THE CANADIAN BAR REVIEW

VOL. XXXV AUGUST-SEPTEMBER 1957 NO. 7

MEMORANDUM TO THE COMMITTEE ON ADMINISTRATIVE TRIBUNALS AND ENQUIRIES*

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New York

During the latter part of 1955, a Committee on Administrative Tribunals and Enquiries was appointed in Britain "to consider and make recommendations on: (a) The constitution and working of tribunals other than the ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purposes of a minister's functions. (b) The working of such administrative procedures as include the holding of an inquiry or hearing by or on behalf of a minister on an appeal or as the result of objections or representations and in particular the procedure for the compulsory purchase of land." It was composed of the following members: Sir Oliver Franks (chairman), Lord Balfour of Burleigh, Mr. R. Bowen, Q.C., Mr. J. C. Burman, Dame Florence Hancock, Mr. D. Johnston, Q.C., Sir Geoffrey S. King, Lord Linlithgow, Major J. Morrison, Miss K. M. Oswald, Parker L.J., Mr. H. Wentworth Pritchard, Mr. Charles Russell, Q.C., Lord Silkin, Mr. Alan Symons and Professor Kenneth Wheare. The secretary of the committee was Mr. J. Littlewood.

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The appointment of the Franks Committee came at a peculiarly opportune moment in English administrative law. It is now a quarter of a century since the Committee on Ministers' Powers made its famous pioneer study of delegated legislation and administrative justice. Yet, important though the work of that Committee has been to students of administrative law, it cannot be denied that all too many of its recommendations have never been given practical effect. At the same time, the years since the Donoughmore Committee reported have seen a constant increase in administrative authority, culminating in the powers given to deal with the war emergency, as well as those essential to perform the vastly increased functions assumed by the post-war State. The expansion of administrative power has been accompanied by increasing uneasiness among students of English administrative law, who have feared that the authority was not sufficiently safeguarded and might sometimes be put to arbitrary and biased use. In addition, there has more and more been articulated concern on the part of the public, expressed both in and outside the halls of Westminster. All that was needed was the catalyst of a *cause célèbre* and it was forthcoming in the now-notorious *Crichel Down* affair. Just as it was Lord Hewart's descent from Olympus in "The New Despotism" that caused the Lord Chancellor to set up the Donoughmore Committee, so it was *Crichel Down* that led directly to the appointment two years ago of the Franks Committee.

The present writer is one of those who submitted a memorandum of written evidence to the Committee. In it he sought to summarize his views with regard to the present state of administrative law in the United Kingdom. With the approval of Sir Oliver Franks, he has thought it worthwhile to publish this evidence now in a periodical on the western side of the Atlantic. He has two principal purposes in doing so. The first is to present publicly in convenient form his own suggestions on English administrative law. The other is to stimulate among the legal profession in the United States and Canada an interest in the work of the Franks Committee. Though the Committee itself is as yet hardly known outside Britain, its work may ultimately prove to be of basic importance in the administrative law of the common-law world.

That such should be the case is clear now that the Franks Committee has published its Report.[1] The Report indicates that

[1] Report of the Committee on Administrative Tribunals and Enquiries (Cmd. 218, July 1957); see also, Administrative Tribunals and Inquiries (1957), 224 L.T. at pp. 49 and 63.

the Committee has, in fact, seized the opportunity given to it to make the study and recommendations that are needed to deal with the present-day deficiencies in English administrative law. This is clear if one analyzes the Committee's main recommendations. These include the following:

1. The personnel of administrative tribunals should be appointed by other than ministers. Chairmen should be appointed by the Lord Chancellor and members by a standing Council on Tribunals. (See *infra* III. (A.).)

2. A standing Council on Tribunals appointed by the Lord Chancellor should exercise continuous scrutiny over the working of tribunals. (Compare *infra* III. (G.).)

3. Judicial review, at least on questions of law, should be available in every case. (See *infra* III. (H.).)

4. Administrative hearing officers (inspectors) should be under the control of the Lord Chancellor and, hence, independent of the Ministry in which they sit. (See *infra* III. (A.).)

5. Inspectors' reports should be published. (See *infra* III. (C.).)

6. Administrative decisions should be reasoned ones. (See *infra* III. (D.).)

These recommendations are directed squarely toward resolution of the principal problems of English administrative law. Indeed, as will be apparent to anyone who reads the material that follows, they do resolve most of the issues raised by the present writer. It is now to be hoped that the Government in Britain will be as forthright in implementing the Report as the Committee itself was in writing it.

Memorandum of Evidence

It may, at first glance, appear presumptuous for one who is not a British subject to give evidence to a Committee concerned with the working of administrative law in the United Kingdom. The present writer hopes, however, that his submission of evidence to this Committee will not be looked upon as mere interference in a subject which is, after all, exclusively the concern of English jurists. His position as an alumnus of an English university, as well as his personal attachment to British legal institutions and the country in which they operate, are, he trusts, factors which may lead the Committee to look more charitably upon evidence from an outsider than they otherwise might.

The subject matter of this Committee's inquiry is one to which much of this writer's professional career has been devoted. In

1949, he published a comprehensive account of administrative law and procedure in the United Kingdom, based largely upon work done as a research student at the University of Cambridge, and, more recently, he has been at work on a study of English administrative law, emphasizing developments since the end of the last war, which will be published after this Committee has reported.

It should perhaps be explained that this writer's concern with English administrative law has not been, for him, a mere matter of academic exercise in comparative law. On the contrary, though his primary concern has always been that of an American administrative lawyer, he has found that there is no better way to understand and to explain his own system than by comparing it with administrative law in other countries. The insight he has gained from his knowledge of other systems has, without any doubt, enhanced his abilities as a domestic lawyer, both academically and professionally. But, if this is true of an American who has some understanding of the administrative law of the United Kingdom, it should also be true of an Englishman with a comprehension of the American system. A Committee such as this, which is engaged in an inquiry into important aspects of English administrative law, will, it is felt, be helped in its work by a presentation to it of the experience in the United States with analogous problems. This is true even though the American attempts to resolve such problems are not necessarily those which this Committee will see fit ultimately to recommend.

Nor should it be feared that this writer's presentation of the experience on the western side of the Atlantic is designed to place administrative law in the United Kingdom in an unfavorable light in comparison with its American counterpart. It is not intended to set up the American law as a yardstick to which the practice in Britain must conform nor to judge the House of Lords and other English courts by appealing to the superior moral jurisdiction of the United States Supreme Court.

I. *Summary*

This written submission is divided into two principal parts. The first is devoted to a presentation of the recent American experience in the matters being considered by this Committee, with particular emphasis upon the Federal Administrative Procedure Act of 1946 and the 1955 Report of the Hoover Commission on administrative procedure. The second part seeks to put forward for the consideration of this Committee certain suggestions for

improvement of the English law of administrative procedure, which are based both upon the American experience already presented and upon this writer's recent inquiries into the administrative law of the United Kingdom. In addition, there will be a conclusion which will summarize what has gone before and place it in its proper perspective, historical and otherwise.

II. *Recent American Experience*

A. *Administrative Procedure Act, 1946*

The law governing the procedure of administrative tribunals and agencies in the United States differs basically from that which prevails in the United Kingdom primarily because of the passage by the Federal Congress of the Administrative Procedure Act of 1946. The enactment of that statute was the culmination of a long and vigorous campaign by the organized legal profession in the United States to improve administrative procedure and, interestingly enough, that campaign was so successful in securing bipartisan support for its objectives that the 1946 Act was passed without a dissenting vote in both Houses of the Congress. Though the contrary has often been asserted, the Administrative Procedure Act is far from a comprehensive code of fair administrative procedure. Instead, it lays down the general procedural principles which are to govern administrative exercises of powers of delegated legislation and adjudication. The fact that it is a general framework rather than a detailed code does not, however, mean that it is not of fundamental importance. Such importance results from three things: (1) The Administrative Procedure Act represents the first legislative attempt in the common-law world to state the essential principles of fair administrative procedure. The Congress, in enacting the law of 1946, mirrored the mood of discontent with the administrative process which existed in the United States among many of those subject to administrative authority. But, as the American Supreme Court aptly put it, the Congress expressed its mood not merely by oratory but by legislation.[2] (2) And this means that the principles of fair procedure laid down in the Administrative Procedure Act are binding upon the federal administrative process as a whole. The 1946 Act is one whose provisions control the procedures of all the administrative tribunals and agencies whose decisions affect the person or property of private citizens. It is true that the draftsmen of the Act relied

[2] *Universal Camera Corp.* v. *N.L.R.B.* (1951), 340 U.S. 474, at p. 487.

primarily upon the best pre-existing administrative practice. What is of basic importance, however, is that the Act, by stating the essentials of such practice in statutory form, in effect, imposes the best pre-1946 procedure upon all the federal departments and agencies. (3) Just as significant, in assessing the impact of the Administrative Procedure Act, is the fact that the Act, in some important respects, goes even beyond the most advanced pre-1946 procedure in any of the federal agencies. This is particularly true with regard to the crucial question of the administrative hearing officer which is at the heart of administrative procedure on both sides of the Atlantic.

The present writer would subscribe unqualifiedly to the conclusion of the recent study by the Inns of Court Conservative and Unionist Society that the provisions of the American Act "are designed to rectify similar abuses and shortcomings to those which we have seen in our own administrative procedure; and they have additional value for us as being enacted within a society with similar traditions and problems to our own and in the context of a system of law of common origin."[3] Of the provisions of the 1946 statute referred to, the most significant are those which deal with the question of the administrative hearing officer, for it is that question which, as already indicated, is the basic one in the field of administrative procedure and it is upon its attempt to resolve it that the American Act turns. The question referred to arises out of the process of administrative hearing and decision that has become common on both sides of the Atlantic. For practical reasons, it has been impossible for ministers themselves to preside at the public inquiries which may often be held before decisions are rendered by them. It is, as Lord Simonds has said, inconceivable for the minister to sit and hold the inquiry, because his time does not admit.[4] The conduct of the inquiries and other public hearings held by Anglo-American administrative agencies has, therefore, customarily been vested in subordinate officials. The typical case in Britain is, of course, that arising under the Acquisition of Land (Authorisation Procedure) Act, 1946, under which a public local inquiry is held before an inspector of the relevant ministry, to permit those affected to present their views to the minister. But, though the subordinate inspector (or examiner, as he is commonly called in the United States) has thus been given the task of presiding at the inquiry or other hearing, it has not been he who has had the power to decide the case. That task has been reserved for others

[3] Rule of Law (1955), p. 26. [4] 185 Lords Deb. 55, col. 1007.

higher in the administrative hierarchy. But it is precisely out of this dichotomization of the functions of hearing and decision that the difficult problems of administrative procedure arise.

There is, in the first place, the problem of hearing officer personnel—i.e., that of who the individuals are who conduct the inquiries and other hearings held by the administration, how they are appointed, and by whom they are controlled. Before the Administrative Procedure Act, these matters were entirely up to the particular administrative agencies and the hearing officers were thus clearly in what the highest American court has termed a dependent status.[5] Under the Act of 1946, a fundamental change has been brought about. It establishes a semi-independent corps of hearing officers called examiners, who are to preside over cases not heard by the agency's heads themselves. Their appointment and tenure is placed under the control of the Civil Service Commission (an independent agency in the executive branch) with the object of enabling qualified examiners to be chosen and of permitting them to maintain the independence appropriate to the exercise of their hearing functions, by freeing them from direct control by the administrative agency in which they work. "The Administrative Procedure Act was designed to give trial examiners in the various administrative agencies a new status of freedom from agency control. Henceforth they were to be 'very nearly the equivalent of judges even though operating within the Federal system of administrative justice.' Agencies were stripped of power to remove examiners working with them. Henceforth removal could be effected only after hearings by the Civil Service Commission. That same Commission was empowered to prescribe an examiner's compensation independently of recommendations or ratings by the agency in which the examiner worked. And to deprive regulatory agencies of all power to pick particular examiners for particulars cases, s. 11 of the Act commanded that examiners be 'assigned to cases in rotation so far as practicable . . .' ".[6]

As of June 30, 1954, there were 278 examiners appointed under the Federal Administrative Procedure Act. They ranged in number from one in several agencies to 106 in the Interstate Commerce Commission (considered by many as the most important of the federal regulatory agencies). Their compensation ranged from $7,000 to $12,690, with all but nine of the examiners receiving over $9,000. This compared with a salary of $15,000 at that time

[5] *Ramspeck* v. *Trial Examiners Conf.* (1953), 345 U.S. 128, at p. 130.
[6] *Ibid.*, at p. 144.

for federal district judges (though the judges' salaries have since been substantially increased). Though not perhaps inadequate as compared with the pay received by other civil servants, the salary of the examiners is certainly not comparable to the amount that a successful practising attorney can earn and efforts are being made to have it increased. Almost all of the American examiners are members of the legal profession: of the 278 already referred to, only six were non-lawyers.

Closely related to the problem of hearing officer personnel is that of the powers conferred upon such officers. The examiners appointed under the American Administrative Procedure Act are given substantial powers at the administrative hearing and in the process of decision, and their position is thus far superior to that of the inspectors who preside at the public local inquiries which are common in administrative law in the United Kingdom. They are vested with authority to preside over the hearing analogous to that exercised by a trial judge in the American system. They are empowered to recommend decisions or to issue initial decisions, which become the decisions of the agency unless appealed. The intent of the Act here is to assimilate the roles of hearing and deciding officers within the agency to those of trial and appellate courts. All recommended or initial decisions of the examiners must be shown to the private parties who are permitted to file objections thereto. The problem of disclosure of the hearing officer's report, so controversial in Britain, is thus expressly resolved in favour of disclosure by the American Administrative Procedure Act.

So far as the conduct of the hearing itself is concerned, the American Act provides that the common law rules of evidence do not prevail, but no administrative decision is to be rendered except "as supported by and in accordance with the reliable, probative, and substantial evidence". The rights of counsel and cross-examination are expressly preserved. The problem presented in cases like *Errington* v. *Minister of Health*,[7] is dealt with by provision for the insulation of the hearing examiner. No such officer is to "consult any person or party upon any fact in issue except upon notice and opportunity for all parties to participate". Attempts by administrative officials to influence decisions in which they are interested are likewise precluded. And, finally, the administrative decision itself must be a reasoned one. It must include "findings and conclusions, as well as the reasons or basis therefor,

[7] [1935] 1 K.B. 249.

upon all the material issues of fact, law, or discretion presented on the record".

B. *Hoover Commission Report*

Despite the substantial safeguards afforded under the Federal Administrative Procedure Act, many American jurists have felt that administrative power is still not adequately controlled by law. Their view has recently been given official expression in the report on administrative law submitted in 1955 by the Commission on Organization of the Executive Branch of the Government—usually referred to as the Hoover Commission, after its chairman, former President Herbert Hoover. The Hoover Commission was set up under a law passed in 1953 to investigate the organization of the executive branch of the Federal Government. Of its twelve members, four were appointed by the President, and four each by the presiding officers of the two Houses of the Congress. The Commission operated through so-called "task forces", composed of eminent specialists, whose job it was to inquire into different fields specified by the Commission. Among these was a Task Force on Legal Services and Procedure, whose task it was to study and report on legal services and procedure in the executive branch of the government. This Task Force was composed of leading judges, practising lawyers, and law professors; its chairman was a former chief justice of the Supreme Court of Missouri.

At its very first meeting, the Task Force on Legal Services and Procedure was told by Chairman Hoover: "you are free to undertake investigations and make recommendations on any subject in the legal field, as far as the executive branch of the government is concerned". Acting under this mandate, the Task Force made a thorough year-long study of the entire field of federal administrative law and submitted its conclusions in a 442 pages Report to the Hoover Commission, which the latter submitted to the Congress, along with its own recommendations. The Task Force Report is so comprehensive that it would be impossible even to summarize all of its parts. An attempt will, however, be made here to present in manageable form those of the Task Force's recommendations on administrative procedure which will, it is felt, be of interest to this Committee:

(1) The Administrative Procedure Act should be replaced by a more detailed prescription of administrative procedures to be called the "Administrative Code". The proposed new Code contains many important and far-reaching amendments to the present

statute. "They include such matters as eliminating some of the existing exemptions in the 1946 act, strengthening the public information requirements, assuring more complete internal separation of powers, perfecting an intra-agency appeals' procedure, encouraging simplified procedures wherever practicable, and, in general, promoting fairer, more efficient, and hence more economical conduct of the regulatory responsibilities of the executive branch".[8]

(2) An Administrative Court of the United States should be established. This court would be vested with the original jurisdiction now exercised by administrative tribunals in the fields of trade regulation and taxation (the Hoover Commission itself recommended that the proposed court be vested also with the jurisdiction in the field of labor relations now exercised by the National Labor Relations Board — an important administrative tribunal). Though it was not proposed that the Administrative Court would have general jurisdiction over the judicial functions of administrative tribunals and agencies, it was hoped that, once it were established, the proposed court would provide an instrumentality to which, from time to time in the future, additional adjudicatory functions in special areas now within the competence of administrative tribunals might be transferred. "The Administrative Court thus would serve as an intermediate stage in the evolution of administrative adjudication and the transfer of judicial activities from the agencies to courts of general jurisdiction".[9]

(3) Examiners under the Administrative Procedure Act should be replaced by hearing commissioners appointed by a chief hearing commissioner. The latter, appointed by the President by and with the advice and consent of the Senate, should be attached to the proposed administrative court. The tenure, status, compensation, and removal of commissioners should be fixed by law. They should be completely independent of the tribunals or agencies whose cases they hear. Under the Task Force's proposal, there would be two grades of hearing commissioners — the first to serve for eight year terms and to receive $12,000 per year, the second to serve during good behavior and to receive $14,000 per year (as compared to the $15,000 salary of federal district judges at the time this recommendation was made). The intent here seems to be to set up a more or less independent pool of hearing officers whose status is intended to approach that of federal trial judges.

(4) The powers of hearing officers should be greatly strengthen-

[8] *Task Force Report*, p. 23. [9] *Commission Report*, p. 87.

ed, even beyond the authority given them by the Administrative Procedure Act. Such officers should prepare initial decisions in all cases, which are to be final in the absence of appeals to the agency heads. Where such appeals are had, the agency's reviewing power is to be limited much as is that of an appellate court. This is intended to complete the analogy between the roles of hearing and deciding officers and those of trial and appellate courts begun by the Administrative Procedure Act.

(5) Administrative procedure should be further judicialized by requiring that administrative hearings should be governed, to the extent practicable, by the rules of evidence applicable in civil nonjury cases in the federal district courts.

(6) Internal separation of functions insulating those who hear and decide in the administrative process from those engaged in other work should be extended by eliminating all exceptions to such separation now in the Administrative Procedure Act; henceforth such separation is to extend even to the process of final decision by the heads of the department or agency.

(7) In cases where no public inquiry or hearing is required, notice of proposed decisions must be given and opportunity for some review within the particular department or agency must be provided.

(8) An Office of Legal Services and Procedure should be set up in the Department of Justice to assist agencies in simplifying, clarifying, and making uniform rules of substance and procedure; to insure agency compliance with public-information requirements; and to receive and investigate complaints regarding legal procedures. The intent here is to have created an agency vested with continuing supervision and responsibility over the subject of administrative procedure.

(9) Congress should look into the feasibility of transferring to the courts certain judicial functions of administrative agencies, such as the imposition or remission of money penalties, the award of reparations, and the issuance of injunctive orders.

It is interesting to note that, though the Hoover Commission Task Force appeared to be given the authority to investigate only the subject of administrative procedure, it interpreted its authority as including the subject of judicial review of administrative action, on the theory that control by the courts was an essential factor in ensuring that adequate procedures are followed by the administration. The Task Force Report consequently fully covered the sub-

ject of judicial review and included the following important recommendations on the subject:

(1) Exceptions to the availability of judicial review should be repealed.

(2) A simplified, uniform system of review by petition should be provided for.

(3) Administrative findings of fact should be set aside on review if "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record".

(4) There should be full review by the courts of administrative applications of law to fact.

Generally speaking, these recommendations would, if adopted, make the scope of review of administrative determinations by the federal courts equivalent to the scope of review by the federal court of appeals of decisions of the federal district courts.

The far-reaching recommendations of the Hoover Commission Task Force (most of which were concurred in by the Commission itself) are not unnaturally the subject of much controversy in the United States. It is to be expected that most of the administrative agencies themselves are opposing adoption of the recommendations, since it is their authority which stands to be limited by such adoption. More significant is the Report filed early this year by a Special Committee appointed by the President of the American Bar Association to consider the recommendations of the Hoover Commission Task Force. That Committee, composed of leading practitioners in administrative law and other fields, has concurred in most of the important recommendations of the Task Force. At its meeting in February 1956, the House of Delegates of the American Bar Association (the legislative organ of that association), acting in accordance with the recommendations of its Special Committee, adopted a number of resolutions substantially endorsing the major recommendations of the Hoover Commission Task Force and urging their enactment in a "Code of Federal Administrative Procedure" which would replace the Administrative Procedure Act.

Conclusion

In the opinion of the present writer, two conclusions can be drawn from the recent American experience just summarized which should be of particular interest to this Committee. There is, in the first place, no doubt that the predominant theme in American administrative procedure is the *judicialization* of the administra-

tive process. Under the Administrative Procedure Act, the public hearings held by American tribunals and agencies are presided over by examiners who possess much of the independence and authority of trial judges. Not unnaturally, the hearings themselves tend to approach the form of proceedings in the courts. The trend toward judicialization is even more pronounced under the recommendations of the Hoover Commission and its Task Force. In certain fields, the jurisdiction of administrative tribunals would be transferred to an Administrative Court. In other cases, the hearing officers of the administration would be transformed into virtual judges, vested even with tenure during good behavior in many cases. These officers would have decision-making powers analogous in many ways to those of trial judges; their decisions would be subject only to appellate review by the heads of the departments or agencies in which they sit. The administrative hearings themselves would be governed, so far as practicable, by the courtroom rules of evidence and review of administrative decisions would be treated as equivalent to review of trial courts by appellate courts. There is certainly in the American development, and particularly in the Hoover Commission proposals, a degree of judicialization of administrative procedure that is utterly foreign to English conceptions. It is not, of course, seriously suggested that this Committee recommend the wholesale importation of the American development. Still, it should be of moment for this Committee to note that, however far they may go in their Report in advocating further procedural safeguards, it is well-nigh impossible for them to recommend anything so extreme as what has actually already occurred in the United States.

The second conclusion to be drawn from the American experience is perhaps of more immediate significance for the work of this Committee. And this is the fact that the procedural safeguards imposed by the Administrative Procedure Act have not, despite fears which were expressed to the contrary, really interfered with the effective functioning of the administrative process. As was aptly stated in the recent study of the Inns of Court Conservative and Unionist Society, "there is no evidence that the obligation to give the facts and reasoning which support a decision, or the practice of publishing an Inspector's Report, or any of the improvements enacted by the A.P.A. have stultified or even hindered effective government."[10] It should be pointed out that, though many of the administrative agencies themselves strenuously opposed the

[10] *Ante*, footnote 3, pp. 27-28.

enactment of the Administrative Procedure Act, opposition to that law has now all but disappeared. Indeed, in the ten years that have elapsed since the enactment of the 1946 Act the basic principles behind it have obtained well-nigh universal acceptance among students of administrative law, even from those who had formerly opposed such legislation. To Americans today, the Administrative Procedure Act states only the basic essentials of fair administrative procedure, as that concept is now conceived on the western side of the Atlantic. The Hoover Commission report shows, in fact, that to many, the Administrative Procedure Act is now so obvious and elementary that it must be substantially strengthened and expanded.

A word should be said finally of what may be termed the administrative-law climate in the United States today. Before the last war it was only those on the so-called "right" (accused by their opponents of being concerned only with property rights and really aiming their shafts at the substance, rather than the administrative machinery, of the New Deal legislation) who were articulate in their demands for controls over agency authority. Since the war, however, proposals for safeguards have evoked a bipartisan response all but inconceivable a generation ago. "Unless we make the requirements for administrative action strict and demanding," a member of the Supreme Court who is anything but noted for his hostility toward the administrative process — Douglas J. — asserted in 1951, "*expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."[11] Fifteen years ago, it would have been almost unthinkable for one of Mr. Justice Douglas' political convictions to direct such a warning against administrative expertness. The tremendous expansion in administrative authority caused by the war and postwar emergencies has led people on both sides of the political party-line boundary to realize the need for safeguards. Extremists on both sides have moved towards the middle, and, that being the case, most of the controversy engendered by extremism has not unnaturally tended to abate.

III. *Suggestions for Improvement of Administrative Procedure in the United Kingdom*

In this portion of his written evidence, this writer will present certain suggestions directed toward the improvement of admin-

[11] *New York* v. *United States* (1951), 342 U.S. 882, at p. 884.

istrative procedure in the United Kingdom. These are based both upon his American experience with the subject and his researches in English administrative law, particularly those on which he has been engaged during the past year. Almost needless to say, it is with the greatest diffidence that these suggestions are advanced by the present writer on what is to him, after all, foreign law. At the same time, it is felt that the point of view of a non-British jurist, who has devoted much study to the subject, will be of use to this Committee, even on matters having to do purely with the administrative law and practice in the United Kingdom. Nor, it should be stated frankly, are the suggestions advanced here offered with anything like dogmatic conviction. They are put forward primarily with the hope of stimulating profitable discussion within the Committee on the various problems dealt with.

A. *Personnel of Administrative Tribunals*

In the mind of the present writer, there is little doubt that the problem of administrative procedure is in large part one of securing the proper personnel to exercise administrative adjudicatory functions. If cases are heard and decided within the administrative process by officers who command public confidence both by their capacity and impartiality, a great deal of the criticisms of administrative procedure will have been met.

In this connection, it is desirable to differentiate between administrative tribunals where cases are both heard and decided by the members themselves and those departments and agencies in which the hearing of evidence is divorced from the duty of decision. At the present time, the members of the majority of tribunals of the first kind (i.e., whose members both hear [in the broadest, not necessarily aural; sense] and decide) are appointed directly by the relevant minister and are, in fact, sometimes even officials of his department. This is true although the political head of a department would appear to be far from the most felicitous choice to select the best personnel for the performance of adjudicatory tasks, especially when the ministry itself is often a party before the tribunal concerned. The suggestion has often been made that the members of administrative tribunals should be appointed by the Lord Chancellor. This would certainly eliminate the present complaints against the personnel of administrative tribunals. The one objection to the suggestion referred to is the practical one of the burden imposed upon the Lord Chancellor by placing the appointing power upon him. If it is felt that the burden that would

be imposed upon the Lord Chancellor is too great, this writer would concur in the suggestion of the Inns of Court Conservative and Unionist Society that, at the least, appointments should be made by the Lord Chancellor whenever the ministry itself is likely to be a frequent party before the tribunal concerned. At any rate, it seems clear that, in such cases, the minister himself is the worst possible person to make the appointments.

As far as the qualifications of those appointed to tribunals are concerned, these should normally be left to the appointing authority. It is, however, difficult to see how a tribunal can properly function without any legally trained members and this writer would strongly urge a recommendation that at least one member of any tribunal (preferably the chairman) be a member of the legal profession.

In cases, such as those arising under the Acquisition of Land (Authorisation Procedure) Act, 1946, where there is a separation between the hearing of evidence and the decision, the greatest difficulty arises out of the subordinate position of the hearing inspector. As far as the private individuals in these cases are concerned, the inspector at the public inquiry is in the position of their trial judge; he is the only one in the ministry to whom they can present their evidence face-to-face. Unless they have confidence in his capacity and impartiality, it is unlikely that they will feel that they have received a fair hearing. Despite the claim often advanced that the minister is not really an interested party in these cases, there is little doubt that there is a widespread impression that the private parties do not get as fair a hearing from a servant of the ministry as they would from someone wholly unconnected with the ministry. In the opinion of the present writer, this impression is justified. It is unrealistic to say that the minister is wholly uninterested in the results in these cases. It is he who has been charged by Parliament to carry out the legislative policies behind the acts administered by him, e.g., to promote the construction of adequate housing. The minister and his subordinates (including his inspectors) are, to some extent at least, infected with what the Donoughmore Committee called "departmental interest". That they should be so infected is eminently proper; it would set an impossible standard to require officials of the ministry not to be predisposed toward enforcement of the policies behind their enabling legislation. What is more questionable, however, is for the private parties concerned to be given their only chance to be heard before servants of the ministry who

have the same "departmental interests". The right to be heard should include the right to present one's case before a wholly impartial hearer—and this as much that justice should seem to be done as that it actually be done.

In this connection, a useful analogy is furnished by the American Administrative Procedure Act, under which hearing officers are placed in an independent position within the different departments and agencies. A similar solution would do much to eliminate the problem of hearing inspectors in Britain. It would establish within each relevant ministry a semi-independent inspectorate, composed of as many inspectors as might be necessary to conduct the public local inquiries held by the ministry. The appointment, compensation, promotion, and tenure of the inspectors should be controlled by some organ wholly independent of the ministry, although (as is true in the American experience) the recommendations of the latter would normally be considered with great respect. It should be emphasized that the inspectors envisaged would be fully employed in presiding over inquiries in the ministries to which they are attached. They would not be *ad hoc* persons assigned to hear individual cases in a particular ministry. As Lord Silkin aptly puts it, "the public gets better service, and the facts are better brought out, by having people who specialise in these matters and whose job it is to conduct public inquiries, than if the work were done by *ad hoc* persons".[12] Independent inspectors assigned to a ministry would possess the necessary expertness. Nor is it entirely accurate to assert, as the learned Lord does, in his speech just quoted, that such inspectors must also become virtually servants of the ministry, in the same way that the present inspectors are. The American experience shows that hearing officers can acquire real independence, if their appointment, compensation, promotion, and tenure, are controlled by an independent organ, even though they do all their work within a particular department or agency.

As far as the body which controls the independent inspectorate envisaged is concerned, several possibilities might be suggested. The Lord Chancellor's department would be ideal; but the burden would probably be too great. More practical would be control by the Treasury, possibly even by a "department of inspectors" set up within the Treasury. At a later point in this evidence, the suggestion is made that a "department of administrative procedure" be established within the Treasury, to supervise procedures

[12] *Ante.*, footnote 4.

within the government departments. Such body might well be vested with the authority envisaged over inspectors in the different ministries.

An important matter bearing upon the question of personnel is that of compensation. It is self-evident that the ludicrously low salaries often received by the members of tribunals and administrative hearing officers must have an adverse effect on the quality of adjudicatory personnel. It is not for the present writer to make any specific suggestions on this point. But he does wish to call the attention of this Committee to the movement (already noted) in the United States to have the salaries of administrative hearing officers tend to approach those of trial judges.

B. *Powers of Tribunals and Inspectors*

If administrative tribunals are adequately to perform their adjudicatory tasks, they must be given substantially the same powers as are possessed by courts of original jurisdiction. This does not necessarily mean that they have to (or even should) follow the details of courtroom procedure, but only that they should be vested with authority over their proceedings comparable to that of trial judges. This should include the power to take testimony under oath (where the tribunal desires to do so) and that to issue subpoenas. The subpoena power is, it is true, one capable of serious abuse. It is, however, essential to the proper exercise of adjudicatory authority and has been generally conferred upon administrative tribunals in America.

Where the duty of hearing evidence is divorced from that of deciding (as is the case where a public local inquiry is held before an inspector of a ministry), the private parties all too often feel that they are not being given a real opportunity to present their case. The position of the hearing officer in English administrative law —i.e., of the inspector at the public local inquiry — seems to be a most unfortunate one from the point of view of ensuring public confidence in administrative justice. His role is simply that of a monitor at the hearing, with authority to keep order and supervise the taking of testimony. He serves as the medium of transmission from the private individual to the ultimate judge; he has little or no power to play a real part in the final decision of the case. But the parties have a sound desire to make their arguments and present their evidence, not to a monitor, but to an officer who has real powers of hearing and decision. They are quite rightly not satisfied where their only hearing is before

a relatively minor official, who has little to do with the final determination.

In this respect, it is interesting to note the powers possessed by hearing officers under the American Administration Procedure Act. Under section 7(b) of that law, such officers are given authority to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters. Similar powers should be vested in inspectors and other hearing officers in Britain.

Even more important, from the private citizen's point of view, are the defects inherent in dichotomization of the processes of hearing and decision. "As the conduct of an administrative hearing becomes divorced from responsibility for decision two undesirable conclusions ensue; the hearing itself degenerates and the decision becomes anonymous". This was the conclusion of an important official report in the United States (that of the Attorney General's Committee on Administrative Procedure) which was recently echoed by the Inns of Court Conservative and Unionist Society study. The decision of his case by a known tribunal before whom one can state his case and meet the contentions of his opponents is vital to the fostering of a belief that justice is being done.

It is true that, in many cases, the desideratum of a personal decision by a known tribunal is not practical in the process of departmental decision. But, even where it is necessary to separate the duty of hearing evidence from that of deciding, steps should be taken to mitigate the evils resulting from such separation. Here again, the solution adopted by the American Administrative Procedure Act furnishes a useful analogy. If, as under that Act, the hearing officer could be given a real responsibility in the decision process, much of the problem will have been met. One way to accomplish this would be by the rule urged by the Inns of Court Conservative and Unionist Society study. "With a view to mitigating these evils, we would like to see it a rule that the inspector should in all cases make a recommendation or provisional decision. The minister would then approximate to a tribunal of appeal, to whom representations could be made as to any error alleged in the inspector's report, but who would not ordinarily dissent from

his findings of fact."[13] The detailed way in which the rule is worked out is, however, of much less importance than the recognition of the principle that the departmental hearing officer should play a responsible part in the process of decision. Nor would such a principle really impair the relevant Minister's own decision-making power. He would still be able to change any recommended or provisional decision on appeal from or review of inspectors' decisions. If the provision of the American Administrative Procedure Act is followed, indeed, the minister's reviewing authority would not be limited to appellate power, as that term is usually conceived. Under the American act, the agency heads, in reviewing the decisions of hearing officers, have all the powers which they would have in making the initial decisions themselves.

C. *Inspector's Reports*

The problem of the disclosure of inspector's reports has been a disputed one in English administrative law ever since the celebrated decision of the House of Lords in *Local Government Board* v. *Arlidge*,[14] The holding in *Arlidge's* case that the private citizen had no right to disclosure of an inspector's report has turned out to be the most controversial part of the House of Lord's decision. It has been severely criticized on both sides of the Atlantic, not least of all by the Committee on Ministers' Powers, which concluded unanimously that inspectors' reports should be published, even implying that non-disclosure in these circumstances was contrary to "natural justice".

Criticisms of the *Arlidge* case, even from as weighty a source as the Donoughmore Committee, have, however, been mainly of academic interest, so far as the English law has been concerned, in view of the rigid adherence of the House of Lords to the doctrine of stare decisis. Thus, in the one case since *Arlidge* where the claim of a right to disclosure of an inspector's report has been raised, Swift J. had no difficulty in holding that the matter was conclusively decided by the case of *Local Government Board* v. *Arlidge*.[15]

Those who, like the present writer, have always felt that *Arlidge's* case was wrongly decided in upholding non-disclosure of inspectors' reports have now received strong support in the 1954 decision of the Supreme Court of New Jersey in *Mazza* v. *Cavicchia*.[16]

[13] *Ante.*, footnote 3, at p. 60. [14] [1915] A.C. 120.
[15] *Denby [Williams] & Sons Limited* v. *Minister of Health*, [1936] 1 K.B. 337, at p. 343.
[16] (1954), 105 A. 2d, 545, (N.J.).

In the United States, as in England, administrative hearings have normally been presided over by subordinate hearing officers (customarily called examiners) who, like their English counterparts, have submitted reports for the benefit of their agency heads. The American practice has, unlike the English one approved in *Arlidge*, been for such reports to be submitted to the private individuals concerned.

It has, indeed, generally been assumed by American administrative lawyers that those affected have a constitutional right to see the report and to take exceptions to it before the decision of the agency is rendered. For an agency decision to be based upon a secret report, by an examiner or some other officer, would be for it to violate the right of the private party to have his decision based only upon materials which he knows about and is given an opportunity to meet.

Though this view clearly seems consistent with basic American administrative-law principles—and it has, it should be noted been given express statutory articulation in the Federal Administrative Procedure Act of 1956—there was not, until recently, a decision by an ultimate appellate tribunal in the United States expressly on the point. During 1954, however, the question of the right of private individuals to disclosure of an administrative hearing officer's report which plays a part in the decision process was unequivocally answered in the affirmative in the decision by the New Jersey court already referred to.

In that case, the private individual had had his licence to sell alcoholic beverages suspended after a hearing, which had been held before a subordinate (in this case called a hearer) of the agency. The hearing officer had forwarded the record of the hearing to the agency head together with a report of his findings and conclusions, but a copy was not furnished to the private party. The court held that the failure to disclose the hearer's report violated the individual's statutory right to a hearing. Though, in a field such as liquor licensing, there is in the American system no constitutional right to be heard, where the enabling statute expressly requires a hearing it carries with it the elementary due process requirement that the hearing be fairly conducted. And this precludes the submission by a hearing officer to the deciding authority of secret reports containing findings of fact, conclusions of law and recommendations for the disposition of the case.

The American court's rejection of the *Arlidge* holding of nondisclosure was based primarily upon the fundamental principle

against *ex parte* evidence which governs all adjudicatory proceedings. It was this principle which was at issue in the well-known case of *Errington* v. *Minister of Health*,[17] and the line of cases following it. Where an administrative deciding officer takes into consideration materials which might have been, though they were not, presented at the public local inquiry or other agency hearing, but were given *ex parte* afterwards without the private parties having any opportunity whatever to deal with those materials, then the administrative decision is illegal. Such was the basis for the decision of the Court of Appeal in *Errington's* case.

The New Jersey court, in the decision under discussion, relied upon the *Errington* principle (which is as firmly established in American as it is in English law) as the foundation for its holding that the private individuals concerned had a right to disclosure of the hearing officer's report. Its opinion, delivered by one of the most distinguished of American jurists, Vanderbilt C.J., starts by reiterating that in any proceeding that is judicial in nature, whether in a court or in an administrative agency, the process of decision must be governed by the basic principle against *ex parte* evidence. " 'Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing' . . . . Unless this principle is observed, the right to a hearing itself becomes meaningless. Of what real worth is the right to present evidence and to argue its significance at a formal hearing, if the one who decides the case may stray at will from the record in reaching his decision? Or consult another's findings of fact, or conclusions of law, or recommendations, or even hold conferences with him?"

The principle against *ex parte* evidence, the opinion goes on, necessarily bars the use of the hearing officer's report as an aid in the decision process unless it is made part of the record. Whatever actually plays a part in the decision should be known to the parties and be subject to being controverted. The report obviously played a part in the administrative decision. For it to have played a part without having been shown to the private individual violates his right to have the decision based exclusively upon public matters, which are known to him and can consequently be controverted by him. The individual litigant is entitled to be apprised of the materials upon which the administrative agency is acting. He has a right not only to refute but, what in a case like this is usually more im-

[17] [1935] 1 K.B. 249.

portant, to supplement, explain, and give different perspective to the hearing officer's view of the case.

The administrative hearing, the chief justice rightly emphasizes, has been given a particular form and character by the legislature for the purpose of satisfying those whose interests may be involved that all relevant facts and considerations will be put fairly before the deciding official, so that he may arrive at a just decision. When the report giving the hearing officer's digest of the evidence and his findings and recommendations is turned over without coming to the attention of the private individual, doubt may well arise as to whether a true view of the facts has been conveyed. 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 hearing officer may have drawn some erroneous conclusion in his report, or he may even have made some factual blunders. Such mistakes are not uncommon in both judicial and administrative proceedings; indeed, the whole process of judicial review in both fields is designed to guard against them. But if a party has no knowledge of the secret report or access to it, how is he to protect himself? An unjust decision may very likely be the result where no opportunity is given to those affected to call attention to mistakes. That is why it is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert. In the instant case, Chief Justice Vanderbilt concludes, the hearing officer can be characterized as a "witness" giving his evidence to the judge behind the back of the private individual who has no way of knowing what has been reported to the judge.

To one familiar with the almost bare assertion of the House of Lords in the *Arlidge* case, that there was no right to disclosure of an inspector's report, the well-reasoned opinion of Chief Justice Vanderbilt appears particularly satisfying. Other than the claim of administrative convenience, no valid reason was really given in *Arlidge* why inspector's reports should be treated as confidential documents. Their lordships appear to have felt that the inspector could declare himself freely only if his report were kept confidential. As it was expressed by Lord Shaw, "if it were laid down in courts of law that such disclosure could be 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". But as Sir Carleton Allen has pointed out, these arguments might apply with equal force to any report whatever. "A judge could often give a very far from 'colourless' judgment if he allowed himself to comment at large on the elements which nearly always loom behind, though they do not actually appear in a lawsuit".[18]

One wonders, indeed, whether those who urge that the disclosure of inspectors' reports would hinder communication between the hearing and deciding officials have not been raising a bugaboo devoid of substance. It is submitted, with all respect, that the fear of Lord Shaw just cited is based upon *a priori* reasoning which may or may not be consistent with the facts of administrative life. Is it at all proved that servants of a ministry will make reports less honestly if they think they will be seen outside the ministry? On the contrary, will not the inspector's report, like the opinion of a court, be a more considered and conscientious product if it has to run the gauntlet of public scrutiny? And, even if the inspector may be somewhat restrained, it does not necessarily follow that that is an unmitigated evil. It is hard to see how the work of a department is impaired if its inspectors purge their reports of the intemperate type of comment that was found to abound in the departmental file in the *Crichel Down* inquiry.

There is not the slightest evidence that the disclosure of the reports of examiners and other hearing officers in the American system has had any adverse effect upon administration on the western side of the Atlantic. On the other hand, there is every indication that, by giving to the citizen the right to see, and if need be, to controvert the reports of hearing officers, the American administrator has notably increased the confidence felt by those subject to administrative justice. It should not be forgotten, as one of the greatest of American judges—Hughes C.J.—pointed out, that "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For . . ., if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance

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[18] Allen, Law & Orders (1945), p. 151.

with the cherished judicial tradition embodying the basic concepts of fair play."[19]

D. *Reasoned Decisions*

Writing in 1947, this writer asserted that no other aspect of English administrative law strikes the outside observer in so unfavorable a light as the failure to require reasons for administrative decisions. In his present evidence to this Committee, he should like to take the opportunity unequivocally to reiterate that assertion and to concur in the recent conclusion of the Inns of Court Conservative and Unionist Society study that "The single reform which would do most to vindicate the Rule of Law and ensure justice in administrative disputes would be to insist that a decision, if challenged, should be fortified by a statement of the facts and reasons on which it is based".[20] In asserting the need for reasons to be given by administrative agencies vested with decision-making authority, this writer is merely following in the footsteps of everyone in Britain who has written on the subject. Regardless of their political inclinations, those outside the government departments themselves have unanimously condemned the present practice. Yet, despite the recommendations on the subject by the Donoughmore Committee and the subsequent strictures from many quarters, the situation in Britain with regard to the obligation to give reasoned decisions remains what it was a generation ago.

The right to know the reasons for a decision which adversely affects one's person or property is a basic right of every litigant (and that whether the forum be judicial or administrative). But the requirement that reasons be given does more than merely to vindicate the right of the individual to know why a decision injurious to him has been rendered. For the obligation to give a reasoned decision is a substantial check upon the misuse of power. The giving of reasons serves both to convince those subject to decisions that they are not arbitrary and to ensure that they are not, in fact, arbitrary. The need publicly to articulate the reasoning process upon which a decision is based, more than anything else, requires the magistrate (judicial or administrative) to work out in his own mind all of the factors which are present in a case. A decision supported by specific findings and reasons is much less likely to rest on caprice or careless consideration. As Judge Jerome

[19] *Morgan* v. *United States* (1938), 304 U.S. 1, at p. 22.
[20] *Ante*, footnote 3, at p. 48.

Frank well puts it, in language as applicable to decision-making by administrators as by trial judges, the requirement of reasons has the primary purpose of evoking care on the part of the decider. "For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper".[21]

In the United States, perhaps the most prominent reason advanced for the requirement of reasoned decisions is the role of such decisions in facilitating review by the courts. If the bases of administrative decision are not articulated, it is most difficult for a reviewing court to determine whether the decision is a proper one. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong", reads an oft-cited statement of Cardozo, J.[22] Even though judicial review is not as important in English administrative law as it is in the American system, this consideration should not be wholly overlooked on the eastern side of the Atlantic. And this is particularly true since the decision of the Court of Appeal in *Rex* v. *Northumberland Compensation Appeal Tribunal*,[23] In that case, the court held that an administrative decision could be quashed on certiorari for error of law where it "spoke" its error on its face. But, where the decision was not contained in such a "speaking order", the courts could not intervene. Under the "speaking order" doctrine, for judicial control to be of practical value, the administrative tribunal or agency, "in making its order, should not make it an unspeaking or unintelligible order, but should, in some way, state upon the face of the order the elements which had led to the decision".[24] The words quoted are from a noted judgment of Lord Cairns L.C., in which he laid down the distinction between "speaking" and "unspeaking" orders, which has become of basic importance in present-day English administrative law. When Lord Cairns speaks of an "unspeaking or unintelligible order", he obviously means an order which gives no reasons.[25] If the administrator does not give reasons, he, in effect, disarms the exercise

[21] *United States* v. *Forness* (1942), 125 F. 2d, 928, at p. 942 (2d Cir.)
[22] *United States* v. *Chicago, M.St. P., & P.R.R.* (1935), 294 U.S. 499, at p. 511.
[23] [1952] 1 K.B. 338.
[24] *Walsall Overseers* v. *London & N.W. Ry.* (1878), 4 App. Cas. 30, at p. 40.
[25] *Rex* v. *Northumberland Compensation Appeal Tribunal*, [1951] 1 K.B. 711, at p. 718.

of the High Court's supervisory jurisdiction. In such a case, the court cannot examine further than the face of the challenged decision, which, in Lord Sumner's famous phrase, "speaks" only with the "inscrutable face of a sphinx".[26]

In order to ensure that they will be able effectively to review the legality of administrative decisions, the American courts have required administrative decisions to be "speaking" ones, that is, they must contain at least the findings upon which they are based. And, interesting enough, the *Conseil d'Etat* in France (in a system which, like that in Britain, is based upon legislative supremacy) has recently gone far in the direction of requiring administrative decisions to contain reasons. In a decision rendered by it in 1950[27] the *Conseil* annulled an administrative decision in which no reasons were given. The *commissaire du gouvernement* there advocated a bold departure from the prior case law and stated that the *Conseil* should require reasoned decisions in every case in which the administrator was exercising adjudicatory authority, even though the legislature did not impose such requirement. Otherwise, he asked, how could the *Conseil* really determine the validity of a challenged decision. In its decision adopting the approach of the *commissaire*, the *Conseil d'Etat* stated that the obligation to give reasons was imposed "in order to enable the reviewing court to determine whether the directions and prohibitions contained in the law have been followed". This, as already stated, is at bottom the reason why American courts have required administrative decisions to contain findings that show their basis. Under the "speaking order" doctrine, it should be noted, this reason is of equal pertinence in Britain.

The only possible justification for a rule so offensive to the fundamentals of fair play as that which now prevails in Britain on the point under discussion is that to require the administrator to give reasons would be to impose an impossible burden upon effective administration. In the opinion of the present writer, the experience in the United States demonstrates that, in fact, the obligation to give reasons does not impede the operation of tribunals and agencies. To require reasons does not, it should be emphasized, mean that the administrator must render an elaborate judicial-type judgment in every case. But he should tell those affected why he has acted as he did and this means that he should, paraphrasing the language of the American Administrative Proce-

[26] *Rex* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128, at p. 159.
[27] (*Billard*, 27 janvier 1950) Sirey 1950, part 3, p. 41.

dure Act state his findings and conclusions, as well as the reasons or basis therefor, upon all the material issues presented in the case. These need not be at all elaborate; they can be stated in an informal letter to those affected. And, unless the administrative action is, in fact, arbitrary, the reasons behind it must be already contained in the departmental file on the case.

This Committee should strongly urge that administrative decisions must be supported by reasons. One can perhaps picture a satisfactory dispensation of justice without reasons by St. Louis under the oak at Vincennes; but who would be willing to submit his case to the unfettered discretion of other than a saint?

E. *Right to Be Heard*

Few people will disagree with the conclusion of the Donoughmore Committee that it is an essential principle of natural justice that "No party ought to be condemned unheard; and if his right to be heard is to be a reality, he must know in good time the case which he has to meet." It cannot, however, be denied that, under a number of recent cases, the salutary principle of *audi alteram partem* has, in the words of one English writer[28] lately shown disturbing signs of debility. Mr. Wade has, indeed, gone even further[29] and luridly referred to the "twilight of natural justice." The importation of such Wagnerian motif into commentaries on English administrative law may be unjustified. At the same time, from a comparative point of view, it would appear that the *audi alteram partem* rule has come in recent years to be more limited in Britain than in almost any other English-speaking country.

In this connection, the present writer wishes to call the attention of this Committee to several post-war cases which deny the existence of a right to be heard prior to the making of an administrative decision on the ground that the decisions at issue were not "judicial" in character. The cases referred to are *Nakkuda Ali* v. *Jayaratne*,[30] *Regina* v. *Metropolitan Police Commissioner; ex parte Parker*,[31] *and ex parte Fry*.[32] Of these three cases, the one that has, not unnaturally, attracted the most attention in Britain is the *Parker* case, where a cab driver was held to be without judicial redress although his license had been revoked without giving him

[28] de Smith, The Right to a Hearing in English Administrative Law (1954), 68 Harv. L. Rev. 569, at p. 588.

[29] The Twilight of Natural Justice (1951), 7 L. Q. Rev. 103.

[30] [1957] A.C. 66, (where, though a decision of the Judicial Committee was involved, their Lordships took pain to emphasize that they were deciding in accordance with the relevant rules of English law).

[31] [1953] 1 W.L.R. 1150. [32] [1954] 1 W.L.R. 730.

any opportunity to call a relevant witness. To many observers in the United Kingdom themselves, it has appeared shocking that the cab driver could thus be deprived of his livelihood, even though there had been a clear denial of natural justice.

According to the Lord Chief Justice, the reason why the rules of natural justice did not apply to the cab driver's case was that "it is impossible to say that the commissioner . . . was in a judicial or quasi-judicial position. He was in fact exercising a disciplinary authority." With all respect, it is believed that the distinction drawn by his Lordship between adjudicatory and disciplinary authority is not sound when applied to a case like that of Parker.

This Committee should be interested to learn that, shortly after the decision of the Divisional Court in *Parker's* case, exactly the same problem was presented to one of the most highly regarded American courts, the Court of Appeals of New York. In the New York case, too, a cab driver's license was revoked without compliance with the rules of natural justice. And the court held for the cab driver, asserting that "Although the statutes empowering the hack bureau and the commissioner to grant, suspend or revoke a hack driver's license do not expressly require that those licenses may be withdrawn only upon notice and an opportunity to be heard, it is not necessary that they do so. Where the exercise of a statutory power adversely affects property rights—as it does in the present case—the courts have *implied* the requirements of notice and hearing, where the statute was silent".[33]

The New York court directly rejects the view (analogous to that of Lord Goddard in *Parker's* case) that the case involved a mere "disciplinary" or "administrative" proceeding. It draws a distinction between the position of the taxi driver and that of a government employee, who can be discharged from his employment without notice or hearing (unless, of course, notice and hearing are required by statute). The petitioner here was not a public employee, but a private citizen. His livelihood depended upon the persons whom he served as a licensed taxi driver. He was not required to report his every action to a government superior, but was merely subject to limited regulation with regard to certain aspects of his business. "The rules applicable to the disciplining, suspension and discharge of public employees," states the New York court, "should not be extended to include the suspension or revocation of licenses of those whose salaries are not paid from public funds." Revocation of a private citizen's license, the court

[33] *Hecht* v. *Monaghan* (1954), 121 N.E. 2d 421, at p. 424 (N.Y.).

concludes, is not a mere "administrative" act. "Where, as in the present case, the statute empowers the agency to revoke a license because of a failure to comply with or because of willful or knowing violation of the regulations of that agency, then the administrative act is of a judicial nature since it depends upon the ascertainment of the existence of certain past or present facts upon which a decision is to be made and rights and liabilities determined. It is clearly not a merely administrative act concerned with the internal functioning of the agency itself, but it is a judicial or quasi-judicial function of the administrative body."

It is not, of course, intended to set up the New York court as an appellate tribunal in *Parker's* case. At the same time, the decision of that court does furnish strong support for those who feel that the Divisional Court in *Parker* was imposing an unwarranted restriction upon the application of the rules of natural justice. It is simply not accurate to assume, as Lord Goddard apparently does, that all exercises of what he calls disciplinary authority by the administration should be treated alike upon review by the courts, regardless of whether they are directed against private citizens or against those who are themselves part and parcel of the administrative hierarchy. On the contrary, where an administrative decision adversely affects the position of a private individual, insofar as the carrying on of his particular calling is concerned, the decision in question should normally be treated as "judicial" in nature, subject to the requirements of natural justice. And this is true, *a fortiori*, where the administrative decision is one which imposes a penalty upon the individual because of his failure to come up to the standard of conduct required of those subject to the particular regulatory scheme. In such a case, the administrative proceeding may not technically be a criminal one; but it visits a great hardship on the individual, comparable in many cases to that imposed upon him for the commission of a crime. For the individual to lose his license is for him to suffer an economic death sentence, whose consequences may be more severe than those resulting from most of the penalties imposed by the criminal law. To condemn him to these consequences unheard is wholly contrary to the spirit of Anglo-American administrative law. As Lord Kenyon C.J. expressed it over a century and a half ago, "every man ought to have an opportunity of being heard before he is condemned: and I should tremble at the consequences of giving way to this principle."[34]

[34] *Rex* v. *Gaskin* (1799), 8 T.R. 209, at p. 210.

It is unsound to make the applicability of the rules of natural justice depend upon the distinction drawn by Lord Goddard in *Parker's* case. And the same is true of the distinction apparently drawn by Lord Radcliffe in the already cited case of *Nakkuda Ali* v. *Jayaratne*,[35] between so-called "privileges" and "rights". In the case referred to, the rules of natural justice were held inapplicable in the revocation of a textile dealer's license because, according to Lord Radcliffe, that was only "executive action to withdraw a privilege." The implication is that administrative action to withdraw a mere "privilege" is not sufficiently "judicial" to be subject to the rules of natural justice.

But to call a particular license a "privilege" does not meet the problem of natural justice. It does not at all follow that because the law may not guarantee a right to drive a taxi (*Ex parte Parker*) to be a textile dealer (*Nakkuda Ali* v. *Jayaratne*), or to be a fireman (*Ex parte Fry*), that an administrative regulatory agency can resort to any scheme for depriving people of their positions as cab drivers, textile dealers, or firemen. It should be, not the tag used to characterize any administrative function, but the effect of its exercise upon the individual concerned that should be determinative. It is true that there is room for distinction in this field between the legislative and the judicial powers of administrative agencies. It is only when the function at issue is adjudicatory—as opposed to one involving the exercise of powers of delegated legislation—that the administrator should be held to the requirements of natural justice. There is, however, no place for further refinement so far as adjudicatory decisions are concerned, and consequently no justification for the recent English tendency in the cases discussed to treat administrative adjudications as "non-judicial". If an administrative decision adversely affects the person or property of a particular private citizen, it should be treated as judicial in nature, at least in order to determine what procedural requirements must be observed.

In the opinion of this writer, the *audi alteram partem* rule should apply to every case where the person or property of a private individual is adversely affected by the decision of an administrative tribunal or agency—and that regardless of whether the decision be characterized as "judicial", "quasi-judicial", "administrative", or one affecting only a "privilege", and regardless of the extent to which discretion may be involved. The test should be that of the effect upon the individual concerned: if he is ad-

[35] *Ante.*, footnote 30.

versely affected, upon individual grounds not common to the community in general, he should be given the opportunity to state this side of the case.

It follows from what has just been said that this writer is opposed to the tendency which became apparent in English administrative law in the *Stevenage* case,[36] to limit the rules of natural justice to cases in which there is a so-called "triangular situation" or *lis*—i.e., a case with two contesting parties and the administrator as the judge between them. If the administrative decision adversely affects a particular individual, he should be heard in accordance with the rules of natural justice whether or not the case involves a *lis* in the *Stevenage* sense. Indeed, it is when there is no triangular situation—when the administrator is not a third-party judge but both party and judge—that the position of the private citizen is weakest. It is in such a case that the law should be especially careful to ensure to him whatever procedural rights it can as a practical matter. To say that, because he is confronted by a judge who is also the opposing party, he must be deprived of all the safeguards of natural justice is a logical *non sequitur*. In such a case, as in those involving a triangular situation, the legislative failure expressly to provide that all the rules of natural justice should govern should not leave the citizen without any adjective rights. The justice of the common law will, in the words of an early case, supply the omission of the legislature.[37]

It would be a most salutary step for this Committee strongly to assert the principle that any individual who is adversely affected, upon individual grounds, in his person or his property by an administrative decision has a right to be heard in accordance with the rules of natural justice prior to such decision. This principle should apply regardless of whether the decision is by a known tribunal or by a government department.

What does the right to be heard include?

It should include:

(1) The right to be heard orally;

(2) The right to present evidence and argument;

(3) The right to rebut adverse evidence, through cross-examination and other appropriate means;

(4) The right to have the decision based only upon known evidence;

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[36] *Franklin and Others* v. *Minister of Town and County Planning*, [1948] A.C. 87.

[37] *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B.N.S. 180, at p. 196; 143 Eng. Rep. 414.

(5) The right to appear with counsel.

All of these rights, it should be noted, are fully safeguarded in cases covered by the American Administrative Procedure Act.

Most difficulty will, it is expected, be felt by this Committee with regard to the recommendation that the citizen should be given the right, should he desire to exercise it, to call for an oral hearing. How, it will be asked, can administration be carried on effectively if every administrative decision which affects private individuals must be preceded by a full hearing?

To this question, three pertinent observations should be made. In the first place, the administrative hearing need not be held before the head of the department or agency concerned. The relevant minister can (indeed he must) delegate the job of hearing cases to subordinates. Thus, a procedure like that under the Acquisition of Land (Authorisation Procedure) Act, 1946, where the inquiry is held before an inspector of the ministry is eminently proper (though, as has been suggested, improvements can be made in the personnel and powers of the inspectorate). In the United States, it should be noted, delegation of the actual hearing function occurs, not only in the case of ministries, but also in those involving many administrative tribunals, where the volume of cases has necessitated initial hearings before examiners rather than the members of the tribunal.

Just as significant is the fact that, subject to the minimum requirements of the rules of natural justice, the details of the hearing which must be afforded will be entirely up to the particular tribunal or agency concerned. The methods of administrative justice need not *ex necessitate* be those of courts of justice. It is not even necessary that the administrative process in Britain follow the formal adversary procedure which characterizes its counterpart in the United States. So long as the essentials of the five rights already listed are afforded, the fundamentals of fair play are preserved, even though the administrator hears without all of the trappings of the courtroom.

The most important factor to be considered, however, is that establishment of the right to be heard orally does not, as Professor Robson aptly points out, mean that a "Day in court" will be held automatically in connection with every trifling dispute with which the administrator has to deal. "In a very large number of cases a desire to save expense, or to avoid personal attendance, or the existence of agreement as to the facts, would prevent the right to an oral hearing from being exercised."[38] The experience in American

[38] Robson, Justice and Administrative Law (3d ed., 1951), pp. 579-80.

administrative law, where the right to a preliminary hearing exists whenever an administrative decision will adversely affect personal or property rights, proves the soundness of Professor Robson's observation. If the right to a full, formal hearing were insisted upon in every case where it exists, it would paralyze administration in the United States. But the fact is that the right is asserted in only a very small percentage of the cases. Taking the work of the American administration as a whole, the cases where hearings are actually insisted upon amount to much less than 5% of all the cases. In well over 95% of the cases where a formal right to be heard exists, then, the parties, for the reasons adverted to by Professor Robson, are willing to waive their right. There is no reason to assume that the American experience in this respect would not be duplicated in the United Kingdom if the right to an oral hearing becomes equally established in British administrative law.

F. *Administrative Procedure Legislation*

In this portion of his evidence, this writer will seek to satisfy what he feels may well be a natural desire on the part of the members of this Committee to obtain from an American jurist his views on the desirability of having in the United Kingdom a statute patterned upon the American Administrative Procedure Act. It should perhaps be made clear at the outset that the present writer has, throughout his professional career, been a strong supporter of the federal law of 1946; indeed, he helped draw up the Hoover Commission Task Force Report which, as already mentioned, seeks substantially to strengthen the Administrative Procedure Act. This Committee should take into account this writer's bias (if one can call it that) in favor of general administrative procedure legislation in considering his views on the subject.

To American administrative lawyers, there is no doubt that the Administrative Procedure Act has proved of great value. This is shown by the fact that there have been no serious attempts since 1946, either within or outside the administration, to repeal, or even substantially to weaken, this Act. On the contrary, as has already been shown, the significant development in present-day American administrative law is in the direction of greatly strengthening the Administrative Procedure Act, if need be by replacing that law with a so-called Administrative Code. All schools of American thought (including those who opposed such a law prior to 1946) appear to have settled on the Administrative Procedure

Act as stating the necessary procedural requirements which the legislature should impose. Indeed, it is fair to say that there is a growing movement in the different states of the American Union for the enactment of laws patterned upon the federal Act. Such a movement would have had little chance of progressing as far as it has if American jurists were not convinced of the value of the Administrative Procedure Act.

It will be objected that, though it may be valuable in theory, a general administrative procedure law would prove unworkable in Britain because of the great diversity in the existing procedures of tribunals and agencies on the eastern side of the Atlantic. A uniform procedure law would thus be impossible, even if it were thought to be desirable. An argument based on the diversity in existing administrative procedures would seem, however, to misconceive the purpose of a general statute like the American Administrative Procedure Act. The aim of such legislation is not, as some would contend, to put the administrative process in a "straight jacket". No one can deny that an attempt to mould all existing administrative procedures into an elaborate legislatively prescribed pattern could be most injurious. But that is just what a statute like the Federal Administrative Procedure Act does not attempt to do. Such a law deals with major principles only, not matters of detail. Every student of administrative law recognizes that many of the procedural details relating to administrative action must necessarily vary from agency to agency. This is as true in America as it is in Britain. However, as the National Conference of Commissioners on Uniform State Laws in the United States urged in its 1943 Report, "there are certain basic principles of common sense, justice and fairness that can and should prevail everywhere." An Administrative Procedure Act incorporates these principles, with only enough elaboration of detail to support the essential major features. The comparison of such a statute to elaborate codes of procedure to which the legal profession of today so strongly objects is totally inapt. "Lawyers are not seeking to tie administrative agencies down by a mass of detail, as so many courts were tied down by statutes and codes a generation ago. What they seek is to secure the basic requirements of just determination of facts and sound application of law".[39]

The experience in the United States with the Federal Administrative Procedure Act strongly urges at least the consideration of whether an analogous statute would not prove of equal value in

[39] Pound, Administrative Law (1942), p. 75.

Britain. The drafting of such a statute for the United Kingdom would, it is true, even with the American example, not be an easy task. One can even concede that, as is the case with the federal law, the legislative prescription of general procedural safeguards must inevitably contain many imperfections. Yet the fact that it may not be possible to draw up a perfect statute to govern administrative procedure does not mean that an adequate statute cannot be drafted. The American experience, for one, indicates the contrary. To quote a leading American judge's conclusion on the Federal Administrative Procedure Act, "Seams have appeared and, as in the case of the Federal Rules of Civil Procedure after a similar trial period, it may sooner or later require a revision, but even with its defects it has gone far to achieve the goal asserted by Mr. Justice Brandeis, 'In the development of our liberty, insistence upon procedural regularity has been a large factor'."[40]

It is hoped that it is more than the natural desire of one to praise his own country's institutions that leads this writer to assert that the example of the American Act of 1946 is most pertinent to a Committee appointed to re-evaluate administrative procedures in the United Kingdom. The Administrative Procedure Act represents the first legislative attempt in the common-law countries to ameliorate the defects that have arisen in the administrative process. It is not contended, of course, that a detailed code of administrative procedure is desirable or even feasible. One must ever bear in mind the warning of Lord Shaw against the over-crystallization of the principles of natural justice. The recognition of the fact does not, however, deny the need for a rigid insistence upon the "fundamentals of fair play" in administrative action. "There are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding."[41] The American Administrative Procedure Act points the way to a legislative formulation of these fundamentals. As it has recently been expressed by an acute English observer, "American administrative law is so much more developed than the British that there is little for the American lawyer to learn from British experience—except to be on guard against a weakening of judicial control. Cannot Marshall Plan Aid include 'administrative law'?"[42]

G. *Continuous Supervision over Administrative Procedure*

In recent years, administrative lawyers in the United States

[40] Vanderbilt, The Doctrine of Separation of Powers (1955), p. 94.
[41] *Ante.*, footnote 39. [42] Street (1950), 59 Yale L. J. 593.

have come to see that *ad hoc* investigation every two decades or so into the different tribunals and agencies is far from adequate to ensure proper procedures within the administrative process. The tremendous expansion of administrative authority, accompanied by a vast proliferation of tribunals and agencies vested with authority over the person or property of private citizens, has been seen to require continuous supervision by a permanent governmental organ. The feeling to this effect was given official articulation in the 1941 Report of the Attorney General's Committee on Administrative Procedure. It recommended the creation of an agency to improve administrative procedures by continuous study and supervision. This agency, to be called the Office of Federal Administrative Procedure, was envisaged as a body whose major function would be to examine critically the procedures and practices of the agencies which may bear strengthening or standardizing, to receive suggestions and criticism from all sources, and to collect and collate information concerning administrative practice and procedure. In addition, as the 1941 Report conceived it, the proposed office was to be vested with supervision over the appointment, compensation, promotion, and tenure of hearing officers within the different departments and agencies.

This proposal of the Attorney General's Committee has not, it is true, as yet been given practical effect in federal administrative law in the United States. Several of the American states have, however, set up central offices of the kind recommended. Notable in this respect has been the State of California, which has set up a Division of Administrative Procedure, responsible both for the hearing officer personnel of the different agencies within that State and for the general subject of administrative procedure. The California Division publishes a monthly bulletin for the information of departments and agencies in that State and is generally believed to play a most useful role in California administrative law.

More recently, both the Report of the Hoover Commission Task Force and that of the Special Committee of the American Bar Association have urged the establishment in the federal government of an office of administrative procedure. Under the Task Force Report, the proposed office (called the Office of Legal Services and Procedure) is to assist the departments and agencies in simplifying, clarifying, and making uniform their rules of practice and procedure; to receive and investigate complaints regarding the legal services and procedures of administrative agencies; and to make reports to the attorney general and the Congress on facts

and statistics collected by the office and its recommendations thereon. It is proposed that statutory authority be provided requiring the departments and agencies concerned to comply with the directives of the suggested office for the simplification, clarification, and uniformity of rules of substance and procedure.

This Committee might well consider whether an agency vested with continuous supervisory authority over administrative procedures, of the type proposed by the American reports referred to, would not prove of equal utility in the United Kingdom. Such an agency, if it were created, might take the form of a "department of administrative procedure" within the Treasury. Such department would place on a permanent basis the work of investigation now being carried on by this Committee. It is not suggested that the proposed department should be empowered to dictate to tribunals and departments on procedural matters. Rather, through continuing studies of the different administrative procedures, it will be able to make constructive suggestions for improvement which administrators will be free to adopt or reject. Even more important, the analysis of problems by statistical and other methods will provide the basis from which administrators and the legal profession can devise improvements in procedure.

An agency like that suggested can serve two other important purposes. In 1945, Sir Gilbert Campion urged before the Select Committee on Procedure of the House of Commons that the Select Committee on Statutory Instruments function as a "committee of grievances" to hear complaints arising out of the operation of delegated legislation. There is at least equal need for such a "committee of grievances" in the field of administrative procedure; one of the chief weaknesses of the present system is the lack of an adequate forum where the ordinary citizen can "ventilate" his complaints against improper administrative procedures. A department of administrative procedure, such as that proposed, could be given the task of receiving and investigating complaints regarding the procedures of the different tribunals and agencies. It would provide an expert forum far more dependable than the possibility of an *ad hoc* inquiry which is available, in practice, only in a *cause célèbre* like the *Crichel Down* case.

In addition, the proposed department of administrative procedure could serve as a central body vested with control over the more or less independent inspectorate in the different ministries which has already been suggested. An agency whose primary purpose is the supervision of administrative procedures would seem

to be the ideal organ to ensure that the independence and status of administrative hearing officers will be maintained.

The principal objection that might be advanced to the suggestion just made for a central agency vested with continuous supervisory responsibility over administrative procedures is that it might unduly impair the responsibility of ministers and other administrative heads over the proper workings of their departments and agencies. This objection loses much of its force, however, if the proposed department is not vested with coercive powers, but is instead primarily an investigatory and recommending agency. If, even so, it is feared that the proposed organ runs counter to British notions of proper administration, it may be worthwhile to attempt to achieve the goal of continuous scrutiny of administrative procedures in some other way. An obvious parallel in this respect is the machinery set up for scrutinizing delegated legislation in the House of Commons, i.e., through the Select Committee on Statutory Instruments. A similar Select Committee on Administrative Tribunals and Inquiries could perform an equally useful task in the field of administrative procedures. In view of the precedent of the Select Committee on Statutory Instruments and the tradition that control of the executive in this respect should be legislative in nature, it may well be desirable to provide for continuous scrutiny of administrative procedures by parliamentary committee rather than by some newly created central administrative organ.

H. *Judicial Control*

As has already been mentioned, the Hoover Commission Task Force appointed to investigate administrative procedure in the United States devoted much of its attention to judicial review of administrative action, since it considered effective judicial control to be one of the surest safeguards to guarantee that adequate procedures will be observed by the administrator. It is not known by the present writer whether this Committee will similarly construe its terms of reference to authorize it to consider the subject of judicial control. For that reason, this evidence will not contain a detailed consideration of that subject. Judicial review is, however, of such significance in administrative law that this writer wishes to make several important brief observations; if it is felt desirable, these can be expanded upon at this Committee's convenience:

1. This writer strongly seconds the rejection by the Donough-

more Committee of a separate system of administrative law patterned upon the *droit administratif* which exists in France. In the Anglo-American world, judicial control must continue to mean control by the ordinary courts. Recent studies of French administrative law (including one published by this writer in 1954) have, it is true, completely refuted the notion that the French administration is in a privileged position, as far as its control by law is concerned. In many ways, indeed, the control exercised by the *Conseil d'Etat* is more effective than the supervisory power of the High Court. But the wholesale importation of the French administrative-court system is quite another matter. As the Inns of Court Conservative and Unionist Society study well puts it, with regard to the creation in Britain of an organ patterned upon the *Conseil d'Etat*, "We do not feel that an attempt to translate such a purely French institution as the *Conseil* into the context of the British Constitution is likely to succeed."[43] To take away the unified character of justice that has prevailed since the merger of law and equity is not necessarily a forward step. To dichotomize the law into private law and administrative law would needlessly reintroduce the jurisdictional difficulties for litigants of the type which prevailed when law and equity were separate and competing systems of justice. These are precisely the difficulties faced by litigants in France under that country's divided system of justice.[44]

2. Judicial review should always be available at the instance of a private individual adversely affected in his person or property by an administrative act. It is recognized that this goes much further in the direction of the availability of judicial control than does the present English law. This writer is, however, strongly of the opinion that the citizen should, in no case, be deprived of access to the courts. This will not, as is usually asserted in Britain, unduly interfere with effective administration, because

3. The scope of judicial review can continue to be a limited one. The judge does not, and should not, sit as a hierarchical superior of the administrator. The judicial role is to ensure administrative observance of the law—not to do over again the work of the administration. Thus, the court, in reviewing an administrative decision, will be concerned primarily with questions of law. Its inquiry into the facts will only go so far as to determine whether there is some evidentiary basis to support the administra-

[43] *Ante.*, footnote 3, p. 52.
[44] See, *The Law Journal*, 10 February 1956, p. 82, for a striking illustration.

tor, for to come to a conclusion which is supported by no evidence is, as Lord du Parcq once said, to make an error of law.[45]

4. The procedure by which judicial review may be obtained should be simplified. As Lord Justice Denning has well said, just as the pick and shovel are no longer suitable for the winning of coal, so also the prerogative order procedure is not suited to a modern system of administrative law.[46] The prerogative orders should be abolished and replaced by a simple, uniform system of review by an application made to the High Court within a stated time after the rendering of a challenged administrative decision. Such review should not be subject to the limitations now contained upon the availability of certiorari, as illustrated by the already referred to *Parker* and *Nakkuda Ali* cases.

IV. *Conclusion*

A. *Historical Perspective*

For this Committee, a far more difficult matter than that of analyzing the present factual situation in administrative law in the United Kingdom will be that of proposing specific solutions. Some might argue that the reasons which led to the vesting of adjudicatory authority in the various tribunals to the exclusion of the courts in the main no longer exist and that, therefore, the obvious thing to do now is, so far as possible, to abolish these tribunals and transfer their jurisdiction to the courts where they are said rightfully to belong. But such a solution, delusively simple though it may sound, is wholly unfeasible, either politically or practically. And, even if it could be done, it would not be desirable thus, in a wholesale way, to turn back the clock to the situation that prevailed before the rise of the modern administrative tribunal. Such an approach ignores the fact that the development of administrative law has brought positive advantages, as well as defects, to the Anglo-American legal system. The main problem now is to retain these advantages while seeking to eradicate the defects. Complete elimination of administrative justice from the law would do away with both.

In this connection, there is an instructive historical parallel between the situation today and that faced by sixteenth- and seventeenth-century Englishmen. It is well to remember that the problem of administrative justice is not a new one in Anglo-American

[45] *Bean* v. *Doncaster Amalgamated Collieries*, [1944] 2 All E.R. 279, at p. 283.

[46] Denning, Freedom under the Law (1949), p. 126.

law. On the contrary, it is precisely that problem with which the common-law world had to deal in Tudor and Stuart times. At that time, too, the jurisdiction of the law courts was being superseded by a number of executive tribunals, of which the most important were the Star Chamber and Chancery. As has been the case with the recent renaissance of administrative justice, it was the inadequacies of the common law and the expense and delay involved in suits in the law courts that led to expansions in the judicial power exercised by the then newly created executive tribunals.

The movement away from the common law in Tudor and Stuart times was a movement from judicial justice administered in law courts to justice administered in what were, to all intents and purposes, administrative tribunals. And the ensuing struggle by the common law to re-establish its supremacy has interesting implications for our own day. This was well seen by A. V. Dicey, who declared that "A lawyer, who regards the matter from an exclusively legal point of view, is tempted to assert that the real subject in dispute between statesmen such as Bacon and Wentworth on the one hand, and Coke or Eliot on the other, was whether a strong administration of the continental type should, or should not, be permanently established in England. Bacon and men like him no doubt underrated the risk that an increase in the power of the Crown should lead to the establishment of despotism. But advocates of the prerogative did not (it may be supposed) intend to sacrifice the liberties or invade the ordinary private rights of citizens; they were struck with the evils flowing from the conservative legalism of Coke, and with the necessity for enabling the Crown as head of the nation to cope with the selfishness of powerful individuals and classes. They wished, in short, to give the government the sort of rights conferred on a foreign executive by the principles of administrative law."[47]

When the common lawyers eventually triumphed after the final expulsion of the Stuarts, they did not, it should be noted, attempt to turn the legal clock back to pre-Tudor times. Instead, they sought to retain what was desirable in the administrative justice of their day and to fit it into its proper place in the legal order. The Star Chamber was abolished; but the law courts themselves realized that a large part of its work was of permanent value, and so much of its law passed into the common law. And, insofar as Chancery was concerned, its place in the legal system was definitely

[47] Dicey, Introduction to the Study of the Law of the Constitution (9th ed., 1952), p. 370.

confirmed. "The danger of Equity turning into the servant of despotism had passed away, and English statesmen, many of them lawyers, were little likely to destroy a body of law which, if in one sense an anomaly, was productive of beneficial reforms."[48] Chancery was retained as a separate tribunal, but it was wholly judicialized along common-law lines. Thus the Lord Chancellor, who, as Chief Justice Vanderbilt has pointed out, "was originally, as his name implies, the chief clerk of the king and dealt out administrative justice in the king's name,"[49] became, in time, the head of a true court, with its established place in the existing legal order. As Roscoe Pound has well stated, "although Coke lost in his quarrel with the Court of Chancery . . . Chancery was made over gradually along common law lines. The equity made in the Court of Chancery and the law as to misdemeanors made in the Star Chamber became parts of our legal system; it is not too much to say they became parts of the common law".[50]

B. *Future Perspective*

The significance of the historical development just described for our own day and age was well put by Chief Justice Vanderbilt over fifteen years ago:

"Maitland, in his Rede lecture, has shown how the common lawyers of the sixteenth century met the challenge of another body of administrative law, in Chancery, in the Star Chamber and in the Privy Council—and to the great advantage of the common law. Then, as now, the administration of the common law left much to be desired. Then, as now, what was needed was more administration in the courts of justice and more of the fundamental principles of justice in the administrative tribunals. The common lawyers of the sixteenth century met their problems and mastered them. The challenge of today is so clear that it does not need to be stated. The only question is can we meet it?"[51]

The challenge of administrative justice in the sixteenth and seventeenth centuries was met by the elimination of the undesirable elements in such justice and the retention and judicialization of the rest. The arbitrary discretion exercised by the tribunals dispensing such justice was canalized within legal limits, and, where such discretion was, as in the case of Star Chamber, too intimate

[48] *Ibid.*, at p. 381.

[49] *Mulhearn* v. *Federal Shipbuilding & Dry Dock Co.* (1949), 66 A. 2d, 726, 731 (N.J.).

[50] Pound, Justice According to Law (1914), 14 Columbia L. Rev. 1, at p. 21.

a part of the tribunal, the tribunal itself was done away with. The common lawyers, who had earlier complained that the justice administered by Chancery was so uncontrolled by legal principles that it might just as well have depended upon the size of the particular Chancellor's foot, were able to ensure that Chancery became a true court for the application of principles which, though different from those of the common law, were no less fixed.

An ideal development of modern administrative law would be for it to follow the pattern of the executive tribunals of three centuries ago. The justice dispensed by present-day administrative tribunals should become judicialized and administered by independent bodies possessing solely judicial authority. Such bodies would, in time, follow the example of Chancery and develop into true judicial tribunals. Administrative justice, like Chancery and the other prerogative tribunals of Tudor and Stuart times, will then have become judicialized and fitted into its proper place in the legal order. Such has been the common historical development of tribunals endowed with judicial authority, though they have started as purely executive agencies. This is what happened, as is well known with Chancery. But equity in England has not been unique in this respect. Its development duplicated the experience of the Roman law many centuries earlier. And, more recently, a similar development has occurred in the judicialization of the *Conseil d'Etat* in the French legal system.

The above long-range development of administrative law should be borne in mind in considering the suggestions which have been made in this evidence. This writer's recommendations do, without a doubt, look toward some judicialization of the administrative process in Britain. This is particularly true insofar as administrative tribunals are concerned. Even Socialist writers like Professor Robson agree that the course of progress for such tribunals is that of judicialization. Tribunals must be placed in a position of independence and their procedures controlled by judicial safeguards. Ultimately, they may evolve into true judicial tribunals.

The present writer is hardly so sanguine as to hope that his views will be mirrored in the recommendations of this Committee. At the same time, it cannot be denied that the present is a time when the whole subject of administrative law is in a state of flux such as it has not been in since the time of the Donoughmore Committee. A period of ferment is one for the urging of straightforward

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[51] Vanderbilt, The Place of the Administrative Tribunal in our Legal System (1938), 24 Amer. Bar Assoc. Journ., 267, at p. 273.

and vigorous solutions, such as those which have characterized all of the great moments of the common law. Administrative law, almost more than any other branch of the law, well exemplifies Mr. Justice Cardozo's famous statement that the law has its periods of ebb and flow. One of the flood seasons is now upon us. It is for this Committee to gather up the driftwood and leave the waters pure.

Justice According to Law

That checks are peculiarly needed with respect to administrative adjudication is made clear by certain general and persistent tendencies of administrative agencies, federal and state, as well as in like agencies in England and in the British Dominions. Perhaps the most serious is a tendency to decide without a hearing, or without hearing one of the parties, or by a mere appearance of a hearing — going through the appearance of one, the results having been predetermined. One form of this is to give full credence to all the testimony on one and deny it to everything testified to on the other side. Courts have called attention to this repeatedly in the last few years. A closely related tendency is to make determinations on the basis of consultations with witnesses in private or of reports not divulged, giving the party affected no opportunity to refute or explain. No less serious is a tendency to make determinations injuriously affecting individual rights without a basis in evidence of rational probative force. Also there is a tendency no less widespread, but much more difficult to reach by judicial review under the statutes and procedure of today, to set up and give effect to policies beyond or even at variance with the statutes or the general law governing the action of the administrative agency. It is easy to say that the public interest calls for activity beyond or in contravention of the statute and to cover this up by a general pronouncement upon the case. It results from zeal to promote social ends to which the legislature might not agree. It involves a degree of legislative power in administrative agencies which is not given them and ought not to be given them. (Roscoe Pound, Justice According to Law (1951) p. 81.)