

William & Mary Law Review

Volume 27 (1985-1986)

Issue 4 *The Seventh Anglo-American Exchange:
Judicial Review of Administrative and
Regulatory Action*

Article 8

May 1986

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Roberts B. Owen, *Placing the Facts of Administrative Decisionmaking Before Reviewing Courts: English and American Techniques*, 27 Wm. & Mary L. Rev. 741 (1986), <https://scholarship.law.wm.edu/wmlr/vol27/iss4/8>

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PLACING THE FACTS OF ADMINISTRATIVE
DECISIONMAKING BEFORE REVIEWING COURTS:
ENGLISH AND AMERICAN TECHNIQUES

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I. INTRODUCTION

The work of the English and American teams that participated in the Seventh Anglo-American Exchange was directed to the theory and practice of judicial review of administrative action. As the only currently practicing litigator on the American team, I found myself focusing principally during the Exchange on the "trial problems" presented by the differing procedures in the two countries. Specifically, stimulated by personal experience as counsel for parties seeking to challenge various types of federal administrative actions in United States courts, my attention was directed primarily to the rights of plaintiffs' counsel in seeking to place the "facts" of the decisionmaking process before reviewing courts.

Not unexpectedly, the practices followed in the two countries are somewhat different. The differences seem to derive, at least in part, from the differences in certain basic attitudes toward the problem of "government secrecy." Over the years Americans have come to feel that they have an inalienable right to know what is or has been going on within their central government, as the enactment of the Freedom of Information Act¹ demonstrates. The English, on the other hand, have tended to be far more restrictive in this regard, as demonstrated by the relatively broad scope of the traditional "Crown privilege."² Given these quite different

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1. 5 U.S.C. § 552 (1982).

2. See, e.g., *Attorney-General v. Mayor & Corp. of Newcastle-upon-Tyne*, [1897] 2 Q.B. 384, 395 (C.A.). This traditional constitutional precept, which, among other things, requires anonymity for subordinate civil servants in the decisionmaking process, more recently has been referred to as "public interest immunity." See *Air Canada v. Secretary of State*, [1983] 2 A.C. 394, 407-09 (noting that the Crown privilege is still broad but no longer absolute; courts must weigh the need for disclosure against the "public interest" in nondisclosure).

attitudes, it is hardly surprising to find that in the United States plaintiffs seeking to delve into the administrative decisionmaking process of the central government are allowed greater freedom of action than their English counterparts.

This difference also may be enhanced by the rather different attitudes taken toward pretrial discovery in the two countries. Americans have come to believe that every civil litigant is entitled before trial to discover all relevant facts known to the opposing party, subject only to the conventional attorney-client privilege and related limitations. In England, on the other hand, a litigant's rights to such foreknowledge traditionally have been significantly more restricted. Although the main engine of discovery in the United States, the pretrial deposition, is of only limited relevance in the context of judicial review of administrative action, nonetheless the fact that a pretrial deposition in England is permitted only for the purposes of preserving testimony and not for the purposes of discovery reveals the difference between the basic attitudes toward pretrial discovery in the two countries.³ The comparatively restrictive English approach toward discovery in general has narrowed the scope and detail of the factual picture presented to English courts in judicial review proceedings, while simultaneously allowing for speedier resolutions at lower public and private costs. Doubtless the ongoing debate as to the proper balance between American thoroughness and English efficiency will continue for years to come.

From the perspective of a trial lawyer, the process of placing the facts before the reviewing court begins with an effort to determine accurately why the individual or institution that made the challenged decision acted as it did. Specifically, the inquiry must be whether the decisionmaker made a rational decision, taking into account the factors that it was required to consider and excluding improper considerations. In assisting the court in this process, counsel must seek out the evidence best calculated to make clear what was in the mind of the decisionmaker. The proper approach is clear enough when the administrative body itself has compiled a formal evidentiary record and prepared a formal decision, but in

3. See Epstein, *English and American Discovery: Comparative View*, Nat'l L.J., Nov. 26, 1984, at 15, 18.

other situations English and American proceduralists have come up with somewhat different approaches for handling the same basic inquiry. The following discussion compares these approaches.

II. PROCEDURES FOR PLACING FACTS BEFORE REVIEWING COURTS

A. *Written Evidence*

1. *English Procedure*

A useful starting point for the comparison is the modern English procedure. Since the decision of the House of Lords in *O'Reilly v. Mackman*,⁴ virtually all applications for judicial review of administrative action in England have been brought under Order 53 of the Rules of the Supreme Court,⁵ which provides a simplified review procedure applicable both to the prerogative remedies—mandamus, certiorari, and prohibition—and to other remedies such as declarations, injunctions, and damages. In effect, Order 53 requires that, in an application for review, the facts must be presented to the court by way of affidavit, and the normal practice is for the official entity whose decision is being challenged to present an affidavit explaining, perhaps well after the fact, both the content and the rationale of the challenged decision. Typically, the same entity also will attach to the affidavit and present to the reviewing court any documents it considers relevant. At that point the court has authority to order discovery to the extent that justice requires, subject to Crown privilege and the other restrictions placed on discovery in England.⁶ Such discovery, however, is rarely if ever granted in practice. As a practical matter, once the government has produced its papers, including the all-important affidavit, the court hears oral presentations from counsel, deriving the facts from the assembled documents without any presentation of oral testimony.

To an American litigator, the most striking aspect of this procedure is the relatively heavy emphasis placed upon the affidavit and the documents selected by the government. This procedure would seem to give the government a relatively high degree of control

4. [1983] 2 A.C. 237 (1982).

5. STAT. INST., 1977, No. 1955.

6. See *supra* notes 2-3 and accompanying text.

over the selection of the facts to be presented to the court. Reflecting the American attitude toward this approach, the United States Supreme Court has characterized "litigation affidavits" generally as "merely 'post hoc' rationalizations," which in the United States "have traditionally been found to be an inadequate basis for [judicial] review."⁷ Perhaps reflecting a lesser degree of confidence in the candor of public officials than would obtain in England, one United States court has observed that "'post hoc' rationalizations," filtered through a factfinder's understandable reluctance to disbelieve the testimony of a Cabinet officer, will rarely provide an effective basis for [judicial] review."⁸

2. *United States Procedure*

The American approach, by contrast, is to focus almost entirely on the documentation created within the agency at the time the decision was made, rather than on statements prepared for the purposes of the litigation. Under United States law, the government usually is obliged to produce "the full administrative record that was before the [decisionmaker] at the time he made his decision."⁹ Essentially, the "administrative record" includes any written statement of the reasons for the decision and all documents and other materials that were directly or indirectly relied upon or

7. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

8. *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1237-38 (D.C. Cir. 1971) (footnote omitted), *cert. denied mem.*, 405 U.S. 1030 (1972).

The English practice does at least require the person or persons with knowledge of the facts of the decisional process to present a sworn statement. One American writer has taken umbrage at the practice of employing sworn affidavits, however, stating that it "is a departure from the deeply established custom that neither judges nor administrators should be required to swear to the opinions they write in explaining reasons for their decisions, and no reason has been stated for such a departure." K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES*, § 11.00, at 36 (Supp. 1980). Professor Davis is correct about the deeply established custom that *judges* are not required to swear to their judicial opinions and that administrators are not required to swear to explanations of decisions if those explanations are provided contemporaneously with the decisions, but a different situation is presented when an administrator is seeking to establish facts that occurred in the past. A "litigation affidavit" of the kind employed in England typically will describe the historical facts surrounding the decision, as well as the decision itself, and in such circumstances a sworn affidavit seems appropriate.

9. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *see also* Administrative Procedure Act, § 706, 5 U.S.C. § 706 (1982) (providing that the reviewing court shall consider "the whole record or those parts of it cited by a party").

considered by the decisionmakers at the time they acted.¹⁰ In addition, documents considered or relied upon by subordinates who assisted in the decisionmaking process have been considered a part of the administrative record, on the theory that such documents indirectly were considered by the decisionmaker.¹¹

Moreover, when judicial review is sought in a federal trial court, as usually would be true when the agency did not undertake a full factfinding adjudication, the United States plaintiff is entitled under the discovery rules to take the initiative in requesting not only "the full administrative record," but also any other categories of documents that counsel can persuade the presiding judge to treat as relevant to the issues raised in the case. To give just one example, when the challenged decision was based on a particular interpretation of a statute or regulation, the plaintiff generally can obtain discovery of documents reflecting any different interpretations that officials of the same agency may have articulated over time.¹² The discoverability of other categories of documents depends on the circumstances of the particular case.

Discovery in such cases in the United States, however, is not unrestricted. Apart from conventional privileges, such as the attorney-client privilege, the courts have created an exemption for predecisional memoranda prepared within the agency "embodying the deliberative process of the agency and its staff."¹³ Conversely, however, all "postdecisional memoranda" reflecting the reasons for the decision are open to discovery and must be produced, whether the government wishes to produce them or not.¹⁴ In practice,

10. *Lloyd v. Illinois Regional Transp. Auth.*, 548 F. Supp. 575, 590 (N.D. Ill. 1982); *Pier-son v. United States*, 428 F. Supp. 384, 391-92 (D. Del. 1977).

11. *See Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299, 317-19 (D. Del. 1979).

12. *See Fedman, Looking Behind the Record—An Analysis of Contemporaneous Construction Discovery*, 17 TULSA L.J. 448 (1982).

13. *National Courier Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975); *see Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-54 (1975); *Montrose Chem. Co. v. Train*, 491 F.2d 63, 66-67 (D.C. Cir. 1974).

The obvious reason for this exemption is that public disclosure of internal staff communications would discourage a full and frank exchange of views during the deliberative process. *See Fedman, supra* note 12, at 464.

14. *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-54 (1975).

therefore, the breadth of discovery permitted in a review proceeding in the United States is significantly greater than that permitted in an English proceeding under Order 53, in which the defending litigant would appear to have a greater degree of freedom to decide what is relevant and what should be produced.

B. Oral Testimony

1. Use in the United States

One of the curiosities of the vocabulary of administrative law in the United States is that, despite the need for reviewing courts to probe the facts sufficiently to decide whether a challenged administrative decision was arbitrary or rational, and whether the decisionmaker took into account the appropriate considerations and excluded inappropriate considerations, United States reviewing courts constantly deny the propriety of judicial attempts to "probe the mental processes of the administrator."¹⁵ In this context the word "probe" has taken on a special meaning—namely, that a reviewing court is free to delve as deeply as possible into the thinking of an administrative decisionmaker through analysis of contemporary documents surrounding the decisionmaking process, but that in ordinary circumstances the court should not permit cross-examination of the decisionmaker. Of course, the irony is that, in the often difficult process of determining what was in the decisionmaker's mind, United States courts permit themselves full access to historical documents that may or may not provide a clear answer to the inquiry, but normally deny themselves the opportunity to obtain a direct answer by simply asking the decisionmaker what he actually had in mind.

The history and rationale, such as it is, underlying the "anti-probing" rule may be traced by reference to the opinion of Justice

15. This phrase apparently derives from the opinion of Chief Justice Hughes in *Morgan v. United States*, 304 U.S. 1 (1938), in which the Chief Justice stated: "[I]t was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions. . . ." *Id.* at 18. Courts considering administrative law cases in the United States have repeated this phrase regularly during the last 50 years. *See, e.g.*, *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Kent Corp. v. NLRB*, 530 F.2d 612, 621 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976); *KFC Nat'l Mgmt. Corp. v. NLRB*, 497 F.2d 298, 304 (2d Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976); *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600, 604 (5th Cir. 1966).

Frankfurter in the Supreme Court's fourth decision in *United States v. Morgan*.¹⁶ In that case, which involved judicial review of a controversial decision by the Secretary of Agriculture, the trial court had required the Secretary to give evidence, both on pretrial deposition and at trial, "regarding the process by which he reached the conclusions of his order."¹⁷ The Supreme Court, on direct appeal, reversed the trial court's decision on several grounds, including the propriety of subjecting the Secretary to cross-examination. Noting that the Secretary had "dealt with the enormous [administrative] record in a manner not unlike the practice of judges in similar situations," Justice Frankfurter reasoned that the administrative proceeding had "a quality resembling that of a judicial proceeding." Because "a judge cannot be subjected to such scrutiny," Justice Frankfurter concluded, "the Secretary should never have been subjected" to oral examination.¹⁸

In seeking to flesh out the asserted principle as it relates to judges, however, Justice Frankfurter cited earlier Supreme Court decisions¹⁹ which, if read closely, create some confusion as to the reasons underlying the principle that a judge never should be required to give testimony concerning the method used to arrive at a particular judicial decision. The principle seems to derive from an early rule that *jurors* could not be compelled to testify concerning what they did and did not decide in a prior case. The rationale for the rule concerning jurors was that, because each juror has an independent mind, "the jurors oftentimes, though they may concur in the result, differ as to the grounds or reasons upon which they arrived at it."²⁰ This rationale, of course, would not apply to a decision made by a single trial judge. Nonetheless, the Supreme

16. 313 U.S. 409 (1941).

17. *Id.* at 422.

18. *Id.*

19. *Id.* (citing *Chicago, B. & Q. Ry. v. Babcock*, 204 U.S. 585, 593 (1907), and *Fayerweather v. Ritch*, 195 U.S. 276, 306-07 (1904)).

Apparently the law now allows a court to require a judge to testify if the judge's testimony is necessary to determine what transpired in a particular case. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2372, at 757-58 (3d ed. 1961). Professor Wigmore, however, did not address whether a court can compel a judge to testify as to why that judge ruled a certain way in a particular case.

20. *Packet Co. v. Sickles*, 72 U.S. (5 Wall.) 580, 593 (1866).

Court in *Fayerweather v. Ritch*²¹ treated earlier cases establishing the principle for jurors as having laid down "the rule" that a trial judge is "obviously incompetent" to testify concerning what issues he did and did not decide in a earlier case.²² The Court acknowledged that "the reasoning" of the juror decisions "is not wholly applicable" when only a single judge is involved,²³ but the Court did not feel compelled to provide any other reason for the prohibition against testimony by a judge.

Justice Frankfurter made some effort to fill this gap when he extended the "anti-probing" principle to administrative decisionmakers in *Morgan*. He simply asserted, somewhat cryptically and without any citation of authority, that the examination of a trial judge as to his decisionmaking in an earlier case "would be destructive of judicial responsibility."²⁴ Some would disagree, contending that the prospect of cross-examination would tend to increase judicial responsibility by creating an incentive toward a high degree of care in the preparation of findings and opinions. Nonetheless, the "rule" seems sound for other reasons. Actual cross-examination of a judge would be demeaning for the judiciary and well might lessen public respect for the institution in an undesirable way. Whether the same rationale is equally applicable to administrative decisionmakers, however, is open to question. Perhaps it would depend on the bureaucratic level involved, the issue that was decided, and other circumstances.

At any rate, in the years since *Morgan*, courts in the United States have been willing to authorize, albeit in very limited circumstances, the very sort of "probing" of administrative thought processes that was condemned in *Morgan*. The most famous instance is *Citizens to Preserve Overton Park, Inc. v. Volpe*,²⁵ in which the Secretary of Transportation claimed to have considered certain factors that a statute required him to consider in arriving at a decision but was unable to produce any documentary evidence that he had done so. The only materials proffered by the Secretary were certain "litigation affidavits" prepared long after the decision

21. 195 U.S. 276 (1904).

22. *Id.* at 306-07.

23. *Id.* at 307.

24. 313 U.S. at 422.

25. 401 U.S. 402 (1971).

had been made.²⁶ Reluctant to approve the Secretary's action without having seen the actual "administrative record,"²⁷ and foreseeing the possibility that no real administrative record would ever turn up, the United States Supreme Court explicitly authorized the district court on remand to require the decisionmakers to "give testimony explaining their action" if the district court concluded that testimony was "the only way there can be effective judicial review."²⁸ Significantly, although two justices thought that a remand back to the Secretary would be more appropriate,²⁹ no justice disagreed with the majority opinion's authorization of oral testimony.³⁰

Overton Park was not a one-time aberration, as at least two subsequent Supreme Court decisions have confirmed. In *Camp v. Pitts*,³¹ the Court carefully emphasized that its authorization in *Overton Park* of compelled oral testimony by the decisionmaker applies only when no "administrative record" is available as a predicate for judicial review. The Court, however, also reiterated that if judicial review otherwise would be rendered ineffective, the district court had the discretionary power to compel the agency to explain its action "either through affidavits or testimony."³² Four years later, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,³³ the Court again affirmed the principle

26. *Id.* at 407-09.

27. *Id.* at 419; see *supra* note 7 and accompanying text.

28. *Id.* at 420.

29. *Id.* at 421 (Black, J., concurring, joined by Brennan, J.).

30. One commentator has expressed "perplexity" as to "why the Supreme Court did not simply ask the Secretary to file a statement of the basis" of his decision, rather than authorizing his cross-examination. 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 17.4, at 290 (2d ed. 1980). At the risk of being accused of probing the mental processes of Justice Marshall when he wrote the opinion in *Overton Park*, one may speculate first that the total absence of any written record of a statutorily-required formal decision, which the Secretary claimed to have made, raised in the Court's mind a question as to the Secretary's credibility, and second that the Court believed that the district court should be free to authorize cross-examination of the Secretary if that course seemed necessary to find out what actually happened. Certainly the events that occurred on remand, including revelation of the fact that the Secretary had *not* made the finding he claimed to have made, provide some justification for the testimonial course suggested in the Supreme Court's opinion. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 335 F. Supp. 873 (W.D. Tenn. 1972).

31. 411 U.S. 138 (1973).

32. *Id.* at 142-43.

33. 429 U.S. 252 (1977).

that a decisionmaker "might be called to the stand at trial to testify concerning the purpose of the official action" if the other available evidence were insufficient to adjudicate the merits of the plaintiff's challenge.³⁴

Some commentators have reacted strongly to *Overton Park*, *Camp*, and *Arlington Heights*, maintaining that even a very limited authorization of cross-examination of the decisionmaker is totally inappropriate.³⁵ The answer to this criticism is that the rule, as it has evolved, permits such compelled testimony only upon (1) a strong showing of bad faith or improper behavior or (2) a judicial determination that no other means is available for providing effective judicial review.³⁶ When the rule is stated in those terms, the argument that the rule is imprudent is difficult to maintain.³⁷ Moreover, in a number of reported cases in which district courts have decided to permit cross-examination of a decisionmaker, the result has been to expose violations of the law that otherwise might have gone undetected.³⁸ So far as I know, no commentator has identified an actual case in which a court authorized the taking of oral testimony and it turned out to be contrary to some recognizable public interest. Provided that this method of taking evidence is used only under the close supervision of the trial judge and is limited to situations in which it is justified in accordance with the

34. *Id.* at 266, 268.

35. *See, e.g.*, K. DAVIS, *supra* note 8, § 11.00, at 36 ("Having administrators testify about their decisions is no more seemly than having judges testify about their decision [sic].").

36. *See Overton Park*, 401 U.S. at 420.

37. *Cf. Schicke v. Romney*, 474 F.2d 309, 319 (2d Cir. 1973) ("We see no objection to plaintiffs' deposing the Secretary if that should be necessary to a determination of whether the Secretary obeyed the statutory mandate. . . .").

38. On remand in *Overton Park*, for example, the district court authorized a pretrial deposition of the decisionmaker, a process that ultimately provided "overwhelming" evidence that the decisionmaker had not considered the factors he had been required to consider by statute. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 335 F. Supp. 873 (W.D. Tenn. 1972). Similarly, in *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972), the district court required the decisionmaker to testify at the trial, and that testimony led the court of appeals to conclude, as in *Overton Park*, that the decisionmaker had failed to comply with the requirements of the statute. *Id.* at 1238-39. My view of the rightness of the latter conclusion is admittedly partial: I represented the plaintiffs in the action. *See also Biscayne Fed. Sav. & Loan v. Federal Home Loan Bank Bd.*, 572 F. Supp. 997, 1006 (S.D. Fla. 1983) (chairman of Home Loan Bank Board testified, after being served with notice of deposition, concerning rationale for decision).

stringent standards noted above, it would seem by hypothesis to be in the public interest.

2. Use in the United Kingdom

Given the very recent flowering of the English procedure under Order 53, it is too early to know whether English law will develop in a parallel way. Inquiries directed to British counsel, including members of the English team during the Anglo-American Exchange, suggest that no applicant for judicial review of a decision of the central government has even requested, much less been granted, judicial leave to cross-examine the decisionmaker. Under the English practice, thus far at least, the usual decisionmaker's affidavit and documents seem to have been viewed as the only proper sources of the facts.³⁹

On the other hand, in *O'Reilly v. Mackman*,⁴⁰ Lord Diplock foresaw the possibility that "rare occasions" might arise in which "the interests of justice will require that leave be given for cross-examination of deponents on their affidavits in applications for judicial review."⁴¹ This last statement seems to indicate that, if an English applicant for judicial review came forward with "a strong showing of bad faith or improper behavior,"⁴² or if effective judicial review appeared to be impossible without oral testimony by the decisionmaker, an English reviewing court might be inclined to grant leave for cross-examination of the responsible official, just as would be done in the United States.⁴³

III. CONCLUSION

Despite significant differences between British and American attitudes toward such matters as "government secrecy" and pretrial discovery, recent case law in both countries indicates a trend toward the development of similar procedural approaches in the field

39. See *supra* notes 5-6 and accompanying text.

40. [1983] 2 A.C. 237 (1982).

41. *Id.* at 282.

42. *Overton Park*, 401 U.S. at 420.

43. See *R. v. Secretary of State, ex parte Powis*, [1981] 1 W.L.R. 584, 595-96 (C.A. 1980) (discussing the need for the taking of evidence when the proceedings may have been tainted by official misconduct).

of administrative law. In judicial review of administrative action, as in many other areas of the law, thoughtful British and American judges have tended to develop remarkably similar approaches over time. This tendency perhaps is due, at least in part, to constructive exercises such as the Anglo-American Exchange.