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THE SEVENTH ANGLO-AMERICAN EXCHANGE: JUDICIAL REVIEW OF ADMINISTRATIVE AND REGULATORY ACTION

THE ANGLO-AMERICAN EXCHANGE: OUR SPIRITUAL COUSINAGE

WARREN E. BURGER*

In preparing to write a foreword to the British edition of *The Spirit of Liberty*, a compilation of his lectures, Judge Learned Hand wrote about the relationship between Great Britain and the United States:

There is a spiritual cousinage between us that will not down; and though, like other cousins, we shall continue to differ, and our differences will appear the more exasperating just on that account, still there is always the hope, and always the chance, that in the end we shall both recognize the bond—in me, at least, very strong and very close—that rests upon common moral fealties; and that, unless all signs fail, in the nearer future at least, will be a vital factor in the preservation of both our peoples.¹

* Chief Justice of the United States.

1. L. HAND, *THE SPIRIT OF LIBERTY* 290 (I. Dilliard 3d ed. 1960). Judge Hand, of course, could trace his familial and judicial lineage back across the Atlantic. See K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* frontispiece (1960).

Having argued before Judge Hand's court and later having sat with him as a visiting judge, I discovered early his veneration for our Anglo-Saxon legal heritage. Much can be learned by us to the end that the best of each of the two systems can influence the other. Programs like the Anglo-American Exchange contribute much to this result.

The Exchanges have been designed and conducted for more than twenty years to allow participants to learn about features of the administration of justice in the other country that might be adapted for use in their own.² Held at roughly four year intervals since 1961, each Exchange highlights a particular area. Past Exchanges have dealt with administrative law, appellate procedure, criminal procedure, and civil procedure. Another example of the value of sharing experiences is found in the area of court administration. Long before the development of court administrators on our side, Britain's courts had officers—often not law-trained—who relieved judges of much of the administrative details falling on Chief Judges on our side. My own observations in London long before I took part in these Exchanges undoubtedly influenced my concern for the lack of court administrators on our side. I acknowledge my debt to our friends in the British courts for what I learned that led to the creation of the Institute for Court Management and the advent of court administrators into the Federal system.

By 1984, it was concluded that a comparative reevaluation of administrative law was appropriate to build on the earlier studies of 1969, and to examine the changes that had occurred. Accordingly, in the Seventh and most recent Anglo-American Exchange, we considered the topic "Judicial Review of Administrative and Regulatory Action." The importance of administrative law today remains evident. No less a student of the American system than Justice Jackson once observed:

The rise of the administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. . . . They

2. See Karlen, *Anglo-American Interchanges: An Approach to the Comparative Study of Judicial Administration*, 57 JUDICATURE 342 (1974); Kaufman, *The Fifth Anglo-American Exchange: Some Observations*, 61 JUDICATURE 327 (1978).

have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.³

The key to the Exchanges is first hand observation. First, each country fields a team whose members are selected for their experience in the subject area. Members of the American team prepare by bringing themselves up to date with articles, reports, and recent holdings. The American team goes to England to observe firsthand the particular features under study—in short, to see how they do it. There is, of course, an enormous difference between studying or even discussing another system and actually observing it in operation. When the British team visits the United States, the same sequence is followed. In a final group discussion with both teams, insights are exchanged. Each team attempts to develop some consensus on changes that might be adopted or adapted in its own country. Finally, there comes an effort to disseminate more widely the teams' observations and such recommendations as may evolve. This effort can take many forms, such as lectures or articles by the participants, and publications such as this Symposium.⁴ In the five Exchanges I have been part of, the late Sir Kenneth, Lord Diplock, lately President of the Law Lords, was Leader of the British team until the 1984 Exchange, when Sir Nigel, Lord Bridge took over. Justice Sandra O'Connor first took part in the 1980 Exchange while she was a State Court judge, and again in 1984 after joining our Court.

With extensive preparation behind us, the American team went to England for the last two weeks in July 1984. Just a sampling of our itinerary demonstrates the comprehensive planning of our British hosts. Those of us who were familiar with the British system generally undertook to remind our colleagues that the fields of administrative activity in the two countries vary a great deal.

3. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

4. Over the years, the result has been a well-regarded body of scholarship. *See, e.g.*, D. KARLEN, *APPELLATE COURTS IN THE UNITED STATES AND ENGLAND* (1963); D. KARLEN, *ANGLO-AMERICAN CRIMINAL JUSTICE* (1967); B. SCHWARTZ & H. WADE, *LEGAL CONTROL OF GOVERNMENT* (1972).

England does not have our array of administrative and regulatory agencies such as the ICC, the FTC, and the NLRB.

When it was the American team's turn to be host in September, we did our best to make the British fortnight on this side of the Atlantic as informative and rewarding as ours was there. Since, for purposes of the Exchange, Washington was the home of our administrative and regulatory agencies, the major share of time was spent observing activities here, including sessions with the Attorney General, the staff and director of the Administrative Conference, and the judges of the United States Court of Appeals, District of Columbia Circuit, which has a large volume of review of administrative agency action.

It is difficult to catalog the benefits to be derived generally from on-the-ground comparative legal studies. The leading delegates to the Constitutional Convention in Philadelphia in 1787 were steeped in what today we call comparative law study. James Madison was perhaps first among them in this regard. As a Middle Temple Bencher I take pride in the fact that seven of the delegates were Benchers of that Temple.

Beginning in his student days under the tutelage of President John Witherspoon at what is now Princeton University, Madison read widely on the subjects of government and political philosophy. During the critical period between the Annapolis Convention in the fall of 1786 and the Philadelphia Convention in the summer of 1787, Madison immersed himself in the literature of political history and theory. His comparative law studies centered on ancient and modern confederacies with the hope of designing a strong but free constitutional government. Time and again, Madison and other delegates drew on their knowledge of other systems to help develop the idea of a republic in contributing to the seminal Virginia Plan and later during the convention debates.

Comparative law also featured prominently in the ratification efforts. Those familiar with the Federalist Papers will have noted the thread of the comparative law theme in them; the various Papers are full of comparative allusions. Indeed, three of the Papers, Numbers 18, 19, and 20, are given over entirely to discussions of comparative law, analyzing ancient and modern confederacies for strengths and weaknesses and contrasting them with the proposed constitutional republic.

The value of contemporary study of the British legal system whose heritage, traditions, and political values we share emerges swiftly once we observe, in the criminal law, for example, how they have twelve jurors in the box in minutes—not hours or days but minutes—ten or fifteen is not uncommon, or when we observe the informality in their administrative hearings. The Framers recognized this too: the lawyers among them in particular could lay aside the recent memory of the struggle with the mother country, as shown by the frequent positive allusions in the Federalist Papers to the British constitution. After all, we remember that the Declaration of Independence was an assertion of the colonists' rights as Englishmen!

The contemporary value to comparative law study between the American and British systems is rooted in differences as well as similarities.⁵ While the American system is derived from the British, the systems have diverged somewhat to meet differing needs. There is much to learn on both sides, but my own view has always been that our side has profited more from the Exchange than have our friends.

I have participated in each of the Third through Seventh Exchanges. On a purely personal level, I not only learned much, but these meetings cemented warm personal friendships with the late Lord Chief Justice Widgery, the late Lord Diplock, and later Lord Bridge, who succeeded Lord Diplock as Leader. I had first met Lord Diplock and Lord Widgery as barristers. Lord Diplock, whose death late in 1985 saddened all who knew him, will long be remembered by team members for his unmatched talent for provoking analytical discussion but keeping it in hand.

It is altogether fitting and proper that this Symposium be published through the College of William and Mary, where our common heritage was first formally studied and taught in the New World and where, on various occasions, Lords Widgery, Diplock, and Bridge were visitors.

We are grateful to the authors of the following papers for their contributions at this closing and important phase of the Seventh Anglo-American Exchange.

5. See Karlen, *supra* note 2.