the specific procedures that courts have prescribed and the ways in which these have affected the character of the hearing. If then analyzes the way judges have approached the problem, including the doctrines on which they have based distinctions, and investigates how they have interacted with other bodies to create a final result. Part One concludes with recommendations about how judges in each country should proceed in the future. The basic question to be kept in mind is comparative: how do the roles of the courts in each system differ?

CHAPTER 2

GREAT BRITAIN:

THE JUDICIAL CREATION OF LAND INQUIRY PROCEDURES

SUBJECT OF INVESTIGATION: LAND INQUIRIES

The focus will be on three types of polycentric tasks entrusted to the administration: the setting of rates to be charged for an activity, the allocation of a limited number of licences among various applicants, and the exercise of control over land ownership and use. In both Great Britain and the United States the administration engages in all three activities. However, the first two - ratemaking and allocative licensing - shed light on the judicial creation of minimum polycentric procedures only in the United States.

Ratemaking in Britain

Various administrative bodies are charged with setting rates in Britain. Railroad ratemaking, which has fathered many rules of administrative procedure in America, has traditionally been the responsibility of the Transport Tribunal.[1] Existing in one form or another since 1873, the Tribunal is charged with deciding isolated disputes over proper charges, but not with supervising the entire system of rail transport on a day-to-day basis. Be that as it may, the courts have never had occasion to use natural justice to mould its procedures. Nor are they ever likely to, since the Tribunal's ratemaking functions were drastically curtailed in 1962.[2]

Rent-setting, which has recently occupied American judges, is the responsibility of rent tribunals (for resident landlords) and

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1. See Wade, Towards Administrative Justice 37-41.
2. See N. Vandyk, Tribunals and Inquiries: A Guide to Procedure 161 (1965).

rent assessment committees (for non-resident landlords).[3] Both sets of bodies are charged with settling disputes between landlords and tenants, in the former case over what constitutes a "reasonable" rent[4] and in the latter a "fair" one.[5] The courts have not hesitated to apply natural justice to require adequate notice to parties of matters in contention,[6] and to ensure that the panel is unbiased.[7] But, like the Transport Tribunal, rent-setting bodies are more concerned with deciding particular disputes than with regulating an overall system. Indeed, a court has prevented a local authority from referring a block of flats en masse to a tribunal for the fixing of charges when there was no disagreement over the reasonableness of particular rents. In doing so, it noted, "It was never intended that this Act should be used as a general rent-fixing tribunal throughout a district. It is to deal with individual cases where hardship exists or may be reasonably supposed to exist."[8]

British ratemaking bodies may be entrusted with superintending an entire pattern of prices. The Milk Marketing Board, for example, buys all the milk produced by farmers at prices which it itself sets. Its method has been to institute a system of regional differentials

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3. See generally J. Farmer, Tribunals and Local Government 113-41 (1974); Schwartz & Wade 45; Yardley, "Rent Tribunals and Rent Assessment Committees," [1968] Pub. L. 135.

Prior to the Rent Act 1974, c. 51, rent tribunals had jurisdiction over furnished premises, while rent assessment committees dealt with unfurnished premises.

4. Rent Act 1968, c. 23, § 73.

5. Id. §§ 45-46.

6. Queen v. Paddington and St. Marylebone Rent Tribunal, ex parte Hodge (1964) 108 Sol. Jo. 379 (D.C.); King v. Paddington and St. Marylebone Rent Tribunal, ex parte Bell London & Provincial Properties Ltd. [1949] 1 K.B. 666, 682-83 (D.C.). See also Crofton Investment Trust Ltd. v. Greater London Rent Assessment Committee [1967] 2 Q.B. 955, 968 (D.C.) (natural justice would require notice to parties of new factors considered by committee after opening of proceedings).

7. Metropolitan Properties Co. v. Lannon [1969] 1 Q.B. 577 (C.A. 1968).

8. King v. Paddington and St. Marylebone Rent Tribunal, ex parte Bell London & Provincial Properties Ltd. [1949] 1 K.B. 666, 680 (D.C.).

which take into account the unequal production and transport costs of producers. A decision at any one point is bound to affect the entire network of relationships, especially since the Board is only given a fixed sum from which to make payments. Any increase in prices paid to some farmers, therefore, will mean decreases in prices paid to others.[9] The Board is apparently accustomed to listening to the representations of dissatisfied producers. But there is no indication that it must give them an open hearing or that the courts have used natural justice to define its parameters.

Allocative Licensing in Britain

The administration in Great Britain engages in many types of licensing, mostly on the local level. Very often the decider must do more than just determine whether an applicant is minimally qualified according to a preexisting standard; he must also decide whether to grant the licence as a matter of expediency.[10] Examples are the licensing of public houses, cinemas, and import-export firms. The courts have long applied natural justice to the licensing of public houses, mostly to prevent bias on the part of deciders.[11] But otherwise the role of natural justice has been somewhat ambiguous.[12] A 1970 Court of Appeal decision did confirm that a licensing authority which was required by statute to have regard only to specified matters must act fairly in deciding a given application. More particularly, it had to give notice of the case to be met.[13] Two years later the Master of the Rolls, who had spoken

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9. See Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997, 1026-27. See also id. at 1036-37 (dissent).

10. See de Smith, Judicial Review 71; Wade, Admin. Law 209; Gordon, "'Administrative' Tribunals and the Courts," (1933) 49 L.Q.R. 94, 107-08.

11. de Smith, Judicial Review 230, 233, 238-39; Wade, Admin. Law 210-11.

12. de Smith, Judicial Review 195-98; Wade, Admin. Law 209-10.

13. Queen v. Gaming Board, ex parte Benaim and Khaida [1970] 2 Q.B. 417, 430 (C.A.) (per Lord Denning, M.R.).

for the Court of Appeal in 1970, said on his own that an authority must hear those whose interests were affected by policy decisions to increase or decrease the number of taxi cab licences in a given area.[14] Courts may build on this in the future. But until now, British judges have certainly not employed natural justice to define the overall character of these proceedings, unlike their American counterparts, who use due process.

Licensing can also be part of a national scheme of economic control. As in the United States, the two most important are broadcasting and transport licensing. Broadcasting is to a large extent handled by the British Broadcasting Corporation, a publicly owned company. It chooses people to run its radio and television facilities in the manner of any other commercial enterprise. More recently, private enterprise has been allowed a limited role under the Independent Broadcasting Authority.[15] Like the American Federal Communications Commission, it issues licences for radio and television stations. But it decides by interviewing each applicant privately. Some have urged that it act more openly,[16] but no one has suggested that judges play any role in compelling this. On the contrary, at least one commentator has urged courts to keep out.[17]

Road transport licensing in Britain is the responsibility of a variety of administrative agencies. Carriers undertaking the haulage of goods come within the jurisdiction of the Transport Tribunal, the same body that was once responsible for railroad rates. Although judges have never had occasion to prescribe licensing procedures for the Tribunal, the Court of Appeal has intervened to require it to exercise its discretion to grant or withhold licences on a case-by-case

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14. Queen v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 Q.B. 299, 307-08 (C.A.) (Lord Denning, M.R.).
15. See generally de Smith, Con. & Admin. Law 478.
16. Ganz 11-13.
17. de Smith, Judicial Review 196.

basis.[18] This discretion was, however, narrowed by the Transport Act 1968, which relegates the Tribunal to deciding whether applicants opposed by British Rail and the National Freight Corporation could nonetheless provide superior service.[19] Entry into the road haulage business is thus to a large extent controlled by the decision of these latter two bodies on whether to oppose a pending application.[20] The system of road passenger transport is in the hands of local traffic commissioners with appeal to the Secretary of State for the Environment.[21] Licensing procedures here have not formed the occasion for natural justice rulings any more than have those governing the haulage of goods.

Nationalization plays an important role in the field of air route licensing. But there is also a system for allocating routes to private carriers that exist in the crevices of the government-owned system. This is handled by the Civil Aviation Authority,[22] formerly the Air Transport Licensing Board. Writers have noted the similarity of the Authority to American regulatory agencies, and particularly to the Civil Aeronautics Board.[23] Like its American counterpart, the Authority is entrusted with reaching the most expedient solution in the light of a system of interlocking licences which it must superintend. It is organized as a tribunal - something which in Britain normally applies standards to facts - but with the possibility of appeal on matters of "policy" to the Secretary of State for Trade and Industry. This hybrid form has been criticized by observers who would prefer to see something more like an inquiry.[24]

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18. Merchandise Transport Ltd. v. British Transport Commission [1962] 2 Q.B. 173, 186, 192-93, 207-08 (C.A. 1961).
19. Transport Act 1968, c. 73, §§ 73-74.
20. J. Farmer, Tribunals and Government 47 (1974).
21. Road Traffic Act 1960, 8 & 9 Eliz. 2, c. 16, § 143.
22. See generally Civil Aviation Act 1971, c. 75.
23. Wade, Towards Administrative Justice 43; Ganz, "Allocation of Decision-Making Functions," [1972] Pub. L. 215, 224-30.
24. Schwartz & Wade 147-48.

Regulations provide for an oral hearing before the Authority,[25] giving it discretion as to the form of the proceeding.[26] The appeal to the Secretary of State[27] must be in writing.[28] This could be a fruitful field for natural justice. But no court has ever been asked to apply it to these matters.

Land Inquiries: An Overview

One seeking to evaluate the role of British judges in prescribing procedures for polycentric decisions must turn to inquiries. These lie somewhere between tribunals, which are for the most part charged with applying a preexisting standard of law to facts, and purely departmental decisions, which aim to produce the best result subject only to final control by Parliament.[29] Inquiries have long been recognized as a hybrid affair requiring procedures which are at once fair and efficient:[30] the decider is charged with making the best decision based on a host of external factors and, with guaranteeing the meaningful participation of those who will be particularly affected. By far and away the most important inquiries are those having to do with land, which may be the subject of a compulsory purchase proceeding, a clearance or demolition order, or a pattern of planning restrictions. Whatever the exact issue, the state will normally be exercising control as part of a scheme, and so must obtain the best overall solution from among many possibilities; it will at

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25. Civil Aviation Authority Regulations 1972, S.I. 1972 No. 178, r. 14.

26. Id. r. 14(4).

27. Civil Aviation Act 1971, c. 75, § 24(6).

28. Civil Aviation Authority Regulations 1972, S.I. 1972 No. 178, r. 16.

29. See generally Wade, Admin. Law 254-76; R. Wraith & G. Lamb, Public Inquiries as an Instrument of Government (1971) [hereinafter cited as Wraith & Lamb].

30. Cf., e.g., B. Johnson & Co. (Builders) v. Minister of Health [1947] 2 All E.R. 395, 398-99, 404 (C.A.); Report of the Committee on Administrative Tribunals and Enquiries, Cmnd. 218, para. 272 (1957) [hereinafter cited as Franks Committee Report]; J. Griffith, Central Departments and Local Authorities 265 (1966).

the same time be granting owners a hearing in which to defend their particular interests, and so must, if possible, act fairly according to predetermined procedures.

The British courts have been dealing with administrative procedures involving land since the turn of the century. That period saw the gradual movement of responsibility for hearing and deciding land matters from the courts to the administration. For example, the Housing, Town Planning, etc. Act 1909[31] transferred appeals over local authorities' closing and demolition orders from quarter sessions to the Local Government Board, a central administrative body entrusted with supervising local government matters. The substantive principles stayed the same: the Board was to allow closure or demolition of a building that was "so dangerous or injurious to health as to be unfit for human habitation."[32] Since the function was to apply a standard of unfitness to the facts of the case at hand, the task remained wholly adjudicative. However, the courts, increasingly asked to apply natural justice to the governmental control of land, began developing precedents that they would later carry over to inquiries preceding a polycentric decision.[33]

These became a factor in administrative law with the passage of the Housing Act 1925,[34] which marked a significant departure from prior statutes. For the first time, the central administration, in exercising coercive control over land, was charged with doing more than just applying a standard. The Minister of Health was entrusted with superintending the creation of "improvement and reconstruction schemes" to rearrange homes and of "housing schemes" to provide dwellings for

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31. 9 Edw. 7, c. 44, §§ 17(3), 18(4).
32. Compare Housing, Town Planning, etc. Act 1909, 9 Edw. 7, c. 44, § 17(1) with Housing of the Working Classes Act 1890, 53 & 54 Vict., c. 70, §§ 30, 31(1), 32(1), 33(1).
33. E.g., Local Government Board v. Arlidge [1915] A.C. 120 (1914).
34. 15 & 16 Geo. 5, c. 14.

the needy.[35] His function was to ensure that local authorities used their limited resources to create the best pattern of public housing. In a word, it had become polycentric. The Minister was also to have the final decision on closing, demolition, and compulsory purchase orders that were made to implement the scheme.[36] With particular land being drastically affected, the feeling continued that the owner should have his say as before. As a result, this and subsequent statutes granted him participation by requiring in language similar to previous legislation that an "inquiry" be held if there were objections.[37] Fairness still had a role to play. It was for judges to determine what sort of participation Parliament intended by the term "inquiry." The principal case was that of Errington v. Minister of Health,[38] a 1934 decision by the Court of Appeal regarding a slum clearance order. It gave rise to a flurry of cases in the late 1930's and early 1940's about compulsory purchase and clearance orders, dealing mainly with the problem of ex parte communications.

In 1947 Parliament imposed a national system of land planning controls, to be administered in the first instance by local authorities. Landowners had to obtain their permission for any development, with the right to appeal denials of permission to the Minister of Town and Country Planning.[39] Given responsibility for determining the use

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35. Id. §§ 35-80.

36. Id. §§ 11, 14, 64.

37. The Housing Act 1925 required the Minister of Health to hold a "public inquiry" when there were objections to a compulsory purchase order. Id. Third Schedule, para. 5. It permitted owners to appeal closing and demolition orders to the Minister, who had general power to hold a "local inquiry" into the matter. Id. §§ 11(2), 14(4), 116(1). All of this was superceded by the Housing Act 1930, which authorized local authorities to create "clearance areas," to be implemented by particular clearance or compulsory purchase orders. 20 & 21 Geo. 5, c. 39, §§ 1, 2, 10. Both types of order had to be confirmed by the Minister, who was to cause a "public local inquiry" to be held if objections were received. Id. First Schedule, paras. 3 & 4; Second Schedule, paras. 4 & 5.

38. [1935] 1 K.B. 249 (C.A. 1934).

39. Town and Country Planning Act 1947, 10 & 11 Geo. 6, c. 51, §§ 14(1), 16 [hereinafter cited as T&CP Act 1947].

of a particular piece of land within a scheme, the Minister was empowered to cause a "local inquiry" to be held before deciding.[40] Inquiries into planning appeals thus joined those into compulsory purchase and clearance orders as subjects of judicial interest.

The mid-1940's also saw new inquiries into proposed administrative action affecting many landowners, each in a small way. Following World War II, the administration had been given power to determine the status of large areas of land. Most important was the power of the Minister of Town and Country Planning to approve general development plans, which were designed to guide individual planning decisions, or to designate areas as new town sites.[41] In the case of development plans, he was to ensure by regulations that "local inquiries or other hearings" be held.[42] Regulations specified that he was either to "cause a public local inquiry to be held into the objections or representations" or to afford to objectors "an opportunity of appearing before and being heard by a person appointed by him for the purpose."[43] In the case of new town designation orders, he was to "cause a public local inquiry to be held with respect" to objections.[44] It had become less a problem of ensuring participation to one person whom a decision would affect drastically, and more a question of allowing many interested people to advise as to the best overall solution. Accordingly, natural justice had to adapt itself.

The 1950's witnessed the entrance in force of non-judicial bodies onto the field. The Committee on Administrative Tribunals and Enquiries (the so-called "Franks Committee") was appointed in 1955[45] and made its report in 1957.[46] From this came the Tribunals and

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40. Id. § 104.
41. Id. § 5; New Towns Act 1946, 9 & 10 Geo. 6, c. 68, § 1(1).
42. T&CP Act 1947, § 10(2)(b).
43. Town and Country Planning (Development Plans) Regulations 1948, S.I. 1948 No. 1767, r. 17.
44. New Towns Act 1946, 9 & 10 Geo. 6, c. 68, First Schedule, para.3.
45. Franks Committee Report iii.
46. Report of the Committee on Administrative Tribunals and Enquiries, Cmnd. 218 (1957) (Franks Committee Report).

Inquiries Act 1958,[47] which created the Council on Tribunals to, among other things, "consider and report on ... administrative procedures" involving all inquiries held pursuant to a statutory duty and, later, designated inquiries held pursuant to a statutory power.[48] The Act likewise authorized the Council to review procedural regulations for these inquiries prior to their promulgation by the Lord Chancellor.[49] With statutory instruments now governing many matters, the courts have had less occasion to employ natural justice creatively. Since 1967 the Parliamentary Commissioner for Administration has also dealt with complaints about land inquiry procedures.[50]

Recently, experiments have been initiated with new forms of public participation in large-scale inquiries of the type first seen in the 1940's.[51] The trend is now to allow participation over an extended period as the scheme is being formulated, with the public hearing serving as the final episode. With the focus shifting rapidly, British courts must move to keep up if they are to maintain a role in the prescription of minimum procedures for land inquiries.

NATURAL JUSTICE AND SPECIFIC PROCEDURES FOR LAND INQUIRIES

The application of natural justice to inquiries has centered on several specific issues of procedure. Not surprisingly, it is here where the tension between the efficient attainment of the best scheme and the fair airing of objections has been greatest. The cases themselves reflect this tug of war, as individuals whose land has been

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47. 6 & 7 Eliz. 2, c. 66, now Tribunals and Inquiries Act 1971, c. 62 [hereinafter cited as TIA 1958 and TIA 1971 respectively].

48. TIA 1958, § 1(1)(c), now TIA 1971, § 1(1)(c). The Council has jurisdiction over "statutory inquiries," which are defined in TIA 1971, § 19(1), (2).

49. TIA 1958, § 7A (added by Town and Country Planning Act 1959, 7 & 8 Eliz. 2, c. 53, § 33), now TIA 1971, § 11.

50. Parliamentary Commissioner Act 1967, c. 13.

51. See Chapter 4 at pp. 120-56 infra.

subjected to governmental control have sought judicial protection of what they conceived to be their procedural rights.

The Revelation of Administrative Communications

In the past the most important area of controversy involved communications between the decider of the ultimate issue and those who advised him or whom he in turn advised. A department entrusted with a final decision might be in communication with the proponent of the initial order (usually a local authority), with other central departments, or with its own in-house experts. In each case the courts had to decide whether natural justice required that the communications be restricted, or if not restricted, at least revealed for purposes of debate. In setting out what had to be disclosed, British judges were in effect defining the scope of people's participation in the decision.

Communications between a Local Authority and the Department. - The earliest cases concerned the exchange of information between the local authority which had made a provisional decision and the department which was to decide, after holding a hearing, whether or not to confirm it. On the one hand, the local authority was a party at the inquiry; therefore, it seemed that any communications between it and the department should be confined to the actual hearing where other parties were present. On the other hand, the local authority and department were engaged in a cooperative venture to find the best solution; as they were like separate branches of the same enterprise, it seemed wise to allow them unimpeded contact with each other.

The initial issue facing the courts was whether all communications between a local authority and the department making the final decision should be confined to the inquiry hearing. Those in favour of this faced an uphill battle, especially since many statutes expressly contemplated some preliminary involvement of the department with each

order.[52] The minister entrusted with deciding was simply not comparable to a judge, who is denied all informal contacts with parties appearing before him.[53] The problem thus shifted to whether the communications, once made, had to be revealed to parties for possible rebuttal.

The leading case was Errington v. Minister of Health, decided by the Court of Appeal in 1934.[54] The Housing Act 1930 empowered local authorities to make clearance orders subject to confirmation by the Minister of Health, who had to "cause a public local inquiry to be held" if owners objected.[55] After excluding "any building which is not unfit for human habitation or dangerous or injurious to health," the local authority was to satisfy itself that demolition was "the most satisfactory method of dealing with conditions in the area," having special regard to the availability of accommodation for persons displaced and the sufficiency of its own resources for redevelopment.[56] Pursuant to the statute, the Jarrow Corporation made an order against property owned by Errington and others. Errington objected and an inquiry was held. After the hearing, the Jarrow Corporation engaged

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52. Many departments were empowered to force recalcitrant local authorities to make initial clearance orders. Parliament must surely have included in this the power simply to give advice. Offer v. Minister of Health [1936] 1 K.B. 40, 47-48, 51 (C.A. 1935).

53. In the United States this whole problem would be solved by requiring the separation of functions within a department. One person would provide day-to-day advice while another actually rendered the final decision, contact between the two being prohibited. Davis, Text c. 13. This solution is not possible in Great Britain, where a department is considered one entity for purposes of advising and deciding. See Offer v. Minister of Health [1936] 1 K.B. 40, 46 (C.A. 1935) (counsel for Offer), following Local Government Board v. Arlidge [1915] A.C. 120, 133, 135, 142 (1914) which refused to distinguish between the person within a department who actually decided and the department as a whole. Offer itself followed this, refusing to take into account evidence that the person deciding never in fact saw the communications. [1936] 1 K.B. at 40, 43. See also B. Johnson & Co. (Builders) v. Minister of Health [1947] 2 All E.R. 395, 398 (C.A.) and Summers v. Minister of Health [1947] 1 All E.R. 184, 186, 187 (K.B.D. 1946), where the fact that the person deciding did actually see the communications made no difference whatsoever.

54. [1935] 1 K.B. 249 (C.A. 1934).

55. 20 & 21 Geo. 5, c. 39, First Schedule, para. 4.

56. Id. § 1(1).

in a series of ex parte contacts with the Ministry regarding the feasibility of restoration as an alternative to demolition. The Corporation pressed for demolition, sending to the Ministry a statement of the local health officer assessing the physical condition of the houses and indicating that repairs would be useless. At one point, officers of the Corporation discussed the physical feasibility of repairs with Ministry officials. A deputation from the Ministry then visited Errington's property at Jarrow in the company of Corporation members. Subsequently, the Corporation sent a letter to the Ministry giving the opinion of the town engineer that the houses could not be satisfactorily repaired because of their weak foundations.

The Court of Appeal vacated the Minister's decision to confirm the order, holding unanimously that natural justice required revelation of these communications to the objectors. However, the opinions were less than helpful in generalizing about which sort of ex parte communications were proscribed and which not. There was much language to suggest that the standard was whether a communication contained evidence bearing on issues which had already been discussed at the inquiry. According to Lord Justice Greer, a minister violated natural justice if "instead of directing his mind solely to those matters [mentioned at the hearing], he takes into consideration evidence which might have been, but was not, given at the public inquiry, but was given ex parte afterwards ... ."[57] The view of Lord Justice Maugham was "founded on the fact that the statements I have referred to were statements in reference to the main question which was dealt with at the public inquiry ... ."[58] That was not to say "that there may be matters which were not in dispute at all at the inquiry, and which were not the subject of anything dealt with at the inquiry, with regard to which

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57. [1935] 1 K.B. at 268.
58. Id. at 278.

[the Minister] might, if he thought fit, inform himself."[59] Lord Justice Roche likewise noted that the offending communications were "upon the same matters which had been heard and dealt with at the inquiry."[60]

Under this standard all of the communications mentioned earlier were offensive, since they concerned the physical state of Errington's property, a matter in controversy at the hearing.[61] This rationale had the advantage of preventing secret evidence on subjects concerning which objectors had already been heard. But it appeared to leave the scope of the objectors' participation to the discretion of the inspector. If he allowed debate on a question at the inquiry, any further communications about it had to be revealed; if not, they could be carried on secretly. Furthermore, it necessarily gave no guidance about what communications could not be made ex parte before the hearing.

It was unfortunate that the Errington court did not establish a principle for identifying matters which had to be confined to the public local inquiry. This was of course the key question for the courts, the answer to which would determine the scope of participation given to people like Errington in the Minister's decision. One must begin with the realization that Errington's appearance was meant to be more than just another source of information for the Minister. It should to the extent possible have determined matters in contention, much as does participation in adjudication. The court should therefore have separated those issues which could feasibly be decided on the basis of the objector's participation from those which could not be.

As noted at the outset, the former class includes questions about the existence of local facts. For example, did the houses in

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59. Id. at 272-73.
60. Id. at 281-82.
61. Id. at 264, 275-77, 281-82.

Errington have paint peeling from the walls? Did they lack running water? Did the temperature fall below a certain level in the winter? Also included are questions involving the application of any fixed, predetermined standard to these facts. In Errington, were the houses "by reason of disrepair or sanitary defects unfit for human habitation?"[62] Questions of this type arise most often when the local authority is deciding whether it can assert control at all over a given piece of land. In other words, does the land come within its general power or jurisdiction? According to Lord Justice Maugham, "the authority in defining the area on the map have to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health ... ."[63] These matters can be dealt with in a trial format, guaranteed by natural justice.

Natural justice should apply in a different way to questions concerning the best of a number of possible paths for the administration to follow. In Errington the issue was whether the houses should be demolished and replaced or simply repaired, considering the costs and feasibility of repairing, the costs of demolition and reconstruction, the dislocation effects of each on the inhabitants, the state of the town's finances, and so forth. First the Jarrow Corporation and later the Ministry of Health was charged with juggling all of these factors and arriving at the best answer. There was no way in which Errington could have a dispositive effect on that answer. At best he could advise on what he thought to be the best treatment of his property within this framework.

Returning to the precise issue in Errington, exactly which communications should natural justice have forced to be revealed and which not? Any discussions between the Jarrow Corporation and the

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62. Housing Act 1930, 20 & 21 Geo. 5, c. 39, § 1(1)(i).
63. [1935] 1 K.B. at 269.

Ministry relating to facts about Errington and his property, or concerning the application of the standard of fitness for human habitation should have been revealed and subjected to possible rebuttal. These included the health officer's opinion that repairs were impossible, the discussions about the feasibility of renovation as an engineering matter, the inspection of the premises (at which observations about the state of the buildings could not have been avoided), and the town engineer's contention about the weakness of the foundations. On the other hand, communications should have been allowed to remain confidential if they concerned whether repair or demolition was the better solution, given the facts about the buildings and granted that they were unfit for human habitation. Many, perhaps most, of the exchanges in Errington were on this subject. Apparently the Jarrow Corporation had its mind set on demolition, whereas the Ministry believed that, given the precarious state of the town's finances, repair was more desirable. There ensued a running debate about whether demolition or repair was the better alternative. The result of the debate was bound to affect Errington drastically. However, since the subject - how best to apply public funds - was not his concern, fairness did not require that it be carried out in his presence. At most he was entitled to be informed at the beginning of the inquiry that the costs of various alternatives were a factor to which he might direct his arguments.[64] Since the resources of the local authority were expressly made a consideration by the statute, Errington was given all he needed here.

The Errington court seems to have reached a good result instinctively. Although it produced no intelligible guiding principle, it correctly identified as offensive those ex parte communications which undermined Errington's appearance at the hearing. In Frost v.

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64. See pp. 59-60 infra.

Minister of Health,[65] decided a few months later, a lower court likewise reached a correct result based on faulty reasoning. The Birkenhead Corporation desired to make a clearance order against Frost's land. Before Frost objected, the town clerk visited the Ministry of Health to obtain advice on the form the order should take, and specifically whether other houses already acquired by the Corporation for other purposes could be included in it. The Ministry advised that the order could not cover this land. The Corporation subsequently made the order, Frost objected, and an inquiry was held. Ultimately the Minister confirmed the order. Frost sued, claiming that Errington required revelation of the pre-inquiry communications.[66] The court held that the discussions did not have to be revealed since they had occurred before Frost filed his objections.[67] This rationale is open to criticism, since the effect on Frost will be the same, regardless of when the exchange occurs.[68] As in Errington, it would be more worthwhile to focus on the contents of the communication. The matters discussed in Frost concerned the contents of a fixed standard of law - whether a local authority had jurisdiction to include in a clearance order property already acquired for other purposes. An affirmative answer might somehow have affected the treatment of Frost's property, but it would in no way have denigrated from his role at the hearing. No argument he might have wished to make on the subject at the inquiry had been compromised. The discussions complained of simply allowed the Birkenhead Corporation to draw on the accumulated expertise of the Ministry in supervising clearance orders. In other words, they went solely to creating the best order possible in the interests of sound administration. The court itself recognized the benefits of communications

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65. [1935] 1 K.B. 286 (1934).
66. Id. at 288 (counsel for Frost).
67. Id. at 293.
68. For an extended criticism of this rationale see pp. 84-88 infra.

of this kind.[69]

The failure to articulate a clear, workable standard encouraged objectors to try their luck with the courts whenever they discovered that something had passed privately between a local authority and the responsible ministry. The 1930's and 1940's were replete with complaints, often trivial, of ex parte communications which supposedly violated natural justice. For example, in Price v. Minister of Health an objector to a compulsory purchase order complained that he had not been shown letters from the London County Council to the Minister of Health indicating that it wished to proceed immediately with its post-war housing programme. What bearing this had on his case, the objector could not say.[70] Those opinions that did generalize about what communications had to be revealed opted for the Errington or Frost rationale. According to Horn v. Minister of Health, the court below had wrongly found a violation of natural justice because it was mistakenly "acting upon the assumption that the subject-matter of the deputation was necessarily identical with the subject-matter of the inquiry and, therefore, of the dispute between Mr. Horn and the Corporation, upon which the Minister had to adjudicate in his judicial function."[71] This simply reiterated the Errington standard of whether the matter had in fact been touched on in the inquiry. Other cases leaned toward the Frost approach, permitting secret communications on all matters before objections were filed.[72]

Both rationales forced the revelation of contacts that occurred after an objection to an order had been made and that concerned matters actually in contention between the parties. In Stafford v. Minister of Health[73] an objector to a compulsory purchase order contended that

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69. [1935] 1 K.B. at 293.
70. [1947] 1 All E.R. 47, 49 (K.B.D. 1946).
71. [1937] 1 K.B. 164, 185 (C.A. 1936).
72. E.g., Offer v. Minister of Health [1936] 1 K.B. 40, 48, 52-53 (C.A. 1935); Miller v. Minister of Health [1946] K.B. 626, 629.
73. [1946] K.B. 621.

his land was unsuitable for the buildings planned by the local authority because it lacked water, that any construction on it would ruin the character of the neighbourhood, that it was essential to his farming operations, and that there was a more suitable site elsewhere. Because the Ministry had allowed the local authority to rebut these contentions behind the objector's back, the order was quashed. The judgment happened to be a correct one because all four questions involved proof of the existence of local facts, matters which by their nature should be resolved within the inquiry.

In B. Johnson & Co. (Builders) v. Minister of Health[74] the previous failures to articulate a correct standard led to a wrong result. Prior to making a compulsory purchase order against the Johnson Company's land, the Huyton-with-Roby Council engaged in correspondence with the Ministry of Health. It mentioned that the land was owned by a firm of speculators, which had offered to sell it at a price far above its assessed value. Furthermore, it said, although the firm professed its willingness to negotiate a fair price, no agreement had been reached for the voluntary sale of the land. Later the Council made a compulsory purchase order, which the Minister confirmed after a hearing at which Johnson was present. Johnson sought to have the order quashed on the ground that the communications had not been revealed to it for rebuttal. The Court of Appeal held that natural justice did not require revelation here, saying that in addition to the fact that the discussions occurred before objections were made,[75] revelation of intra-administrative communications would be "alien to the whole of our conception of government."[76] Instead of repeating well-worn formulas, the court might have noted that the communications concerned facts about

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74. [1947] 2 All E.R. 395 (C.A.).
75. Id. at 403-04, 405.
76. Id. at 403.

the status and conduct of the Johnson Company itself. They certainly reflected on the character and motivations of the Company's management, and hence may have determined the weight that the Minister gave to its objections.[77] These matters should have been confined to the hearing, where the Company could have cross-examined the informants and offered evidence in rebuttal. They were local or "adjudicative" facts, and natural justice should have required their revelation.

As explained below,[78] the issue of ex parte communications between local authorities and ministries was eventually resolved, at least for compulsory purchase orders and planning appeals, by statutory instruments as part of the broader problem of fresh factual evidence. That represented the culmination of involvement by non-judicial bodies in the problem. Interest was first shown in 1947 when Parliament prescribed inquiries into large-scale development plans. The natural justice requirements of revelation, such as they were, came from the compulsory purchase and clearance fields. They were apparently thought too strict for development plan inquiries, where constant consultation was necessary to facilitate readjustments as factors changed.[79] A planning scheme had to be brought up to date continuously. Accordingly, the Town and Country Planning Act 1947 allowed the Minister further to consult local authorities following an inquiry into a development plan without "any obligation to consult any other authority or person, or to afford any opportunity for further objections or representations or to cause any further local inquiry

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77. This was actually recognized by Lord Greene, M.R., in the leading opinion. Id. at 398.

There is an indication that the person in the Ministry who made the final decision did in fact see the comments about the Company's true motivations. Id. Of course this makes no difference in British administrative law, where the department is considered a single unit for these purposes anyway. See note 53 on p. 34 supra.

78. See pp. 53-54 infra.

79. Franks Committee Report paras. 260, 378.

or other hearing to be held."[80] Parliament thus blocked the application of one rule of natural justice to this new form of inquiry.

The Council on Tribunals, no less than Parliament, has made its influence felt in this area. On various occasions, it has received complaints from citizens who felt wronged by ex parte exchanges between departments and governmental authorities who had been parties at an inquiry.[81] The Packington Estate Case[82] is illustrative. The Islington Borough Council sought planning permission to redevelop an estate, but was opposed by local residents who argued that the land should only be rehabilitated. Following an inquiry, the Minister of Housing and Local Government decided in favour of the residents, indicating that he was not satisfied that redevelopment was preferable to rehabilitation. Subsequently, however, he entered into ex parte discussions with the Borough Council about a modified scheme of development, which was ultimately approved without the knowledge of the objectors. The Council on Tribunals felt that, although they had no legal rights as third parties, the objectors had been less than fairly treated. Following a special report to the Lord Chancellor[83] and a debate in the House of Commons,[84] the Minister agreed that the objectors should have been informed about the revised scheme.[85] The Packington Estate Case illustrates important points about the work of the Council on Tribunals. Unlike the courts, the Council need not worry about whether complainants have strict legal rights under applicable legislation. Nor need it look

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80. T&CP Act 1947, § 10(3). For the current equivalent of this provision, see Town and Country Planning Act 1971, c. 78, § 14(4)(e), added by Town and Country Planning (Amendment) Act 1972, c. 42, § 3(2) (inquiries by the Department of the Environment into local plans).

81. 1973-74 Council on Tribunals Ann. Rep. paras. 90-98 (H.C. 289, 1975); 1969-70 Council on Tribunals Ann. Rep. paras. 70-74 (H.C. 72, 1970); 1965 Council on Tribunals Ann. Rep. paras. 77-82; Appendix A (1966). See also 1964 Council on Tribunals Ann. Rep. paras. 77-81 (1965).

82. 1965 Council on Tribunals Ann. Rep. paras. 77-82; Appendix A (1966).

83. Id. Appendix A.

84. Id. para. 82.

85. See id. para. 81.

to see whether the ex parte contacts involved local facts, new considerations, or any of the other matters thought offensive under natural justice. It is sufficient for its purposes that citizens feel a sense of grievance that could easily have been avoided. This is especially important when the authority proposing an order is communicating with the ministry entrusted with deciding. Extra-inquiry contacts may be necessary to allow for adjustments and coordination. But they can usually be revealed to objectors to avoid ill feelings.

Consultation between Departments. - Communications between departments on land matters occur every day as a part of normal administrative routine. Usually they are accepted without fuss by the public and the judiciary. Problems occur, however, when a department entrusted with the final decision following an inquiry receives, either upon specific request or as part of normal practice, facts or advice from another department bearing on the case under consideration. Since no party is involved, there is not quite the same cause for complaint as when the local authority is one of the communicants. But the flow of unseen information between departments when an inquiry is pending may lead to just as much resentment among private citizens.

The problem of inter-departmental communications first arose in Summers v. Minister of Health, a 1946 case involving a compulsory purchase order which had come before the Ministry of Health for confirmation. It consulted, among others, the Ministry of Agriculture and Fisheries and the Ministry of Town and Country Planning. These latter eventually wrote to it saying that they had no objection to the taking of Summers' land. The King's Bench Division made short work of Summers' contention that failure to reveal this letter violated natural justice: "I cannot conceive how it would have assisted the applicants to know that other

departments did not object to the confirmation order or that the Ministry of Agriculture was not supporting the objections of the applicants."[86]

More difficult was the later case of Darlassis v. Minister of Education.[87] The London County Council desired to take land owned by Darlassis in order to build a school. Pursuant to statute, the Ministry of Education, which had to pass on the compulsory purchase order, held an inquiry where Darlassis argued that there was a more suitable site nearby already owned by the Ministry of Housing and Local Government. After the hearing, the Ministry of Education asked the Ministry of Housing and Local Government about the availability of the alternative site and was told that plans for constructing housing on it were already in an advanced stage. The Ministry of Education therefore confirmed the taking of Darlassis' land. Darlassis sought review in the High Court, claiming that natural justice required that the inter-departmental communications be revealed for purposes of rebuttal. The Queen's Bench Division refused to uphold the claim, finding that the communications concerned matters of "policy," which were not proper subjects for the hearing. Indeed, they were no concern of Darlassis at all.[88] The opinion of Mr. Justice Barry demonstrated a good feel for the polycentric nature of the communications: what was involved, he indicated, was coordination between governmental departments, the purpose of which was to ensure that available land in the community be used to the greatest advantage with least disruption to private owners. The departments had no specific legal duty to coordinate their efforts. It was done simply "[i]n the interests of good administration."[89] The Ministry of Housing and Local Government could have

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86. [1947] 1 All E.R. 184, 189 (K.B.D. 1946).
87. (1954) 118 J.P. 452 (Q.B.D.).
88. Id. at 464-65.
89. Id. at 464.

summarily refused to give up the alternative site. However, to make matters clear to the Ministry of Education, it gave a specific reason - that plans for use of the land were already in an advanced stage. Darlassis could not argue that as a matter of fact plans were not in an advanced stage.[90] In this the court was surely correct. Although the current planning situation was an issue of fact, it did not directly relate to either Darlassis or the school that was being planned. Rather, it bore on a much broader question - what was the best pattern of use for all the land in the area owned or susceptible to compulsory purchase by the government.[91] It was not even desirable as a matter of efficiency that Darlassis be allowed to advise on this, much less required as a matter of fairness. If statements on matters like these were subject to rebuttal for errors of fact, a ministry would be tempted to couch advice in the most general terms possible. Thus, a measure taken to ensure fairness to objectors would only end up forcing bad administrative methods on the departments.

The Franks Committee distinguished between two kinds of communications from central government departments - post-inquiry advice sent to the department entrusted with deciding a particular matter and pre-inquiry advice normally given to a local authority and then mentioned in the hearing as support for its position. The former it dealt with as part of the larger problem of the receipt of information after the close of the hearing. Its recommendations culminated in the Chalkpit rules, discussed below.[92] The latter it singled out for special attention. The Committee hoped that other departments would make their views known before the inquiry, thus removing "the dissatisfaction which arises from the feeling that in many cases the decisive voice is that of an authority which has remained in the background throughout the initial and enquiry

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90. Id.
91. Id. at 466.
92. See pp. 53-54 infra.

stages."[93] Once this was done, it saw "no reason why the factual basis for a departmental view should not be explained and its validity tested in cross-examination."[94] But equally importantly, it recommended that the evidence required should "be confined to factual matters as opposed to policy matters, and the inspector should ensure that this distinction is observed."[95] Facts of the Darlassis type, which bore more on the administration's overall pattern of land use than on the character of a specific piece of land, would presumably be excluded from examination. These recommendations have been embodied in procedural regulations governing compulsory purchase and planning appeal inquiries. They require any department which takes a position in writing which will be relied on by the governmental authority opposing an objector or appellant to make a representative available at the inquiry for cross-examination.[96] Significantly, however, they prohibit any questions on matters which are "directed to the merits of government policy."[97]

The Council on Tribunals has followed the example of the Franks Committee in encouraging departments to make their views known before the inquiry. In one case the Ministry of Housing and Local Government upheld, after consulting the Ministry of Transport, the denial of planning permission for a motel and filling station abutting a dual carriageway. Although it offered to reopen the inquiry to allow comment on the new views, the appellant declined because of the added expense. The Council got the Ministry to agree that consultation should have occurred before the inquiry and to reform its practice for the future.[98]

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93. Franks Committee Report para. 320.
94. Id. para. 316.
95. Id. para. 318.
96. E.g., Town and Country Planning (Inquiries Procedure) Rules 1974, S.I. 1974 No. 419, r. 8; Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules 1962, S.I. 1962 No. 1424, r. 6 [hereinafter cited as T&CP(IP) Rules 1974 and CPLA(IP) Rules 1962 respectively].
97. T&CP(IP) Rules 1974, r. 8(5); CPLA(IP) Rules 1962, r. 6(3).
98. 1967 Council on Tribunals Ann. Rep. paras. 104-06 (H.C. 316, 1968).

In another situation the Council concerned itself with communications which fell outside the strict scope of the rules. There, it approved arrangements of the Ministry of Agriculture, Fisheries and Food whereby reports to local authorities on agricultural facts relevant to planning applications for the development of farm land would be revealed to the applicant.[99] Because the report would contain no recommendation, it would not come within the rules. And because it was not being communicated to the Ministry of Housing and Local Government, natural justice could not as yet force its revelation. However, all things considered, it seemed fairer that an applicant knew of its contents when considering whether to appeal.

In sum, non-judicial bodies have gone beyond natural justice to see that consultations are carried out before the hearing, so that all assumptions of local fact can be tested there. The Council on Tribunals has even encouraged local planning authorities to reveal advice received from central departments regarding particular planning applications before there is a controversy to which natural justice might apply.

Advice from Experts. - Whoever ultimately decides the issues in a land inquiry will often require the advice of experts, normally from inside the department. These can be of assistance in sifting the evidence, assessing opinions of other departments, and bringing specialized experience to bear on the case. To what extent does minimum fairness require that their advice be revealed to parties for possible rebuttal?

Because this problem exists in strictly adjudicative contexts, the courts had experience with it well before they first applied natural justice to land inquiries. In The Banshee, decided by the Court of Appeal in 1887, nautical assessors had advised the Admiralty Division that the steamship "Banshee" was solely to blame for a collision with

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99. 1968 Council on Tribunals Ann. Rep. paras. 78-81 (H.C. 272, 1969).

the "Kildare." Nonetheless, the court found the "Kildare" to be at fault. On appeal, the Court of Appeal declined to force the court below to reveal the written reasons of the assessors, saying rather tersely, "Such a thing has never been done."[100] Nor was there any reason to hold otherwise, since the assessors had merely given their own expert opinion on the ultimate issue. The judge, who was responsible for deciding, had come to a different conclusion on the basis of the same facts, which had presumably been proven in open court.

When adjudicative tasks passed to administrative bodies, it became likely that experts would be used not only to weigh agreed-on evidence, but also to gather new evidence. The first important case was Queen v. London County Council, ex parte Commercial Gas Company,[101] decided in 1895. The metropolitan gas examiner was charged with making periodic reports on the quality of gas being provided by local companies, the reports to serve as a possible basis for legal proceedings. The examiner normally sent out subordinates to measure the flow of gas at testing places, using certain prescribed methods. Failure to reveal these methods was held to be sufficient ground for quashing the gas examiner's report, which the court found actually carried the weight of a judgment. Although the court gave no more of an explanation than had the Banshee one in reaching the opposite result, it also was correct. The subordinates were reporting facts about the gas flow which might lead to the service being labelled "deficient." If the companies were to be able to dispute them, then they had to know how they had been arrived at. Revelation of these local or "adjudicative" facts would have been useless without revelation of the experts' methodology.

The need for expert advice was accentuated when the administration took on polycentric tasks in addition to adjudicative. The matters to be considered, and hence the relevant facts, became myriad. Experts were

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100. (1887) 56 L.T. 725, 726 (C.A.).
101. (1895) 11 T.L.R. 337 (Q.B.D.).

called upon to find these facts and then to advise on how they would interact with policy to form the final result. The earliest cases seemed curiously insensitive to the potential problems of expert advice. Re Manchester (Ringway Airport) Compulsory Purchase Order[102] came before the King's Bench Division in 1935, the year after Errington had alerted the administration to the dangers of ex parte evidence. The Manchester Corporation was thinking of either expanding an already-existing airport or of taking land by compulsory purchase for an entirely new one. The Air Ministry sent one Allen to make an inspection of the proposed new site and to report back, in order to enable it to give guidance to the Manchester Corporation if requested. Subsequently the Corporation took the land, objections were received, and an inquiry was held. At the hearing Allen sat with the inspector under the title of "assessor" and gave technical advice. The objectors sought to have quashed the Ministry's final order confirming the compulsory purchase on the ground that Allen's communications first to the Ministry and later to the inspector should have been revealed. The court found that natural justice had not been violated because Allen could have been cross-examined on any of his opinions when he appeared at the hearing. Perhaps so, but one cannot help agreeing with the objectors that revelation of his report would have pinpointed any facts that Allen might have observed at his inspection and then placed in his report to the Ministry. Any other advice that Allen gave need not have been revealed.

Eleven years later the same court failed to detect a possible instance of secret evidence being admitted with expert reports. In Summers v. Minister of Health, the Minister considering whether to confirm a compulsory purchase order had taken into account unrevealed "reports of the district valuer and the mineral valuer in regard to the site." The court found nothing suspicious in this: "Quite properly, no

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102. (1935) 153 L.T. 219 (K.B.D.).

point was taken by counsel for the applicants in regard to these documents, which dealt purely with matters in regard to which the district valuer and the mineral valuer could give information ... ."[103] The court made no effort to find out whether the valuers had based their opinions on local facts presented at the inquiry or on private observations of the site.

By 1960 the Scottish Court of Session was aware of the proper considerations governing the revelation of expert advice. In General Poster and Publicity Co. v. Secretary of State for Scotland, a business objecting to an order restricting advertising on certain land complained that it had not been shown the views of a "technical assessor" who sat with the inspector at the inquiry and whose recommendations the Secretary of State had ultimately accepted in preference to the inspector's. The court found no violation of natural justice:

> There might have been something in this point if the appellants had been able to say that, after the facts had been brought out, in what is conveniently referred to as the quasi lis of the inquiry, there had been fresh facts produced to the [inspector] in their absence, from under the counter as it were, and that it was substantially on these fresh facts that the decision of the quasi lis had proceeded. That cannot be said. All that can be said is that on the facts as brought out as the result of the inquiry, differing views were held ... .[104]

The court might have been clearer about the distinction between local facts, whose proof must be confined to the hearing, and facts going solely to the creation of the best overall pattern of permitted advertising into which this case had to be fitted.

Three years before the General Poster decision, the problem of extra-inquiry evidence had been considered by the Franks Committee. It lumped all communications to a minister together, "whether from his own

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103. [1947] 1 All E.R. 184, 189 (K.B.D. 1946).
104. [1960] S.C. 266, 274-75.

or another Department or from an outside source, which he obtains after the enquiry." It thought it both "desirable and possible to draw a distinction at the post-enquiry stage between new factual evidence on the one hand and advice on policy on the other." "Factual evidence" included "expert opinion on matters of fact but not expert assistance in the evaluation of technical evidence given at the enquiry."[105] Two points bear mentioning. First, these recommendations were confined to post-inquiry communications. In this respect they were narrower than natural justice, which controlled pre-inquiry communications, at least as soon as objections were filed. And second, "expert opinion on matters of fact" appeared to include fresh departmental opinions on local facts proved at the hearing. The Committee thus preferred revelation of matters that the Court of Session was later to allow to be communicated secretly in General Poster. In this respect the recommendations were broader in scope than natural justice.

Nothing concrete resulted until the Council on Tribunals entered the arena in 1960. The occasion was the celebrated Chalkpit Case.[106] A firm was denied planning permission by the Saffron Walden Rural District Council to work its land for chalk. On appeal to the Minister of Housing and Local Government, it was opposed by neighbouring land-owners, who objected that the dust from digging operations would damage their property. Following an inquiry, the inspector recommended that the appeal be rejected and permission permanently denied. The Minister, however, first asked an expert from another department whether "kibbling," a process of chalk removal producing relatively little dust, could be used on the applicant's land. Whatever answer he received was not revealed to the objectors. When the inspector was overruled and planning permission

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105. Franks Committee Report para. 350.

106. 1960 Council on Tribunals Ann. Rep. paras. 111-16 (1961); 1961 Council on Tribunals Ann. Rep. paras. 56-62; Appendix D (1962). The Chalkpit Case is discussed in Wade, Admin. Law 237-38 and in Wade, Towards Administrative Justice 107-28.

granted, these complained to the Council on Tribunals about the secret nature of the advice.[107] From the facts, they seem to have been justifiably aggrieved, as the communications involved an opinion about the application of certain technical standards to the land under consideration. These could very easily have been confined to the hearing - facts could have been gathered about the land and proofs adduced about the feasibility of using the kibbling process on it. The Council reported the matter to the Lord Chancellor,[108] who agreed that there had been cause for grievance[109] and accepted a special report proposing statutory regulations to remedy the problem.[110] The Council suggested that whenever a minister was disposed to depart from his inspector's recommendation because of

> (a) fresh evidence on a question of fact, or (b) fresh expert evidence (including expert advice), or (c) the introduction of a fresh issue, the inquiry should (if any of the parties so desire) be re-opened and the new evidence or issue should be produced at the re-opened inquiry.[111]

Like the Franks Committee, the Council was concerned solely with post-inquiry material. No doubt influenced by the facts of the Chalkpit Case, it wanted revelation only when the new matter would dispose the minister to disagree with the inspector. In both respects its recommendations were narrower than the reach of natural justice. "Fresh evidence on a question of fact" was probably meant to cover local facts and not facts going solely to the best policy or the best overall scheme. If this interpretation prevailed, there would be an identity with the facts that natural justice forced to be revealed. Fresh "expert advice" (which was the problem in the Chalkpit Case itself) or "fresh issues"

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107. The neighbours had previously failed to obtain a judicial remedy because they were not "persons aggrieved" within the meaning of the statute giving the right to sue. Buxton v. Minister of Housing and Local Government [1961] 1 Q.B. 278 (1960).

108. 1960 Council on Tribunals Ann. Rep. para. 116 (1961).

109. 1961 Council on Tribunals Ann. Rep. para. 61 (1962).

110. Id. Appendix D.

111. Id. Appendix D, para. 5(2).

meant the revelation of more than was required by any natural justice case. It seems that the Council was focusing on those matters that caused most discontent among the public, rather than trying to codify the natural justice holdings.

The recommendations regarding evidence have found their way into statutory rules of procedure. In deciding planning appeals, for example, the Secretary of State for the Environment must inform parties if he is disposed to disagree with his inspector because of

> any new evidence (including expert opinion on a matter of fact) or any new issue of fact (not being a matter of government policy) which was not raised at the inquiry ... .[112]

These rules also require the revelation of any differences "on a finding of fact" even if not occasioned by new evidence,[113] something recommended by the Council,[114] but never required by natural justice. In sum, in dealing with the extra-inquiry material that caused most friction between the administration and private citizens, the Chalkpit rules are both narrower and broader than the requirements of natural justice.

Where the Chalkpit rules apply, the courts are prone to see them as having absorbed the rules of natural justice. In Lake District Special Planning Board v. Secretary of State for the Environment, decided in 1975, a party to a planning appeal argued that the Secretary of State had violated natural justice by entertaining ex parte representations from another party after the inquiry.[115] In declining to quash the decision, the court noted that the communications were not proscribed by the Chalkpit rules, which applied here. One alleging breach of natural justice in such circumstances was under a heavy burden, the court said, since the statutory instrument itself laid down requirements to

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112. T&CP(IP) Rules 1974, r. 12(2)(b). See also, e.g., CPLA(IP) Rules 1962, r. 9(2)(b).

113. E.g., T&CP(IP) Rules 1974, r. 12(2)(a); CPLA(IP) Rules 1962, r. 9(2)(a).

114. 1961 Council on Tribunals Ann.Rep. Appendix D, para. 5(1) (1962).

115. (18 Feb. 1975) Times 9 (Q.B.D.).

ensure that justice would be done. Natural justice thus continues to have a role in this area, but on the margin of procedural regulations.

In the rare instance where a statutory instrument does not apply, natural justice is alive and well. In the 1973 case of Hibernian Property Co. v. Secretary of State for the Environment,[116] the inspector made a survey on her own of property subject to a compulsory purchase order to see whether residents favoured demolition or rehabilitation, something which was to be a factor in the Secretary of State's decision. The inspector recommended compulsory purchase and the Secretary of State confirmed the order. Because the Secretary of State had not disagreed with his inspector, the Chalkpit rules did not apply. The Queen's Bench Division, however, went on to vacate the order because the inspector had violated natural justice. Clearly the opinion of the residents was a local fact which should have been confined to the hearing. In Fairmount Investments Ltd. v. Secretary of State for the Environment, decided in 1976, the House of Lords affirmed the quashing of a compulsory purchase order made against land in a clearance area. During a site inspection, the inspector had noticed some cracks which he took to indicate settling. Without notifying the objector of his discovery he concluded that the structure could not be economically rehabilitated and recommended that the order be confirmed. This the Secretary of State did. No statutory instrument applied to this particular type of compulsory purchase order.[117] The House of Lords held unanimously that the use of undisclosed evidence about the state of the foundations violated natural justice. Lord Russell agreed with the objector's contention "that this suggestion of inadequate foundations was truly a bolt from the blue," which prevented it from "demonstrating that the inference as to inadequacy of foundation was erroneous ... ."[118]

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116. (1973) 72 L.G.R. 351 (Q.B.D.).
117. [1976] 2 All E.R. 865, 867 (H.L.).
118. Id. at 873.

Natural justice may not be needed quite as often as it once was, but it stands ready to protect citizens where regulations do not reach.

Where a statutory instrument does apply, the courts retain an important role as interpreters of the rules. In this capacity they may do well to remember lessons learned in giving content to natural justice. Lord Luke of Pavenham v. Minister of Housing and Local Government[119] is a case in point. Lord Luke desired to build a house for himself in a walled-off area of his estate. The local authority denied planning permission, saying that the proposed construction would constitute an isolated and sporadic development in an area where only necessary agricultural structures should be built. Luke appealed to the Minister of Housing and Local Government, who caused an inquiry to be held. After the hearing, the inspector submitted a report in which he explained the local authority's planning policy and detailed facts about the location of the property. He concluded that Luke's proposed house would not constitute an isolated and sporadic development because the site was well-defined and already built on, was surrounded by a wall, and indeed would be enhanced by a tasteful home. Furthermore, the location was so isolated that the construction would not serve as a precedent for future development. The Minister declined to follow the inspector's recommendation, saying that, although he accepted all the facts set out in it, he believed that the house would still constitute isolated and sporadic development. Luke sought review, alleging that the Minister had violated the procedural regulation requiring that he be given an opportunity for further rebuttal whenever the minister differed with an inspector on a finding of fact.[120] The Queen's Bench Division quashed the Minister's order, finding that he had differed from the inspector on a question of fact, namely whether Luke's construction would violate the local

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119. [1968] 1 Q.B. 184 (C.A. 1967) rev'g [1968] 1 Q.B. 172 (1966).

120. T&CP(IP) Rules 1965, S.I. 1965 No. 473, r. 12(2)(a), now T&CP(IP) Rules 1974, r. 12(2)(a).

authority's open space plan as it then existed. The Court of Appeal reversed, finding that the difference between the Minister and inspector lay in the application of planning policy to facts,[121] namely whether Luke's project could be satisfactorily distinguished from other possible proposals, the granting of which would lead to full development of the open space.[122] The court might have noted that the difference was on a matter of overall judgment - whether the slightness of change in use proposed by Luke was overbalanced by the risk to the general planning presumption of open space. The Minister concluded that the best solution involved sacrificing Luke's house. As there was no difference on any factual matter relating to Luke's property, failure to allow Luke an opportunity for further rebuttal did not in any way undermine his participation in the prior hearing. The courts, although no longer applying natural justice, can still use natural justice doctrines as a way of approaching the regulations.[123]

The Council on Tribunals, as well as the judiciary, still applies the lessons learned by the courts in the early days of inquiries. A complaint made in 1963 concerned the Ministry of Housing and Local Government's desire to institute a College of Further Education in a residential area.[124] The inspector recommended the denial of planning permission, finding that evening traffic in the area would be greatly increased. The Minister reversed the inspector, concluding that the increase would not be unreasonable in light of the major traffic-carrying roads already situated nearby, the need for the College, and the lack of suitable alternative sites. The local residents who had been objectors at the inquiry complained to the Council that the Minister had differed

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121. [1968] 1 Q.B. 184, 193, 194 (C.A. 1967).

122. Id. at 192.

123. In Vale Estates (Acton) Ltd. v. Secretary of State for the Environment (1971) 69 L.G.R. 543 (Q.B.D. 1970) the court also allowed the Secretary of State to differ with the inspector on the ground that the overall planning presumption in favour of open space should not be sacrificed in this instance to development.

124. 1963 Council on Tribunals Ann. Rep. paras. 48-49 (1964).

on findings of fact (specifically, the likely increase in traffic and the availability of alternative sites) without allowing further representations. The Council found that the Minister simply had given greater weight to the urgent need for a College. The Council was saying in effect that the Minister's solution was at odds with the inspector's because the Minister viewed one factor differently. As in Lord Luke, the difference came from varying assessments of factors going into a polycentric decision, rather than from different views about facts relating to the land in question.

In the early days, then, British judges had their attention drawn to the large volume of communications in which a department determining the best disposition of a piece of land within a scheme must engage. Those who brought the first complaints about ex parte contacts between departments and local authorities were doubtless shocked by the departure from normal practices in adjudication, where such conduct would be prohibited as a matter of course. The task of judges was to decide to what extent the normal adjudicative paradigm should apply. Using natural justice, they attempted to identify those communications which had to be revealed and subjected to debate, and hence to define the scope of citizens' participation in the decision. Scrutiny of communications with local authorities who were parties gave way to treatment of the less obvious problem of contacts with other departments and finally to the most difficult one of relations with administrative subordinates. As time went on, the question was revealed to be one not so much of communication per se as one of secret information, whether sent by other bodies or picked up by departmental officials on their own. When the Council on Tribunals finally took the initiative from judges, the basic outlines of a solution had been drawn. Although the Council is interested in any administrative practice that causes citizens to complain, even if it does not violate natural justice, it

draws on the experience of the courts both when it recommends procedural regulations and when it handles individual cases. Judges for their part can now apply their accumulated knowledge to the interpretation of these regulations, using natural justice where they do not apply.

Notice and Presentation of Case

Courts sometimes must decide what the concerned governmental body (whether it be a local authority or a central ministry) must present on its side in an inquiry. There is a whole spectrum of possibilities, ranging from a brief statement of what the administration proposes to do and the authority under which it is acting on the one hand, to a full presentation of evidence and proofs on the other. In order to determine what natural justice should require, one must reiterate the basic question: what can be taken as the sine qua non of participation, the minimum necessary to assure someone a meaningful role?

Certainly an objector or appellant must have some useful idea of what the administration is about - not only what it is going to do and under what authority it is acting, but also what its purposes are, what factors are likely to influence it, and what approach it is likely to take at the hearing. Otherwise he must present his own side blindly, with no assurance that he is helping his own cause. The various values or policies on which the department will base its ultimate decision should be presented to the extent feasible, not for purposes of debate, but to provide a context into which the objector or appellant can direct the arguments permitted him. Extra-inquiry communications have always been suspect because they may contain evidence which parties should have an opportunity to contest. But they may be equally offensive because they introduce new considerations of policy which remain unknown to the private citizen. Natural justice might require revelation in a

case like this to ensure adequate notice of the factors governing a decision rather than to allow for the rebuttal of new evidence.

Giving adequate notice can be especially difficult when the task is polycentric. For then the factors influencing the decision - and sometimes even the possible outcomes - can often be known only as the hearing develops and the situation is analyzed. In an inquiry, the administration may thus have to make a continuing effort to keep parties abreast of matters in contention. A case that came before the Council on Tribunals in 1964 illustrates the point.[125] Objections were made to a plan of the Central Electricity Generating Board to put power lines across certain land on the ground that it would mar an area of great scenic beauty. After an inquiry, the responsible Minister confirmed the plan because the time required to investigate alternative sites would be too great in view of the urgent need for electricity. The objectors complained to the Council that the Minister had failed to explain the importance of the time factor so that they could direct their arguments to it. The Council treated the complaint as one against the Ministry's taking into account new evidence after the close of the hearing; finding the urgency of the need for electricity to be a matter of "policy," it concluded that the Chalkpit rules had not been violated. But surely the Ministry's conduct offended more because it entailed a failure to state its concerns properly. If the urgent need for electricity had been explained earlier, the objectors could have directed their arguments to it. As it was, they may have missed making some of their most effective points.

It is less clear what the administration need offer as far as evidence and proofs are concerned. Fairness does not require the local authority opposing a private citizen at an inquiry to introduce everything it has in favour of its position. It should be free to present as little

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125. 1964 Council on Tribunals Ann. Rep. para. 90 (1965).

as it wishes, and then run the risk of not persuading the ministry responsible for deciding. However, when the administrative body opposing the private citizen is the ministry responsible for deciding - as when the Department of the Environment both proposes a compulsory purchase order for land for a trunk road and decides whether to confirm it - the situation changes somewhat. The ministry does not risk failing to persuade itself by not introducing affirmative evidence at the inquiry. Natural justice may then have to require the ministry to present enough evidence to reveal the issues to objectors, to give them something into which to sink their teeth. But it should compel nothing beyond this minimum. Objectors who try to force the presentation of full-scale evidence and proofs probably have something other than procedural fairness in mind. Rather, they want the administration to establish its case according to some quantum of proof so that a reviewing court (or possibly even Parliament) can see if its decision is supported by any evidence. In these circumstances the problem becomes one of review on the evidence. Nonetheless, litigants have confused it with issues of natural justice in the past.[126]

When invited to apply natural justice, British judges have generally moved in the proper direction. The so-called Kingston By-pass Case[127] is the prime instance. The Minister of Transport decided to widen a trunk road at a roundabout by taking land owned by the Ace of Spades Road House. At the hearing the Minister's representative presented the proposals, along with the statutory authority and the purposes of the scheme. He did not, however, present evidence or submit

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126. But see Queen v. Deputy Industrial Injuries Commissioner, ex parte Moore [1965] 1 Q.B. 456, 476, 487-88 (C.A. 1964), which says that natural justice requires a national insurance tribunal to act on the basis of probative evidence of some kind. This was applied to planning appeal inquiries in Burwoods (Caterers) Ltd. v. Secretary of State for the Environment (1972) Estates Gazette Digest 1007 (Q.B.D.) (natural justice violated because Secretary of State's finding that there was no need for development was based on no evidence). Professors Schwartz and Wade have called this a "novel suggestion." Schwartz & Wade 239.

127. Re London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2), 1938 [1939] 2 K.B. 515 (D.C.).

himself to cross-examination. The Divisional Court denied a motion by Ace of Spades to quash the final compulsory purchase order for failure to comply with natural justice. It agreed that the Minister was required to give adequate notice of his plans for purposes of the inquiry:

> It is plainly the duty of the Minister and his representatives to give to the public, as well as to those who may be directly affected by his proposals, the fullest information with regard to those proposals and to explain clearly the purposes he has in view and how such purposes will be achieved and also the statutory or other authority under which the proposals are made.[128]

The court declined to require the Minister to present affirmative evidence or to make a representative available for cross-examination, saying that "the object of the inquiry was to hear objections to the proposals,"[129] rather than to investigate the proposals themselves. This is a curious reason, since failure to present a minimum of evidence could conceivably deprive a party of the chance to have his objections heard. The court was only saying that the Minister was under no obligation to prove his case to anyone, something which, although possibly true, does not go to the natural justice point. Later cases have, however, been satisfied with this part of the holding.[130]

The positive prescriptions of the Kingston By-pass Case seem to have had less than full effect. Almost twenty years later in 1957, the Franks Committee was forced to go over the same ground again. The Committee recommended embodying in clear legislative language what the Divisional Court had said was a requirement of natural justice:

> We consider that the statutory requirements should, where necessary, be amended to compel acquiring and planning authorities to give full particulars of their case in good time before the enquiry, so that

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128. Id. at 522.

129. The Ministry had, however, made a representative available throughout the hearing to answer questions about its proposals. Id. at 522-23.

130. E.g., Franklin v. Minister of Town and Country Planning [1948] A.C.87, 105-06 (1947). But see Burgh of Ayr Magistrates v. Lord Advocate [1950] S.C. 102, 108-09 (proponent of police amalgamation order must present evidence so that Parliament can decide whether to exercise its power of negative resolution).

> those affected are better able to prepare and present their case. These particulars should be made available in the form of a written statement.[131]

The Committee also went well beyond judicial decisions, suggesting that the statement should summarize the views of other government aurhorities which had been consulted on the matter.[132] Apparently it wanted to ensure that any factors or concerns raised at pre-inquiry conferences would be revealed to parties so that they could direct their arguments to them. As to post-inquiry behaviour, the Committee found it "a major source of grievance that the considerations of general policy upon which many minsterial decisions are primarily based are not known to the individual at the time of the enquiry and that, were they known, the presentation of his case would take a different form."[133] No one suggested that government policy should be debated at the inquiry, simply that it should be revealed. The Committee recommended that a statement of ministerial policy be made available prior to the inquiry, and that any changes in policy following the hearing be explained in the final decision letter. It advised, however, against making this a formal statutory requirement.[134]

The Franks Committee was unhappy also about the failure of ministries preparing to acquire land to support their proposals by evidence at the inquiry. Apparently, these had taken the Kingston By-pass Case as justification for presenting nothing on their part. The Committee believed that objectors could not present their cases adequately unless the opposing party, whether it be a local authority or a central department, supported its proposals by evidence at the

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131. Franks Committee Report para. 281.

132. Id. In Summers v. Minister of Health [1947] 1 All E.R. 184, 187 (K.B.D. 1946), a court had declined to require the revelation of the Ministry of Agriculture and Fisheries' request that the Ministry of Health consider the compulsory purchase of an alternative site on agricultural grounds.

133. Franks Committee Report para. 286.

134. Id. paras. 287-90, 409(68),(69).

inquiry. Accordingly, it recommended a statutory requirement to this effect.[135]

The Council on Tribunals pressed for regulations requiring the administration to state its case adequately, concentrating on the behaviour of local authorities at inquiries into planning appeals.[136] But, at least in the case of development plan inquiries, it seemed uninterested in forcing local authorities to present evidence in favour of their position.[137] Its attitudes have found their way into statutory instruments. Prior to an inquiry into a planning appeal, the applicant and other parties must receive "a written statement of any submission which the local planning authority propose to put forward at the inquiry."[138] Similarly, before a compulsory purchase inquiry, the acquiring authority must "serve on each statutory objector a written statement of their reasons for making the order."[139] But the regulations have not gone so far as to require affirmative evidence from the administration, even when the ministry is a party, as when it initiates a compulsory purchase order.[140]

There is still room for improvement in requiring the continuous notice peculiar to polycentric decisions - that is, notice as the hearing progresses of new factors which may influence the minister's decision, or of possible outcomes recognized only as parties explore the issues. Procedural regulations now allow for modification of the local or acquiring authority's preliminary submissions and reasons at the discretion of the inspector.[141] But the rules do not require that factors once

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135. Id. paras. 306-09, 409(71).

136. 1962 Council on Tribunals Ann. Rep. para. 26 (1963); 1961 Council on Tribunals Ann. Rep. para. 85 (1962).

137. 1960 Council on Tribunals Ann. Rep. paras. 117-18 (1961) (Council agrees that danger of delay excuses local planning authority from presenting evidence in favour of including large estate in green belt or from providing representative for cross-examination).

138. T&CP(IP) Rules 1974, r. 6(2)(a).

139. Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules 1962, S.I. 1962 No. 1424, r. 4(4).

140. Compare id. r. 4 with Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967, S.I. 1967 No. 720, r. 5.

141. E.g., T&CP(IP) Rules 1974, r. 10(5); CPLA(IP) Rules 1962, r. 7(5).

identified form the sole basis for the minister's decision. The Council on Tribunals recommended that the Chalkpit rules include an opportunity for further representations if a minister was disposed to disagree with his inspector because of the entrance of "some factor not considered at the inquiry"[142] or because of "the introduction of a fresh issue."[143] Neither of these latter two suggestions found its way into the rules. As a result, no statutory instrument was violated by the Ministry's failure to explain the urgent need for electricity as a consideration in the power line case mentioned at the beginning of this section.[144] Nor have the regulations focused on the need to give continuing notice about the possible results of the inquiry, which may shift as the decider balances known facts and considerations against each other. For example, suppose that in the Chalkpit Case the inspector or Minister had decided on his own to grant planning permission for removal of a limited amount of chalk, seeing this as a compromise between the owners' desire to profit from his land and his neighbours' fear of excessive dust. The decision may simply have resulted from a fresh look at matters adduced at the hearing, rather than from consideration of new facts or expert advice. Nevertheless, the parties might justifiably feel aggrieved if they had not even suspected that this result might emerge until the decision was actually handed down. For one reason or another, one or both might wish to argue specially against this outcome. Yet the administration would have violated no procedural regulation. Non-judicial bodies, then, have not yet exhausted the possibilities of fairness in the area of notice.

Meanwhile, the courts have indicated that natural justice could make up for the gaps in the procedural regulations. Crofton Investment Trust Ltd. v. Greater London Rent Assessment Committee[145] involved rent-

142. 1961 Council on Tribunals Ann. Rep. Appendix D, para. 5(1) (1962).
143. Id. Appendix D, para. 5(2)(c).
144. See p. 60 supra.
145. [1967] 2 Q.B. 955 (D.C.).

setting rather than a land inquiry. A landlord appealed to a rent assessment committee from the decision of a rent officer lowering the price he could charge for letting his premises. The committee affirmed the decision on the ground that a local "scarcity element" in available housing had driven market price above the fair rental value. The landlord then sought relief from the High Court, alleging that he had not been notified that scarcity value would be a factor in the decision. The Queen's Bench Divisional Court held that the landlord had received sufficient notice in the initial proceedings before the rent officer. But Lord Chief Justice Parker noted that natural justice would require notice of new factors which emerged as the proceeding progressed and which might influence the ultimate decision:

> It is quite clear that whenever a new point emerges, something which might take a party by surprise or something which the committee have found out and of which the parties would have no knowledge, fairness would clearly dictate that they should inform the parties and enable them to deal with the points.[146]

This sort of reasoning was recently applied to land inquiries by the House of Lords. In Fairmount Investments Ltd. v. Secretary of State for the Environment, it found that undisclosed observations by an inspector about the foundations of a house subject to a compulsory purchase order violated natural justice. The issue was whether or not the houses could be rehabilitated by the owner. The observations offended not only because they constituted secret evidence, but also because they introduced a new factor into the Secretary of State's calculations. Even if there were no factual dispute, the condition of the foundations should have been pointed out as an important ingredient in the decision as soon as it was recognized as such. Failure to do so deprived the objector, in Lord Russell's colourful phrase, of "a fair crack of the whip."[147] Natural justice is still capable of plugging the gaps left

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146. Id. at 968.
147. [1976] 2 All E.R. 865, 874 (H.L.).

by the procedural regulations dealing with notice.

The Court of Appeal has begun a process that may result in the administration's having to present evidence beyond the minimum necessary to ensure adequate notice. In Coleen Properties Ltd. v. Minister of Housing and Local Government[148] decided in 1971, it overturned a compulsory purchase order because it was based on "no evidence." The Tower Hamlets London Borough Council included a new building owned by Coleen Properties in its renewal scheme, finding it to be "reasonably necessary for the satisfactory development or use of the cleared area." At the inquiry, the Council offered no evidence whatever to show that Coleen's building was "reasonably necessary" for the project. Nevertheless, the Minister confirmed the order. The Court of Appeal held that judges could overturn decisions unsupported by evidence, and then proceeded to do so on the facts before it. To the extent that Coleen is followed in the future,[149] it will in effect require the administration to present evidence on its own, although this has been done, quite properly here, as a matter of ensuring a particular type of judicial review, rather than as a matter of procedural fairness.

Revelation of the Inspector's Report

The inspector who conducts an inquiry can be seen as just another departmental employee giving advice. His expertise comes from listening to successive presentations of facts and to arguments about their significance. He then forwards these along with his own assessment of the case to the minister, who is thereby aided in making the final decision. Natural justice would require revelation of his report in the same circumstances as any other in-house communications: when,

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148. [1971] 1 W.L.R. 433 (C.A.).

149. The Court of Appeal made no mention of prior authority which would seem to contradict its holding. E.g., Robinson v. Minister of Town and Country Planning [1947] K.B. 702, 714, 717, 720 (C.A.). Furthermore, it is by no means clear that all polycentric decisions of ministers will be subjected to a "no evidence" test. See generally de Smith, Judicial Review 260-61.

for instance, the inspector views a site on his own and records his observations in a report. However, the inspector's role is in many ways unique. He may be entrusted with making findings of local fact and applications of preliminary standards which are for practical purposes conclusive.[150] For example, if after days of listening to evidence an inspector were to find that the land sought for public housing lay over a rich surface deposit of coal, it seems likely that this would stand; the minister, or those acting on his behalf, simply do not have the time to duplicate the inspector's efforts. The landowner resisting compulsory purchase would certainly wish to know the impact of his appearance. Did the department reject his evidence about the seam of coal, or did it accept it as proven, but find that the need for public housing outweighed the need for fuel? Furthermore, suppose the inspector wrongly concludes that the housing will not interfere with mining operations because the coal is far enough below the surface to be reached by tunnelling. If the inspector's report is never revealed, errors like this might render an objector's participation at the inquiry useless. True, the inspector's findings, including his mistakes, may come to light with any reasons given by the minister. But reasons, even when required, are more likely to deal with broader issues like the influence of national housing and fuel policies on the disposition of this piece of land. They are a poor substitute for a report dealing point by point with the local matters raised by the objector.[151] There is a strong argument, then, that fairness requires automatic revelation of the inspector's report.[152]

British judges, however, have never been sympathetic to the idea

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150. In many routine planning appeals the inspector's decision is now in fact conclusive. See generally Town and Country Planning Appeals (Determination by Appointed Persons) (Inquiries Procedure) Rules 1974, S.I. 1974 No. 420.

151. Donoughmore Committee Report sec. III, § 14, at 105.

152. But see J. Griffith, Central Departments and Local Authorities 347 (1966) which argues that publishing the inspector's report gives undue weight to what will be only one factor in the minister's decision. It would seem easy enough, however, to explain exactly what weight was given the report whenever there is danger of misunderstanding.

that private citizens should automatically be shown inspectors' reports. In Local Government Board v. Arlidge,[153] decided in 1914, the House of Lords declined to hold that natural justice required revelation. Arlidge involved not a polycentric decision, but simply the application of the standard of "fitness for human habitation," to see whether certain houses could be made the subject of a closing order. The case was fought and decided on whether the inspector was more closely analogous to an internal departmental advisor or to an outside source of information. Counsel for the Board resisted revelation on the ground that the inspector was comparable to nautical assessors who traditionally gave confidential advice to admiralty courts on the technical aspects of shipping.[154] Counsel for Arlidge, on the other hand, argued that the inspector's report was a material document which, if not revealed, was comparable to secret evidence.[155] The House of Lords accepted the former analogy. To Lord Shaw of Dunfermline, the question involved the "disclosure of the views of the inspector written out by him, in jottings or otherwise, for the guidance or consideration of the department in dealing with the case."[156] Described in this manner, the report was just another internal document. If disclosures were compelled, "a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks."[157] Likewise, Viscount Haldane believed that the Local Government Board was not bound to reveal the report "any more than it would have been bound to disclose all the minutes made on the papers in the office before a decision was come to."[158] Lord Parmoor saw it as "simply a step in the statutory procedure for

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153. [1915] A.C. 120 (1914).
154. Id. at 122-23; [1914] 1 K.B. 160, 169 (C.A. 1913).
155. [1915] A.C. at 124; [1914] 1 K.B. at 167-68.
156. [1915] A.C. at 136.
157. Id. at 137.
158. Id. at 134.

enabling an administrative body" to reach a decision.[159] And Lord Moulton wanted to leave the Board free to "derive its knowledge from its agents" out of the public eye.[160] No one considered the possibility that revelation might be the sole means of discovering whether the report contained material (be it facts or conclusions) not fully commented on by a party.[161] Nor did anyone in the House of Lords take up counsel's suggestion that natural justice might act to prohibit the appearance of injustice,[162] even in cases where the report did not contain anything new.

The Arlidge decision has been criticized by writers as a missed opportunity for requiring openness at a key stage of administrative procedure.[163] Nonetheless, the holding has stood uneroded by subsequent judicial opinion. Occasionally the courts have noted in passing that a ministry has not seen fit to reveal the inspector's report.[164] When private parties actually challenge the practice, they get nowhere. William Denby & Sons, Ltd. v. Minister of Health, decided in 1935, was the first case to apply Arlidge to inquiries held by a minister into a clearance order.[165] Mindful of the Errington decision the year before, Denby argued that the inspector's report stood on the same basis as had fresh evidence in that case.[166] The King's Bench Division agreed that

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159. Id. at 144.

160. Id. at 151.

161. This had apparently influenced the Court of Appeal below to require automatic revelation as a matter of natural justice. See [1914] 1 K.B. at 176-77, 183, 187-88. Lord Justice Hamilton, who dissented in the Court of Appeal, seemed to concede that any report containing matters not known to the parties would have to be revealed. Id. at 193-94. But when reports are kept secret, it is impossible to know when this is actually the case.

162. [1915] A.C. at 124 (counsel for Arlidge).

163. Schwartz, Introduction 155-60; Wade, Admin. Law 194. But cf. 2 Davis, Treatise § 11.09, at 72-73 where the author argues that American courts should not require automatic revelation of an intermediate hearing officer's report as a matter of due process, desirable though it may be in certain circumstances.

164. Horn v. Minister of Health [1937] 1 K.B. 164, 176 (C.A. 1936); Errington v. Minister of Health [1935] 1 K.B. 249, 273 (C.A. 1934). But see Darlassis v. Minister of Education (1954) 118 J.P. 452, 455, 457 (Q.B.D.), where the court complimented the Minister for voluntarily revealing her inspector's report to the objector.

165. [1936] 1 K.B. 337 (1935).

166. Id. at 338 (counsel for Denby), 339 (counsel for Minister), 340.

the inspector would have to reveal any evidence that he obtained on his own, just as would the Minister.[167] But it saw the inspector here as no different from the one in Arlidge, who was not so much a source of new material as a filter of known information. The fact that this statute more clearly contemplated that an inspector would be used did not persuade the court to distinguish Arlidge.[168] Two decades later the Court of Appeal in effect affirmed Denby. In Steele v. Minister of Housing and Local Government, it likewise declined to require revelation following an inquiry into a clearance order. To counsel's suggestion that disclosure might allow objectors to correct any mistakes in the report, the justices replied that there was no authority in the statute for a second inquiry into the inspector's findings.[169] Lord Justice Birkett voiced the court's belief that "the fullest opportunity was given to the objector to make his case known."[170] Judges, it seemed, would be content only with a clear demonstration that non-disclosure had led to special prejudice in the case before them. They were decidedly uninterested in instituting a broad rule of revelation, without which, of course, it was impossible for a party to know whether he had in fact suffered prejudice.

It remained for non-judicial bodies to institute the automatic revelation that litigants had failed to obtain under natural justice. Freed from the need to be shown actual damage in each case, they could push for a general rule. In 1932 the Committee on Ministers' Powers (the "Donoughmore Committee") noted the conflict over whether inspectors' reports should be revealed, as a matter either of natural justice or of good policy.[171] It took no position on the natural justice issue, but, after weighing the arguments, concluded that it would be desirable for

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167. Id. at 342-43.
168. Id. at 347.
169. (1956) 6 P.&C.R. 386, 391, 399 (C.A.).
170. Id. at 397.
171. Donoughmore Committee Report sec. III, § 3(iv) & 14.

the administration to adopt a practice of automatic revelation.[172] It did, however, make two qualifications. It was prepared to concede that an inspector's advice on matters of ministerial policy should be kept confidential.[173] It also wanted the report revealed only with the minister's final decision, so as to avoid a second inquiry into the inspector's findings.[174] Nothing came of any of this, so that the Franks Committee was forced to devote an entire chapter of its 1957 report to the same issue.[175] It joined its predecessor in urging the automatic revelation of inspectors' reports.[176] But it went further in several respects. The Franks Committee suggested that the reports be divided into two parts - the first to summarize evidence, findings of fact, and inferences of fact, and the second to give the reasoning from the facts, including the application of policy and the recommendations.[177] Unlike the Donoughmore Committee, it wanted the entire report - including the second part - revealed with the minister's decision. It also recommended that at the request of a party the first part be disclosed before it was handed on to the ministry. Any participant would then be allowed to propose corrections of fact, which the inspector would then decide whether or not to accept.[178]

Subsequent procedural regulations have finally settled the basic question in favour of automatic revelation of the entire report at the time of the minister's decision.[179] But they have not adopted the Franks Committee's proposals to divide the reports into two parts or to allow comments on findings of fact immediately after the inquiry. The Council on Tribunals believes that both practices, which have been

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172. Id. sec. III, § 11(c), § 14, at 105, § 22(VI).
173. Id. sec. III, § 14, at 105-06.
174. Id. sec. III, § 14, at 106.
175. Franks Committee Report c. 23.
176. Id. paras. 343-44, 409(81).
177. Id. paras. 328, 409(80).
178. Id. paras. 345, 409(82).
179. E.g., T&CP(IP) Rules 1974, r. 13(2); CPLA(IP) Rules 1962, r. 10.

adopted in Scotland, would reduce the number of complaints about reports.[180] Even given these problems, there is little doubt that the regulations have enhanced participation at inquiries: a party can now assess the effect on the hearer of his arguments and evidence on local matters. They have also made other procedures function more fairly. The Chalkpit rules turn on the revelation of the inspector's report, since they go into effect only when the minister is disposed to disagree with his recommendations. Judges are aided in spotting violations of natural justice, such as the private gathering of evidence by inspectors.[181] In sum, when the courts balked at requiring something as a prerequisite of fundamental fairness, other institutions took the initiative, explored the possibilities, and arrived at a result reflecting their judgment of the best solution. The courts can now build on what others have done.

The Requirement of Reasons

Students of the administrative process have long expounded the need for departments to give reasons for their decisions.[182] The arguments may possibly be even more compelling when the task is polycentric instead of adjudicative. Most importantly, reasons make for a fairer decision. A decider compelled to give reasons must confront the evidence and arguments of objectors and dispose of them in an open and convincing way. By ensuring that objections are dealt with intelligently, reasons help to guarantee meaningful participation. They at once make a correct decision more likely and satisfy parties that their points have been considered. This may be quite important when

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180. 1962 Council on Tribunals Ann. Rep. para. 60 (1963). See also 1964 Council on Tribunals Ann. Rep. para. 86 (1965) (reports and decision letters should distinguish carefully between findings of fact and inferences from fact).

181. This occurred in Hibernian Property Co. v. Secretary of State for the Environment (1973) 72 L.G.R. 351 (Q.B.D.).

182. E.g., Franks Committee Report para. 351; Donoughmore Committee Report sec. III, § 3(iii); Davis, Text § 16.01, at 318, § 16.07, at 326, § 16.08, at 311; R. Lorch, Democratic Process and Administrative Law 146-47 (1969).

the function is polycentric. In most cases of adjudication, the contested issues are few and the evidence can only lead to one of two possible results. But when a polycentric solution is sought, the relevant factors are many and their influence on the result not always forseeable. Without an explanation by the decider, the parties may be left completely in the dark.

In addition to enhancing participation, the requirement of reasons will aid courts in their reviewing functions. Nothing is more difficult for a court to consider than a collection of facts followed by the bare announcement of a result. On the other hand, an enumeration of facts found, followed by an articulation of the connection between them and the decision, helps judges to spot any excess of jurisdiction or error of law. Furthermore, where there is judicial review on the evidence, the courts can retrace the administration's process of decision, checking it for possible unreasonableness. This is especially important where the administration is engaged not in applying a legal standard to facts (something familiar to judges), but in weighing facts and factors to reach the best result. In that situation, judges are more likely to find it hard to retravel on their own the path from the presentation of raw facts to the arrival at a final decision.

The third benefit of requiring reasons is their value for the future. If important or representative decisions are published, then prospective parties gain an impression of the general approach of the department, including the factors which it is likely to take into account. To be sure, these cannot have the same binding effect as precedent in adjudication, since each polycentric decision is by definition unique.[183] But they can still give guidance to those who come later.

In spite of this, British courts have never looked kindly on the idea of using natural justice to require a minister to give reasons for

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183. See Franks Committee Report para. 263(iv).

his decision following an inquiry.[184] The earliest cases deal with reasons solely as an aid to judicial scrutiny of the administrative decision, rather than as a prerequisite of fairness per se. Although the courts have been prepared to use reasons when volunteered as an aid to ferreting out errors of law[185] or to take adversely any failure to give reasons,[186] they have refused to compel reasons to facilitate judicial review.[187]

Recently, the Court of Appeal dealt directly with the question of requiring reasons for the sake of procedural fairness. The occasion was the 1970 case of Queen v. Gaming Board, ex parte Benaim and Khaida.[188] Benaim involved not an inquiry, but the application of a general standard of trustworthiness to applicants for a licence to run a gaming club. Following a hearing, Benaim and Khaida were denied a certificate on the basis of undisclosed police reports. They then requested reasons for the denial, apparently believing that there had been errors of fact or of inferences from fact. Curiously, counsel for the applicants conceded at the start that natural justice did not require the Board to reveal its reasons, arguing simply that reluctance to do so invited the inference that the reasons were bad.[189] Lord Denning, speaking for the court, agreed on the natural justice point. Although the Gaming Board must certainly conduct its proceedings according to the rules of natural justice,[190] it need not give reasons for its

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184. See generally Akehurst, "Statements of Reasons for Judicial and Administrative Decisions," (1970) 33 M.L.R. 154.

185. See generally Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997. Several judges indicated that, although a minister might be under no duty to give reasons in the first place, any reasons he did give might be used to overturn his order. See id. at 1006-07 (C.A. 1966) (Lord Denning, M.R., dissenting), 1032-33 (H.L. 1967) (Lord Reid).

186. Id. at 1061-62 (Lord Upjohn) (dictum).

187. Minister of National Revenue v. Wright's Canadian Ropes, Ltd. [1947] A.C. 109, 123 (P.C. 1946).

188. [1970] 2 Q.B. 417 (C.A.). The requirement of reasons found in the Tribunals and Inquiries Act 1958, note 203 on p. 78 infra, did not apply here. [1970] 2 Q.B. at 423 (counsel for Gaming Board).

189. Id. at 420-21 (counsel for Benaim and Khaida).

190. Id. at 429-31.

decision. Natural justice simply did not require it. Lord Denning's explanation was brief:

> After all, the only thing that they have to give is their opinion as to the capability and diligence of the applicant. If they were asked by the applicant to give their reasons, they could answer quite sufficiently: "In our opinion, you are not likely to be capable of or diligent in the respects required of you." Their opinion would be an end of the matter.[191]

Why the Board could not explain how it had arrived at its opinion, he did not say. The only authority cited was a case noting that a record to be reviewed for error on its face need not contain a tribunal's reasons.[192]

Given this summary treatment for tribunals, it is not surprising that the British courts have not required reasons for a minister's decision following an inquiry. Indeed, they have never really ruled squarely on the matter. At best, there are the statements in Robinson v. Minister of Town and Country Planning that a minister need justify his final decision only to Parliament.[193] This is in spite of the fact that both commentators[194] and investigative committees[195] have urged courts to use natural justice here. The first governmental committee to study the problem was the Donoughmore Committee in 1932. It recommended that "Every Minister exercising a judicial or quasi-judicial function ... should give the decision in the form of a reasoned document."[196] Inquiries into compulsory purchase and clearance orders and those into planning appeals all fall within the Committee's definition of "quasi-judicial" activities.[197] The Committee emphasized that "if the

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191. Id. at 431.

192. Id., citing King v. Northumberland Compensation Appeal Tribunal, ex parte Shaw [1952] 1 K.B. 338, 352 (C.A. 1951).

193. [1947] K.B. 702, 712, 717, 720 (C.A.).

194. E.g., Schwartz & Wade 156, 244; Wade, Admin. Law 214.

195. Donoughmore Committee Report sec. III, § 3(iii) (reasons should be required as a "third principle of natural justice," especially where further proceedings are open to a party). Cf. Franks Committee Report para. 351 (reasons are a "fundamental requirement of fair play").

196. Donoughmore Committee Report sec. III, § 22(V).

197. See id. sec. III, § 8, at 90-92.

Minister modifies the recommendations or rejects the findings in the inspector's report, it is especially important that his decision should draw attention to his reasons for so doing."[198] However, it then made a serious qualification. If "the Minister's ultimate decision is based solely on his views of public policy," he need do no more than notify parties to that effect.[199] The Donoughmore Committee may have been reflecting a belief that when the administration moves from applying law to facts to adjusting considerations to obtain a result, the process of decision becomes too vague, intuitive, and ineffable to permit explanation. Something of the feeling that such things are just matters of "opinion" creeps into Lord Denning's judgment in Benaim. Possibly also there is a feeling that a minister's letter of decision is not the best place to reveal any political values that may have influenced him. Parliament would under this view be the proper forum for elucidation and possible debate.[200] At any rate, neither explanation can stand examination. Surely a polycentric decision should be the product of a rational process of thought, no less than an adjudicative one. Any political values influencing it can then be revealed to those affected, not for purposes of debate, but for the sake of explanation.

There may be one other cause for the failure of British judges to require reasons following inquiries. Unlike other procedural defects like ex parte communications or lack of adequate notice, it is often difficult to demonstrate actual prejudice arising from a particular failure to give reasons.[201] Rarely can a party show that the giving of

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198. Id. sec. III, § 13(d).

199. Id.

200. Wade, "'Quasi-Judicial' and Its Background," (1949) 10 Camb. L. J. 216, 230.

201. For what constitutes prejudice, see Hibernian Property Co. v. Secretary of State for the Environment (1973) 72 L.G.R. 351, 363 (Q.B.D.). There, the court explained that the complainant need not prove that the result would have been different. He need only show that the error may have contributed to the final decision.

reasons might have made the decision go the other way. He can only surmise that it might have forced the decider to focus his mind more on the problem or revealed errors to a reviewing court. In this respect, the requirement of reasons is very much like the revelation of an inspector's report. It may as a practical matter take other bodies, which can prescribe generally irrespective of actual prejudice to particular parties, to institute it as a reform.

Whatever the explanation, the Franks Committee in 1957 did not treat "policy" matters in a special way. It recommended that "the Minister's letter of decision should set out in full his findings and inferences of fact and the reasons for the decision."[202] So important did Parliament consider the point that it enacted this procedural recommendation into law via statute, leaving the others for administrative regulation. Section 12 of the Tribunals and Inquiries Act 1958 required a minister "to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving or notification of the decision, to state the reasons." The statement was to form part of the decision and accordingly be incorporated into the record for purposes of judicial review.[203] Although objectors must explicitly request reasons under the Act, most departments give them automatically now.[204] Furthermore, statutory instruments require that, following an inquiry, the minister "notify his decision, and his reasons therefor" in writing to specified parties whether requested to or not.[205]

With the importance of reasons made manifest by other bodies, courts have stepped in to play a supplementary role. Interpreting the Tribunals and Inquiries Act and statutory instruments promulgated under it, they have held that the reasons given by an agricultural tribunal

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202. Franks Committee Report paras. 352, 409(84).
203. TIA 1958, § 12(1),(3), now TIA 1971, § 12(1),(5).
204. Schwartz & Wade 155; Wade, Admin. Law 236, 270-71.
205. E.g. T&CP(IP) Rules 1974, r. 13(1); CPLA(IP) Rules 1962, r. 10(1).

engaged in adjudication must deal adequately with any substantial points raised.[206] When weighing the adequacy of a minister's reasons following a polycentric decision, they have been cautioned by counsel against applying the same standards that they might apply to adjudication: rather than expecting an analysis of facts and law based on sharply defined issues, they should content themselves with a less precise judgment based on matters of "policy," possibly influenced by particular facts found about the parties.[207] Even bearing this in mind, the Queen's Bench Division overturned a minister's decision on a planning appeal in Givaudan & Co. v. Minister of Housing and Local Government.[208] Givaudan, a manufacturer of cosmetics, applied to the Caterham and Warlingham Urban District Council for permission to erect a building on its premises. The Council refused permission and an inquiry was held. After the inquiry, the inspector recommended that permission be denied, finding that, although the proposed structure would not constitute overintensive development of the site or create a parking problem, it would lead to an increase in the already noxious smells emanating from the factory. The Minister confirmed the recommendation, saying that he agreed with all of the inspector's conclusions. However, he also noted his belief that a new planning law might affect matters, and seemed to indicate, contrary to the inspector, that the construction could lead to parking problems. On the basis of these reasons, the court quashed the Minister's decision, finding that his assumption about the new planning law had been incorrect, hence raising the possibility that he had based his decision partly upon improper considerations.[209] Equally important, his general statement of agreement with the inspector,

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206. Re Poyser and Mills' Arbitration [1964] 2 Q.B. 467, 477-78 (1963).
207. Earl of Iveagh v. Minister of Housing and Local Government [1964] 1 Q.B. 395, 404-05 (C.A. 1963) (counsel for Minister).
208. [1967] 1 W.L.R. 250 (Q.B.D. 1966).
209. Id. at 259-60.

coupled with seeming disagreement on the parking problem, left substantial doubt as to his meaning.[210]

Other decisions have confirmed the judicial role in enforcing and elucidating Parliament's requirement of reasons. The courts can issue mandamus to compel a recalcitrant department to explain its decision[211] or can remit for reasons on appeal.[212] They can of course also quash if the reasons indicate excess of jurisdiction or error of law on the face of the record.[213] Furthermore, in Coleen Properties Ltd. v. Minister of Housing and Local Government, the Court of Appeal held recently that judges can review ministers' decisions on the evidence.[214] Not only will this compel the administration to present affirmative evidence on its part,[215] but it will also force ministers to give clear reasons to explain the connection between the facts alleged and the conclusions reached.[216] The need to reveal the inspector's report puts the added burden on a minister of articulating the considerations of policy which force him to depart from the inspector's recommendations.

The reports of the Council on Tribunals testify to the beneficial effects of requiring reasons. In one complaint brought before the Council, the reasons contained in a decision letter revealed an error of fact which would doubtless have gone unnoticed before.[217] Furthermore, because the inspector's report must be revealed, the Council is able to tell when a minister is disagreeing with his inspector on a finding of local fact,

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210. Id. at 258, 260-62.

211. Brayhead (Ascot) Ltd. v. Berkshire County Council [1964] 2 Q.B. 303, 313-14 (D.C. 1963); Parrish v. Minister of Housing and Local Government (1961) 59 L.G.R. 411, 418 (Q.B.D.).

212. Mountview Court Properties, Ltd. v. Devlin (1970) 21 P.&C.R. 689 (D.C.) (determination of fair rent by rent assessment committee).

213. Id. at 694-95.

214. [1971] 1 W.L.R. 433 (C.A.).

215. See p. 67 supra.

216. Cf. Evans, "Judicial Review for Insufficiency of Evidence," (1971) 34 M.L.R. 561, 565-66.

217. 1964 Council on Tribunals Ann. Rep. para. 79 (1965).

as opposed to some other matter.[218] Thus, the views of the inspector on matters with which he is best qualified to deal have been enhanced. One final benefit was demonstrated by a complaint that the decision letter in a planning appeal decided on the basis of written comments contained an inaccurate description of the site and its surroundings. Investigation revealed the cause to be an undisclosed inspection by ministry officials. The Council cautioned against this procedure, which until then had been customary in cases where the representations were in writing.[219] The requirement of reasons can thus help the Council perform its duty of spotting bad practices and urging their correction.

By way of summary, the British courts failed to act on their own to require reasons as a matter of natural justice. But when other bodies assumed the initiative, judges got into the spirit, and now play their proper part in furthering this aspect of fairness. The Council on Tribunals, meanwhile, is also assisted in its function of ensuring the health of the system of inquiry procedures.

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218. See 1965 Council on Tribunals Ann. Rep. paras. 90-92 (1966) (Minister differs with inspector on question of taste rather than of fact); 1963 Council on Tribunals Ann. Rep. paras. 48-49 (1964) (Minister differs with inspector on need for development).

219. 1964 Council on Tribunals Ann. Rep. para. 83 (1965).

The statement of reasons in the Minister's decision letter also alerted objectors to the department's questionable procedural practices in the Chalkpit Case. See Wade, Towards Administrative Justice 110-11.

CHAPTER 3

GREAT BRITAIN:

THE ROLE OF COURTS IN THE CREATION OF LAND INQUIRY PROCEDURES

The focus now shifts from what British courts have done to how they have done it. The approaches used in creating procedures for land inquiries shed light on judges' conception of their own role. Their relationships with other bodies engaged in the same enterprise reveal more directly their place among institutions responsible for inquiry procedures. As will become apparent in later chapters, it is a place different from that held by American courts when confronting analogous problems.

JUDICIAL METHODS OF APPROACH

In applying natural justice to inquiries, the British courts have developed certain doctrines upon which to base distinctions. These have passed in and out of style, and have been more or less successful in pointing them toward their place in the institutional scheme.

The Existence of a Lis

The phrase lis inter partes, usually shortened to lis, has had a long career in judicial opinions about inquiry procedures. It refers generally to a contest between parties before a hearer who makes some sort of a finding. It has come to connote proceedings similar to those in a courtroom, where participants "litigate" the application of law to facts. Opposed to it is "administration," where the government usually deals with citizens through letters and informal conferences.

The phrase appeared, appropriately enough, in the important case of Local Government Board v. Arlidge in 1914. In the Court of Appeal, counsel for Arlidge argued that an inquiry into an appeal from a closing order was a "proceeding inter partes, namely the owner of the premises

and the local authority." Therefore, the Local Government Board, which held the inquiry, had to act "judicially," or in accordance with natural justice.[1] The Court of Appeal accepted this. Lord Justice Vaughan Williams found that the appeal was a "lis inter partes as between the person alleging that he was aggrieved by the order and the local authority." There were two sides, each of which the Board had to listen to. In other words, the inquiry had to be conducted according to natural justice.[2] In the House of Lords, Viscount Haldane agreed that the Board had to act "judicially," in the sense of allowing each party to present its case.[3] But he doubted "whether it is correct to speak of the case as a lis inter partes," since the local authority and the Board were both parts of the administration.[4] Therefore, he placed fewer procedural duties on the Board than had the Court of Appeal.

By the 1930's the question of whether there was a true lis was becoming synonymous with whether courts could control inquiry procedures by means of natural justice. A decision which natural justice required to be arrived at fairly was now labelled "quasi-judicial;" all others were purely "administrative." In Errington v. Minister of Health counsel for the Minister argued that the Minister was "acting in an administrative capacity" when deciding whether or not to confirm a clearance order over the objections of property owners.[5] He added that "there is no lis between parties,"[6] presumably because the Minister and the local authority were ultimately engaged in a cooperative venture.[7] The court below accepted this, finding that the Minister "was not acting as a judge deciding an issue between two parties, but was acting as an administrative

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1. [1914] 1 K.B. 160, 167 (C.A. 1913) (counsel for Arlidge).
2. Id. at 174-75.
3. [1915] A.C. 120, 132 (1914).
4. Id. at 134.
5. [1935] 1 K.B. 249, 254 (C.A. 1934) (counsel for Minister).
6. Id. at 258 (counsel for Minister).
7. See id. at 256-57 (counsel for Minister).

officer ... ."[8] The Court of Appeal disagreed, holding that the Minister was bound by natural justice. Unlike the King's Bench Division, it found that a lis existed:

> In determining whether the position of the Minister is that which I have described as being quasi-judicial, I think it necessary to appreciate that ... there is a true contest as between the owners of the property in the area and the local authority; in other words, there are two sides as between whom the Minister has to come to a determination after consideration.[9]

Later courts took the lis concept one step further. The question was not simply whether a lis did or did not exist. The question was rather when it came into being. If one could identify the exact point, then he could tell when the Minister would have to begin observing the rules of natural justice. The Errington court had noted that the Minister's function remained "administrative" so long as no objections were made to the clearance order.[10] The logical answer, then, was that natural justice applied as soon as objections were made and the Minister was bound by statute to decide between the contentions of property owners and those of the local authority. Stated in this way, there was nothing wrong with the lis approach. Problems occurred, however, when the courts said that the Minister could do whatever he wished prior to the existence of the lis and not violate natural justice.

Mr. Justice Swift appeared particularly susceptible to this trap. On three separate occasions he was asked to decide whether certain ex parte communications between the Ministry of Health and a local authority violated natural justice. Frost v. Minister of Health[11] and Offer v. Minister of Health[12] dealt with inquiries into clearance orders;

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8. Id. at 253-54.
9. Id. at 271 (Maugham, L.J.) [emphasis added].
10. Id. at 258-59.
11. [1935] 1 K.B. 286 (1934).
12. [1936] 1 K.B. 40, 43 (K.B.D. 1935), 46 (C.A. 1935).

Horn v. Minister of Health concerned a compulsory purchase order.[13] In each case he merely inquired into when the communications had occurred. In Frost and Offer they had been completed before objections were filed and accordingly natural justice had no application.[14] In Horn, on the other hand, they had occurred after the magic moment, so that natural justice required their automatic revelation, just as if the proceeding had been judicial.[15] This approach ignored the fact that participation in an inquiry may be infringed by administrative actions occurring before a lis is joined; conversely it may not be affected in the least by actions occurring during the lis. The question about ex parte communications is whether they concern local facts bearing on a party's objections. The issue revolves around the contents of the communications, not the time at which they were made.

The Court of Appeal, which had the last word in Offer and Horn, gave the lis approach ambiguous treatment. The court eventually found that the communications in neither case had violated natural justice, thus affirming in Offer and reversing in Horn. Lord Justice Roche in Offer[16] and Lord Justice Greer in Horn[17] appeared to accept the approach of Mr. Justice Swift. However, the rest of the court found the communications inoffensive in Offer because they had not in any way prejudiced the objector's case against the clearance order.[18] The majority in Horn found that the communications had nothing to do with the particular compulsory purchase order against Horn's land, but instead concerned the local authority's overall programme to relieve housing congestion.[19] The weight of authority was that judges should examine the content of of the communications rather than the time at which the lis was joined.

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13. [1937] 1 K.B. 164, 170 (K.B.D. 1936), 175 (C.A. 1936).
14. Frost [1935] 1 K.B. at 293; Offer [1936] 1 K.B. at 45.
15. [1937] 1 K.B. at 171-72.
16. [1936] 1 K.B. at 52-53.
17. [1937] 1 K.B. at 178.
18. [1936] 1 K.B. at 49.
19. [1937] 1 K.B. at 178, 179, 182-83, 185-86.

The lis trap continued, however, to bedevil judges. A series of decisions in the mid-1940's about ex parte communications affecting inquiries into compulsory purchase orders brought Mr. Justice Swift's approach to its apotheosis. In Miller v. Minister of Health the King's Bench Division had this to say about a communication:

> That was a letter which came into existence long before the "lis," as it has been conveniently described in some of the authorities, was ever adjudicated. ... I do not think there is any substantial complaint to be made of the letter of September 13 having been considered by the Minister before he began to act in a judicial capacity.[20]

Likewise, in Price v. Minister of Health the court said:

> I think it is clear that many documents must come into the possession of the Minister while he is acting administratively, and before a time when he enters on semi-judicial duties, or, to use the language of Greer, L.J.: " ... before ... the 'lis' is joined between the objecting property owners and the local authority."[21]

And in Summers v. Minister of Health a few days later the King's Bench Division declined to inquire into the details of a whole list of letters, saying only, "These documents all appear to have come into existence before what has been conveniently described as the lis came to be adjudicated on."[22]

Finally the Court of Appeal added its imprimatur to the trend. In the 1947 case of B. Johnson & Co. (Builders) v. Minister of Health, Lord Greene began by lecturing at length against careless use of the term lis.[23] Adopting the word "quasi-lis" as more to his liking, he then proceeded to approve a rule which prevented natural justice from forcing the disclosure of any information which came to the Minister before objections were lodged.[24] Miller, Price, and Summers obtained

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20. [1946] K.B. 626.
21. [1947] 1 All E.R. 47, 51 (K.B.D. 1946) (alternative holding).
22. [1947] 1 All E.R. 184, 187 (K.B.D. 1946).
23. [1947] 2 All E.R. 395, 399 (C.A.).
24. Id. at 403. Cohen and Asquith, L.JJ., concurred. Id. at 405, 406.

his explicit approval.[25] As a result, the Johnson Company was prevented from rebutting allegations of the local authority about the character and motivations of its management. The court also added something else ominous:

> The administrative character in which [the Minister] acts reappears at a later stage because, after considering the objections, which may be regarded as the culminating point of his quasi-judicial functions, there follows something which again, in my view, is purely administrative, viz., the decision whether or not to confirm the order.[26]

Lord Greene appeared to be saying that the inquiry ended at some point before the Minister made his decision. He then could again act "administratively" - that is, he was no longer bound by natural justice. Had this been picked up by later courts, there is hardly a limit to the damage it might have done. Not only would it have prevented judges from using natural justice to force revelation of post-inquiry ex parte communications, but also could have kept them from even considering whether to compel disclosure of the inspector's report or the issuance of reasons following a minister's decision. Fortunately it has lain buried in the opinion.

After the 1940's courts dealing with inquiries into compulsory purchase and clearance orders managed to sidestep the lis approach. The turning point was Darlassis v. Minister of Education,[27] analyzed above,[28] which came before the Queen's Bench Division in 1954. There, it will be remembered, the Ministry of Education, which was contemplating

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25. Id. at 403-05.
26. Id. at 399. See also Price [1947] 1 All E.R. at 50:

> I think that counsel for the Minister must be right when he suggests that the Minister of Health must at some stages be acting purely administratively, that there will come a time when he will be acting in a quasi-judicial capacity, and that thereafter he may again enter on a period when he is acting administratively. [emphasis added].

27. (1954) 118 J.P. 452 (Q.B.D.).
28. See pp. 45-46 supra.

the compulsory purchase of Darlassis' land for a school, was told by the Ministry of Housing and Local Government that a possible alternative site was unavailable. In holding that natural justice did not require revelation of these discussions, the court focused on their content rather than their timing. It explained that the principles of Offer, Miller, and Summers had been embodied in Johnson.[29] Then, somewhat generously, it interpreted the Court of Appeal's holding in Johnson as turning on whether the communications were made for purposes of the "quasi-lis," rather than on when they had occurred.[30] In the future natural justice could require revelation of all discussions about matters properly at issue in the inquiry, regardless of when they occurred.

Judges no longer use the lis approach to determine at what point natural justice should apply to small-scale inquiries (those into compulsory purchase and clearance orders, and more recently, planning appeals). But their past adventures with it are instructive: they indicate how courts sought to define their role in creating inquiry procedures. Judges attempted to confine themselves to what most closely resembled the traditional adversary contest, where parties presented evidence on narrowly defined issues - the inquiry hearing itself. Beyond its boundaries lay "administration," where ministers and their departments were free to act unimpeded by natural justice. Only gradually did they grasp that, while the hearing was the main focus for participation, they might have to control the actions of the administration both before and after it in order to maintain its integrity.

Information-Gathering and Related Doctrines

The lis approach emphasized the similarities of inquiries to traditional courtroom adjudication: the possibility of contested issues of

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29. 118 J.P. at 459-60.
30. Id. at 460-66.

local fact and of argument over their significance. A different cluster of concepts has been used by British judges to draw attention to the opposite aspect of inquiries: their similarity to legislation, where a hearing is meant more to aid the decider than to protect those affected. After World War II the courts were faced for the first time with the need to prescribe minimum procedures for large-scale inquiries into whole schemes. No longer was it just a question of taking or controlling land as part of a larger plan; the focus was now on creating the plan itself. General development plans were imposed on large geographic areas, new towns were put down in the place of farms and fields, and local government boundaries were scrapped and redrawn. Parliament normally required that these be preceded by some sort of inquiry. The courts responded by looking for a quick, wholesale solution. Instead of openly reassessing the role of natural justice, they took refuge in doctrines and approaches that appeared to allow little place for fairness. As a result, judges have failed to act creatively to guarantee participation to people who are to be affected by these new schemes.

Their method was to use three concepts, each distinct in itself, yet interwoven with the others in their thinking. First, there was information-gathering. This had long been recognized as at least one of the purposes of both adjudicative hearings[31] and inquiries.[32] However, it had only been mentioned in passing and had had no dispositive effect on the application of natural justice. But when courts began to deal with inquiries affecting large numbers of people, each in a small way, it took on more sinister tones. It became the practice to say that the hearing was meant solely to inform the minister. If that were so, then it could only be intended by Parliament

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31. King v. Westminster Assessment Committee, ex parte Grosvenor House (Park Lane) Ltd. [1941] 1 K.B. 53, 62-65 (C.A. 1940).

32. William Denby & Sons, Ltd. v. Minister of Health [1936] 1 K.B. 337, 338-39 (counsel for Denby), 342 (1935).

for the minister's benefit, in order to secure the best decision. The objectors should be no better off, it seemed, than departmental experts, whose views the minister could consider or not as he pleased.

Second, there was the inquiry into objections. This was theoretically distinct from information-gathering, yet was used to exactly the same effect. Statutes sometimes speak in terms of an inquiry into objections to a large scheme, instead of simply an inquiry into the scheme itself.[33] This means that the inquiry is to focus on dissatisfaction with the plan as put forward. Entirely different plans are to be considered only to the extent that they reflect on the suitability of the proposal in issue, and not for their own sakes. But the words have been misused to say that the inquiry was meant solely to bring to light objections for the minister's benefit. In other words, its purpose was to gather information. As before, the interests of the administration became paramount and those of the objectors shrank into insignificance.

The third approach resulted from discovering special significance in the fact that the ministry which decided had itself often proposed the plan. When the proponent and decider were the same, there appeared to be no real contest, or, to use a familiar term, lis. How could there be any genuine dispute where one of the parties would just be arguing to himself? The only point of the proceedings could be further to enlighten the minister about public reaction to his plan. Yet again, rights of participation took second place to the need to gather information. Any large-scale plan would normally be proposed by a central department rather than a local authority, so the new inquiries into overall schemes became victims of this analysis also.

The first errant decisions were made in the 1940's. Robinson v.

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33. E.g., New Towns Act 1965, c. 59, Schedule 1, § 3 (designation of rural area as new town site); Police Act 1964, c. 48, Schedule 3, § 3 (amalgamation of police jurisdictions).

Minister of Town and Country Planning,[34] decided in 1947, involved the designation by a Minister of a whole urban area as temporarily closed to private development. The statute empowered, but did not require, the Minister to hold an inquiry into "matters to which [any] objection relates."[35] The Court of Appeal eventually held that the Minister was not required to act "judicially" in any way, although it conceded that "the inquiry itself must be conducted on what may be described as quasi-judicial principles."[36] The Minister did not have to reveal any matters of fact or opinion that came to him independently of the inquiry.[37] Natural justice, in other words, had no effect outside of the hearing. At one stroke the court seemed to accept what the lis approach in small-scale inquiries had pointed towards but never actually attained. Lord Greene, writing the leading opinion, seemed to see the inquiry solely as a means of gathering information: "The object of such an inquiry under the first schedule can only be to elucidate matters upon which [the Minister] desires to be better informed."[38] Lord Justice Somervell noted that the statute gave the Minister discretion whether or not to hold the inquiry: "It is only if, in his opinion, that information is or may be insufficient that he causes a public local inquiry to be held. It is a means by which he can, if he thinks fit, obtain further information before coming to his decision."[39] Lord Greene added that the Minister both proposed the order and decided eventually whether to approve it:

> It is the case of an original order to be made by the Minister as an executive authority who is at liberty to base his opinion on whatever material he thinks fit, whether obtained in the ordinary course of his executive functions or derived from what is brought out at a public inquiry if there is one.[40]

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34. [1947] K.B. 702 (C.A.).
35. Town and Country Planning Act 1944, 7 & 8 Geo 6, c. 47, Schedule 1, § 6.
36. [1947] K.B. at 716.
37. Id. at 715-17.
38. Id. at 713.
39. Id. at 718.

Lord Justice Wrottesly ended by saying that the inquiry was meant only to inform the Minister of objections to the plan rather than to consider the plan itself.[41]

A few months later the House of Lords appeared to confirm that natural justice did not apply to the actions of a minister responsible for a large-scale inquiry. The case was Franklin v. Minister of Town and Country Planning[42] and concerned the designation of Stevenage as the site of the first new town. The main issue was whether the Minister had shown such bias in favour of the order before the inquiry that he could not possibly fulfill his statutory duty to consider the objections raised there. The House of Lords found that he had done nothing to foreclose him from genuinely considering objections. However, it used some unfortunate language to describe the Minister's duties. Lord Thankerton said, "In my opinion, no judicial, or quasi-judicial, duty was imposed on the [Minister], and any reference to judicial duty, or bias, is irrelevant to the present case."[43] By "quasi-judicial duty," he appeared, if the practice of prior courts was to be any guide, to be referring to natural justice. He continued:

> It seems clear also, that the purpose of inviting objections, and, where they are not withdrawn, of having a public inquiry, to be held by someone other than the [Minister], to whom that person reports, was for the further information of the [Minister], in order to [allow] the final consideration of the soundness of the scheme of the designation; ... I am of opinion that no judicial duty is laid on the [Minister] in discharge of these statutory duties ... .[44]

Later, he reiterated, "As I have already pointed out, the object of the inquiry is to further inform the mind of the Minister, and not to consider any issue between the Minister and the objectors; that is for the Minister thereafter to consider and decide."[45] Because the Minister

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41. Id. at 725.
42. [1948] A.C. 87 (1947).
43. Id. at 102.
44. Id.
45. Id. at 106.

both proposed and decided, there could be no issue between him and the objectors. With no issue, there could apparently be no contest or lis. The only purpose of the inquiry could therefore be to gather information for the Minister's benefit. Natural justice seemed to have no place.

Misuse of the three concepts continued well past the 1940's. Two 1960's cases going under the name of Wednesbury Corporation v. Ministry of Housing and Local Government dealt with an inquiry into objections to a local government amalgamation scheme. In the first, the Court of Appeal refused to force revelation of departmental instructions to the three inspectors who had jointly conducted the inquiry.[46] Lord Denning put the issue thus:

> [I]f the inquiry of the inspectors was of the nature of a judicial inquiry into a lawsuit between parties, then it would be wrong for a Minister to issue a brief or instructions to the inspector behind the backs of the parties. The brief or the instructions might contain all sorts of observations on the case which one side or the other ought to know. If the inquiry were of such a nature, I should have thought that it would be necessary in the interests of justice that full disclosure should be given of the communications between the Minister and the inspector. On the other hand, if the inquiry was not of the nature of a lawsuit between parties, but was a channel for providing information to the Minister ... then it would be a different matter ... . The inspectors in such a case would be nothing more nor less than a channel of information to the Minister himself.[47]

Citing Franklin, he concluded that the inquiry was "not in the nature of a lawsuit between parties, but is to inform the mind of the Minister when he comes to make his decision."[48] Therefore the communications between the Minister and his inspectors did not have to be revealed. In the second Wednesbury case,[49] objectors complained that the Minister

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46. [1965] 1 All E.R. 186 (C.A. 1964).
47. Id. at 190.
48. Id. at 191.
49. [1966] 2 Q.B. 275 (C.A. 1965).

had prevented his inspectors from making a recommendation on the basis of arguments presented at the hearing. Lord Justice Sellers, in upholding the Minister, continued the old approaches:

> If the local inquiry was in the nature of a judicial inquiry, then I think that there can be no doubt that those holding the inquiry should be free and unfettered and any direction or restriction on their freedom to decide as they thought fit and to arrive at a decision would be improper. ... It was submitted for the [Ministry] that the true nature of the inquiry was administrative ... . The provision of the statute says no more than that "the Minister shall cause a local inquiry to be held into the objection." It might be regarded as a "one-sided inquiry." There is no issue or lis. It is an inquiry into the nature or extent of an objection.[50]

He concluded, "... the inquiry into objections enables the Minister the better to appreciate their nature and strength and serves to inform him accordingly. The Minister was not, therefore, in my judgment, acting in a judicial capacity ... ."[51] Finding there to be no analogy to what courts did, Lord Justice Sellers simply gave up, instead of investigating to see whether fairness required that the inspectors be allowed to make a recommendation. His colleague, Lord Justice Diplock, did just that, and declined to hold that natural justice required such a thing here.[52]

The approach used in Robinson, Franklin, and Wednesbury was both unhelpful and dangerous. Finding no lis or contest in the traditional sense, judges appeared to be saying that natural justice could not control the way in which ministers made large-scale polycentric decisions. Surely it still had a role to play, albeit a modified one. The judges' method was doubly dangerous because it removed natural justice sub rosa, without any reference to the values upon which an answer must depend.

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50. Id. at 297.
51. Id. at 298.
52. Id. at 304-05.

The judges themselves did not even seem prepared to accept the consequences of the doctrines they espoused. No matter how much they cut back on the requirements of natural justice, they never withdrew it entirely from the area. Robinson stated that the hearing, if not the entire inquiry, should be conducted in a "quasi-judicial" manner.[53] Franklin required that a minister remain unbiased enough to weigh the arguments of objectors.[54] And in the first Wednesbury case, Lord Denning acknowledged that "The inquiry has, of course, to be fairly conducted; and the Minister has to consider the report with an open mind so as to be able to give full weight to the objections."[55] Unfortunately, the approaches used stressed the inability of the courts to require anything positive. It was no wonder that, in a 1967 case, counsel cited Franklin and Wednesbury as possible instances of a minister's exercising wide discretion "free from judicial control."[56]

Not all judges have fallen prey to these approaches. Burgh of Ayr Magistrates v. Lord Advocate,[57] a 1950 decision of the Scottish Court of Session, dealt with an inquiry held by a "commissioner" into the amalgamation of police areas. Following the inquiry, the Secretary of State for Scotland was to make a draft order, which would then be laid before Parliament for approval. The court recognized that "one of the main objects, if not indeed the sole object" of the inquiry was to give Parliament enough information on which the base a decision.[58] That did not mean, however, that the Secretary of State was not bound to follow natural justice:

> In the present case it appears that the County Council of Ayr, while assenting to the general principle of amalgamation, had certain objections to the clauses of the draft scheme. No

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53. [1947] K.B. at 716.
54. [1948] A.C. at 102-03, 104.
55. [1966] 2 Q.B. at 191.
56. Essex County Council v. Ministry of Housing and Local Government (1968) 66 L.G.R. 23, 31 (Ch. 1967).
57. [1950] S.C. 102.
58. Id. at 107.

> mention of these objections was made to the commissioner on behalf of the county council. After his report had been lodged, however, the county council made representations direct to the Secretary of State regarding the details of the scheme ... . This seems to me to be quite out of order. Such objections should, in my opinion, have been brought to the notice of the commissioner so that the comments of all parties might be publicly ventilated in the presence of each other, and that the commissioner might be able to deal with these matters in his report.[59]

The court accordingly gave a declaration that the draft order was void.

An equally straightforward approach to the problem of applying natural justice to a large-scale inquiry came in Essex County Council v. Ministry of Housing and Local Government, decided in 1967.[60] The Chancery Division eventually held that natural justice did not require that objectors to the Stansted Airport special development order be heard in the absence of an express statutory command. Whether one agrees or disagrees with this conclusion, one must applaud the court's liberation from old labels. The court reached its decision by analyzing the statutory scheme and the reason of the thing.[61] It made no distinction whatever between inquiries into proposals and inquiries into objections.[62] It was indifferent to the fact that the Minister had proposed the original order. And only after deciding that natural justice did not apply did it characterize any hearing actually given as "purely informative."[63]

Both lis and information-gathering should be abandoned in favour of more functional approaches which explicitly consider how essential a procedure is in guaranteeing participation in an inquiry. But both doctrines, which are really just the converse of one another, are worth studying as the creations of judges anxious to define the limits

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59. Id. at 111.
60. (1968) 66 L.G.R. 23 (Ch. 1967).
61. Id. at 31.
62. Id. at 29.
63. Id. at 31.

of their interference with administrative procedures. Underlying each concept is the idea that there should be an area of "administration" where ministers are free to apply policy to particular citizens unimpeded by "quasi-judicial" restraints. Judges defined this area by focusing on the role they had always played in adjudication - guaranteeing to adversaries the right to put their cases fully within a hearing where specific issues were sharply contested. In small-scale inquiries this resulted in a tendency to draw artificial lines, bringing ministers under procedural control once objections were filed, and threatening to release them once the hearing was completed. In large-scale inquiries it came close to leaving the minister free of any judicially imposed procedural restraints.

There was, however, one consolation. In Britain, mistakes of the courts are likely to be corrected or mollified by other bodies. Thus, judges could not ignore the fact that Parliament had granted some sort of voice to persons affected by large-scale schemes. Also, when the lis approach had demonstrated its inability to distinguish between which communications should be revealed and which not, the Council on Tribunals stepped in to help the courts.[64] However hesitant judges may sometimes be, others always seem to be available to put things right.

THE INTERACTION OF COURTS WITH OTHER BODIES

What, then, of these other bodies which forever hover in the background, moving forward at various times to take the initiative in guaranteeing fair procedures? They include special commissions, the Council on Tribunals, and of course Parliament itself. Their function is to provide the courts with overall guidance and to perform duties

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64. See pp. 53-54 supra.

that might otherwise fall to the judges. As a result, while the courts remain the guardians of basic fairness, the final adjustment between fairness and efficiency is a team effort.

Parliament as Initiator and Guide

Initiator of the Hearing Requirement. - It was Parliament which initially made fairness a factor by requiring that various land matters be decided only after an "inquiry." The word acted as a signal to the courts that fairness was goal, and hence that natural justice had a role to play. This is not to say that Parliament need always be the initiator. Judges can conceivably use natural justice to require a hearing or some other form of participation in a polycentric function where the statute is silent. Nothing says that they need confine themselves to defining the parameters of a hearing which has already been legislatively prescribed.

The classic instance of a court's acting on its own in land matters is Cooper v. Wandsworth Board of Works, decided in 1863.[65] There, the Court of Common Pleas held that a Board of Works had to afford a builder a hearing before exercising its power to pull down construction that had been started without giving statutory notice. The statute had said nothing about a hearing. Clearly the Board was engaged both in adjudicating (deciding whether the statute had been violated) and in finding the most expedient solution (deciding what to do if the statute had in fact been violated).

The precedent is thus there, but the courts have never required on their own a land inquiry of the type discussed in this thesis. Commentators agree that judges can use natural justice to compel a hearing where the administration is singling out an individual and adversely affecting his legal position as part of an overall scheme.[66]

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65. (1863) 14 C.B. (N.S.) 180 (C.P.).

66. de Smith, Con. & Admin. Law 582-83; de Smith, Judicial Review, 67, 159-60; Wade, "'Quasi-Judicial' and Its Background," (1949) 10 Camb. L.J. 216, 233.

However, they disagree when the proceedings expand to include consideration of the whole scheme. Professor Wade has argued for judicial activism here, believing that natural justice can require that a hearing precede even broad polycentric decisions, "such as where schools have to be closed and teachers dismissed."[67] Professor de Smith was less certain, saying that, while they should compel deciders to consider fairly any representations that were in fact made, the courts should not initiate hearing requirements on their own.[68] Cases touching on the matter may be read to favour the latter view.[69]

The point is that, at least as far as land inquiries are concerned, natural justice has had to do no more than prescribe particular procedures once participation of some sort has been legislatively mandated. Parliament, not the courts, has taken the initiative in requiring participation in the first instance. As will be seen below, this is different from what often happens in America.

Creator of Other Bodies. - Parliament's role as initiator has not been confined to prescribing hearings. After setting inquiries in motion, it continued to keep an eye on specific issues as they arose through natural justice litigation. By the early 1950's it had

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67. Wade, Admin. Law 207-09.

68. de Smith, Judicial Review 158-59, 196; cf. de Smith, Con. & Admin. Law 584. Professor de Smith does go on to suggest, however, that in some circumstances the courts might compel the administration to entertain oral argument or written comments. de Smith, Judicial Review 159-60.

69. See Ridge v. Baldwin [1964] A.C. 40, 72 (dictum of Lord Reid that consideration of scheme for a new road might be treated differently under natural justice than consideration of whether to tear down house in Cooper v. Wandsworth Board of Works, note 65 on p. 98 supra; criticized in Wade, Admin. Law 208); Essex County Council v. Ministry of Housing and Local Government (1968) 66 L.G.R. 23 (Ch. 1967) (natural justice inapplicable to making of special development order for siting of new airport).

But see Queen v. Liverpool Corporation, ex parte Taxi Fleet Operators' Association [1972] 2 Q.B. 299, 307-08 (C.A.) where Lord Denning, M.R., indicated that natural justice required a city to give taxi cab drivers a hearing before increasing the number of licences. One British writer has questioned whether courts are as well equipped as Parliament or the administration to regulate the procedures attending administrative activities so far removed from ordinary judicial ones. See Evans, "The Duty to Act Fairly," (1973) 36 M.L.R. 93, 97-98.

become clear that something had to be done about inquiries, largely because of the large volume of public complaints.[70] Judicial attempts to guarantee minimum fairness had just not been enough. It was becoming evident that natural justice, even if applied in the wisest way imaginable, could not do the entire job itself. People were looking not just for minimum fairness, but for something more. For example, not everyone agreed that it was basic to a citizen's participation always to be given reasons for the minister's ultimate decision. Nonetheless, it seemed a fair thing to do, especially since it did not threaten to make administration less efficient. Going beyond fundamental fairness might in the end lead to a more satisfied public, fewer complaints, and hence a more smoothly operating administrative machine.[71] To this end, the Government appointed the Franks Committee and, pursuant to its recommendations, Parliament set up the Council on Tribunals. Nine years later, Parliament created the Parliamentary Commissioner for Administration, whose effect on the judicial prescription of procedures for land inquiries is discussed below.

Parliament exists, then, to initiate and to provide for important changes in direction. Having established inquiries, it left the courts to grapple with the issues as they arose - to identify problems and to give their own solutions on the basis of fundamental fairness. When problems were persistent enough and judicial solutions did not seem wholly satisfactory, Parliament stepped in again. This time it created alternative bodies, which view inquiry procedures from the perspective of what is best for all concerned, rather than just essential to the participation of affected citizens. In so doing, it handed new problems to the courts, which serve increasingly nowadays

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70. Wade, Admin. Law 228.
71. See, e.g., 1963 Council on Tribunals Ann. Rep. para. 4 (1964).

as interpreters of statutory instruments containing procedures. If they perform this job correctly, the courts will help to identify new problems, perhaps requiring future types of parliamentary intervention.

Guide through Statutory Language. - Parliament has also given direct guidance through the words and phrases used in statutes. Or perhaps more accurately, the courts have found guidance in these, often using them as a point of departure for their analysis. If, as is usual, statutory language is not dispositive of the case, it will at least provide the parties with terms over whose meaning they can argue.

Two of the most important cases applying natural justice to land inquiries provide striking examples. In Local Government Board v. Arlidge,[72] the statute said that the Board "shall not dismiss any appeal without having first held a public local inquiry."[73] The House of Lords had to decide whether natural justice required either an oral presentation before the Board itself or revelation of the inspector's report. Counsel for Arlidge argued the affirmative on both points, noting that the word "appeal" had referred in other statutes to an oral hearing, and that an inquiry could not be "public" unless the inspector's report were revealed.[74] Counsel for the Board countered that "appeal" had also been known to denote a written presentation, while "public" meant that the hearing itself, but not necessarily the inspector's report, should be in the open.[75] In the leading opinion, Viscount Haldane began by noting that the court should look first to the statutory language, and guess at Parliament's intentions only when the language was ambiguous.[76] Apparently sensing

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72. [1915] A.C. 120 (1914).
73. Housing, Town Planning, etc. Act 1909, 9 Edw. 7, c. 44, § 39(1)(b).
74. [1915] A.C. at 124 (counsel for Arlidge).
75. Id. at 125 (counsel for Local Government Board).
76. Id. at 130.

ambiguity, he proceeded to consider the general legislative background of the statute.[77] Lord Shaw of Dunfermline found that Parliament, in requiring that the local inquiry be "public," had by implication exempted the inspector's report and the Board's deliberations from publicity.[78] Lord Parmoor for his part agreed with the Local Government Board that the word "public" referred only to the hearing before the inspector, and not to revelation of his report.[79] To be sure, none of the judges relied solely on the words of the statute, susceptible as they were to varying interpretations. But each felt it his duty to frame his result in terms of them.

British judges may also turn to statutory language at the end of their opinions. Finding no words of Parliament directly helpful, they go immediately to the problem of whether natural justice ought to apply. Having obtained a provisional answer, they then check back to see if it does violence to anything in the statute. In Errington v. Minister of Health,[80] it will be remembered, the issue was whether certain ex parte communications between the Jarrow Corporation and the Minister of Health concerning a clearance order violated natural justice. The Housing Act 1930 stated that the Minister "shall, before confirming the order, cause a public local inquiry to be held and shall consider any objection not withdrawn and the report of the person who held the inquiry."[81] Each judge approached the problem by analyzing the requirements of and limits to natural justice. Lord Justice Greer reviewed the facts and precedents and found that some of the ex parte exchanges diluted the effect of the objections. The Minister had considered more than just "any objection not withdrawn and the report of

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77. Id. at 130-35.
78. Id. at 138.
79. Id. at 143.
80. [1935] 1 K.B. 249 (C.A. 1934).
81. 20 & 21 Geo. 5, c. 39, First Schedule, para. 4.

the person who held the inquiry." Therefore he had violated Parliament's instructions.[82] Lord Justices Maugham and Roche each went through their own explications, finding that at least some of the communications appeared offensive. They then chose the statutory language requiring inquiries to be "public." When one party was consulted after the hearing on an ex parte basis, the hearing was in effect continued in private. Therefore Parliament's instructions had been violated and the final administrative order had to be vacated.[83]

In sum, the British courts have used statutory language as a kind of touchstone. Whether as a starting point or a check on provisional conclusions, the exact words of Parliament are never far from mind. Courts thus maintain some contact with parliamentary wishes, which must serve as the ultimate source of natural justice doctrine. However, as a way of doing obeisance to the supremacy of Parliament, consideration of statutory language always runs the risk of becoming ritualistic. The court may reach its conclusion and then intone a few words from the statute book which are said to support it. By itself this is usually quite unsatisfactory. The problem is normally before the courts in the first place because the statute is ambiguous on the point. A word like "public" does not have a single, fixed meaning. Indeed, it can be taken in directly opposite ways, as the arguments of counsel in Arlidge demonstrate. The problems caused by a simplistic treatment of the phrase "inquiry into objections" have been set out above.[84] It is no good for courts to adopt the interpretation that supports the result they favour instinctively, with nothing more. Although they may appear to be doing the bidding of Parliament, they stand in danger of simply giving voice to their own predilections. Happily, abuses of this kind are rare. As the above cases illustrate,

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82. [1935] 1 K.B. at 267-68.
83. Id. at 272, 282.
84. See pp. 88-97 supra.

British courts more often use statutory language to direct and supplement analysis rather than to replace it. In so doing, they are allowing Parliament to play its proper role in deciding what basic fairness requires.

Guide through Statutory Scheme . - Where there is no precise statutory language bearing on a natural justice problem, British courts sometimes turn to the general logic of the statute for an answer. In Offer v. Minister of Health,[85] the issue was whether pre-inquiry communications between a local authority and a Ministry in a clearance order case violated natural justice. The Court of Appeal noted that Parliament had authorized the Ministry in a separate part of the statute to investigate with a view to initiating clearance orders on its own. Certainly it was bound to learn something about the case in these preliminary investigations. Thus, Parliament must have contemplated that the department have some knowledge about the matters in controversy before the hearing. The mere communication of these by the local authority would not then be a per se violation of natural justice.[86]

Similarly, in the 1967 case of Essex County Council v. Ministry of Housing and Local Government,[87] the Chancery Division had to decide whether natural justice compelled the Minister to hold an inquiry before making a special development order granting planning persmission for the third London airport at Stansted. The court answered in the negative, in part swayed by the fact that the section of the statute authorizing development orders was silent on the matter of participation, while other sections authorizing other orders expressly prescribed hearings. Parliament could not then be presumed to have

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85. [1936] 1 K.B. 40 (C.A. 1935).

86. Id. at 47-48, 51. See also Robinson v. Minister of Town and Country Planning [1947] K.B. 702, 712 (C.A.); Horn v. Minister of Health [1937] 1 K.B. 164, 186-87 (C.A. 1936).

87. (1968) 66 L.G.R. 23 (Ch. 1967).

intended a hearing here.[88] These constant references back to Parliament may seem commonplace enough in Britain. They stand in marked contrast, however, to the technique of American courts, which rarely examine the language or logic of statutes, even when they are applying legislative standards of fairness.[89]

Departments and the Council on Tribunals as Creators of Statutory Instruments

Although Parliament gets other bodies moving in a general direction and provides guidance through statutory language and schemes, it does not create the detailed procedures which govern the conduct of an inquiry. With all the conflicting demands made upon it, the amount of time that it can devote to inquiry procedure is limited. Parliament's attention span is short, and it must confine itself to those procedures which are too important to be left to other bodies - for example, the requirement that ministers give reasons with their decisions.[90] Accordingly, Parliament delegates to others the task of creating detailed procedural codes, retaining for itself the power of annulment by resolution of either House.[91] The normal practice is for the responsible ministry to submit draft procedures to the Council on Tribunals, which by law must examine them prior to promulgation by the Lord Chancellor.[92] The Council is especially important, since it ensures that procedures are in accord with prevailing notions of fairness and that they parallel, where possible, rules governing other inquiries. Under the guidance of the Council, statutory instruments have resolved old controversies, such as whether the inspector's report must be automatically revealed. They have also refined the doctrines of natural justice controlling extra-inquiry evidence: the

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88. Id. at 31.
89. See pp. 293-97 infra.
90. TIA 1971, § 12.
91. Id. § 16(1).
92. Id. § 11(1).

Chalkpit rules now allow departments to know more precisely than before what need be revealed for rebuttal and what need not. Perhaps most importantly, they have done these things on a broad scale. Procedural regulations governing land inquiries echo one another, whether they concern compulsory purchase orders,[93] planning appeals,[94] applications for the storage of gas underground[95] or the placement of electricity lines across particular land,[96] or proposals for the construction of pipe-lines and compulsory purchase orders to obtain needed rights of way.[97] Statutory instruments have become the normal means of expressing general ideas of procedural fairness.

But their influence need not be confined to those inquiries where they are strictly applicable. Because they embody broad standards of fairness, statutory instruments serve as an analogy in cases where the problems are comparable. This occurred in Coleen Properties Ltd. v. Minister of Housing and Local Government.[98] There, the Tower Hamlets London Borough Council made a compulsory purchase order against a new building owned by Coleen adjacent to a clearance area, alleging it to be "reasonably necessary for the satisfactory development or use of the cleared area."[99] When the Borough Council presented no evidence whatsoever to support its contentions, the inspector recommended that Coleen's property be excluded from the final order. The Minister disagreed without explanation. Lord Justice Sachs noted

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93. Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules 1962, S.I. 1962 No. 1424; Compulsory Purchase by Ministers (Inquiries Procedure) Rules 1967, S.I. 1967 No. 720.

94. Town and Country Planning (Inquiries Procedure) Rules 1974, S.I. 1974 No. 419; Town and Country Planning Appeals (Determination by Appointed Persons) (Inquiries Procedure) Rules 1974, S.I. 1974 No. 420.

95. Gas (Underground Storage) (Inquiries Procedure) Rules 1966, S.I. 1966 No. 1375.

96. Electricity (Compulsory Wayleaves) (Hearings Procedure) Rules 1967, S.I. 1967 No. 450.

97. Pipe-Lines (Inquiries Procedure) Rules 1967, S.I. 1967 No. 1769.

98. [1971] 1 W.L.R. 433 (C.A.). See also Fairmount Investments Ltd. v. Secretary of State for the Environment [1976] 2 All E.R. 865, 867-68 (H.L.).

99. Housing Act 1957, 5 & 6 Eliz. 2, c. 56, § 43(2).

that the Minister could not differ with his inspector on the basis of evidence he had obtained on his own "without informing the subject and giving him an opportunity to deal with that evidence on the lines which are set out in regard to a parallel matter in the Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules 1962."[100] No procedural regulation applied to this particular type of compulsory purchase inquiry.[101] Lord Justice Sachs seemed to be using the Rules as a general indicium of fairness, against which administrative actions in analogous cases could be measured. In the future it would not be surprising if statutory instruments of this type served as a guide to judges seeking to apply natural justice to inquiries not covered by any regulation.

The Council on Tribunals and the Parliamentary Commissioner for Administration as Hearers of Complaints

The Council on Tribunals. - Besides reviewing procedural rules, the Council on Tribunals serves as a kind of permanent Franks or Donoughmore Committee, identifying points of friction in the administrative process where natural justice for one reason or another has not resolved the issues. It is in this capacity that the Council deals with specific complaints of unfairness.

The Council usually keeps clear of matters which are the subject of current litigation so as not to interfere with the work of the courts.[102] Conversely, the Council often steps in to handle a complaint which the courts for one reason or another will not consider. The best-known example is the Chalkpit Case, where a judicial solution

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100. [1971] 1 W.L.R. at 439.

101. The procedural regulation cited applies by its own terms only to compulsory purchase inquiries held under the Acquisition of Land (Authorisation Procedure) Act 1946, 9 & 10 Geo. 6, c. 49. CPLA(IP) Rules 1962, S.I. 1962 No. 1424, r. 2. Inquiries into the compulsory purchase by a local authority of property adjoining a clearance area are not subject to the Acquisition of Land Act. See Housing Act 1957, Third Schedule.

102. See 1962 Council on Tribunals Ann. Rep. para. 64 (1963) (Council defers commenting on matters being litigated in what eventually became Wednesbury Corporation v. Ministry of Housing and Local Government (No. 2) [1966] 2 Q.B. 275 (C.A. 1965)).

had foundered on the obstacle of locus standi.[103] The same problem would have arisen if the Packington Estate Case[104] had ever been brought to court. Another illustration of how the Council might reach beyond the courts is the 1975 case of Lake District Special Planning Board v. Secretary of State for the Environment.[105] There, the Queen's Bench Division declined to hold that post-inquiry communications between one party and the Secretary of State had violated natural justice, because there was no indication that anyone had been prejudiced. The Council on Tribunals, on the other hand, can deal with cases where there has been the appearance of unfairness, which may cause ill feeling regardless of actual harm to anyone's position.

A complaint reported in 1975[106] brings several themes together. The Oxfordshire County Council agreed to prohibit development forward of a designated line along a road that was to be widened. By oversight, however, it granted planning permission for a supermarket to extend in front of the line. After construction started, residents called the County Council's attention to this error and urged it to make an order under its statutory powers[107] modifying planning permission to require the building to be set back behind the line. The County Council refused, fearing that it would have to pay the supermarket owner a sizeable sum in compensation. The residents then asked the Secretary of State for the Environment to exercise his default powers[108] to direct the County Council to remedy its mistake. The Secretary of State held a public local inquiry to determine whether to modify planning permission and to order the construction to be

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103. See p. 53 & note 107 supra.
104. See pp. 43-44 supra.
105. (18 Feb. 1975) Times 9 (Q.B.D.).
106. 1973-74 Council on Tribunals Ann. Rep. paras. 90-98 (H.C. 289, 1975).
107. Town and Country Planning Act 1962, 10 & 11 Eliz. 2, c. 38, §§ 27 & 28.
108. Id. § 207.

placed behind the line. After the inquiry, at which the residents appeared as third parties, the inspector recommended that the buildings be set back. The Department notified them that the Secretary of State was inclined to accept this recommendation, and that it would be consulting the County Council about the proper distance. Some time later it announced that on the basis of these consultations he had decided not to exercise his default powers and hence to leave the construction in place. Since the residents were third parties, they had no remedy in a court of law. Furthermore, it was not clear that the consultations had involved new evidence of the kind prohibited by natural justice. The Council on Tribunals did not bother with these points. It noted:

> While we recognized that there were no statutory rules of procedure applicable to the inquiry in question, we felt strongly that as soon as the Department had decided to reconsider the decision to set back the building an opportunity to make further representations should have been afforded to the local residents. Nothing less would have satisfied the principle of fairness and have accorded with the spirit of the "chalk pit" rule applicable to planning inquiries. ... The Department have accepted that, although the procedure in this case was not governed by the planning inquiries Rules, an opportunity should have been given to the local residents to make further representations before a final decision was taken. They have issued additional guidance to staff, stressing among other matters the need to act in accordance with the spirit of the planning inquiries Rules in cases to which the Rules do not apply.[109]

The Council on Tribunals, it bears mentioning, was using the Chalkpit rules, as had Lord Justice Sachs in Coleen, as general indicators of fairness. More importantly for present purposes, it was taking a complaint as the occasion to alert the Department to the need to observe their "spirit."

In the above cases, the Council was operating where judicial redress was unlikely or impossible. It was serving as a supplement

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109. 1973-74 Council on Tribunals Ann. Rep. para. 97.

to the courts. But the Council has also entertained complaints that could just as easily have been brought before the judiciary. One instance occurred in 1963 when an inspector, following an inquiry, viewed property that was the subject of a planning appeal in the absence of the appellant.[110] Because the Minister ultimately agreed with the inspector's recommendation, there was no violation of the Chalkpit rules.[111] Apparently despairing of obtaining a judicial remedy, the appellant complained to the Council, which was able to persuade the Ministry to hear its comments on the new matter. Yet, ten years later landowners in another case were able to get a compulsory purchase order quashed by the Queen's Bench Division after the inspector had conducted a similar survey on her own and the Secretary of State had confirmed her recommendation.[112] Likewise, the House of Lords recently affirmed the quashing of a compulsory purchase order after the inspector had relied upon unrevealed observations about the physical condition of the premises in recommending confirmation.[113] The Council does, in other words, obtain redress for individuals where natural justice might do the same in a court of law.

Another example is the College of Further Education Case, analyzed above.[114] There, the issue was whether the Minister had differed with the inspector on a question of fact or on the weight of one factor in the overall solution. The Council decided on the latter, and so took no action beyond suggesting that the Ministry word its decisions more carefully in the future. The issues seem no different

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110. 1963 Council on Tribunals Ann. Rep. paras. 37-44 (1964).

111. Id. para. 41.

112. Hibernian Property Co. v. Secretary of State for the Environment (1973) 72 L.G.R. 351 (Q.B.D.).

113. Fairmount Investments Ltd. v. Secretary of State for the Environment [1976] 2 All E.R. 865 (H.L.).

114. See pp. 57-58 supra. See also 1965 Council on Tribunals Ann. Rep. paras. 90-92 (1966) (disagreement between Minister and inspector over effect of proposed buildings on Cambridge skyline).

from those considered by the Court of Appeal in Lord Luke, also discussed above.[115] That case likewise revolved around whether a Minister had disagreed with his inspector on a simple issue of fact and hence whether he should have allowed the objectors further rebuttal under the Chalkpit rules. On the surface, at least, the Council seems to be encroaching on the jurisdiction of the courts. One might argue in reply that, although they may deal with identical subjects, the approaches of the Council and the judiciary are quite different. The Council looks primarily to the health of the whole system of inquiry procedure. It is concerned with past administrative mistakes only to the extent that they indicate a malfunctioning of the system. Remedying them is at most incidental to its main task. The judiciary, on the other hand, is in the business of providing remedies. It prescribes for the future (and hence attends to the health of the system) only as a necessary incident of rendering judgment. Judges focus on righting specific procedural wrongs while the Council concentrates on prescribing broad rules of fairness. But to the extent that it acts like an ombudsman, investigating complaints and obtaining redress,[116] the Council on Tribunals has become a substitute for the judiciary in inquiry procedure.

The Parliamentary Commissioner for Administration. - Even if it wanted to, the Council could not act as a proper ombudsman and hence seriously impinge on the position of the courts. It is not set up to handle a large volume of complaints, nor does it have sufficient staff for thorough investigations. On the other hand, there is the British ombudsman himself, or Parliamentary Commissioner for Administration as he is more properly called. Since his establishment in 1967, has he heard complaints about inquiry procedure that might previously have come to the courts under natural justice?

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115. See pp. 56-57 supra.
116. E.g., 1963 Council on Tribunals Ann. Rep. para. 42 (1964).

The Parliamentary Commissioner is charged by statute with investigating and reporting on claims of "injustice in consequence of maladministration" referred by Members of Parliament following complaints by private citizens.[117] His jurisdiction extends over most central departments,[118] including the Department of the Environment and others charged with holding land inquiries. Although not defined in the enabling legislation, the word "maladministration" has always been presumed to include inadequate or unfair procedures.[119] One might suppose, then, that the Parliamentary Commissioner would concern himself with inquiry procedures.

The statistics bear out this conjecture. The Commissioner's initial report covering his first nine months of operations in 1967 mentions 69 cases in all, of which 13 involved land inquiries and 10 (or 15% of the total) land inquiry procedures. Of these latter, the complaints in 5 (or 50%) were found to have some merit.[120] Eight years later, the report covering the months of February, March, and April of 1975 showed a substantial increase in the total number of cases dealt with. Meanwhile, the proportion involving land inquiry procedures had remained constant. The report listed 54 cases, of which 11 concerned land inquiries and 6 (or 11% of the total) land inquiry procedures. Of these latter, the complaints in 2 (or 33%) were discovered to have been at least partially justified.[121] Inquiry procedures thus form an important part of the Parliamentary Commissioner's work.

The Commissioner, like the Council on Tribunals, investigates complaints of procedural unfairness that judges will not consider. He

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117. Parliamentary Commissioner Act 1967, c. 13, § 5(1)(a).
118. Id. § 4 & Schedule 2.
119. Annual Report of the Parliamentary Commissioner for 1967, para. 33, in 1967-68 First Report of the P.C.A. (H.C. 6, 1967).
120. See generally 1967-68 Fourth Report of the P.C.A. (H.C. 134, 1968).
121. See generally 1974-75 Fourth Report of the P.C.A. (H.C. 405, 1975).

too has shown interest in the plight of third party objectors to planning applications who have no legal rights. A case in 1974 involved an inquiry by the Department of the Environment into a Home Office proposal to use an abandoned military airfield as the site of a new prison.[122] After the proposal had been confirmed, local residents who had opposed the scheme at the inquiry complained to the Commissioner that the Department had violated natural justice[123] by, among other things, deciding the matter after engaging in secret discussions with the Home Office about the disposition of the land.[124] The Commissioner eventually found that the consultation had concerned the current administration of the property rather than planning matters. Although there had been no maladministration,[125] he had at least provided a forum where third party objectors could have their procedural complaints aired.

The Commissioner cannot investigate matters where the complainant has or has had a remedy in a court of law unless satisfied that it would be unreasonable to expect him to resort to it.[126] The cases show that this restriction has not limited the Commissioner's investigations of inquiry procedure. Time and again he has concerned himself with complaints that could have been brought before the courts under natural justice or even under recent statutory instruments codifying notions of fairness. The perennial problem of secret evidence has received its share of his attention. In 1974, for example, the Commissioner recognized that a complaint about collusion between a local authority and a departmental inspector on a planning appeal could have been brought before the High Court.[127] Nonetheless, he considered

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122. Case No. C. 20/T in 1974 Second Report of the P.C.A. 34 (H.C. 170, 1974).
123. Id. 39, at para. 23.
124. Id. 41, at para. 31.
125. Id. 41, at para. 32.
126. Parliamentary Commissioner Act 1967, c. 13, § 5(2)(b).
127. Case No. C. 160/T in 1974 First Report of the P.C.A. 29 (H.C. 2, 1974).

the case.

The clearest violation of natural justice appears in a 1970 report.[128] The Ministry of Transport held an inquiry on a proposal to take farm land by compulsory purchase to serve as the site of a motorway service area. The inspector recommended an alternative site on the ground that, although it would create more engineering difficulties, it would cause less disturbance to agriculture and could be acquired voluntarily. Ministry officials subsequently went out on their own and obtained information about the costs of construction on the recommended site, the views of the Ministry of Agriculture on the disruption to farming, and the likelihood that the owner of the land would object to a taking. The Department then reversed the inspector and confirmed the original compulsory purchase order. The first and third matters had certainly involved questions of local fact, which should have been revealed to the parties at the inquiry. The Ministry of Transport without question violated natural justice. The Commissioner eventually accepted, somewhat naively one might think, the Ministry's assurances that the post-inquiry investigations had not influenced its decision.[129] He did, however, criticize the Ministry's conduct as ill-advised.[130] Numerous other cases in the Parliamentary Commissioner's reports confirm, albeit less spectacularly, that a body other than the courts is dealing with the subject of secret evidence,[131] and may obtain redress informally for complainants who have suffered injustice from them.

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128. Case No. C. 54/L in 1969-70 Second Report of the P.C.A. 167 (H.C. 138, 1970).

129. Id. 169, at para. 16.

130. Id. 171, at para. 22(c).

131. E.g., Case No. C. 395/T in 1974 Third Report of the P.C.A. 60, 62, at paras. 12-13 (H.C. 281, 1974); Case No. C. 288/T in 1974 First Report of the P.C.A. 37, 37, at para. 1; 38, at para. 8 (H.C. 2, 1974); Case No. C. 1109/68 in 1969-70 Second Report of the P.C.A. 125, 125, at para. 4(4); 127, at para. 10 (H.C. 138, 1970); Case No. C. 1010/68 in id. 143, 148-49, at paras. 33(a),34,35.

The area of notice has also been the subject of the Commissioner's attentions. He has dealt not only with alleged failures to give statutory notice of the time and place of an inquiry,[132] but also complaints about the inadequacy of other types of notice unique to polycentric decisions. In the motorway service area case above, he criticized the Ministry of Transport for failing to notify objectors as the hearing proceeded that the engineering difficulties attending construction on the alternative site would be an important factor in its decision. As a result, objectors were denied the opportunity to direct proofs and arguments to this point.[133] Similarly, the Commissioner has dealt with allegations of failure to notify parties of possible outcomes. Thus, a 1969 complaint stated that the Ministry of Power had failed to warn objectors at an inquiry that the route finally selected for power lines was under consideration. The Commissioner eventually upheld the Ministry, finding that there had been no violation of a statutory instrument.[134] Had there been no statutory instrument, this matter could certainly have formed the subject of a natural justice complaint to the courts.

One can only speculate how many of these cases might have reached the courts had there been no Parliamentary Commissioner. Many might not have been thought worth the expense of litigation. But the Commissioner, even more than the Council on Tribunals, is providing an alternative forum to which citizens can bring complaints about inquiry procedure. This may well be beneficial for the system of administrative law as a whole in Britain. But it augurs a less important role in the

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132. Case No. C. 237/T in 1974 Second Report of the P.C.A. 47, 48-49, at paras. 6-8 (H.C. 170, 1974).

133. Case No. C. 54/L in 1969-70 Second Report of the P.C.A. 167, 170, at para. 22(b) (H.C. 138, 1970).

134. Case No. C. 614/67 in 1968-69 Second Report of the P.C.A. 99 (H.C. 129, 1969). See also Case No. C. 231/L in 1969-70 Second Report of the P.C.A. 167, 170, at para. 22(b) (H.C. 138, 1970) (alleged failure of Ministry of Transport to notify objectors of possible approval of road project without pedestrian subway).

future for judges as providers of remedies for specific instances of procedural unfairness.

Standing alone, the Parliamentary Commissioner lacks one institutional characteristic of the judiciary. His responsibility extends no farther than investigating and reporting on specific instances of injustice. Unlike judges, he does not create broad rules of fairness as an incident to dealing with particular cases. If he always acted alone, the Commissioner would find his effect limited to pointing out isolated wrongs and suggesting ad hoc reforms. But Parliament has arranged it so that he does not function in complete seclusion. By virtue of enabling legislation, the Parliamentary Commissioner is an ex officio member of the Council on Tribunals.[135] This is in part to prevent unnecessary overlap between the activities of the two.[136] But it also enables them to coordinate some of their functions. For example, the Parliamentary Commissioner was the first to investigate the Department of the Environment's behaviour in the Oxfordshire default order case presented above.[137] Sensing unfairness, he convinced the Department to reimburse the residents for their costs in attending the inquiry.[138] The Council then used his report to assess the Department's conduct from the broad perspective of the Chalkpit rules.[139]

On several occasions the Parliamentary Commissioner has funnelled the more important complaints that indicate broad defects in inquiry procedure to the Council. One case involved an inquiry into a proposed development plan amendment to authorize a southern relief road

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135. Parliamentary Commissioner Act 1967, c. 13, § 1(5), now TIA 1971, § 2(3).

136. Annual Report of the Parliamentary Commissioner for 1968, para. 26, in 1968-69 Second Report of the P.C.A. (H.C. 129, 1969); 1967 Council on Tribunals Ann. Rep. para. 19 (H.C. 316, 1968); 1965 Council on Tribunals Ann. Rep. paras. 13-15 (1966).

137. See pp. 108-09 supra.

138. Case No. C. 241/G in 1972-73 Fourth Report of the P.C.A. 46, 51, at para. 21 (H.C. 290, 1973).

139. 1973-74 Council on Tribunals Ann. Rep. paras. 90, 97 (H.C. 289, 1975).

for Oxford near Christ Church Meadow. A participant complained to the Commissioner that the report of a traffic engineering assessor had not been annexed to the inspector's opinion so that the Department of the Environment could consider it in its final decision. Sensing that the case raised general issues about the use of assessors at inquiries, the Commissioner referred the matter to the Council.[140] Likewise, in a planning appeal the Ministry of Housing and Local Government first assured an owner who wished to develop her agricultural land that a representative of the Ministry of Agriculture, Fisheries and Food would attend the inquiry; later it was unable to make good on its promise. Upon receiving a complaint, the Parliamentary Commissioner notified the Council, which subsequently reformed procedures for the giving of inter-departmental advice in inquiries.[141] Other cases considered by the Commissioner have been dealt with simultaneously by the Council from the standpoint of procedural reform.[142]

The lesson is that the Council can provide what the Commissioner by himself lacks: the ability to translate specific complaints about inquiry procedures into proposals for reform. Conversely, the Commissioner can supply what the Council by itself has limited ability to obtain: a constant flow of cases that identify points of friction in the system of inquiry procedure. Together, the two perform a function that was once the sole province of the courts - that of pinpointing specific wrongs and drawing from them broad standards of procedural fairness. The point need not be exaggerated to be valid. Certainly, where statutory instruments are inapplicable or unhelpful, judges will

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140. Case No. C. 76/T in 1974 Third Report of the P.C.A. 35, 40, at para. 19 (H.C. 281, 1974).

141. Case No. C. 192/67 in 1968-69 Second Report of the P.C.A. 53, 54, at paras. 4-6 (H.C. 129, 1969).

142. E.g., Case No. C. 147/J in 1974-75 Fourth Report of the P.C.A. 34, 36, at para. 13 (H.C. 405, 1975); Case No. C. 496/B in 1972-73 First Report of the P.C.A. 31, 34, at para. 16 (H.C. 18, 1972); Case No. C. 56/G in id. 46, 48, at paras. 18-19.

continue to hear cases and to develop natural justice. But with the Council on Tribunals and Parliamentary Commissioner performing identical functions, the occasions will be fewer. This is in marked contrast to the American experience, where no other body rivals the courts as hearers of specific complaints and prescribers of new standards of fairness. In the United States, other bodies end up ministering to the courts; in Britain, they serve increasingly as alternatives to them.

Summary of the Interaction in Great Britain

Non-judicial bodies influence natural justice both directly and indirectly. They may in effect overrule judicial decisions which they find defective. Thus, they have extricated the courts from absurd or inconsistent conclusions that attended the misuse of doctrine. Rules sponsored by the Council on Tribunals rationalized the whole area of secret evidence, which had for two decades been a source of confusion and litigation. They can also be fairer than the courts themselves. In requiring automatic revelation of the inspector's report and the giving of reasons, non-judicial bodies went beyond natural justice to guarantee the most satisfactory participation possible. Or occasionally they may provide something less for citizens, as when Parliament allowed local authorities and central departments greater freedom of consultation in development plan inquiries than natural justice seemed to permit.

But non-judicial bodies also have more indirect effects on natural justice. Parliament, no doubt aware that in the end natural justice is no more than an expression of its will, provides overall initiative. It made fairness a factor in the first place by requiring land inquiries, and then created new bodies to deal with problems that could not be solved through natural justice. It also gives guidance

in subtler ways, by providing a statutory scheme and specific language in the light of which various problems of procedure can be approached. The Council on Tribunals now ensures that statutory instruments embody general standards of fairness. The courts therefore find themselves more in the position of interpreting rules than of pioneering new procedures on their own. The rules, even when not strictly applicable, may influence the content of natural justice. The Council is assisted in its endeavoursby the fact that it and the Parliamentary Commissioner for Administration, with whom it works in consonance, deal with specific complaints of unfairness. Because others both provide remedies and prescribe standards of fairness, the courts have less occasion to use natural justice nowadays. They are well able to conserve it as a last resort guarantor of basic fairness.

CHAPTER 4

GREAT BRITAIN:

COURTS AND LAND INQUIRIES IN THE FUTURE-

APPLYING NATURAL JUSTICE TO LARGE-SCALE SCHEMES

Most precedent in this area has arisen from small-scale inquiries into the treatment of one landowner within a larger scheme. The earliest decisions resulted from protests against closing or clearance orders. Later, the focus shifted to compulsory purchase orders, and still later to appeals against the denial of planning permission. The common denominator in each case was a single piece of land whose owner objected to the intentions of the administration. Over the years the contours of an acceptable procedure have emerged, created by Parliament, the departments, and the courts, all assisted more recently by the Council on Tribunals and the Parliamentary Commissioner for Administration. Judges can in the future confine themselves to interpreting statutory instruments and to applying natural justice occasionally to new problems as they arise. One cannot, however, be so sanguine about larger land inquiries - those into a whole scheme or network, where national or regional policies are at stake and many people are likely to be affected. Both the procedures and the role of the courts in creating them remain to be satisfactorily defined.

What specifically are these large-scale inquiries? Several kinds have been touched on in previous chapters. There are inquiries into the redrawing of boundary lines for jurisdictional purposes. Under the Local Government Act 1972, the Local Government Boundary Commission can recommend the reorganization of local government bodies. The Act gives the Commission discretion to "cause a local inquiry to be held with respect to any review" of local government boundaries.[1]

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1. Local Government Act 1972, c. 70, § 61(1).

Similarly, the Police Act 1964 requires the Home Secretary, when he proposes to make an order amalgamating police forces, to "cause a local inquiry to be held in respect of" any objection by a police force being amalgamated.[2]

The siting of power plants and electricity lines is the responsibility of the Secretary of State for Energy. If a local planning authority objects to a proposal of the Central Electricity Generating Board for a plant or lines, the Secretary of State must "cause a public inquiry to be held." If anyone else objects, then the inquiry is discretionary.[3] Similar statutory provisions apply to the construction of cross-country pipe-lines, although there the same Secretary of State must grant a hearing whenever an objection is received.[4]

The Secretary of State for the Environment is for his part responsible for designating rural areas as the site for new towns. If objections are made to his proposed designation order and not withdrawn, he must "cause a public local inquiry to be held with respect to the objection."[5] The Secretary of State is also accustomed to holding an inquiry into the adoption of a master plan for a new town once the site has been selected, although this is not required by statute.[6] The same Secretary of State is entrusted with the final decision on the routing of motorways and trunk roads. If certain enumerated local or central government bodies object to a draft proposal, he must "cause a local inquiry to be held." The inquiry is discretionary if the objection is from "any other person appearing to him to be affected" to whom he gave notice of the proposed scheme.[7]

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2. Police Act 1964, c. 48, Schedule 3, para. 3.
3. Electricity Act 1957, 5 & 6 Eliz. 2, c. 48, § 34(1),(3).
4. Pipe-Lines Act 1962, 10 & 11 Eliz. 2, c. 58, § 1; First Schedule, para. 4(1).
5. New Towns Act 1965, c. 59, Schedule 1, para. 3.
6. Wraith & Lamb 69.
7. Highways Act 1959, 7 & 8 Eliz. 2, c. 25, First Schedule, para. 5.

Applications for planning permission that raise "considerations of national or regional importance" (or present unfamiliar "technical or scientific" questions) may now be referred to a "planning inquiry commission," which first identifies and investigates those considerations before holding a "local inquiry."[8] These commissions, which in England report to the Secretary of State for the Environment, are likely to deal with matters affecting many people, such as the location of new airports.

Finally, and most importantly for present purposes, there is the creation of overall plans to control development. In 1968 the single development plan which had existed since 1947 was replaced with a two-tiered system. At the county level, there must now be a "structure plan," which is a "written statement ... formulating the local planning authority's policy and general proposals in respect of the development and other use of land in that area."[9] The structure plan is to be accompanied by "such diagrams, illustrations and descriptive matter as the local planning authority think appropriate for the purpose of explaining or illustrating the proposals ... ."[10] The structure plan will deal with overall strategy, including matters like the rate and scale of population growth, the future geographical distribution of people, and general transport proposals.[11] Each structure plan will be implemented in detail by a number of "local plans," each covering a limited area within the county. According to the Act, a local plan "shall consist of a map and a written statement and shall ... formulate in such detail as the [local planning] authority think appropriate the authority's proposals for the development and other use of land in that part of their

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8. Town and Country Planning Act 1971, c. 78, §§47-49.

9. Town and Country Planning Act 1968, c. 72, § 2(3)(a), now Town and Country Planning Act 1971, c. 78, § 7(3)(a)[hereinafter cited as T&CP Act 1968 and T&CP Act 1971 respectively].

10. T&CP Act 1971, § 7(6).

11. See, e.g., Oxfordshire County Planning Department, "The First Structure Plan for Oxfordshire: A Second Situation Report" (1974).

area."[12] The local plan is therefore more likely than the structure plan to have an immediate effect upon identifiable property. In the case of a local plan, the local planning authority or, if he directs it, the Secretary of State for the Environment himself is "[f]or the purpose of considering objections made" to "cause a local inquiry or other hearing to be held."[13] For a structure plan, the Secretary of State is to "consider any objections" in writing, and then to cause "an examination in public" to be held into selected issues with selected participants.[14] As will be seen below, this examination is intended to replace the traditional inquiry.

With the exception of the siting of pipe-lines,[15] there are no statutory rules of procedure governing the above matters comparable to those controlling smaller inquiries into compulsory purchase orders and planning appeals. In the past, the administration has often used the latter as a model on which to base its conduct of the larger inquiries.[16] Experiments are currently in progress with procedures which afford citizens new modes of participation in larger planning decisions. This chapter will examine those experiments in order to discover the logic of the new procedures. It will then recommend a future role for natural justice, projecting forward what has been learned about the part played by British judges in inquiry procedure in the past.

NEW MODES OF PARTICIPATION IN LARGE-SCALE LAND INQUIRIES

The Need for New Procedures

Traditional inquiry procedures have been constructed around the single hearing. The possibilities are formulated beforehand and then

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12. T&CP Act 1971, § 11(3)(a).
13. Id. § 13(1).
14. Id. § 9(3), as amended by Town and Country Planning (Amendment) Act 1972, c. 42, § 3(1) [hereinafter cited as T&CP(A) Act 1972].
15. See Pipe-Lines (Inquiries Procedure) Rules 1967, S.I. 1967 No. 450.
16. See, e.g., Drapkin, "Development, Electricity and Power Stations: Problems in Electricity Planning Decisions," [1974] Pub. L. 220, 234 [hereinafter cited as Drapkin] (siting of power stations); Department of the Environment Booklet, "Public Inquiries into Road Proposals," §§ 8-9 (H.M.S.O. 1973) (choice of route for trunk roads).

debated at one or several formal sittings. The decision follows the hearing and is based upon matters adduced there. This works best when the task most resembles adjudication - when the scope of the problem is confined, the number of parties is few, and the number of possible outcomes limited. Such is the case with routine compulsory purchase orders and planning appeals.

However, the situation is different with large-scale inquiries. A decision involving an entire scheme is rarely made at a single instant following a hearing; nor can it be based solely on matters presented there. Decision-making is a lengthy affair, by which needs are conceived, issues defined, possibilities examined and narrowed, new problems dealt with as they arise, and a solution finally reached. In this vein, the Department of the Environment has described the way in which trunk roads are planned: "The process is one of the continuous development and refinement from a general concept to a detailed plan."[17] The body responsible for initiating a proposal will frequently seek the assistance of other public agencies and experts through a series of consultations well before the inquiry.[18] By the time the public participates in the hearing, the main issues have often been decided. Objectors are left with little to do but voice protest over the plan as put forward and to suggest minor modifications. Certain large-scale inquiries have been more prone to these problems than have others. Inquiries into new town designation orders have apparently resulted in major modifications,[19] whereas those into the siting of power plants rarely produce important changes.[20]

In reaction, objectors may press the administration to begin at

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17. Department of the Environment Circular No. Roads 30/73, "Public Participation in Road Planning," para. 17.

18. See, e.g., Burroughes, "Public Inquiries and Large-Scale Development: The Minister of Power and the Supergrid," [1970] Pub. L. 224, 228 [hereinafter cited as Burroughes] (siting of electric power lines); Drapkin 226 (siting of power stations).

19. Wraith & Lamb 71-74.

20. Drapkin 225-29, 240-41, 242.

the beginning and to conduct a full-scale reconsideration of all of the alternatives and possibilities.[21] This sort of pressure came to a head in the 1965 inquiry into the Stansted Airport special development order. There, the inspector was not satisfied that alternative locations for the airport had received sufficient attention in public. He therefore recommended an open reconsideration of the entire scheme, which was eventually undertaken by the Roskill Commission.[22] Attracting equal attention a few years later was the inquiry into the Greater London Development Plan.[23] Because of the number and scope of objections, this proceeding expanded and dragged on until, in the words of a Member of Parliament, it "looked like beating 'The Mousetrap' as the longest-running show in London."[24]

The solution is to take public participation, which has traditionally been confined to a single occasion, and to make it continuous. Those affected by the administration's scheme should be involved in each step of planning, from the beginning when strategic alternatives are first considered until the end when the detailed blue print is approved. The single inquiry must give way to a series of consultations, during which people help to formulate the proposals. Statutory hearings will be the final episode in this process, the point at which opinions are summed up and presented for the last time, rather than the sole occasion for public participation.

New Methods of Participation

The new methods of public participation in large-scale inquiries have been pioneered, appropriately enough, by non-judicial bodies. As

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21. Ganz 39-45.

22. "Report of the Commission on the Third London Airport" (H.M.S.O. 1971). See generally Ganz 45-48; Wraith & Lamb 205-08.

23. "Greater London Development Plan - Report of the Panel of Inquiry" (1973).

24. 829 Parl. Deb., H.C. (5th ser.) 1490 (1972) (Mr. John Silkin, M.P.). See also 325 Parl. Deb., H.L. (5th ser.) 793-94 (1971) (Lord Nugent of Guildford); Ganz 50-52.

will be seen below, Parliament and the departments have for the most part taken the lead, assisted by a special commission and by the Council on Tribunals. The result is a new procedural framework in which the courts may eventually have occasion to operate creatively. But before exploring the opportunities for judicial creativity, it is necessary to examine the framework a bit more closely.

Public Consultation. - Departments charged with making a polycentric decision have often consulted with other government bodies both before and after the inquiry. Communications of this sort, when engaged in secretly, have of course been a perennial source of friction between the administration and private parties whose land is the subject of a small-scale inquiry.[25] When the subject matter changes from the treatment of particular land within a scheme to the creation of the scheme itself, consultation becomes even more important. Other governmental bodies are bound to be affected by whatever conclusion is reached and often have special knowledge or points of view that can aid in the decision.[26] Occasionally, this sort of consultation is prescribed by statute in addition to an inquiry. The New Towns Act 1965 says that the Secretary of State for the Environment may make a new town designation order only "after consultation with any local authorities who appear to him to be concerned."[27] Sometimes it may even replace an inquiry. An example is the work of the Local Government Boundary Commissions for England and Wales. The system that existed by virtue of 1958 legislation required a Commission to consult various public bodies whose jurisdiction might be affected by the alteration of local government boundaries. If any objected to the resulting proposal, the Minister of Housing and Local Government was required to hold an inquiry.[28] The 1972 version of this

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25. See pp. 44-48 supra.

26. Burroughes 228 (siting of electric power lines); Drapkin 226 (siting of power stations).

27. New Towns Act 1965, c. 59, § 1(1).

28. Local Government Act 1958, 6 & 7 Eliz. 2, c. 55, §§ 21(4),(5), (6), 23(2)

Act expands the consultation process, while making the inquiry totally discretionary with the Commission.[29]

Recently, attention has turned to including the public in the process of consultation. The most noteworthy advances have been made in the field of town and country planning, where legislation requires that public consultation precede the drafting of structure and local plans. In preparing a structure plan, a local planning authority must

> take such steps as will in their opinion secure -
> (a) that adequate publicity is given in their area to the report of the survey ... and to the matters which they propose to include in the plan;
> (b) that persons who may be expected to desire an opportunity of making representations to the authority with respect to those matters are made aware that they are entitled to an opportunity of doing so; and
> (c) that such persons are given an adequate opportunity of making such representations,
> and the authority shall consider any representations made to them within the prescribed period.[30]

When the structure plan is eventually submitted, it must contain particulars of the steps taken by the authority to comply with the statute and of the way views were considered.[31] The Secretary of State for the Environment must then satisfy himself of the adequacy of the public consultation before deciding whether to approve the plan. He may return the plan to the authority if not satisfied that the consultation has been adequate.[32] Similar provisions govern the adoption of local plans.[33]

Statutory regulations require that the period of consultation last at least six weeks and ensure that certain enumerated local government bodies are included.[34] Beyond that the Department of the

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29. Local Government Act 1972, c. 70, §§ 60, 61.
30. T&CP Act 1971, § 8(1).
31. Id. § 8(3).
32. Id. § 8(4).
33. Id. § 12.
34. Town and Country Planning (Structure and Local Plans) Regulations 1974, S.I. 1974 No. 1486, rr. 5-6 [hereinafter cited as T&CP(S&LP) Regulations 1974].

Environment and the local planning authorities have been left free to work out procedures in whatever way they think best. Both have been aided in this venture by the report of the Committee on Public Participation in Planning. The Skeffington Committee, as it is popularly called, was appointed by the Minister of Housing and Local Government in March of 1968 to suggest ways of implementing the statute. Specifically, it was "to consider and report on the best methods, including publicity, of securing the participation of the public at the formative stage in the making of development plans for their area."[35] Its report, issued in 1969, suggests practical ways for local planning authorities to publicize structure and local plans as they are being formulated, and to engage the public in an active dialogue on their contents.

A Department of the Environment circular contains comments on the main recommendations of the Skeffington Committee Report and indicates how they can be implemented. The Circular emphasizes the need for local planning authorities actively to stimulate public interest and to encourage participation at the early stages of planning. The latter are encouraged to identify interested groups and to convene meetings,[36] to invite assistance from citizens on technical matters,[37] and to provide general education about the planning process,[38] presumably through public exhibitions and the like. In addition, the Circular identifies some specific duties which are related to broader principles of procedural fairness. The first comes under the general heading of "notice." The local planning authority should publish a timetable at the outset,[39] so that consultation will

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35. "People and Planning," Report of the Committee on Public Participation in Planning, para. 1 (H.M.S.O. 1969) [hereinafter cited as Skeffington Committee Report].

36. Department of the Environment Circular No. 52/72, Annex, paras. 6-9.

37. Id. Annex, para. 11.

38. Id. Annex, para. 12.

39. Id. Annex, paras. 2-3.

be seen to be a rational process, moving from the general to the particular, with suitable pauses for public comment.[40] Notice must be continuous, occurring anew at various stages, as fresh issues emerge and possible solutions change.[41] The Circular also suggests that at the end of the process the local planning authority give an explanation of what the representations have achieved and why they have or have not been accepted.[42] This is of course the old requirement of reasons, appearing for the first time in a new setting.

The Department of the Environment also engages in prior public consultation on trunk road proposals, which it must ultimately confirm or reject. This consultation is non-statutory, having been undertaken voluntarily by the Department at the urging of the Council on Tribunals, in order to give citizens a chance to influence proposals before relatively firm draft schemes are prepared.[43] Practice here is likewise governed by a circular, which resembles a code of procedure somewhat. Consultation is to occur at two stages - first, when the general area (or "corridor") of the road is being considered, and, second, when the exact route within the corridor is being chosen.[44] The parallel of the corridor designation to a structure plan and of the route designation to a local plan is hard to resist.[45] Public consultation at the former stage is likely to involve general issues having to do more with strategy; at the latter stage it will be more specific, as identifiable landowners will be directly affected.

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40. Id. Annex, para. 4.
41. Id. Annex, para. 1.
42. Id. Annex, para. 10.
43. 1972-73 Council on Tribunals Ann. Rep. paras. 88-89 (H.C. 82, 1974).
44. Department of the Environment Circular No. Roads 30/73, Appendix 2, para. 9.
45. See id., "Public Participation in Road Planning," para. 11.

The procedures prescribed by the Circular for both corridor and route designations seem clearly to have been influenced by the Skeffington Committee Report. Indeed, they are remarkably similar to those thought appropriate for structure and local plans. The Circular first ensures that the public receives proper notice of the consultation process. Specifically, it provides for the publication of a timetable indicating the future dates for the issuance of a "consultation statement," for the holding of a "public exhibition," and for the submission of comments.[46] Soon afterwards, the Department is to issue a "consultation statement," which will constitute initial notice of the issues and alternatives.[47] This should include information about traffic needs, describe various options, and explain which ones have been provisionally rejected, along with the reasons why. The statement should move on to assess the effectiveness of the alternatives still being considered in meeting traffic needs, state the estimated costs, and give the engineering details of possible designs. It should also contain information about the likely environmental impact and the approximate numbers of landowners affected.[48] The consultation statement should conclude with an explanation of the alternative favoured, if any.[49] The goal is to provide people with something to sink their teeth into, to furnish a starting point for debate. Later, the Department is to hold a public exhibition to ensure that the proposals reach a wide audience. Possibilities will be explained, major steps in the timetable pointed out, and the national and regional context shown, all in laymen's terms.[50] At the end of the period allowed for the submission of views, the Department is to announce "which alternative is to be the subject

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46. Id. Appendix 2, para. 2.
47. Id. Appendix 2, para. 6.
48. Id. Appendix 2, para. 3.
49. Id. Appendix 2, para. 5.
50. Id. Appendix 2, para. 6.

of further detailed work" with a view to eventual inclusion in a draft order. The announcement will contain a summary of the views expressed and the reasons for the choice made.[51] Reasons are thus thought as necessary to the consultation process on trunk roads as to that on structure and local plans. As noted above,[52] eventually there will be an inquiry at which the draft order is considered. What seems evident is that various circulars governing public consultation use the same sorts of proceduresto ensure adequate participation.

Public Hearings. - Public consultation usually is undertaken as a prelude to some sort of more formal hearing, where the proposal provisionally settled on can be subjected to more intense examination. As noted above, this hearing normally takes the form of the traditional inquiry. However, the administration is now experimenting with a more relaxed proceeding more in tune with the special requirements of a large-scale scheme. The most significant changes have to do with structure plans. Under the Town and Country Planning Act 1968, the responsible Minister was required to "afford to any persons whose objections [to a structure plan] are not withdrawn an opportunity of appearing before, and being heard by, a person appointed by him for the purpose."[53] Regulations[54] and subsequent statements in Parliament[55] made it clear that this hearing was to take the form of the traditional public local inquiry.

The Town and Country Planning (Amendment) Act 1972 altered this. In place of the traditional inquiry, it instructed the Secretary of State for the Environment to "consider any objections to the plan, so far as they are made in accordance with regulations," and then to

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51. Id. Appendix 2, para. 7.
52. See p. 121 & note 7 supra.
53. T&CP Act 1968, § 4(3)(b).
54. T&CP(S&LP) Regulations 1971, S.I. 1971 No. 1109, r. 23.
55. 829 Parl. Deb., H.C. (5th ser.) 1481 (1972) (Mr. Graham Page, M.P., Minister for Local Government and Development).

"cause a person or persons appointed by him for the purpose to hold an examination in public of such matters affecting his consideration of the plan as he considers ought to be so examined."[56] The Secretary of State is still bound under the statute to weigh all objections to the structure plan. Only now objectors have no absolute right to a hearing. According to regulations, the objections are to be in writing.[57] The Secretary of State will then hold a hearing on those matters which he thinks should be examined in greater detail. The Act confirms that he may choose the participants as well as the issues at this examination in public.[58] The main difference from the traditional inquiry, then, is lack of an automatic right for objectors to appear at the hearing and present whatever views they have.

The Department of the Environment has promulgated an informal, non-statutory "Code of Practice" to govern the receipt of written objections and the conduct of the public examination.[59] The Code is divided into three parts setting out procedures to be followed before, during, and after the examination. Before the examination, the main task for the Department is to select the issues and participants for the hearing. Issues are to be chosen on the basis of the structure plan itself, the local planning authority's statement about publicity and public consultation (which presumably will pinpoint controversial matters), and the written objections received.[60] Participants will be selected according to their ability to cast light on the particular issues. Thus, those representing larger bodies of opinion and having

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56. T&CP(A) Act 1972, § 3(1), amending T&CP Act 1971, § 9(3).
57. T&CP(S&LP) Regulations 1974, rr. 20, 22; Schedule 3, Forms 1, 3.
58. T&CP Act 1971, § 9(5), as amended by T&CP(A) Act 1972, § 3(1).
59. Department of the Environment Booklet, "Structure Plans: The Examination in Public," part 3 (H.M.S.O. 1973) [hereinafter cited as Code of Practice].
60. Code of Practice §§ 3.10-3.26.

special expertise are likely to be favoured.[61] Afterwards, the Department will give notice of the issues and participants provisionally decided upon, and will entertain written comments on its choices before publishing the final list.[62] During the examination the chairman of the panel is given discretion under the statute to add participants.[63] The hearing itself is to be conducted not as an adversary contest, but rather as a "probing discussion."[64] In accordance with this idea, both panel and participants will sit together around a table.[65] This is in marked contrast to the court-like arrangement of most inquiries. After the examination, the process in many ways begins to parallel the familiar procedure of inquiries. The panel is directed under the Code to make a report to the Secretary of State, assessing the matters selected for the examination in light of the discussions held.[66] The Secretary of State must publish for comment any new information received after the examination which leads him to take a decision he would not otherwise have taken.[67] Beyond this, he is to give special notice of material modifications of the plan and to provide further opportunity for comments (presumably written).[68] The Secretary of State is finally to publish a "reasoned decision letter"[69] in fulfillment of the statutory command that he "give such statement as he considers appropriate of the reasons governing his decision."[70] Simultaneously, the panel's report is to be published,[71] just as an inspector's report is published

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61. Id. §§ 3.28-3.30.
62. Id. § 3.35.
63. T&CP Act 1971, § 9(5), as amended by T&CP(A) Act 1972, § 3(1).
64. Department of the Environment Booklet, "Structure Plans: The Examination in Public," § 1.3 (H.M.S.O. 1973); Code of Practice §§ 3.12, 3.45.
65. Code of Practice § 3.50.
66. Id. § 3.57.
67. Id. § 3.59.
68. T&CP(S&LP) Regulations 1974, r. 25; Code of Practice § 3.60.
69. Code of Practice § 3.61.
70. T&CP Act 1971, § 9(8), as amended by T&CP(A) Act 1972, § 3(1).
71. Code of Practice § 3.61.

along with the ministerial decision.

Passing from structure to local plans brings one into more familiar territory. As already noted, local plans will go into detail and are likely to have an identifiable effect on particular property. This led the Government to suggest that the safeguards of the traditional inquiry be maintained, even as it was recommending a more relaxed proceeding for structure plans.[72] Accordingly, no change was made in the Town and Country Planning Act 1971, which requires a local planning authority to "cause a local inquiry or other hearing to be held" for "the purpose of considering objections to a local plan."[73] Or the Secretary of State may direct that the local plan be referred to him for purposes of holding the inquiry.[74] Regulations confirm that any inquiry into a local plan shall be a "public local inquiry."[75] Although no formal or informal procedures have been issued, it is safe to assume that hearings on local plans will be conducted in the normal manner of small-scale inquiries: relevant local facts will be adduced as evidence, policy brought in and explained, and adjustments suggested and examined. The difference between inquiries into local plans and more traditional inquiries will doubtless lie in their context. Unlike the latter, the former do not stand alone as the single occasion for participation by those to be affected by the polycentric decision. Rather, they are the end point of a long process that began with consultation on the structure plan, moved through written objections and the examination in public, and continued with consultation on the local plan. They should accordingly escape the pressure that has been exerted by the public in the past to expand inquiries into a reconsideration of matters from the beginning.

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72. See 829 Parl. Deb., H.C. (5th ser.) 1481-82 (1972) (Mr. Graham Page, M.P., Minister for Local Government and Development).
73. T&CP Act 1971, § 13(1).
74. Id. § 14(4)(c), as amended by T&CP(A) Act 1972, § 3(2).
75. T&CP(S&LP) Regulations 1974, r. 31.

THE FUTURE ROLE OF THE COURTS

What role, if any, should judges play in these new procedures? At first glance, precedent does not seem to hold much hope for judicial involvement. On the few occasions where British courts have been asked to apply natural justice to large-scale inquiries, their response has been ambiguous. As explained in the last chapter,[76] they have been led astray by the obvious lack of a lis, or sharply-defined contest. Accordingly, they have been prone to adopt approaches that emphasize the role of the hearing in informing the minister at the expense of its role in protecting objectors. This has resulted in a largely negative view of their own potential contribution. The decisions have made it clear that natural justice does not apply in the same way as it does to small-scale inquiries, but give little indication of what procedures it might actually require.

Commentators who have touched on the subject are not particularly encouraging about the future of natural justice in these large-scale land matters. Gabrielle Ganz identifies natural justice with the adversary process, which she rightly sees as playing no role in inquiries of this sort. She concludes, therefore, that the courts will be irrelevant to these new procedures.[77] Professor de Smith, no foe of judicial review, speaks of the audi alteram partem rule being excluded, at least in part, from structure and local plan hearings.[78] These comments may, however, be unduly pessimistic. Given a broader perspective on the role of the courts in the British system, there is still a place for natural justice. Other bodies have created the framework of a new system of participation. Parliament has prescribed public consultation for structure and local plans, and a new

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76. See pp. 88-97 supra.
77. Ganz 1-2, 100-01.
78. de Smith, Judicial Review 161. See also McAuslan, "The Plan, the Planners and the Lawyers," [1971] Pub. L. 247, 262-66 (irrelevance of traditional natural justice doctrines to large-scale planning).

kind of hearing for structure plans. The administration has, with the advice of bodies like the Skeffington Committee, created informal procedures on an experimental basis. And as will be seen below, the Council on Tribunals has repeatedly given guidance to ensure that particular practices are fair. If the past is any guide, the Council will be aided in the future by complaints made to the Parliamentary Commissioner for Administration on any failings of these informal procedures. Within the logic of the procedural framework being created by others, the British courts can make a contribution.

Public Consultation

The Application of Natural Justice to Public Consultation.

The current rules of natural justice are based upon the assumption that the only opportunity for public participation comes during the inquiry hearing. Since Parliament clearly intends public consultation (where it is required by statute) as a procedural protection for citizens, judges should be ready to use natural justice to define its essentials. The situation is somewhat reminiscent of the 1920's, when Parliament ordered that an owner whose land was being made subject to a clearance order be given an "inquiry," but said nothing more. Now, as then, the challenge for judges is to identify what is basic to participation.

Although there has been some talk about making statutory the informal consultation that accompanies trunk road proposals,[79] the only public consultation with current legislative sanction is that preceding the promulgation of structure and local plans. It is best to begin by analyzing statutory language. Consultation with other public bodies is normally required in absolute terms. For example, the Local Government Act 1972 states that a Local Government Boundary Commission, in reviewing the adequacy of current boundaries, "shall consult the council of any local government area affected by the review."[80]

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79. See Department of the Environment Circular No. Roads. 30/73, para. 27.
80. Local Government Act 1972, c. 70, § 60(2)(a)(i).

On the other hand, consultation of the public is often phrased in more discretionary terms. The same Act states that the Commission "shall consult such other persons as they think fit."[81] The Town and Country Planning Act 1971 similarly says that local planning authorities are to "take such steps as will in their opinion secure" adequate public participation in the creation of a draft structure or local plan.[82] Furthermore, the Secretary of State for the Environment is to decide for himself, at least in the first instance, whether the duty to consult has been adequately filfilled. In the case of a structure plan, the Secretary of State is to proceed to consider the plan if "satisfied that the purposes" of the subsections on public consultation have been achieved.[83] For local plans, he "may ... direct the [local planning] authority not to take any further steps for the adoption of the plan" if "not satisfied that the purposes" of the subsection have been attained.[84]

By its own terms the statute gives the administration latitude to experiment with various methods of consultation. In the first instance, at least, it is the local planning authority and the Department of the Environment who should ensure the fairness of public consultation. But the statute should not be read as giving them unbridled discretion. If called upon, the courts must be prepared to confine that discretion within limits. There is good precedent for this in the 1971 case of Agricultural, Horticultural and Forestry Industry Training Board v. Aylesbury Mushrooms Ltd.[85] The Industrial Training Act 1964 empowered the Minister of Labour to set up industry training boards to arrange for the training of employees

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81. Id. § 60(2)(a)(iii).
82. T&CP Act 1971, §§ 8(1), 12(1) [emphasis added].
83. Id. § 8(4).
84. Id. § 12(4).
85. [1972] 1 W.L.R. 190 (Q.B.D. 1971).

in selected industries, to be financed by levies on employers. Before making an order for a particular industry, the Minister had, according to the Act, to "consult any organisation or association of organisations appearing to him to be representative of substantial numbers of employers engaging in the activities concerned."[86] The Minister made an order covering the agricultural, horticultural, and forestry industries without consulting the Mushroom Growers' Association, an organization representing approximately eighty-five per cent of all mushroom growers in England and Wales. Although representatives of the Minister indicated that the Association was not one "appearing to him to be representative of substantial numbers of employers," the Queen's Bench Division held that the Minister was under a duty to consult it. Because he had failed in this duty, the order was inapplicable to members of the Association. In delivering judgment, Mr. Justice Donaldson emphasized "the importance which attaches to consultation in the scheme of the Industrial Training Act 1964, which seems to be based upon the healthy principle of 'no taxation without consultation.'"[87] The lesson is that courts retain the power to define the parameters of even a subjectively-worded duty to consult. The reason, as the Aylesbury Mushrooms court indicated, is the presumed importance of this type of participation to the legitimacy of a scheme which affects property interests.

There is further support for this in dictum of Lord Justice Sachs in the 1970 case of Sinfield v. London Transport Executive.[88] The Transport (London) Act 1969 provided that, where it proposed to "vary a bus service," the London Transport Executive "shall ... consult with the council ... within whose area that route ... is situated."[89] The Camden London Borough Council alleged that the Executive had

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86. Industrial Training Act 1964, c. 16, § 1(4) [emphasis added].
87. [1972] 1 W.L.R. at 195.
88. [1970] Ch. 550 (C.A.).
89. Transport (London) Act 1969, c. 35, § 23(3).

illegally failed to consult it about inconvenience to transport passengers prior to withdrawing certain routes and varying others that passed through its area. The Court of Appeal held unanimously that the alterations had been completed before the Act along with its consultation provisions came into effect.[90] But it accepted the invitation of counsel to express an opinion on whether the Executive was under a duty to consult borough councils not only about traffic problems caused by alterations, but also about the inconvenience to transport passengers. The court read the consultation sections of the Act to refer only to traffic considerations, in part because another section of the Act (section 14) provided a mechanism by which inconvenienced transport users could object after the changes came into effect. Lord Justice Sachs went out of his way, however, to recommend a presumption in favour of giving a broad reading to the rights of consultation granted at a preliminary stage in the decision-making process. It had been suggested, he said, that the Transport Executive could disregard at will the representations made during the preliminary consultation. He continued:

> If that was intended to intimate that the executive merely looked on consultations as being an opportunity for those consulted to make ineffective representations, it would represent an approach that, to put it mildly, cannot be supported. Consultations can be of real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal. I start accordingly from the viewpoint that any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals - before the mind of the executive becomes unduly fixed.
>
> Surely a right to be consulted is something which one would have expected to find in the provisions of the Act of 1969 so that the ... councils would have an opportunity to make appropriate representations before changes in bus service were brought into operation. Moreover, it would seem essential to them that such consultation should be on a broad basis so

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90. [1970] Ch. at 555-56, 557-58, 560.

> as to enable them to deal with any important question that touched either their interests or those who lived in their area.
>
> It follows that only with reluctance would one so interpret the provisions ... so as to confine any consultation to what have been described as "traffic considerations." ... In that event, there is no provision whatever for consultation with anyone concerned with the interests of users whilst fresh proposals are at a formative stage. The voice of such users will in practice only be heard by virtue of section 14 when the changes have come into operation - and everyone familiar with the administrative process knows how much more difficult it is to get a decision reversed or modified once it has come into effect.[91]

To be sure, Lord Justice Sachs was beginning with a duty to consult a public body expressed in absolute terms. But his words have broader significance for more discretionary types of public consultation in two respects. First, they intimate a general presumption in favour of giving a duty to consult broad application. The underlying policy is the same as that which attends natural justice - to protect the participation of that segment of the public which will be affected by the plan. Second, Lord Justice Sachs has identified the unique attributes of consultation in a procedural scheme - it allows outsiders to influence administrative thinking at the formative stages of a proposal. Thus, as he recognizes, participation in this process has value over and above the right to comment on or to object to a proposal that has already been tentatively settled on. The dictum in Sinfield can hence serve as a starting point for the development of unique natural justice doctrines for public consultation.

Lord Justice Sachs' opinion can also be read as saying that the right to be consulted may become more important as the opportunity to influence the administrative decision at a later date diminishes. The courts may accordingly set a higher standard of fairness when the

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91. Id. at 558-59.

ultimate formal hearing is either limited in scope or non-existent. Although public transport users might have a chance to object to the new bus scheme later under section 14, the Camden London Borough Council did not. Its only chance to be heard was during preliminary consultations. If these were confined solely to the problem of traffic flow, the Council would

> literally have no right at all to be heard on matters which may concern [its] own vital interests. The provision of, or failure to provide, proper transport facilities may seriously affect a council in more than one way. For instance, a new route may render noisy a previously quiet residential district and reduce the rateable values there: lack of transport can affect the ability of a borough to attract trade or commerce: indeed, transport facilities or the lack of them can do much to change the character of a neighbourhood. It seems clearly right and in accordance with the normal policy of the legislature in such matters that councils should be able to make heard the various interests of themselves in their corporate capacities and of their ratepayers.[92]

The courts should implement the "normal policy of the legislature" by giving broader scope to the right of consultation the less chance there is for someone to make himself heard in other ways. This was in fact suggested by counsel in the 1954 case of Re Union of the Benefices of Whippingham and East Cowes, St. James.[93] A 1923 Church Measure had required a "local inquiry" whenever the Church Commissioners for England proposed to amalgamate benefices.[94] Its 1949 successor dropped the duty to hold an inquiry in favour of "consultation so far as is practicable with ... the parochial church councils concerned."[95] The issue was whether the Church Commissioners had fulfilled their duty to consult the Whippingham Parochial Church Council, which stood to

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92. Id. at 559.
93. [1954] A.C. 245 (P.C.).
94. Union of Benefices Measure 1923, 14 & 15 Geo. 5, No. 2, § 2(1).
95. Pastoral Reorganization Measure 1949, 12 & 13 Geo. 6, No. 3, § 3(1).

be merged with two others. Counsel for Whippingham argued for a strict view of the statutory requirement of consultation on the ground that it was a substitute for the former inquiry hearing.[96] The court never took up this suggestion, eventually finding that the consultation given had been adequate. Modern courts, however, more attentive to Lord Justice Sachs' dictum in Sinfield, should be more receptive. They could, for example, apply this sort of thinking to the public consultation preceding the submission of structure plans. Now that the final public local inquiry has been replaced by the examination in public, the preliminary consultation will be the only chance that most citizens have to confront officials in person. The courts should therefore make a special effort to ensure adequate participation at this stage.

Particular Consultation Procedures that Natural Justice Might Require. - Statute could combine with precedent, then, to bring natural justice to public consultation. Judges would have to identify the prerequisites of adequate participation in the early stages of administrative decision-making. As always, their goal would be to create a series of presumptions about parliamentary intentions as to procedural fairness.

First, judges must be attentive to the timing of public consultation. With structure and local plans, it must obviously be completed well before the formal hearing: the Secretary of State must approve the consultation process before holding a public examination on the structure plan or allowing the local planning authority to hold an inquiry into the local plan.[97] But if a statute is ever silent, courts should ensure that consultation occurs at a sufficiently early date to make public participation in the formulation of the scheme meaningful. Two cases involving the consultation of public bodies

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96. [1954] A.C. at 246.
97. T&CP Act 1971 §§ 8(4), 12(4).

illustrate the point. The New Towns Act 1965 empowers the Secretary of State for the Environment to make a new town designation order "after consultation with any local authorities who appear to him to be concerned" and after causing "a public local inquiry to be held with respect to" any objection not withdrawn.[98] Both Rollo v. Minister of Town and Country Planning[99] and Fletcher v. Minister of Town and Country Planning[100] were decided in 1947 under identical language of a previous statute. In both cases residents of areas designated as new town sites sought to have the designation orders quashed. Among other things, they complained that the statutory consultation had not been completed before the issuance of the draft orders which were to serve as the basis for the inquiries.[101] Mr. Justice Morris disagreed in each case, saying that, while consultation might be "fruitful and satisfactory" before the issuance of a draft order, it need only occur sometime before the Minister made his final decision.[102] In this he was supported by the Court of Appeal.[103]

It would be unfortunate if these decisions were taken as judicial approval of consultation which occurred before the Minister made his final decision, but after the draft order had been issued and the inquiry held. Consultation, if it is to mean anything, must occur at an early stage before administrative attitudes harden in favour of a provisional order. When it is required by Parliament in addition to an inquiry, its only purpose can be to allow parties to influence the formulation of proposals. The inquiry will only afford

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98. New Towns Act 1965, c. 59, § 1(1); Schedule 1, § 3.
99. [1947] 2 All E.R. 488 (K.B.D.), aff'd [1948] 1 All E.R. 13 (C.A. 1947).
100. [1947] 2 All E.R. 496 (K.B.D.).
101. Rollo [1947] 2 All E.R. at 491; Fletcher [1947] 2 All E.R. at 499.
102. Rollo [1947] 2 All E.R. at 494. See also Fletcher [1947] 2 All E.R. at 500.
103. Rollo [1948] 1 All E.R. at 17 (C.A.).

an opportunity to oppose the proposals as formulated. This is what Lord Justice Sachs meant in Sinfield when he stated that, once a plan was provisionally agreed upon, it might be "too late to avoid the tendency of those in a big organisation to sit comfortably back on a fait accompli and point to the undesirability of another change."[104] Rollo and Fletcher may themselves be acceptable because in either case at least some consultation had apparently occurred before the draft orders were issued. The courts could surely have investigated further, however, to see exactly how much. In sum, judges should be prepared to use natural justice to see that consultation occurs at a sufficiently early stage to make it worthwhile. Otherwise, people may be deprived of participation while the decision-making process is still fluid.

In line with this, courts should be ready to require administrative bodies to divide public consultation into logical stages, proceeding from the consideration of the most general issues to the choice of specific alternatives. This is to prevent the public from being shut out until the later stages when the possibilities have been drastically narrowed. The Department of the Environment has already adopted this requirement on its own, directing its regional offices and local planning authorities to proceed by steps in consulting the public, making decisions on the basis of prior consultation and then pausing to hear views on choices that are to be made at the next stage.[105]

The British courts have employed natural justice in the past to require adequate notice. Notice of consultation should be woven into this tradition. The Town and Country Planning Act 1971 places special responsibility on the local planning authorities to ensure that "adequate publicity is given in their area to the report of

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104. [1970] Ch. at 559.
105. See pp. 128-29 & note 40, p. 130 & note 46 supra.

survey ... and to the matters which they propose to include in the plan" and that "persons who may be expected to desire an opportunity of making representations to the authority with respect to those matters are made aware that they are entitled to an opportunity of doing so."[106] But even when the statute is less explicit, the courts are likely to look closely at the adequacy of the notice given. In Fletcher the court found that the local authorities being consulted on the designation of a new town site had understood well enough what was afoot and had realized that their views were being sought. Nonetheless, it criticized the Minister's letter announcing the commencement of consultation. It did

> not state that the Minister would seek at the conference the views, opinions and criticisms of local authorities, nor that the purpose of the proposed conference was that ... the Minister would actively seek the guidance of those with local knowledge so as to know whether he was on the right lines or whether he should retract his tentative ideas.[107]

Natural justice can now require a positive program of publicity that seeks to spur public interest and draw people into the early stages of planning.

Natural justice can also require that the notice include enough to serve as a basis for early discussions. What is needed is a document of some sort that introduces the issues, presents possible strategies, and suggests ways of implementing them. This would simply be an expanded version of the "case" which the administration is required to present on its own behalf at small-scale inquiries.[108] In deciding the appeal from the High Court decision in Rollo, Lord Justice Bucknill noted that, when public bodies are being consulted on new town designation orders, "the Minister must supply sufficient

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106. T&CP Act 1971, § 8(1) (structure plans). See also id. § 12(1) (local plans).

107. [1947] 2 All E.R. at 500. See also Whippingham [1954] A.C. at 254.

108. See pp. 61-67 supra.

information to the local authority to enable them to tender advice."[109] It would seem even more necessary to "supply sufficient information" when it is the public, with its lack of expertise, which is being consulted. The "consultation statement" supplied by the Department of the Environment at an early stage in trunk road cases[110] would probably satisfy this need.

As with inquiries, natural justice should require that the notice of public consultation be continuous - that is, that it not be confined to the beginning, but rather that it recur as often as issues change or new choices emerge. Since matters are by definition fluid at the formative stages of a large-scale proposal, the courts should pay special heed that notice keeps pace with events.

Passing beyond notice, natural justice should compel the administrative body consulting the public to institute some formal system for receiving written or oral comments. It would certainly be sufficient if a form were published upon which written comments could be made. A public exhibition where people might voice their views directly to officials in a personal, informal way would satisfy the need to receive oral representations.

Lastly, natural justice should require some sort of announcement at the end of the results and the reasons for them. This basic element of fairness has already been accepted by the Department of the Environment, which has directed in circulars that reasons be given at the close of public consultation on structure and local plans on the one hand and on trunk road schemes on the other.[111] Natural justice may have been lax in not compelling reasons in the past, but this should not keep it from moving now. Reasons are especially necessary when people participate on a continuous basis and do not have

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109. [1948] 1 All E.R. at 17 (C.A.).
110. See p. 130 supra.
111. See pp. 129, 130-31 supra.

personal contact with those responsible for provisional decisions. In that case, reasons become the only way for them to gauge the effect of their representations on the decision-makers.

The Examination in Public

Consultation can constitute the sole occasion for public participation. Alternatively it can be used in tandem with other methods for allowing people a voice in decisions affecting them. The newest of these is the examination in public being pioneered with structure plans. This novel procedure is characterized by an unlimited opportunity to make formal objections to the Secretary of State in writing, followed by an oral hearing on selected issues with selected participants. If successful with structure plans, the examination in public could become the standard means for public participation in strategic determinations. Those that come most readily to mind are decisions about trunk road corridors (as opposed to routes within corridors) and power plant siting. What role would natural justice have here?

Written Comments and Objections. - The Town and Country Planning Act 1971 states that the Secretary of State for the Environment "shall, before determining whether or not to approve [a structure plan] - consider any objections to the plan, so far as they are made in accordance with regulations under this part of the Act."[112] Under the regulations, objections are to be made in writing to the Secretary of State.[113] The courts will of course enforce the right of everyone to have their comments on the structure plan considered. Not only will this result in points of view being put for their own sake, but it will identify issues and participants for inclusion in the later examination in public.

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112. T&CP Act 1971, § 9(3)(a), as amended by T&CP(A) Act 1972, § 3(1).

113. T&CP(S&LP) Regulations 1974, rr. 20, 22; Schedule 3, Forms

Natural justice can ensure that adequate notice of a special kind is given of the opportunity to make written comments. It has long been recognized that the bifurcation of the planning process into structure and local plans may create a difficulty: what looks like a purely strategic decision in a structure plan may, when all is known, have an identifiable impact on individual land. For example, there may be general agreement at the structure plan stage that there is a need to keep express traffic out of the centre of a city; consequently, a ring road may be agreed upon in principle. When the time comes in the local plan to decide exactly where, the topography and pattern of development may allow only one route. The interests of the property owners along that route have been effectively disposed of at the structure plan stage. By the time the local plan is considered, it will be too late to object effectively. Concern that objections may "fall between" the structure and local plan in this way has been voiced in Parliament[114] and repeatedly by the Council on Tribunals.[115] The Department of the Environment devoted a whole section of an informational booklet to it,[116] urging local planning authorities to make clear the exact implications of the structure plan at the structure plan stage.[117] The courts should ensure that, where they can be identified, people whose proprietary interests will be directly affected by the structure plan are notified, so that they can submit their comments in writing to the Secretary of State before it is too late.

The Examination Hearing. - By statute, the Secretary of State

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114. 325 Parl. Deb., H.L. (5th ser.) 780-81 (1971) (Viscount Colville of Culross).

115. 1972-73 Council on Tribunals Ann. Rep. para. 85 (H.C. 82, 1974); 1971-72 Council on Tribunals Ann. Rep. para. 28 (H.C. 13, 1972); 1970-71 Council on Tribunals Ann. Rep. para. 78 (H.C. 26, 1971); 1967 Council on Tribunals Ann. Rep. para. 28 (H.C. 316, 1968).

116. Department of the Environment Booklet, "Structure Plans: The Examination in Public," part 4 (H.M.S.O. 1973).

117. Id. § 4.8.

is to cause to be held "an examination in public of such matters affecting his consideration of the [structure] plan as he considers ought to be so examined." In addition, the "Secretary of State shall not be required to secure to any local authority or other person a right to be heard at any examination ..., and the bodies and persons who may take part therein shall be such only as he may ... in his discretion invite to do so."[118] Echoing the public consultation sections, these provisions appear to leave the selection of both issues and participants at the examination in public wholly to the discretion of the Secretary of State. The examination, unlike the traditional inquiry, is not meant to satisfy the basic right of objectors to be "heard." The written comments, coupled with the prior consultation, do that. The purpose is more to help the Secretary of State to inform himself before reviewing the structure plan.

And yet common sense says that matters cannot be wholly at the discretion of the Secretary of State. The courts must retain a role in ensuring that minimum standards of fairness are adhered to. The statute places a duty on the Secretary of State to hold some sort of examination in public. Surely there are some issues or points of view, and possibly even some participants, which he excludes from the hearing at the risk of breaching that duty. The Council on Tribunals, concerned as always with the fairness of procedures, has expressed uneasiness about precisely this aspect of the new examination.[119] It is the business of the courts, if called upon, to identify that point at which the proceeding ceases to be an "examination in public" as required by statute.

The examination provides a focus for complaints in a way that written comments do not. Like any oral hearing it allows for a certain

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118. T&CP Act 1971, § 9(3)(b),(5), as amended by T&CP(A) Act 1972, § 3(1).

119. 1971-72 Council on Tribunals Ann. Rep. para. 28 (H.C. 13, 1972).

give-and-take which may lead to suggestions of adjustment and compromise. These are made all the more likely by the Department of the Environment's casting of the examination in the mould of a "probing discussion" rather than of an adversary contest.[120] Could the courts identify some issues which it would be an abuse of discretion not to submit to "probing discussion"? The most likely would be those which involved substantial controversy and which had ramifications too complicated and far-reaching to be treated adequately in written comments. The Department of the Environment itself recommends that "issues involving substantial controversy which has not been resolved" be included in the examination.[121] It is equally conceivable that some points of view on a certain issue could not be lawfully excluded from the examination; to do so would prevent what ensued from being any sort of "discussion." If this is so, then organizations and even individuals who are alone competent to put that point of view cannot be kept out. Representatives of those who stand to be deprived of real property by the structure plan could in this way be ensured an opportunity to rivet the Secretary of State's attention on their case at the hearing: the attitudes of those few with proprietary interests at stake could be at least one factor in some structure plan decisions. Despite the statutory language to the contrary, then, the courts might be acting within their province if they forced certain persons to be heard. It would be a case of sacrificing specific statutory language in order to fulfill the overall legislative desire for an "examination."

The courts might look more leniently on the exclusion of particular issues, points of view, or parties if the Department demonstrates that it has complied with its self-imposed rule allowing comment on the preliminary selection of issues and participants.[122] In effect

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120. See p. 133 & note 64 supra.
121. Code of Practice § 3.13.
122. See p. 133 & note 62 supra.

they would be trading away a stricter view of what could be excluded in return for a procedure which makes it less likely that the Secretary of State will abuse his discretion here.

During the examination itself, the courts can require certain specific procedures. They need only draw on their prior experience with inquiries, making certain to modify doctrines where necessary. The first area is that of notice to participants of the issues to be explored and of the other parties who will be present. If the Department has done its job well, notice of the examination will really constitute the final phase of a long, continuous process of notice and publicity that began with the earliest consultation. Formal regulations specify the exact notice of the hearing to be given,[123] and then go on to require that the Secretary of State give further notice after the close of the examination of any material modifications that he proposes to make to the structure plan.[124] The need for continuous reappraisal of issues and possible outcomes after the beginning of the hearing is thus recognized by statutory instrument. The courts should be prepared to use natural justice, where necessary, to ensure that participants understand as the hearing progresses what is at stake and what factors are likely to influence the Department.

The courts might also consider a modified version of the Chalkpit rules for the examination in public. Of course, it will be neither desirable nor possible to confine all findings of local or other fact to matters adduced at the hearing. The hearing will be only the end point of a long process of fact finding. But judges could use natural justice to compel the revelation for comment of any new information that becomes available after the close of the examination and that leads the Secretary of State to alter his decision. The Department of the Environment has imposed this requirement upon itself in its Code

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123. T&CP(S&LP) Regulations 1974, r. 24.
124. Id. r. 25.

of Practice.[125] Because it lies squarely within the traditions of natural justice, the courts should be prepared to impose it on their own upon any errant department.

The same arguments that were made for the revelation of an inspector's report following an inquiry[126] apply to the revelation of the panel's report following a public examination. True, the panel does not make conclusive findings of local fact in the manner of an inspector. But parties should still be allowed to see the effect of their arguments on those who heard them. Parliament apparently intended the panel's report to be revealed at some point.[127] The Council on Tribunals for its part pressed the Department of the Environment to reveal the report and received assurances that this would become the normal practice.[128] The Department made good its promise in its Code of Practice, which requires revelation of the panel's report at the time that the Secretary of State's final decision is issued.[129] Everyone involved appears to accept that revelation is a prerequisite of fairness. It is certainly time, then, for the courts to catch up and require it as a part of natural justice. The road seems open to judges to lay this portion of the Arlidge opinion to rest once and for all.

Lastly, natural justice can compel the Secretary of State to give reasons for his final decision following an examination in public. For structure plans, this will never be an issue, since the statute requires explicitly that he "give such statement as he considers appropriate of the reasons governing his decision."[130] This provision was added to the Town and Country Planning Act at the express urging of the

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125. Code of Practice § 3.59.
126. See pp. 67-68 supra.
127. 829 Parl. Deb., H.C. (5th ser.) 1482 (1972) (Mr. Graham Page, M.P., Minister for Local Government and Development).
128. 1970-71 Council on Tribunals Ann. Rep. para. 77 (HC. 26, 1971).
129. Code of Practice § 3.61.
130. T&CP Act 1971, § 9(8), as amended by T&CP(A) Act 1972, § 3(1).

Council on Tribunals,[131] and has been affirmed in the informal Code of Practice.[132] Again, other bodies seem to have anticipated judges in instituting a procedure. The unanimous agreement among other bodies that reasons should be required indicates that it is time for judges to bestir themselves. If Parliament should prescribe a public examination in the future, the courts should be prepared to compel the issuance of reasons as a part of natural justice. They can also ensure that any reasons given are adequate. The parallel to the Givaudan case, discussed above,[133] is obvious. Although the words "such statement as he considers appropriate" indicate a parliamentary intention to allow the Secretary of State some leeway, the courts must in the end decide whether the reasons given are sufficient to explain the decision.

The Local Inquiry

Inquiries will continue to be held into large-scale land schemes that have identifiable effect on particular owners of property - for example, local plans and trunk road routes. However, as new techniques of prior consultation and public examination are adopted, they will serve more as the final, rather than the sole, occasion for public participation.

Although these inquiries have been on the scene since the end of World War II, the courts have so far failed to apply natural justice to them in any systematic way. As explained above,[134] they have been content to adopt approaches sharply limiting their role. A few points can be noted, however. The decisions appear to concede that, whatever may be the position of the minister, the inquiry itself must be conducted

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131. 1971-72 Council on Tribunals Ann. Rep. para. 33 (H.C. 13, 1972); 333 Parl. Deb., H.L. (5th ser.) 1134-35 (1972) (Lord Sandford, Parliamentary Under-Secretary of State for the Environment, and Lord Hoy).

132. Code of Practice § 3.61.

133. See pp. 79-80 supra.

134. See pp. 88-97 supra.

fairly.[135] But the inspector need not invariably make a formal recommendation after the hearing.[136] The minister for his part must at least listen to objections with an open mind.[137] Beyond this, the precise requirements of natural justice are hazy. There is some authority that natural justice cannot force the revelation of matters of fact or opinion coming to the minister outside of the inquiry,[138] and some that it can.[139] Parliament seems to assume that the latter view applies, since it has taken special pains to exempt local plan inquiries from this requirement. The Town and Country Planning Act 1971 allows ex parte communications between parties and the decider outside of a local plan inquiry. When he is entrusted with confirming the plan, the Secretary of State for the Environment "may consult with, or consider the views of, any local planning authority or other persons, but shall not be under an obligation to consult with, or consider the views of, any other authority or persons ... ."[140] This is simply the successor to the provision in the 1947 Act that allowed freer consultation on development plans than was permitted in small-scale inquiries.[141]

Granting these exceptions, the current notions of basic fairness developed for small-scale inquiries can be applied to these larger ventures. This should be easier now than it has been in the past since (given other forms of prior participation) there will be less pressure to expand them into wide-ranging explorations of regional

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135. Wednesbury Corporation v. Ministry of Housing and Local Government [1965] 1 All E.R. 186, 191 (C.A. 1964) (Lord Denning, M.R.) ("The inquiry has, of course, to be fairly conducted ... ."); Robinson v. Minister of Town and Country Planning [1947] K.B. 702, 716 (C.A.) (Lord Greene, M.R.) (" ... the inquiry itself must be conducted on what may be described as quasi-judicial principles").

136. Wednesbury Corporation v. Ministry of Housing and Local Government (No. 2) [1966] 2 Q.B. 275 (C.A. 1965).

137. Franklin v. Minister of Town and Country Planning [1948] A.C. 87, 102-03, 104 (1947); Wednesbury [1965] 1 All E.R. at 191.

138. Robinson [1947] K.B. at 715-17. See Wednesbury [1965] 1 All E.R. at 190-91.

139. Burgh of Ayr Magistrates v. Lord Advocate [1950] S.C. 102, 111.

140. T&CP Act 1971, § 14(4)(e), as amended by T&CP(A) Act 1972, § 3(2).

141. See pp. 42-43 & note 80 supra.

policies and alternative schemes. The issues will be restricted to those amenable to the traditional inquiry format.

GENERAL CONCLUSIONS ABOUT THE FUTURE OF BRITISH COURTS IN LARGE-SCALE LAND SCHEMES

Non-judicial bodies are taking the initiative and creating a new system of public participation in large-scale land schemes. In the past few years they have revealed a new procedural framework with its own internal logic. Its underlying principle is that of continuous public participation by steps, starting with initial consultation and ending with a formal hearing. The process may also be divided into two stages, one general and the other more specific - for example, structure and local plans, or trunk road corridor and trunk road route schemes.

Obviously the system is still in the early stages of experimentation. Parliament has expressly given the administration wide discretion, and the administration has proceeded by informal, non-statutory rules of procedure. Since so much is still unsettled, many of the initial procedural complaints could be sent to the Parliamentary Commissioner for Administration under that catchall concept, "maladministration." Those that raise more general procedural issues will no doubt be funnelled by him to the Council on Tribunals. In view of the current and projected activities of others, it would be wrong for the courts to charge in and require a whole code of procedures.

Yet it would be equally wrong to see British judges as having no place whatsoever. Their past role with inquiries foreshadows a useful future role. Where others fail, they should be prepared to take the existing framework and require certain procedures, most of which have their grounding in traditional rules of natural justice.

They will thus fulfill their function of filling in gaps in a procedural system created by others and of prodding, where necessary, those others into action.

CHAPTER 5

UNITED STATES:

THE FORM OF HEARING PRESCRIBED BY JUDGES

FOR POLYCENTRIC DECISIONS

SUBJECTS OF INVESTIGATION:

RATEMAKING, ALLOCATIVE LICENSING, LAND MATTERS

The United States has developed no single system of procedure for dealing with land comparable to the British inquiry. From the beginning, the vast sweep of the country precluded central control over real property. Land use and planning remained local affairs, with the federal government exerting almost no influence and state authorities scarcely more. Furthermore, the relative abundance of open space and the laxity of even local controls prevented land from becoming quite the same source of friction between the administration and the citizen as in Britain. America has thus lagged behind in creating a single, developed system of procedure for subordinating the disposition and use of real property to central control.

If one wishes to evaluate the performance of American courts in creating minimum procedures for polycentric decisions, he must look first to the field of economic regulation. Beginning with the creation in 1887 of the Interstate Commerce Commission, entrusted with supervising railroads, the federal government has set up successive administrative agencies to regulate whole industries affected with a public interest. These include transportation, communications, and power production, all of which would be subject to nationalization in Great Britain.[1] In exercising their control, regulatory agencies make many polycentric decisions, some involving the creation of whole schemes,

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1. See generally Schwartz & Wade, 26-34.

others the disposition of a particular business within a scheme. Two of the most important, mentioned in Chapter 1, are the setting of rates that businesses may charge their customers, and the choosing of one of several applicants to perform a public service. Procedures have evolved around ratemaking and allocative licensing, which, like British inquiry law, give parties a meaningful voice before a choice of expediency is made. Those familiar with the British and American administrative systems have noted the similarities between regulatory and inquiry proceedings.[2] The first two sections of this chapter will investigate the response of the federal courts to the problem of requiring minimum procedures for ratemaking and allocative licensing, always keeping in mind the British experience with land inquiries. The third section will examine what federal and state courts have done with the direct American counterpart of land inquiry procedures - those involving the taking of land by eminent domain, the zoning of municipalities, and the planning of urban renewal and highway projects.

One other difference must be noted at the outset. Once they have established a right to be heard, American judges will ask, often unconsciously, what its general character should be - for example, whether a trial is necessary, or whether written comments are sufficient. Only after answering this question do they settle down to the business of requiring particular procedures like notice and reasons. Accordingly, this chapter will deal with the overall format that hearings take. The next chapter will treat American responses to problems comparable to those faced by British judges when asked to review particular administrative practices.

RATEMAKING

Ratemaking occurs when an agency sets prices that a regulated

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2. Schwartz, Introduction 83; Schwartz & Wade 109; Wade, Towards Administrative Justice 38-39, 57.

business can charge its customers. The most significant ratemaking powers are those of the independent federal agencies - of the Interstate Commerce Commission over railroad, motor carrier, and oil pipeline rates,[3] of the Civil Aeronautics Board over airline fares,[4] of the Federal Maritime Commission over tariffs for interstate water transport,[5] of the Federal Communications Commission over telephone and telegraph fees,[6] and of the Federal Power Commission over charges for the transmission and sale of natural gas and electric power.[7] In addition, as will be seen below, some of the executive departments have been given various rate-setting responsibilities. The normal technique is for the administrative body to determine if existing rates are permissible (the phrase "just and reasonable" appears repeatedly) and then to set new rates if they are not. Sometimes the agency will deal with businesses on an ad hoc basis, fitting them into a larger price structure. At other times it will act by prescribing rates throughout an industry or geographical area. In either case the function is polycentric. The administrative body will have to adjust a pattern, either at one point or all over, using factors like the cost of providing the service, the allowance of a reasonable rate of return to investors, consumer needs, and desired industry growth. To reach an optimum price, it will have to resort to data, economic studies, expert opinions, and its own value judgments. But the decision will not just be a managerial one. From the earliest days there has been a feeling that businesses, whose profitability and even life may depend on the rate set, should be allowed to participate in the decision. Fairness has always been an important consideration. Recently the idea

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3. Interstate Commerce Act, 49 U.S.C. §§ 1(5), 15(1),(7) (1970) (railroads and oil pipe-lines); id. § 316(a),(b),(e),(g) (motor carriers).
4. Federal Aviation Act, 49 U.S.C. §§ 1374(a), 1482(d) (1970).
5. Shipping Act, 46 U.S.C. §§ 817(a), 822 (1970).
6. Communications Act, 47 U.S.C. §§ 201(b), 204, 205 (1970).
7. Natural Gas Act, 15 U.S.C. §§ 717c(a),(e), 717d(a) (1970); Electric Utility Companies Act, 16 U.S.C. §§ 824d(a),(e), 824e(a) (1970).

has expanded to include those who will be paying the price to be set - the consumers themselves. If anything, then, the demands for procedural fairness in this traditionally American activity will be increasing.

Early Requirements

In the early years judicial attention was focused on the fixing of rates for a single business, usually a railroad. The first case to touch directly on procedure involved a state railroad commission. A Minnesota statute declared that intra-state railroad rates "shall be equal and reasonable," and established a Railroad and Warehouse Commission with power to label a charge "in any respect unequal or unreasonable" and to "compel any common carrier to change the same, and adopt such rate ... as [it] shall declare to be equal and reasonable."[8] The Act made no mention of a hearing. In Chicago, Milwaukee & St. Paul Railway v. Minnesota ex rel. Railroad and Warehouse Commission,[9] decided in 1890, the Chicago Railway brought suit following the lowering of rates it could charge for the shipment of milk. The state courts had interpreted the statute as precluding judges from reviewing the reasonableness of rates set by the Commission.[10] The United States Supreme Court agreed with the Chicago Railway that the Constitution required judicial review on the evidence to ensure that the rates set were not arbitrary or unreasonable, and hence a deprivation of property without due process of law. The majority seemed as disturbed about the failure of the Minnesota statute to prescribe adequate procedures for the Commission as the denial of judicial review on the evidence. Although the Commission had interviewed the Railway's representatives at its offices before making the order,[11]

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8. Act of March 7, 1887, ch. 10, Minn. Gen. Laws, §§ 2(a), 8(e).
9. 134 U.S. 418 (1890).
10. Id. at 452, 456.
11. Id. at 436-37.

this was not enough.[12] According to the Court, the statute

> deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which ... cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice.[13]

It continued:

> No hearing is provided for; no summons or notice to the company before the commission has found what it is to find, and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission, - in fact, nothing which has the semblance of due process of law.[14]

In conclusion, the Court stated:

> The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination.[15]

Clearly the problems of procedure and of judicial review on the evidence could both be cured by a de novo hearing on the issue of reasonableness before a court of law.[16]

The Chicago Railway decision is important in several respects. First, it established the close link in American thinking between procedural fairness and judicial review on the evidence. The two concepts were interwoven in the majority's opinion: de novo judicial review would invariably provide a party with fair procedures.[17] Second, at

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12. Id. at 457.
13. Id.
14. Id.
15. Id. at 458.
16. See id. at 458-59.
17. The four justices who did not join in the majority opinion separated the two concepts. Mr. Justice Miller agreed that courts could not be constitutionally precluded from reviewing the Commission's decision on the evidence, but denied that the Commission had to provide any sort of hearing. Id. at 460-61. Mr. Justice Bradley, joined by two others, dissented on the ground that the Constitution required neither de novo review nor a hearing before the Commission. Id. at 461-66.

the very beginning an American court was using due process to compel a hearing in the face of legislative silence. Rather than expanding or filling in a statute, it was acting entirely on its own. Third, partly as a result of this, its requirements were expansive. It was prescribing broadly, directing the legislature and agency to provide for a "judicial" hearing, complete with "summons" and "witnesses." Unlike British judges, the Chicago Railway Court was not just making the Commission reveal particular evidence or declining to require disclosure of a given hearing officer's report.

Chicago Railway later came to stand for the proposition that due process required courts to review the reasonableness of rates set.[18] But other decisions continued the assumption that prices should be fixed through "judicial" procedures. In 1906 Congress gave the Interstate Commerce Commission, which had existed since 1887, explicit power to "determine and prescribe what will be the just and reasonable rate" whenever "after a full hearing ... it shall be of the opinion that any of the rates ... collected by any common carrier ... are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act."[19] In the 1913 case of Interstate Commerce Commission v. Louisville & Nashville Railroad,[20] the Supreme Court, before reviewing a Commission order to see if it was supported by substantial evidence, clarified the general language of the Act: "... the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the

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18. E.g., Missouri v. Chicago, Burlington & Quincy R.R., 241 U.S. 533, 537-38 (1916).

19. Hepburn Act of June 19, 1906, ch. 359, § 4, 34 Stat. 589, now Interstate Commerce Act, 49 U.S.C. § 15(1) (1970).

20. 227 U.S. 88 (1913).

duty of deciding in accordance with the facts proved."[21] This meant specifically that:

> All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.[22]

The fact that participation was granted by statute rather than due process did not alter the approach. The Court was again prescribing broadly, independently of a specific procedural complaint. The decision was to be based on facts adduced at the hearing, with the right to introduce affirmative evidence through testimony or documents and to rebut contradictory evidence through further proofs or cross-examination. In a word, the Court was requiring a trial, the traditional mode of participation in adjudication. There was no thought of confining it to issues of local fact. Rather, it was to serve as an overall format for the entire ratemaking proceeding.

The main part of the Louisville & Nashville opinion consisted of the Court's reviewing the Commission's rate order on the evidence. As it noted, the rate decided on would be void "if the finding was contrary to the indisputable character of the evidence, or if the facts found do not, as a matter of law, support the order made."[23] This had more than a casual connection to the Court's prescription of procedures. Review on the evidence could be meaningful only if the Court had before it everything used by the Commission in reaching its decision. A full trial, with its emphasis on testimony and cross-examination followed by adversary debate on the issues, would produce a well fought-over "record" against which the Court could measure the Commission's decision. The procedures were meant to protect the

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21. Id. at 91.
22. Id. at 93.
23. Id. at 91 [citations omitted].

judicial ability to review as well as to enhance participation. By way of contrast, there was no indication until recently that British courts would review the decisions of ministers on the evidence following inquiries.[24] Thus, there was not the same need for formal procedures to enhance that review.

By the 1930's it was accepted that agencies entrusted with final ratemaking authority had to provide a trial. A series of decisions prior to World War II swept away any doubts that might have lingered. The most important was Morgan v. United States, which came before the Supreme Court several times.[25] The Packers and Stockyards Act of 1921 gave the Secretary of Agriculture control over the commissions charged by marketing agencies for buying and selling livestock in the nation's stockyards. Adopting the usual statutory formula, it said:

> Whenever after full hearing ... the Secretary is of the opinion that any rate ... is or will be unjust, unreasonable, or discriminatory, the Secretary -
>
> (a) May determine and prescribe what will be the just and reasonable rate or charge ... .[26]

The Secretary made an order prescribing maximum rates to be charged by fifty agencies for buying and selling livestock in the Kansas City Stock Yards. The agencies brought suits attacking the order for various procedural defects. The first Morgan case became famous for requiring the Secretary to address himself personally to the evidence before approving the order.[27] But it is of greater interest here for other reasons. Mr. Chief Justice Hughes, speaking for a unanimous Court, described the statutory scheme:

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24. See p. 67 supra.
25. 298 U.S. 468 (1936); 304 U.S. 1 (1938); 307 U.S. 183 (1939); 313 U.S. 409 (1941).
26. Ch. 64, § 310, 42 Stat. 166, now 7 U.S.C. § 211 (1970).
27. 298 U.S. at 481. See, e.g., Schwartz & Wade 168, 247, 250-51.

> The Secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be "unjust, unreasonable, or discriminatory."[28]

He seemed to be saying that the Secretary had to apply a legal standard of "unreasonableness" before exercising his positive rate-making powers. Once this precondition was satisfied, "he may 'determine and prescribe' what shall be the just and reasonable rate ... thereafter to be charged."[29] The hearing was to precede the first determination. In other words, it was to go entirely to applying the standard of unreasonableness to see whether the Secretary had jurisdiction to prescribe rates. Since the Secretary would be engaging in adjudication, there was little wonder that a trial was required:

> Nothing can be treated as evidence which is not introduced as such. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. ...
>
> A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding.30

The problem, as noted in Chapter 1,[31] is that the Court, no doubt influenced by the statutory language, was treating a polycentric decision as an adjudicative one. Determining the "unreasonableness" of a rate may appear to involve the application of a standard. In fact, it is an instruction to investigate a pattern of prices to see if they need adjustment. The determination that current rates are unreasonable and that they will continue to be so goes hand in hand

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28. 298 U.S. at 479-80.
29. Id. at 480.
30. Id. [citations omitted].
31. See pp. 13-14 supra.

with the prescription of future rates. The Court was well aware of this earlier in the opinion:

> The proceeding was instituted by an order of the Secretary of Agriculture in April, 1930, directing an inquiry into the reasonableness of existing rates. Testimony was taken and an order prescribing rates followed in May, 1932.[32]

When describing what actually happened, the Court did not separate the two facets.

Special circumstances may have pushed the Morgan Court to overemphasize the trial format. Apparently the Secretary believed that too many agencies were operating in the Kansas City Stock Yards. By putting an upper limit on commissions, he hoped to eliminate the inefficient ones.[33] Since the rate was intended to put some of the agencies out of business, the proceeding was more adversary in nature than most ratemaking. As the Chief Justice put it, "In all substantial respects ... the Department was prosecuting the proceeding against the owners of the market agencies."[34] Hence there was a push for maximum procedural protections.

Other cases, however, did not distinguish Morgan on this point. A year after the first Morgan decision, the District of Columbia Circuit Court of Appeals used the due process clause of the Fifth Amendment to define, in the face of statutory silence, the duties of the Secretary of War in fixing "reasonable" tolls for interstate bridges. Referring to Morgan, it stated that the Secretary could not do his job

> in the absence of complete and full testimony as to all the conditions bearing upon the rights of these respective parties. As suggested, the procedure is judicial and all the attributes of a judicial proceeding should be observed in order to arrive at a just and equitable conclusion.[35]

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32. 298 U.S. at 472. See also 304 U.S. at 17.
33. 298 U.S. at 472-73.
34. 304 U.S. at 20.
35. Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 89 F.2d 788, 791 (D.C. Cir. 1937).

And when measuring the requirement of a "hearing" in a state statute governing natural gas prices against the due process clause of the Fourteenth Amendment, the Supreme Court summed up the drift of the cases: "... the procedure must be consistent with the essentials of a fair trial ... ."[36]

The cases requiring that ratemaking be preceded by a trial became so secure that they were eventually cited as authority for extending similar protections to situations where they were much more necessary. Thus fairness in price fixing helped give birth to fairness in cases of adjudication involving personal liberties.[37] Courts seemed to be approaching matters backwards, drawing the requirement of a trial in adjudicative decisions from the requirement of a trial in polycentric ones. One need not tax himself to think of criticisms. Ratemaking, like any polycentric task, cannot be reduced to an adversary proceeding where parties present evidence and witnesses to prove their positions. Even when just one business is appearing before an agency, the final decision is likely to turn on the interaction of a host of factors, influenced by reams of data. Trial may be the best method of settling disputes over the existence of facts about a particular business or the industry of which it is a part. But beyond this, the need is for a discussion of countless shifting considerations. Forcing everything into a trial format is only likely to make the process inflexible, to encourage delays, and to prevent the agency from exploring issues and considering necessary information freely. Nor is the private party necessarily protected. On the contrary, his participation becomes

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36. Railroad Commission v. Pacific Gas & Electric Co., 302 U.S. 388, 393 (1938).

37. E.g., Greene v. McElroy, 360 U.S. 474, 497 (1959) (revocation of aeronautical engineer's security clearance by Department of Defense on basis of untrustworthiness); Gonzales v. United States, 348 U.S. 407, 413 (1955) (classification of registrant as "conscientious objector" by selective service board); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 165 & n. 10 (1951) (Frankfurter, J., concurring) (designation of organization as "Communist" by Attorney General for purposes of proceedings before Loyalty Review Board of Civil Service Commission).

irrelevant because it is hard to see how an agency can set rates intelligently by means of this process. Requiring a trial thus failed even to attain its objective of ensuring fairness.

Ratemaking, the Acheson Committee Report, and the Administrative Procedure Act

In 1939, shortly after the Supreme Court's decision in the second Morgan case, the Attorney General appointed a Committee on Administrative Procedure under the chairmanship of Mr. Dean Acheson to investigate the "need for procedural reform in the field of administrative law."[38] When published in 1941, the Acheson Committee Report was immediately compared to that of the Donoughmore Committee, which had been issued in Britain nine years before.[39] The Report retains its place today as a thorough investigation and systematic treatment of the field. It divided administrative activities into two rough categories - "adjudication," which involved "the investigation and decision ... of particular cases,"[40] and "rule making," which consisted of the "promulgation of general regulations."[41]

The Committee seemed to see ratemaking as a species of "rule making."[42] It was quite certain that trial was not the proper method for most rule making:

> The application of the procedures of a judicial trial to administrative rule making is limited ... by the distinctive characteristics of rule-making proceedings. The issues are normally complex and numerous; the parties may be diverse and not alignable into classes; the outcome will involve a judgment concerning the consequences of rules to be prescribed for the future and a discretion in

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38. Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. 1 (1941) [hereinafter cited as Acheson Committee Report].

39. See, e.g., Davison, "Administrative Technique - The Report on Administrative Procedure," 41 Colum. L. Rev. 628, 628, 643-44 (1941).

40. Acheson Committee Report 35.

41. Id. 97.

42. See id. 54, 106-08.

> devising measures to effectuate the policies of the statute. These factors differentiate these proceedings from the normal judicial trial in which adversary hearings are traditionally employed and accordingly limit the possibility of defining issues in advance, of addressing evidence to them, of permitting systematic cross-examination, and of stating the findings and conclusions fully.[43]

However, it recognized that by 1941 most agencies did not conduct ratemaking in this fashion:

> Governmental price fixing has ... been accompanied by the statutory hearing requirement. Rate fixing for public utilities has been attended by a high degree of procedural formality; and the same kind of procedure has been employed under the Packers and Stockyards Act as respects both stockyard companies and "market agencies," or commission merchants. In these instances, however, the number of enterprises having their rates fixed in a single proceeding is quite limited, with the consequence that rate fixing has come to be thought of as adjudication rather than as rule making.[44]

The explanation based on numbers seems a bit strained when it is remembered that Morgan involved ratemaking for fifty market agencies. The Committee did suggest that trial might be the proper configuration for those proceedings "in which an adversary element is present," such as those where "[l]ow-cost producers [would benefit] as against high-cost producers with respect to maximum prices ... ."[45] As suggested above, this may explain the requirement of a trial in Morgan itself. But there was no hint either there or elsewhere of limiting it to such circumstances. The Committee's attempts at rationalization reflect an unease with what the courts had done with ratemaking procedures. The latter would have done well to heed its advice in another section of the Report. Although the trial format could be employed "[i]n many proceedings of this sort as in price-fixing ... where controversies can be narrowed to a series of specific

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43. Id. 109.
44. Id. 106-07.
45. Id. 108.

issues," it was "not uniformly applicable and to impose it in some instances would probably produce confusion and delay rather than improvement." It might be appropriate, however, for "subsidiary questions of fact upon which sharp issue may be joined by conflicting interests."[46]

The Acheson Committee Report eventually resulted in the federal Administrative Procedure Act of 1946.[47] In spite of the Committee's reservations about current ratemaking practice, the Act did little to alter it. With the exception of a few specific procedures,[48] it simply confirmed the framework that the courts had created and filled in the details. In tune with the thinking of the times, it divided the procedural universe into "rule making" and "adjudication." "Rule making" was the "process for the formulation ... of a rule," which was "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ... ." It was to include "the approval or prescription for the future of rates."[49] "Adjudication" was the "process for the formulation of an order," which was "the final disposition ... of any agency in any matter other than rule making ... ."[50] Under this scheme, the prescription of reasonable rates for the future was "rule making," whereas the determination of the unreasonableness of existing rates was "adjudication." The Act thus reflected the judicial tendency, noted in the analysis of Morgan, artificially to divide ratemaking into two phases.

But this conceptual division made no more practical difference in the Act than it had in judicial opinions. The Act prescribed a series of courtroom-like procedures for "adjudication required by statute to

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46. Id. 54.
47. Ch. 324, 60 Stat. 237, as amended 5 U.S.C. § 500 et seq. (1970).
48. See pp. 171-72 infra.
49. APA § 2(c), now 5 U.S.C. § 551(4),(5) (1970).
50. Id. § 2(d), now 5 U.S.C. § 551(6),(7) (1970).

be determined on the record after opportunity for an agency hearing."[51] Since the words "required by statute" were broadened by judicial interpretation to include "required by the Constitution,"[52] any decision about the reasonableness of existing rates was included. A partial list of procedures suggests what the Act had in mind. Every party was given the right "to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."[53] Parties could subpoena evidence and be represented by counsel.[54] The hearing was to be conducted before an impartial examiner with the power to administer oaths and rule on offers of proof.[55] The Act did make one concession to the special nature of ratemaking: "proceedings involving the validity or application of rates" were exempted from the provisions prohibiting all contact between staff engaged in investigating and prosecuting on the one hand, and those engaged in deciding on the other.[56] With this exception, proceedings concerning the reasonableness of existing rates were to be conducted as a trial.

The same was true of the prescription of future rates. Granted, this was not "adjudication," but rather "rule making," for which informal procedures were normally sufficient.[57] However, where "rules are required by statute to be made on the record after opportunity for an agency hearing," the sections of the Act providing for formal adversary procedures applied.[58] Since the prescriptions of future

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51. Id. § 5, 5 U.S.C. § 554(a) (1970).
52. Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950).
53. APA § 7(c), 5 U.S.C. § 556(d) (1970). See also id. § 5(b), 5 U.S.C. § 554(c)(1) (1970).
54. Id. § 6(a),(c), 5 U.S.C. § 555(b),(d) (1970).
55. Id. § 7(a),(b), 5 U.S.C. § 556(b),(c) (1970).
56. Id. § 5(c), 5 U.S.C. § 554(d)(B) (1970).
57. Id. § 4(b), 5 U.S.C. § 553(c) (1970).
58. Id.

rates discussed above all fell into this category,[59] they too were attended by trial under the Act. There was one important proviso, which went unused for the time being. The agency was permitted, "where the interest of any party will not be prejudiced thereby, [to] adopt procedures for the submission of all or part of the evidence in written form."[60] If interpreted liberally, this gave an opening for relaxed procedures that might swallow up the trial requirement altogether. But exploitation of it lay in the future.[61] For the time being, Congress had done no more than confirm the judicial imposition of a trial on ratemaking.

Countercurrents against the Trial in Ratemaking

Two isolated cases provided the first hint that judges would not invariably place all ratemaking in the straightjacket of a trial. Norwegian Nitrogen Products Co. v. United States[62] was decided by the Supreme Court in 1933, well before the arrival of the Administrative Procedure Act on the scene. Under the Tariff Act of 1922 the President was given authority to alter rates of duty on various imports in order to equalize the costs of American and foreign producers.[63] The President could only act pursuant to an investigation and report of the United States Tariff Commission, which was to "give reasonable public notice of its hearings and ... reasonable opportunity to parties interested to be present, to produce evidence, and

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59. Where the Constitution rather than a statute requires that rates be prescribed on the basis of a record after an evidentiary hearing, Wong Yang Sung, note 52 on p. 171 supra, would seem to bring the trial provisions of the Act into play.

60. APA § 7(c), 5 U.S.C. § 556(d) (1970). Nor did the presiding officer need to recommend an initial decision in on-the-record rule making. Id. § 8(a), 5 U.S.C. § 557(b) (1970).

61. See pp. 185-86 infra.

62. 288 U.S. 294 (1933).

63. Ch. 356, § 315(a), 42 Stat. 941, as amended 19 U.S.C. § 1336(c) (1970).

to be heard."[64] The President had increased the duty on sodium nitrite following a recommendation of the Commission. Norwegian Nitrogen, one of the two chief importers of the substance, sought to have the increase vacated on the ground that the hearing before the Commission had fallen below the statutory standard of fairness. Specifically, it alleged that the Commission had illegally refused to supply it with the costs of American producers. Before upholding the Commission, Mr. Justice Cardozo, speaking for the Court, answered the contention of Norwegian Nitrogen that Congress had mandated a trial. He conceded that there were functional similarities between what the Tariff Commission did on the one hand, and what the Interstate Commerce Commission and state public utility rate-making bodies did on the other.[65] But he distinguished the cases imposing a trial on rate-setting proceedings on the ground that the agencies there had final power to determine legal rights. The Tariff Commission, on the other hand, only investigated and reported. Besides, no one had a legal right to the maintenance of an existing duty.[66] Nor did the Tariff Act impose the same close judicial review on the evidence, which would have increased the need for a trial.[67]

Freed from the grip of prior procedural law, Mr. Justice Cardozo went on to define what was required here. He cautioned that "All depends upon the context. ... The answer will not be found in definitions of a hearing lifted from their setting and then applied to new conditions."[68] The bulk of the opinion is an analysis of legislative history, prior tariff practice, and statutory language. The conclusions about the general character of the hearing are enlightening. This

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64. Id. § 315(c), as amended 19 U.S.C. § 1336(a) (1970).
65. 288 U.S. at 317-18.
66. Id. at 318.
67. Id. at 318-19.
68. Id. at 317.

ratemaking was to be preceded by "a hearing of the same order as had been given by congressional committees when [tariff-setting] was in the hands of Congress and no one else."[69] "Nothing in the statute suggests a belief of the lawmakers that every producer or importer was to be viewed, like a party to a lawsuit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series."[70] Congress had required this elsewhere in the statute when it gave the Commission power to appraise particular goods and attached "the incidence of a trial in court."[71] Here, on the other hand, judges should only compel the definition of the issues that were to be the theme of debate and force the disclosure of limited information sufficient to allow argument.[72] Norwegian Nitrogen thus stood against the other cases requiring a trial for ratemaking.

Thirty-six years later in 1969, the Court of Claims, also operating free of encumbering precedent, indicated scepticism with the trial format. Moore-McCormack Lines, Inc. v. United States[73] likewise dealt with the setting of a subsidy, this time in favour of American shipyards. The Merchant Marine Act empowered the Secretary of Commerce to pay to American shipping lines that placed orders with American yards the difference between the yard's price and "the fair and reasonable estimate of cost, as determined by the Secretary, of the construction of that type of vessel ... in a foreign shipbuilding center."[74] The Secretary delegated his duty to estimate foreign construction costs to the Maritime Subsidy Board. The Board was entrusted in each case with calculating the hypothetical bid of a foreign shipyard,

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69. Id. at 305.
70. Id. at 308.
71. Id. at 316.
72. Cf. id. at 319-21.
73. 413 F.2d 568 (Ct. Cl. 1969).
74. 46 U.S.C. § 1152(b) (1970).

using known quotations for various items, wage rates, overhead estimates, and profit margins. Although this was not classic rate-making involving the overall regulation of a price pattern, it still necessitated many of the same estimates, calculations, and value judgments. A shipping line was likely to want the foreign price set as low as possible (to increase the subsidy and decrease the price it would have to pay), while the Board was likely to resist.

Moore-McCormack complained that the Board had refused to divulge the thinking, studies, or estimates going into a particular calculation. The court eventually agreed and invalidated the price arrived at. Its opinion, like that in Norwegian Nitrogen, is of interest for the way in which it defined the contours of participation. Although the Administrative Procedure Act did not apply[75] and the Merchant Marine Act did not explicitly grant a hearing, the court interpreted the words "fair and reasonable estimate of cost" in the latter to mean that the "estimating process [must] be fair and reasonable."[76] In this way it avoided having to make a constitutional ruling,[77] although it recognized at the beginning that the issue was whether the procedures were "fundamentally unfair."[78] It emphasized:

> We do not consider it mandatory for the Board ... to hold trial-type evidentiary hearings. ... Full-scale evidentiary hearings would be costly for both parties, time-consuming, and not so surely productive of a fairer, or more accurate, subsidy determination in these cases as to warrant imposition of such a burden.[79]

Moore-McCormack had only to be informed fully of the Board's position

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75. The Act's rule making procedures, which govern the "prescription for the future ... of valuations, costs, or accounting," do not apply to "any matter relating to ... public property, loans, grants, benefits, or contracts." APA §§ 2(c) & 4, 5 U.S.C. §§ 551(4) & 553(a)(2) (1970).

76. 413 F.2d at 584 [emphasis added].

77. Id. at 587.

78. Id. at 570.

79. Id. at 590.

and allowed "to present additional material and argument to the Board ... ."[80] The court added, "The Board can determine, in its discretion, whether or not to allow oral argument (and if so to what extent) in addition to written presentations by the owners and staff."[81] Moore-McCormack accordingly joined Norwegian Nitrogen in the realization that fairness could be accorded in ratemaking by something less than a trial on all issues. The two cases have, however, gone largely unappreciated. Perhaps it is because they purported to interpret particular statutes rather than general constitutional requirements; or that they existed outside the public utility field, which has always been the focus of ratemaking law. Whatever the reason, they have remained isolated, even from each other. Strangely, the Moore-McCormack court did not even cite Norwegian Nitrogen. It was left for other cases to explode the established notion that trial was the only proper format for ratemaking.

Group Ratemaking

The first line of decisions stems from the increased setting of rates for a whole group of regulated businesses, rather than for each one individually. In these circumstances, it is less easy to maintain the fiction that one party's rights are being adjudicated before the administration. The planning aspects of ratemaking come to the fore, as the agency adjusts the entire rate structure. When this occurs, it is no longer possible to hide the fact that, above all, it is a pattern that is being created, upon which individual dispositions will depend.

The Acheson Committee was aware that the utility of a trial decreased as the number of businesses whose rates were being changed

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80. Id.
81. Id. at 591.

increased. It said that trial prevailed in those instances where

> the number of enterprises having their rates fixed in a single proceeding is quite limited, with the consequence that rate fixing has come to be thought of as adjudication rather than as rule making. The fixing of mine-mouth prices for virtually all of the bituminous coal sold in the United States, on the other hand, involves a large number of enterprises. Nevertheless, despite the fact that the statutory procedural requirement is not entirely clear, the Bituminous Coal Division has employed an elaborate hearing procedure in arriving at its recent country-wide price order.[82]

Again, the "elaborate hearing procedure" could only have been encouraged by Morgan, which had involved fifty market agencies. Group ratemaking did not begin to affect procedure until the 1960's. By then many of the regulatory agencies were using it as one way of discharging their price-setting functions. Most notable was the changeover of the Federal Power Commission from setting rates for natural gas producers one at a time,[83] to holding one large proceeding for all producers within a given geographical area.[84] With group ratemaking now the norm, procedural law had to respond.

The authoritative holding involved the classic problem of railroad rates. Finding that there was a national freight car shortage, Congress empowered the Interstate Commerce Commission to take concrete steps to encourage railroads to acquire their own cars and to return cars belonging to others as soon as possible. A 1966 amendment to the Interstate Commerce Act authorized the Commission to add an "incentive element" to the rental rate of freight cars above the expense of ownership and maintenance.[85] In language that had existed

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82. Acheson Committee Report 107 [citation omitted].

83. An example is the proceeding reviewed in Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575 (1942).

84. An example is the proceeding reviewed in Re Permian Basin Area Rate Cases, 390 U.S. 747, 757-59 (1968).

85. Act of May 26, 1966, Pub. L. No. 89-430, § 1, 80 Stat. 168, now Interstate Commerce Act, 49 U.S.C. § 1(14)(a) (1970).

since 1917, Congress stated that the Commission was to act "after hearing."[86] Spurred on by the Senate Subcommittee on Surface Transportation, the Commission held an informal group ratemaking proceeding. After preliminary investigation, it published a proposed schedule of incentive per diem charges for the use of standard boxcars and invited written comments, promising an oral hearing only to those who could demonstrate special need. The Commission remained unsympathetic to the demands of the Florida East Coast Railway and others for a trial. Eventually it arrived at a final schedule on the basis of written comments.

In United States v. Florida East Coast Railway,[87] decided in 1973, the Supreme Court rejected Florida East Coast's contention that the Commission had used legally inadequate procedures. The majority, speaking through Mr. Justice Rehnquist, dealt first with the applicability of the Administrative Procedure Act. The Commission was prescribing rates for the future, which was "rule making" within the terms of the Act. The question was then whether it was rule making "required by statute to be ... on the record after opportunity for an agency hearing" for which a trial was prescribed (known as "formal rule making") or rule making for which written comments were sufficient ("informal rule making").[88] Although most observers, including at least two lower courts[89] and the Commission itself,[90] believed that the words "after hearing" in the Interstate Commerce Act meant "after hearing on the record," thus triggering the formal rule making

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86. Id.
87. 410 U.S. 224 (1973).
88. Id. at 234-38. See APA § 4(b), 5 U.S.C. § 553(c) (1970).
89. Florida East Coast Ry. v. United States, 322 F. Supp. 725, 728-29 (M.D. Fla. 1971); Long Island R.R. v. United States, 318 F. Supp. 490, 497-98 (E.D.N.Y. 1970).
90. 410 U.S. at 236 & n. 6. Id. at 825-26 (Douglas, J., dissenting).

provisions of the Administrative Procedure Act, the Supreme Court upset these expectations. The informal rule making provisions applied here, so that all that was required was, in the words of the Act, an "opportunity to participate ... through submission of written data, views, or arguments with or without an opportunity for oral presentation."[91] For this group ratemaking, the Administrative Procedure Act, at least, did not require a trial.

The Court then faced the question of whether the Constitution or the Interstate Commerce Act itself commanded a trial. This was more of a problem, since precedent seemed to answer unanimously in the affirmative. Mr. Justice Rehnquist first noted that Congress had occasionally used the word "hearing" to refer to written comments.[92] He then set about distinguishing prior precedents that appeared to mandate a trial. Louisville & Nashville was taken as applying only to the setting aside of existing rates as unreasonable,[93] even though the Court had said explicitly there that the Commission could "require the substitution of just for unjust charges" and even though the Commission had in fact done so.[94] Morgan, which had imposed the trial format on ratemaking involving fifty businesses, was narrowed to require only adequate notice.[95] The Court concluded by emphasizing the distinction

> between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.
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> Here, the incentive payments proposed by the Commission in its tentative order, and later adopted in its final order, were applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act. No effort was made to single out any particular railroad for special

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91. APA § 4(b), 5 U.S.C. § 553(c) (1970).
92. 410 U.S. at 239-42.
93. Id. at 244.
94. 227 U.S. 83, 90, 92 (1913).
95. 410 U.S. at 242-44.

> consideration based on its own peculiar circumstances. ... [Any] factual inferences were used in the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts.[96]

In the future, then, group ratemaking that does not treat individual businesses in a special way need not necessarily be cast in the trial mould.

It is unfortunate that the Court limited its holding to rates "applicable across the board" to many carriers. Whether rates are prescribed for a group of businesses or for an individual business, the basic nature of the task remains the same. In each case the agency is performing an economic calculation to arrive at an optimum rate, considering factors prescribed by Congress and data gathered about the industry. In each case the decision will affect an entire web of relationships which must always be kept in mind. The only difference is that in group ratemaking the entire web is being adjusted rather than a single part. It is wrong, then, to say that the determining factor is the number of parties before the agency. To be sure, particular facts about a party, the determination of the existence of which is best made in a trial, are more likely to be important when rates are being set for only one business. But even when many are involved, these, along with facts about the entire scheme, may be in issue. Trial should be confined to these matters. Trial is an appropriate or inappropriate format for the entire proceeding regardless of numbers. Mr. Justice Douglas seems to have recognized at least this when he dissented, saying that due process demanded "a full hearing that includes the right to present oral testimony, cross-examine witnesses, and present oral argument," just as it did for rate-making involving one business.[97]

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96. Id. at 245-46.
97. Id. at 247.

The implications of Florida East Coast have been explored in a recent series of lower court opinions involving the Federal Power Commission. The Commission is authorized by statute to determine "the just and reasonable rate" for the production and transportation of natural gas if "after hearing" it finds that any rate is "unjust, unreasonable, unduly discriminatory, or preferential."[98] As noted above, the Commission was one of the first agencies to move from individual to group ratemaking, and has recently been experimenting with national price-setting. Phillips Petroleum Co. v. Federal Power Commission,[99] decided in 1973, was the first case to deal with group ratemaking procedures for natural gas. There the Tenth Circuit Court of Appeals, applying Florida East Coast, allowed the Commission to embark on an informal proceeding, holding that the formal rule making procedures of the Administrative Procedure Act did not apply, and that neither due process nor the Natural Gas Act automatically imposed a trial.

Later in 1973, however, the District of Columbia Circuit Court of Appeals seemed to import the trial requirement back into the field. In Mobil Oil Corp. v. Federal Power Commission[100] the Commission sought to establish area rates for the movement of liquefiable hydrocarbons in natural gas pipe-lines. Unfortunately, it left parties with the impression that it was only exploring the possibility of allocating a certain percentage of pipe-line costs to hydrocarbons rather than setting actual rates. It also based some of its findings on data presented in a conference where only some parties were present.[101] The Court of Appeals was asked to overturn the rate schedule because of the defects in procedure. The first part of its opinion is a paradigm

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98. Natural Gas Act, 15 U.S.C. § 717d(a) (1970).
99. 475 F.2d 842 (10th Cir. 1973), cert. denied 414 U.S. 1146 (1974).
100. 483 F.2d 1238 (D.C. Cir. 1973).
101. Id. at 1244-45.

of the new judicial approach. The court cautioned against the propensity to impose either a trial on the one hand or minimal procedural requirements on the other. Judges could require something in between: "Flexibility in fitting administrative procedures to particular functions is critically important ... ."[102] Later, it explained:

> The APA may be viewed as providing the outer boundaries of administrative procedures. ... There is no reason, however, to conclude that Congress in establishing these limits intended to preclude all the possible formulations that might lie in between the two extremes.[103]

The court then noted that "in any administrative proceeding, the type of procedure required is related and proportionate to the degree of evidentiary support required for the agency's decision."[104] The Natural Gas Act, unlike the provision of the Interstate Commerce Act reviewed in Florida East Coast, required judicial review to ensure that the decision was supported by "substantial evidence."[105] So far there was nothing with which to quarrel. But then the opinion took a startling turn. The court concluded that there was need of "some sort of adversary, adjudicative-type procedures" to create a record for the courts to review.[106] This conflicted with the assumption in Phillips that a record might consist of "written comments ... together with questionnaire data ... ."[107] Although it conceded that written interrogatories might replace oral cross-examination,[108] the Mobil court was reimposing the trial requirement, not as a matter of procedural fairness, but as a prerequisite to judicial review on the

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102. Id. at 1251.
103. Id. at 1253. See also id. at 1253-54.
104. Id. at 1259.
105. Natural Gas Act, 15 U.S.C. § 717r(b) (1970). See 483 F.2d at 1257-58 & n. 68, 1260-61.
106. 483 F.2d at 1259. See generally id. at 1257-63.
107. 475 F.2d at 850.
108. 483 F.2d at 1263.

evidence. This is especially ironic, since the court had previously agreed with Phillips that the Natural Gas Act did not require a hearing "on the record," and hence that the formal rule making procedures of the Administrative Procedure Act (imposing a trial) did not apply.[109] It would have been much more sensible to have joined the dissenting judge in Phillips, who believed that the Natural Gas Act required a decision "on the record," thus triggering the formal rule making provisions of the Administrative Procedure Act.[110]

Two subsequent decisions have indicated that the "substantial evidence" scope of review can live with relaxed procedures in rate-making. American Public Gas Association v. Federal Power Commission[111] was decided by a different panel of the same court that delivered the Mobil judgment. It set out the following requirements for group ratemaking:

> The procedure chosen by the Commission must ... give the parties fair notice of exactly what the Commission proposes to do, together with an opportunity to comment, to object, and to make written submissions; and the final order must be based upon substantial evidence.[112]

Due process and the informal rule making provisions of the Administrative Procedure Act normally compelled no more.[113] The Commission had met this standard here:

> In its notices of investigation and proposed rule making the Commission stated exactly what it proposed to do. Without limiting the scope of any submittals on the issues the Commission then

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109. Id. at 1250-51.

110. 475 F.2d at 854 (Seth, J., dissenting). This interpretation receives support from the fact that when rules must be made "on the record," the Administrative Procedure Act prescribes judicial review on the basis of "substantial evidence," the same standard given in the Natural Gas Act. APA § 10(e)(B)(5), 5 U.S.C. § 706(2)(E) (1970).

111. 498 F.2d 718 (D.C. Cir. 1974).

112. Id. at 722.

113. Id. at 722-23.

> indicated the methodology it proposed to follow, setting forth specific areas of inquiry and requesting relevant information. Procedures were established for the collection of data relating to intrastate contracts, and such data were collected from many producers. Public hearings were held in eight major states and comments and submittals were received from all interested parties ... . Replies to the initial submittals were also received ... . All submittals, replies, comments, transcripts and data were made available to all parties.[114]

If producers wanted a trial on any point, they would have to show special need. Otherwise, there would be "no reason to believe that the exchanges or dialogue between and among the parties were so inadequate as a mechanism for finding the facts that a trial-type proceeding was necessary."[115] Mobil was distinguished on the grounds that notice had been inadequate and that an ex parte conference had been held there.[116] To prove that an adequate record had been created, the court went on to review the rates and find them supported by substantial evidence.

This approach was supported by the Fifth Circuit Court of Appeals in Shell Oil Co. v. Federal Power Commission,[117] decided in late 1975. There, the Federal Power Commission was for the first time fixing a national rate for the sale of natural gas at the wellhead. The Commission gave notice of the national scope of the proceeding and invited sworn written comments. Over eighty parties submitted data and arguments. There was then a pause, after which another round of written comments was entertained in reply to the first. A public conference was held on two selected questions involved in computing the rate. Finally the Commission heard oral argument. The court found that this satisfied procedural due process:

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114. Id.
115. Id. at 723.
116. Id.
117. 520 F.2d 1061 (5th Cir. 1975).

> Were the Commission to have allowed all interested parties to submit oral testimony and conduct oral cross-examination on an undertaking so massive and novel as setting a national rate for new gas, the proceeding would have taken years, and the Commission's power to effectively regulate the industry would have been destroyed.[118]

Again, businesses would have to demonstrate a special need for trial on particular issues: "Without concrete demonstration of how the Commission's reliance on written submittals prejudiced the rights of the petitioners, we cannot say that as a matter of law the FPC was prohibited from adopting the procedures it did, or was required to conduct a full, oral hearing."[119]

The judicial abandonment of the trial can even extend to rate-making subject to the formal rule making provisions of the Administrative Procedure Act. These have been thought to mandate an oral evidentiary proceeding whenever the substantive statute or the Constitution requires a hearing "on the record." The courts have accordingly exempted incentive per diem car rates under the Interstate Commerce Act and group rates under the Natural Gas Act from these provisions. However, even when a particular type of ratemaking is subject to an "on-the-record" hearing, a trial will not now necessarily follow. The Administrative Procedure Act allows an agency in formal "rule making ... when a party will not be prejudiced thereby, [to] adopt procedures for the submission of all or part of the evidence in written form."[120] It has been suggested that the courts could use this to prescribe a proceeding based on written comments,[121] with trial presumably for contested issues of local fact. Indeed, in the Shell Oil

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118. Id. at 1076.
119. Id. at 1075.
120. APA § 7(c), 5 U.S.C. § 556(d) (1970).
121. See Nathanson, "Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and Other Federal Statutes," 75 Colum. L. Rev. 721, 737-39 (1975).

case, the court went out of its way to note that the Federal Power Commission had satisfied "even the more stringent requirements of the formal hearing process. ... The procedures used in setting the national rate neither prejudiced the [producers], nor prevented a full and true disclosure of the facts."[122] Likewise, in Long Island Railroad v. United States,[123] decided before Florida East Coast, a lower court held that the Interstate Commerce Commission was engaged in formal rule making when it set incentive per diem rates on freight cars. Nonetheless, a railroad could not obtain a trial unless it pointed to specifics on which it needed to cross-examine witnesses or to present live rebuttal testimony. Otherwise, it would not be "prejudiced," in the words of the Act, by "the submission of all or part of the evidence in written form." In sum, the last obstacle to relaxed procedures in group ratemaking - the formal rule making provisions of the Administrative Procedure Act - appears to be surmountable. The courts, which originally placed the trial stamp on all ratemaking, are now removing it, at least where many businesses are involved.

Rent-Setting

In addition to group ratemaking, there is a second line of cases heralding an end to the old overjudicialization of price-setting. Like group ratemaking, the cases involve a large number of parties. However, the parties are poor people rather than large businesses, and they must pay, rather than receive, the prices set. The federal Department of Housing and Urban Development is heavily involved in financing housing for the poor. Most significantly, it attempts to make ownership of low-income housing projects financially feasible for private enterprise

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122. 520 F.2d at 1075. See also American Public Gas, 498 F.2d at 723.

123. 318 F. Supp. 490 (E.D.N.Y. 1970).

through a number of monetary incentives, including the guarantee of low-interest mortgages. To receive aid of this sort, a private owner must be supervised under, among other possibilities, "a regulatory agreement or otherwise, as to rents, charges, and methods of operation, in such form and in such manner as in the opinion of the Secretary will effectuate the purposes of this section."[124] Regulations prescribe that "No charge shall be made by the mortgagor for accommodations, facilities, or services offered by the project except those approved in writing by the [Department]."[125] Similarly, rents for publicly-owned, low-income housing subsidized by the federal government "shall be fixed by the public housing agency and approved by the [Department] ... ."[126] And of course public housing authorities operating independently of federal subsidies must determine the rents tenants pay. In all cases, an administrative body is entrusted with regulating a scheme, apportioning rents on the basis of the ability of tenants to pay, the likely effect on the general rent level, the financial condition of the project, and the need to ensure a fair return to investors.

Beginning in 1970 tenants have asked the courts to require the responsible authority, normally the Department of Housing and Urban Development, to give them a hearing before permitting a rent increase. Since the statutes are silent, the question normally resolves itself into whether due process requires the Department to accord some sort of hearing. Six years after it was first considered, the matter is still in doubt. In allowing a rent increase, the Department would in effect be withdrawing a benefit from tenants. Is this deprivation of "life, liberty, or property" within the meaning of the due process

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124. National Housing Act, 12 U.S.C. § 1715l(d)(3) (1970).
125. Department of Housing and Urban Development Rules, 24 C.F.R. § 221.530(a) (1975).
126. Low Rent Housing Act, 42 U.S.C. § 1402(1) (1970).

clauses? Prior to 1972 the practice was to weigh the beneficiary's interest in some sort of hearing against the government's interest in expedited action. Tenants first sought a voice in the Department's rent-setting decisions under this "balancing test."[127] However, in a 1972 case involving a hearing for a non-tenured teacher denied reemployment by a state university, the Supreme Court directed judges to analyze the character (rather than the weight) of an asserted interest to see if it was "property" protected by law.[128] The question then became whether government benefits like rent restrictions were legally-recognized "property." Some courts have held that a clear statutory desire to aid a party is sufficient. Hence, low-income tenants, who are obviously beneficiaries of rent controls, have a "property" interest in low rents.[129] Others have taken a more restrictive approach. The expectation of government benefits can only ripen, they say, into a property interest when the government is required to grant them upon the showing of certain facts. Under the housing statutes, the Department can loosen rent controls if

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127. Compare Hahn v. Gottlieb, 430 F.2d 1243, 1246-48 (1st Cir. 1970), McKinney v. Washington, 442 F.2d 726, 727-28 (D.C. Cir. 1970), and People's Rights Organization v. Bethlehem Associates, 356 F. Supp. 407, 411-13 (E.D. Pa.) (alternative holding), aff'd mem. 487 F.2d 1395 (3d Cir. 1973) (due process requires no voice under balancing test) with Langevin v. Chenango Court, Inc., 447 F.2d 296, 304-07 (2d Cir. 1971) (Oakes, J., dissenting) (due process requires a voice under balancing test).

128. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

129. Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483, 488-91 (9th Cir. 1974); Dew v. McLendon Garden Associates, 394 F. Supp. 1223, 1230-31 (N.D. Ga. 1975). Accord, Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165, 1167-68 (2d Cir. 1973) (involving public housing project independent of federal subsidy); Ponce v. Tulare Housing Authority, 389 F. Supp. 635, 648-49 (E.D. Cal. 1975) (involving low-income farm dwellings receiving subsidy from Department of Agriculture). Compare Thompson v. Washington, 497 F.2d 626, 632-33, 635, 638 (D.C. Cir. 1973) (tenants of federally-subsidized, low-income public project have statutory right to hearing) and Marshall v. Lynn, 497 F.2d 643, 645-47 (D.C. Cir. 1973), cert. denied 419 U.S. 970 (1974) (tenants of federally-aided, low-income private project have statutory right to hearing) with Tenants' Council v. Lynn, 497 F.2d 648, 651-53 (D.C. Cir. 1973), cert. denied 419 U.S. 970 (1974) (tenants of federally-aided, middle and upper-income project have no right to hearing, since statutes meant to clear urban blight rather than to benefit these tenants).

it finds that the landlord's interest in a fair return outweighs the tenants' in low rents. Therefore the benefit is discretionary and no property interest exists.[130] It is not necessary to resolve the matter here, since this thesis is concerned with what due process requires once it applies rather than with its precise scope of application. What is important for present purposes is that those judges who have required something have prescribed new forms of participation.

In fashioning procedures for rent-setting, judges have operated independently of the Administrative Procedure Act. Rent-setting, like other prescriptions of rates for the future, is "rule making" within the terms of the Act. The Act's rule making provisions do not apply to "a matter relating to ... public property, loans, grants, benefits, or contracts."[131] It was accordingly recognized at the outset that the Administrative Procedure Act had no direct role to play here.[132] Any procedures would have to be judge-made.

The early rent-setting decisions used the balancing test to determine both whether a hearing was required and what form one might take. In Hahn v. Gottlieb, tenants of a federally-subsidized, private housing project, no doubt influenced by traditional ratemaking cases, made the mistake of demanding an "opportunity to cross-examine adverse witnesses and an agency decision based on a formal record."[133] The First Circuit Court of Appeals showed a distinct lack of enthusiasm for the trial model:

> The proceeding in which [the tenants] seek to assert their interests is basically an informal rate-making process. The landlord who seeks a rent increase submits

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130. Geneva Towers, 504 F.2d at 493-98 (Hufstedtler, J., dissenting); Harlib v. Lynn, 511 F.2d 51, 55 & n. 11 (7th Cir. 1975); Paulsen v.Coachlight Apartments, Inc., 507 F.2d 401, 403, 404 (6th Cir. 1974); People's Rights Organization v. Bethlehem Associates, 356 F. Supp. at 413 (alternative holding).

131. APA § 4(2), 5 U.S.C. § 553(a)(2) (1970).

132. Hahn v. Gottlieb, 430 F.2d 1243, 1247 n. 4 (1st Cir. 1970).

133. 430 F.2d 1243, 1245 (1st Cir. 1970).

> documentation to the [Department] showing his expenses, return on investment, and the like. The [Department's] staff then examines his proposal in the light of the terms of the regulatory agreement, the broad criteria of the regulations, and current economic conditions. [The tenants] seek to encumber these negotiations with a formal hearing, the right to cross-examine adverse witnesses, and an impartial decision-maker, who must state the reasons for his decision and the evidence on which he relies.[134]

A trial would contribute little to an understanding of the issues, while significantly burdening the federal housing program.[135] The court therefore required nothing. This was certainly correct once the question was put in terms of all or nothing. Forcing the Department to conduct a full trial would have spread the bane of over-judicialization to yet another field. As with the group ratemaking cases, the court seems to have been influenced by the sheer impossibility of giving a trial where the parties were so many and the issues so far-reaching.

In Langevin v. Chenango Court, Inc.[136] Chief Judge Friendly of the Second Circuit likewise denied tenants participation in a similar case. He agreed with the Hahn court that the decision whether or not to allow rent increases was action "committed to agency discretion by law" under the Administrative Procedure Act,[137] and hence not subject to judicial review on the evidence.[138] There was thus no need for procedures to create some sort of record for judicial review. On the purely procedural point, he appeared to say that the Department's approval of rent increases by a private landlord did not constitute sufficient "government action" to bring due process into play.[139] But he gave ample indication of what was really bothering him. Congress had wanted to avoid "subjecting all rent increases in such projects to

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134. Id. at 1248.
135. See id. at 1248-49.
136. 447 F.2d 296 (2d Cir. 1971).
137. APA § 10(2), 5 U.S.C. § 701(a)(2) (1970).
138. 447 F.2d at 302-04. Accord, Hahn, 430 F.2d at 1249-51.
139. See 447 F.2d at 301.

what would amount to a full-fledged public utility rate proceeding, with the expense and delay necessarily incident thereto ... ." The whole housing program might be damaged if rent increases could "be held up for months during a trial-type hearing, with discovery of the owner's records, the taking of testimony, and written findings by an examiner."[140] Again, a court was forcing itself to choose between requiring a full trial on the one hand or nothing whatever on the other. Judge Friendly may himself have been afraid that due process, once injected into the field, would inevitably go too far. In his non-judicial writings he has freely criticized its tendency to overburden the administrative enterprise.[141] The past overjudicialization of ratemaking seems to have fostered a mistrust of due process as a potentially uncontrollable juggernaut, which ends by subjecting all to its will.

But other judges were more willing to give due process a chance. Judge Oakes dissented in Langevin, believing that the Constitution required a "fair administrative hearing." He dismissed Judge Friendly's finding of insufficient "government action" as based on "a distinction without a difference."[142] But he did not propose an "inflexible full-scale hearing in the form of a judicial or quasi-judicial trial." Rather, he thought that "minimum procedural fairness" could be afforded by

> notice of the proposed rent increase and a meaningful hearing at which [the tenants] would have an opportunity to present their complaints, if any, of the unreasonableness of the proposed rents, any failure of the landlord to maintain equipment and services required of him under the basic lease and Regulatory Agreement, as well as to confront and cross-examine witnesses substantiating the landlord's financial case for a rent increase.[143]

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140. Id.

141. Friendly, Forward to Schwartz & Wade at xvi-xix. Cf. Friendly, "'Some Kind of Hearing,'" 123 U. Pa. L. Rev. 1267, 1305-15 (1975).

142. 447 F.2d at 304. Other courts have been unanimous in their agreement with Judge Oakes. See, e.g., Geneva Towers, 504 F.2d at 487-88; id. at 493 (Hufstedtler, J., dissenting).

143. 447 F.2d at 306 [footnotes omitted].

As in group ratemaking, trial would be confined to a question of local fact, here the landlord's financial condition.

Judge Oakes' faith in relaxed procedures has been rewarded. Burr v. New Rochelle Municipal Housing Authority,[144] decided by a different panel of the Second Circuit in 1973, concerned a direct rent increase by a state housing authority, rather than the approval of one by a federal agency. However, this made no difference as far as procedures went. The court below had confirmed Judge Friendly's worst nightmares by holding that the due process clause of the Fourteenth Amendment compelled the Authority

> not only to serve on the tenants a written notice of a public hearing but also to provide an opportunity to exchange evidence prior to the hearing. The court also held that due process required the oral presentation of evidence by the Authority, representation of the tenants by selected representatives, assisted by counsel, an opportunity to introduce rebuttal evidence, a stenographic verbatim transcript of the hearing, and a written determination by the Authority Board of Review based upon the evidence presented at the hearing.[145]

But this, said the court, was not necessary, or even helpful. The tenants' interests had to be "evaluated within the context of the Authority's overall financial condition, the intricacies of project management, the possibilities of savings in some types of operations, and a hundred other intricate details."[146] The court then prescribed a broad alternative to the trial format:

> Notice of the proposed increase in rent shall be served well in advance of the date for the increase. Opportunity for filing written objections shall be given. There need be no opportunity for oral presentation. The tenants or their representatives shall have the right to submit any material they consider relevant to disprove the need for the rent increase. Finally, the Review Board upon reaching a decision shall issue a statement outlining the reasons for either approving or rejecting the requested rent increase. The tenants may of course be represented by counsel.[147]

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144. 479 F.2d 1165 (2d Cir. 1973).
145. Id. at 1166.
146. Id. at 1169.
147. Id. at 1170.

Unlike Judge Oakes, the Burr court did not even think that an oral hearing was necessary. It was prescribing a system of written comments, similar to the informal rule making procedures of the Administrative Procedure Act.[148]

Later in 1973 the District of Columbia Circuit Court of Appeals took the process one step further. In Thompson v. Washington[149] and a companion case,[150] it interpreted the housing statutes as requiring that tenants of publicly and privately-owned low-income housing receiving federal subsidies be given a voice before the Department of Housing and Urban Development approved rent increases. Citing Florida East Coast, the Thompson court stated its belief that an "opportunity to make written presentations" would normally suffice.[151] In this, it was in accord with Burr. It then continued:

> We have on occasion voiced the view that basic considerations of fairness may under exceptional circumstances require oral submissions even in a legislative-type proceeding. Conceivably there may be instances of rent increase proceedings when the dictates of fairness will require an opportunity for limited oral presentations and perhaps the right to pose questions submitted through the hearing officer.[152]

The court added in a footnote:

> There may be need, as well, for cross-examination by interested parties, at least if the proceeding involves specific issues of critical importance that cannot be adequately ventilated under a written statement procedure.[153]

The court may have been pushed to contemplate limited oral proceedings by the facts of this case. Unlike in Burr,[154] the housing authority was not just planning an across-the-board rent increase for all tenants. Rather, it was leaving the rents of some tenants alone while raising

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148. APA § 4(b), 5 U.S.C. § 553(c) (1970).
149. 497 F.2d 626 (D.C. Cir. 1973).
150. Marshall v. Lynn, 497 F.2d 643 (D.C. Cir. 1973), cert. denied 419 U.S. 970 (1974).
151. 497 F.2d at 641.
152. Id. [citations omitted].
153. Id. n. 48.
154. 479 F.2d at 1166-67.

those of others, at different rates depending upon the services they were receiving and the size of their families.[155] Since the rents of classes of tenants were being adjusted with respect to each other, there was a greater likelihood that an oral proceeding would be needed, not only to establish sharply-disputed local facts, but also to work out possible compromises. The best form would be a conference. There, the tenants could "make innovative suggestions for compromising competing interests," as "the issue [was] not necessarily limited to [an] increase vel non."[156]

Subsequent cases have confirmed that due process, assuming that it applies to rent-setting in the first place, requires written comments,[157] although none have gone as far as Thompson in suggesting a limited role for oral proceedings. However, the Thompson approach has found support in two cases involving hearings for customers resisting the increase of rates by publicly-owned utilities. In Virgin Islands Hotel Association v. Water and Power Authority,[158] the Third Circuit Court of Appeals assumed that electricity users had a constitutional right to a voice before the Authority raised rates. But the court denied the request for a trial, noting that the Authority had actually conducted a proceeding where its representatives had discussed the proposed increases, entertained written questions and comments, and allowed concluding

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155. 497 F.2d at 628, 630.
156. See id. at 638-39.
157. Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483, 491-92 (9th Cir. 1974); Dew v. McLendon Garden Associates, 394 F.Supp.1223, 1231-33 (N.D.Ga. 1975); Ponce. v. Tulare Housing Authority, 389 F.Supp. 635, 652 (E.D. Cal. 1975).
158. 476 F.2d 1263 (3d Cir.), cert. denied 414 U.S. 1067 (1973).

oral statements. The court held that written questions were sufficient, although it mentioned expressly that the "present case does not compel us to hold that cross-examination will never be required ... ."[159] In Northern California Power Agency v. Morton, decided two years later in 1975, a district court required that cross-examination. It held that purchasers of hydroelectric power from a federally-owned project were entitled by the Constitution to "limited-on-the-record questioning of proponents of [a] rate increase" being considered by the Secretary of the Interior.[160] The court acknowledged that the circumstances were special: the increase was being proposed by one branch of the Department of the Interior and decided on by another. Limited cross-examination of departmental experts was the best means of laying bare the factual assumptions and reasoning behind the rise in charges.

In conclusion, American courts have fashioned dramatic changes in ratemaking procedures since 1973. Responding to the inclusion of many parties, they have thrown off the trial format in group ratemaking and rent-setting. In its place they have required an opportunity to make written comments, with the possibility of oral proceedings, and even trial, on selected issues. The parallel with what the British Parliament has done with structure plans is intriguing. There, the number of parties and the broad nature of the issues likewise forced abandonment of the oral adversary proceeding

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159. 476 F.2d at 1269.
160. 396 F.Supp. 1187, 1193 (D.D.C. 1975).

as the sole means of participation. It has been replaced in part by the "examination in public," offering an unlimited opportunity for written comments, with an actual hearing on those issues where there is special need.[161] As in the United States, it is for the courts in the final instance to determine that special need. But in Britain, the courts will be entering the process only at that point. In the United States, they will have been involved from the beginning, broadly prescribing the form of the proceeding in the manner of the British Parliament.

ALLOCATIVE LICENSING

The administration is often responsible for deciding whether a person or business may engage in a certain activity or be granted a certain status. Many of these decisions involve pure adjudication. Standards are set out, and any applicant that meets them must be certified. Examples are restaurant licences or licences to engage in most callings. A standard may be vague -- for example, that an applicant be "of good moral character." While this gives the decider more discretion, it does not change the basic nature of his calculation. He will simply be filling in the standard as he applies it to each applicant. Other licences, however, are not just issued to anyone meeting minimum requirements. Usually there are physical or economic constraints on the number that can be granted. The administration will therefore be looking for the "best" applicant, trading off numerous benefits and defects against each other. It will also probably be fitting him into a whole system of interlocking licences, which it must superintend in the public interest. A

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161. See pp. 131-34 supra.

decision at any one point may affect the entire pattern, just as the setting of a rate for one business may affect an entire price structure. The function is thus polycentric.

In the United States, allocative licensing, like ratemaking, is undertaken mostly by the federal regulatory agencies. A statute will normally require a business to obtain a "certificate of public convenience and necessity" from the responsible agency before engaging in a regulated enterprise. The Interstate Commerce Act prevents railroads from extending or abandoning lines without a certficiate from the Interstate Commerce Commission.[162] The same Commission is charged with licensing motor carriers to provide specified services on designated routes in interstate commerce.[163] Various statutes require producers and transporters of natural gas and electricity to obtain permits from the Federal Power Commission before acquiring, constructing, or extending facilities.[164] Likewise, the Federal Communications Commission issues broadcasting licences to applicants "if public convenience, interest, or necessity will be served thereby," with the aim of providing "a fair, efficient, and equitable distribution" of radio and television facilities to states and communities.[165] Lastly, the Civil Aeronautics Board controls the national network of air routes by granting certificates to carriers that are "fit, willing, and

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162. Interstate Commerce Act, 49 U.S.C. §1(18)(1970).
163. Id., 49 U.S.C. §§306(a)(1), 307(a) (1970).
164. Natural Gas Act, 15 U.S.C. §717f(c)(1970); Federal Power Act, 16 U.S.C. §797(e)(1970).
165. Communications Act, 47 U.S.C.§§301, 307 (1970).

able to perform such transportation properly" and which demonstrate that it is "required by public convenience and necessity."[166] In all cases, the agency is charged with selecting the best applicant and fitting it into a nation-wide pattern of licences.

Allocative Licensing in the Shadow of Ratemaking

Allocative licensing is of more recent vintage than ratemaking. Whereas the latter was well-established by 1890, allocative licensing did not appear on the scene until 1920, when the Interstate Commerce Commission was given power over railroad track extensions.[167] Not surprisingly, it grew up in the shadow of its elder sibling, especially as far as procedures were concerned. The earliest authority bearing on procedure was the Chicago Junction Case, decided by the Supreme Court in 1924.[168] The New York Central Lines desired to acquire the Chicago Junction Railway, which owned the terminal facilities at Chicago, in order to obtain continuous track from the east to the mid-west. Because it would in effect be extending its line, New York Central applied to the Interstate Commerce Commission for permission under the sections of the Act governing certificates of necessity and convenience, as well as under those controlling mergers. After some hesitation, the Commission decided the issue on the basis of the latter sections, granting permission for the merger. Various rivals of New York Central sought judicial review, alleging that the Commission's finding that the merger would be in the public interest was unsupported by evidence. The Supreme Court agreed, and after finding that the competitors had standing to obtain a judicial

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166. Federal Aviation Act, 49 U.S.C. § 1371(a),(d)(1) (1970).
167. Transportation Act of 1920, ch. 91, § 402, 41 Stat. 477, now Interstate Commerce Act, 49 U.S.C. § 1(18),(19) (1970).
168. Baltimore & Ohio R.R. v. United States, 264 U.S. 258 (1924).

remedy, held the Commission's approval of the merger void. Mr. Justice Brandeis, speaking for the majority, used the Louisville & Nashville ratemaking case as authority for the proposition that courts could review the Commission's decision on the evidence. Drawing on Louisville & Nashville, he noted the close connection between judicial review and administrative procedure. The statute authorized the Commission to approve mergers only "after hearing."[169] He continued:

> The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action.[170]

In a footnote, Mr.Justice Brandeis applied the same analysis to certificates for the extension of lines, which he stated could be decided on "only after hearing."[171] This was noteworthy, since the Act itself seemed to leave the question of a hearing to the Commission's discretion.[172] At an early date, the Supreme Court had applied the ratemaking precedents without qualification to allocative licensing.

The regulatory agencies seem to have received the message fairly quickly. There are relatively few cases dealing with licensing procedures prior to the Administrative Procedure Act, probably because the agencies were affording a trial on their own initiative. A lower court decision in 1941 reveals the assumptions dominating procedural thinking. In Kline v. United States the Interstate Commerce Commission

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169. Transportation Act of 1920, ch. 91, §406, 41 Stat. 481, as amended Interstate Commerce Act, 49 U.S.C. §5(2)(1970).
170. 264 U.S. at 265.
171. Id. at 265 n.10.
172. See Transportation Act of 1920, ch. 91, §402, 41 Stat. 478, now Interstate Commerce Act, 49 U.S.C. §1(19)(1970).

had found that an applicant to carry goods by truck on a designated route was ineligable for automatic certification under a statutory "grandfather clause," which recognized vested rights in those who had been operating prior to the original licensing Act. The court set aside the resulting order because it had been based on extra-record evidence. It elaborated on the procedural defects of the hearing:

> We think that this procedure violated the essential rights of a full and fair hearing, as the same is laid down in the rule in the case of [Louisville & Nashville], and in violation of the procedural requirements as defined in the case of [Morgan]. The fact that the final order of the Commission might be justified on the merits does not obviate the requirement of a fair trial. The requirement of a fair trial is binding on administrative agencies, as well as on the Court.[173]

The court cannot be faulted for prescribing a trial here, since the Commission was engaged in true adjudication -- deciding on the facts whether the applicant had engaged in the carriage of goods before the Act came into effect. But it gave no hint that it would limit the trial format to this aspect of licensing. Indeed, the citation of ratemaking cases indicated that the same requirements would prevail when the Commission came to decide matters of "public convenience and necessity." A later decision in fact cited Kline for this very proposition.[174]

There was dictum in a 1940 Supreme Court opinion that cautioned judges against the automatic imposition of a trial on allocative licensing. The case was Federal Communications Commission v. Pottsville Broadcasting Co., involving an order from a lower court to the Federal

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173. 41 F.Supp.577, 583 (D.Neb. 1941).

174. Pierce Auto Freight Lines v. United States, 57 F.Supp. 192, 197 (D.Ore. 1944), rev'd on other grounds 327 U.S. 515 (1946).

Communications Commission to determine an application for a radio licence on the record of a prior hearing and not to hold a second hearing. The Supreme Court reversed this, saying that the Commission had discretion about how to proceed in such circumstances. But Mr.Justice Frankfurter, writing for the Court, saw a "much deeper issue." Fresh from the Byrne Professorship of Administrative Law at Harvard, he took advantage of his new podium on the Court to deliver a lecture gratis on the limits to judicial interference with regulatory agencies:

> The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. ... [But agencies have] power far exceeding and different from the conventional judicial modes for adjusting conflicting claims -- modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts. 175

As timely as this advice was, it had no direct effect on the law. Since it was not anchored to any holding, it suffered the fate of being celebrated by academics[176] and ignored for practical purposes by judges.

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175. 309 U.S. 134, 142-43 (1940)[citation omitted].
176. See, e.g., Davis, Text §8.01, at 195.

Allocative Licensing and the Administrative Procedure Act

The Acheson Committee Report, which appeared a year after Portsville, had little to say about licensing hearings per se. It did praise the Civil Aeronautics Board for experimenting with a "prehearing conference," which was held after the institution of proceedings, but before the formal trial:

> At first the major purpose was to reach an agreement before hearing on the authenticity of documents, the simplification of statistical proof, and the qualification of proposed witnesses as experts on specified matters. The conferences were so successful that their scope has been extended. They may now be convened by an examiner to formulate the issues involved in the hearing, to simplify proof by stipulations, to agree upon the number of witnesses, and to arrange an exchange of exhibits prior to the hearing.[177]

The Committee suggested that conferences of this sort might be used to advantage "in rate and other technical proceedings."[178] Unfortunately this suggestion has never been enacted into law.

An attempt to amend the Administrative Procedure Act twenty-two years later to provide generally for prehearing conferences got nowhere.[179]

The Administrative Procedure Act lumped all licensing together, whether it involved applying a minimum standard or adjusting a pattern. Licensing was defined as "adjudication,"[180] even though applications for initial certificates of public convenience and necessity, like the prescription of rates, looked to the future, and hence might seem closer to "rule making." Licensing that was

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177. Acheson Committee Report 66.
178. Id.
179. S.1663, 88th Cong., 1st Sess. (1963). See Long, "Administrative Proceedings: Their Time and Cost Can Be Cut Down," 49 A.B.A.J. 833, 835-36 (1963).
180. APA §2(d),(e), 5 U.S.C. §551(6),(7),(8),(9) (1970).

"required by statute to be determined on the record after opportunity for an agency hearing" was, like other "adjudication," subject to the formal adversary procedures of the Act.[181] Some concessions were made to the special nature of allocative licensing. Like "proceedings involving the validity or application of rates," "applications for initial licences" were exempted from the provisions prohibiting all contact between staff entrusted with investigating and staff entrusted with deciding.[182] The Act also allowed the agency rather than the examiner to issue tentative decisions when determining applications for initial licences.[183] Most important, where initial licences were being applied for, agencies might "when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."[184] As with the prescription of future rates, this was the exception that might ultimately swallow the trial requirement.[185]

With a few qualifications, then, the Administrative Procedure Act confirmed the trial as the overall model for allocative licensing, just as it had for ratemaking. In 1956 the Supreme Court did make a slight qualification. In United States v. Storer Broadcasting Co.,[186] it permitted the Federal Communications Commission to promulgate a rule denying additional licences to owners of multiple broadcasting facilities unless they could give adequate reasons in writing why the rule should be waived. The

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181. Id. §§ 5, 7, 8, 5 U.S.C. §§ 554, 556, 557 (1970).
182. Id. § 5(c), 5 U.S.C. § 554(d) (1970).
183. Id. § 8(a), 5 U.S.C. §557(b) (1970).
184. Id. § 7(c), 5 U.S.C. §556(d) (1970).
185. See pp. 185-86 supra & p. 218 infra.
186. 351 U.S. 192 (1956).

"full hearing" mandated by the Communications Act[187] applied only to applicants who could make a case for being exempted from the rule. However, once they did so, the Communications Act and the Administrative Procedure Act required

> that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Such hearing is essential for wise and just application of the authority of administrative boards and agencies. 188

One attempt to evade the Administrative Procedure Act was unsuccessful. The Interstate Commerce Act has never expressly compelled the Interstate Commerce Commission to hold a hearing on applications for motor route licences.[189] Therefore, the Administrative Procedure Act's sections on formal "adjudication" should apply only if this licensing is required by the Constitution "to be determined on the record after opportunity for an agency hearing."[190] In Riss & Co. v. United States, a federal district court agreed that "a full and fair opportunity to present matter before the Commission as to the right to a certificate is a fundamental requirement in such proceedings; and where such is denied, or is inadequate or unfair, the Commission's order is to be held void."[191] However, the Constitution did not necessitate a "formal hearing" sufficient to trigger the "adjudication" provisions of the Administrative Procedure Act imposing a trial.

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187. 47 U.S.C. §309(e)(1970).
188. 351 U.S. at 202 [citation omitted].
189. See Interstate Commerce Act, 49 U.S.C. §§306(a)(1), 307(a) (1970).
190. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).
191. 96 F.Supp. 452, 455 (W.D. Mo. 1950).

The court did not believe that the formal hearing prescribed for the Commission in ratemaking cases like Louisville & Nashville was necessary here. In deciding matters of public convenience and necessity,

> the Commission is not usually required to weigh contested issues of fact such as are inherent in cases of adjudication contemplated by Section 5 of the A.P.A. ... [Its decision rests] in part on statutory policy interests established by Congress, having only prospective effects. The required determination by the Commission of the issue of public convenience and necessity, on the face of the statute, and under the legislative scheme established by Congress, is not one made on existing facts, the result of present controverted rights and duties usually found in proceedings of an adjudicative character, as commonly understood, but is one made dependent upon policy interests as well as upon the showing made by a motor carrier, requiring the formation and determination of future rights and duties compatible with such policy. 192

The court therefore declined to apply the formal "adjudication" sections of the Administrative Procedure Act, but instead measured the Commission's conduct on the basis of a more relaxed standard of due process. This is analogous to what the Supreme Court was to do with group ratemaking in Florida East Coast twenty-three years later: it interpreted a statutory requirement of a "hearing" to mean less than a "hearing on the record," so that the formal rule making provisions of the Administrative Procedure Act requiring a trial did not apply.[193] However, in the early 1950's the Supreme Court was not ready to take such a bold step. It summarily reversed the lower court's holding in Riss,[194] citing its prior decision that "adjudication"

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192. Id.
193. See pp. 178-79 supra.
194. 341 U.S. 907 (1951).

required by due process to be "on the record" was subject to the trial sections of the Administrative Procedure Act. There the law stands to this day.

The Expansion of Licensing Proceedings

The trial format is no more functional for expanded licensing proceedings than for expanded ratemaking. When confronted with the need to prescribe licensing procedures that will accommodate many parties and deal with broad policy questions, the response of American courts has been uncertain.

The Ashbacker Problem. -- The first opportunities came as the result of the so-called "Ashbacker doctrine." In the early 1940's, two companies, Fetzer and Ashbacker, sought licences to operate radio stations from adjacent towns on the same frequency. The Federal Communications Commission noted that the applications were "mutually exclusive" since the stations would interfere with one anothers' broadcasts. The Commission therefore granted Fetzer's application, and in order to comply with the statutory command to accord a "full hearing" before denying a licence, scheduled Ashbacker's for a hearing, where, presumably, Ashbacker would argue that it should be substituted for Fetzer. In Ashbacker Radio Corp. v. Federal Communications Commission, the Supreme Court vacated the Commission's action, finding that Ashbacker had in effect been denied its right to be heard. When two applications for a licence were "mutually exclusive" in the sense that the grant of one would automatically preclude the grant of the other,

the Commission would have to hear both applicants before making a decision.[195] Stated in this way, the Ashbacker doctrine was simply a special application of the general right to a hearing.

The idea was extended beyond broadcasting licensing to compel a consolidated hearing when two applicants applied for certificates to construct hydroelectric power plants on the Columbia River at locations sufficiently close to create mutual interference.[196] In the field of transportation licensing it was given a new twist. When rivals applied for a route, it was usually physically possible for both to operate on it. However, the courts held that Ashbacker applied to cases of mutual exclusivity based on economic conditions. Thus, if there was only enough traffic on a route to support one licence, all applications had to be consolidated and heard in a single proceeding. This was applied to air route[197] and natural gas pipe-line[198] licences, and was held applicable to trucking licences.[199]

It was in the field of air route licensing that the Ashbacker doctrine had greatest significance for procedure. The 1959 case of Delta Air Lines, Inc. v. Civil Aeronautics Board[200] illustrates what could happen. The Civil Aeronautics Board initiated a proceeding to award a licence from St. Louis to Florida. The Board favoured Trans World Airlines because it proposed to combine the route with a California-St.Louis one that it already possessed, and thereby provide transcontinental service from California to Florida with a stop at St. Louis. Other airlines seeking to provide transcontinental

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195. 326 U.S. 327, 333 (1945).
196. Public Utility District v. Federal Power Commission, 242 F.2d 672 (9th Cir. 1957).
197. Northwest Airlines, Inc. v. Civil Aeronautics Board, 194 F.2d 339 (D.C. Cir. 1952).
198. Northeastern Gas Transmission Co. v. Federal Power Commission, 195 F.2d 872, 877-81 (3d Cir.), cert. denied 344 U.S. 818 (1952).
199. Great Western Packers Express v. United States, 263 F. Supp. 347, 350-51 (D. Colo. 1956).
200. 275 F.2d 632 (D.C. Cir. 1959), cert. denied 362 U.S. 969 (1960).

service across the southern part of the country then asked to have the proceedings consolidated, since there was only enough traffic to support one carrier. At this point Eastern Air Lines requested consolidation of its application for an extension of its existing Florida-St. Louis route to California. Finally, American, National, and Delta, which together operated an interchange service between California and Florida through Texas, sought entry on the ground that any grant of a new licence would in fact modify their existing one. A somewhat bewildered Court of Appeals eventually found a prima facie case for mutual exclusivity, requiring consolidation in every instance but the last one.

With amazing rapidity, then, the Ashbacker doctrine might expand a hearing to comprise an entire geographical area. A court warned that "An existing certificate holder cannot by the mere filing of applications for routes transform a limited inquiry into a massive consideration of the whole of American air transportation."[201] Yet that is what Ashbacker seemed to require. The effect on procedures was identical to that of group ratemaking: they would have to loosen to accommodate the expanded nature of the hearing. However, the courts gave no hint that they would permit this. In an earlier 1955 case bearing the same name of Delta Air Lines, Inc. v. Civil Aeronautics Board, the District of Columbia Circuit Court of Appeals disabused the Board of the notion that Ashbacker required simply the simultaneous decision, rather than hearing, of mutually exclusive applications: "We read [Ashbacker] as meaning that, where the applications of two qualified applicants for a licence are as a matter of economic fact mutually exclusive, each applicant is entitled to a comparative hearing

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201. Eastern Air Lines, Inc. v. Civil Aeronautics Board, 243 F.2d 607, 609 (D.C. Cir. 1956).

and consideration with his adversary." The court then delivered the blow: "The requirement of a comparative hearing means all the give-and-take of contesting parties, including cross examination, rebuttal, participation in prehearing proceedings, objections, briefs and arguments as contesting parties."[202] Trial was still the prescribed format. Accordingly, four years later in the second Delta case, the court held that failure to consolidate Eastern's application with the area licensing proceedings "deprived Eastern of the full hearing required by" the first Delta case.[203]

Judicial attempts to broaden air route licensing hearings eventually produced a reaction. In the mid-1960's the courts began a retreat that left the Civil Aeronautics Board again in control of the scope of its proceedings. Now judges reiterate that "the Board must be free to exercise a considerable measure of discretion in defining the scope of air route cases," subject of course to judicial control for abuse of discretion.[204] The Board has responded by limiting proceedings while maintaining the basic trial format. It has the habit, for example, of labelling a preliminary order denying consolidation "a pre-trial restriction."[205] A practitioner noted in the 1960's that although the Board made some use of a prehearing conference, the main occasion for participation remained the trial, probably because the Board feared that judicial reversal would halt any experiments.[206]

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202. 228 F.2d 17, 22 (D.C. Cir. 1955) [citation omitted].
203. 275 F.2d at 644.
204. National Airlines, Inc. v. Civil Aeronautics Board, 392 F.2d 504, 508 (D.C. Cir. 1968). See also Delta Air Lines, Inc. v. Civil Aeronautics Board, 497 F.2d 608, 612-13 (D.C. Cir. 1973); Frontier Airlines, Inc. v. Civil Aeronautics Board, 349 F.2d 587, 591 (10th Cir. 1965).
205. Delta, 497 F.2d at 612.
206. Westwood, "Administrative Proceedings: Techniques of Presiding," 50 A.B.A.J. 659, 662 (1964).

The contrast to what happened in group ratemaking is marked. When the Supreme Court originally held that the Federal Power Commission had authority to set group rates, it emphasized that "the ultimate achievement of the Commission's regulatory purposes may easily depend upon the contrivance of more expeditious administrative methods."[207] It therefore encouraged experiment, which eventually led the Commission to try new procedures.[208] In contrast, judges used Ashbacker to force the Civil Aeronautics Board to expand proceedings without loosening the trial requirement. This was a mistake, since relaxed procedures must attend area proceedings, whether rates are being set or licences allocated.

Intervention and Procedures. -- Rival applicants are not the only interests that may desire a place in licensing proceedings. Others who may be specially affected by the issuance of a licence, such as existing licensees or the public being served, may seek a hearing before the responsible administrative agency. Since a polycentric decision is by definition concerned with the best overall result, their interests may be relevant to whatever adjustment is being undertaken.

In Britain a clear solution has emerged for the same problem in small-scale land inquiries. The statute prescribing an inquiry will specify the parties entitled to be heard. In compulsory purchase inquiries these are the acquiring authority and any owner, lessee, or occupier of the land sought to be taken;[209] in planning appeals they are

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207. Re Permian Basin Area Rate Cases, 390 U.S. 747, 777 (1968).

208. See Mobil Oil Corp. v. Federal Power Commission, 483 F.2d 1238, 1255-56 (D.C. Cir. 1973); Phillips Petroleum Co. v. Federal Power Commission, 475 F.2d 842, 845, 850 (10th Cir. 1973), cert. denied 414 U.S. 1146 (1974).

209. Acquisition of Land (Authorisation Procedure) Act 1946, 9 & 10 Geo. 6, c. 49, Schedule 1, Part 1,§ 4 (2), (3).

the applicant and the local planning authority.[210] Statutory instruments may simply confirm the right of statutory parties to be heard (as do those governing compulsory purchase inquiries)[211] or extend the right slightly (as do those controlling inquiries into planning appeals) to specified government bodies and to anyone with a legal interest in the land.[212] In addition, "any other person may appear at the discretion of the [inspector]."[213] However, these latter participants do not obtain all of the procedural benefits of the regulations. Unlike statutory parties, they are not entitled to receive notice of the local authority's case, to call evidence and to cross-examine witnesses freely, to participate in site inspections, or to be advised of any new evidence obtained by the Department after the inquiry.[214] Owners of nearby land, for example, may be admitted to the inquiry at the discretion of the inspector, but they gain no legal rights. Most important for present purposes, they cannot have the courts use natural justice to ensure fair treatment.[215] Their procedural interests are guarded, if at all, by the Council on Tribunals and the Parliamentary Commissioner for Administration.[216]

In America the solution is not so tidy. Judges have taken the lead in extending rights of intervention and hence expanding the scope of licensing proceedings. They have then had to define the procedural rights of intervenors. The most important area has been broadcasting licensing. The Communications Act of 1934 stated that if the Federal Communications Commission was not inclined to grant a radio broadcasting licence, it should "afford such applicant an opportunity to be heard ... ."[217]

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210. T & CP Act 1971, §36 (1), (4)
211. E.g., CPLA (IP) Rules 1962, r. 5(1).
212. E.g., T & CP (IP) Rules 1974, r. 7(1).
213. CPLA (IP) Rules 1962, r. 5(1). See also, e.g., T & CP (IP) Rules 1974, r 7(2).
214. E.g., CPLA (IP) Rules 1962, rr. 4(4), 7(3), 8, 9(2); T & CP (IP) Rules 1974, rr. 6, 10(3), 11, 12(2).
215. Cf. Buxton v. Minister of Housing and Local Government [1961] 1 Q.B. 278, 284-85 (1960).
216. See pp. 107-08, 112-13 supra.
217. Ch. 652, §309(a), 48 Stat. 1085.

It said nothing about intervention, and did not appear to require a hearing if the Commission were disposed to grant an application. In this respect it was like the British statute, which does not require an inquiry when a local authority is disposed to grant an application for planning permission.[218] However, in Federal Communications Commission v. National Broadcasting Co.,[219] decided in 1943, the Supreme Court held that the Commission could be legally compelled to hold a hearing even when it was disposed to grant an application. Station WHDH applied to have the power and operating time of its Boston radio transmitter increased, something amounting to a request for a new licence. Station KOA, operating from Denver on the same frequency, objected that its transmissions would be subject to interference. It stated that this amounted to a "modification" of its licence, and hence that under another section of the Act, it should "have been notified in writing of the proposed action and the grounds or reasons therefor and ... given reasonable opportunity to show cause why such an order of modification should not issue."[220] Although the Commission had in fact allowed it to present written briefs and oral argument, KOA contended "that it was entitled, as a matter of right, to participate in the hearing before the Commission on the question of the granting of WHDH's application and that its rights in this respect were not satisfied by permitting it to file a brief and present argument."[221] The Court agreed, holding that although KOA might not

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218. See T & CP Act 1971,§ 36(1),(4). However, the Secretary of State may "call in" a planning application (including one that the local authority is disposed to grant) for decision. If the applicant or local authority requests it, he must then hold a hearing before deciding. Id. §35 (1), (5).

219. 319 U.S. 239 (1943).

220. Communications Act of 1934, ch. 652, §312(b), 48 Stat. 1087, as amended 47 U.S.C. § 316(a) (1970).

221. 319 U.S. at 242.

have a strict property interest in its licence, the fact that it stood to suffer economic injury gave it a right to intervene as a party in the proceedings. This meant that it had to be "afforded opportunity to participate in the hearing, to offer evidence and to exercise the other rights of a party."[222] Once a business was given the right to intervene, it had to be accorded a trial automatically. The Court could "accord no other meaning to the language of the proviso" requiring that the holder of a licence to be modified be "given reasonable opportunity to show cause why such an order of modification should not issue."[223]

Mr. Justice Frankfurter, dissenting, thought it quite easy to accord another meaning to the proviso. To him, the Court was violating the spirit of Pottsville, allowing intervenors "the full rights of a party litigant" in the manner of a courtroom proceeding. Granting intervenors the automatic right to a trial might allow them to "shape and distort the direction of a proceeding ... ."[224] He believed that the Commission could require them to make specific factual charges of electric interference before receiving full rights to participate in the evidentiary hearing.

In 1952 Congress went part of the way toward enacting Mr. Justice Frankfurter's dissent into law. It amended the Communications Act to compel anyone seeking to intervene as a "party in interest" to "specify with particularity the facts, matters, and things relied upon ... ." Participation in the hearing could then be limited to "the issues set forth in said protest."[225] Congress thus sought to confine the scope of

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222. Id. at 246.
223. Id. at 245.
224. Id. at 263-64.
225. Act of July 16, 1952, ch. 879, §309(c), 66 Stat. 715.

licensing proceedings. Meanwhile, judges continued to expand rights of intervention. The term "party in interest" was taken to include not only those who stood to suffer electrical interference, but also those who might be subject to economic injury from the grant of a licence. This latter category was enlarged from rival broadcasting stations that might lose advertising revenue[226] to rival media like newspapers that might be similarly affected.[227] Eventually it included the competitor of an applicant's parent company, which opposed the renewal of a licence on the ground that the parent used its subsidiaries' broadcasting facilities to gain monopolistic advantage in publicizing its products.[228]

With licensing proceedings ballooning, the courts remained insistent on the trial format for intervenors. In Clarksburg Publishing Co. v. Federal Communications Commission,[229] a 1955 decision, the District of Columbia Circuit Court of Appeals held that an intervenor was not confined to proving facts alleged in his protest petition. He could demand a "full evidentiary hearing" on any issue properly raised in order to elicit further facts. Although there was authority to the contrary in other judgements of the same court,[230] Congress felt sufficiently alarmed to re-amend the Communications Act. It read Clarksburg as requiring a "full evidentiary hearing, regardless of the issues raised by the protest." It did not wish to limit the class of "parties in interest," only to allow the Commission "in appropriate cases, to dispose of protests without holding a full evidentiary hearing ... ."[231]

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226. E.g., Greenville Television Co. v. Federal Communications Commission, 221 F.2d 870, 872 (D.C. Cir. 1955); Camden Radio, Inc. v. Federal Communications Commission, 220 F.2d 191, 195 (D.C. Cir. 1954).

227. E.g., Clarksburg Publishing Co. v. Federal Communications Commission, 225 F.2d 511, 514 (D.C. Cir. 1955).

228. Philco Corp. v. Federal Communications Commission, 257 F.2d 656 (D.C. Cir. 1958), cert. denied 358 U.S. 946 (1959).

229. 225 F.2d 511 (D.C. Cir. 1955).

230. Cf., e.g., Harbenito Broadcasting Co. v. Federal Communications Commission, 218 F.2d 28, 30-31 (D.C. Cir. 1954).

231. S. Rep. No. 1231, 84th Cong., 2d Sess. (1955) in 1956 U.S. Code Cong. & Admin. News 2195, 2196-97.

In 1956 Congress accordingly required prospective intervenors to "specify with particularity the facts relied upon ... ." The Commission, if it found the intervenor to be a "party in interest," was to designate the licence application for a hearing on issues specified in the protest, "except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented."[232] Intervenors were thus required to specify the facts relied on. Trial would be limited to establishing material facts alleged, although intervenors would have the right of oral argument on the question of materiality. Congress was nudging the courts into requiring trial for intervenors only on disputed questions of fact. The expansion of proceedings had removed trial as the proper overall format for all parties.

Congress went further in 1960 to keep broadcasting proceedings within manageable proportions. It amended the Act yet again to do away with the right to oral argument on the materiality of facts alleged. Now intervenors simply make "specific allegations of fact" supported by affadavits. The applicant may file a reply in which allegations of fact must likewise be supported by affadavits. The Commission may grant the application without a hearing if there are no "substantial and material questions of fact." Otherwise, it "shall formally designate the application for hearing on the ground or reasons then obtaining ... ."[233]

Congress acted just in time. Six years later, the courts ordained yet another expansion of the term "party in interest." Now representatives of listeners are entitled to intervene in licensing proceedings in order to assert the public interest in balanced and fair

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232. Act of Jan. 20, 1956, ch. 1, §309(c), 70 Stat. 3.
233. Act of Sept. 13, 1960, Pub. L. No. 86-750, §4, 74 Stat. 890, as amended 47 U.S.C. §309(d),(e) (1970).

programming.[234] Since there is scarcely a limit to the variety of interests that can gain entry by this method, proceedings are now under more pressure than ever to expand. The courts have responded by taking the wishes of Congress to heart. Representatives of the listening public are allowed an evidentiary hearing only on "substantial and material questions of fact." Two recent cases illustrate the current law. In Citizens Committee to Preserve the Voice of the Arts v. Federal Communications Commission, a broadcaster of classical music in Atlanta sought to transfer his licence to a company planning a popular music format. The Citizens Committee protested that the transfer would deprive devotees of classical music, already an embattled group in Atlanta, of their last source of culture. Specifically, it contested the broadcaster's allegations that the station was currently unprofitable, that leading citizens had expressed distaste for its classical programs, and that there was another station nearby presenting the same fare. The court held that the Commission was required to conduct an evidentiary hearing on these three issues. It noted particularly the dispute about what leading Atlanta citizens actually thought:

> The truth is most likely to be refined and discovered in the crucible of an evidentiary hearing; and it is precisely a situation like the one revealed by this record which motivated the Congress to stress the availability to the Commission of the hearing procedure. The controversy that developed in this case is one that characteristically continues to be blurred until it is subjected to the adversary process -- inside the hearing room and not out.[235]

On the other hand, trial was denied an intervenor in Hartford Communications Committee v. Federal Communications Commission. There, a citizens' group opposed the assignment of a radio licence to the Faith Center, a

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234. Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir. 1966).

235. 436 F.2d 263, 271 (D.C. Cir. 1970).

religious organization, on the ground that there would be a shift in emphasis toward religious programming, that broadcasts would not be sufficiently multi-denominational, and that news services would be unacceptably diminished. The court found that any unresolved issues of fact in these allegations were neither substantial nor material. It concluded:

> It is difficult to envision what [an evidentiary] hearing could have added. Essentially, appellants do not dispute facts, but rather inferences to be drawn from those facts. They challenge not facts, but rather the Commission's judgment and policies. 236

The court therefore affirmed the Commission's denial of an evidentiary hearing.

The push to limit the participation of intervenors in hearings before the Federal Communications Commission has been paralleled in licensing hearings before the Interstate Commerce Commission. In motor carrier cases, the latter Commission must likewise notify "interested parties" of pending licensing applications and afford "opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held ... ."[237] "Interested parties" usually turn out to be current licence holders who stand to suffer economic loss from competition if more licences are granted. In 1966 the Commission announced that in order to expedite matters, it would use a "modified procedure," which is now codified in the regulations.[238] Its core is the requirement that, following the exchange of verified statements of fact, the parties specify the basis for an oral hearing and detail the matters on which they wish to cross-examine witnesses. The rules emphasize that, "Unless material facts are in dispute, oral hearing will not be held for the sole purpose of cross-examination."[239]

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236. 467 F.2d 408, 415 (D.C. Cir. 1972).
237. Interstate Commerce Act, 49 U.S.C. §305(e) (1970).
238. Interstate Commerce Commission Rules, 49 C.F.R. §§ 1100.45-1100.54, 1100.247 (1975).
239. Id. § 1100.53(a).

The courts have given their blessing to this relaxed procedure. In the leading case, Allied Van Lines Co. v. United States, [240] Pyramid Van Lines applied for a certificate authorizing it to transport household goods on certain interstate routes. In support of its application it submitted verified statements and affadavits from shippers who had experienced inadequate service on the route, from others who vouched for the efficiency of Pyramid's current operations, and from carriers which wished to link their routes with Pyramid's proposed routes. Pyramid also offered statistics on the projected increase in demand for the carriage of household goods. Allied Van Lines, which was already licensed to carry household goods on the route, intervened and requested an opportunity to cross-examine every person who had filed an affadavit. A three-judge district court affirmed the Commission's denial of this request, finding that Allied had failed to specify which facts it wished to dispute and why counter-affadavits would be insufficient. The court noted that Allied could have used available discovery procedures to ascertain these matters.[241] Allied thus parallels Hartford Communications in approving the limitation of intervenors' right to a trial. Later courts [242] have added that the "modified procedure" does not violate the formal "adjudication" provisions of the Administrative Procedure Act, which, while generally prescribing a trial in cases of this sort, state that "in determining applications for initial licenses, an agency may ... adopt procedures for the submission of all or part of the evidence in written form."[243]

The courts have come to accept, then, that when licensing proceedings expand to include intervenors, the trial format must give way. However, it is important to note that the trial format is only giving

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240. 303 F. Supp. 742 (C.D. Cal. 1969).
241. Id at 749.
242. E.g., Subler Transfer, Inc. v. United States, 396 Supp. 762, 764-65 (S.D. Ohio 1975).
243. APA § 7 (c), 5 U.S.C. § 556 (d) (1970).

way for intervenors, and not for licence applicants. No judicial decision has intimated that anything less than a full evidentiary hearing can be accorded the latter. Because of this, the Interstate Commerce Commission has stated that it will use its "modified procedure" only when it is disposed to grant an application and an intervenor wishes to be heard in protest.[244] In this respect, allocative licensing still trails ratemaking, where judges have allowed something less than a trial even for businesses whose charges are being set.

HEARINGS INVOLVING LAND

As noted at the beginning of the chapter, land inquiries have not played the same prominent role in American procedural law that they have in British. However, it is worth tracing what courts have done in the past, as well as noting recent developments that presage a more important place for land inquiries in the future.

Eminent Domain

The American equivalent of a compulsory purchase order is a proposal to take land by eminent domain. It is well settled that due process does not require that an owner of land subject to eminent domain proceedings be given a hearing on the issue of taking. The only hearing necessary is on the amount of compensation. The case cited most often for these propositions is Bragg v. Weaver, decided by the Supreme Court in 1919. The state of Virginia took earth from Bragg's land, as it was expressly authorized to do by statute, to repair an adjacent public road. Bragg sought an injunction, claiming that the statutory right

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244. Kingpak, Inc., 103 M.C.C. 318, 343-44 (1966), aff'd sub nom. Household Goods Carriers' Bureau v. United States, 288 F. Supp. 641 (N.D. Cal.), aff'd per curiam 393 U.S. 265 (1968).

to a hearing in a court of general jurisdiction on the question of just compensation was insufficient as a matter of due process. The Supreme Court affirmed the state courts' dismissal of his suit. Mr. Justice Van Devanter, speaking for a unanimous Court, put the matter crisply:

> The objection urged against the statute is that it makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking ... .
>
> Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.
>
> But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. 245

Bragg remains as secure today as it ever was, having been applied most recently in 1976.[246]

The best attempt at rationalizing Bragg and its followers came in Trager v. Peabody Redevelopment Authority,[247] a 1973 district court case. The Authority announced its intention to take an area of land, including a parcel owned by Trager, as part of an urban renewal project. Although the City Council had held a public hearing on the entire project as required by state statute, Trager sought an injunction on the ground that he had been denied his constitutional right to a hearing on the taking of his particular land. The court, as expected, denied the injunction, citing Bragg and other authorities. But it also attempted to explain its holding:

> The procedural due process requirements of notice and hearing attach themselves wherever there is need for an adjudicative hearing, i.e., when an individual or a small number of persons suffer a particular loss under circumstances peculiar to each individual or group. How-

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245. 251 U.S. 57, 58-59 (1919) [citations omitted].
246. Smart v. Texas Power and Light Co., 525 F.2d 1209, 1211 (5th Cir. 1976).
247. 367 F. Supp. 1000 (D. Mass. 1973).

> ever, where a hearing body, as a delegatee of the Legislature, is weighing general information and ideas affecting relatively large numbers of people, that body is considering legislative facts. At such a legislative hearing, the hearing body is determining the best overall public policy and is not concerned with the particular problems of individuals. These legislative hearings do not require notice of an opportunity to be heard to individuals whose rights are affected as part of an overall scheme to benefit society in general. 248

The problem with this explanation is that it proves too much. The same reasoning could be used to deny a hearing to businesses having their rates set or to applicants seeking licences. A hearing on the amount of compensation for land taken may not be enough. A party being singled out for drastic treatment should at least be allowed representations about how he should or should not fit into the scheme. An example of how useful these can be is provided by the facts in the British case of Coleen Properties Ltd. v. Minister of Housing and Local Government.[249] There, a local government body wanted to take a new building owned by Coleen as part of a plan to redevelop a surrounding slum. Coleen argued persuasively at the hearing that the authority could accomplish its objectives just as easily at much less expense by leaving its building alone. Trager may have wished to make the same sort of point.

One must not be too hard on the Trager court. It could have done little as a practical matter to require a hearing, given the settled state of the law to the contrary. It certainly deserves credit for attempting to explain precedents that have been laid down with a minimum of rationalization. But the court's approach reflects one bad habit already seen. That is the tendency to equate the right to a hearing with the right to a trial. The court was saying that where issues of local fact are not dispositive and hence a trial is inappropriate,

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248. Id. at 1002 [citations omitted].
249. [1971] 1 W.L.R. 433 (C.A.).

judges need not require any hearing whatever. But due process should not be confined to requiring a trial on the one hand or nothing whatever on the other. Because it has been, the "overjudicialization" of rate-making and allocative licensing has been complemented by the "under-judicialization" of taking by eminent domain.

Nor has any Administrative Procedure Act changed things. The relevant Act would not be the federal one, but one covering the activities of a state or territorial government, which will have immediate jurisdiction over land. Many states have adopted legislation based on the Revised Model State Administrative Procedure Act, which closely resembles its federal counterpart. "Rule making" and "adjudication" in the federal Act are paralleled by making "rules" and determining "contested cases" in the Model Act.[250] Although judges have been wont to emphasize the "legislative" aspects of the compulsory acquisition of land, it seems clear that eminent domain falls within the definition of a "contested case" -- a proceeding "in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after opportunity for hearing."[251] Of course, the hearing "required by law" comes on the amount of compensation, which, as with all "contested cases," must be conducted as a trial.[252] The Model Act therefore adds nothing to the procedural rights of landowners.

Not surprisingly, the most outspoken criticism of the failure to require a hearing on the issue of taking comes from one familiar with the British system. Professor Bernard Schwartz[253] believes that the Constitution demands a hearing, as it normally does when the administration is deciding whether to single out an individual and deprive him of

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250. Revised Model State Administrative Procedure Act §1(2),(7) (1970) [hereinafter cited as Revised Model State APA].

251. Id. §1(2).

252. Id. §§9-13.

253. Professor Schwartz is co-author of B. Schwartz & H.W.R. Wade, Legal Control of Government: Administrative Law in Britain and the United States (1972).

his property. He suggests quite convincingly that the casual judicial treatment of the question of taking is the product of peculiarly American circumstances. Because land has always been relatively plentiful, a person could usually find comparable property. Hence the only real issues involved compensation. Now the United States is becoming more like Britain, where the scarcity of land and the growth of social services like public housing have made the question of taking a great source of friction.[254] This, coupled with a more flexible attitude toward what due process can require, could lead the courts to compel some sort of hearing in the future.

Zoning

In America, land use control is accomplished by "planning" and "zoning." "Planning" involves the creation of a "comprehensive" or "master plan," which is a statement of objectives for the guidance of officials and the general public. Like the structure or local plan in Britain, it indicates how existing features should combine with proposed developments in the future. "Zoning" is the legal means for putting certain features of the master plan into immediate effect. It consists of a municipal ordinance which divides the area into districts or zones, and then regulates matters like land use, building heights and features, and lot areas in each one. Unlike the British structure or local plan, the American zoning ordinance has formal legal effect. A landowner wishing to develop his property within the terms of the ordinance is entitled to a building permit as a matter of right.

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254. B. Schwartz, A Commentary on the Constitution of the United States: The Rights of Property 259-63 (1965).

However, if his desired use would violate the ordinance, he may apply for special permission in the form of a "variance." These are granted by zoning boards in cases where there are special circumstances and the public interest permits it. The most obvious case is where the zoning ordinance imposes such economic hardship on the landowner that it could be said to be "confiscatory." There has also been increasing employment of "special exception permits," likewise issued by zoning boards. These authorize certain uses enumerated in the ordinance (such as churches or schools), which are granted where neighbouring properties would not be adversely affected and there is no conflict with the general purpose of the zoning scheme. Applications for variances and special exception permits are the American counterparts of applications for planning permission in Britain.

Hearings on Variances and Special Exception Permits. -- The state courts have by and large been responsible for zoning procedures, although occasionally a federal court will receive a case involving land under federal jurisdiction, or be asked to make a due process ruling in a case concerning land under state jurisdiction. American judges are in general agreement about the form of hearing required for variances and special exception permits. Usually the landowner will make an initial application to a designated municipal official. Most zoning statutes, following the example of the Standard State Zoning Enabling Act, provide for an appeal to a local board of zoning appeals by "any person aggrieved or by any officer, department, board or bureau of the municipality affected by any decision of the administrative officer."[255] The term

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255. Standard State Zoning Enabling Act §7.

"person aggrieved" comprises not only an applicant denied permission but also a neighbouring landowner who wishes to oppose the application because his property may be adversely affected.[256] Where no statute applies, courts have made it clear that due process requires that neighbours, as well as applicants, be heard.[257] Thus, in contrast to Britain, the former can request a hearing and obtain full procedural rights when one is held.

The courts agree that a zoning board must give an evidentiary hearing to applicants and objectors. Heath v. Baltimore, decided by the Maryland Court of Appeals in 1946, indicates one factor motivating judges. Scott applied for a "special exception" allowing him to add an extra garage to his premises. After the Buildings Engineer disapproved his application, he appealed to the Board of Zoning Appeals. The Board scheduled a hearing, but when Scott's architect was the only person to appear, it summarily granted the application. Heath and other neighbouring landowners sought to have the Board's order vacated as being unsupported by evidence. The Court of Appeals held in their favour, noting that the Board was required by statute to hold a hearing:

"A statutory provision for a public hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with the evidence, and it is arbitrary and unlawful to make an essential finding without supporting evidence."[258] Since judges would review on the evidence, the hearing had to focus on putting facts on the record to support the order. One is reminded of Louisville & Nashville in

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256. E.g., State ex rel. St. Louis Housing Authority v. Wind, 337 S.W. 2d 554, 557-58 (Mo. Ct. App. 1960); Bayport Civic Association v. Koehler, 138 N.Y.S. 2d 529-31 (Spec. T. 1954).

257. E.g., Scott v. Indian Wells, 99 Cal. Rptr. 745, 749-50 (1972).

258. 49 A.2d 799, 804 (Md. 1946).

ratemaking and of the Chicago Junction Case in allocative licensing,[259] each of which prescribed trial procedures to ensure that a record was built for judicial review. Similarly, in 1969 the Kentucky Court of Appeals set aside the grant of a variance after a zoning board failed to accord objectors any hearing whatever: "Plainly, the proceedings before the Board of Zoning Adjustment in the instant case did not afford procedural due process -- there was no real hearing; no taking of evidence; no finding of fact; nothing to support the order."[260]

The decision on a variance or special exception permit will often turn on disputed matters of local fact. Therefore, the courts may have been more justified in emphasizing the trial format here than elsewhere. However, they have not always been sufficiently aware of its limits. For example, in Somerset v. Board of Appeals a zoning board considering whether to grant a special exception permit made the mistake of announcing that "we are conducting public hearings in the true sense of a public hearing rather than an adversary trial ... ."[261] It therefore denied objectors the automatic right of cross-examination, but instead allowed them to call the applicant's witnesses and examine them at the end of the hearing. Citing Louisville & Nashville, the Maryland Court of Appeals vacated the Board's order granting the permit on the ground that objectors had been denied their due process rights of cross-examination.[262] The court's reaction seems a bit precipitous. It could have at least ascertained whether objectors had been prevented by the board's procedure from refuting allegations about the existence of local facts.

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259. See pp. 162-63 & 198-99 supra.
260. Morris v. Catlettsburg, 437 S.W. 2d 753, 755 (Ky. 1969).
261. 225 A.2d 294, 297 (Md. 1966).
262. Id. at 302-03.

A better approach was taken by the Kentucky Court of Appeals in 1971. In Louisville v. McDonald, it vacated a decision denying the "rezoning" of a particular parcel of land from the single family dwelling to the apartment house category. In doing so, it stated what the applicant was entitled to before the zoning authorities made their decision:

> ... constitutional due process requires a trial type hearing for the purpose of determining the adjudicative facts necessary to decide the issue. The required procedural elements ... include a hearing, the taking and weighing of offered evidence, a finding of fact based upon a consideration of the evidence and conclusions supported by substantial evidence. 263

Trial was properly seen as appropriate for establishing "adjudicative," or local, facts. This is its basic role here as elsewhere.

Courts could conceivably apply the Revised Model State Administrative Procedure Act to ensure adherence to the trial format. The main problem is bringing local zoning boards within the definition of a state "agency" for purposes of the Act. [264] Although the boards rely on state statute for their authority, they do not operate on a statewide basis. They might therefore be excluded from the ambit of the Act. If they are not, then it seems clear that the decision on a variance or special exception permit is a "contested case," since "the legal rights, duties, or privileges of a party are required by law to be determined ... after an opportunity for a hearing."[265] The District of Columbia courts have so held when applying the District's version of the Act. [266]

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263. 470 S.W. 2d 173, 177 (Ky. 1971).
264. Revised Model State APA §1(1), (2).
265. Id. §1(2).
266. E.g., Dietrich v. Board of Zoning Adjustment, 293 A.2d 470, 472 (D.C. 1972).

Under the Act, "contested cases" are subject to the same adversary, evidentiary procedures as are cases of formal "adjudication" under its federal counterpart.[267]

Hearings on the Enactment or Amendment of Zoning Ordinances.--When one moves from the treatment of a single piece of land within a zoning scheme to the creation or adjustment of the scheme itself, the procedural picture changes. The enactment or amendment of a zoning ordinance is by definition a legislative act, usually undertaken by a municipal council. The courts have almost unanimously refused to require anything as a matter of procedural due process. For example, in Burke v. Board of Representatives, the Stamford Board of Representatives rejected an amendment to a town zoning map that would have changed a "one-family residence district" to a "neighbourhood business district." Burke, who owned premises within the area, sought to have the Board's action set aside on the ground that the Board had afforded him no opportunity to be heard. The Connecticut Supreme Court of Errors upheld the Board, saying, "Since the board of representatives was acting in a legislative capacity, no notice or hearing was necessary to satisfy the requirements of due process of law."[268]

Likewise, in 1974 the California Supreme Court declined to require a hearing in analogous circumstances. San Diego had amended its zoning ordinance to establish height limits for buildings constructed along a specified part of the coast. It had acted, as it was authorized

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267. Compare Revised Model State APA §§9-13 with APA §§5-8, 5 U.S.C. §§ 554-57 (1970).

268. 166 A.2d 849, 853 (Conn. 1961).

to do, through an "initiative," whereby citizens voted directly on the ordinance. In San Diego Building Contractors Association v. San Diego,[269] the court upheld this method in the face of a challenge that it violated coastal residents' due process rights to a hearing. Rejecting occasional dicta to the contrary,[270] it noted that the case involved "the adoption of a broad, generally applicable, legislative rule." By way of contrast, there were "zoning decisions, such as the grant of a variance or the award of a conditional use permit, which are adjudicatory in nature and which thus involve entirely different constitutional considerations."[271] Three justices dissented, believing that a hearing was constitutionally required, since zoning "is in a class by itself and presents real and tangible risks of deprivation of private property far beyond those involved in ordinary 'legislative' measures."[272] This idea has received some support from commentators who believe that zoning ordinance amendments often single out specific property interests for drastic treatment.[273]

Many state statutes do prescribe a "public hearing" before the enactment of a zoning ordinance.[274] This may be seen as an American analogue to the British "examination in public" on

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269. 118 Cal. Rptr. 146 (1974), appeal dismissed 96 S.Ct. 3184 (1976).
270. 118 Cal. Rptr. at 152-53 & n. 6.
271. Id. at 150 [footnote omitted].
272. Id. at 157.
273. Comment, "Zoning Amendments -- The Product of Judicial or Quasi-Judicial Action," 33 Ohio State L.J. 130 (1972). See also Note, "Procedure Followed by Second Class Cities in Granting Changes to the Zoning Ordinance," 48 Ky. L.J. 304, 306-08 (1960).
274. E.g., Ariz. Rev. Stat. Ann. §§11-822 & 11-823 (1956); Cal.Code Ann. §65854 (Supp.1976); D.C. Code Ann. §5-415 (1973); Ky. Rev. Stat. Ann. §§100.207 & 100.211 (1970).

structure plans, or, more accurately, the "public local inquiry" on local plans. Judges have concentrated on ensuring that the public receives adequate notice of these hearings.[275] Although the courts agree that persons appearing are not entitled to a trial, but need only be allowed to present views and arguments,[276] they differ over whether the deciding body can investigate matters outside of the hearing. The Arizona Supreme Court has said that it can,[277] while the District of Columbia District Court has stated that all information received must be made a matter of record.[278]

The Revised Model State Administrative Procedure Act could be interpreted to give rights of participation here. If a municipal council is considered a state "agency" within the meaning of the Act, then a zoning ordinance surely comes within the Act's definition of a "rule" as an "agency statement of general applicability that implements, interprets, or prescribes law or policy."[279] The Act requires that in the case of rule making "all interested persons" be afforded "reasonable opportunity to submit data, views, or arguments, orally or in writing." Furthermore, in the "case of substantive rules, opportunity for oral hearing must be granted if requested by 25 persons, by a governmental subdivision or agency, or by an association having not less than 25 members."[280] No state

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275. E.g., Hart v. Bayless Investment and Trading Co., 346 P.2d 1101, 1105-08 (Ariz. 1959); Planning and Zoning Commission v. Ogden, 210 S.W. 2d 771, 772-73 (Ky.1948).

276. See, e.g., Louisville v. McDonald, 470 S.W.2d 173, 177-78 (Ky. 1971)(due process does not require that "public hearing" take the form of a trial).

277. Hart v. Bayless Investment and Trading Co., 346 P.2d 1101, 1108-09 (Ariz. 1959).

278. Ruppert v. Washington, 366 F.Supp. 686, 689-90 (D.D.C. 1973).

279. Revised Model State APA §1(1),(7).

280. Id. §3(a)(2).

court has yet been asked to apply these provisions to the making of zoning ordinances. But they remain a possible basis for public participation.

Federally-Mandated Hearings on Urban Renewal Schemes and Highway Projects

In the past decade the courts have been confronted with new hearings concerning the disposition and use of land. As was noted in the rent-setting section, the federal government is heavily involved in financing housing. Its program includes a series of loans and grants made available by the Secretary of Housing and Urban Development to state authorities undertaking urban renewal projects. The Housing Act makes it clear that the Secretary is to use his power to grant or withhold aid as a means of exercising planning control over projects. For example, he is to ensure that there is "a workable program for community improvement," that displaced families are adequately relocated, and that demolition is preferable to rehabilitation.[281] The Act states that "No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after a public hearing... ."[282] Likewise, the Secretary of Transportation has authority to approve plans for highways in the "federal-aid system." No project within the system is eligable for federal funds without his approval.[283] A state highway department submitting plans for approval must "certify to the Secretary that it has had public hearings, or has afforded the opportunity for such

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281. 42 U.S.C. §§1451(c), 1455(c), 1460(c) (1970).
282. Id. §1455(d).
283. Federal-Aid Highway Act, 23 U.S.C.A. §103(f)(Supp.1975).

hearings ... ." The certification is to be accompanied by a "report" indicating the "economic, social, environmental and other effects" of the highway and "various alternatives which were raised during the hearing or which were otherwise considered." The state highway department will then submit "a copy of the transcript of said hearing" to the Secretary along with the certification and report.[284] As a precondition to receiving federal funds, then, Congress has required state urban renewal and highway authorities to hold a "public hearing."

The courts have been invited on various occasions to give body to this vague congressional prescription. Their response has been independent of the Administrative Procedure Act. The Act's "adjudication" provisions do not apply because urban renewal and highway decisions are too general in effect and because they need not be made "on the record."[285] Nor do the Act's "rule making" provisions have any effect, since matters relating to "public property, loans, grants, benefits, or contracts" are specially excepted from their sweep.[286]

The courts got off to a rough start in the 1959 case of Hoffman v. Stevens.[287] Hoffman brought suit in a federal district court to enjoin the Pennsylvania Department of Highways from taking his land to widen a federally-aided highway. He alleged, among other things, that the Department had not held the "public hearing" required by statute as a precondition to receiving federal funds. His suit

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284. Id. §128.

285. APA §§5 & 7, 5 U.S.C. §§554(a) & 556(a) (1970). Gart v. Cole, 263 F.2d 244, 251 (2d Cir.), cert. denied 359 U.S. 978 (1959). See also Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F.Supp.809, 829 (E.D. Pa. 1968).

286. APA §4, 5 U.S.C. §553(a)(2) (1970). Powelton, 284 F.Supp. at 830.

287. 177 F.Supp. 898 (M.D.Pa. 1959).

seems misconceived, since a court that finds a violation of the statute should only be able to enjoin the federal Secretary from disbursing funds or the state department from receiving them. Although this may mean as a practical matter that the project will not proceed,[288] the power of the state authority to take the land should not be affected. In making this point, however, the court in Hoffman used some very curious language:

> The provision [for a public hearing] was obviously intended to insure wise and fair use of federal funds. ... At best, failure to afford a hearing might give rise to a dispute between the Secretary of Commerce and the Pennsylvania Department of Highways as to the allocation and use of federal funds. 289

The court seemed to be saying that failure to hold a hearing was an intragovernmental affair, which did not concern those whose land was to be affected by the project.

Later cases have put any doubts raised by Hoffman to rest. They assume not only that citizens can obtain legal redress if a hearing is inadequate, but also, quite surprisingly, that a court can directly enjoin state authorities from proceeding with projects.[290] In 1970 one judge stressed the importance of the procedures by stating that Congress could not constitutionally pick out a project and waive them. Impatient with delays in the construction of the Three Sisters Bridge over the Potomac River in Washington, Congress passed a 1968

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288. The federal share of highway costs, for example, may be as high as 95%. See, e.g., Linnecke v. Department of Highways, 348 P.2d 235, 236 (Nev. 1960).

289. 177 F.Supp. at 903.

290. E.g., Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1339 (4th Cir.), cert. denied 409 U.S.1000 (1972); Concerned Citizens for the Preservation of Clarksville v. Volpe, 445 F.2d 486, 495 (5th Cir. 1971).

statute ordering construction to be "undertaken as soon as possible after the date of enactment of this Act ... ."[291] District of Columbia officials took this as permission to dispense with the usual public hearing. In D.C. Federation of Civic Associations, Inc. v. Volpe, the District of Columbia Circuit Court of Appeals found this to be a misapprehension of legislative desires. In spite of statements by individual congressmen to the contrary, it held that Congress had not wanted to do away with the usual hearing. Judge Wright in the leading opinion conceded that "the rights in this case are derived only from statutes."[292] Even so, Congress could not constitutionally single out those who might wish to object to the Three Sisters Bridge project and deprive them of a hearing. It could not be said "that this right of citizen participation in the highway planning process is an unimportant right, easily to be discarded."[293] Judge Wright would therefore "carefully and meticulously scrutinize any proposal which would deny to some the federally created right to influence the course of a highway in their neighborhood... ."[294] He concluded that there was insufficient justification for such discrimination. To prevent the 1968 statute from violating constitutional provisions guaranteeing participation in the political process and preventing unjust discrimination, he read it as not dispensing with the public hearing.[295] Judge Wright did not command

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291. Federal-Aid Highways Act of 1968, Pub. L. No. 90-495, § 23, 82 Stat. 827.
292. 434 F.2d 436, 442 n. 27 (D.C. Cir. 1970).
293. Id. at 441.
294. Id. at 443.
295. Id. at 443-444.

a majority of his court on the constitutional point.[296] However, his opinion, along with others that have noted constitutional arguments in passing,[297] indicates that federally-mandated land hearings are now taken quite seriously indeed.

What form, then, have judges prescribed for these hearings? As early as 1960 the Nevada Supreme Court rejected the trial format. In Linnecke v. Department of Highways, residents of Reno attacked a highway hearing

> as not complying with the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts, to the end that a decision may be made in good conscience, in consideration of the evidence and, guided by that alone, to reach a conclusion uninfluenced by extraneous considerations ... .[298]

The court did not accept this. It stated that "the public hearings contemplated by the federal act were for the purpose of informing the residents of the area of the locations being considered by the state so that such residents might be given the opportunity to express

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296. Chief Judge Bazelon concurred in the result on the ground that the statutes could be interpreted to require a hearing independently of any constitutional arguments. Id. at 448. Judge MacKinnon dissented, believing that Congress could constitutionally deny a hearing and had in fact done so. Id. at 449-62.

297. One court has acknowledged the "constitutional importance of public hearings prior to final administrative determination of highway location and design." Concerned Citizens for the Preservation of Clarksville v. Volpe, 445 F.2d 486, 495 (5th Cir. 1971). Another court has mentioned "the intriguing if undeveloped proposition" that citizen participation in planning decisions should be protected by the First Amendment, which may be read as guaranteeing effective, as well as free, expression. Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F.Supp. 809, 832 n.13 (E.D. Pa. 1968).

298. 348 P.2d 235, 237 (Nev. 1960).

their views ... ."[299] The court found the Morgan case, which had confirmed the trial format for ratemaking,[300] to be "not in point," since these hearings were not "quasi-judicial."

In 1971 the United States Supreme Court agreed. In Citizens to Preserve Overton Park, Inc. v. Volpe, it was asked to review a decision of the Secretary of Transportation routing a highway through an urban park. The Court rejected the "substantial evidence" test, which usually accompanies administrative decisions required to be made "on the record" after a trial. It noted that the hearing

> is a public hearing conducted by local officials for the purpose of informing the community about the proposed project and eliciting community views on the design and route. The hearing is nonadjudicatory, quasi-legislative in nature. 301

The Court held that the Secretary's decision was still reviewable on the evidence, the test being whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[302] This is a more relaxed scope of review than the substantial evidence test, and confirms that no trial is necessary to produce a well fought-over record for close judicial scrutiny.

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299. Id. at 238.
300. See pp.164-66 supra.
301. 401 U.S. 402, 414-15 (1971).
302. Id. at 416, quoting APA §10(e)(B)(1), 5 U.S.C. §706(2)(A) (1970).

The form of urban renewal and highway hearings has largely been left for the administration to define. The federal Departments have responded with both formal and informal rules of procedure. The Department of Housing and Urban Development has issued a list of procedures to be followed by state authorities in urban renewal hearings. But instead of publishing them in the Code of Federal Regulations, it has kept them in its "Urban Renewal Handbook" for internal use.[303] The Department of Transportation first issued a "Memorandum" governing highway hearings,[304] which it later put into more formal regulations.[305] The rules prescribe two hearings, the first to concern the corridor of the highway and the second the design.[306] In both hearings, members of the public have the right to present their views orally. Citizens may also submit "written statements and other exhibits in place of, or in addition to, oral statements at a public hearing."[307] To ensure that interested parties have an adequate chance to participate, the rules require that broad notice be given and that participants have adequate information about the project, the alternatives studied, and the thinking of planners.[308] Officials must be present at any hearing

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303. See Shannon v. Department of Housing and Urban Development, 436 F.2d 809, 813 (3d Cir. 1970).

304. Department of Transportation Policy and Procedure Memorandum 20-8, 23 C.F.R. ch. I, part I, Appendix A (1971).

305. Federal Highway Administration (Department of Transportation) Rules, 23 C.F.R. §§ 790.5-790.7 (1975).

306. Id. § 790.5(a).

307. Id. § 790.7(b)(2).

308. Id. § 790.7(a),(b).

to explain various aspects of the plan.[309] The transcript required by statute to be forwarded to the Secretary of Transportation[310] must be accompanied by copies of written comments, exhibits, and all information made available to the public.[311] The Secretary will then review these materials before approving or rejecting funds for the project.

Unlike the Federal-Aid Highway Act, the Housing Act is silent about forwarding a transcript of the public hearing to the Secretary. As a result, there is nothing to ensure that he (or those acting in his behalf) will ever have direct knowledge of the objections made. The local authority could conceivably hold the public hearing and then submit its urban renewal plan to the Secretary of Housing and Urban Development making no mention of opposition. This led homeowners objecting to a plan in 1959 to demand a second oral hearing before federal officials. In Gart v. Cole, the Second Circuit Court of Appeals denied this, saying that one hearing, before the local authority, was enough. However, the court did note that the objectors had been allowed to submit "documentary information on the plan's feasibility" to the federal agency.[312] Nine years later, in Powelton Civic Home Owners Association v. Department of Housing and Urban Development,[313] a district court made this a constitutional requirement. Following a public hearing by the Philadelphia Redevelopment Authority, the Secretary of Housing and Urban Development had proceeded to approve federal financing of an urban renewal plan without entertaining

309. Id. § 790.7(b)(4),(6),(8),(9).
310. Federal-Aid Highway Act, 23 U.S.C.A. § 128(b)(Supp. 1975).
311. 23 C.F.R. § 790.7(c).
312. 263 F.2d 244, 250-51 (2d Cir.), cert.denied 359 U.S.978 (1959).
313. 284 F.Supp.809 (E.D. Pa. 1968).

further representations from landowners. These latter sought to have the disbursement of funds enjoined on the ground that due process required that they be heard one last time. The court agreed:

> Nowhere does the Housing Act explicitly require the Secretary to consider the views or claims of anyone other than the local public agency; nor does the Housing Act require the local agency to include any viewpoint or contentions other than its own in the materials submitted to the Secretary. 314

The courts would make sure that objections to the plan actually reached the Secretary. The Powelton court refused a trial at the federal level: there were too many parties, local facts were likely to play a minor role, and the decision would turn on general judgments of policy.[315] Nor would a second opportunity to make oral arguments "facilitate fairer or more informed decisions on the kinds of issues presented ... ."[316] Due process did, however, require that homeowners have an "opportunity to submit written and documentary evidence" to counter the report of the local redevelopment authority.[317] When Congress was silent, the courts would see to it that the Secretary listened to all sides.

Powelton is an encouraging sign as far as judicial supervision of urban renewal and highway procedure goes. The courts have sensibly abandoned the trial format, and have required written evidence and comments. There is a rough parallel to what they have been doing in group ratemaking and rent-setting on their own, and what they

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314. Id. at 831.
315. Id. at 829-30.
316. Id. at 830.
317. Id. at 830-32.

have been allowing in allocative licensing with the encouragement of Congress and the administration: turning away from the old false choice between compelling a trial on the one hand or nothing whatever on the other. Depending upon the issues to be decided, they can mandate a trial, conferences, oral argument, written comments, or any combination of these. The expansion of proceedings has dictated this varied procedural response. Today, as always, American courts are prescribing the general form of participation to be accorded citizens in polycentric decisions. Only now they are doing it more effectively, since they are more conscious than they have been in the past of the variety of formats at their disposal.

CHAPTER 6

UNITED STATES:

THE JUDICIAL REQUIREMENT OF PARTICULAR PROCEDURES

British courts go directly to the question of what particular procedures are required by natural justice. In the United States, judges reach analogous questions only after consciously or unconsciously inquiring into two related matters. The first was the subject of the previous chapter -- namely, what general form should the hearing take? The second was an ever-present undercurrent -- what should be the scope of review on the evidence? As can be imagined, the answers to these two questions influence the particular procedures prescribed. Passing this difference, American judges meet many of the same problems encountered by their British brethren. Their reactions can be readily compared to those of British courts.

NOTICE AND PRESENTATION OF CASE

As noted in Chapter 2,[1] giving adequate notice may include presenting enough evidence about a proposal to afford parties a starting point for debate. This may be especially necessary when, as is often the case in American administrative law, an agency proposes a course of action and then decides, after a hearing, whether to adopt it. For then it does not risk failing to convince itself by presenting insufficient evidence. However, in America, where judicial review on the evidence is so pervasive, it may risk failing

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1. See pp. 60-61, 67 supra.

to convince a reviewing court. In those cases there is little need for courts to compel agencies to present enough evidence to give parties adequate notice of their proposals. The agencies will do it anyway to build a record for judicial review. But where judicial review is relaxed, as in federal-aid highway hearings, the problem may exist. Department of Transportation regulations provide for elaborate notice of highway hearings, and in particular require state highway departments to make available "pertinent information" about alternatives studied.[2] The courts have interpreted this provision broadly. In Rye v Schuler, a federal district court held that the information made available was insufficient so long as it did not include all documents prepared by the New York State Department of Transportation in support of its proposals. Otherwise, there would be less than "full opportunity for effective public participation."[3]

It was also noted in Chapter 2 that giving adequate notice presents unique problems when the task is polycentric.[4] In adjudication the issues define themselves around the standard being applied. The object of notice is, along with pleadings and discovery, to narrow the range of the dispute and to highlight contested issues. The hearing will proceed from these materials. The outcome will be one of two possibilities, the clear product of factors made relevant by the standard being applied. Once the hearing begins, the presiding

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2. Federal Highway Administration (Department of Transportation) Rules, 23 C.F.R. § 790.7(b)(3) (1975).

3. 355 F.Supp. 17, 28 (S.D.N.Y. 1973). See also Keith v. Volpe, 352 F.Supp. 1324, 1353 (C.D.Cal. 1972).

4. See pp.60, 64-67 supra.

officer can normally adopt the role of passive umpire, letting the parties contest the issues. When the task is polycentric, however, the factors influencing the decision are not always readily obvious, and are often innumerable. Furthermore, there are many possible outcomes. Without extra help the parties may remain oblivious to both important considerations and likely results until the final decision is actually handed down. The burden of elucidating relevant factors and foreshadowing possible outcomes will fall on the agency itself, with its experience in related cases and its permanent duty to supervise the system. It will therefore have to take an active, continuing role in giving proper notice.

In its 1941 report the Acheson Committee was well aware of the problems attending notice in administrative proceedings. It was unhelpful, the Committee noted, for a licence applicant to be "put to his proof on such broad issues as public interest, convenience, and necessity, although in fact the ground upon which the agency doubts the propriety of a grant may be narrow." In addition to the "formal notice of hearing," other kinds of notice were often necessary at various stages of a proceeding to disclose the issues fully. The Committee even saw the examiner's report as providing a final indication of the matters on which a decision would rest.[5] It recommended that agencies be more attentive to the need to give adequate notice, although it did not think that much could be accomplished by legislative prescriptions or exhortations.[6]

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5. Acheson Committee Report 63. In America, the examiner's report is normally revealed immediately, well before the final agency decision.

6. Id. 63, 108.

The Administrative Procedure Act specifies the initial notice that must attend both "rule making" and "adjudication." Notice of "rule making" must be published in the Federal Register, and must include, in addition to the time, place, and nature of the proceeding and the legal authority under which the rule is proposed, "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[7] The prescription of future rates is subject to these requirements, while the creation or amendment of zoning ordinances may be subject to analogous sections of the Revised Model State Act.[8] Notice of "adjudication" must include, besides the time, place, nature, and legal authority of the hearing, "the matters of fact and law asserted."[9] These requirements, which echo court rules, apply to the determination of the reasonableness of past rates and all allocative licensing. The Revised Model State Act requires simply that "contested cases," which may include applications for zoning variances and the like, be preceded by "a short and plain statement of the matters asserted," which afterwards can be made "more definite and detailed."[10]

It has been left to the courts to ensure that the continuous notice peculiar to polycentric decisions be given. These have allowed the initial notice to be vague, provided that issues are defined and parties informed sometime before the end of the proceedings. In Civil Aeronautics Board v. State Airlines, Inc., the Board, subsequent to an area proceeding, awarded Piedmont Airlines a licence

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7. APA § 4(a), 5U.S.C. §553(b) (1970).
8. Revised Model State APA §3(a)(1).
9. APA §5(a), 5 U.S.C. §554(b) (1970).
10. Revised Model State APA §9(b).

for which it had not originally applied. State Airlines, a disappointed rival, sought to have the award overturned on the ground that this result had not been mentioned as a possibility in the original filings. The Supreme Court upheld the Board, agreeing that "limiting all applications to the precise routes they describe would destroy necessary flexibility." It added, "In such an area proceeding it would exalt imaginary procedural rights above the public interest to hold that the Board is hamstrung by the lack of foresight or skill of a draftsman in describing routes."[11] Parties were certainly entitled to timely notice of the matters at stake. Not only had State understood during the hearing that Piedmont might receive the contested route, but it had been given a limited rehearing to argue against the award. The Court was accordingly satisfied that notice had been adequate. Likewise, in the 1975 case of Shell Oil Co. v. Federal Power Commission,[12] one party alleged that it had not been notified that the final group ratemaking order would extend to "renewal contracts" concerning natural gas already flowing in interstate commerce. Although the Commission's initial notice had made no mention of these, parties were informed when the proceedings were extended to include them. The Fifth Circuit Court of Appeals therefore found no violation of due process.

But the courts have let it be known that they will deal harshly with agencies that fail adequately to define issues before

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11. 338 U.S. 572, 577-78 (1950).
12. 520 F.2d 1061, 1076 (5th Cir. 1975).

the end of the hearing. In Mohawk Airlines, Inc. v. Civil Aeronautics Board, the Board conducted a proceeding to realign the licences of Allegheny Airlines. At the outset it stated that a segment on which Mohawk competed would not be considered and that in any event authority for one-stop service would not be replaced with authority for non-stop service. Despite prodding by Allegheny, the examiner indicated during the hearing that he would adhere to this. Only when the final decision was announced did it become clear that the Board had altered Allegheny's licence on the segment where it competed with Mohawk from one-stop to non-stop service. At the behest of Mohawk, the Second Circuit Court of Appeals set aside the Board's order. The court stated broadly that "A party's right to know what issues of interest to him may be determined in a proceeding in which he is participating is an absolute requisite of elemental fairness."[13] It concluded that

> the agency itself declined to determine with any reasonable degree of precision the issues it wished to include in the investigation until it actually rendered its decision. And we believe this obvious state of indecision was the cause for the inadequate notice to Mohawk ... .[14]

Despite their deferential attitude toward urban renewal and highway hearings, judges may come down hard on authorities that fail to give notice of possible outcomes. In Ward v. Ackroyd, the initial notice for a federal-aid highway hearing stated that the issue was whether the freeway would pass through the southern portion of a Baltimore park. Although several participants suggested the northern

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13. 412 F.2d 8, 13 (2d Cir. 1969).
14. Id. at 16.

portion as an alternative, the Maryland State Roads Commission said nothing about its being actually in contention. When the northern alignment was selected, a federal district court enjoined the release of federal funds on the ground that the "public hearing" required by federal statute had been inadequate. Again, participants had not received requisite notice of the outcome.[15] The lasting significance of the second Morgan case[16] may lie in the area of notice. On its way to requiring a trial in ratemaking, the Supreme Court noted that "the Government formulated no issues and furnished appellants no statement or summary of its contentions and no proposed findings."[17] This could have been cured in a number of ways -- by drawing up a more specific complaint at the outset, by revealing the examiner's report prior to its consideration by the Secretary, or by noting the possibilities as oral argument progressed before the Secretary's representative.[18] Although the Supreme Court has recently questioned Morgan's insistence on a trial, it has reaffirmed its requirement that parties receive adequate notice of the possible outcomes of a proceeding.[19]

If the administration can be compelled to give notice about possible results, it can also be forced to pinpoint the factors influencing those results. In Moore-McCormack Lines, Inc. v. United States, the Court of Claims made the Maritime Subsidy Board do just that. As a prelude to setting a shipbuilding subsidy, the Board had calculated the costs of foreign shipyards without notifying parties of its methodology.

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15. 344 F.Supp. 1202, 1217-21 (D.Md.1972).
16. See pp. 164-66 supra.
17. Morgan v. United States, 304 U.S. 1, 16 (1938).
18. Id. at 18-19.
19. United States v. Florida East Coast Ry., 410 U.S. 224, 242-44 (1973).

The court found that this violated their statutory right to a hearing. Theirs was

> not a situation in which the relevant factors were already known to all parties. The foreign cost computations were complex and abstruse, with a very large number of variables and nuances. The owner could not evaluate with any accuracy all the matters which the staff would consider of importance ... . It was indeed a "game of blindman's bluff," in which like Samson the unsighted owners had to contend with open-eyed opponents. 20

The court set aside the subsidy which had been arrived at and remanded the case to the Board. Similarly, in Keith v. Volpe the California Highway Commission failed to explain during a federal-aid highway hearing that the noise and pollution likely to result from the completed project would be important factors in the Secretary of Transportation's decision about whether to grant funds. The court enjoined further work on the freeway pending a new public hearing.[21]

American judges have thus been active in requiring agencies to give the notice peculiar to polycentric decisions. Whatever the overall format of the hearing, they have done as well as even non-judicial bodies in Britain in ensuring that parties understand the forms that a polycentric decision may take and the factors that may influence it.

EXTRA-RECORD EVIDENCE

In Great Britain, the courts built natural justice doctrines for inquiries around the problem of secret communications and evidence.

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20. 413 F.2d 568, 585 (Ct. Cl. 1969).
21. 352 F. Supp. 1324, 1339, 1353 (C.D. Cal. 1972).

The most important cases dealt with what must be revealed to parties as a matter of fundamental fairness and what need not be.[22] In the United States the identical problem exists, but it has not occupied the same central place in the development of due process. That has been taken by the question of what the general character of the hearing should be.

Furthermore, the problem has a slightly different slant from that in Britain. Before the advent of federal-aid urban renewal and highway hearings, Americans had little experience in having one administrative authority propose a course of action and another decide whether to confirm it. There has consequently been less of a tendency to focus on communications between bodies. The emphasis has been instead on the use of economic data and information necessary for the many types of business regulation for which agencies are responsible. But the underlying question has been the same as in Britain -- which information must be revealed, or as Americans say, placed "on the record," for possible comment or rebuttal by parties?

The overall form a hearing must take is of decisive importance. If a decision must be made "on the record" following a trial and can be overturned by a court if unsupported by "substantial evidence," then judges are likely to be severe about extra-record evidence. Cases dealing with ratemaking and allocative licensing confirm this. In United States v. Abilene & Southern Railway, decided in 1924, the Interstate Commerce Commission made an order dividing joint rates among railroads serving a route on the basis of data gleaned from their annual reports. The information included matters like freight ton-miles, passenger-miles, and total operating revenue for each carrier.

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22. See pp.33-59 supra.

The Supreme Court vacated the order because the Commission, while stating generally that it would rely on the reports, had failed to pinpoint the precise data and introduce it formally into evidence. Mr. Justice Brandeis put the matter succinctly: "Nothing can be treated as evidence which is not introduced as such."[23] Eleven years later in West Ohio Gas Co. v. Public Utilities Commission, the Supreme Court vacated a natural gas rate order in similar circumstances. The Commission's use of the Company's annual reports without its knowledge to ascertain gas distribution expenses in various localities was held to be a violation of due process.[24] In either case, the agency was engaged in gathering Professor Davis' "adjudicative" (or local) facts[25] -- facts about individual parties before it -- outside of the evidentiary hearing.

Of slightly greater difficulty is the 1937 case of Ohio Bell Telephone Co. v. Public Utilities Commission. To determine whether Ohio Bell's intrastate charges over the previous eight years had been unreasonable, the Commission had first to calculate the value of its Ohio property to obtain a "rate base." To do this, it took the current valuation, which had been arrived at after an open hearing, and discounted it by a certain percentage over each of the years in question. The percentage was inferred from data on price trends appearing in community land records and engineering magazines, but never introduced into evidence at the hearing. The

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23. 265 U.S. 274, 288 (1924).
24. 294 U.S. 63, 70-71 (1935).
25. See pp. 5, 7, 18 supra.

Supreme Court vacated the Commission's decision ordering refunds. According to Mr. Justice Cardozo, "The fundamentals of a trial were denied to the [Company] when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record."[26] Unlike those in Abilene and West Ohio Gas, these were not specific facts about an individual party, but general facts about economic conditions in Ohio. But because they were of critical importance in determining the value of Ohio Bell's property, they should have appeared on the record. Mr. Justice Cardozo also noted a related objection to what the Commission had done: "[H]ow was it possible for the appellate court to review the law and the facts and intelligably decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"[27] Both procedural due process and judicial review on the evidence required that this data be revealed for purposes of analysis and debate.

The provisions of the Administrative Procedure Act that prescribe a trial for "adjudication" and formal "rule making" confirm these earlier decisions. The Act says that in these cases the transcript of testimony along with the exhibits and papers filed are to constitute the "exclusive record" for decision. When the "agency decision rests on official notice of a material fact not appearing in evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary."[28] The decisions indicate that a "material fact" for these purposes will be limited to "adjudicative," or local, facts. In Northeast Airlines, Inc. v. Civil Aeronautics Board,[29] the Board refused to renew Northeast's temporary licence for service between New England and Florida. It based its decision on Northeast's

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26. 301 U.S. 292, 300 (1937).
27. Id. at 303.
28. APA §7(d), 5 U.S.C. §556(e) (1970).
29. 345 F.2d 484 (1st Cir.), cert. denied 382 U.S. 845 (1965).

operating figures for the previous eight months, which indicated, it said, that the route was unprofitable. The First Circuit Court of Appeals held that the Board's failure to allow Northeast to contest or explain the figures violated both the Administrative Procedure Act and due process. In Delta Airlines, Inc. v. Civil Aeronautics Board,[30] the Board denied Delta two routes and awarded them instead to Southern Airways on the basis of undisclosed forecasts of traffic and revenue for the route. The court vacated the awards on the ground that both the Administrative Procedure Act and the Constitution required that Delta be allowed to test and refute the forecasts. These involved facts peculiar to the scheme being created and hence should have been put on the record.

By way of contrast is data going solely to the formulation of general administrative policy -- facts that determine what values an agency will consider important to any scheme. In Chicago v. Federal Power Commission,[31] the Commission relied on extra-record reports that the production of natural gas was outstripping the discovery of new sources to infer a danger of future shortages. From this it concluded that the need to stimulate exploration would be a factor in deciding whether to apply area rates already set for independent producers to producers which also transported their own gas in interstate commerce. The court upheld the Commission's failure to reveal the evidence, even assuming that the proceedings were subject to the formal "rule making" provisions of the Administrative Procedure Act. Although the court declined to decide whether the evidence fell into Professor Davis' category of "legislative" (as opposed to "adjudicative")

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30. 442 F.2d 730 (D.C. Cir. 1970).
31. 458 F.2d 731 (D.C. Cir. 1971), cert. denied 405 U.S. 1074 (1972).

facts,[32] it seems clear that they did. The statistics about the relative decline in natural gas resources went to formulating the general policy of stimulating production. They therefore did not have to be included on the record for debate.

Although the requirement of putting data on the record has grown out of cases where a full trial is required, it is not limited to them. In Moore-McCormack Lines, Inc. v. United States, the Maritime Subsidy Board failed not only to give adequate notice of the factors influencing its determination, but also to reveal information about foreign production costs on which it would base its subsidy award. As in Ohio Bell, this was data about general economic conditions, which would go toward calculating a specific rate. Although the court in Moore-McCormack required only written comments instead of a trial, it said explicitly that a party was entitled to "underlying data for any estimate, in order to give it an opportunity to present any countervailing evidence or reasoning it may have."[33] Similarly, in American Public Gas Association v. Federal Power Commission,[34] the District of Columbia Circuit Court of Appeals confirmed that due process was satisfied in natural gas group ratemaking by the informal rule making procedures of the Administrative Procedure Act. These latter say only that participants are to be allowed to submit "written data, views, or arguments," after which the agency is to consider the "relevant matter presented."[35] They mention nothing about a record, let alone evidence that must be confined to it. Nonetheless, the court in American Public Gas noted that "[a]ll submittals, replies, comments,

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32. 458 F.2d at 746 n. 65.
33. 413 F.2d 568, 587 (Ct. Cl. 1969).
34. 498 F.2d 718 (D.C. Cir. 1974).
35. APA §4 (b), 5 U.S.C. §553(c) (1970).

transcripts and data were made available to all parties." It distinguished a prior case on the ground that, there, "much of the data relied upon by the Commission was provided in an informal and to some extent ex parte conference ... ."[36] The point is that, even when a trial is not required, the courts will in some circumstances force evidence to be placed on the record. In American Public Gas the court was probably concerned about ensuring adequate judicial review via the "substantial evidence" test. In Moore-McCormack, on the other hand, the court seems to have been motivated solely by a concern for procedural fairness.

In some hearings preceding a polycentric decision there is no requirement whatever that all evidence be revealed. It was noted in Chapter 5 that in some states where a "public hearing" must attend the enactment or amendment of zoning ordinances, courts have allowed municipal authorities to obtain information beyond its confines.[37] The federal courts have implied that the Secretary of Transportation need not reveal factual information coming to him outside of a federal-aid highway hearing. The Supreme Court has said explicitly that the public hearing "is not designed to produce a record that is to be the basis of agency action."[38] A lower court has said that it would not overturn the Secretary's decision simply because it could be shown that he had been subject to congressional pressure, since "[t]here is no requirement that he base his decision only on matters presented at a public hearing, but rather, there is only the implied require-

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36. 498 F.2d at 722-23.
37. See p. 230 & note 277 supra.
38. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

ment that he base his decision on the merits of the project."[39] Regulations do mandate that after highway hearings, "all information developed in support of the proposed location or design ... be available upon request, for public inspection and copying," but say nothing about the Secretary's having to give people a chance to comment on or rebut any new information revealed.[40]

In sum, the attitude of American courts to extra-record evidence usually depends on the character of the hearing and the scope of judicial review on the evidence. Unlike in Britain, judges have not used the problem of secret evidence as the chief occasion for defining participation in polycentric decisions. Instead, they have set the overall format of the hearing and then let their treatment of extra-record evidence flow from it.

REVELATION OF THE EXAMINER'S REPORT

The arguments for forcing the examiner's report to be revealed have already been canvassed in Chapter 2 on Britain.[41] It is always beneficial for parties to know what effect their presentations had on the person who heard them. But revelation is also necessary as a prerequisite to a fair decision. An examiner's findings on matters of local fact are likely to be conclusive. His recommendation on how the parties should fit into the overall scheme will be given some weight, and will probably be affirmed unless there are more general considerations pushing against it. Without automatic revelation, the examiner's report may remain buried in the ultimate polycentric

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39. D.C. Federation of Civic Associations, Inc. v. Volpe, 316 F. Supp. 754, 767 (D.D.C. 1970), rev'd 459 F.2d 1231, 1245-49 (D.C. Cir. 1971) (Secretary did not in fact decide on merits), cert. denied 405 U.S. 1030 (1972).

40. Federal Highway Administration (Department of Transportation) Rules, 23 C.F.R. § 790.7(b)(8) (1975).

41. See pp. 67-68 supra.

decision, along with any mistakes of fact and errors of law or procedure.

In Great Britain, it will be remembered, natural justice did not require automatic disclosure of inspectors' reports. But statutory instruments came to the aid of citizens, and now the inspector's recommendation and reasons for it are routinely revealed. In the United States, the problem is slightly different. Agencies often allow parties to file written briefs or make oral arguments to agency heads (or their representatives) on the basis of the record made during the prescribed evidentiary hearing before the trial examiner.[42] The examiner's report is revealed as a matter of course to facilitate this. The problem of revelation has therefore never had the same urgency in America as in Britain. However, there have been cases dealing with the failure to disclose examiners' reports. The first was none other than Morgan v. United States. In the initial Morgan case, the marketing agencies complained, among other things, that the report of the examiner who took evidence about economic conditions in the Kansas City Stock Yards had not been revealed before the Secretary of Agriculture had set rates. The Supreme Court dealt with this contention briefly in passing:

> Again, while it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties, and to permit exceptions and arguments addressed to the points thus presented -- a practice found to be of great value in proceedings before the Interstate Commerce Commission -- we cannot say that that particular type of procedure was essential to the validity of the hearing. [43]

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42. See Acheson Committee Report 45.
43. 298 U.S. 468, 478 (1936).

The Court was not prepared to institute any broad rule of automatic revelation. However, in the second Morgan case, it strongly hinted that in some circumstances the examiner's report might have to be disclosed. The Court eventually vacated the rate order because, following the evidentiary hearing, the marketing agencies had received inadequate notice of the issues to be argued orally before the Acting Secretary. It noted that the "request that the examiner prepare a tentative report, to be submitted as a basis for exceptions and argument, was refused."[44] And later it stated, "In the absence of any report by the examiner or any findings proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument."[45] The examiner's report could have informed the marketing agencies of the matters at stake. Although the Court reiterated its statement in the first Morgan case that revelation was not always required,[46] it seems clear that it could be compelled whenever there is no other way of giving notice to parties of the issues at oral argument.

Thirty years after Morgan, the Second Circuit Court of Appeals required revelation of a hearing officer's report in special circumstances. The case of United States v. Purvis involved not a polycentric decision, but simply the application of a legal standard to determine if a draft registrant was a "conscientous objector." A registrant whose claim to this classification was denied by his local board could appeal to an "appeal board." In making its decision, the appeal board was to consider a Department of Justice recommendation made on the basis of a hearing before an examiner. It was customary

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44. 304 U.S. 1,16 (1938).
45. Id. at 19.
46. Id. at 21-22.

not to reveal the examiner's report to the appellant, but at most to summarize its contents in the Department's recommendation. Purvis applied for exemption from military service on the basis of his Quaker beliefs. After a hearing, the examiner recommended that he be exempted from service as a combatant, but not as a non-combatant, because he had both indicated his willingness to participate in war in some circumstances and stated that he had no objection to serving in the medical corps. The report was not revealed to Purvis, but sent on to the Department, which recommended to the appeal board that he only be excused from being a combatant. The appeal board accepted this, and Purvis was declared subject to limited service. When he refused to be inducted, he was charged and convicted of draft evasion. On appeal, Purvis alleged that the administrative procedures had been unfair since he had not received the hearing officer's report. The court agreed, noting the tendency of the appeal board to rely heavily on the Department's recommendation. Purvis argued convincingly that the examiner had misquoted him: he had stated his moral opposition to all war and had said that he would consider working only in a non-military hospital. The court held that, when it contained misstatements of fact, the examiner's report would have to be disclosed. But it was careful not to institute a rule of automatic revelation:

> ... we emphasize that we are not laying down a broad, general rule which would invariably or even frequently require turning over the hearing officer's report. We hold only that on these facts, where appellant was allegedly quoted incorrectly on crucial matters, it was unfair not so to advise him before the Department acted. 47

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47. 403 F.2d 555, 562 (2d Cir. 1968).

One wonders how a party will be able to know whether the examiner's report contains misstatements of fact unless it is automatically revealed. The parallel to how British courts treated inspectors' reports under natural justice is striking. They also declined to institute a broad rule of revelation, insisting instead on being shown actual prejudice resulting from non-disclosure in the case before them.[48]

One American court has instituted a broad rule of revelation. In Mazza v. Cavicchia, decided in 1954, the New Jersey Supreme Court held that the due process clause of the state constitution required automatic disclosure. Like Purvis, Mazza involved pure adjudication. Agents of the New Jersey Division of Alcoholic Beverage Control brought a proceeding to suspend Mazza's liquor licence on account of "lewdness and immoral activity" at his establishment. A hearing was held before an examiner, who forwarded the transcript together with a report of his findings and conclusions to the Division. The Division found Mazza guilty of the charges and suspended his licence. Mazza then appealed on the ground that he had been denied access to the examiner's report. Mr. Chief Justice Vanderbilt held on behalf of the court that "by reason of the failure to supply the appellant with a copy of the hearer's secret report to the Director the appellant was deprived of his right to due process and a fair hearing before the administrative tribunal."[49] Unfortunately, he based his decision on the principle of exclusivity of the record -- that all evidence must be introduced openly and placed on the record for possible rebuttal. Citing Ohio Bell and

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48. See p. 71 supra.
49. 105 A.2d 545, 547-48 (N.J. 1954).

Abilene, he stated that the secret use of the examiner's findings, conclusions, and recommendations was equivalent to going beyond the record to gather facts.[50] But clearly there is a difference between gathering new facts outside of the record and making an independent assessment of facts already on the record. For this, the Mazza opinion has been roundly and justly criticized.[51] Professor Davis in particular has led a campaign against it, stressing that it contains within it the seeds of a doctrine that would require revelation of any assessment of evidence by any administrative functionary, including all staff memoranda.[52] His criticisms have led some courts to shy away from Mazza.[53]

This is unfortunate because there is much in Mazza that is worth preserving. The decision can stand on its own without the "exclusivity of the record" rationale. Mr. Chief Justice Vanderbilt first dealt with prior authorities. Although he was deciding on the basis of the due process clause in the New Jersey constitution, he felt it necessary to explain Morgan's refusal to compel automatic revelation. He noted that Morgan had only considered the matter in passing, and that it and succeeding cases had been concerned more with whether examiners were required to make reports in the first place than with whether reports once made had to be revealed.[54] He also considered the leading British case of Local Government Board v. Arlidge,[55] and rejected its reasoning, finding the arguments of the

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50. Id. at 554-55.

51. E.g., Comment, 54 Colum. L. Rev. 1307, 1309 (1954); Comment, 68 Harv. L. Rev. 363, 364 (1954).

52. Davis, Text § 11.09, at 235-36; 2 Davis, Treatise § 11.09, at 72-82; Davis, "New Jersey's Unique Conception of 'Fair Play' in the Administrative Process," 10 Rutgers L. Rev. 660, 662-71 (1956).

53. E.g., De Remer v. United States, 340 F.2d 712, 717 (8th Cir. 1965); Des Plaines Currency Exchange, Inc. v. Knight, 194 N.E.2d 89, 92 (Ill. 1963), cert. denied 376 U.S. 969 (1964); Re Application of Hackensack Water Co., 212 A.2d 394, 399, 401 (N.J. Super. Ct. 1965).

54. 105 A.2d at 556-57.

55. [1915] A.C. 120 (1914). See pp. 68-70 supra.

Donoughmore Committee in favour of automatic revelation to be more convincing.[56] The examiner's report was more than just another internal document aiding the Director of the Division in "the time-consuming effort involved in the mechanical task of dictating his decision."[57] He went on:

> When the report giving the hearer's digest of the evidence and his findings and recommendations is turned over to the Director without coming to the attention of the licensee, doubt may well arise as to whether a true view of the facts has been conveyed to the Director's mind. The very purpose of the statute is that the hearing should be public, but how can it be said that the hearing is public when the report which summarizes it as to both law and facts and makes recommendations as to sanctions is private?
>
> The hearer may have drawn some erroneous conclusion in his report, or he may even have made some factual blunders. 58

He concluded that parties must

> be given an opportunity to correct any mistakes that may appear in the report. This simple requirement, while imposing no hardship on the agency, does protect the individual against the strong possibility of a miscarriage of justice or the suspicion thereof. 59

This, rather than protection of the record per se, is the reason why due process should require automatic revelation of examiners' reports. As the Chief Justice put it, a decision without the report "is like a performance of Hamlet without the Prince of Denmark."[60]

In another case involving the suspension of a liquor licence, the New York Court of Appeals indicated that there may be a mean between requiring the disclosure of all examiners' reports on the one hand or of only those whose non-disclosure would lead to special prejudice on the other. In Sorrentino v. State Liquor Authority,

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56. 105 A.2d at 557-58.
57. Id. at 553.
58. Id. at 555.
59. Id. at 559.
60. Id. at 560.

it interpreted state liquor licensing regulations to require the revelation of examiners' reports before the final decision of the Authority was rendered. Eschewing both a due process ruling and the broad prescription of Mazza, it rested its holding on the fact that under the regulations the examiner had broad powers to rule on the admissability of evidence, to limit oral argument, and to submit findings and make recommendations. He was not just a "mere ministerial agent of the Authority," but rather a "separate tribunal of first instance," with the subsequent determination of the Authority being "a form of administrative review of the hearing officer's findings rather than a primary determination." [61] Sorrentino is broad enough to require revelation whenever the examiner makes an initial decision, or even a recommendation that is usually accepted. It could also be read to mandate disclosure of those aspects of a report that as a practical matter are conclusive, such as findings of local fact, as opposed to general judgements of policy.

If American judges have been ambivalent about automatic revelation, other bodies have not. The Acheson Committee recommended in 1941 that the examiner's report should be "final and binding" unless review was sought by a party or by the agency itself. Furthermore, the "findings, conclusions, and recommendations of the hearing commissioner should be included in the record upon which any court review is sought." The Committee apparently thought that the report would be revealed as soon as made to allow parties to decide whether to appeal to the agency.[62] The provisions of the Administrative Procedure Act governing "adjudication" and formal "rule making" have adopted these suggestions. They require examiners to issue "initial" decisions,

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61. 218 N.Y.S. 2d 635, 638-39 (1961).
62. Acheson Committee Report 60-61.

although in the case of formal rule making (which includes the prescription of rates for single enterprises) and applications for initial licences, a "recommended" decision may be issued by agency employees, or a "tentative" decision by the agency itself. All of these decisions are immediately made part of the record and "shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." Parties may make exceptions to them for purposes of agency review.[63] The Act thus requires that reports be revealed immediately in the case of allocative licensing and of rate-making for single businesses.

In the case of federal-aid highway hearings, regulations require revelation. It will be remembered that the state highway authority is required by statute to forward to the Secretary of Transportation a transcript of the public hearing, together with a report indicating, among other things, the consideration given to "various alternatives which were raised during the hearing ... ."[64] Regulations require the transcript and report to be revealed to the public at the time the state highway authority submits its final plan to the Secretary for approval.[65]

When all is said and done, most reports by hearing officers in America are revealed to parties, usually before the final decision of the agency is handed down. However, where statutes or regulations have not required this or agencies have not done it as a matter of practice, courts have been ambivalent about compelling it on their own. Their attitude has been somewhat like that of their British counterparts, who have declined to require automatic disclosure

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63. APA §8, 5 U.S.C. §557(b), (c) (1970).
64. Federal-Aid Highway Act, 23 U.S.C.A. §128 (Supp. 1976).
65. Federal Highway Administration (Department of Transportation) Rules, 23 C.F.R. §§ 790.7(c)(2), 790.9(d) (1975).

barring special circumstances.

THE REQUIREMENT OF FINDINGS AND REASONS

As explained in Chapter 2,[66] reasons may be even more necessary following a polycentric decision than following an adjudicative one -- to force the decider to deal openly with all facts and considerations presented, to aid the courts in performing their functions on review, and to alert future parties to the approach of the department and the factors likely to influence it. In Great Britain, judges refused to require reasons as a matter of natural justice. Instead they waited for Parliament and the administration to act through statute and statutory instrument, and then began to play a role as interpreters and enforcers of the new requirement.

In the United States, courts and commentators are accustomed to speaking of both "findings" and "reasons." Findings are said to involve facts, whereas reasons involve "law, policy, and discretion."[67] American courts have often required findings and reasons from agencies as part of what Professor Davis calls administrative "common law"[68] -- that is, a series of presumptions which, like natural justice, are read into a wide range of statutes by courts. But unlike natural justice, the policy behind these doctrines is not necessarily to ensure procedural fairness. Here, at least, the courts are more interested in protecting their ability to review on the evidence.

Colorado-Wyoming Gas Co. v. Federal Power Commission, decided by the Supreme Court in 1945, indicates the conditions under which judges will require findings. The Federal Power Commission ordered Colorado-Wyoming to reduce by a certain sum the rates it charged customers for natural gas. Colorado-Wyoming sought to have the

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66. See pp.73-74 supra.
67. Davis, Text §16.07, at 326.
68. Id. §16.02 at 319, §16.07, at 326.

order set aside as unsupported by substantial evidence. The Supreme Court remanded the case to the Commission without undertaking to decide the substantial evidence question. It explained:

> Here ... the findings of the Commission leave much to be desired. The findings are general and incorporate by reference the staff exhibits, on which reliance is put for the subsidiary findings. But in this case there are added difficulties.[69]

The Commission had stated that it would calculate Colorado-Wyoming's fixed costs on the basis of demand on a "system peak day," but then had given no indication why a certain day had been designated "system peak day." The record was also unclear about whether the Commission had made good on its promise to base its computations on the volume of gas delivered rather than on the volume of gas demanded. This was too much for the Court to accept. Mr. Justice Douglas noted that the Court was to give conclusive weight to facts found by the Commission if supported by substantial evidence:

> But we must first know what the "finding" is before we can give it conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. Their absence can only clog the administrative function and add to the delays in rate-making. We cannot dispense with them for Congress has provided the standards for judicial review under this Act. The courts cannot perform the function which Congress assigned to them in absence of adequate findings.[70]

The case was accordingly remanded to the Commission for findings.

In the 1949 case of Johnston Broadcasting Co. v. Federal Communications Commission, the District of Columbia Circuit Court of Appeals was asked to set aside the award of a radio broadcasting licence as unsupported by substantial evidence. Before reviewing the record and upholding the award, the court set out one of "the

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69. 324 U.S. 626, 631 (1945).
70. Id. at 634 [citations omitted].

essentials" of this type of administrative decision: "The bases or reasons for the final conclusion must be clearly stated."[71] The courts would require reasons as well as findings to facilitate review of the record.

More recently, a federal district court was forced to remand for findings and reasons an order by the District of Columbia Zoning Commission denying a petition to "rezone" a parcel of property from residential to commercial. Although a statute requiring another zoning body to give "full reasons for its decisions" did not apply to the Commission, this did not deter the court:

> The Court has before it only the record of the hearing before the Commission and the minutes of the Executive Session, which indicate merely a negative finding on plaintiff's petition. Because of the manifest difficulty of reviewing the action of the Zoning Commission to ascertain whether, in our opinion, the determination was arbitrary and unreasonable, the Court, after careful consideration, will order that this matter be remanded to the Zoning Commission for findings of fact to indicate the Commission's reasons for denial of plaintiff's petition for rezoning.[72]

The court would compel findings and reasons on its own to allow it to review the decision on the evidence.

The Administrative Procedure Act in effect codified the common law on the subject, ensuring that findings and reasons were given to enhance judicial review on the evidence. In the case of "adjudication" and formal "rule making," the Act requires the final decision to be made part of the record and to "include a statement of ... findings and conclusions, and the reasons therefor, on all the material issues of fact, law, or discretion presented on the record."[73] The courts now use the Act as authority for remanding

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71. 175 F.2d 351, 357 (D.C. Cir. 1949).
72. Donovan v. Clarke, 222 F. Supp. 632, 633 (D.D.C. 1963).
73. APA § 8(b), 5 U.S.C. § 557(c)(A) (1970). See also Revised Model State APA § 12 (requiring findings but not reasons).

administrative decisions that lack the findings and reasons necessary to identify those parts of a record that afford "substantial evidence" in support of an order. In Baltimore & Ohio Railroad v. Aberdeen & Rockfish Railroad, the Supreme Court affirmed a lower court's remand of a rate order to the Interstate Commerce Commission on account of inadequate findings. The Commission undertook to divide joint rates among northern and southern railroads on the basis of cost of service. However, instead of calculating the costs of north-south traffic, it took the overall costs of all traffic, including that confined to the north on the one hand and that confined to the south on the other. The Court held that this was impermissable unless the Commission could demonstrate that overall costs were comparable to north-south costs. In at least three areas the record suggested that the costs were not equivalent. The Court therefore remanded the case for specific findings about costs in these areas. Otherwise, it warned:

> The requirement for administrative decisions based on substantial evidence and reasoned findings -- which alone make effective judicial review possible -- would become lost in the haze of so-called expertise. ... That is impermissable under the Administrative Procedure Act.[74]

As in Great Britain, the courts have stressed that the reasons given must be intelligible, although this is more for the benefit of courts than of parties. In Northeast Airlines, Inc. v. Civil Aeronautics Board, the First Circuit Court of Appeals vacated a decision of the Board declining to renew Northeast's licence as the third carrier between New York and Florida. The

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74. 393 U.S. 87, 92 (1968).

examiner had found that the route could support a third carrier, but that, in view of its inability to make the service profitable, Northeast was unfit to continue in that capacity. The Board agreed that Northeast's licence should not be renewed, but gave as its reason the inability of the New York-Florida route to support a third carrier. However, the Board then went on to analyze Northeast's financial difficulties as an overall business, indicating at several points that Northeast was unable for reasons peculiar to itself to service the route adequately. The court explained why it was vacating the Board's order: "First and foremost, while we know that the Board refused to extend Northeast's certificate, we cannot be sure of the basis on which the Board rested its refusal."[75] Noting that Northeast, the Board, and other carriers supporting the Board disagreed over the Board's reasons, it continued:

> There should be no room for this dispute. Courts ought not to have to speculate as to the basis for an administrative agency's conclusion. Indeed, to prevent just such speculation [the Administrative Procedure Act] provides that all agency decisions shall include not only the appropriate rule, order, sanction, relief or denial thereof, but also findings and conclusions "as well as the reasons or basis (emphasis added) therefor ... ."[76]

One is reminded of the Givaudan case in Britain, where a court likewise overturned a polycentric decision because the reasons given were unclear and contradictory.[77] However, the American court's action is more clearly linked with its duty to review the decision on the evidence.

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75. 331 F. 2d 579, 586 (1st Cir. 1964).
76. Id.
77. See pp.79-80 supra.

The Supreme Court has recently indicated that ensuring adequate judicial review may necessitate further extension of the requirement of findings and reasons. In Citizens to Preserve Overton Park, Inc. v. Volpe, it held that the Secretary of Transportation's decision about whether to approve federal funds for a state highway project following a "public hearing" could be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[78] The appellants argued that, relaxed though this scope of review was, it still required the Secretary to "make formal findings and state his reason for allowing the highway to be built" to assist courts in their reviewing function.[79] The Secretary resisted this, saying that it was sufficient if he presented affadavits in court stating that the decision was supported by evidence. The Court seemed willing to satisfy neither: "We agree that formal findings were not required. But we do not believe that in this case judicial review based solely on litigation affadavits was adequate."[80] A court could compel "some explanation" from the Secretary, which might take the form of his subordinates' giving "testimony explaining their action."[81] Hitting upon the obvious alternative, the Court then suggested somewhat ingenuously, "It may be that the Secretary can prepare formal findings ... that will provide an adequate explanation for his action."[82] It seems likely that the Secretary,or any administrative officer in his position, will follow this helpful hint rather than subject himself

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78. 401 U.S. 402, 416 (1971), applying APA §10(e)(B)(1), 5 U.S.C. § 706(2)(A)(1970).
79. 401 U.S. at 417.
80. Id. at 409.
81. Id. at 420.
82. Id.

or his employees to questioning in a court of law. In effect, then, the Supreme Court has compelled findings and reasons in federal-aid land hearings as an adjunct to the judicial power to review on the evidence. As before, procedural fairness can be served by requirements adopted for other purposes.

Where the informal "rule making" provisions of the Administrative Procedure Act apply, as in group ratemaking, agencies must incorporate in their decision "a concise general statement of their basis and purpose."[83] Similarly, where the equivalent provisions of the Revised Model State Act apply, as they might in the adoption or amendment of zoning ordinances, an agency must upon request "issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption."[84] These represent a substantial legislative contribution to procedural law which, unlike the requirement of findings and reasons following "adjudication" and formal "rule making," do more than just confirm what the courts have done on their own.

Until recently American courts seemed uninterested in requiring findings and reasons as a matter of procedural fairness. In this respect they paralleled British judges using natural justice. The best explanation is that they felt a hesitancy toward requiring from agencies as a constitutional matter what they themselves did not always give when deciding.[85] Possibly also there was the fear that due process, once unleashed, would not be satisfied until it forced

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83. APA § 4(b), 5 U.S.C. § 553(c) (1970).
84. Revised Model State APA § 3(a)(2).
85. Davis, Text § 16.02, at 319, § 16.07, at 326.

the administration to make formal findings and to give detailed reasons in writing for every decision, no matter how trivial. Of course there is no reason, in theory at least, why due process cannot be moderated to require no more than, for example, a short verbal explanation in the more minor cases. Be that as it may, until a few years ago only dictum in one licensing case indicated that procedural fairness might have a role to play. In Federal Communications Commission v. Pottsville Broadcasting Co., Mr.Justice Frankfurter, speaking for the Supreme Court, mentioned in passing that "the fundamentals of fair play" required in the case of regulatory agencies "that judgment must express a reasoned conclusion."[86] This statement was, however, never built upon by judges.

Matters began to look up for proceduralists in 1969 when the Court of Claims stated in Moore-McCormack Lines, Inc. v. United States that the Maritime Subsidy Board, before fixing a subsidy, was expected to entertain written comments and then "to show, and not merely say, that the parties' presentations have been fully considered."[87] Although it might have been more explicit, the court seemed to be requiring the Board to explain its decision for the benefit of the parties. Certainly it did not have judicial review on the evidence in mind. In the past three years there has been a flurry of decisions explicitly compelling reasons as a matter of procedural due process. Most have been in the field of rent-setting. There, it will be

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86. 309 U.S. 134, 143-44 (1940).
87. 413 F.2d 568, 591 (Ct.Cl. 1969).

recalled,[88] the courts have required the Department of Housing and Urban Development to entertain written comments from tenants before allowing landlords in federally-subsidized low-income housing projects to raise rents. Several cases have included reasons among the constitutional requirements. Burr v. New Rochelle Municipal Housing Authority stated that a board setting rents in state-owned housing "upon reaching a decision shall issue a statement outlining the reasons for either approving or rejecting the requested rent increase."[89] Geneva Towers Tenants Organization v. Federated Mortgage Investors confirmed that tenants in a privately-owned project receiving federal aid were entitled to "receipt of a concise statement of the [Department's] reasons for its action."[90] And Ponce v. Tulare Housing Authority extended the requirement to decisions of the Secretary of Agriculture permitting rent increases in federally-subsidized housing for farm labourers. There, the district court stated that due process required that an impartial decision-maker must give notice of the issues and accept written representations. Then, "[a]s an integral segment of the determination process, the decision-maker should state the reasons for its determination and indicate the evidence relied on."[91] In none of these cases has judicial review on the evidence played a part: judges have made it clear that they will not superintend these determinations even on the basis of the relatively relaxed "arbitrary or capricious" scope of review.[92]

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88. See pp. 193-95 supra.
89. 479 F.2d 1165, 1170 (2d Cir. 1973).
90. 504 F.2d 483, 492 (9th Cir. 1974).
91. 389 F.Supp. 635, 653 (E.D. Cal. 1975).
92. Langevin v. Chenango Court, Inc., 447 F.2d 296, 302-04 (2d Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243, 1249-51 (1st Cir. 1970).

The sudden judicial interest in reasons for the sake of procedural fairness can be explained by the nature of the participation prescribed. In each of the above cases it has been limited to the filing of written comments. Requiring the ultimate determination to be accompanied by a statement of reasons will be the only way of ensuring that someone has actually considered the comments. In an oral hearing, parties have the benefit of questions and answers to gauge the effect of their presentation on the hearer. He will be more or less forced to listen to what they have to say. Written comments, on the other hand, can easily go directly from parties to the wastebasket with no one being the wiser. Reasons become very important, guaranteeing that arguments are received and considered. Congress itself seems to have recognized this several times. It took special care to require reasons in informal "rule making," which is built upon written comments.[93] Similarly, it allowed the Federal Communications Commission to dispose of objections to the grant of a licence without a hearing if "there are no substantial and material questions of fact," but expressly required it to "issue a concise statement of the reasons for denying the [objection], which statement shall dispose of all substantial issues raised by the [objection]."[94] A House of Representatives Committee Report makes it clear that reasons were required not only to furnish an adequate basis for judicial review, but also "to assure the [objector] that issues raised by his petition would be considered and disposed of by the Commission prior to granting the application concerned without a hearing ...."[95]

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93. APA §4(b), 5 U.S.C. §553(c) (1970).
94. Communications Act, 47 U.S.C. § 309(d)(2) (1970).
95. H.R.Rep. No.1800, 86th Cong., 2d Sess. (1960) in 1960 U.S. Code Cong. & Admin. News 3516, 3520.

The courts have thus established an initial beachhead, which they may expand in the future into wider due process requirements. In 1975 a court took the first step in this direction. As administrator of the Central Valley hydroelectric project in California, the Secretary of the Interior is authorized to sell electricity to power companies and to set charges. After a series of consultations with the companies and consumer groups, the Secretary fixed the rates "without stating the factors relied on or the underlying reasoning." In Northern California Power Agency v. Morton, a district court held that due process required that the Secretary give notice and provide an oral proceeding to permit on-the-record questioning of departmental experts. Following this, "the decision-maker must set forth the underlying findings and reasoning which led him to his conclusion."[96] Although the court seemed to contemplate some sort of judicial review on the evidence, the thrust behind the requirement of findings and reasons was procedural: "... where the decision-maker never spelled out a detailed rationale for his decision, the meaningful opportunity to be heard required by due process was denied."[97] Findings and reasons can accordingly be required in the future following oral hearings to allow parties to gauge the effect of their presentations on the decider, independently of whether judges will review the decision on the evidence.

In conclusion, in the field of findings and reasons, American courts have been more active than the British courts in prescribing minimum requirements. But in the past they have been motivated by

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96. 396 F. Supp. 1187, 1193 (D.D.C. 1975).
97. Id. at 1194.

their desire to protect their own review on the evidence rather than by their solicitude for the procedural rights of parties. Be that as it may, there has been a beneficial effect for polycentric decisions like ratemaking for single businesses, allocative licensing, and determining zoning variances, where review on the evidence is relatively close. Even where review is more relaxed, as with federal-aid land hearings, the courts may in effect force agencies to make findings to ensure adequate judicial review. Recent cases indicate that procedural due process will require reasons where it is especially necessary for the administration to demonstrate that it has seriously addressed itself to the parties' contentions. As they did with the revelation of examiners' reports, American courts are using due process to require a particular procedure in a small class of cases where a party's participation depends upon it. Whether this eventually grows into a broad rule, comparable to what in Britain would be found in statute or statutory instrument, remains to be seen.

CHAPTER 7

UNITED STATES:

THE ROLE OF THE COURTS IN THE CREATION OF POLYCENTRIC PROCEDURES

In the United States, as in Britain, the role played by courts in the creation of polycentric procedures can be inferred from the approaches they use. It can also be seen more directly from the way in which other bodies contribute to or affect judicial solutions.

JUDICIAL METHODS OF APPROACH

In the past, British judges have used various approaches to distinguish between where natural justice should apply to land inquiries and where it should not.[1] Concepts like lis and its converse, information-gathering, have been of limited utility in helping them to find a proper role for themselves. But they are of interest because they indicate a judicial tendency to confine involvement to those aspects of an inquiry that resemble the traditional courtroom contest between adversaries. British judges were intent above all on defining the limits of their own interference with administrative procedures. Meanwhile, other bodies stood ready to extend procedural fairness to areas that the courts would not touch.

How have American courts confronted the need to delineate minimum procedures for polycentric tasks? What approaches have they

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1. See pp.82-97 supra.

used, and how have these reflected and in turn influenced their role in creating administrative procedures?

The "Judicial" vs. the "Legislative" Analogy

In the United States, as in Britain, the words "judicial" and "quasi-judicial" appear frequently in opinions. Often they are complemented by the terms "legislative" and "quasi-legislative." The two sets of words have come to serve as a shorthand for certain procedural results.

Reference was made to these terms in the early ratemaking case of Chicago, Milwaukee and St.Paul Railway v. Minnesota ex rel. Railroad and Warehouse Commission, decided in 1890. In holding that the Fourteenth Amendment required that a state railroad commission's setting of a "reasonable" rate be subject to de novo review in a court of law, the Supreme Court stated that ratemaking was "eminently a question for judicial investigation, requiring due process of law for its determination."[2] The Court seemed to assume that setting a rate was tantamount to applying a legal standard of "reasonableness" and hence required "the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy ... ."[3] Mr.Justice Bradley dissented, disagreeing with the view that

> what is a reasonable charge is a judicial question. On the contrary, it is pre-eminently a legislative one, involving considerations of policy, as well as of remuneration; and is usually determined by the legislature, by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract.[4]

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2. 134 U.S. 418, 458 (1890).
3. Id. at 457.
4. Id. at 462.

The dissent was noting that the traditional locus of ratemaking was the legislature. It was also describing the character of the decision, saying that it "involved considerations of policy," in contrast to the majority's assumption that it entailed investigating "the truth of a matter in controversy." Not surprisingly, Mr.Justice Bradley thought it sufficient if the commission adopted the relaxed procedures of a legislative committee, whereas the majority prescribed the formal trial usually seen in a court of law. At an early stage, then, "legislative" and "judicial" were used as labels pointing to diametrically opposed procedures.

In 1913 the Interstate Commerce Commission argued that "having been given legislative power to make rates, it can act, as could Congress, on such information" as it obtained outside of a hearing.[5] In Interstate Commerce Commission v. Louisville & Nashville Railroad, the Supreme Court disagreed. Prior cases, the Court noted, "distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair ... ."[6]

This gradually became the accepted usage. In the Chicago Junction Case, the Supreme Court noted that Congress had required the Interstate Commerce Commission to base a decision granting a railroad permission to acquire new track on the evidence adduced at a hearing. Citing Louisville & Nashville, the Court stated that Congress had "prescribed quasi judicial action," implying "both

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5. Interstate Commerce Commission v. Louisville & Nashville R.R., 227 U.S. 88, 93 (1913).
6. Id. at 91.

the privilege of introducing evidence and the duty of deciding in accordance with it."[7] A later case agreed that in issuing certificates for the extension of track, the Commission was "vested with quasi judicial powers."[8]

The first Morgan case attempted to resolve the confusion arising from some judges' having labelled ratemaking "legislative." The Supreme Court put the question in two parts: "What is the essential quality of the proceeding under review, and what is the nature of the hearing which the statute prescribes?" With respect to essential quality, it was "a proceeding looking to legislative action in the fixing of rates of market agencies," since it would result in a future prescription.[9] But this did not determine the nature of the hearing:

> A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi judicial character.[10]

Morgan thus confirmed that for procedural purposes ratemaking was "quasi-judicial."[11]

Where courts were asked to prescribe procedures for land matters, they used the same terms. When the Maryland Court of Appeals explained the procedural requisites for decisions on zoning variances or special exception permits, it said, "The Board

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7. Baltimore & Ohio R.R. v. United States, 264 U.S. 258, 265 & n.9 (1924).
8. Pennsylvania R.R. v. United States, 40 F.2d 921, 923 (W.D. Pa. 1930).
9. Morgan v. United States, 298 U.S. 468, 479 (1936).
10. Id. at 480.
11. See also Clarksburg-Columbus Short Route Bridge Co. v. Woodring, 89 F.2d 788, 790-91 (D.C. Cir. 1937).

of Zoning Appeals is an administrative agency, and it acts in a quasi judicial capacity in that it hears facts and makes decisions based thereon."[12] This implied "both the privilege of introducing evidence and the duty of deciding in accordance with the evidence, and it is arbitrary and unlawful to make an essential finding without supporting evidence."[13] By way of contrast were the creation and amendment of zoning schemes, where due process would require nothing. The Connecticut Supreme Court of Errors had this to say of a zoning commission that had altered regulations to permit an increase in the size of certain classes of lots:

> In adopting regulations, the commission acts in a legislative capacity. It is by no means confined to a consideration of only such evidence as may be presented to it, and it is not required to disclose at the [statutory] public hearing the information upon which it will act. It is entitled to take into consideration facts which may have been learned through personal observation.[14]

Similarly, the question of whether land should be taken by eminent domain was said to present "legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment."[15]

It is instructive to contrast the British use of similar terms. "Quasi-judicial" in Britain usually does no more than denote those decisions that natural justice will require to be arrived at fairly. Occasionally it, or more normally the term

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12. Heath v. Baltimore, 49 A.2d 799, 803 (Md. 1946).
13. Id. at 804.
14. DeMars v. Zoning Commission, 115 A.2d 653, 655 (Conn.1955).
15. Bragg v. Weaver, 251 U.S. 57, 58 (1919).

"judicial," will be used to delineate those functions within a "quasi-judicial" decision that must be exercised fairly, as opposed to "administrative" functions, which need not be.[16] In America the words "judicial" and "quasi-judicial" likewise indicate where the courts will use due process to require fair procedures. But, unlike their British equivalents, they also connote a whole format for participation -- trial, followed by review on the record, normally via the "substantial evidence" test. Rather than defining the limits of judicial interference with administrative procedures, these terms have expressed a whole complex of procedures set out by judges for agencies. They reflect the role of American judges as architects of a whole framework of procedures for polycentric decisions.

American courts continue to use these terms, although in recent years they have given them a bit more thought. This is thanks largely to Professor Davis, who, beginning in the 1950's, has criticized the attachment of what he calls "separation-of-powers" labels to administrative proceedings. As a replacement, he has proposed his distinction between "adjudicative" and "legislative" facts, with the courts requiring a trial for disputes over the former, and something less, if anything, for disputes over the latter.[17] Although judges have not followed Professor Davis' suggestion that they stop labelling whole proceedings, they have begun to examine what goes into the labels. In Hunt Oil Co.

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16. See generally pp. 83, 96-97 supra.
17. E.g., Davis, "The Requirement of a Trial-Type Hearing," 70 Harv. L. Rev. 193, 201-06 (1956).

v. Federal Power Commission, the Fifth Circuit Court of Appeals held that individual natural gas producers were not entitled to evidentiary hearings before area rates were applied to them. To hold that they were,

> would ignore the basic character of area rate regulation, which is in the nature of a rulemaking proceeding. Area rates are quasi-legislative rather than quasi-judicial in that they involve considerations that apply industrywide. If adjudicatory facts -- facts governing the applicability of the rates to particular persons as distinguished from facts applying broadly across the industry -- had been in issue, then a hearing might be necessary ... .[18]

Similarly, the First Circuit in Hahn v. Gottlieb declined to require anything in rent-setting. A trial, it said, would be

> characteristic of adjudicatory proceedings, where the outcome turns on accurate resolution of specific factual disputes. Such safeguards are not, however, essential in "legislative" proceedings, such as rate-making, where decision depends on broad familiarity with economic conditions. As Professor Davis has pointed out, when decision turns on "legislative" rather than "adjudicative" facts, a formal adversary hearing may contribute little or nothing to the agency's understanding of the issues.[19]

Like explanations have been given as to why the taking of land by eminent domain is "legislative,"[20] and as to why the creation of a zoning schme is "unquestionably a legislative act," while the treatment of a parcel of land within it is "adjudicatory in nature."[21]

The problem is that, even when thought is given to their use, the labels still represent extremes -- a judicially-imposed trial on the one hand, as opposed to no judicially-required procedures

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18. 424 F.2d 982, 985 (5th Cir. 1970). See also Phillips Petroleum Co. v. Federal Power Commission, 475 F.2d 842, 852 (10th Cir.), cert. denied 414 U.S. 1146 (1974).

19. 430 F.2d 1243, 1248 (1st Cir. 1970) [citations omitted].

20. Trager v. Peabody Redevelopment Authority, 367 F.Supp. 1000, 1002 (D.Mass. 1973).

21. San Diego Building Contractors Association v. San Diego, 118 Cal.Rptr. 146, 150 (1974), appeal dismissed 96 S.Ct. 3184 (1976).

on the other. Thus, the Supreme Court in United States v. Florida East Coast Railway stated that findings of fact were used in group ratemaking "in the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts."[22] It therefore had due process requiring nothing. The dissent saw the adjudication of "a particular set of facts" as predominating, and would have required a trial.[23] Since ratemaking involves both general policy judgments and disputed facts about particular parties, both sides were right. Each should have been prepared to require a mixture of procedures. This more proper approach has been foreshadowed in the 1973 case of Mobil Oil Corp. v. Federal Power Commission. There, the court said that group ratemaking

> possesses elements of both a legislative policy determination and an adjuciative resolution of disputed facts. Although these distinct elements are intertwined and necessarily exist simultaneously in any rate-making, one may predominate over the other. Rate-making always involves factual predicates; yet the facts relevant to rates in any given industry may be more or less well established. For example, if industry costs are well established, the rate-making process would consist primarily of policy judgments such as the fair rate of return or the desired level of safety; appropriate procedures for resolution of these policy disputes would not resemble adjudication. In contrast, if the rate of return policy was clear but the cost base uncertain, adjudication might be more appropriate.[24]

Elsewhere in its opinion, the court recommended that judges take a flexible approach to requiring procedures depending on the precise issues in each case.[25] When this attitude becomes accepted,

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22. 410 U.S. 224, 246 (1973).
23. Id. at 246-52.
24. 483 F.2d 1238, 1257 (D.C. Cir. 1973) [footnote omitted].
25. Id. at 1251-53.

American courts will at last have extricated themselves from the baneful effects of the "judicial" and "legislative" labels. In so doing, they will be mirroring the movement of British judges away from the lis concept on the one hand (which emphasizes the judicial aspects of a polycentric decision) and the information-gathering one on the other (which emphasizes the legislative aspects).

The Use of the Londoner and Bi-Metallic Cases

The role of American courts in creating polycentric procedures is reflected by the judicial treatment over time of two early Supreme Court cases -- Londoner v. Denver,[26] decided in 1908, and Bi-Metallic Investment Co. v. State Board of Equalization,[27] in which the Court, speaking seven years later, explained its Londoner decision. Londoner and Bi-Metallic are important because they constituted due process rulings by the highest court. As such they could not be ignored. But they were also open-textured enough to be susceptible of varying interpretations. These interpretations reflect the change in the judicial treatment of polycentric decisions, from former times when the cases were taken as drawing a clear line between situations where due process required a trial and those where it required nothing whatever, to more modern times when they are read as having less extreme connotations.

The cases themselves deal with the need for a hearing when a governmental body is assessing and taxing real property. In Londoner v. Denver, the City of Denver paved a street and then assessed the costs of the improvement against the property of adjoining landowners, according to the benefits they had received. Londoner, one of the owners, protested that he and the others should have been

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26. 210 U.S. 373 (1908).
27. 239 U.S. 441 (1915).

granted an oral hearing on the amounts assessed against their land, rather than just the opportunity to present written comments guaranteed by the city charter. The Supreme Court, speaking through Mr.Justice Moody, agreed, holding that due process required a hearing in which Londoner had "the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."[28] Seven years later, the Court had occasion to qualify its Londoner opinion. In Bi-Metallic Investment Co. v. State Board of Equalization, the Colorado state authorities ordered the Denver assessor to increase the assessed value of all taxable property in Denver by forty per cent. The Bi-Metallic Investment Company argued that, as a landowner, it must be granted an oral hearing in accordance with Londoner before its property was subjected to increased tax liability. Mr.Justice Holmes, who had dissented without opinion in Londoner, took the opportunity to set the record straight on behalf of the Court. Londoner, he explained, did not say that due process required a hearing whenever an assessment was laid on real property. There, "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds ... . " Here, there was a "general determination dealing only with the principle upon which all the assessments in a county had been laid."[29] Thus, due process required nothing by way of procedure.

Both Londoner and Bi-Metallic concerned polycentric decisions, but of a quite different sort. In Londoner there was a set liability owed the city for which a given number of property owners were

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28. 210 U.S. at 386.
29. 239 U.S. at 446.

collectively responsible. The issue was how the liability would be apportioned among them. The optimum solution was that best matching assessments with benefits. Unlike most polycentric decisions in government, the outcome did not hinge on factors or information external to the parties involved. Any decision reached without the landowners' participation was likely to be as arbitrary as one reached that way in adjudication. Furthermore, that participation would probably have to be by means of an oral hearing rather than written comments, since any proposed change in the way one landowner was treated might call for instant reply from the others, whose liability would be affected. And it would require an evidentiary hearing to resolve disputes about the actual benefits to various parcels of land. In Bi-Metallic the decision would have the same economic impact on the land. But the task involved getting the proper sum of money from all Denver landowners via taxation, presumably to pay for benefits they were receiving in common. The outcome depended upon a general finding that local taxing officials had uniformly undervalued all property in the city by a certain percentage. Unlike in Londoner, no point that any individual property owner made about the place of his land in the overall scheme could possibly change the effect of the decision on him. Although it might be desirable for the State Board to consult representatives of the city or its landowners at some point, due process need not require it.

Most interpretations of Londoner and Bi-Metallic have seen the distinction as one between pure adjudication and pure legislation. Bi-Metallic has come to stand for the proposition that due process normally requires no hearing whatever in rule making, where a standard

is being created.[30] Londoner normally requires that a hearing (probably in the form of a trial) precede the application of a legal standard to facts.[31] Only recently have the courts begun to apply the Londoner-Bi-Metallic rationale to the placing of a number of parties in a scheme. Most judges agree that the cases require a trial in these circumstances only if certain conditions are present. Some think that it turns on the number of parties concerned, with no procedures being required by due process when "the impact of the determination is upon the group, not upon individuals."[32] Others go beyond this simplistic approach. They say that Londoner,as interpreted by Bi-Metallic,requires a trial only if "adjudicative" facts about particular parties predominate over general policies in determining the conclusion.[33] These cases are good as far as they go. But they limit the Londoner-Bi-Metallic rationale to the role of liberating polycentric decisions from the automatic requirement of a trial. Surely it stands for something more positive.

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30. E.g., Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 694 & n. 38 (9th Cir.1949)(setting of standards for canning and labelling of oysters).

31. E.g., Oestereich v. Local Board No.11, 393 U.S. 233, 243 & n. 6 (1968) (Harlan, J., concurring)(classification of selective service registrant as "delinquent"). A few cases have taken Londoner as requiring an oral argument (rather than a trial) in special circumstances. E.g., Federal Communcations Commission v. WJR, The Goodwill Station, 337 U.S. 265, 275-76 (1949).

32. Gart v. Cole, 263 F.2d 244, 251 (2d Cir.), cert. denied 359 U.S. 978 (1959)(urban renewal project).

33. United States v. Florida East Coast Ry.,410 U.S. 224, 244-45 (1973) (group ratemaking); Virgin Islands Hotel Association v. Water & Power Authority, 476 F.2d 1263, 1268 (3d Cir.), cert. denied 414 U.S. 1067 (1973) (ratemaking for single utility); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F.Supp. 809, 829 (E.D. Pa.1968) (urban renewal project).

Happily there is now a case that recognizes this. The 1973 decision in Thompson v. Washington interprets Bi-Metallic as having denied participation to taxpayers because they could make no relevant contribution on the decision.[34] On the other hand, tenants resisting rent increases in low-income housing projects could supply information about local factors and make suggestions for compromises.[35] The court thought that it was sufficient if participation was confined to written comments, although it recognized the possibility of requiring an oral proceeding. It might have added that Londoner requires this in a case like rent-setting, where the parties are seeking an adjustment vis a vis each other. The use of the Londoner-Bi-Metallic rationale, like that of the "judicial" - "legislative" approach, may be moving toward a happy conclusion. Taken first as requiring a trial in adjudication and nothing in rule making, the cases became tools for releasing polycentric decisions from the trial format. Now they may lead a third life as authorities for requiring moderate procedures. Because these cases will inevitably determine the procedures for a whole spectrum of administrative business, it is important that they be interpreted in a flexible way.

THE INTERACTION OF COURTS WITH OTHER BODIES

It would be wrong to say that American courts are alone responsible for creating procedures governing polycentric decisions. Other bodies operate in the area and have had great influence on the

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34. 497 F.2d 626, 638 & n.42 (D.C. Cir. 1973).
35. Id. at 638-39.

way in which the administration behaves. The roles played by Congress and the agencies can be inferred from the previous two chapters. At the risk of repetition, that role will be summarized below, with specific comparisons to the situation in Britain. Subsequently, some less obvious methods of interaction between the courts and other bodies will be explored.

The Contribution of Congress to Polycentric Procedures

Courts vs. Legislatures as Initiators of Hearing Requirements.-- In Britain it was Parliament that made fairness a factor in "policy" decisions by requiring that various land matters be decided only after an "inquiry." Although natural justice can theoretically compel a minister to hold an inquiry when Parliament is silent, it has never in fact had to to do so.[36] Matters are different in America. Courts there routinely find themselves fulfilling this particular function of Parliament. The first decision to deal with ratemaking procedures in 1890 prescribed a hearing in the face of legislative silence.[37] Similarly, the first one touching on allocative licensing procedures in 1924 assumed that a hearing was necessary, although the statute said nothing about it.[38] In either case, a court, not a legislature, introduced fairness as a factor. Congress confirmed in later statutes that businesses whose rates were being set or whose applications for licences were being determined had a right to a "hearing."

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36. See pp.98-99 supra.
37. Chicago, Milwaukee & St.Paul Ry. v. Minnesota ex rel. Railroad and Warehouse Commission, 134 U.S. 418 (1890). See pp. 160-62 supra.
38. Chicago Junction Case (Baltimore & Ohio R.R. v. United States), 264 U.S. 258 (1924). See pp. 198-99 supra.

Whenever it neglected to do so, courts used due process to make up for the omission.[39] Later, judges extended rights of participation in these hearings: in ratemaking, to consumers who pay charges[40] and in allocative licensing to potential rivals for certificates and others who stand to be more remotely affected.[41] The initiative in requiring hearings and defining their scope has always been with judges.

Occasionally, however, legislatures have been ahead of the courts. Congress has made itself felt most dramatically as an initiator in the field of federal-aid land hearings.[42] It was of course Congress that forced state authorities to hold public hearings as a precondition to obtaining federal funds for urban renewal and highway projects. Thus, for the first time landowners have the right to be heard on the question of whether their property should be taken for admittedly public purposes. Judges are slowly beginning to fill in specific procedural requirements. For once Congress appeared bolder than the courts, which may have been put off by the novelty and complexity of the subject matter, the large number of people involved, and the problems of federal-state relations. Similarly, various state legislatures have required that a public hearing precede the enactment or amendment of zoning ordinances.[43] When the issue is the taking and use of land, legislatures hold the initiative.

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39. See pp. 166-67 supra.
40. See pp. 186-95 supra.
41. See pp. 206-19 supra.
42. See pp. 231-40 supra.
43. See pp. 229-30 supra.

The Administrative Procedure Act.-- The most significant legislative contribution to the form hearings take has been the Administrative Procedure Act. Its importance stems from the fact that it prescribes procedures for a broad range of administrative decisions. The only real British equivalent is the requirement of reasons in the Tribunals and Inquiries Act.[44] How is it possible, then, to say that Congress has had less influence than Parliament on particular procedures accompanying polycentric decisions?

The answer has already been suggested. Generally, the effect of the Administrative Procedure Act on polycentric procedures was far from revolutionary. Its basic dichotomy between "adjudication" and "rule making" reflected the division made by courts between "judicial" (or "quasi-judicial") and "legislative" (or "quasi-legislative") decisions. Polycentric decisions were distributed between these categories exactly as they had been distributed by judges, with identical consequences. Ratemaking was split between the two, with the determination of the reasonableness of existing rates termed "adjudication" and the prescription of future rates "rule making." This made no difference procedurally in the Act any more than it had in judicial opinions, since the creation of the category of formal "rule making" guaranteed that the prescription of future rates would ensue from a trial, normally the same proceeding where existing rates were found to be unreasonable.[45] Judges had never treated allocative licensing

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44. TIA 1971, §12.
45. See pp. 170-71 supra.

any differently from licensing entailing the application of a legal standard. Neither did the Act, labelling all licensing "adjudication" and prescribing a trial.[46] For various reasons the Act has had nothing to say directly about the more recent problems of rent-setting and federal-aid land hearings.[47] Nor has its equivalent, the Revised Model State Act altered procedures governing eminent domain or zoning.[48]

What the Administrative Procedure Act did do was to confirm the procedural framework already created by judges and embody their approaches in statute. Above all, it endorsed the close relationship between the trial format and judicial review on the evidence via the "substantial evidence" test.[49] Its terms and provisions are now inextricably bound into judge-made law on polycentric procedures. And yet the Act is not so fixed or definite that it cannot be manipulated when necessary to produce startling turnabouts. Judges are still the masters. Most important is their ability to determine whether a decision is required to be made "on the record after opportunity for an agency hearing."[50] If they hold that it is, then they automatically trigger the provisions of the Act prescribing a formal evidentiary hearing.[51] In the early 1950's the Supreme Court foiled an attempt to liberate truck route licensing from the trial requirement by summarily reversing a lower court's holding that the decision there did not have to be "on the record" within the meaning of the Act.[52] Yet in 1973 the Court

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46. See pp. 202-03 supra.
47. See pp. 189 & 232 supra.
48. See pp. 222, 227-28, 230-31 supra.
49. APA §10(e)(B)(5), 5 U.S.C. §706(2)(E)(1970).
50. APA §§4(b) & 5, 5 U.S.C. §§553(c) & 554(a) (1970).
51. APA §§7 & 8, 5 U.S.C. §§556 & 557 (1970).
52. Riss & Co. v. United States, 341 U.S. 907 (1951), rev'g 96 F.Supp. 452 (W.D. Mo.1950). See pp. 204-06 supra.

adopted this very method to free group ratemaking from the trial format, holding -- contrary to expectations -- that the hearing prescribed in the Interstate Commerce Act did not have to result in a decision "on the record."[53]

Nor is this all. Even when a decision does have to be "on the record," the courts may discover new flexibility in the sections of the Act requiring an evidentiary hearing. These provide that in "rule making" and "applications for initial licences" the "agency may, when a party will not be prejudiced thereby adopt procedures for the submission of all or part of the evidence in written form."[54] Although this provision lay fallow for twenty-five years, the courts have begun to work it to good advantage. It has been used to justify relaxed procedures centering on written submissions in both truck route licensing[55] and group ratemaking.[56] The point is that the Administrative Procedure Act is really more a creature of the courts than of Congress. Judges laid the groundwork for it, and now adapt it to keep it current with their notions of elemental fairness.

Judicial Use of Statutory Language and Scheme. - British courts are prone to base their analysis on, and express their results in, statutory language. They may look to the internal logic of the statute for guidance when confronted with a particular procedural problem. By doing this, they both discipline themselves

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53. United States v. Florida East Coast Ry., 410 U.S. 224 (1973). See pp. 178-79 supra.
54. APA §7(c), 5 U.S.C. §556(d)(1970).
55. E.g. Subler Transfer, Inc. v. United States, 396 F.Supp.762, 764-65 (S.D. Ohio 1975). See p. 218 supra.
56. E.g., Long Island R.R. v. United States, 318 F.Supp.490 (E.D.N.Y. 1970). See pp. 185-86 supra.

and allow Parliament to play a part, albeit an indirect one, in applying natural justice.[57]

As should be apparent by now, this is not the style of American judges. They are prone to seek guidance and discipline from precedent in related areas. It will be remembered, for example, that licensing procedures owed more to ratemaking decisions than to statutes prescribing hearings when businesses applied for certificates. Two cases stand out, not as examples of the normal practice, but as exceptions to it. The first is Norwegian Nitrogen Products Co. v. United States,[58] decided by the Supreme Court in 1933. There, the Court held that a hearing undertaken by the Tariff Commission with the object of recommending tariff increases to the President did not have to be conducted as a trial, with the automatic requirement that all evidence be placed on the record. The opinion of Mr.Justice Cardozo is a model of how courts can infer procedural results from a seemingly silent statute. The precise issue was whether the Commission had to reveal to importers of sodium nitrite all information in its possession, specifically the costs of American producers. The statute said only that the Commission was to give "reasonable opportunity to parties interested to be present, to produce evidence, and to be heard."[59] Mr.Justice Cardozo cautioned:

> The answer will not be found in definitions of a hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or forseen. To know what they are, there must be recourse to all the aids available in the process of construction, to history and analogy,

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57. See pp.101-05 supra.

58. 288 U.S. 294 (1933).

59. Tariff Act of 1922, ch. 356, § 315(c), 42 Stat. 943, as amended 19 U.S.C. § 1336(a) (1970).

and practice as well as to the dictionary.[60]

Recourse to analogy meant investigating the procedures traditionally used by Congress and congressional committees to set tariffs. Nowhere had there been a practice of making all information public or of affording an unlimited right to cross-examination.[61] This created an inference against disclosure, albeit an inconclusive one. Next, the Court turned to the legislative history of the Tariff Act. Congress had repeatedly rejected attempts to require that the "'hearings shall be public,' or that the President shall publish the testimony when announcing his decision ... ." Were they to give parties an automatic right to all information used by the Commission, the courts would in effect be enacting the very provision that Congress had refused.[62] Third, the Court looked to the practice of prior tariff commissions, as well as to that of the current one. Each of these had repeatedly declined to disclose information upon which it was acting. Congress, although often criticial of other aspects of the commissions' behaviour, had never spoken out against this practice.[63]

Mr.Justice Cardozo still was not finished with the statute: "To the external aids that are drawn from history and analogy and administrative practice there is to be added another that may be said to be internal; the aid to be derived from the wording of related sections."[64] He had already noted that the operative section specified only "reasonable opportunity" to present evidence and be heard.[65] By way of contrast was a neighbouring section governing

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60. 288 U.S. at 317.
61. Id. at 304-05.
62. Id. at 305-07.
63. Id. at 308-15.
64. Id. at 315.
65. Id. at 307-08.

appeals from the decisions of appraisers valuing imported goods. At the request of importers, Congress had amended this section to give parties the right to "hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered in evidence."[66] The difference in wording was too great to be ignored.[67] Mr.Justice Cardozo summed up: "The tokens of intention set down in this opinion have a force in combination that is denied to any one of them alone."[68] The statute could not be read to mandate the same disclosure of information that would be required in a trial.

The second example of the intelligent use of a statute is the dissent of Mr.Justice Frankfurter in Federal Communications Commission v. National Broadcasting Co.[69] The majority had held that a radio station that stood to suffer electrical interference from the grant of a licence to another station could intervene as a full party in the licensing proceedings -- that is, that it had the right to a trial. Mr.Justice Frankfurter objected, saying, "Such a construction appears to me to disregard the structure and language of the legislative scheme."[70] Congress required the Commission to grant an applicant an "opportunity to be heard" before denying his request for a licence.[71] This could be taken to mean a trial. On the other hand, those whose existing licences stood to be modified by

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66. Tariff Act of 1922, ch. 356, § 501, 42 Stat. 966.
67. 288 U.S. at 315-17.
68. Id. at 319.
69. 319 U.S. 239 (1943).
70. Id. at 262.
71. Communications Act of 1934, ch. 652, § 309(a), 48 Stat. 1085.

the grant of a new licence were to be afforded, in the words of Congress, a "reasonable opportunity to show cause why such an order of modification should not issue."[72] The inference was that Congress was content that existing licensees receive something less than a trial. As noted below, subsequent events have shown this to be the correct assessment of legislative wishes.

In both of the above opinions the reference to the language and logic of the governing statute resulted in prescriptions of relaxed procedures. Both rejected the trial format, contrary to the accepted approach of the times. The method of statutory analysis appears to have exerted a moderating influence. Procedures were matched to the particular task rather than being transplanted wholesale from other areas of administrative law. Unfortunately, these opinions are exceptional. More often, American judges have not allowed Congress to participate in this manner. Rather, they have used their own broad precedents and the approaches dictated in them.

Particular Legislative Contributions.-- When judges are applying statutory standards of fairness, Congress may help them out of particular procedural difficulties. The most striking instance was its response to the decision in the National Broadcasting case. After the Supreme Court rejected Mr.Justice Frankfurter's warnings and gave intervenors the right to a trial in broadcasting licensing proceedings, Congress made itself clear. In a series of amendments, it changed the Communications Act to allow the Federal Communications Commission to give intervenors something less than a trial. Now intervenors are denied an evidentiary hearing unless they can demonstrate in writing that they allege facts that may affect the outcome.[73] Because

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72. Id. §312(b), 48 Stat. 1087.
73. See pp. 214-15 supra.

the courts were interpreting a statute rather than the due process clause, Congress could nudge them away from the idea that a trial was the only possible format for participation. Recently, it has been suggested that this practice be extended to other areas besides broadcasting licensing.[74] By responding to a particular difficulty, Congress provided the foundation for a general rule.

The Contribution of Agencies

Particular agencies have for their part poured out procedures via administrative regulation. These range from complete codes governing the conduct of broadcasting and air route licensing[75] to brief instructions about how state highway authorities are to go about obtaining public comments.[76] The various regulations have remained relatively isolated from one another, having little in common. Innovations usually have no influence beyond the procedures immediately affected. By way of contrast are British procedural regulations governing land matters. Because the latter concentrate on setting out minimally fair procedures, they tend to echo one another, whether they concern planning appeals, compulsory purchase orders, or the route of a new motorway.[77] Again, it is the courts

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74. 1970-71 Admin. Con.Ann. Rep. rec. no. 20 (now rec. no. 70-3), at 42-43 (1971); 1971-72 Admin. Con. Ann. Rep. 32-33 (1972). See also 1971-72 Admin. Con.Ann. Rep. rec. no. 28 (now rec. no. 71-6), at 61 (1972).

75. Federal Communications Commission Rules of Practice and Procedure, 47 C.F.R. §§1-1.120, 1.201-1.363, 1.501-1.605, 1.971-1.973, 1.1201-1.1251 (1975); Civil Aeronautics Board Rules of Practice in Economic Proceedings, 14 C.F.R. §§302.3-302.40, 302.901-302.930 (1975).

76. Federal Highway Administration (Department of Transportation) Rules, 23 C.F.R. §§790.5-790.7 (1975).

77. See p.106 supra. See also Department of the Environment Booklet, "Public Inquiries into Road Proposals," paras. 8-9 (H.M.S.O. 1973) (inquiries into trunk road route proposals are conducted like inquiries into compulsory purchase orders and planning appeals).

in America that are by and large responsible for extending broad requirements of fairness to polycentric decisions.

Important procedural advances occasionally appear for the first time in administrative rules. The Department of Transportation has taken the lead in outlining procedures for federal-aid highway hearings. Clearly it is contemplating a novel form of hearing, where emphasis is placed on the giving of broad notice (to include information about the project, the alternatives studied, and the thinking of planners) in order to allow the public to make intelligent comments.[78] The procedures afford participants an adequate opportunity to make oral argument. Gone is the traditional stress on the presentation of proofs about narrow issues of fact. In contrast to the normal practice, a department has outlined the basic format for the benefit of courts rather than the other way around.

The Interstate Commerce Commission has recently adopted expedited procedures for truck route licensing via regulation. The so-called "modified procedure" permits it to deny a trial to intervenors who do not propose to dispute material facts.[79] This of course parallels the way Congress has treated intervenors in broadcasting licensing proceedings. Although the courts may not have allowed it twenty years ago, they have recently given this innovation their enthusiastic approval.[80] Again, the administration does not invariably confine itself to following the procedural lead of the courts.

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78. See pp. 237-38 supra.
79. Interstate Commerce Commission Rules, 49 C.F.R.§§1100.45-1100.54, 1100.247 (1975).
80. See p. 218 supra.

The Judicial Use of Authority: Due Process vs. Statutory Fairness

In addition to the above, certain less obvious forms of interaction have developed in the United States, based on the fact that the initiative is with judges. When properly understood, they point to a more important place for other bodies than might appear initially. The first centers on the judicial use of authority. It has already been noted that Congress may be encouraged to lend a hand when the courts make errors in interpreting statutory requirements. When due process is not in the picture, Congress has power to remedy matters. The judicial choice between due process and non-constitutional standards of fairness, then, may have significance for the place occupied by Congress in creating polycentric procedures.

An observer cannot help being amazed at the way American courts mix the authority for their decisions. The traditional requirement of a trial in ratemaking was based on hybrid authority. The important case of Morgan v. United States[81] was grounded on a statutory requirement of a "full hearing." The Supreme Court stated explicitly that it was not deciding the case on due process grounds.[82] However, it did say that it was spelling out "fundamental procedural requirements,"[83] and spoke of "principles established by our decisions"[84] demanding a "full hearing."[85] Later cases showed that the Morgan holding had taken on constitutional significance. Railroad Commission v. Pacific Gas & Electric Co. cited it side by side

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81. 298 U.S. 468 (1936).
82. Id. at 477-78.
83. Id. at 480.
84. Id. at 482.
85. Id. at 477-78.

with a due process case to buttress the due process requirement of a trial in ratemaking.[86] Recently the Supreme Court acknowledged with admirable understatement that some ratemaking decisions

> expressly speak in constitutional terms, while others are less than clear as to whether they depend upon the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution, or upon generalized principles of administrative law formulated prior to the adoption of the Administrative Procedure Act.[87]

The Court then proceeded to discuss all precedents, Morgan among them, in the same breath, whether they were based on due process or not.[88] In the later case of Phillips Petroleum Co. v. Federal Power Commission, the appellants based their claim to a trial on the due process clause,[89] but the court denied it on the basis of statute alone.[90] This could only happen where constitutional and statutory doctrines of fairness are so interchangeable that a decision on one will be recognized as a decision on the other.

In land planning also, there has been a mixture of authority. In Gart v. Cole, for example, a court denied a hearing before the Secretary of Housing and Urban Development to persons affected by an urban renewal scheme. Blending authorities with abandon, it used due process cases to show that the relevant housing statute did not contemplate an evidentiary hearing of the kind prescribed by the Administrative Procedure Act.[91]

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86. 302 U.S. 388, 393 (1938).
87. United States v. Florida East Coast Ry., 410 U.S. 224, 242 (1973).
88. Id. at 242-46.
89. 475 F.2d 842, 847, 848 (10th Cir. 1973), cert. denied 414 U.S. 1146 (1974).
90. 475 F.2d at 848-49, 851.
91. 263 F.2d 244, 251 (2d Cir.), cert. denied 359 U.S. 978 (1959).

Judges combine due process with statutory fairness not only when deciding whether there should be a hearing and what character it should take, but also when prescribing specific procedures. For example, the sufficiency of notice[92] and the permissability of secret evidence[93] in licensing cases have been treated identically under Constitution and statute.

One used to the British system, where the courts are normally quite precise about the authority on which they rely, is bound to experience quite a jolt. He might feel that everyone would be better served if judges stated the exact authority for their decisions and then used only the proper precedents. But however much purists may object to this random commingling of statute with Constitution, it is hard to demonstrate actual harm, except to an aesthetic sense of order. On the contrary, it would be foolish to expect anything other than mongrelization of authority under American conditions. Whether they are interpreting the word "hearing" in a statute, filling the interstices of the Administrative Procedure Act, or elaborating on the dictates of due process, American judges are engaged in the business of deciding what is required as a matter of fundamental fairness. Even when construing statutes, they are operating largely on their own. As already noted, they rarely look to the language, internal logic, or history of statutes requiring hearings. It is not surprising, then, that in interpreting general statutory

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92. Compare Civil Aeronautics Board v. State Airlines, Inc., 338 U.S. 572 (1950) (interpreting statute) and Mohawk Airlines, Inc. v. Civil Aeronautics Board, 412 F.2d 8, 13 (2d Cir. 1969) (interpreting statute's "absolute requirement of elemental fairness") with Dallas v. Civil Aeronautics Board, 221 F.2d 501, 504-05 (D.C. Cir. 1954) (interpreting Administrative Procedure Act and due process clause together).

93. Delta Airlines, Inc. v. Civil Aeronautics Board, 442 F.2d 730, 732, 733, 735, 737, 738 (D.C. Cir. 1970)(decision explicitly based on due process, but supported by doctrine from Administrative Procedure Act and aviation statutes); Northeast Airlines, Inc. v. Civil Aeronautics Board, 345 F.2d 484, 486 (1st Cir.), cert. denied 382 U.S. 845 (1965) (decision based on Administrative Procedure Act and due process).

requirements of fairness, American judges draw on existing constitutional doctrines and precedents. Nor is it startling that subsequent due process cases should in turn draw on statutory interpretations.

But if doctrines under both are identical, are there principles to guide a court faced with the choice of grounding a procedural requirement in a statute or in the Constitution? When is it more proper to use one than the other? One can of course take refuge in the old adage that the Constitution should serve only as a last resort, when no other authority is available. This well-known principle of judicial decision-making has found its way into this area of the law. For example, in Powelton Civic Home Owners Association v. Department of Housing and Urban Development, the court turned to the due process clause to require a hearing only after it had examined the housing statutes and Administrative Procedure Act, and had found them silent on the issue.[94] But even this guideline poses problems. American courts are not above creating the statutory requirement of a hearing out of whole cloth.[95] If they are always to prefer statutory interpretation to constitutional construction, then due process would be used solely to contradict the explicit mandates of Congress. This is rarely necessary in this branch of administrative law, where the problem is most often congressional silence. If this approach were pressed to its logical conclusion, due process would be almost entirely absent from this field of procedure.

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94. 284 F.Supp. 809, 830-32 (E.D. Pa. 1968).

95. E.g., Moore-McCormack Lines, Inc. v. United States, 413 F.2d 568, 587 (Ct.Cl. 1969).

The short of the matter is that the choice between constitutional and statutory authority may reflect the confidence judges have in a given procedure. As the saga of Londoner and Bi-Metallic proves, a constitutional decision will inevitably have effect on all polycentric procedures. One based on a particular statute can be extended by analogy to other substantive areas or confined to the statute, depending on its ultimate utility. Thus, the Ashbacker doctrine began as an intepretation of a communications statute, spread to air route licensing cases, and then took on constitutional dimensions.[96] Recent cases limiting it have mentioned only its statutory side,[97] thereby emphasizing its shrinking significance. Likewise, the majority in Phillips Petroleum Co. v. Federal Power Commission, in abandoning the trial for group ratemaking, distinguished the classic case of Louisville & Nashville in part upon the ground that the Supreme Court had been interpreting a different statute.[98] The dissent, which would have required a trial, cited the case approvingly.[99] Courts often stress the statutory basis of doctrines when they are unsure of themselves. That way they can more easily control the effect of a holding. Even more importantly for present purposes, they can also obtain help from Congress. Perceptive judges may use statutory authority as a signal to others either to make their desires known or to accept the court's action, which may in the future attain constitutional status.

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96. E.g., Northwest Airlines, Inc. v. Civil Aeronautics Board, 194 F.2d 339, 344, 345 (D.C.Cir.1952); Western Airlines, Inc. v. Civil Aeronautics Board, 184 F.2d 545, 549 (9th Cir. 1950).

97. E.g., Delta Airlines, Inc. v. Civil Aeronautics Board, 497 F.2d 608, 612-13 (D.C. Cir. 1973). See also National Airlines, Inc. v. Civil Aeronautics Board, 249 F.2d 13, 15 (D.C. Cir. 1957).

98. 475 F.2d 842, 849 n.7 (10th Cir.1973), cert. denied 414 U.S. 1146 (1974).

99. 475 F.2d at 855.

The best example of this interaction is the recent series of rent-setting cases. The question was whether low income tenants must be allowed to participate in the government's decision about rent increases. The first two courts facing the problem felt that neither the statutes nor due process could require anything. They did, however, suggest rather pointedly that Congress or the the Federal Housing Administration might want to give the tenants a voice as a matter of wise policy.[100] Two years later, the Second Circuit used the due process clause of the Fourteenth Amendment to require an unaided state housing authoirty to afford written comments before allowing rents to be increased.[101] This should have alerted federal authorities to what was in store. Shortly afterwards, the District of Columbia Circuit reached a compromise between the uselessness of mere admonition and the inflexibility of due process. In Thompson v. Washington it simply read the requirement of an informal hearing into the appropriate statute.[102] The opinion by Judge Leventhal not only deferred to the traditional practice of avoiding constitutional issues whenever possible,[103] but emphasized that Congress should have room to reexamine the question free of the inhibitions imposed by a constitutional ruling.[104] The court, however, explicitly recognized

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100. Langevin v. Chenango Court, Inc.,447 F.2d 296, 301-02 (2d Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243, 1251 (1st Cir. 1970). This solution was supported in Note, "Procedural Due Process in Government-Subsidized Housing," 86 Harv. L.Rev. 880, 912-13 (1973).

101. Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165 (2d Cir. 1973).

102. 497 F.2d 626 (D.C. Cir. 1973).

103. Id. at 633, 639.

104. Id. at 639.

the constitutional implications of its holding, noting that due process provided an analytical framework in which to consider the statutory issues,[105] and that it was prepared if necessary to face the constitutional problem squarely.[106] In a law review article Judge Leventhal has elaborated on what he was doing:

> ... I have based my view on statutory interpretation, including resort to the APA, synthesizing a legislative intention to accomodate expanding views of fair procedure. This does not mark less concern for those involved, but a sense that unfolding administrative experience may recommend an alteration in procedural remedy that can be better achieved if the issue is informed by but not grounded in constitutional doctrine. 107

In October, 1974 the Department of Housing and Urban Development finally adopted regulations embodying the requirements of Thompson: notice to tenants of proposed rent increases, opportunity to make written submissions, and the giving of reasons for the final decision.[108] Subsequent cases, while disagreeing about whether due process applies to this sort of rent-setting in the first place, have agreed that the issue is now whether the Department's conduct measures up to its own procedural standards.[109] Because the regulations are grounded in statute, Congress remains free to alter requirements in the light of future experience.

These rent-setting cases highlight the way in which American courts sometimes encourage other bodies to participate in the creation of fair polycentric procedures. Hints that the administration should act gave way to the command that an informal hearing be provided

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105. Id. at 633, 639.
106. Id. at 639.
107. Leventhal, "Walter Gellhorn: A Judicial Appreciation," 75 Colum. L.Rev. 703, 706 (1975) [citations omitted].
108. Department of Housing and Urban Development Rules, 24 C.F.R. §§401.1-401.4 (1975)(federally-assisted private housing projects); id. §§410.71-410.74 (federally-subsidized state housing projects).
109. Compare Harlib v. Lynn, 511 F.2d 51, 54 (7th Cir. 1975) and Paulsen v. Coachlight Apartments,Inc., 507 F.2d 401, 403 (6th Cir. 1974).with Dew v. McLendon Gardens Associates, 394 F.Supp.1223, 1227-29 N.D.Ga. 1975).

under statute, if not under due process. Finally the administration acted on its own. Although the applicability of due process remains unsettled, the courts have enlisted the aid of others in guaranteeing fair procedures. This constitutes interaction of a specially American kind at its best.

The Judicial Use of Analogy: The Administrative Procedure Act's Procedures for Informal Rule Making

Even when American courts base their decisions on the Constitution, their reliance on other bodies does not come to an end. They may always borrow doctrines and approaches pioneered by others. This is more of a one-way process than the judicial use of authority. Instead of encouraging a colloquy as they did there, judges, having assumed total responsibility, are taking from others what they need. Their method is similar to that of British judges, who occasionally draw general standards of fairness from particular statutory instruments.[110] For example, in holding that the due process clause of the New Jersey constitution required automatic revelation of a hearing examiner's report, the New Jersey Supreme Court noted that the federal Administrative Procedure Act ensured revelation. It conceded,

> [t]his does not, of course, bear directly upon the question of whether the procedure of the instant case violates due process. It does, however, indicate the desire of Congress to maintain the disclosure of the examiner's report as the basic feature of the process of federal administrative decision. 111

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110. See pp.106-07 supra.
111. Mazza v. Cavicchia, 105 A.2d 545, 560 (N.J. 1954).

What Congress required for federal agencies as a matter of elemental fairness could serve as an analogy for what the courts could require of state agencies.

The most fruitful instance of this borrowing centers on another section of the Administrative Procedure Act. Although most of the procedures prescribed by the Act apply only when due process or a particular statute requires a hearing on the record to begin with,[112] one provision of the Act requires a hearing on its own. This is section 4(b), dealing with informal rule making -- that is, rule making that, unlike formal rule making, need not proceed on the basis of a record made at an evidentiary hearing. This in fact includes most administrative prescriptions of general rules. The procedures set out are quite relaxed. Following the issuance of notice,

> the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. 113

This provision constitutes an original legislative contribution to administrative procedure, going well beyond anything required by judges. It applies directly to group ratemaking, now that the hearing preceding the latter need not be "on the record" under the Act.[114] But it does not apply to any of the other polycentric functions considered in this thesis.

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112. APA §§4(b) & 5, 5 U.S.C. §§553(c) & 554(a) (1970).
113. Id. §4(b), 5 U.S.C. §553(c) (1970).
114. See pp. 178-79 supra.

Yet even when the informal rule making procedures have not applied directly, they have cast a long shadow. They have demonstrated to the courts that advantage can be derived from requiring relaxed procedures, especially in situations where the outcome depends more on the prescription of policy for the future than on an evaluation of a party's past conduct.[115] Judges have managed to take the example of this section and to apply it by analogy to a variety of polycentric decisions.

An early opinion considering whether objectors to an urban renewal plan should be allowed a further hearing before the federal Secretary pointed out that an opportunity had already been given to make written comments in accordance with section 4(b) of the Administrative Procedure Act.[116] This was in spite of the fact that section 4(b) was strictly inapplicable. The case that finally held that due process required that the Secretary entertain written objections likewise demonstrated its awareness of the informal rule making procedures of the Act.[117] Even more explicit was a court that excused a power authority from holding a trial as a matter of due process before it set rates. It noted that the Administrative Procedure Act, although inapplicable, would have required only written comments in a similar situation.[118] Lastly, another court used the Act to positive effect when it held that tenants

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115. See Attorney General's Manual on the Administrative Procedure Act 14-15 (1947).

116. Gart v. Cole, 263 F.2d 244, 250-51 (2d Cir.), cert. denied 359 U.S. 978 (1959).

117. Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F.Supp. 809, 830 (E.D. Pa. 1968).

118. Virgin Islands Hotel Association v. Water & Power Authority, 476 F.2d 1263, 1268 (3d Cir.), cert. denied 414 U.S. 1067 (1973).

objecting to rent increases had a right to make written comments. Noting the large number of parties and the multiplicity of issues, it concluded that

> tenants will have adequate opportunity to express their views if they are afforded a hearing of the type prescribed by the Administrative Procedure Act for rule-making proceedings: an opportunity to make written presentations. We note that an opportunity of this sort has been held to protect the interests of claimants under a variety of circumstances. 119

Again, the Act is not strictly applicable to rent-setting.

But the beneficial effects of the Act's rule making provisions are just beginning to be felt when it comes to oral proceedings that do not take the form of a trial. The peculiar suitability of polycentric decisions for oral argument or conference, as opposed to trial, has been explained previously.[120] Strangely, however, this has never made much of an impression on American judges, possibly because they have always focused on the trial format. Oral argument has usually been considered, if at all, as another aspect of an evidentiary hearing. For example, in Londoner v. Denver the Supreme Court mentioned that, in addition to the right to offer evidence, a party objecting to assessments on his land had "the right to support his allegations by argument, however brief ... ."[121] In 1949 the Supreme Court finally faced squarely the question of requiring oral argument, but not a trial. A broadcaster claimed the right to intervene in a licensing proceeding because it stood to

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119. Thompson v. Washington, 497 F.2d 626, 640-41 (D.C. Cir. 1973) [citations omitted].

120. See pp. 19-20 supra.

121. 210 U.S. 373, 386 (1908).

suffer "objectionable interference" from the grant of a certificate. The Federal Communications Commission denied intervention, finding on the basis of written submissions that there would be no "objectionable interference" within the meaning of the statute. The lower court held that the Commission had violated due process in failing to afford an opportunity to present oral argument on the issue of law. In Federal Communications Commission v. WJR, The Goodwill Station, the Supreme Court reversed, saying that the court below would

> require oral argument upon every question of law, apart from the excluded interlocutory matters, arising in administrative proceedings of every sort. This would be regardless of whether the legal question were substantial or insubstantial; of the substantive nature of the asserted right or interest involved; of whether Congress had provided a procedure, relating to the particular interest, requiring oral argument or allowing it to be dispensed with; and regardless of the fact that full opportunity for judicial review may be available. 122

This was much too broad a requirement. Due process might compel oral argument by itself in certain circumstances. In exactly which circumstances was a question "for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them."[123] Oral arguement was not necessary here because the statutory scheme did not favour it and because the broadcaster had not demonstrated the inadequacy of written representations.

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122. 337 U.S. 265, 274-75 (1949).
123. Id. at 277.

WJR involved the application of a legal standard to known facts. It accordingly dealt with oral argument, which is appropriate for adversary proceedings, rather than with conferences, which are preferable when interests are being adjusted in a pattern. But it had equal significance for both. The Court had suggested the conditions in which judges would compel an oral proceeding other than a trial: when there were no disputed questions of local fact, but the issues were of broad importance, significant interests were affected, the statutory scheme allowed it, and errors were unlikely to be corrected by judicial review. This could be of great consequence for large-scale polycentric decisions where trial is inappropriate, yet written comments are inadequate. Judges might have taken WJR as encouragement to begin developing doctrine on a case-by-case basis. However, no such thing occured. WJR came to stand only for the negative, and rather obvious, proposition that due process does not necessitate oral argument whenever the administration disposes of a case,[124] or indeed whenever the courts do.[125] Writers have concurred in this, apparently fearing yet another wholesale burden on the agencies.[126]

It was left for the informal rule making provisions of the Administrative Procedure Act to point the way in which courts could require an oral argument or conference, but not a full-fledged trial. Section 4(b) calls for the "submission of written data, views, or arguments with or without opportunity for oral presentation."[127]

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124. E.g., Cogar v. Schuyler, 464 F.2d 747, 753-54 (D.C.Cir. 1972).

125. E.g., Re Amendment of Rule 3, 440 F.2d 847, 849 (9th Cir. 1970).

126. Davis, Text §7.08, at 170-71; Friendly, Forward to Schwartz & Wade at xviii-xix.

127. APA § 4(b), 5 U.S.C. §553(c) (1970) [emphasis added].

In certain circumstances, denial of an opportunity for oral presentation may be an abuse of discretion. Judges have begun to recognize this with respect to the promulgation of general standards. In Walter Holm & Co. v. Hardin, the Department of Agriculture, following the receipt of written comments, issued a rule prescribing minimum sizes for various classes of tomatoes. The Court held that the Department had improperly denied a request by tomato importers to be heard in person under section 4(b). Pursuant to departmental practice, the regulation had been proposed by an association of domestic tomato producers, but applied automatically to importers also. The court felt that the written comments allowed importers were insufficient to overcome this disadvantage. It therefore required an oral hearing, which it said could be "legislative in type." It concluded, "What counts is the reality of an opportunity to submit an effective presentation, to assure that the Secretary and his assistants will take a hard look at the problems in the light of those submissions."[128] The court felt that oral proceedings would allow importers to voice their concerns in public and force the Department to confront their arguments in a way that written comments never would.

This may serve as an example to judges in polycentric proceedings where the Administrative Procedure Act is inapplicable, as in rent-setting. Thus, shortly after noting the analogy of the written procedure it was requiring to informal rule making, the court in Thompson v. Washington cited the Walter Holm case for the proposition that "there may be instances of rent increase

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128. 449 F.2d 1009, 1016 (D.C. Cir. 1971).

proceedings when the dictates of fairness will require an opportunity for limited oral presentations ... ."[129] The informal rule making procedures of the Administrative Procedure Act can accordingly stimulate the courts to require oral arguments or conferences in certain circumstances. In this way Congress can have a beneficial effect on judicial doctrines of fairness, even when not formally determining their content.

The Judicial Use of Advice: The Administrative Conference as Forum for Scholarly Criticism

There is one more body involved in administrative procedures which has not yet been mentioned. This is the Administrative Conference of the United States, which serves as a rough equivalent to the British Council on Tribunals.[130] Created by Congress in 1964,[131] the Conference began operations in 1968.[132] Like the Council on Tribunals, the Conference must, among other things, "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations ... ."[133] The Conference consists of a Chairman, a Council (with directive and coordinating powers), and an Assembly (with ultimate power over Conference activities). Members are assigned to "standing committees," each with responsibility for a particular area of difficulty. For example, there is a committee on ratemaking and one on licensing.[134]

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129. 497 F.2d 626, 641 (D.C. Cir. 1973).

130. See generally Davis, Text § 1.04, at 10-11; Schwartz & Wade 174, 180-84; Ablard, "Some Comparisons between the Council on Tribunals and the Administrative Conference of the United States," 24 Am. J. Comp. L. 73 (1976).

131. Administrative Conference Act of 1964, Pub. L. No. 88-499, 78 Stat. 615, now 5 U.S.C. §§ 571-76 (1970).

132. 1969 Admin. Con. Ann. Rep. 1 (1970).

133. Administrative Conference Act, 5 U.S.C. § 574(1) (1970).

134. 1971-72 Admin. Con. Ann. Rep. 9 (1972) (ratemaking); 1969 Admin. Con. Ann. Rep. 20-21 (1970) (licensing).

The committees choose subjects for investigation and then employ a "consultant" to do research and prepare a report containing a recommendation. After discussing, and perhaps revising, the consultant's work, the committee presents the recommendation to the full Conference meeting in plenary session. The Conference decides whether to adopt the recommendation or not, much in the manner of a legislature.[135]

Although its statutory mandate is similar, the Conference does not play a role identical to that of the Council on Tribunals. Unlike its British counterpart, it does not receive specific complaints of unfairness as an incident to overseeing the procedural system. It is therefore not tempted to remedy various wrongs that might otherwise have been left to the courts. Nor are agencies required to submit proposed procedural regulations to it for vetting. It does occasionally advise on these when requested.[136] But even then it is more likely to be assisting with a particular problem than seeking the convergence of codes meant to perform similar functions. Indeed, it has explicitly stated that, instead of devoting resources to standardizing procedures, it would prefer to confine itself to "making recommendations in those areas where the need and utility of Conference action are most apparent."[137] Its organization into separate committees no doubt both reflects and fosters this. Not surprisingly, then, the Conference has not had the same broad, innovating influence as the Council on Tribunals, even allowing for its comparative youth.

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135. 1969 Admin. Con. Ann. Rep. 13-16 (1970).

136. See 1972-73 Admin. Con. Ann. Rep. 2-3 (1973); 1971-72 Admin. Con. Ann. Rep. 4 (1972).

137. 1972-73 Admin. Con. Ann. Rep. 50 (1973); id. 15. See also 1971-72 Admin. Con. Ann. Rep. 3 (1972) (tendency of Conference to focus on specific recommendations).

This is not to say that it has not made some helpful recommendations with respect to polycentric procedures. Following the general trend, it has criticized the emphasis on "formal trial-type hearings,"[138] and has pressed for particular procedural innovations in both ratemaking[139] and licensing.[140] On a more general level, it has recommended that agencies refuse a trial where no genuine issue of material fact exists,[141] and that, when a trial is held, intervenors be denied an automatic right to the full status of parties.[142] It is probably too early to assess the effect of the Conference's recommendations on polycentric procedures. It does seem to have a moderating influence. But its institutional position makes it less able to put ideas into direct effect on a large scale than the British Council on Tribunals.

To leave matters at that would be to treat the Conference only in British terms. It would also be to underestimate both the past effect of the Conference and its future potential. The secret of discovering the true influence of any organization lies in recognizing that it is the courts that maintain the broad initiative in creating polycentric procedures. Does the Conference have a way of reaching these innovators directly?

Any organization concerned with procedural reform is likely to attract the attention of scholars. But the structure and methods

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138. 1970-71 Admin. Con. Ann. Rep. 3-4 (1971). See also 1972-73 Admin. Con. Ann. Rep. rec. no. 72-5, at 32-33 (1973) (trial should not be automatic format for promulgating rules of general effect).

139. 1971-72 Admin. Con. Ann. Rep. rec. no. 35 (now rec. no. 72-4), at 86 (1972)(need for procedure allowing settlement of some rate proceedings without formal hearings).

140. 1969 Admin. Con. Ann. Rep. rec. no. 15 (now rec.no. 69-7), at 45 (1970) (need for procedural techniques to define possible outcomes so as to control scope and duration of licensing proceedings).

141. 1970-71 Admin. Con. Ann. Rep. rec. no.20 (now rec. no. 70-3), at 42-43 (1971); 1971-72 Admin. Con. Ann. Rep. 32-33 (1972).

142. 1971-72 Admin. Con. Ann. Rep. rec. no. 28 (now rec. no. 71-6), at 61 (1972).

of the Conference ensure that academics are given a special place. The Conference's Assembly, which has ultimate power to approve recommendations, is made up almost equally of representatives of administrative agencies and private citizens, some of whom are to be "scholars in the field of administrative law or government."[143] The same is true of its eleven-man executive body, the so-called "Council."[144] Indeed, the four chairmen of the Conference to date have all been law professors.[145] The consultant to whom new subjects are assigned for investigation and reporting is normally a law professor. Many of the reports, in addition to serving as support for formal recommendations, are subsequently published as law review articles. Hence they receive wide circulation in the legal world. Furthermore, persons associated with the Conference, either as members or staff, are accustomed to summing up their findings and seeking a broad forum for their views in academic publications.[146]

When someone associated with the Conference turns to the law reviews, he is engaging in more than just a scholarly exercise. Professor Jaffe, in his book on English and American judges, noted the importance of law journals to the work of the latter.[147] Legal periodicals have long helped the American judiciary to perform its function of adapting the law to changing circumstances.

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143. Administrative Conference Act, 5 U.S.C. §573(b)(6) (1970).

144. Id. §575(b).

145. The four are Professor Jerre S.Williams (University of Texas) (1968-1971), Professor Roger C.Cramton (University of Michigan)(1971-1973), Professor Antonin Scalia (University of Virginia)(1973-1975), and Professor Robert A.Anthony (Cornell University)(1975-present).

146. E.g., Merrill, "Procedures for Adverse Actions against Federal Employees," 59 Va. L. Rev. 196 (1973)(originally a consultant's report); Cramton, "A Comment on Trial-Type Hearings in Nuclear Power Plant Siting," 58 Va. L. Rev. 585 (1972)(article by chairman of Conference); Boyer, "Alternatives to Administrative Trial Type Hearings for Resolving Complex Scientific, Economic and Social Issues," 71 Mich. L.Rev. 111 (1972) (originally a staff report).

147. L. Jaffe, English and American Judges as Law Makers 106-07 (1969). See also Oakes, "Law Reviews and Judging," 50 N.Y.U.L. Rev. 2 (1975) (address by Judge Oakes of the Second Circuit Court of Appeals).

Law reviews customarily go well beyond stating what the courts have done in order to criticize trends and suggest new approaches. A judge may have had experience in editing a journal when at law school. He will almost certainly employ a "clerk," or research assistant, who has done so within the previous few years. He is therefore likely to turn to the pages of a law review when confronted with a difficult problem of procedure. The tendency is accentuated because he, unlike an administrator or legislator, creates procedures on the basis of a coherent body of doctrine rather than of ad hoc adjustments of expediency. Judicial determinations of what fairness requires must occupy a rational place in a line of decisions.

American judges listen, then, to what legal periodicals say. The most dramatic example of an academic's contribution to judicial doctrine in this area is, of course, Professor Davis' distinction between "adjudicative" and "legislative" facts. It was this, as much as anything else, that helped the courts to see where a trial was necessary and where not.[148] Yet there was a span of about twenty-five years from the time that the distinction was first made until it began to have a widespread effect on judicial decisions.[149] The Administrative Conference may change all of this. It provides

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148. See pp. 5-6, 281-83 supra.

149. Professor Davis first made the distinction in 1942. Davis, "An Approach to Problems of Evidence in the Administrative Process," 55 Harv. L. Rev. 364, 402 (1942). However, as late as 1963 Professor Wade could not see that it had been explicitly adopted by American courts. Wade, Towards Administrative Justice 121. Since the late 1960's it has been overtly recognized in opinions. E.g., Virgin Islands Hotel Association v. Water & Power Authority, 476 F.2d 1263, 1268 (3d Cir.), cert. denied 414 U.S. 1067 (1973); Hahn v. Gottlieb, 430 F.2d 1243, 1248 (1st Cir. 1970); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F. Supp. 809, 829 (E.D. Pa. 1968).

an ideal forum for scholarly criticism of polycentric procedures, matching dissatisfaction with investigation, and serving to finance and coordinate research. Equally important, it gives an official imprimatur to what might otherwise be the suggestions of a lone academic. True, most of these suggestions are addressed not to the courts, but to bodies that can reach out on their own and solve particular problems -- Congress and the agencies. But the publication of reports in periodicals ensures that they receive the attention of judges.

The Conference has produced a number of articles dealing with the proper procedures for polycentric decisions. A 1962 report to its predecessor, the temporary Conference, analyzed in depth the process by which the Civil Aeronautics Board conducted its air route licensing hearings. The report, which was later published,[150] examined arguments in favour of discarding the trial format.[151] Later articles have stressed the desirability of moving away from the extremes of trial or nothing in polycentric proceedings. One explores the need for something in rule making between the Administrative Procedure Act's requirements of a trial on the one hand or written comments on the other.[152] Several warn against the mindless imposition of the trial format on proceedings involving the management of personnel,[153] the siting of nuclear power plants,[154] or any

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150. Jones, "Licensing of Domestic Air Transportation," 30 J. Air L. & Com. 113 (1964), 31 J. Air L. & Com. 89 (1965).

151. 31 J. Air L. & Com. at 93-98.

152. Hamilton, "Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rule-making," 60 Calif. L. Rev. 1276 (1972).

153. Merrill, "Procedures for Adverse Actions against Federal Employees," 59 Va. L. Rev. 196, 231-35 (1973).

154. Cramton, "A Comment on Trial-Type Hearings in Nuclear Power Plant Siting," 58 Va. L. Rev. 585 (1972). See also Murphy, "The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?" 72 Colum. L. Rev. 963, 990-1005 (1972).

other matters where the relevance of the decision to a larger scheme makes public participation appropriate.[155] Perhaps the most useful article explored the alternatives to a trial in regulatory hearings.[156]

The courts have taken explicit notice of these articles, most notably when dealing with procedures appropriate for hearings on government land projects to which people object on environmental grounds.[157] The articles are helping judges to see hearings as occasions for not just proving facts and then applying a standard, but also for persuading a decider to adopt a certain polycentric scheme or for simply satisfying the public that it has been listened to.[158] More generally, they are partly responsible for a new awareness among judges that something is possible between a trial and nothing whatever.

To some extent, there is a parallel with the influence that Congress has exerted on the courts through section 4(b) of the Administrative Procedure Act. In both cases the courts are borrowing approaches pioneered by others. To be sure, the Conference cannot put the advice contained in its studies into action as can Congress. Section 4(b) gained much of its influence from the clear demonstration that what it prescribed worked. But this is compensated for by the ability of the Conference's

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155. Cramton, "The Why, Where and How of Broadened Public Participation in the Administrative Process," 60 Geo. L.J. 525, 535-36 (1972).

156. Boyer, "Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues," 71 Mich. L. Rev. 111 (1972).

157. E.g., Amoco Oil Co. v. Environmental Protection Agency, 501 F.2d 722, 731 n.24 (D.C. Cir. 1974)(citing Hamilton, note 152 on p. 319 supra); Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495, 500 n.20 (4th Cir. 1973) (citing Boyer, note 156 supra).

158. See, e.g., Hanly v. Kleindienst, 471 F.2d 823, 840 (2d Cir. 1972) (Friendly, C.J., dissenting).

studies to appeal to the intellectual processes of judges who will ultimately have to rationalize their decisions. In sum, courts in America create the general framework of fairness for polycentric tasks; the Conference may in the end have greater significance on a broad scale by appealing directly to them. In contrast is the British Council on Tribunals, which influences judicial decisions by first having its advice put into statutes or statutory instruments. American courts interact directly with their advisory body on administrative procedure, British courts only through Parliament and the administration.

Summary of Interaction in the United States

Although the initiative in creating general rules of fairness for the most part remains with the courts, other bodies have occasionally duplicated the British practice of prescribing new departures for judges or of rescuing courts from particular difficulties in which they have found themselves. Much more interesting is the uniquely American type of interaction here. The ability of Congress to participate directly is possible only when judicial doctrines of fairness are non-constitutional. To the extent that they consciously manipulate the authority on which they decide, the courts can invite or discourage this participation. If they finally insist on a constitutional basis for their decisions, American judges can still borrow the approaches of Congress or the agencies to analogous problems. Or they can adopt doctrines pioneered in studies sponsored by the Administrative Conference.

The contrast to Britain is marked. There, the courts played a supplementary role in ensuring fair procedures for polycentric

decisions. Parliament, the administration, the Council on Tribunals, and the Parliamentary Commissioner together had a much greater effect. In America, on the other hand, Congress, agencies, and the Administrative Conference participate almost at the bidding of judges.

CHAPTER 8

UNITED STATES:

COURTS AND POLYCENTRIC DECISIONS IN THE FUTURE

In Britain future opportunities for applying natural justice creatively to policy decisions involving land lie within a procedural framework created by others. Now that Parliament has established new modes of participation in large-scale land schemes, there is a potential need for some judicially-imposed procedures. The business of the courts is to discern the logic of the new system and to require particular procedures where necessary to its integrity. In America the courts, if they are to be true to their place, cannot wait for others to act. Rather, they must continue to lead the way in establishing minimally fair procedures for a broad range of polycentric tasks. The need is first of all for an approach that will allow them to perform their institutional duty.

THE PROPER APPROACH

Recently the Supreme Court clarified what judges should do whenever they are asked to apply procedural due process to administrative activities. First, they are to examine the nature of the private citizen's interest to see if it is "life, liberty, or property" within the meaning of the Fifth and Fourteenth Amendments. To meet this test, it must be protected by the Constitution, statute, or common law. Once the interest is determined to be a protected one, the courts are to use a balancing test to decide exactly what due process requires. This entails weighing the need for quick, efficient procedures against the desire of protected persons for

maximum participation.[1] Of course this is not to say that efficiency and fairness always conflict. A process that solicits the aid of citizens and ensures that they play a part in the ultimate decision will be more efficient than one that disregards their views, thus opening itself to errors and public resistance. But when a conflict does exist, the courts must apply the normal balancing test. The two-step approach has recently been applied to polycentric decisions like rent-setting.[2]

This thesis has not dwelt on the first stage of the judicial inquiry. It is enough to note that what judges decide there will determine what they have to decide at the second stage. If, for example, they ultimately agree that due process does apply to rent-setting[3] or that it does give utility consumers a voice in ratemaking,[4] then they must devise procedures to accommodate widened rights of participation. Similarly, if judges continue to expand statutory rights of intervention in licensing proceedings, then they will put even more pressure on the traditional trial format.[5] In Britain Parliament determines the scope of polycentric proceedings by defining those interests with a right to be heard. In America it is often the judges, appropriately enough, who do this as the first stage in prescribing fair procedures.

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1. Board of Regents v. Roth, 408 U.S. 564, 570-72 (1972).
2. E.g., Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483, 488-93 (9th Cir. 1974).
3. See pp. 187-89 supra.
4. See pp. 194-95 supra.
5. See pp. 210-17 supra.

It is with the second stage that this part of the thesis has been concerned. At this stage, the courts should explicitly recognize and follow the approach they have unconsciously used from the beginning: ask two more questions. The first entails investigating what the general character of the voice given various parties should be. As emphasized in prior chapters, the form of the hearing depends on the precise issues at stake. If the balancing test is to be correctly applied, the courts must begin with the simple realization, that neither of the competing interests -- that of the citizen in maximum participation or that of the administration in efficient decision-making -- is served by a format that does not match the task at hand. Once the character of the hearing is known, judges can prescribe particular procedures as required. Some will be essential to any type of participation, whereas others will attend only particular types. For example, there must always be adequate notice to inform parties about the mechanics of the hearing and to explain the administration's case. But notice will also have to be of the continuous type when the proceeding is oral and the issues emerge only as the parties explore possible courses of action. Similarly, the need for the administration to give reasons will be greater when participation takes the form of written comments: this may be the only way for parties to obtain a response from the administration, to receive assurances that their ideas have been received and considered.

Again, this merely recognizes what American judges have been doing from the beginning, usually unconsciously. It provides a mean between endless ad hoc prescriptions of isolated procedures on the one hand and general injunctions about the need for fairness

on the other. By indicating the general form of the hearing, the courts will remain true to their role as creators of an overall framework. The administration can then fill in the details, according to what the particular form demands. Judges will be available to require within this framework particular procedures that the administration may have neglected.

COURTS AND CONTINUOUS PARTICIPATION IN LARGE-SCALE POLYCENTRIC DECISIONS

The above approach will be simple enough to apply to the traditional small-scale polycentric proceeding such as setting rates for a single business or deciding on a particular zoning variance. Participation -- whether it be by trial, by oral argument or conference, by written comments, or by any combination of these -- will occur at one point and will be followed by a single decision. But what about broader decisions comparable to structure plans or trunk road schemes in Britain? These include making group rates, establishing networks of licences, and creating urban renewal and highway projects. Like their British counterparts, they are unlikely to be settled on in a single instance. They also will emerge from a lengthy process whereby information is gathered, alternatives suggested and investigated, choices winnowed, and a tentative pattern arrived at. Have Americans come to recognize, as have the British, that participation cannot be confined to a single episode, but must include continuous consultation?

In America, "consultation" has traditionally been seen as a worthy, albeit voluntary, facet of rule making. The Acheson Committee with characteristic perception discussed it as an alternative to the set hearing. It noted that many agencies

consulted informally with interests likely to be affected by rules and that consultation often took a unique form: "If the interested parties are sufficiently known and are not too numerous or too hostile to discuss the problems presented conferences have evident advantages over hearings in the development of knowledge and understanding." But it cautioned that, as useful as it was in certain circumstances, consultation should not be prescribed broadly by legislation.[6] A few pages later the Committee discussed the long process of investigation that often preceded the promulgation of rules, but also warned against making this a uniform statutory requirement.[7]

Although the occasional statute has required that consultation precede the creation of a specific rule,[8] this has never been widespread. Where consultation has been legislatively prescribed, the courts have not responded very enthusiastically. For example, a temporary Act in 1942 empowered the Price Administrator to freeze maximum prices for commodities. It stated:

> Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order.[9]

Although the Administrator was brought to court several times for alleged failure to consult, no regulation was ever struck down under this section. Typical is the case of Seaboard Oil Co. v. Bowles.[10] There the Emergency Court of Appeals declined to vacate

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6. Acheson Committee Report 103-05.
7. Id. 111-14.
8. 1 Davis, Treatise §6.02.
9. Emergency Price Control Act of 1942, ch. 26, §2(a), 56 Stat. 25.
10. 149 F.2d 661, 664 (Emer. Ct. App. 1945).

a regulation prohibiting rises in the price of "dry" gas. Although Seaboard charged that the Administrator "did not advise or consult with any members of the industry," the court found no abuse of discretion without even bothering to investigate the allegation. Nor did failure to consult violate due process, since businesses were entitled to present written protests to the Administrator after the regulation had been promulgated and to obtain judicial review.[11] The court did not see consultation as a vehicle for giving businesses a voice before a rule was tentatively settled on.

Judges have seen to it that consultation, when it does occur, does not undermine any legally mandated hearing. The greatest danger is that it will be conducted ex parte. A dramatic illustration is Moss v. Civil Aeronautics Board,[12] where consultation not only undermined, but indeed replaced, a statutory hearing. Any airline or group of airlines that wishes to alter its tariffs may do so by filing a new schedule with the Civil Aeronautics Board. The Board then decides whether to suspend the schedule pending a normal ratemaking proceeding of its own. There are no statutory procedures governing the Board's decision on suspension. What often happens is that the airlines consult at length with the Board to make certain that they submit a tariff schedule that will not be immediately suspended. Normally these consultations need not be public, since a decision not to suspend does not commit the Board to accepting the rate. The Board can still institute a proceeding to set a new rate of its own.[13]

In Moss the Board held the normal series of informal meetings

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11. Emergency Price Control Act of 1942, ch. 26, §§ 203 and 204, 56 Stat. 31.

12. 430 F.2d 891 (D.C. Cir. 1970).

13. Public Utilities Commission v. United States, 356 F.2d 236 (9th Cir.), cert. denied 385 U.S. 816 (1966) (suspension of telephone rate schedule by Federal Communications Commission).

with carriers about the need for increased fares. The carriers then filed a new schedule. Apparently still not satisfied, the Board requested a second round of conferences. By this time it had excited the interest of consumer groups and, more ominously from its point of view, of some thirty-two congressmen. The Board made the mistake of rejecting their suggestion that it make its consultations public. It did, however, hold oral argument on the question of suspension, at which the public was invited to put its views. The congressmen and others urged the Board to suspend the tariffs and to institute a general ratemaking proceeding, but refused to attend the oral argument on the ground that the Board had already arrived at a solution secretly with the airlines. As if to confirm this, the Board then suspended the original tariffs but suggested a complicated and detailed schedule in its place, to go into effect immediately if filed by the airlines. Completing their part in this elaborate quadrille, the airlines submitted a schedule with the suggested rates, which were allowed to stand without suspension or investigation.

Those who had been excluded from the conferences sought to have the tariffs declared invalid. Although the Board remained legally free to replace them with rates of its own, they argued that it was unlikely to do so. The court agreed, holding that the Board had in fact set rates without holding the hearing required by statute. The decision had clearly been made during the series of closed conferences, with the oral argument at the end being pro forma. This did not amount to a hearing, nor could it create an adequate record for judicial review.

Commentators have been the first to sense that consultation, when carried out openly, has a positive role to play. A series of

articles in the early 1960's dealt with the procedures employed by the Atomic Energy Commission (now the Nuclear Regulatory Commission) in deciding whether to license proposed nuclear facilities on safety grounds. Because nuclear technology was still in its infancy, each decision had to be a planning process of its own rather than the application of predetermined standards that one might expect. Writers noted that the decision was almost always the result of early consultations between the applicant and the Commission's staff. The eventual public hearing (which took the form of a trial) had a perfunctory quality about it, with the Commission disposed to approve the result that had been reached in the prior negotiations with the applicant.[14] It was recommended that outsiders be kept informed of early consultations and possibly be allowed to participate in them,[15] although participation was bound to be limited by the technical nature of the issues. Ten years later the Commission was considering environmental and amenity matters as well as safety issues. An article by the chairman of the Administrative Conference noted that outside interest in nuclear licensing had increased. Although the important determinations were made in the preliminary conference, public participation was still confined to the single evidentiary hearing that immediately preceded the final decision. The chairman recommended, somewhat timidly, that the bargaining process be opened to public scrutiny and input.[16]

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14. Davis, "Dueprocessitis and the Atomic Energy Commission," 47 A.B.A.J. 782, 782-83 (1961); Cavers, "Administrative Decisionmaking in Nuclear Facilities Licensing," 110 U. Pa. L. Rev. 330, 334-39 (1962); Davis, "Nuclear Facilities Licensing: Another View," 110 U. Pa. L. Rev. 371, 373-74 (1962).

15. Davis, 47 A.B.A.J. at 784; Cavers, 110 U. Pa. L. Rev. at 353-56; Davis, 110 U.Pa. L. Rev. at 373-74.

16. Cramton, "A Comment on Trial-Type Hearings in Nuclear Power Plant Siting," 58 Va. L. Rev. 585, 594-97 (1972).

Criticism of the single hearing as vehicle for public participation extended beyond nuclear licensing to the siting of other types of power facilities and of electricity lines. A 1973 article written under the aegis of the Administrative Conference complained that "... regulators eliminate effective public participation in the decisionmaking they do undertake by shifting the time of actual decisions from statutorily prescribed hearings to earlier negotiations... ."[17] It did, however, note one success story where the public had been voluntarily consulted at an early stage concerning the location of a proposed power plant. As a result, when time came for formal approval of the site selected, there was no public opposition whatever.[18] Another article described the limitations of public hearings on urban renewal schemes, recommending that, among other things, the public be involved when the proposals were at a formative stage. The hearing would simply be the "culmination of a series of informal, decentralized block meetings and negotiations, during which the agency makes its plan known, and makes alterations in the light of the information and reactions that it receives."[19]

Recommendations of this sort are beginning to be put into practice in highway planning. The Department of Transportation has made certain that state highway authorities obtain some outside advice before settling on the provisional corridor and design plans that will be the subject of the public hearing. Department rules state that highway authorities "shall solicit the views" of

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17. Case & Schoenbrod, "Electricity or the Environment: A Study in Public Regulation without Public Control," 61 Calif. L. Rev. 961, 961 (1973). See also id. 979-88.
18. Id. 982.
19. Jowell, "The Limits of the Public Hearing as a Tool of Urban Planning," 21 Ad. L. Rev. 123, 151 (1969).

various federal, state, and municipal bodies.[20] They then continue:

> Other public hearings or informal public meetings, clearly identified as such, may be desirable either before the study of alternate routes in the corridor begins or as it progresses to inform the public about highway proposals and to obtain information from the public which might affect the scope of the study or the choice of alternatives to be considered, and which might aid in identification of critical social, economic and environmental effects at a stage permitting maximum consideration of these effects. State highway departments are encouraged to hold such a hearing or meeting whenever that action would further the objectives of this part or would otherwise serve the public interest.[21]

Several points bear mentioning. Although consultation with governmental bodies is mandatory, consultation with the public is still discretionary: state highway authorities are only "encouraged" to undertake it. In this respect the rules fall short of public consultation in Britain, which is mandatory in the case of both structure and local plans. But the purposes are identical to those in Britain. In the words of a prior section, they are "to give all interested persons an opportunity to become fully acquainted with highway proposals of concern to them and to express their views at those stages of a proposal's development when the flexibility to respond to these views still exists."[22] The Department deserves praise for recognizing that consultation at an early stage affords a unique type of participation, beyond that provided by the eventual public hearing. A court recently enjoined the New York Department of Transportation from proceeding

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20. Federal Highway Administration (Department of Transportation) Rules, 23 C.F.R. §790.4(a) (1975).
21. Id. §790.4(b).
22. Id. §790.1(b).

with such a hearing until it complied with the mandatory provisions about soliciting the views of other government bodies. Consultation had been confined to environmental problems and had not occurred early enough to allow the intra-governmental coordination contemplated by the regulations.[23] If public consultation were also mandatory, the courts would similarly be compelled to consider its place in the procedural scheme.

One still cannot help thinking that it will be the courts, rather than Congress or the agencies, which eventually take the lead in prescribing consultation. Group ratemaking is ripe for it. The parallel between the new procedures attending group ratemaking and those accompanying the approval of structure plans was noted above.[24] In either case there is an unlimited opportunity to submit written comments about the tentative proposal. Requests to be heard in person will be granted only in special circumstances: with structure plans, if the Secretary of State or the panel decides that a party can contribute to the discussion of issues selected for public examination; with group ratemaking, if a party wishes to contest material issues of local fact or otherwise demonstrates that the opportunity to present written representations is inadequate. The big difference for present purposes comes before the tentative plan is arrived at: with structure plans, consultation is legally required, whereas with group ratemaking it is not.

Yet consultation does in fact occur often in the early stages of group ratemaking. Almost every judicial opinion on the subject mentions that the affected businesses have been involved from the

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23. Rye v. Schuler, 355 F.Supp.17, 27-28 (S.D.N.Y. 1973).
24. See pp. 195-96 supra.

beginning. The leading Supreme Court case of United States v. Florida East Coast Railway is no exception. The procedure centering on written comments that was eventually held to satisfy both the Administrative Procedure Act and due process occured only at the conclusion of a long process of participation. At the first stage, the Interstate Commerce Commission investigated the possibility of setting temporary per diem incentive rates for the rental of freight cars. After announcing its intentions, it made public the views of its staff and received statements of position from a number of railroads. It then held hearings at which a number of witnesses were examined. On the basis of these, it decided to defer action pending further investigation. A few months later the Commission directed railroads to submit information about freight car supply and demand at sample stations. It also allowed them to comment on its proposed methodology and to suggest modifications. The Commission then held an informal conference at which it discussed objections to its approach as it was developing and entertained further suggestions. A report of the conference was sent to the railroads. On the basis of all of this the Commission promulgated a tentative rate schedule.[25] This in turn served as the basis for the written comments that the Supreme Court eventually held to be legally adequate. Although the railroads had played a part from the beginning, their participation only had legal effect at this late stage.

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25. 410 U.S. 224, 231-34 (1973).

Similar procedures have been adopted by the Federal Power Commission. In American Public Gas Association v. Federal Power Commission, the Commission announced its intention to set natural gas rates and revealed that it aimed to ensure an adequate supply of gas without changing the structure of the industry. It requested information and comments about the costs of finding and producing natural gas, about the proper rate of return, and about the weight to be given to current contract prices. The responses were circulated to other producers. The Commission then designated staff to make a special investigation of intra-state rates. The staff sent out questionnaires and listened to representatives of various producers in person. Public hearings were eventually held at several locations, and transcripts of the proceedings published. After a final round of written comments, rates were set.[26] This lengthy process received different judicial treatment from that in Florida East Coast. The court gave legal effect to all of it from beginning to end, rather than ignoring everything but the final chance to make written comments. The practical result was the same: the informal rule making provisions of the Administrative Procedure Act and the loosened requirements of due process, necessitating as they do only written representations, were easily satisfied.[27] In a later case, another court noted that a similar process of consultation had gone "well beyond the rudiments of informal rulemaking."[28]

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26. 498 F.2d 718, 720-21 (D.C. Cir. 1974).
27. Id. at 722-23.
28. Shell Oil Co. v. Federal Power Commission, 520 F.2d 1061, 1074 (5th Cir. 1975).

Because they see participation as necessary at only one instant, the courts have not known what to make of consultation in the above cases. Either they have failed to give it legal effect or they have simply counted it toward satisfying the need for written comments at one point before the final decision. In the future they should make it a legal requirement, having recognized it for what it is: a chance to involve those affected from the start. The first instance of a court's doing this is the rent-setting case of Thompson v. Washington. The landlord there was a federally-subsidized municipal housing authority, which had to obtain the approval of the Department of Housing and Urban Development before raising rents. The court could have confined itself, as had others, to forcing the Department to receive written protests from tenants before approving a rent increase. However, the court also required the municipal housing authority to listen to the tenants before submitting its request to the Department. Its reasons were convincing:

> Allowing the tenants to present their views first to the local housing authority gives them an opportunity to influence the preparation of proposals at an early stage, before important issues have been foreclosed and objection has become a futile gesture.[29]

The court was guaranteeing to tenants what Parliament has guaranteed to the public concerned with planning in Britain -- a role in formulating proposals that will later be presented for approval. It was acting in the American fashion, prescribing the character of participation out of whole cloth. Consultation would take the form of written comments sent to the municipal housing authority, which would forward them along with its final proposal to the Department.

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29. 497 F.2d 626, 640 (D.C. Cir. 1973).

The final "hearing" before the Department would be in the form of a second round of written submissions.[30]

This is the first hint that American judges may make participation at more than one point a legal requirement. British planning procedure provides an overall analogue: extensive consultation with private interests at formative stages with the final hearing serving as a capstone. Judges can force agencies to open the early stages of planning to whoever has a right to be heard. They should be prepared to identify those points at which alternatives are narrowed and choices made, and to compel some sort of participation at each point. As did the Thompson court, they can outline a general format, prescribing particular procedures within it if necessary. The British experience indicates that this will take pressure off the final hearing on the tentative plan. Rather than retracing the entire planning process, the hearing can focus on selected problems. Any record necessary for judicial review on the evidence can be compiled gradually rather than just at the final hearing.

The above is both a prescription and a prediction for American courts. It accepts that they will continue to take the initiative in instituting new procedures on a broad scale for polycentric decisions. Given this, it presents a solution based on British innovations in an analogous field. One country can provide the other with ideas, but each must work them out in terms of its own institutions.

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30. Id. at 639-40.

GENERAL COMPARISONS WITH BRITISH COURTS AS CREATORS OF POLYCENTRIC PROCEDURES

This part of the thesis has compared the judicial solutions in Britain and America to the problem of ensuring fair procedures for polycentric decisions. It has also made some recommendations for the future. In each country the courts have the same basic task -- to give those whom the administration is including in a polycentric scheme the chance to influence, if not control, the final result. In each country judges have brought to the job a tradition geared to adjudication. The challenge has been for them to modify approaches and attitudes to provide proper procedures in the polycentric context. In both Great Britain and the United States the courts concentrated initially on polycentric decisions affecting one person or business. Here it was possible to maintain at least the illusion of adjudication. Now the focus is shifting from the procedures attending the regulation of a scheme at individual points to those attending the formation of the entire scheme. Here the adjudicative model is clearly inappropriate, and the courts have found their procedural ingenuity sorely taxed.

American judges, but not British, are accustomed to defining the whole character of a hearing at a stroke. Reflecting their confidence as ultimate interpreters of the procedural dictates of the Constitution, they do not hesitate to paint broadly, requiring a trial, oral argument, written comments, or the like. Unfortunately, this has in the past fostered an all-or-nothing attitude: they have usually required a trial or nothing at all. This approach may be salutary when the task is adjudicative, and trial is really the only proper format for participation. It has led to problems when it is polycentric, and the voice to be afforded persons affected must take on a variety of forms. Americans must learn that due process guards

the ability to persuade as well as to prove. The British courts do not make it a practice to fashion general hearing requirements out of whole cloth. They operate more on an ad hoc basis, addressing themselves to each individual procedural error as it arises. As a result, any mistakes they make are likely to be confined to one area, whether it be that of ex parte communications, notice, or whatever.

British judges are more part of a group effort than their American counterparts. They receive substantial aid from others, whether it be Parliament providing overall initiative and guidance, or the Council on Tribunals vetting statutory instruments or joining the Parliamentary Commissioner in handling individual complaints. They can concentrate on being a final stopgap, guarding against gross unfairness in particular cases. American courts, by way of contrast, are independently responsible for creating a whole framework of fair procedures. Other bodies contribute, but not normally in the British fashion. They may take advantage of the implicit invitation contained in many non-constitutional rulings to contribute something. Or, where the prevailing doctrines are constitutional, they can provide an example which the courts will find it worthwhile to emulate. Lastly, an advisory body like the Administrative Conference makes itself felt on a broad basis by influencing the content of due process directly. This it does not by making formal recommendations, but by sponsoring studies that demonstrate new ways in which the courts can approach their work.

In general, American courts play the role of innovators on a broad scale. They are responsible for creating a framework of procedures for polycentric decisions that ensures basic fairness.

Other bodies then fill in the details within the structure that judges have built. If these others wish to influence that structure, they must make themselves heard by the judiciary. In Britain, non-judicial bodies are in no such subservient position. They themselves create the framework in which judges operate. The latter are more overseers, attending to specific problems of gross unfairness. Even as they do, they are dependent on Parliament for authority, and on both Parliament and the administration for guidance. In Britain, the courts operate where others choose; in America, the exact opposite is true.

PART TWO

THE ENFORCEMENT OF

ADMINISTRATIVE RULES OF PROCEDURE

CHAPTER 9

THE GENERAL VALUES GOVERNING THE JUDICIAL ENFORCEMENT OF ADMINISTRATIVE RULES OF PROCEDURE

The creative work of judges is not limited to inventing minimum procedures for the administration to follow. Even when the administration has prescribed procedural regulations on its own, the courts may be called upon to decide whether or not to enforce them in a particular case.[1] Normally, an agency or department will have ignored its own rules either through inadvertence or through a desire to reach certain substantive results.[2] When this occurs, the party affected may challenge the final decision in court because of the agency's failure to adhere to its own procedures.

The controlling considerations now shift somewhat. No longer does it help to analyze the nature of the overall administrative task. It makes no difference whether a department is making an adjudicative or polycentric decision. For once it has taken the initiative and provided procedures, the values at stake are identical, whether it is applying a standard to facts or taking a situation and creating the best solution. In either case, one must look to see what is necessary to

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1. The question of whether or not a procedure should be enforced must be distinguished from that of what should be done once an enforceable procedure is disregarded. In the latter instance the courts will sometimes refrain from invalidating the administrative act for a variety of reasons. See generally de Smith, Judicial Review 122-26. See also note 74 on p. 400 infra.

2. It is assumed that the procedures do not on their face give the administration discretion to disregard them; further, that the courts cannot interpret them to permit this. Lastly, this Part does not deal with cases where a judge reinterprets an ambiguous procedure to find that it was not in fact violated.

foster the participation of those affected by the administrative activity.

What principles should govern here? When should a department or agency follow its own regulations and when not? The competing values come to mind readily enough. Agencies need flexibility in running themselves and in dealing with their clientele. They should not be compelled to adhere woodenly to their procedures regardless of time or context. On the other hand, it is equally necessary that people be able to predict the ways in which an agency will behave, so that they may adjust their conduct accordingly. Also, there is the danger that an administrative body, by varying its methods of practice, will treat individuals arbitrarily or unequally.

But when should flexibility take precedence over predictability? It is best to begin by inquiring into a procedure's purpose.[3] Is it meant solely to regulate the internal workings of the administrative body or does it primarily govern the relations of the body with outsiders? If the former, then it is to be judged by its utility in running the department as a going concern. To the extent that it helps the department accomplish its task more efficiently, it is a worthwhile rule; to the extent that it fails in this task, it is of diminished value. An example is a rule stating that departmental files will be destroyed after twenty years. One may assume that its purpose is to provide an orderly procedure for the disposal of out-of-date records. A department overburdened with useless paperwork is

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3. See generally Fuller, The Morality of Law 13-27, 206-16; Fuller, "Collective Bargaining and the Arbitrator," 1963 Wis. L.Rev. 1, 18-34; Fuller, "Adjudication and the Rule of Law," 54 Proceedings of the American Society of International Law 1,2 (1960).

less able to administer its own sector of government. Old files may cause confusion, and they will certainly require an allocation of space and manpower, thus diverting resources from the department's substantive task. Those who instituted this "twenty-year rule" no doubt decided that the utility of having a single cut-off date for all files outweighed that of retaining the files indefinitely.

Procedures of this sort will be promulgated as general regulations solely as a matter of efficacy. There is nothing in their nature that prevents them from being particular or ad hoc. A functionary could conceivably go through departmental records file by file and decide how long to keep each one individually. An overall "standard operating procedure" simply frees people from having to devote their energies to making independent determinations on the same routine problems. Again, a decision has been made that more is to be gained from disposing of all files after twenty years and occasionally losing a valuable one than from devoting resources to the separate consideration of each one.

Nor is there anything in the nature of these procedures that requires them to be followed until formally changed. A departmental employee acting on the orders of a superior or pursuant to general instructions might decide to destroy a certain file that had become useless before the end of the twenty-year period or to keep another file that had special value beyond the prescribed time. Here, the refusal to follow a procedure does not damage the administrative function. Rather, it aids it: presumably the department has decided that it has more to gain from waiving the "twenty-year rule" in a given instance than from following it. To the extent that this helps the department perform its job, this departure from prescribed

procedures has actually enhanced the administrative process.

By way of contrast are those procedures that are designed not to make the administration a more efficient organization, but to govern its dealings with the public. Procedures of this kind are judged not so much by their contribution to administrative efficiency as by their effectiveness in defining a department's relationship with others. If successful, they allow people to predict administrative actions beforehand and to order their affairs accordingly. They also set limits on the manner in which the government may act, and hence confine it for the benefit of the citizen. They may perhaps promote efficient administration in a very indirect way -- a public that has knowledge of a department's internal workings is likely to prove a more satisfied client, and may even produce suggestions about how the department can better accomplish its substantive task. But something other than efficiency dictates that the procedure be both promulgated as a general rule and adhered to in specific instances. Suppose, for example, that the rule considered above says not that the department's files should be destroyed after twenty years, but that they should be kept open for public inspection for that length of time. If in spite of the rule the department continued to destroy files when it pleased, the public would very soon lose confidence in the rule itself. It would be impossible to enter into transactions or relationships that were dependent in any way on the existence of departmental files. Also, depending on the contents of the particular file sought, an outsider might feel that the administration had granted him a benefit and then arbitrarily denied it. Procedures of this type, governing as they do the relationship of the administration with outsiders, can be

effective only so long as they are adhered to by agencies.

Suppose, however, that a procedure merely prescribes that departmental files should be kept for twenty years. Should it be enforced against the agency promulgating it? The answer depends on the purpose of the procedure -- something not readily ascertainable from the rule itself. If the procedure is meant to preserve the files for the department's own internal use, then what the department does with any one file is its own concern, and it may disregard the rule as it pleases. However, if the regulation is designed to preserve the files for public inspection, then it is meant to govern dealings with outsiders and should be adhered to rigorously. When confronted with ambiguity of this type, one must ascertain purpose by going behind a procedure and examining its background.

The arguments in favour of enforcement are strongest when the procedure does not stand alone, but is one of a series of procedures that interlock to form a hearing. The interdependence of these latter procedures was demonstrated in Part One of this thesis. Failure to follow one often diminished the value of others. For example, giving reasons for a polycentric decision meant less when the inspector's or examiner's report was not revealed, since parties would find it more difficult to tell whether the decision was based on findings of local fact or on overall judgements of policy.

Furthermore, disregard of one procedure may have a less direct, though potentially more harmful, effect on the entire hearing. The whole point of a hearing is to guarantee citizens a certain type of participation. Participation may be diminished by any sudden,

unexplained departure from the normal way of doing things, even if the procedure disregarded is not required by natural justice or due process. For example, one might believe that neither doctrine requires the revelation of a hearing officer's report, and yet still be offended by the sudden departure from a long-standing practice of volunteering it. One might suspect that the administration was being influenced by impermissable factors. No one can counter these blindly, and a party is likely to feel that he would not win even if he could. After all, a department that takes into account extraneous factors is less likely to consider his arguments seriously in the first place. To this extent, the entire hearing is undermined. The administration should adhere, therefore, to procedures that are part and parcel of a hearing.

In sum, it is possible to make rough distinctions between those procedures that an agency should follow and those that it need not. Briefly, procedures governing intra-administrative matters can remain optional. On the other hand, procedures regulating the administration's relations with outsiders should be adhered to, especially where a hearing is involved. A legal system can be judged by the extent to which its solutions approximate the one outlined here. As demonstrated in Part One, however, it is not enough to look at final solutions alone. It is necessary also to analyze the institutional framework, of which the courts are a part, which is responsible for the solution. In both Great Britain and the United States, judges bear the ultimate responsibility for deciding whether or not administrative bodies should follow their own procedures. But, as might be expected, their roles differ sharply, in a way that parallels the differences that attended the creation of minimum procedures for polycentric decisions in Part One.

CHAPTER 10

GREAT BRITAIN:

THE COURTS AS ENFORCERS OF PROCEDURES

THE GENERAL ROLE OF VARIOUS BODIES

An investigation of the enforcement of administrative procedures in Britain must begin with an examination of the role played by non-judicial bodies. For, as will be seen, these confine the scope of judicial activity to an even greater extent than they did in Part One.

Parliament

When requested to enforce a procedure against the administration, a British court will begin by inquiring into matters of legal status. It asks whether the procedure was promulgated by the department pursuant to a parliamentarily granted power to legislate. If it was, then it is said to be "statutory" and must be enforced by the courts against the department at the behest of an injured party. If not, then it is "non-statutory" and can be departed from at will.[1] The rationale behind this distinction lies in basic British constitutional law. In Great Britain the courts can enforce a regulation (including an administrative procedure) only if it is "law." Otherwise, it is no more enforceable than, for example, the rules of a football match. For a rule to be "law," its authority must be traceable back to one of three legitimate sources of governmental power -- Parliament

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1. Schwartz & Wade 103-04; de Smith, Judicial Review 62-63.

acting through statute, the Crown acting through royal prerogative, or the courts acting through common law. In administrative law the latter two play a relatively minor role, and so the only relevant source of law for present purposes is parliamentary enactment. For its authority to be properly traceable, then, an administrative rule of procedure must be made pursuant to a parliamentary grant of power to legislate.[2]

Parliament normally does not bother to give the status of "law" to rules governing the internal management of departments. The power of governmental departments to run themselves is thought to be an inherent one, existing independently of any parliamentary enactment. In this respect, public bodies in Britain are identical to private organizations, which certainly require no formal grant of legal power to administer internal operations. Internal procedures are normally published as departmental circulars or orders to subordinates, elucidating the steps to be taken by agency personnel in dealing with matters within their competence. Because they are no concern of Parliament, they might be characterized as lacking "legal pedigree." Their violation by administrative subordinates is solely a matter for the internal discipline of the department. A Ministry of Town and Country Planning circular promulgated in 1947 instructed local authorities to consult a "Regional Estate Officer" of the Ministry about the management of land acquired via compulsory purchase.[3] Because the circular laid out internal procedures for the best use of land under the Ministry's supervision, it was thought to require no formal grant of legal authority. Hence

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2. This is a commonplace truth recognized throughout British administrative law. See 1 Halsbury's Laws of England para. 2 (4th ed. 1973).

3. Ministry of Town and Country Planning Circular No.35/47, para. 6.

it was not enforceable against the Ministry in a court of law. A person who felt injured by the failure of local authorities to consult a Regional Estate Officer could not obtain a judicial remedy.

By way of contrast are those procedures that are to be found in formal statutory instruments, promulgated pursuant to express parliamentary authority.[4] Parliament normally provides for these when it grants to the administration the power to vary the legal rights and immunities of subjects, but desires that it be exercised in certain fair and predictable ways. Because they possess the requisite "legal pedigree," procedures of this type are considered "law" and hence will be enforced by the courts against the department. The codes discussed in Part One governing the conduct of inquiries into compulsory purchase orders and planning appeals fall into this class.[5] Because they are promulgated in formal statutory instruments, which, as is customary, begin by reciting their parliamentary authority, these inquiry procedures will be enforced against the Department of the Environment by the courts at the behest of an injured party.

Parliament sometimes concerns itself with the legal status of particular procedural regulations. It gave the Secretary of State for the Environment power to promulgate statutory instruments to govern the procedure at the new examination in public which replaced the traditional public local inquiry into structure plans.[6] However,

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4. Statutory Instruments Act 1946, 9 & 10 Geo. 6, c.36, §§ 1 and 2.
5. E.g., Compulsory Purchase by Local Authorities (Inquiries Procedure) Rules 1962, S.I. 1962 No.1424; Town and Country Planning (Inquiries Procedure) Rules 1974, S.I. 1974 No.419.
6. T&CP(A) Act 1972, § 3(1), amending T&CP Act 1971, § 9(4).

it made it clear that he was not to exercise that power for the time being. Instead, it wanted him to experiment with a "code of practice," which would have no formal legal effect. An exchange in the House of Lords in Committee shows that Parliament was acting quite deliberately. Lord Brooke of Cumnor expressed his concern at the unenforceability of the regulations, which were meant to guide and benefit private citizens:

> ... there has been some indication that the Government have had second thoughts and are proposing that there should be a code of practice relating to this public examination of structural plans without there being any enforceable regulations at all. I would have said that in a matter of this kind, which is somewhat delicate, it was desirable to have statutory regulations so that everybody may know exactly where he stands.[7]

Lord Sandford, a Parliamentary Under-Secretary of State for the Environment, reassured him. The Government intended

> that this code of practice should be a non-statutory document so as to secure the broadest possible acceptance of a common form of procedure together with an opportunity to adjust that procedure, which will be a new procedure, in the light of our early experience. But ... it may well be necessary to codify this more firmly in regulations ....[8]

Parliament was making a conscious choice about the legal status of the new procedures, sacrificing predictability for the time being in favour of flexibility.[9]

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7. 326 Parl. Deb., H.L. (5th ser.) 748 (1971).
8. Id. 750.
9. See also 325 Parl. Deb., H.L. (5th ser.) 779 (1971) (Viscount Colville of Culross), 800 (Lord Sandford); 829 Parl. Deb., H.C. (5th ser.) 1482, 1523-24 (1972) (Mr. Graham Page, M.P., Minister for Local Government and Development); 841 Parl. Deb., H.C. (5th ser.) 352-54 (1972) (Mr. Graham Page, M.P.).

The Council on Tribunals

The Council on Tribunals, with its concern for the fairness of administrative practice, is likely to keep an eye on the classification of particular procedures. The Council has been well aware of the dangers attending the promulgation of non-statutory rules to govern structure plan hearings. In 1971 it noted that the Department of the Environment

> proposed in the first instance to provide procedural guidance by way of a published circular on which they would consult us. While accepting that there might be a case for deferring the making of statutory rules, we emphasised that such rules were generally welcomed and helpful to the public and asked that their introduction should not be postponed for long.[10]

A year later, it brought the matter up again:

> We raised no objection to the Department's intention to provide initially for the procedures to be followed at or in connection with an examination by means of a Code of Practice because we were given to understand that statutory rules would be made later in the light of experience gained in the operation of this new form of proceedings.[11]

Although the Council has no coercive power of its own, it can draw the attention of departments and, if necessary, Parliament to instances of incorrect classification.

The Administration

Sometimes it may be left to the administration to choose whether or not a procedure will be enforceable against it.

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10. 1970-71 Council on Tribunals Ann. Rep. para. 76 (H.C. 26, 1971).
11. 1971-72 Council on Tribunals Ann. Rep. para. 32 (H.C. 13, 1972).

To the extent that it has discretion to employ either a statutory instrument or a circular, an administrative body can decide for itself in the first instance whether or not it wants to be legally bound by a procedure. As a practical matter, Parliament, aided by the Council on Tribunals, will probably prevent cases of egregious misclassification. But departments may have great discretion with marginal procedures which could arguably be designed either to supervise internal operations or to benefit citizens who were the object of administrative actions. An example would be the ambiguous "twenty-year rule" postulated in the previous chapter. In cases like this, it is unlikely that anyone would question the form in which the rule was issued. The administration would have the final say over whether the procedure would be enforced against it.

The Parliamentary Commissioner for Administration

Even when a procedure has been published in a circular and hence is not legally enforceable, a department may not escape all outside pressure to adhere to it. Since 1967, the Parliamentary Commissioner for Administration has been concerning himself with cases of "injustice" arising from "maladministration."[12] Quite clearly, the term "maladministration" involves more than just violations of "law." Indeed, the point of having a Parliamentary Commissioner is to get at administrative acts which, while not being strictly illegal, still result in unfairness to citizens. The Commissioner might be the logical person to prevent arbitrary

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12. Parliamentary Commissioner Act 1967, c. 13, §5(1)(a).

deviations from non-statutory procedures that are designed to guide or benefit the public.

The reports of the Parliamentary Commissioner confirm the validity of this conjecture. At various times in the nine years since his office was created, the Commissioner has investigated complaints of unexplained departures from non-statutory procedures. A case reported in 1975 is especially noteworthy.[13] A local authority proposed a development plan in which a particular parcel of land was zoned as green belt. Relying on this proposal, citizens refrained from objecting. But before approving the plan, the Scottish Development Department allowed modifications that permitted construction there. This violated a circular requiring the Department to advertise its intention to permit modification of development plans after they had been submitted, and to give possible objectors an opportunity for further comment. Irate citizens complained to the Parliamentary Commissioner of the Department's failure to adhere to its own procedure. In answer to the Commissioner's query, the Department explained that, since no statutory instrument was involved, it was under no legal duty to give notice.[14] But that did not satisfy the Parliamentary Commissioner. Agreeing with the citizens, he concluded, "... I criticize the Department for, in my view, failing to follow the procedure they themselves had laid down in Circular DHS 50/1958, and, in consequence, failing to give those interested a proper opportunity to consider if they wished to object to the proposed modification."[15] He encouraged the Department to use its special

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13. Case No. C. 115/J in 1974-75 Fourth Report of the P.C.A. 161 (H.C. 405, 1975).
14. Id. 164-65, at paras. 12-13.
15. Id. 167, at para. 20.

powers to reconsider the status of the parcel in question. The procedure was clearly designed to put potential objectors on notice of changes in the development plan so that they might make further comments.

In another case the Ministry of Building and Public Works failed to follow a circular requiring it to refer any proposals for public buildings to which local planning authorities objected to the Ministry of Housing and Local Government for review.[16] The Ministry of Building and Public Works planned to convert an abandoned brewery into a sorting center for the Post Office. Although the local planning authority expressed apprehension about the light and noise that might attend night-time sorting, the Ministry did not refer the matter to the Ministry of Housing and Local Government. After the conversion had been made, neighbourhood residents, their nights made sleepless by Post Office displays of son et lumière, complained to the Parliamentary Commissioner. The Commissioner agreed that the Ministry had not followed its own circular. Finding maladministration, he pressed the Ministries to remedy the situation. Again, the procedures were meant to protect the neighbourhood residents rather than simply to find the best possible place for sorting from the Post Office's viewpoint.

The Parliamentary Commissioner has considered many other alleged violations of procedural circulars. Among these are procedures similar to those of the Scottish Development Department requiring additional comments before development plans are altered.[17] There

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16. Case No. C. 308/S in 1971-72 Second Report of the P.C.A. 73 (H.C. 116, 1972).

17. Cases Nos. C. 321/T & C. 360/T in 1974-75 Third Report of the P.C.A. 166 (H.C. 241, 1975); Case No. C. 458/B in 1972-73 First Report of the P.C.A. 21 (H.C. 18, 1972).

have also been investigations into supposed departures from non-statutory rules governing the "call in" of planning applications by central departments for inquiries.[18] Lastly, there have been single complaints about the breach of informal procedures governing the appointment of inspectors[19] and directing the automatic renewal in the face of unchanged circumstances of planning permission that had been allowed to lapse.[20]

But there is certainly no requirement that the non-statutory procedure be embodied in circular. A 1968 case concerned a failure by the Ministry of Housing and Local Government to follow its normal practice of informing known third party objectors to a planning application that an appeal had been taken.[21] As a result, a Residents' Association was denied participation in an inquiry into the construction of an eight-storey office block. The Parliamentary Commissioner pointed out that the Ministry's conduct had fallen short of standards that it had set for itself, and convinced it to reopen the inquiry. Similarly, the Department of the Environment has been taken to task by the Commissioner for reneging on a single procedural promise. It had assured the Allotment and Gardening Society that it would consult it before taking allotment sites for an access road to a new school. Relying on this, the Society had held its hand, discovering only later that the sites had been subsequently allocated without its knowledge.[22]

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18. Case No. C.350/J in 1974-75 Fourth Report of the P.C.A. 59 (H.C. 405, 1975); Case No.C. 14/J in 1974 Third Report of the P.C.A. 193 (H.C. 281, 1974)

19. Case No. C. 347/J in 1974-75 Fourth Report of the P.C.A. 54 (H.C. 405, 1975).

20. Case No. C. 257/G in 1972-73 Fourth Report of the P.C.A. 57 (H.C. 290, 1973).

21. Case No. C. 473/67 in 1967-68 Fourth Report of the P.C.A. 31 (H.C. 134, 1968).

22. Case No. C. 56/T in 1972-73 Fifth Report of the P.C.A. 68 (H.C. 406, 1973).

In sum, the Parliamentary Commissioner has taken an active part in seeing to it that British departments adhere to certain informal, non-statutory procedures. Although he has not formulated any guiding principles, he is most likely to find the "injustice" required by the Act when the procedure is designed to aid complainants rather than just to make administration more efficient. It is therefore not strictly true that a department is responsible to no one but itself for violating an informal procedure. At the same time, it bears mentioning that the Parliamentary Commissioner is without power to remedy matters on his own. He can only report and criticize, relying on the good will of the administration to put things right, or in extreme cases on the authority of Parliament to reverse errant departments.

The Courts

The above framework seems to leave very little room for judicial creativity. Parliament decides whether a procedure should be enforceable against a department. If it prefers enforcement, then it simply grants formal rule-making authority, and, with the possible aid of the Council on Tribunals, sees that it is exercised. If not, it allows the department to deal with the matter by means of circular. In marginal cases the administration may determine the form in which a procedure is promulgated, and hence its enforceability. The Parliamentary Commissioner can at least publicize administrative failures to adhere to non-statutory procedures that should be enforced. The courts for their part need only look to see whether they are dealing with a statutory instrument or a circular, and enforce or not enforce the procedure accordingly.

One instance is Essex County Council v. Ministry of Housing and Local Government,[23] involving the Stansted Airport special development order. The Minister, who was not bound to observe the rules of natural justice, had considered new factual evidence after the close of a discretionary inquiry. This allegedly violated a circular which required opportunity for further comment.[24] Although the court did not believe that the circular was meant to apply to this sort of inquiry, it indicated that it would have declined to enforce it against the Minister in any case.[25] An identical statutory instrument would certainly have received more serious treatment.

THE SPECIAL ROLE OF THE COURTS

Courts in Great Britain actually play more than the passive role suggested by theory. For various reasons they have found it necessary or expedient to enforce non-statutory procedures of the type usually embodied in circulars. In examining the pressures which push courts to exercise creativity in spite of their formally insignificant role, it will be helpful to keep in mind the distinctions previously made between procedures regulating internal management and those having effect on outside parties. It will also be illuminating to examine how British institutional assumptions -- that Parliament decides these issues initially with the help of the administration -- affect the way in which the courts go about their work and the results that they eventually reach.

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23. (1968) 66 L.G.R. 23 (Ch. 1967).
24. Ministry of Housing and Local Government Circular No. 9/58, para. 20.
25. 66 L.G.R. at 31-32.

The Criminal Injuries Compensation Board and Its Procedures

A recent case involving one administrative tribunal illustrates the circumstances in which British courts will force the administration to adhere to clearly non-statutory procedures. The Criminal Injuries Compensation Board was established by the Home Office in 1964 pursuant to directions in a Government White Paper [26] and parliamentary debates.[27] Its purpose was to compensate victims of violent crimes and their survivors out of public funds. To this end it was to receive money from the Home Office which had been obtained by parliamentary grant-in-aid. Once set up, the Board promulgated substantive rules to govern the making of awards, and procedures to regulate the handling of cases before it.[28] Both were laid before Parliament and approved. But neither the Board nor any of its rules existed by virtue of statute. At most it could be said that Parliament had given its informal approval to the scheme through the White Paper and the debates, which together might serve as a yardstick against which to measure the Board's activities. The Board clearly lacked a foundation in "law." Hence, under British theory a court should have been no more able to enforce procedures against it than against a private philanthropist who had decided to compensate victims of violent crime out of personal feelings of compassion.

In Queen v. Criminal Injuries Compensation Board, ex parte Lain,[29] however, the Queen's Bench Divisional Court upset these expectations. There, the widow of a slain policeman applied for certiorari to have the Board's decision quashed. Among other things, a panel of the Board

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26. Cmnd. 2323 (1964).

27. 694 Parl. Deb., H.C. (5th ser.) 1127-1243 (1964); 257 Parl.Deb., H.L. (5th ser.) 1351-1419 (1964); 697 Parl. Deb., H.C. (5th ser.) 89-94 (1964) (written answer); 259 Parl. Deb., H.L. (5th ser.) 306-10 (1964); 717 Parl. Deb., H.C. (5th ser.) 351-52 (1965) (written answer).

28. The actual workings of the Board, including its procedures, are examined briefly in Garner, "The Criminal Injuries Compensation Board," [1967] Pub. L. 323.

29. [1967] 2 Q.B. 864 (D.C.).

hearing her appeal to have her original award increased had ended by reducing it. Under the Board's rules, she argued, the appellate panel could either affirm the original decision or substitute for it the result which she desired. It could not under any circumstances reduce her award. Although it eventually found that the Board had not in fact violated its rules,[30] the court held as a preliminary matter that it could grant certiorari to quash a decision which had been arrived at contrary to prescribed procedures.

The rationale for the Lain case is far less clear than the holding. In oral argument, counsel for Mrs.Lain attempted to establish a source for the Board's rules in "law" by pointing out that Parliament had voted funds forthe Board in the Appropriation Act.[31] Thus, he concluded, Parliament had provided some foundation in statute for the Board's activities, and the rules of the Board had the requisite "legal pedigree."[32] This argument does not appear to have appealed to the court, as it was mentioned in none of the judgments. It is not difficult to understand why. A parliamentary grant of funds will as a practical matter ensure the continued existence of any administrative body. But as a rationale for locating the source of its rules in statute, it proves too much. Under this approach any administrative activity that is financed by parliamentary grants (and very few are not) would have a basis in "law" and hence be controllable by the courts. Most importantly for present purposes, circulars that clearly were confined to matters of internal administrative management would be enforceable against governmental departments. It is not surprising, therefore, that the court was not attracted to this line of reasoning.

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30. Id. at 879-80.
31. Appropriation Act 1966, c. 3, Schedule (B), Parts 4 and 11.
32. [1967] 2 Q.B. at 868, 874 (counsel for Mrs. Lain).

But the rationales that the Lain court did adopt are hardly more satisfactory. Lord Chief Justice Parker found legal authority for the Board and its procedures in what he called "prerogative."[33] Clearly he was using the term "prerogative" in its loosest sense, as the source of authority for executive acts that are not uniquely governmental in character. These comprise acts which, because they do not affect the rights and immunities of subjects, could be performed by any private person or organization. Setting up procedures for compensating victims of violent crimes certainly comes within this conception of prerogative. However, prerogative as used in this sense clearly does not constitute a legitimate source of "law." By way of contrast is the term as it is more commonly employed. More often it refers to the residual power of the Crown to make "law," limited nowadays to activities like declaring war and legislating for newly acquired territories.[34] The word "prerogative" is better confined to this narrow set of circumstances where it serves as a foundation for true legal authority. That is how Blackstone understood the term:

> By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of common law, in right of his regal dignity. It signifies, in its etymology, (from prae and rogo) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. 35

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33. Id. at 881, 882.
34. de Smith, Con. & Admin. Law 99-140. See Note, (1967) 83 L.Q.R. 486, 487-88.
35. 1 W. Blackstone, Commentaries on the Laws of England *239 (1765).

The matters referred to by Lord Parker could then be called simply "the inherent power of governmental departments to run themselves." This is in fact what Lord Justice Diplock suggested in his opinion in Lain. Prerogative as used by Lord Parker, he indicated, gave the executive the power to engage in any activities that did not deprive subjects of rights guaranteed by statute or common law, or grant them immunities not emanating from these sources. This is to be distinguished from "prerogative legislative power," which can itself create rights and immunities.[36] Lord Parker's conception of prerogative thus ends by getting us nowhere. It is merely another way of stating what everyone knew to be true all along: that the administration in Britain has inherent power to run itself. Alone, it cannot give legal status and hence enforceability to procedures promulgated without benefit of an enabling statute.[37]

Lord Justice Diplock for his part fared scarcely better in finding an acceptable rationale for the Lain decision. In his judgment he spoke of the Board as the "agent" of the executive, acting in a "fiduciary capacity." As such it determined applicants' eligibility for payments as a "condition precedent" to making them an "offer" of payment.[38] It is hard to understand why this technical language from private law is suddenly injected into the administrative context. Whatever the reason, it serves to give a cloak of respectability

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36. [1967] 2 Q.B. at 886.

37. The only possible way that Lord Parker's approach could be of use is as follows. If one assumes that there is no inherent power in government to do anything, not even to run itself, then every internal rule of procedure must ultimately be traceable back to some statutory authority somewhere. Authorization for internal rules of management would most often be implied from the statute creating a department. As a result, every administrative rule of procedure would have legal status and could be enforced by courts against agencies. This reasoning would be unthinkable in Britain where courts accept the inherent power of the administration to run itself. On the other hand, it would be quite plausible in the United States. See note 48 on p. 392 infra.

38. [1967] 2 Q.B. at 888-89.

to the result reached while obfuscating the true issues. Lord Justice Diplock's language, unravelled and put into common sense terms, seems to mean the following. The Board has no authority to make payments except in accordance with the substantive and, more relevant for present purposes, procedural rules of the Home Office's scheme. Once those rules are satisfied, the Board can make payments (or rather, the Home Office could not legally prevent the Board from making payments).[39] The fact that payments are authorized is sufficient to attract the supervisory jurisdiction of the Divisional Court to quash for error on the face of the record -- here, failure to follow enunciated rules.[40] To paraphrase, any decision of the Board may have some legal consequences somehow, so the court can review by certiorari. This rationale, unfortunately, is seriously flawed. Just because the Board is authorized to make payments in certain circumstances, it does not follow that the scheme it operates is "law," which an applicant can have enforced by the courts. Again, the Board is doing no more than a private citizen could do. Like a private citizen, the Board may change its legal relationship with potential recipients by authorizing payment to them. However, this does not mean that the procedures followed have legal status and hence can be enforced by courts of law.[41] Lord Justice Diplock's rationale comes no closer than Lord Parker's to justifying enforcement of the Criminal Injuries Compensation Board's procedures.[42]

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39. Id. at 889.
40. Id.
41. See Note, (1967) 83 L.Q.R. 486, 488.
42. The Diplock approach, even if accepted, would have only a limited impact. In order for its action to have legal effect, according to this approach, the Board must first authorize payment. Thus, certiorari will lie where, as in Lain, the Board initially authorizes payment and then denies it later on appeal. However, in cases where the Board initially denies payment there would never be an authorization, hence no legal effect, and hence no certiorari. This distinction seems nonsensical, and later courts have disregarded it without comment, reviewing even when payment was initially denied. See Queen v. Criminal Injuries Compensation Board, ex parte Schofield [1971] 1 W.L.R. 926 (D.C.).

One might summarize the Lain case by saying that, although it had great difficulty with the theory, the Divisional Court knew perfectly well as a practical matter what it was doing. Confronted with a scheme which was not formally "law" and hence beyond judicial cognizance, the court nonetheless reached out to ensure that the Board remained faithful to its prescribed rules and procedures.[43] The work of the Criminal Injuries Compensation Board clearly involves adjudication -- the application of a known standard to ascertained facts to determine an applicant's eligability for payments. The particular procedures, taken together, allow the claimant to participate by presenting proof of entitlement. The integrity of the adjudication here, as elsewhere, demands that procedures be adhered to by the decider. In the Lain situation, the Board could not have continued very long to reduce awards on appeal if the scheme appeared to prohibit it. Applicants would have been less able to predict the consequences of taking an appeal and they would justly have wondered about the Board's general impartiality. Had the Board been created by statute, the courts would clearly have prevented this sort of abuse. In acting as it did, the Lain court was giving notice to Parliament and the Home Office that they could not dodge judicial control simply by proceeding informally. But it was forced to resort to transparent technicalities and irrelevant legal doctrines to cloak its own lack of authority.

Cases Redefining Circulars as Delegated Legislation

Lain is not the only case where the British courts have searched for a legitimate way to force the administration to follow apparently non-statutory procedures. A series of post-war decisions involving various pieces of subdelegated legislation indicates that the courts will, where necessary, go beyond matters of form and find

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43. See Schwartz & Wade 104; Wade, Admin. Law 348; Note, (1967) 83 L.Q.R. 486, 489.

administrative procedures to be of statutory origin even though embodied in departmental circulars and letters.[44] Parliament, in order to meet the war emergency quickly, had delegated broad powers to governmental departments with permission to subdelegate them in turn to local authorities. Among these was the ability of the Ministry of Health to requisition dwellings for the use of people rendered homeless by enemy bombing. The Ministry had subdelegated this power to local authorities, setting out in circulars the substantive and procedural standards to be followed. Because subdelegated legislation was involved, there was no requirement that the standards having formal authority be put in statutory instruments or even published. As a result, there was no easy way of telling which rules were statutory and hence possessed the status of "law," and which were non-statutory and hence could legally be disregarded by the local authorities. It fell to the courts to articulate standards for determining which rules were enforceable and which were not. In effect, they could find that procedures which were non-statutory in form (because published in circulars) were really statutory and enforceable against the administration.

The leading case was Blackpool Corporation v. Locker.[45] The Ministry of Health had employed a circular to put restrictions on on the requisitioning of unoccupied homes. Local authorities were instructed not to requisition furniture, and, if furniture were on the premises, to direct the owner to remove it or to store it themselves. Furthermore, if within fourteen days of the notice of

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44. See generally Wade, Admin. Law 330-31.
45. [1948] 1 K.B. 349 (C.A. 1947).

requisition the owner announced his intention to occupy the house, the authority was to proceed no further. The Blackpool Corporation took control of Locker's house and his furniture, even though he had notified it of his intention to go into occupancy. The question confronting the Court of Appeal was whether the restrictions in the circular were statutory rules (and hence enforceable by judges against the Corporation) or whether they were non-statutory (and hence mere directions to local authorities, enforceable only by the Ministry of Health using internal disciplinary procedures).[46] The court held unanimously that the provisions as to furniture were statutory and hence that it could compel the Corporation to adhere to them.[47] Lord Justices Scott and Asquith held likewise with respect to receipt of notice of intent to occupy,[48] although Lord Justice Evershed was somewhat doubtful on the point.[49]

The Blackpool case dealt with substantive rules, but later cases demonstrated that procedures embodied in the same sort of circular would be treated no differently. Jackson Stansfield & Sons v. Butterworth [50] involved the form of a building licence, control over the issuance of which the Ministry of Works had illegally subdelegated to local authorities. Had the subdelegation been authorized, Lord Justice Scott stated, the Ministry's "Notes for

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46. In Blackpool, the matter resolved itself into the question of whether or not the instructions prohibiting the requisitioning of furniture or occupied houses were conditions of the subdelegation (the disregard of which would render the requisition ultra vires) or exhortations incidental to an unconditional subdelegation (the disregard of which would be of no legal effect). See [1948] 1 K.B. at 367-69, 385.

47. Id. at 378, 386-88.

48. Id. at 378.

49. Id. at 388-89.

50. [1948] 2 All E.R. 558 (C.A.).

the Guidance of Local Authorities" would have binding, even though promulgated as a circular.[51] Hence the provisions in the Notes requiring the building licences to be in writing would have been dispositive. In Patchett v. Leathem[52] a Ministry of Health circular stated that when local authorities requisitioned a home, they should send notice to the owner. Failure to adhere to this procedure was held to be sufficient to invalidate the requisitioning. Similarly, in Acton Borough Council v. Morris[53] the Court of Appeal enforced a circular requiring the local authority to obtain approval from the Ministry's regional office before extending the requisition of a home beyond the original period of one month. This procedure, like the others, was held to have legal status in spite of the form in which it had been promulgated.

In all of the above cases, the courts attempted to create standards for deciding whether procedures promulgated via circular should be treated as "law." Since Parliament had clearly given the departments the authority to create binding procedures, the most obvious course was to inquire into whether they had in fact exercised that authority. The question was whether Parliament would have wanted the procedures to be followed as a precondition to the exercise of administrative authority and whether the department, presumably faithful to parliamentary intention, would have accordingly granted them legal status. But parliamentary and administrative intention were rarely clear. The court in Blackpool analyzed the language of the provisions and their position in the circular; if they spoke in mandatory terms and were placed with what were clearly legal requirements, then they would be enforced.[54]

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51. Id. at 565.
52. (1949) 65 T.L.R. 69 (K.B.D. 1948).
53. [1953] 1 W.L.R. 1228 (C.A.).
54. [1948] 1 K.B. at 366, 386-89.

More often the courts had to create their own presumptions about intention. Lord Justice Evershed said in Blackpool that in cases of real doubt about whether a provision was a "limitation or instruction, prima facie, I should have thought, the construction favourable to the private citizen should in these courts be adopted."[55] Mr. Justice Streatfeild confirmed in Patchett that judges could be expected "in case of doubt, to incline towards the protection of the citizen whose rights are, unknown to himself, being invaded."[56] He then noted the purpose of the provisions requiring notice to owners whose houses were being requisitioned: "The object of those two circulars is to give the owner a reasonable opportunity to state his intentions ...."[57] The court had hit upon the best means of identifying those procedures that should be given legal status and enforced against the administration, even though embodied in circular. By inquiring into matters of purpose, it could single out procedures designed to guide and limit the administration for the benefit of outsiders. The pre-requisition notice to homeowners in Patchett was intended to alert them to the proposed governmental action and to allow them to inform the authority of any desire to occupy the premises. In Acton, the Ministry's regional office was meant to consider local authorities' requests to extend requisitions (at least in part) in order to protect homeowners from overzealous town officials.

Whether the exact problem in these cases will ever recur is highly doubtful. Unlike the subdelegated legislation of the war period, rules today having legal authority will almost certainly

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55. Id. at 386.
56. 65 T.L.R. at 70.
57. Id. at 71.

be embodied in formal statutory instruments.[58] If they are not, then the administration has indicated its intention not to accord them the status of "law." Hence the courts should not enforce them. There is an indication in Blackpool, however, that the courts may go against the obvious intention of a governmental department. The Ministry of Health had apparently thought that the rules against requisitioning furniture or occupied dwellings were of no legal effect since it had refused to publish them. Nonetheless, the court found the rules to be "law" and so judicially enforceable.[59] Other judges could follow the lead of the Blackpool court and find an administrative "intention" to give procedures legal status even though the administration has promulgated them via circular.

If the British courts were to take this tack in future cases, they would in effect be doing the same thing that was done in Lain -- manipulating legal forms to ensure that in certain circumstances the administration acts consistently, once it has set out the manner in which it will proceed. If the department were allowed to disregard the procedures in the above cases at will, then their integrity as a means for prediciting departmental actions would have been impaired. Participation of homeowners in the decision would have been diminished. Such considerations pushed the courts to find a parliamentary and administrative intention to accord the rules legal status. In the future they might have the same effect on seemingly unenforceable procedures.

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58. See Statutory Instruments Act 1946, 9 & 10 Geo. 6, c. 36, §§ 1 & 2.

59. Wade, Admin. Law 331.

Cases Using an Estoppel-Natural Justice Rationale

A third group of cases indicating that British courts will sometimes enforce non-legal procedures centers on the doctrine of estoppel. As used here, it is an offshoot of the familiar private law concept of estoppel -- the legal principle that generally prevents persons from going back on representations relied upon by others to their detriment.[60] Estoppel has been introduced into public law mostly through the efforts of Lord Denning. By analogy to its private law counterpart, it forces the administration to adhere to representations made by departmental officials and relied on by a private party to his detriment. Difficulties develop, however, when adherence to a prior promise actually prevents a department from doing its statutory duty or forces it to commit an ultra vires act. It is this byproduct of the doctrine that has stalled its progress among more conservative members of the bench.[61]

Most cases relying on public law estoppel arise from the same general set of circumstances. A subordinate officer in a governmental department normally gives assurances to a private party about how to proceed. In reliance, the party follows the procedures. Later the officer is found to have prescribed a course that violates a statute or statutory instrument. To ratify the procedure retroactively, the department must refuse to perform a legal duty or must commit an ultra vires act. Nonetheless, in the cases where

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60. Private law estoppel appears in the fields of both contract and property. See G.Treitel, The Law of Contract 268-69 (4th ed. 1975); R. Megarry & H.W.R. Wade, The Law of Real Property 651-54 (3rd ed. 1966).

61. See generally 1 Halsbury's Laws of England para. 24 (4th ed. 1973); de Smith, Judicial Review 88-91; Wade, Admin. Law 68-69.

estoppel has been applied, the department has been forced by the judiciary to follow this course in order to satisfy the party's original expectations.

The 1948 case of Robertson v. Minister of Pensions[62] was the first and the most sweeping in character. Having received assurances from the Ministry of War that his injury was service-related, Robertson forewent a physical examination that might have proved his claim once and for all. Mr.Justice Denning (as he then was) held that the Ministry of Pensions was bound by these assurances, even though the Ministry of War had no power to adjudicate on the application. That the court was depriving the former of its statutory power to decide seemed to make no difference. More recently, in Wells v. Minister of Housing and Local Government,[63] a builder was told that certain planned construction was exempt from the requirement of planning permission. Lord Denning, acting now from the Court of Appeal, held the local authority to its statements after the builder carried out his construction, even though the work was not in fact exempted by statute or statutory instrument. Similarly, in Lever Finance Ltd. v. Westminster (City) London Borough Council, a builder was incorrectly informed by the borough engineer that proposed variations in a building plan were not material and hence that no additional planning permission was needed. Lord Denning again found these assurances binding, using the language of estoppel.[64]

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62. [1949] 1 K.B. 227 (1948).

63. [1967] 2 All E.R. 1041 (C.A.). Russell, L.J., dissented, believing that informal assurances could not be binding. Id. at 1050.

64. [1971] 1 Q.B. 222, 230-31 (C.A. 1970). Sachs, L.J., concurred on the ground that the local planning authority had in fact delegated legal authority to its engineer to waive the need for further planning permission. Id. at 233-34.

Public law estoppel by no means commands the support of all British judges. Those who oppose it feel that, although the private party in these cases may suffer unjustly from governmental inconsistency, the administration should still not be prevented by the courts from fulfilling its duty to decide freely. Two Lords of Appeal in Ordinary have expressly spoken out against the Denning view,[65] and some lower courts have followed their lead.[66] Any court trying to use estoppel to hold a department to a procedure without legal status would thus face an uphill battle.

The best case for using estoppel is where reliance on an administrative promise leads a party to put himself in a more vulnerable position. Often, however, reliance may be of a more general character,,consisting of the expectation that the administration will act consistently. The case of Queen v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association[67] indicates that the British courts may move in the future to vindicate this more general reliance. There, the Liverpool Corporation was given discretion by statute to determine the number of taxi cab licences that should be granted in Liverpool. The Corporation agreed with the Taxi Fleet Operators' Association that it would not increase the number of licences without granting it a hearing beforehand or before Parliament passed a bill bringing private-hire cars under the Corporation's control. The Court of Appeal, led by Lord Denning,

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65. Howell v. Falmouth Boat Construction Co. [1951] A.C. 837, 844-45 (Lord Simmonds), 849 (Lord Normand), qualifying [1950] 2 K.B. 16, 26 (C.A.).

66. E.g., Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd. [1962] 1 Q.B. 416 (D.C. 1961); Essex County Council v. Ministry of Housing and Local Government (1968) 66 L.G.R. 23, 31-33 (Ch. 1967).

67. [1972] 2 Q.B. 299 (C.A.).

held that because of its undertakings, the Corporation was required to give the Association a hearing before increasing the number of licences. The court did not ask whether the Association had put itself in a more vulnerable position because of the promises. It was sufficient for its purposes that promises had been made. Administrative consistency was required for its own sake rather than to rescue a party that had exposed itself to loss in response to governmental assurances.

The Liverpool Taxi case foreshadows a way in which courts could get around the most trenchant objection to estoppel in administrative law -- that when they force administrative consistency, judges may also prevent departments from doing their statutory duties. Estoppel kept various authorities from determining according to their own lights (as they were required to do by statute) whether building permission should be granted in the Lever Finance and Wells cases, and whether a pension was actually owed in Robertson. However, if a department is forced to adhere to a non-statutory rule that is clearly procedural, it may actually be aided in performing its ultimate statutory duty. Enforcement will enhance the participation of those whom the procedure is designed to guide and protect. The administration will accordingly obtain the benefit of their advice. Lord Justice Roskill seemed to have something like this in mind in Liverpool Taxi:

> If I thought that the effect of granting to the [Association] the relief sought was to prevent the [Corporation] validly using those powers which Parliament has conferred upon it, I would refuse relief. But that is not the present case. It seems to me that the relief claimed will in the end ... assist the [Corporation] to perform rather than inhibit the performance of its statutory duties.[68]

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68. Id. at 310.

By listening to the Association as it had promised, the Liverpool Corporation would be aided in exercising its discretion. In reply, it could be said that the administration should be left to decide for itself whether following a non-statutory procedure will help or hinder it in the performance of its duties. As support, one could cite the statement of Mr.Justice Plowman in Essex County Council v. Ministry of Housing and Local Government. In declining to require a Minister to honour a procedural circular, he noted, "A fetter on the exercise of a statutory discretion is, in my judgment, just as objectionable as the abrogation of the discretion."[69] Liverpool Taxi indicates, however, that this view may not be accepted in the future.

Liverpool Taxi did not, at least explicitly, involve the doctrine of estoppel. It may instead foreshadow some sort of emerging concept of natural justice -- the idea that in certain circumstances the courts may infer a generalized parliamentary intention that, all things being equal, the administration should be made to act in a consistent manner, even where procedures are non-statutory. The court in Liverpool Taxi was equivocal about whether the Corporation was under an independent duty to hear the Association before increasing the number of licences. Lord Denning said that it was,[70] Lord Justice Roskill expressly declined to decide the issue,[71] and Sir Gordon Willmer remained silent on the point.[72] But all agreed that the Corporation had violated a duty to act fairly, even though

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69. (1968) 66 L.G.R. 23, 32 (Ch.1967).
70. [1972] 2 Q.B. at 307-08.
71. Id. at 311.
72. Id. at 312-13.

no one mentioned natural justice by name. It was the fact that an administrative body had entered into an undertaking that created the right to a hearing. It was irrelevant that the undertaking in itself had no legal effect.[73] The precise promise influencing the court seems to have been the substantive one -- not to increase the number of taxi licences until Parliament had passed a certain statute.[74] In that event the court would simply be saying that an administrative body that has agreed to limit its discretion may go back on its promise only after granting a hearing to the promisees. But there was also a procedural undertaking not to increase the number of licences without first consulting the Association.[75] This certainly pushed the court in the direction of requiring a hearing. Indeed, at least one commentator believes that it was the decisive factor.[76] To the extent that it was, the administration was being held to a non-statutory procedural undertaking.

To summarize, in this area Lord Denning has led what amounts to an attack on administrative inconsistency. The rationale is related to that underlying the Lain and Blackpool cases: procedures promulgated to guide and protect citizens should be adhered to regardless of their form. Those who oppose this approach find a solid basis in legal and constitutional theory. To force departments to adhere to promises not sanctioned by law is to prevent them from doing their statutory duty, and sometimes even to force them to

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73. Id. at 310.
74. Id. at 308, 311, 312.
75. Id. at 306, 312. See also Evans, "The Duty to Act Fairly," (1973) 36 M.L.R. 93, 98.
76. de Smith, Judicial Review 91 and n. 52; 1 Halsbury's Laws of England para. 66 n.4, para. 76 n.9, para. 146 n. 5 (4th ed. 1973) (edited by Professor de Smith).

commit ultra vires acts. However, as indicated by Lord Justice Roskill in Liverpool Taxi, forcing consistency with non-statutory procedures may actually aid a department in performing the task prescribed by Parliament. Whether their authority is public law estoppel or some variant of natural justice, the British courts have been reaching out to enforce supposedly unenforceable procedures aginst the administration.

JUDICIAL ENFORCEMENT OF NON-STATUTORY PROCEDURES IN THE FUTURE

Can one project a future role for British judges in enforcing non-statutory procedures? Generally, the British method of hinging legal enforceability on statutory pedigree works quite well. Parliament is alert to the need to give the administration formal rule making authority in appropriate circumstances. The Council on Tribunals can be expected to goad lagging departments into action. The Parliamentary Commissioner for Administration will publicize inexcusable failures to adhere to non-statutory procedures and may obtain redress for wronged citizens through persuasion. Accordingly, judicial intervention will continue to be a rare thing, reserved for instances where the system has not worked with its customary efficacy.

The cases identify factors which should push the courts toward intervention. Of course the procedure must be intended to guide or benefit citizens with whom the administration is dealing. No one has an interest in forcing departments to adhere to their internal housekeeping procedures. The arguments for enforcement are strongest when the procedure forms part of a larger scheme of participation (such as a hearing) which stands to be damaged as a whole. Second, the courts should examine the position of the complainant. Did he rely justifiably on the administration's

acting in a certain manner? He may have received specific directions about how to proceed; or the department may simply have published the non-statutory procedure, as a circular for example, and followed it regularly. In either case it would be reasonable for him to expect administrative consistency. Also a factor would be the degree of detriment resulting from reliance. The worse off a citizen stands to be from failure to adhere to a non-statutory procedure, the more should judges tend toward enforcement. Third, the courts should look toward the administration. Does it have statutory power to promulgate formal procedures? If so, why has it failed to act? Can they infer an intent to evade legal control? It would be relevant, although not decisive, if it could be shown (as in the case of structure plan examinations) that Parliament wanted the department to defer promulgating formal procedures in order to experiment with more flexible non-statutory ones. The attitude of the Council on Tribunals and of the Parliamentary Commissioner might be a factor. Has the department ignored the warnings of the former to give the procedures statutory status or the criticisms of the latter for failure to adhere to them? Finally, the courts should ask the question brought up by the public law estoppel cases: would judicial enforcement prevent the department from performing a statutory duty or compel it to commit an ultra vires act? As suggested earlier, this is less likely to happen in the case of a procedure than in that of a substantive rule. The administration's arguments would be strongest when there was a bona fide reason for departing from the procedure without warning -- for example, a special need for a speedy decision.

The above factors are points which a court should investigate if asked to enforce a non-statutory procedure. Enforcement should turn on the extent to which they are resolved in favour of the citizen and against the administration. The justification should be natural justice -- a general parliamentary intention that in certain extreme circumstances the administration should be made, as a matter of fairness, to adhere to its own non-statutory procedures. Obviously the particular function should have some basis in statute; natural justice will have the same difficulties as other doctrines with totally non-statutory activities, such as those of the Criminal Injuries Compensation Board. The latter, however, are quite exceptional. If judges can enforce procedures there, they can certainly use natural justice to enforce an occasional non-statutory procedure where there is a statute in the background.

SUMMARY FOR GREAT BRITAIN

Each of the three series of cases discussed -- the Criminal Injuries Compensation Board decision, the cases redefining circulars as delegated legislation, and the estoppel-natural justice holdings -- form separate strands of a larger theme. In each situation the courts are really attempting the theoretically impossible: to accord legal status to procedures which are by definition without it. It is no wonder, then, that they have such a difficult time justifying their holdings. Doctrines of prerogative,[77] true departmental intention,[78] or justifiable reliance[79] can scarcely resolve so fundamental an

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77. See pp. 361-62 supra.
78. See pp. 367-68 supra.
79. See pp. 371-74 supra.

inconsistency. At the same time, they serve as familiar legal bases from which to launch attacks on administrative inconsistency. Judges must act under the cloak of settled principles of "law" to ensure the integrity of procedures that have been misclassified.

In so doing, they are not necessarily undermining the position of Parliament or the departments. As they often did when applying natural justice to inquiry procedures, the courts are really addressing themselves to others and forcing them to think again. When requiring the revelation of certain administrative communications in inquiries, they were able to highlight the issues and to provide solutions that later formed the basis for procedural codes. Similarly, in Blackpool and the cases related to it, judges alerted Parliament and the administration to the dangers of failing to distinguish between formal and informal rules. Consequently, no longer is subdelegated legislation treated so casually by these bodies. Perhaps Lain will eventually have a similar effect, and the Criminal Injuries Compensation Board and its procedures gain formal statutory status. A working party which is reviewing the criminal injuries compensation scheme with a view to putting it on a statutory footing has recently sought the advice of the Council on Tribunals.[80] Even when denied formal authority to act, the British courts continue their role as the final guarantors of participation in the administrative process, stopgaps alerting other bodies to instances of gross unfairness.

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80. 1973-74 Council on Tribunals Ann. Rep. para. 16 (H.C. 289, 1975).

CHAPTER 11

UNITED STATES:

THE COURTS AS ENFORCERS OF PROCEDURES

It has already been shown how American courts take the initiative on a broad scale in creating polycentric procedures. Rather than just filling in gaps left by other bodies, they assume responsibility for the whole system. How interested are they in enforcing procedures created by others?

Several factors may push them to rely on procedures not of their own making. Most obviously, due process and non-constitutional doctrines of fairness may provide a general framework in which the administration is to operate, but they rarely supply the details. Administrative codes deal with particular matters like the exact form of notice or the time limit for intra-agency appeals. Furthermore, agencies may require even more than the Constitution, especially in places like eminent domain and comprehensive zoning, where due process has long lain dormant. Lastly, although the courts might well apply due process in certain situations, they may not wish to use it for one of two reasons. First, there may be a feeling (less evident nowadays than formerly) that invoking heavy constitutional artillery is a drastic measure, to be utilized only as a last resort. A court that can ensure administrative fairness by forcing an agency to adhere to its own procedures may take that less serious route.[1] Second, the courts may wish to defer

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1. See, e.g., Thorpe v. Durham Housing Authority, 393 U.S. 268, 272-73, 283-84 (1969); Peters v. Hobby, 349 U.S. 331, 338 (1955).

to ready-made procedures in order to avoid having to delineate exactly what is required by the Constitution.[2] In that situation, as in the others, it becomes a matter of practical importance whether American courts will hold agencies to their procedural regulations.

THE JUDICIAL FAILURE TO BASE ENFORCEMENT ON MATTERS OF "LEGAL PEDIGREE"

Given the British experience, it is natural to begin by inquiring into the distinction between statutory and non-statutory rules. Like the British, American courts identify rules made pursuant to a legislatively delegated power to make law. These are distinguished from those that are not the product of any formal lawmaking authority.[3] The dichotomy has significance in many areas. Whether an administrative rule is "law" will determine the scope of review employed by courts in measuring it against any enabling statute,[4] whether its violation can result in criminal penalties[5] or make a contract unenforceable,[6] whether it prevails over conflicting

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2. Cf. Antonuk v. United States, 445 F.2d 592, 594-95 (6th Cir. 1971) (court can force military to follow its own procedures and still avoid having to define exactly when military must accord a hearing).

3. See generally 1 Davis, Treatise § 5.03.

4. E.g., Federal Communications Commission v. Schreiber, 381 U.S. 279, 289 (1965); Skidmore v. Swift & Co., 323 U.S. 134, 137-38 (1944). See Davis, Text § 5.03, at 127-28.

5. E.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 151-52 (1967); United States v. Grimaud, 220 U.S. 506, 523 (1911).

6. E.g., Regents of New Mexico College v. Albuquerque Broadcasting Co., 158 F.2d 900, 906 (10th Cir. 1947).

state statutes by virtue of the supremacy clause of the Constitution,[7] or whether it can establish standards of care for tortfeasors.[8]

The distinction is also said by commentators to have significance for the enforcement or non-enforcement of administrative rules. Phrased as it is, it does indeed appear to be akin to that made in Great Britain:

> A large number of opinions have bound the administrator to his express regulation ... by a brief reference to the fact that validly enacted administrative regulations have "the force and effect of law." The regulation, it is argued, thus controls the administrator in the same manner as the statute governs the legislature. The significance of this capsulized argument is indicated by the phrase, "force and effect of law." The phrase was coined in recent years as a method of succinctly stating that administrative regulations were enacted in the administrator's exercise of a validly delegated legislative power, a power often called the rule-making authority.[9]

However, having stated the proposition, American writers fail to grasp its significance. The author of the above quotation, having presented sufficient justification by British lights for a court to enforce statutory rules, goes on to say:

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7. Boske v. Comingore, 177 U.S. 459, 467 (1900). Cf. Thorpe v. Durham Housing Authority, 393 U.S. 268, 277 (1969) (state housing authority bound by federal procedural circular enacted pursuant to statutory rule making authority).

8. E.g., Lilly v. Grand Trunk Western Ry., 317 U.S. 481, 486 (1943); Interstate Motor Lines, Inc. v. Great Western Ry., 161 F.2d 968, 969-70 (10th Cir. 1947).

9. Note, "Judicial Enforcement of Administrative Adherence to Express Regulations and Established Customs," 23 Geo. Wash. L. Rev. 751, 754 (1955) [citations omitted]. The cases cited, however, do not support the proposition. Yakus v. United States, 321 U.S. 414, 435 (1944) deals with the validity of administrative rules that allow certain issues normally tried in a criminal court to be decided before an agency. Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 418-19 (1942) relates to whether certain administrative regulations can by their very promulgation make a case "ripe" for judicial review. United States v. Grimaud, 220 U.S. 506, 523 (1911) considers whether violations of certain regulations can bring criminal sanctions. Edwards v. Gunther, 103 P.2d 6 (Colo. 1940) merely states that judicially enforceable administrative regulations have the effect of law.

> The opinions which held that ... regulations must be followed in agency proceedings were very terse and justified the holding merely by a brief reference to the regulation's "force and effect of law." The terseness of the opinions limits conjecture as to the actual considerations which persuaded the courts.[10]

The fact that a rule has the "force and effect of law" would be reason enough to enforce it in Britain. In the United States, however, the search is for the "actual considerations" underlying the classification.

In fact, it soon becomes clear that American commentators are not using the phrase "force and effect of law" in the same sense as their British counterparts. A leading casebook mentions that courts in the United States have been known to enforce a variety of rules against agencies, and then notes that these "regulations have 'the force and effect of law' and must therefore be deemed binding on the government."[11] As used here, the phrase is merely conclusory. Once the courts have decided to enforce a rule, it gains "the force and effect of law." A respected academic begins by defining all administrative regulations as being the product of "the delegated legislative power."[12] He concludes, quite logically, "So long as we accept the premise that regulations have 'the force of law,' the conclusion must follow that regulators are bound by them."[13] Nowhere does he explain why he automatically accords "legal pedigree" to each and every administrative rule. The words "force of law" are really being used here in an argumentative

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10. 23 Geo. Wash. L. Rev. at 756.
11. W.Gellhorn & C. Byse, Administrative Law: Cases and Comments 862 (4th ed. 1960).
12. Berger, "Do Regulations Really Bind Regulators?" 62 Nw. U.L. Rev. 137, 137 (1967).
13. Id. 179 [footnote omitted].

sense. The author, believing that all rules should be enforced, supports his contention by calling them "law." On the other hand, a recent student note argues that although regulations may have "the force of law with respect to the public," it does not necessarily follow that they also have "the force of law with respect to the agency."[14] Such a suggestion would be shocking to British lawyers, for whom a regulation is either "law" or not, regardless of who is enforcing it against whom.

The cases themselves indicate that in the United States the judicial enforcement of administrative procedures does not hinge on matters of "legal pedigree." In Vitarelli v. Seaton[15] the United States Supreme Court compelled the Secretary of the Interior, in discharging an employee, to follow procedures set out in a departmental "Order." Because the employee had no rights under any statute (or contract), it is hard to see how the Order could have had any basis in "law." The Court for its part did not even pause to consider whether the procedures had been promulgated pursuant to a congressionally granted power to enact subordinate legislation. It merely cited Service v. Dulles,[16] which had forced the Secretary of State in a similar case to follow procedures contained in departmental "Regulations" that were unquestionably grounded in statute.[17] Service had relied on United States ex rel. Accardi v. Shaughnessy, where the Department

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14. Note, "Violations by Agencies of Their Own Regulations," 87 Harv. L. Rev. 629, 630 n.8 (1974).
15. 359 U.S. 535 (1959).
16. 354 U.S. 363 (1957).
17. See id. at 373-76.

of Justice had been compelled to adhere to procedures governing the suspension of a deportation order which were found in "Regulations [that] with the force and effect of law supplement the bare bones" of the statute.[18] From the British point of view, therefore, the Supreme Court has been rather careless with the distinction between statutory and non-statutory rules. In short, it has failed to notice the difference, much less predicate legal results on it.

Lower federal courts have been known to base enforcement on the fact that a procedure was promulgated pursuant to statutory authority to make law.[19] But this has been unusual. Like the Supreme Court, they have enforced seemingly non-statutory rules without even inquiring into matters of legal status.[20] Vitarelli has been cited along with Service and Accardi as support for the enforcement of procedures with a likely foundation in statute.[21] Apparently statutory and

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18. 347 U.S. 260, 265 (1954) [citations omitted].

19. Brookhaven Housing Coalition v. Kunzig, 341 F. Supp. 1026, 1029-30 (S.D.N.Y. 1972) (executive order, requiring General Services Administration to consult with executive departments about impact on community of new federal facility, "having been issued and published by the President pursuant to statutory authority, is not a mere internal housekeeping arrangement").

20. E.g., United States v. Heffner, 420 F.2d 809 (4th Cir. 1969) (Internal Revenue Service news release); Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959) (Federal Communications Commission "usual practice"); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1954) (Department of the Interior "consistent policy"); American Broadcasting Co. v. Federal Communications Commission, 179 F.2d 437 (D.C. Cir. 1949)(Federal Communications Commission Standards of Good Engineering Practice).

21. E.g., Hamlin v. United States, 391 F.2d 941, 943 & n.3 (Ct.Cl. 1968) (Department of Army regulations); Pacific Molasses Co. v. Federal Trade Commission, 356 F.2d 386, 387, 389-90 (5th Cir. 1966) (Federal Trade Commission Rules of Practice); Roberts v. Vance, 343 F.2d 236, 239 (D.C. Cir. 1964) (Department of Army regulations).

non-statutory procedures have even been enforced together in the same case.[22]

Writers have noted the propensity of American courts to compel compliance with non-statutory procedures.[23] But they have neglected to say that judges may occasionally countenance the non-observance of statutory procedures. In one instance a Texas state court excused the Texas Railroad Commission from complying with a state statute requiring examiners in truck route licensing cases to submit a written report containing a brief statement of the evidence and making a recommendation. The court said simply, "We consider such requirement of the statute to be made for the benefit and convenience of the Commission and a requirement which the Commission may, as it apparently did here, waive."[24] In the next paragraph the court did imply that it would invalidate the Commission's order if non-compliance resulted in injury, although such a violation of law would seem to be injury enough.[25]

In Luhring v. Glotzbach a court actually did inquire into matters of "legal pedigree." The Internal Revenue Service, a division of the Department of the Treasury, had assessed back taxes against the Luhring family without complying with various regulations: without having its investigator examine pertinent materials at the taxpayers' premises and afford them an opportunity

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22. Smith v. Resor, 406 F.2d 141 (2d Cir. 1969) (both Department of Army regulations and Army bulletin); Schatten v. United States, 419 F.2d 187 (6th Cir. 1969) (both Uniform Code of Military Justice on the one hand and Marine Corps bulletin and manual on the other).

23. Schwartz & Wade 92-93, 103.

24. Merchants Fast Motor Lines, Inc. v. Newman, 236 S.W.2d 646, 648 (Tex. Civ. Ct. App. 1951).

25. See also Hoffman v. Stevens, 177 F. Supp. 898, 903 (M.D. Pa. 1959) (semble) (court appears to excuse state highway commission from complying with federal statutory requirement to hold hearing on project before receiving federal funds).

to agree with his conclusions, without holding an informal conference to discuss the investigator's findings, and without notifying the taxpayer of the investigator's recommendation prior to the formal hearing. The Luhrings argued that the regulations had the "force and effect of law" because promulgated under statutory authority, and hence were "mandatory in their operation and unless they [were] observed no valid assessment and collection of taxes [could] be made."[26] The Internal Revenue Service countered that the procedures were not the product of formal rule making authority because not approved by the Secretary of the Treasury as required by statute.[27] The court agreed with the latter, but took pains to announce that it would not have compelled the Service to follow the regulations even if they had been grounded in statute: whatever their background, the rules were "not mandatory in legal effect; and they [did] not curtail the power conferred upon the Secretary of the Treasury or his delegate ... to send a notice of deficiency ... ."[28]

THE ABSENCE OF FORMAL INDICATORS OF LEGAL STATUS

In Great Britain it is easy to ascertain whether a procedure has been promulgated according to an administrative body's power to make law. One need only look, first, at the enabling statute to see if it grants authority to the department in question and, second, at the preamble of the rule to see if it was made pursuant to that authority. If the rule was so made, it should

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26. 304 F.2d 560, 563 (4th Cir. 1962).
27. Id. at 563-64.
28. Id. at 564-65.

appear in an annual compilation entitled "Statutory Instruments."[29] In the United States the task is not so simple. There, a regulation rarely begins by citing its statutory authority.[30] A court investigating the question of authority may possibly find a statement somewhere in the regulation linking it to an explicit congressional grant of rule making power.[31] Or the statute establishing an agency may expressly forbid it to make legislative rules.[32] However, neither situation is common. Most of the time American courts must rely on less formal indicators of legal status. They can ask whether the rule was originally promulgated in accordance with the procedures prescribed by Section 4 of the Administrative Procedure Act,[33] which governs the creation of regulations of general effect. Rules of "agency organization, procedure, or practice," however, are not subject to the requirements of Section 4.[34] Rules that are promulgated according to Section 4 do not automatically attain legal status.[35]

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29. Statutory Instruments Act 1946, 9 & 10. Geo. 6, c. 36, §§1 & 2. Prior to this Act, subordinate legislation in Britain was not always promulgated in this form, and the courts sometimes had to exercise their ingenuity in determining what legal status to give various rules. This is what occured in Blackpool Corporation v. Locker [1948] 1 K.B. 349 (C.A.). See generally pp. 364-69 supra.

30. While it is true that the Code of Federal Regulations (the official compilation of federal administrative rules) includes enabling legislation in the headnotes to each regulation, these headnotes are not part of the official text. Nor have the editors of the Code ever claimed to be making judgments about the legal status of the rules contained in it. The Administrative Conference has suggested that tables in the Code connecting regulations to their statutory authority be made more complete. 1969 Admin. Con. Ann. Rep. rec. no. 3 (now rec. no. 68-3) (1970). See also 1971-72 Admin. Con. Ann. Rep. 20-21 (1972).

31. See, e.g., Service v. Dulles, 354 U.S. 363, 375-76 (1957).

32. See, e.g., Siomkin v. Fairchild Camera and Instrument Corp., 174 F.2d 289, 292 (2d Cir. 1949) (Wages and Hours Administration without power to issue formal regulations).

33. 5 U.S.C. §553 (1970).

34. APA §4(a), 5 U.S.C. §553(b)(A) (1970).

35. Lewis-Mota v. Secretary of Labor, 337 F. Supp. 1289, 1294 (S.D.N.Y. 1972) (Department of Labor "schedule" listing occupations, alien holders of which are exempted from certain immigration procedures, labelled non-statutory even though promulgated in accordance with Section 4).

Nor does the fact that a procedure was not issued under Section 4 prejudice its chances of being judicially enforced. One court compelled the Internal Revenue Service to follow rules governing the conduct of special agents investigating criminal tax fraud, noting, "Nor does it matter that these IRS instructions to Special Agents were not promulgated in something formally labelled a 'Regulation' or adopted with strict regard to the Administrative Procedure Act ... . "[36]

The Code of Federal Regulations contains, according to statute, "complete codifications of the documents of each agency of the Government having general applicability and legal effect... ."[37] In one case a court did say that a Department of the Interior regulation, which had been published in the Code as one of "general applicability and legal effect," had "the force and effect of statute" and hence was "binding upon the Secretary until repealed or modified by him."[38] The court's enforcement of the rule on the basis of its presence in the Code is unusual. Normally this is not determinative: procedures contained in the Code may not be enforced,[39] while others may be.[40] The odyssey of the Department of Transportation's "Policy and Procedure Memorandum 20-8"[41] is instructive. The Memorandum, covering the overall conduct of federal-aid highway hearings, first appeared in the Code as an appendix to other departmental rules. Accompanying it was a statement that it was being published there in order to

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36. United States v. Heffner, 420 F.2d 809, 812 (4th Cir. 1969).
37. Federal Register Act, 44 U.S.C. §1510(a) (1970). See also Federal Register Committee Rules, 1 C.F.R. §1.1 (1976).
38. Sheridan-Wyoming Coal Co. v. Krug, 172 F.2d 282, 287 (D.C. Cir. 1949), rev'd on other grounds 338 U.S. 621 (1950).
39. See, e.g., Luhring v. Glotzbach, 304 F.2d 560 (4th Cir. 1962).
40. See, e.g., cases cited in note 15 on p. 384 & note 20 on p. 385 supra.
41. See pp. 237-38 supra.

receive the widest distribution and that it was not to be taken as one of the rules.[42] A lower court consequently expressed "considerable doubt that the Policy and Procedure Memorandum was intended to have the effect of a regulation."[43] Nonetheless, the court enforced it against the Department, citing the Supreme Court's decision in Vitarelli.[44] Later the Memorandum was integrated into the regulations.[45] Judicial judgements about "general applicability and legal effect" appear to have determined the form in which the procedures were issued. In Britain the exact opposite would have been true.

THE AUTHORITY FOR FORCING AGENCIES TO FOLLOW THEIR OWN PROCEDURES

In the end, one approaching these matters from a British point of view may be forced into a more or less circular set of conclusions: American courts do not base enforcement on the statutory nature of a procedure because there is no easy way of identifying statutory procedures; and there is no easy method of identification because American courts do not base enforcement on it. The only escape from this quandary lies in asking whether the British approach has any utility in the American context. It would be useful if, as in Great Britain, American courts were forced to rely on an enabling statute as authority for forcing agencies to adhere to their own procedures. In that case, they too would be concerned with matters of "legal pedigree." However,

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42. Department of Transportation Policy and Procedure Memorandum 20-8, 23 C.F.R. ch. I, part I, Appendix A (1971).

43. Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F.Supp. 1189, 1193 (W.D.Tenn.), aff'd 432 F.2d 1307 (6th Cir. 1970), rev'd on other grounds 401 U.S. 402 (1971).

44. 309 F. Supp. at 1193.

45. Federal Highway Administration (Department of Transportation) Rules, 23 C.F.R. part 790 (especially §§790.5-790.7)(1976).

unlike their British counterparts, courts in the United States are under no such compulsion.

The most obvious authority available to an American judge who wishes to enforce an agency's procedures against it is the Constitution itself. The operative sections are again the due process clauses of the Fifth and Fourteenth Amendments. However, no longer is the issue one of "procedural" due process (the judicial creation and enforcement of basic standards of fair procedure). Rather, it is of "substantive" due process (the prohibition of arbitrary governmental conduct). A court forcing an agency to adhere to its own procedural rules is not so much holding it to certain fundamentally fair procedures as guarding against arbitrary administrative action. Under this theory, an administrative body, when it departs from settled patterns of behaviour in its dealings with individuals or organizations, must show that it is doing so for acceptable reasons. Otherwise, it may be presumed to be acting arbitrarily. It is precisely this type of unexplained governmental inconsistency at which "substantive" due process is aimed.

It is quite clear that the due process clause can be used to control any administrative activity, whether uniquely governmental or not. In Great Britain, it is accepted that the government has inherent power to run its own internal affairs like any private enterprise. Therefore no parliamentary authority is needed to legitimate what are purely matters of internal departmental management. On the other hand, Parliament must authorize activities that are distinctly governmental in character -- those that reduce legally recognized rights or expand immunities.[46] Because

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46. See pp. 349-50 supra.

they can operate solely in the realm of "law," British courts can therefore enforce only those procedures attending uniquely governmental activities. Under the due process clause, however, American courts do not ask whether only the government could promulgate a procedure. They ask rather whether the government has promulgated it. The mere act of issuance, coupled with a failure to follow the procedure in a given situation, will constitute enough "state action" to bring due process into play.[47] The due process clause thus allows the courts to reach all administrative procedures, regardless of their statutory authority.[48]

One looking, however, at cases where agencies have been forced to adhere to their own rules cannot help being puzzled at how casually the courts go about defining the authority under which they are acting. Instead of bold assertions of the ability of

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47. On the "state action" requirement of due process, see generally Van Alstyne & Karst, "State Action," 14 Stan. L. Rev. 2 (1961); Lewis, "The Meaning of State Action," 60 Colum. L. Rev. 1083 (1960).

48. It may well be that in the strictest sense administrative agencies in the United States have no inherent powers. That is, any administrative activity, including the ability of an agency to run itself, must be found in or implied from congressional enactment. For example, heads of executive departments are formally authorized by statute to "prescribe regulations for the government of [the] department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records and property." 5 U.S.C. § 301 (1970). This particular statute is the descendant of the congressional acts that first established executive departments and gave them custody of their records. E.g., Act of July 27, 1789, ch. 4, § 2, 1 Stat. 29 (Department of State). The acts were brought together, put into present form, and codified in 1875. U.S. Revised Statutes § 161 (1875). According to judicial holding, the function of the present statute is "to furnish the departments with housekeeping authority." National Labor Relations Board v. Capitol Fish Co., 294 F.2d 868, 875 (5th Cir. 1961). See also Luhring v. Glotzbach, 304 F.2d 560, 563-64 (4th Cir. 1962). In Britain this would be of great significance: with every administrative activity ultimately dependent upon statute for its authority, all procedures, even informal rules of internal management, would be "law," and hence potentially enforceable by the courts.

due process to ensure administrative consistency, one meets an almost lackadaisical attitude toward whatever authority gives the courts power to act here. The leading case is United States ex rel. Accardi v. Shaughnessy,[49] where the Supreme Court announced what was to become known as "the Accardi doctrine" -- that agencies must follow their own procedures. Accardi was an admittedly deportable alien who requested the Department of Justice to exercise its statutory discretion to suspend his deportation order. The Department had established procedures by which the Board of Immigration Appeals was to make an independent determination on applications of this sort. Accardi alleged that the Attorney General had interfered with the Board's deliberations by including his name in a list of "unsavory characters" to be given top priority in the Department's deportation efforts. The Supreme Court held that if Accardi's allegations were true, the Department had illegally failed to follow its own procedures. The words "due process" appeared only once, in the concluding sentence of the opinion, where they seem to have been used in a casual and colloquial manner. By forcing the Board to make an independent determination, the Court said, it was guaranteeing that Accardi would be "afforded that due process required by the regulations in such proceedings."[50] This appears only to restate the prior holding that Accardi was entitled to the procedures prescribed in the regulations. The portion of the opinion containing the actual holding said nothing at all about the due process clause.[51]

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49. 347 U.S. 260 (1954).
50. Id. at 268.
51. Id. at 267-68 & n. 8.

It merely asserted that the regulations in question would be enforced against the agency, citing two cases, neither of which had relied on due process.[52]

In spite of this, some lower courts have taken Accardi as authority for saying that the due process clauses of the Constitution require an agency to follow its own rules at pain of having its determinations vacated. In Pacific Molasses Co. v. Federal Trade Commission[53] the Fifth Circuit Court of Appeals held, citing Accardi, that the Federal Trade Commission violated due process when it disregarded its rule requiring adherence to agreements made in pre-trial conferences. The Fourth Circuit found in United States v. Heffner[54] that the failure of the Internal Revenue Service to follow its own enunciated procedures in an investigation for tax fraud also breached due process requirements. Other recent cases merely state as a general proposition that the agency in question is required by due process to follow its own procedures, citing authorities that provide questionable support or no support at all.[55] In spite of the equivocal attitude of the judiciary, it is generally accepted that the due process clause permits the courts to interfere here.[56]

In contrast to the above decisions, there are several opinions indicating that something other than due process might serve as

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52. United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923) (mentions by way of dictum that an agency cannot violate its own rules, but does not give the due process clause as authority); Bridges v. Wixon, 326 U.S. 135, 156-57 (1945) (explicitly avoids considering the "larger constitutional questions").

53. 356 F.2d 386, 387 (5th Cir. 1967).

54. 420 F.2d 809, 811-12 (4th Cir. 1969).

55. Friedberg v. Resor, 453 F.2d 935, 938 (2d Cir. 1971) (cites no case); Berends v. Butz, 357 F.Supp. 143, 151-52 (D.Minn. 1973) (cites cases relying on Accardi); Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F.Supp. 602, 606 (D.Minn. 1972) (cites cases relying on Accardi).

56. See, e.g., Note, "Violations by Agencies of Their Own Regulations," 87 Harv. L.Rev. 629, 653-55 (1974).

authority for the judicial insurance of procedural consistency. Otero v. New York City Housing Authority has been the most explicit, although it involved rules that were more substantive than procedural. The New York City Housing Authority had issued regulations guaranteeing priority in new public housing projects to former residents of the site. When it came time to allocate places in the rebuilt Seward Park Extension on the lower east side of Manhattan, the Authority violated these rules by giving preference to Jewish applicants because of the proximity of an historic synagogue. At the behest of excluded former residents (most of whom were black or Puerto Rican), a federal district court enjoined the Authority from proceeding with its plan. The court held that in dishonouring its own regulations, the Authority had violated due process of law. It continued, "If the Housing Authority's course be deemed less than a constitutional violation, it is in any event a breach of legal duty correctable in this proceeding."[57] As sole support, the court cited Vitarelli v. Seaton,where the Supreme Court had compelled the Department of the Interior to grant a hearing as required by non-statutory departmental rules to an employee discharged for being a "security risk." Without mentioning due process, the Vitarelli Court had said simply that the Secretary "was obligated to conform to the procedural standards he had formulated... ."[58] Vitarelli has not been the only decision to rely on uncertain authority. As already noted, some of the most important cases say nothing at

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57. 344 F.Supp. 737, 745 (S.D.N.Y. 1972).

58. 359 U.S. 535, 539 (1959). The Corut did cite Service v. Dulles, 354 U.S. 363, 372 (1957), which relied on Accardi, while not itself mentioning due process.

all about the due process clause.[59]

Although the courts have been quite vague, the language in Otero about a non-constitutional "legal duty" raises the possibility of authority independent of due process. More specifically, it can be read as referring to a doctrine of administrative common law springing from the inherent power of the courts themselves to control agencies. Although it treated it as a makeweight, the Otero court did mention that housing applicants may have relied on actual assurances given by the Authority beyond those implicit in the regulations.[60] One is reminded of "public law estoppel" in Britain, which originated in the idea that the administration should be bound by promises on which the public justifiably relies.[61] But, as in Britain, actual reliance fades as a precondition when it is realized that the real aim is to prevent arbitrary action by forcing agencies to act in predictable patterns.[62] In the end, American courts that base enforcement of non-statutory procedures on something other than the Constitution may be paralleling the course of their British counterparts.[63]

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59. See, e.g., Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); United States ex rel. Brooks v. Clifford, 409 F.2d 700 (4th Cir. 1969); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C.Cir. 1959); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1954).

60. 334 F. Supp. at 741, 743, 745 n.13.

61. See pp. 370-72 supra. For the use of estoppel in other areas of American administrative law, see Berger, "Estoppel against the Government," 21 U. Chi. L. Rev. 680 (1954).

62. On the unimportance of actual reliance, see Note, "Violations by Agencies of Their Own Regulations," 87 Harv. L. Rev. 629, 631-32 (1974).

63. Two other authorities have been suggested as a basis for judicial interference in this area. One is the equal protection clause of the Fourteenth Amendment, which prohibits intentional or systematic discrimination by the government. U.S. Const. amend. XIV, §1. The other is the Administrative Procedure Act, which authorizes courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." APA §10(e)(B)(1), 5 U.S.C. §706(2)(A) (1970). Neither authority, however, has gained any following among the courts. See generally Note, "Violations by Agencies of Their Own Regulations," 87 Harv.L.Rev. 629, 651-53 (1974).

The haphazard treatment of authority by American judges contrasts with the British attitude. British judges strained to demonstrate some sort of foundation in "law" for the enforcement of procedures -- whether in prerogative, common law doctrines like estoppel, or some generalized parliamentary desire for procedural fairness. Similarly, in Part One they were prone to seek support for natural justice holdings in the language or structure of parliamentary enactment.[64] American judges, on the other hand, tend to be positively careless about authority. In Part One they did occasionally manipulate it to invite participation from Congress or the agencies.[65] Here, however, it is impossible to discern any such guiding principle: other bodies will contribute equally, regardless of the footing chosen by judges, according to principles explained below.[66] The relaxed treatment of authority in this case simply reflects the assured status of constitutional courts. Like a wealthy man who is certain to obtain sustenance from somewhere, American judges just do not always bother to distinguish among sources of support.

THE FREQUENTLY-EXPRESSED REQUIREMENT OF ABSOLUTE ADHERENCE

Whatever their actual authority, the courts in the United States certainly do not follow the normal British practice of enforcing procedural rules against an agency depending on whether or not they are the product of a statutory power to legislate.

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64. See pp. 101-05 supra.
65. See pp. 300-07 supra.
66. See pp. 417-19 infra.

But neither do they force every administrative body to follow its every procedure in every situation. Like their British brethren, judges in the United States refuse to enforce a large class of administrative procedures against agencies. But unlike British judges, they decide for themselves which rules they will enforce, independently of any initial legislative delineation. Standards in this area are almost entirely judge-made.

Courts have often stated in unconditional terms that agencies must follow their own procedures. An example is the opinion in Pacific Molasses Co. v. Federal Trade Commission, where the Fifth Circuit Court of Appeals used due process to force the Commission to abide by a procedure binding it to promises made in preliminary conferences:

> When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed. This is so even when the defined procedures are "... generous beyond the requirements that bind such agency ... ." For once an agency exercises its discretion and creates procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules.[67]

This absolute tone characterizes a whole set of opinions dealing with the enforcement of administrative procedures.[68]

There are two possible explanations for such extreme language. First, doctrines grow out of the concrete cases confronting the courts, and controlling doctrines come from the decisions of the highest courts. The great majority of cases dealing with the enforcement of administrative procedures involve adjudication, usually

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67. 356 F.2d 386, 389-90 (5th Cir. 1966) [citations omitted].
68. E.g., Hamlin v. United States, 391 F.2d 941, 943 (Ct.Cl. 1968); Roberts v. Vance, 343 F.2d 236, 239 (D.C.Cir. 1964).

of matters of personal status. The reports are replete with decisions regarding job security,[69] deportation,[70] compelled service in the armed forces,[71] and incarceration.[72] In situations like these the arguments for forcing agencies to adhere to their own procedures are most strong. Furthermore, the best known Supreme Court decisions, those cited most often, deal with this same narrow range of issues.[73] The tendency is for the reasons given in these cases to take on a life of their own irrespective of context. The second explanation for the absolute approach toward enforcement of administrative procedures is that the courts like any institution tend to conceptualize matters in terms of the familiar. They are most accustomed to adjudication, where departure from prescribed procedures betokens the loss of needed predictability and perhaps even the entrance of impermissable considerations. With these matters in the backs of their minds, judges not surprisingly tend to begin by overstating the case for enforcement of procedures.

The contrast to the style of British judges is intriguing. British courts were more cautious about compelling enforcement of non-statutory procedures, their judgements couched in terms of the true intention of Parliament, of time-worn common law doctrines, or of royal prerogative. There is also a parallel

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69. E.g., Ingalls v. Zuckert, 309 F.2d 659 (D.C.Cir. 1962); Massman v. Secretary of Housing and Urban Development, 332 F.Supp. 894 (D.D.C. 1971).

70. E.g., Bridges v. Wixon, 326 U.S. 135 (1945); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923).

71. E.g., Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); Schatten v. United States, 419 F.2d 187 (6th Cir. 1969).

72. E.g., Yellin v. United States, 374 U.S. 109 (1963); United States v. Heffner, 420 F.2d 809 (4th Cir. 1969).

73. Vitarelli v. Seaton, 359 U.S. 535 (1959) (hearing to decide on discharge of Department of the Interior employee for security reasons); Service v. Dulles, 353 U.S. 363 (1957) (hearing to decide on discharge of Department of State employee for disloyalty); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) (hearing to decide whether deportation order against alien should be suspended).

to what American courts themselves did in Part One. Entrusted with creating their own standards, they looked to the adjudicative model, and, using it, made absolute pronouncements. In Part One the result was that the trial became the sole format for participation in a polycentric decision. Here, the effect is an overstatement of the need to enforce procedures against the administration.

THE RESULTS OF JUDICIAL DECISION-MAKING

As in Part One, the courts are forced to retreat from the rigid categories suggested by the adjudicative model. Having presented the case for administrative consistency in absolute terms, they proceed to recognize exceptions.[74] The most important is that governing procedures dealing with internal management.

Procedures Dealing with Internal Management

Ironically, the first judicial refusal to interfere with matters of internal management involved a substantive statute rather than a procedural regulation. In Perkins v. Lukens Steel Co.[75] the Supreme Court considered a statute requiring the Secretary of Labor to make certain that any private enterprise that applied for a government contract observed the minimum wage

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74. Judges may backtrack by declining to invalidate the final order absent a showing that non-compliance with a regulation resulted in "prejudice." Minor procedures are usually accorded this treatment: the courts feel that, unless the result was arguably affected, the inconvenience arising from forcing the agency to begin again outweighs the benefit from requiring absolute adherence as a precondition to legal validity. See, e.g., United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371, 375 (2d Cir. 1968), cert. denied 394 U.S. 929 (1969) (serviceman denied discharge from active duty because no prejudice resulted from Army's failure to comply with regulation requiring him to be notified officially of initial denial of his request for exemption). These decisions are criticized in Berger, "Do Regulations Really Bind Regulators?" 62 Nw. U. L. Rev. 137, 158-78 (1967).

75. 310 U.S. 113 (1940).

set by the Secretary for its "locality." The Lukens Steel Company alleged that the Secretary had misinterpreted the word "locality" in the statute, had consequently set the minimum wage for Lukens' employees at an incorrect level, and hence had illegally excluded Lukens from government contracts. The Supreme Court held that Lukens lacked standing to sue,[76] because the damage it sustained (disqualification from government contracts) was not the result of a deprivation of legally recognized rights.[77] The holding is curious by British standards since Lukens was asserting that the Secretary had deprived it of the right to contract with the government by misconstruing statutory conditions. American writers have criticized Perkins for making government contracts a "privilege" to be dispensed at the government's pleasure.[78] It is more interesting for present purposes because the majority opinion of Mr. Justice Black speaks in terms of internal government management. According to Mr. Justice Black, the government was acting like a private business, which "may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies ... ."[79] At most, this case involved a "self-imposed restraint" that could be enforced by the government against its own officers as a matter of internal discipline, but not by an outside party.[80] The Court would not allow Lukens "to interfere with the manner in which the Government may dispatch its own internal affairs."[81] But surely the statute was at the very least intended to guide businesses

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76. Id. at 129, 132.
77. Id. at 125.
78. See, e.g., Davis, Text § 7.13, at 180-81. Professor Davis has also criticized Perkin's concept of "standing." Id. § 22.01, at 420.
79. 310 U.S. at 127.
80. Id.
81. Id. at 129.

wishing to do business with the government -- to ensure that they adhered to stated minimum wage scales. To say that it concerned internal management was to misuse the phrase.

Perkins is important because it indicates that American judges will exercise self-restraint when asked to control what they see as administrative housekeeping matters. A later court used the same approach with much more justification to deny a party standing to enforce a procedure regulation. United States v. Jaskiewicz grew out of a prosecution for income tax evasion. While the prosecution was pending, the government filed a "statutory notice of deficiency" against Jaskiewicz as a prelude to a civil suit to recover back taxes. The Policy Manual of the Internal Revenue Service stated that no deficiency notice would be filed while a criminal prosectuion was pending. The court denied Jaskiewicz' motion to dismiss the indictment for the failure of the Internal Revenue Service to follow its own procedures, saying that "it does not appear that the defendant has any standing, constitutional or otherwise, to object to a deviation" from the Manual.[82] The procedure was not designed, as Jaskiewicz had alleged, to guard against forcing defendants to give possibly incriminating testimony in civil suits. Rather, it was meant to ensure that the government devoted all of its energy to the criminal prosecution once launched, in order to achieve a maximum deterrent effect. It was, in the words of the government, "simply a housekeeping provision of the Internal Revenue Service and was not intended

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82. 278 F. Supp. 525, 537 (E.D. Pa. 1968).

to bestow any rights upon the defendant, constitutional or otherwise."[83] It is clear that in denying standing to Jaskiewicz, the court was saying that it would never enforce the procedure at the request of a private party, since no one else outside of the administration could conceivably have standing either.

The courts have also used the concept of "prejudice" to escape having to enforce procedural regulations. An excellent example is Federal Trade Commission v. Foucha.[84] Legislation authorized agencies to apply an immunity statute (under which a person can be compelled to testify in return for immunity from subsequent criminal prosecution) to certain witnesses in administrative proceedings, after first obtaining the approval of the Attorney General. Department of Justice regulations subdelegated the duty to give approval in antitrust proceedings to the Assistant Attorney General in charge of the Antitrust Division and required him to obtain the concurrence of the Assistant Attorney General in charge of the Criminal Division. Foucha, from whom the Federal Trade Commission hoped to compel testimony in an antitrust proceeding, alleged that the latter's concurrence had been obtained in a perfunctory manner from a departmental subordinate who had deferred totally to the judgement of the prosecutors. The court held that, even if Foucha could prove his allegations, it would still grant the Commission's application for an order to compel him to testify. The court explained:

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83. Id. [citation omitted].
84. 356 F. Supp. 21 (N.D. Ala. 1973).

> Regulations once adopted are binding upon the adopting governmental agency. But for actions taken contrary to regulations to be invalidated for that reason, some prejudice must be shown or apparent.
>
> In the present case it is neither shown nor apparent that defendants have suffered any prejudice by reason of the assumed failure 85

The rule was apparently not meant to protect persons in Foucha's position from damage to reputation or from possible collateral investigations that might result from testimony. Instead, its purpose was threefold. The Assistant Attorney General in charge of the Criminal Division was to route the request to the departmental division dealing with the substantive matters at issue (here, the Antitrust Division, because the testimony involved an antitrust suit before the Federal Trade Commission); second, to note the request in departmental records; and third, to check whether granting the request would embarrass any current investigation or prosecution by the Criminal Division. In the court's words, the regulation was designed not for the benefit of the witness, but rather "for the benefit of the government, of a 'housekeeping nature,' and from which [Foucha] would not have suffered prejudice."[86] "Prejudice," as used here, would never occur, even though the Department's failure to comply with procedures might eventually result in Foucha's having to testify against his will.

Of course there is no reason why the courts have to approach the question through standing or prejudice. In fact, there is a comparatively early case from the highest authority dispensing with

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85. Id. at 25-26 [citations omitted].
86. Id. at 26.

those doctrines. Sullivan v. United States[87] came before the Supreme Court in 1954. A Department of Justice Circular Letter directed local United States Attorneys to present evidence to grand juries in tax fraud prosecutions only if authorized to do so by the Department. A United States Attorney presented evidence to a grand jury in a tax prosecution against Sullivan without first clearing the matter as directed. The trial court denied Sullivan's motion to dismiss the indictment for failure to comply with departmental procedures. The Supreme Court affirmed, stating that the procedure "was simply a housekeeping provision of the Department and was not intended to curtail or limit the well-recognized power of the grand jury to consider and investigate any alleged crime within its jurisdiction."[88] For failure to follow the Circular Letter, the United States Attorney was answerable to the Department alone.[89] The Court was concerned lest failings within the Department of Justice hamper the work of the grand jury. Sullivan is accordingly cited often as supporting the independent power of grand juries to indict,[90] even in the face of procedural irregularities within the prosecutor's office.[91] However, it can also serve as authority

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87. 348 U.S. 170 (1954).
88. Id. at 173.
89. Id. at 173-74.
90. E.g., Nixon v. Sirica, 487 F.2d 700, 791 & n.159 (D.C. Cir. 1973) (Wilkey, J., dissenting).
91. United States v. Hutul, 416 F.2d 607, 626-27 (7th Cir. 1969), cert. denied 396 U.S. 1012 (1970) (violation of Department of Justice press release requiring central clearance for federal prosecutions for acts that were previously the subject of state prosecution); Re Berkovitz, 367 F. Supp. 1058, 1061-62 (E.D. Pa. 1973) (violation of Department of Justice "normal procedure" requiring approval of Tax Division for tax fraud prosecutions); United States v. Goldstein, 342 F. Supp. 661, 666, 668-69 (E.D.N.Y. 1972) (violation of Internal Revenue Service Regulation and Manual requiring preliminary conference for taxpayer about to be prosecuted for tax fraud). See also United States v. Jaskiewicz, 278 F. Supp. 525, 537-38 (E.D. Pa. 1968) (involves power of grand jury to indict, although court does not explicitly base refusal to enforce procedure on need to protect it).

for the judicial refusal to force agencies to follow internal housekeeping procedures where no grand jury is involved.[92] Be that as it may, Sullivan has not had a broad impact on administrative law. Judges and writers seem oblivious to it, preferring instead to lavish their attention on the Accardi case,[93] decided nine months before Sullivan, which emphasized the need to enforce procedures against agencies.[94]

In fact, five years later the Court of Claims enforced an administrative procedure in a case that seemed directly analogous to Sullivan. In Starzec v. United States,[95] a former employee of the Internal Revenue Service sued the United States to obtain back pay on the ground that he had been dismissed illegally. An Internal Revenue Service Directive stated that when an employee was suspected of wrongdoing that might result in discharge, the Regional Commissioner was to receive a report of the investigation and to make a recommendation before transmitting the materials to the District Director, who had power to initiate proceedings. This closely parallels the Circular Letter in Sullivan, which likewise required central approval before action was instituted against someone

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92. United States v. Kline, 366 F. Supp. 994, 997 (D.D.C. 1973) (defendant in prosecution for perjury and conspiracy to obstruct justice seeks exclusion of evidence allegedly obtained in violation of Department of Justice "internal guidelines").

93. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). See, e.g., 1 Davis, Treatise §5.03, at 299-300 & nn. 3 & 5; W.Gellhorn & C.Byse, Administrative Law: Cases and Comments 861 (4th ed. 1960); Schwartz & Wade 92; Berger, "Do Regulations Really Bind Regulators?" 62 Nw. U.L. Rev. 137, 149-58 (1967); Note, "Violations by Agencies of Their Own Regulations," 87 Harv. L. Rev. 629, 653-55 (1974) (all mention or discuss Accardi but not Sullivan).

94. See pp. 393-94 supra.

95. 145 Ct. Cl. 25 (1959).

suspected of wrongdoing. Starzec, who had been dismissed for falsifying his own tax returns, alleged, as had Sullivan before him, that the adverse action was illegal for failure to follow this procedure. However, he managed to succeed where Sullivan had failed. The Court of Claims stated:

> We think there is enough of a probability that the Regional Commissioner would not have recommended the discharge of the plaintiff to require us to say that the plaintiff was deprived of a substantial and important right when the Internal Revenue Service failed to follow the procedures prescribed by its own regulations.[96]

An agency could not choose when and when not to apply regulations "unless they are mere housekeeping directions, of no concern except to the Government."[97]

How was it possible for the Sullivan and Starzec courts to reach opposite conclusions on similar procedures? The answer must lie in different perceptions of purpose. The procedures might have been intended to protect those under investigation by requiring a disinterested opinion before proceedings were instituted; or they might have been designed simply to ensure to agency heads that enforcement was uniform. More recent cases have treated the question of purpose as central. In United States v. Lockyer,[98] decided in 1971, the Internal Revenue Service Manual stated that a revenue agent, whose responsibility was to audit tax returns, was to suspend his investigation when he discovered an "indication of fraud" and to hand the case over to a special agent concerned with criminal matters. Lockyer, who was charged with tax fraud, moved to have all of the evidence against him suppressed and the

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96. Id. at 29-30.
97. Id. at 31.
98. 448 F.2d 417 (10th Cir. 1971).

criminal complaint dismissed on the ground that the revenue agent assigned to his case had violated this rule. The trial court held in his favour, citing Accardi.[99] The Tenth Circuit Court of Appeals reversed, holding that even if the regulation had been violated, it was not enforceable against the Internal Revenue Service. The court turned immediately to questions of purpose: the rule was meant to prevent revenue agents from going too far, and hence duplicating the efforts of special agents; also to prevent them from jeopardizing the criminal case by giving the taxpayer a basis for claiming that the Service had obtained statements and information under the guise of conducting a civil suit. The court summed up:

> The entire design and thrust of the instant directive is that of internal administration. It ... does not purport to exist for the protection of the taxpayer's interests and rights; its manifest purpose is avoidance of encroachment and duplication and prevention of mistakes by the agent which could result in complicating prosecutions.[100]

Although it often appears that way, not all of the law in this area has grown out of the activities of the Internal Revenue Service and the Department of Justice. Shannon v. Department of Housing and Urban Development[101] dealt with procedures governing the approval of federal-aid urban renewal plans. Regulations of the Department of Housing and Urban Development required a new "public hearing" whenever a municipal redevelopment authority made material changes in a plan that had already been approved. A departmental Memorandum detailed procedures to be

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99. Id. at 419.
100. Id. at 421.
101. 305 F. Supp. 205 (E.D. Pa. 1969), vacated on other grounds 436 F.2d 809 (3d Cir. 1970).

followed by a Regional Office in deciding whether a proposed change was significant enough to require a new hearing. Shannon sought an injunction against the distribution of federal funds to the Philadelphia Redevelopment Authority for the construction of a project called Fairmount Manor. As a preliminary matter, he alleged that the Regional Office had allowed material changes in Fairmount Manor without considering the need for a new hearing in accordance with the Memorandum's procedures. Specifically, he seemed to believe that the Memorandum required the Regional Office to make a written explanation of its decision about a new hearing. The court first noted that the Department's regulations, of which this procedure was one, were "of course, grounded on the Congressional grant of power to promulgate them framed in [statute]." The Department had not seen fit to codify the procedure "apparently because it considers the memorandum to treat interdepartmental operations."[102] The court later explained that the Memorandum did not in fact require a written explanation from the Regional Office. But before that, it indicated that the Department need not adhere to it in any event. Shannon had made

> the erroneous assumption that [the Department's] internal procedures for making an ex parte determination are to be accorded the same force and effect as regulations governing a plenary, adversary adjudication. With primary responsibility under the Housing Act for the efficient management of federal urban renewal policy in [the Department's] hands, its determination that an informal procedure ... provides the best balance of efficient use of limited resources and thorough review is ... a judgment entitled to our deference.[103]

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102. 305 F.Supp. at 213.
103. Id. at 216.

In short, the procedure was meant to regulate internal operations, not to aid outsiders.

Isolated Procedures Guiding or Benefiting an Outside Party

The courts have normally been quite ready to enforce isolated procedures that are designed to guide or benefit citizens. In Brookhaven Housing Coalition v. Kunzig,[104] the General Services Administration, in selecting a site for a new Internal Revenue Service building, disregarded an Executive Order requiring it to consult various departments about the likely impact on the community. Although the court declined to enjoin use of the new building on equitable grounds,[105] it left no doubt that the procedure was binding. It was not, as the government argued, "a mere internal housekeeping arrangement,"[106] but "was intended for the benefit of both employees and non-employee residents of the area ... ."[107] In this very case, citizens of Brookhaven had shown that the influx of low-income employees was likely to exacerbate an already serious housing shortage. Consultation would have alerted the General Services Administration to the consequences of its plan and revealed alternatives.

Two unusual cases demonstrate the dangers of failing to enforce this sort of procedure. The first is National Labor Relations Board v. Monsanto Chemical Co.,[108] decided in 1953. National Labor Relations

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104. 341 F. Supp. 1026 (E.D.N.Y. 1972).

105. The court did enjoin the General Services Administration from disposing of surplus military housing nearby pending consultations on whether it was needed to house employees of the new facility. Id. at 1030-31.

106. Id. at 1029.

107. Id. at 1030.

108. 205 F. 2d 763 (8th Cir. 1953).

Board rules prescribed a time limit for appealing to the Board from a decision of a Regional Director. An employee who alleged that he had been wrongly discharged because of collusion between his union and his employer, appealed to the Board from the Regional Director's denial of his claim. Although the appeal missed the cut-off date by six days, the Board nevertheless decided to hear it. The court upheld the Board's waiver of its own procedure, saying that there had been no prejudice to the employer or union. Of course, it is rare that waiver of a time limit will actually damage the case of a party defending an appeal. The problem is that if the time limit is to mean anything in the long run, it must be enforced strictly.[109] It is a preeminent example of a procedure that draws a line that must be adhered to. Once the agency indicates that it will disregard it at pleasure, it damages the rule's integrity as a guide for outsiders. Both those wishing to appeal and those waiting to be appealed against will be tempted to disregard it in their calculations.

United States v. Wilbur[110] demonstrates a judicial failure to enforce a procedure meant not so much to guide as to benefit an outside party. In order to obtain a student deferment, a draft registrant had to make a formal request to his selective service board. It was the practice of local boards to send the appropriate forms to the registrant upon being notified that he was attending a university full time. Wilbur's board failed to do so, and he never made a formal request for deferment. The Court of Appeals

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109. See Berger, "Do Regulations Really Bind Regulators?" 62 Nw. U. L. Rev. 137, 147-49 (1967).

110. 427 F.2d 947 (9th Cir.), cert. denied 400 U.S. 945 (1970).

refused to overturn his conviction for draft evasion, noting that no court had enforced the mere practice of a local branch of an agency, and that there was no evidence of actual reliance.[111] The court's explanation is flawed on all counts. Judges have enforced both customary practices of agencies[112] and procedures promulgated informally by their local branches.[113] There is no reason why they should not enforce the customary practice of a local branch. Passing this, courts sometimes do raise the possibility that a procedural regulation was relied on. But they do not go so far as to ask whether the regulation actually led the citizen at bar to put himself in a worse position.[114] Instead of focusing on matters of form, the court should have inquired into the purpose of the practice. Apparently it was meant to aid registrants in their dealings with the selective service bureaucracy. It should accordingly have been enforced.

Monsanto and Wilbur are exceptions to the trend. In United States v. Leahey,[115] decided soon after Wilbur, the First Circuit Court of Appeals gave the best presentation yet of the factors that should motivate judges. An Internal Revenue Service news release required special agents to give notice to taxpayers that they had the function

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111. 427 F.2d at 949.

112. E.g., Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224-25 (D.C.Cir. 1959) (enforcement of Federal Communications Commission's "usual practice" of imposing cut-off dates for comments on proposed scheme).

113. E.g., Starzec v. United States, 145 Ct. Cl. 25 (1959) (enforcement of directive of Internal Revenue Service's Regional Commissioner for Philadelphia Region).

114. See, e.g., United States v. Leahey, 434 F.2d 7, 10 -11 (1st Cir. 1970)(no way of ensuring that regulation was not actually relied on by someone).

115. 434 F.2d 7 (1st Cir. 1970). See also United States v. Heffner, 420 F.2d 809 (4th Cir. 1969).

of investigating the possibility of criminal tax fraud. Mrs.Leahey moved at her trial for tax evasion to have evidence gathered by the special agent suppressed on the ground that she had not received this warning. In affirming the trial court's grant of her motion, Judge Coffin went to the heart of the matter. The press release had stated that it was meant to promote uniform conduct among special agents:

> If this self-imposed rule of conduct could be violated without the sanction of judicial exclusion, what would be the result? Of course internal disciplinary measures would be available. But if the case or culprit were important, and the disobedient officer's conduct resulted in a conviction, the court playing Pontius Pilate, we suspect that any penalties would be token. ... Indeed an Agent's violation of these procedures in selective cases may benefit the agency.[116]

The press release was "avowedly for the purpose of 'protecting the Constitutional rights of persons suspected of criminal tax fraud.'"[117] It was "designed to protect taxpayers by setting a clear and uniform standard governing the first contact between a Special Agent and a tax fraud suspect."[118] Anticipating Lockyer,[119] the court cautioned that "[o]ur result would have been different if the I.R.S. had violated a procedure designed to promote some other agency goal." If, for example, the Service violated a rule requiring that only trained special agents interrogate suspects and instead allowed an accountant to conduct the interview, the only difference would be in the adeptness of the questioning: "Only the

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116. 434 F.2d at 10.
117. Id. [quoting press release].
118. Id. at 11.
119. See pp. 407-08 supra.

efficiency of I.R.S. operations would be harmed."[120] The opinion clearly links the enforcement of procedures with the need for administrative consistency in dealing with the public and non-enforcement with the need for efficiency in running internal operations. It also pinpoints the critical institutional difference from Britain: the absence of any body (like the Council on Tribunals or the Parliamentary Commissioner for Administration) other than the courts to force consistency where necessary. If the courts, "playing Pontius Pilate," were not to act, there would be no other body immediately available to push agencies toward adherence.

Procedures Forming a Hearing

Hearing procedures, it will be remembered, present the best arguments for enforcement. A hearing is normally meant to afford some sort of participation to those affected by an administrative decision. Judgments about the purpose of a specific procedure within it are likely to be affected by the general atmosphere: the parts take on the colour of the whole. The point is illustrated, paradoxically, by a Supreme Court decision involving a hearing whose overall purpose was not to protect anyone. The House of Representatives Committee on Un-American Activities had issued rules to govern its investigative proceedings. One rule stated that if a majority of the Committee believed that interrogation of a witness in public might "unjustly injure his reputation," the witness was to be questioned in executive session to determine whether or not the investigation should proceed in private. Yellin was convicted of contempt of Congress for refusing to testify in public about his

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120. 434 F.2d at 11.

activities as a Communist organizer in the steel industry. In Yellin v. United States[121] the Supreme Court reversed, holding that the failure of the Committee to consider his request for an executive session constituted a defence. Mr.Chief Justice Warren answered the government's contention that the rule "was written to provide guidance for the Committee alone and that it was not designed to confer upon witnesses the right to request an executive session... ."[122] The procedure under consideration was part of a body of rules whose "dominant theme is definition of the witness' rights and privileges."[123] Other rules required, for example, that the Committee announce the subject of the investigation and seek only germane information, that it make available to each witness a transcript of his testimony, that it accord him the right to have counsel, and that it permit him to keep out of the range of television cameras if he wished. The rule in question, "in providing for an executive session when a public hearing might unjustly injure a witness' reputation has the same protective impact."[124] Procedures that form a hearing are similarly part of a larger whole whose purpose is to guide and benefit outsiders.

They are also interdependent in a way that isolated procedures obviously cannot be. For example, the Federal Trade Commission's Rules of Practice state that proceedings before the Commission shall be controlled by agreements reached in prehearing conferences.[125] In Pacific Molasses Co. v. Federal Trade Commission,[126]

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121. 374 U.S. 109 (1963).
122. Id. at 115.
123. Id.
124. Id. at 116.
125. 16 C.F.R. §3.10(b) (1960), now 16 C.F.R. §3.21(d) (1976).
126. 356 F.2d 386 (5th Cir. 1966).

the Commission brought a complaint against Pacific Molasses accusing it of discriminatory pricing in violation of the anti-trust laws. At a prehearing conference it was agreed that the company would receive a list of all adverse witnesses and documentary evidence at least fifteen days before the start of the hearing. The Fifth Circuit Court of Appeals set aside the eventual cease and desist order on the ground that the examiner had not enforced the agreement. The court explained how the failure to live up to the rule requiring such agreements to be binding had tainted the later proceeding: Pacific Molasses had been deprived of the chance to prepare its case effectively and to cross-examine adverse witnesses. Failure to observe one procedure dragged down the entire hearing.

The same thing occured in the well-known case of Vitarelli v. Seaton.[127] Vitarelli, a Department of the Interior employee, was discharged as a "security risk." The Department had granted him a hearing, but had violated rules requiring it to provide him with a complete list of charges, to restrict the hearing to relevant issues, and to allow cross-examination of known informants. Violation of these procedures, said the Supreme Court, transformed the hearing into a "wide-ranging inquisition into [Vitarelli's] educational, social, and political beliefs," while depriving him of the chance to meet the charges against him.[128] The whole proceeding, in other words, became a sham. The Department was in effect giving a hearing with one hand and taking it away with the other. Realizing that the integrity of the adjudication was at stake, the Court vacated the

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127. 359 U.S. 535 (1959).
128. Id. at 543.

Department's discharge of Vitarelli.

THE ROLE OF THE ADMINISTRATIVE AGENCIES

All of the above cases -- whether they deal with managerial procedures, with isolated procedures guiding or benefiting citizens, or with procedures forming part of a hearing -- make one point: in America it is the courts that decide which procedures should be enforced and which should not be. Why Congress and the agencies have not opted for the British solution of creating formal statutory instruments is not clear. The fault may lie with Congress for not devising anything so formally clear-cut as a statutory instrument by which an agency might know when it is making "law." Or it may lie with the agencies themselves, which use a variety of methods to promulgate a variety of procedures, both important and unimportant, relating to matters of internal management and to the expectations of outside persons. Wherever the initial responsibility may lie, the courts in the United States have not done their part to force a formal distinction between procedures that are "law" and those that are not. Rather they have cheerfully taken to themselves the task of delineating which procedures should be enforced and which should not be.

But this is not to say that judges operate entirely unaided by others. Unlike in Part One, they are working with procedures that agencies have already created. If they are to make an intelligent decision about enforcement, they must look to see what the agency intended to accomplish. Most cases involve rules that could arguably be designed either to govern internal operations or to guide or benefit citizens. Agencies are likely to contend in court for the former interpretation, and citizens for the latter. Judges have developed several techniques for divining the purpose of an ambiguous procedure.

The most obvious is to search the text of the rule or any accompanying notes for a statement of administrative intent. This kept them from enforcing Internal Revenue Service procedures requiring revenue agents to transfer investigations to special agents when they discovered an indication of fraud.[129] Conversely, it led them to enforce those requiring special agents, once they got the case, to warn taxpayers that they were suspected of criminal fraud.[130] The courts can also infer purpose from context: as the Yellin case illustrates,[131] an ambiguous procedure surrounded by others whose purpose is clear is likely to take its tone from them. Next, there is the form in which a rule is promulgated. Although this may not have the same controlling significance as in Britain, it does give some indication of what an agency is trying to accomplish. Agencies are likely as a general matter to issue housekeeping rules in circulars or press releases and to embody rules that guide or benefit outsiders in codes of regulations.[132]

Connected with this is the publicity that a procedural rule has received. Failure to announce a procedure publicly has been held indicative of an intent solely to regulate internal departmental matters,[133] whereas publication may push a court toward enforcement.[134] Nonetheless,

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129. United States v. Lockyer, 448 F.2d 417, 420 and n.2 (10th Cir. 1971)(use of Internal Revenue Service Audit Technique Handbook to find purpose of procedure contained in Manual).

130. United States v. Leahey, 434 F.2d 7, 10-11 (1st Cir. 1970); United States v. Heffner, 420 F.2d 809, 812-13 (4th Cir. 1969)(use of statements in press release to find purpose of procedure contained in press release).

131. Yellin v. United States, 374 U.S. 109, 115-16 (1963). See pp. 414-15 supra.

132. See Sullivan v. United States, 348 U.S. 170, 173 (1954); United States v. Hutul, 416 F.2d 607, 626-27 (7th Cir. 1969), cert. denied 396 U.S. 1012 (1970).

133. E.g., United States v. Lockyer, 448 F.2d 417, 420-21 (10th Cir. 1971); United States v.Kline, 366 F.Supp.994, 997 (D.D.C. 1973). See also Shannon v. Department of Housing and Urban Development, 305 F.Supp. 205, 213 (E.D. Pa. 1969), vacated on other grounds 436 F.2d 809 (3d Cir. 1970)(Department did not "codify publicly" a procedure, apparently because it considered it to control internal operations).

134. United States v. Leahey, 434 F.2d 7, 10-11 (1st Cir. 1970). See also Yellin v. United States, 374 U.S. 109, 116 (1963) (notes that rules require that witness be furnished with a copy of them).

the courts have been known not to enforce procedures appearing in published regulations.[135] Lastly, courts may deduce purpose from the conduct of the agency itself. Consistent adherence to a procedure over a period of time indicates an administrative intent to guide and benefit citizens,[136] whereas frequent disregard in the interests of internal efficiency points in the opposite direction.[137] When all is said and done, agencies have more control than is initially apparent over which procedures are enforced against them and which not.

COMPARISONS

When it comes to enforcing administrative rules of procedure, courts in America play a different role from those in Britain. In Britain judges operate on the edges of a system that is for the most part the responsibility of others. Parliament and the administration,watched over by the Council on Tribunals, make the basic distinction between statutory and non-statutory procedures. The Parliamentary Commissioner for Administration uses his influence to ensure that non-statutory procedures are followed where fairness demands it. Judicial involvement is limited to isolated episodes where these bodies have demonstrably failed.

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135. E.g., United States v. Goldstein, 342 F.Supp. 661, 665-68 (E.D.N.Y. 1972) (pre-indictment conference described in published Internal Revenue Service Regulations held, along with conference described in internal manual, to have solely an internal purpose).

136. Yellin v. United States, 374 U.S. 109, 116-17 (1963).

137. United States v. Goldstein, 342 F.Supp. 661, 665-666 (E.D.N.Y. 1972)(pre-indictment conference prescribed in internal manual frequently dispensed with in interests of Internal Revenue Service).

In America judges play a central role from start to finish, creating a coherent body of principles on the basis of which they enforce or decline to enforce a wide range of procedures. Agencies participate to the extent that the judiciary lets them -- by making clear beforehand whether a procedural rule is meant to regulate internal housekeeping matters or to guide or benefit outsiders. Unlike in Britain there are no institutions other than the courts to pressure or compel agencies to follow their own procedures where administrative consistency is called for.

There is a rough parallel to the comparisons drawn in Part One. There, American judges also operated at the centre, by defining the general character of the hearing that was to attend a polycentric decision before prescribing particular procedures. Other bodies then filled in details, made slight corrections, or pioneered new approaches for judges. British courts in contrast stood more to the side, dealing with specific complaints of unfairness as they arose. Because they were part of a group effort, their creativity was directed toward ensuring the soundness at various points of a structure fashioned by others. They do exactly the same thing when they force the administration to follow its own non-statutory procedures. British judges are inspectors of a framework fashioned and tended by others; American judges are themselves architects of the framework.