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"SOME KIND OF HEARING" IN ENGLAND

CHARLES H. KOCH, JR.*

After the Second World War, commentators expressed consider-
able doubt as to whether England had administrative law at all.¹ At Oxford, no such course was even taught.² By the early seventies, however, administrative law was a growing part of English law. As with the United States, the seventies saw administrative law expand to major significance in the English legal system.³ Neither the new enthusiasm for laissez-faire nor the old enthusiasm for nationalization restrained its maturation.

The development of English administrative law provides mem-
bbers of the American legal community with useful contrasts when evaluating the expansion of our own administrative procedures. Some axiomatic thinking breaks down when one sees that another system accepts or succeeds with approaches traditionally rejected by one's own system. Study of English procedural efforts is partic-
ularly useful for this purpose because their development shows in-
stances when even in the face of similar fundamental concepts dif-
ferent instincts result in different procedural choices. For these purposes, this article provides an overview of procedural develop-
ment in England in comparison with parallel American efforts.

CONCEPTS OF NATURAL JUSTICE AND DUE PROCESS

Professor Wade, a leading scholar in English administrative law, contends that English administrative law was not discovered in the

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1. See Ridge v. Baldwin, [1964] A.C. 40 (H.L.). "We do not have a developed system of
administrative law—perhaps because until fairly recently we did not need it." Id. at 72
(opinion of Lord Reid).

2. B. SCHWARTZ & H. WADE, LEGAL CONTROL OF GOVERNMENT 322 (1972) [hereinafter
cited as SCHWARTZ & WADE].

3. "It may truly now be said that we have a developed system of administrative law."
Breen v. Amalgamated Eng'r Union, [1971] 1 All E.R. 1148, 1153 (C.A.) (opinion of Lord
Denning, M.R.); see J. GARNER, ADMINISTRATIVE LAW 1 (5th ed. 1979).
seventies but that it was rediscovered: it was an important part of English law in the 17th and 18th centuries and began long before that. The fundamental concepts of administrative law in England are based on the longstanding doctrine of natural justice much as ours are based on due process. England experienced a natural justice explosion during approximately the same period that this country saw a due process expansion.

Natural justice is based on two fundamental concepts. The first is a guarantee of an unbiased tribunal. This doctrine stems from the idea that no one should be a judge in his own case. The second precept of natural justice is a guarantee of some kind of hearing, which arises from the right to present the other side. The right to be heard prescribes no particular format because it incorporates very few clearly established procedural elements. This second concept forms the basis for much of the recent development. Because the development under this concept parallels so closely that of American due process, this comparative discussion will focus on the right to a hearing, but the right to an unbiased tribunal will be considered in its place.

Unlike the United States, England has no written constitution and consequently no due process clause. Technically, all law comes from Parliament, and fundamental statutes such as the Bill of Rights Act of 1689 and the Habeas Corpus Act of 1679 could be repealed as easily as any other statute. This structure has tremendous impact on the role of the courts. The courts can impose neither substantive nor procedural requirements that are contrary to the will of the legislative branch. Judicial legislating, such as that undertaken in this country in the name of due process, is simply illegal. Nonetheless, English courts inject fundamental proce-

8. 1 W. & M., c. 2.
9. 31 Car. 2, c. 2.
dural concepts into the law through the device of natural justice.\(^\text{12}\)

Americans must remember that natural justice does not stand by itself, for Parliament is superior to both natural justice and the courts. The theory by which it is enforced holds that the duty to act fairly is \textit{implied} in every statute. Therefore, administrative action that impugns natural justice is void as \textit{ultra vires}—outside the authority delegated the agency by Parliament.\(^\text{13}\) Parliament can deny all or any part of natural justice in a particular administrative scheme if it so desires. The only power the courts have to protect natural justice is to require, because the rights are so fundamental, that Parliament state very clearly its intention to preempt natural justice.\(^\text{14}\) Such tenuous theoretical underpinnings for fundamental procedural protection are difficult for Americans to grasp, but, in reality, the basic precepts of natural justice are nearly as safe from attack as are those of due process in the United States. Although in a sense English courts establish these fundamental procedures with the acquiescence of Parliament, the emotional strength of this doctrine replaces constitutional command with a psychological force having nearly equal effect.

Although the growth of American due process also resulted from a strong urge to assure that the government act fairly towards its citizens, the need for a textual foundation forced due process analysis to follow a more semantic course to many of the same objectives. The drive for due process always was an important force in our constitutional history, but the drive gained new impetus in 1969 with the Supreme Court's decision in \textit{Goldberg v. Kelly}.\(^\text{16}\)

That decision added new scope to the potential entitlement to

\(\text{12}\). Natural justice and natural law are not synonymous terms. Although the early development of natural justice can be linked to natural law theory, the appeal of natural justice stems from the same concern for fairness that fueled the later growth of due process in the United States. \textit{See} Master v. Miller, 100 Eng. Rep. 1042 (K.B. 1791), \textit{aff'd}, 101 Eng. Rep. 205 (Ex. 1793); Moses v. Macferlan, 97 Eng. Rep. 676 (K.B. 1760) (In an action for fraud, "the defendant . . . is obliged by the ties of natural justice . . . to refund the money."); R. v. Chancellor of Cambridge, 92 Eng. Rep. 818 (K.B. 1723) (also known as Dr. Bentley's Case) (mandamus action to restore academic degree to Bentley who had been stripped of his degree for "speaking opprobrious words of the vice-chancellor").

\(\text{13}\). H. WADE, \textit{supra} note 4, at 447-48.

\(\text{14}\). \textit{Id.} at 451-53. Under certain circumstances the presumption in favor of natural justice may be rebutted. \textit{Id.}

rights protected by due process. Following Professor Reich's lead, the Supreme Court found that in a social welfare society government largess becomes a property right. Following Professor Reich's lead, the Supreme Court found that in a social welfare society government largess becomes a property right. Goldberg, therefore, marked the initiation of a trend to extend the application of due process requirements into the area of executive and administrative action, which had been the exclusive domain of administrators exercising unstructured discretion.

Due process theory in the United States formulates a test based on the threatened deprivation of life, liberty, or property by government action. To establish the opportunity to be heard one first must show some entitlement, usually to liberty or property. Such an allegation is made easier by the decisions expanding the reach of liberty and property.

The Supreme Court offered concise expression of the expanded definition in Board of Regents v. Roth. That case involved the right of a state university to fire an assistant professor without a hearing. The Court found no entitlement in that case and hence refused to require a hearing. In doing so, however, the Court used a broad notion of both liberty and property. It defined the liberty interest, beyond the common usage, to include government action "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." This definition gave rise to two situations in which a liberty interest was at stake: (1) when the government made charges against the individual that "might seriously damage his standing and associations in his community," or that threaten his "good name, reputation, honor, or integrity"; and (2) when the state imposed "a stigma or other disability [upon the individual] that foreclosed his freedom

17. 397 U.S. at 261-64.
19. The concept of deprivation of life rarely enters into this due process analysis, but in O'Bannon v. Town Court Nursing Home, 447 U.S. 773 (1980), the Supreme Court faced the argument that moving elderly people to nonapproved nursing homes may deny due process by endangering their lives. Only one Justice, however, found the argument appealing. Id. at 802-04 (Blackmun, J., concurring).
21. Id. at 573 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).
to take advantage of future employment opportunities." Similarly, the Court used a very broad concept of property. It found that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation... He must... have a legitimate claim of entitlement to it." This broader concept of property supported the trend towards greater coverage of the due process clause.

Despite the propensity to expand due process coverage, the Supreme Court seems to require a threat of grievous loss in the government action to require a hearing. There is some likelihood, however, that this expression relates to a cost/benefit approach: the cost to the government in affording a hearing balanced against the benefit to the citizen in receiving one. This balancing of fairly abstract costs and benefits compels a value-sensitive approach. Although this value-sensitive approach may further the search for real fairness and enrich the law, it may also run contrary to the requirement that textual support must be found for constitutional prescriptions. Nonetheless, the new vigor in due process thinking added by Goldberg is the result of the Court's refusal to be bound to restrictive textual interpretation. Fortunately for the English they do not have to worry about textual justification and can search uninhibited for new approaches to the guarantees of procedural fairness.

The broader concept of property also moves American due process theory closer to the English parliamentary supremacy. Under the entitlement doctrine, the right to due process rests on the interpretation of enabling legislation. Procedures may not be re-

22. Id. at 573-74.
23. Id. at 577.
25. 424 U.S. at 335.
27. Rabin, Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement, 44 U. Chi. L. Rev. 60, 71 n.44 (1976) (Professor Rabin supports the "positivist approach" under which legal interests such as property rights are derived through statutory and judicial interpretation as opposed to constitutional interpretation).
quired, for example, when the administrator is not required by the statute to apply legislative standards but rather may exercise discretion.\textsuperscript{28} Even assuming that this approach to entitlement is overly semantic, the thrust of Professor Reich's new property concept still is that \textit{legislatively created} benefits cannot be denied by an agency without due process. Hence this foundation for due process can be removed by the legislature because there is no entitlement except as the legislature creates the right. Under the entitlement approach, the legislature is supreme in the sense that it can withdraw the entitlement and probably prescribe procedures.\textsuperscript{29} Entitlement doctrine places the legislature in a position superior to the courts much as is Parliament in England. Of course, some of the fundamental and nonstatutory property rights beyond the domain of the legislature in this country may be, at least theoretically, subject to parliamentary caprice in England. Only the "new property" creates a parallel legislative control in this country. Under the present political environment, the distinction between the two will become more significant. The distinction seems inconsequential to date only because Congress has expanded, never contracted, "new property" rights.

\section*{When Is Natural Justice Required?}

Reinvigoration of natural justice and the evolution of this new sophistication in its application began with the House of Lords opinion in 1963 in \textit{Ridge v. Baldwin}.\textsuperscript{30} As \textit{Goldberg} was to due process, \textit{Ridge} proved to be for natural justice. The case involved the dismissal of the Chief Constable of Brighton. He was acquitted of conspiracy to obstruct justice, but the judge made two adverse comments. The Brighton Watch Committee dismissed the Constable without notice or a hearing. After the dismissal, the Committee conducted a hearing but affirmed the action taken. Upon exhausting administrative appeals, the Constable resorted to the courts. The House of Lords issued a declaration\textsuperscript{31} voiding the dismissal\textsuperscript{32}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 77-78.
\item [1964] A.C. 40 (H.L.).
\item Like a declaratory judgement in this country, an English declaration merely advises a
\end{enumerate}
\end{footnotesize}
because the Constable was given no notice of the charges against
him nor any opportunity to offer a defense.\textsuperscript{33} Lord Reid’s opinion
was of great significance because it reviewed existing natural jus-
tice authority and exposed the fallacies into which the decisions
had fallen in order to circumvent established concepts of natural
justice.\textsuperscript{34} As Professor Wade declared: “At last we reach the result
directly instead of by a devious path: administrative powers which
affect rights must be exercised in accordance with natural jus-
tice.”\textsuperscript{35} Although Ridge was in no way the beginning, for a good
deal passed before it, it was the watershed from which the English
right to hearing jurisprudence flowed.

The English have had at least as much difficulty creating a gen-
eral theory of natural justice as we have had developing a general
theory for due process. Without the textual boundaries of a written
constitution, they have cast about for a doctrine to distinguish
those administrative contacts with citizens which incorporate by
their nature natural justice guarantees from those which leave the
citizen with no fundamental protection. In the periods of narrow
natural justice application the English constructed unsatisfactory
doctrines similar to those used to contract due process. They also
drifted away from these restrictive doctrines over the years as the
doctrines’ artificiality was found to frustrate justice.

Both countries have experimented with the rights/privilege doc-
trine and ultimately rejected it for practical purposes. The rights/
privilege doctrine guaranteed procedural fairness only when the
government action involved a right, because a privilege constituted
a mere gratuity conferred in an exercise of unilateral generosity by
the government. Professor Reich suggested that in modern social
welfare society government largess should be viewed as creating
“new property” rights upon which the government must act fairly
in conferring or denying.\textsuperscript{36} Goldberg and its progeny in the United

\textsuperscript{32} Not all violations of natural justice will void an action; if the violation is not serious
the action may be only voidable, rendered void only by judicial declaration. De Smith, Judi-

\textsuperscript{33} [1964] A.C. at 79-81.
\textsuperscript{34} Id. at 63-81.
\textsuperscript{35} H. Wade, supra note 4, at 446.
\textsuperscript{36} Reich, supra note 16.
States followed this lead by undertaking expanded definitions of liberty and property rights which, being rights and not privileges as formerly characterized, raised the guarantees of due process.37 Thus the rights/privilege doctrine succumbed to the new definitions of property rights so that express rejections of the doctrine were unnecessary. These benefits which formerly might have been classed as privileges became rights, thereby depriving the rights/privilege distinction of any practical impact on due process guarantees. Whether evaded or expressly rejected, the rights/privilege doctrine has faded into the history of due process analysis. Similarly, the English courts which reinvigorated the exploration for natural justice refused to find that the requirement that the government act fairly depends on a finding of a preexisting right.

Some observers claim that the rights/privilege doctrine survives under new terminology because the decision as to entitlement resembles the past determination of whether a right is involved.38 This view is supported by the Goldberg requirement of "grievous loss": that a serious entitlement must be involved.39 Can there be much difference between the search for a serious entitlement and for a right? Perhaps partly because of the absence of textual reference, the English seem to free themselves more completely from similar semantic distinctions. Professor Wade comments on recent natural justice development:

[T]he courts have succeeded in enforcing the principle very widely, broadly speaking in all cases where legal rights or status are affected by the exercise of administrative power, saving only cases where the difficulty is insuperable; and that, accordingly, natural justice has become a doctrine with a high degree of universality.40

 Nonetheless, the English system searches for structural limita-

39. 397 U.S. at 268-70. See also 424 U.S. at 333.
40. H. WADE, supra note 4, at 421.
tions in the face of broad substantive coverage. One effort involves the concept of *lis*. Under this concept, the agency has unfettered discretion up to the point where the administrative action is published and an objection is lodged. From that point onward there is an issue, a *lis*, between the agency, usually a local authority, and the objecter. The decisionmaking body then can deal no longer with one side without dealing with the other. This doctrine is disfavored for its lack of coverage and for its artificiality. The doctrine does not permit natural justice to work on decisions other than those when two adverse sides are formed. Moreover, the doctrine is unsatisfactory when a single agency both proposes the action and hears the objection.

The concept of *lis* seems based on the notion that procedural rights attach only after the actual finalization of administrative discretion. Although American administrative law creates no similar concept, a greater protection is accorded for rights already attached than for rights not yet received. This instinct is expressed in a more viable and pragmatic form than the artificial concept of *lis*. Indeed, in *Lavine v. Milne* the Supreme Court suggests that those who already have a benefit deserve greater procedural protection than those who are applying for one. Although this notion also resembles the rights/privilege doctrine, Judge Friendly explains that it merely expresses the human difference between losing what you have and not getting what you want. In addition, this notion does not suggest, as does the concept of *lis*, that procedural protection begins only after initial government action is taken. It merely suggests that the potential loss is greater once the benefit is conferred.

English development was retarded greatly by the efforts to limit natural justice in administrative contexts to "quasi-judicial" func-

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41. Id. at 434.
42. See, e.g., Marriott v. Minister of Health, 52 T.L.R. 63 (1935); Fredman v. Minister of Health, 154 L.T. 240 (1935); Denby & Sons Ltd. v. Minister of Health [1936] 1 K.B. 337.
44. 424 U.S. 577 (1976).
45. Id. at 584-86. The Administrative Procedure Act, 5 U.S.C.A. §§ 551-576 (West 1977 & Supp. 1981), for example, affords more protection in the proceedings for one already holding a license required by law than for one applying for that license. Id. at § 558.
tions. At one time the English defined administrative acts as "judicial" in order to examine them for compliance with natural justice. For example, in Hopkins v. Smethwick Local Board of Health, the court stated that "[i]n condemning a man to have his house pulled down, a judicial act is as much implied as in fining him £5; and as the local board is the only tribunal that can make such an order its act must be a judicial act . . . ."47

For a time English judges justified their intervention by assuming that every judicial act was subject to procedures required by natural justice. The exercise then became defining additional activities as judicial or quasi-judicial. During the period after the Second World War when English courts began to narrow the coverage of natural justice, they relied on the notion that natural justice applied only to judicial or quasi-judicial acts. Thus they refused to apply natural justice to "purely administrative acts."48 These cases greatly inhibited natural justice's ability to provide procedural protection for those affected by government action. Technically, it was in overturning this concept that Ridge served to reopen the doors to procedural fairness.49 Lord Hudson made the court's intention in this regard clear:

[T]he answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity as if that was the antithesis of a judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principles of natural justice.50

From this case forward the English courts no longer were impeded by the semantic debates in interpreting the scope of natural justice. The law as to coverage became that expressed by Lord Loreburn: "[Decisionmakers] must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who

47. Id. at 714-15 (opinion of Wills, J.).
49. See notes 30-33 & accompanying text supra.
decides anything.”

The scope of the phrase “everyone who decides anything” is very broad because the application of natural justice, unlike due process, does not require state action. Because natural justice is not based on a written document, an English court need not find textual justification for its analysis as an American court would be required to do when interpreting the fifth and fourteenth amendments. Parliament is supreme over both public and private action. It has the power to eliminate procedural protection in the public sector and the power to require it in the private. This power means that any concept of natural justice which derives its force from parliamentary action or acquiescence applies with equal force to public and private decisionmakers. Thus, natural justice is applied to labor unions, private clubs, private and professional associations, religious bodies, and private schools. This concept cannot be carried too far, however, because natural justice is applied differently to private decisionmakers than to government. Much of the recent movement in procedural protection is directed to government action, and no firm conclusion can be reached as to how this development applies to private decisionmakers.

In creating the potential for very broad coverage, Ridge moved the debate into deciding what procedures are required for which types of administrative action. Fortunately for the English, who have no textual support for natural justice, their courts are free to take a more flexible approach to the application of natural justice. This advantage results in more freedom to determine what procedures are required. Whether under a definitional approach or a value-sensitive/balancing approach, American entitlement decisions focus attention on the black-white conclusion as to whether

procedures are required. Indeed, one line of cases finds that due process entitles one to either a trial or to nothing. By contrast, in the classic statement quoted above, Lord Loreburn continued, "But I do not think . . . [decisionmakers] are bound to treat such a question as though it were a trial."

The English have no need to start from statutory and philosophical interpretations of the terms life, liberty, or property, and hence they naturally focus on the crucial question of what procedures are appropriate and useful for a particular decision. In making this judgment, they are aware of administrative law's duty to the taxpayer, including the duty to assure that money allocated to social welfare is not diverted to unnecessary procedures, as well as the duty to individuals directly affected by administrative action. Intuitively, the better Supreme Court due process decisions, most notably Goss v. Lopez, focus on what procedural elements should be used. They view the question not as whether due process is required, but as what process is due.

What Kind of Hearing

With the new breadth in coverage, natural justice theory is left to wrestle with the same problems which plague current due process thinking: what procedural elements are required under what circumstances. American due process jurisprudence tends to focus on the procedural elements listed in Goldberg. Although the hearing contemplated there is not to "take the form of a judicial or quasi-judicial trial," it has many elements of a trial. Since that case, courts and commentators alike have analyzed the appropriate combinations of procedures for a particular administrative decision according to the Goldberg list.

Although natural justice gives the English a fundamental right

54. Rabin, supra note 27, at 75.
55. [1911] A.C. at 182.
58. 397 U.S. at 267-71. Among the fundamental concepts the Court denoted in Goldberg were an opportunity to be heard in a meaningful manner, adequate and timely notice, the right to confront and cross-examine witnesses, and in certain circumstances, the right to competent counsel. Id.
59. Id. at 266.
to a hearing similar to an American right to due process, the particulars of the English right by American standards are minimal. Not only does the right not contemplate a trial, but the longstanding right probably includes only the right to notice and some opportunity to make a presentation (saving for the moment the well-established element of an unbiased tribunal). In general, the amount of procedural protection available under natural justice is far less than that to which Americans have grown accustomed. Nonetheless, the variety of particular procedural elements which might be required under natural justice has expanded greatly in recent years. Increasingly, natural justice, as does due process, may involve any number of combinations of procedures beyond those traditional procedural elements.

Commentators extract somewhat different lists from Goldberg, depending on the need for detailed itemizing. For the purposes of

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61. Schauer, supra note 52, at 58.
63. Professor Davis considers 20 different procedural elements in his due process discussion. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 10.6 (2d ed. 1979). He finds that the Court in Goldberg required 10 elements in a trial-type hearing: (1) "timely and adequate notice detailing the reasons for a proposed termination," (2) "an effective opportunity to defend by confronting any adverse witnesses," (3) oral presentation of arguments, (4) oral presentation of evidence, (5) cross-examination of adverse witnesses, (6) disclosure to the claimant of opposing evidence, (7) the right to retain an attorney, (8) a determination resting "solely on the legal rules and evidence adduced at the hearing," (9) "the decisionmaker should state the reasons for his determination and indicate the evidence he relied on," and (10) "an impartial decisionmaker is essential."

Davis also found that the Court expressly excluded four elements: (11) "a complete record," (12) "a comprehensive opinion," (13) counsel provided by the government, and (14) "a full opinion or even formal findings of fact and conclusions of law."

Other items that might be considered, especially in a criminal context, are (15) a jury trial, (16) a right to appeal to a higher authority, (17) a right to subpoena witnesses and evidence and a right of discovery, (18) a hearing open to the public, including the press, (19) proof beyond a reasonable doubt, and (20) protection against undue delay.

Professor Cramton considers the general characteristics of trial-type procedures:

The essentials of trial-type procedure are well understood. They involve (1) the special characteristics of the tribunal, which should be impartial and competent; (2) the right of the parties to participate through special procedural devices, such as entitlement to notice, opportunity to present proof and to cross-examine opposing witnesses, and the like; (3) a special requirement that the decision be based on the record, consistent with accepted principle and rationally explained; and (4), as a means of enforcing the other requirements,
this article, only the broad categories of procedural elements are used. This section will discuss the English and American view of certain elements cited in Goldberg: (1) "timely and adequate notice," including notice of adverse evidence; (2) "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) appearance through counsel; (4) a record and some form of reasons; and (5) an impartial decisionmaker. Because the actual procedure under inspection in Goldberg provided for appeal, the court did not consider the necessity of a right to appeal, but in comparing the two systems the right to administrative and judicial review also will be considered.

**Timely and Adequate Notice**

In Goldberg, the Supreme Court stated that timely and adequate notice is a basic principle of the right to a meaningful hearing. The natural justice right of an opportunity to be heard also sets out adequate notice as a fundamental principle. Indeed, no element is established so well under natural justice as the right to notice. As with due process, the natural justice right to notice also demands that the notice be given in reasonable time to allow the citizen to confront the agency action.

Although due process doctrine clearly requires that notice be given in a timely fashion and in a manner reasonably calculated to inform the citizen of the proposed action, the particulars of what constitutes adequate notice vary a good deal. Because even in formal adjudication no more than notice pleading is required, the reviewability of decisions by an appellate court.


64. See notes 58-59 & accompanying text supra.
65. 397 U.S. at 267-68.
68. Friendly, supra note 5, at 1280.
69. 5 U.S.C.A. § 554(b) (West 1977); United States Dept of Justice, Attorney Gen-
standard for notice in informal administrative decisionmaking is not very high.\textsuperscript{70} Similarly, although the natural justice right to notice has existed for centuries, standards of adequacy are defined no better in England than in the United States.

In discussing hearing rights, the Supreme Court in \textit{Goldberg} cited its pronouncement in \textit{Green v. McElroy}\textsuperscript{71} that the government must disclose the evidence it intends to use.\textsuperscript{72} However, the extent to which this is required for adequate notice is unclear. In England there is corresponding debate over whether natural justice requires disclosure of reports and evidence in the government's possession. At least one case holds that an administrative tribunal must disclose reports and evidence bearing on the case under consideration.\textsuperscript{73} In the administrative context this right may be limited by a balancing of the government's needs or those of a statutory scheme against the interests of the citizen in such information.\textsuperscript{74} Natural justice may be satisfied by supplying the citizen with the substance of the case he must meet without disclosing the precise evidence or sources of information.\textsuperscript{75}

\textbf{Confrontation and Presentation of a Defense}

A well-established doctrine of natural justice is that the citizen should have some opportunity to present contrary argument and information.\textsuperscript{76} This opportunity normally takes the form of some sort of oral proceeding, though it need not be a trial-like hearing.\textsuperscript{77}

In England this opportunity likely is provided in the form of a "statutory tribunal." There are some 2,000 established tribunals in England and Wales.\textsuperscript{78} These administrative bodies are structured more formally and regulated more closely than other English ad-

\textsuperscript{70}. K. \textsc{Davis}, \textit{Administrative Law of the Seventies} § 8.05 (1976).
\textsuperscript{72}. 360 U.S. at 496-97.
\textsuperscript{73}. H. \textsc{Wade}, \textit{supra} note 4, at 460.
\textsuperscript{74}. 397 U.S. at 270 (quoting 360 U.S. at 496-97).
\textsuperscript{77}. J. \textsc{Garner}, \textit{supra} note 3, at 219.
ministrative forums. They possess many of the same characteristics of a formal hearing in the United States without all the accoutrements of a trial.\textsuperscript{79} Such bodies are governed by the most pervasive administrative procedural reform legislation in recent times—the Tribunals and Inquiries Act of 1971.\textsuperscript{80} Not only are the tribunals supervised by the country's chief legal officer, the Lord Chancellor, but they also are subject to monitoring by a special administrative body, the Council on Tribunals.\textsuperscript{81} The Council in some ways is similar to the Administrative Conference of the United States (ACUS)\textsuperscript{82} in that it acts only through advice and consultation. However, although the Tribunals and Inquiries Act is not so firm and concrete as the United States' Administrative Procedure Act (APA), the Council has a more formal place in the regulation of administration than does ACUS. Therefore, over time the Council probably will add structure and uniformity to the type of hearing provided by tribunals. At present there is too little uniformity and too much complexity.\textsuperscript{83} Even so, as in the United States, the specter of overjudicialization hangs over English natural justice thinking.\textsuperscript{84}

The natural justice right to correct or contradict the government applies to all forms of government decisionmaking. When the statute does not establish a tribunal, however, the scope of this right is amorphous. Generally, the hearing must be oral although completely written procedures are upheld.\textsuperscript{85} When an oral hearing is held the rules of evidence do not apply,\textsuperscript{86} and although a citizen usually has the right to call and question a witness, that right

\begin{footnotes}
\item[79] See id. at 231-44.
\item[80] The Tribunal and Inquiries Act, 1971. This Act replaced the more limited 1958 legislation which had regulated administrative procedure and practice in England. H. Wade, supra note 4, at 756-58.
\item[83] J. Garner, supra note 3, at 244.
\item[84] Compare Bell, Administrative Tribunals Since Franks, 4 Soc. & Econ. Ad. 279, 298 (1970) with J. Garner, supra note 3, at 244.
\item[85] R. v. Bishop of Ely, 5 T.R. 475, 477 (1794). The Court of Justice, for example, relies almost solely on written submissions.
\item[86] H. Wade, supra note 4, at 462.
\end{footnotes}
might give way to its unsuitability to the function in question.\textsuperscript{87}
The right of discovery appears unnecessary under natural justice,\textsuperscript{88}
just as it is unnecessary for due process in the United States.\textsuperscript{89}

Due process analysis tends to assume an adversary process. Pro-
cedural commentary in the United States, however, questions the
advisability of an adversary approach to many mass justice pro-
grams,\textsuperscript{90} and study shows that an adversary process is not
preferred even by the participants under certain circumstances.\textsuperscript{91} Be-
cause the English do not wed their thinking to the concept of trial
as much as we do,\textsuperscript{92} they have not had to mitigate the urge to build
a trial into every process. They have not, therefore, had to develop
the extensive informal action jurisprudence that has freed adminis-
trative law imaginations over the last decade or so. Nonetheless,
they have experimented with several informal approaches to ac-
complishing the goals of administrative law. One approach is
through the recognition that informal procedure in certain circum-
stances may be the best way to achieve administrative justice.\textsuperscript{93}
For example, they use something called "satisfaction procedure" in
some situations. This process uses personal conferences and internal
review to make administrative decisions and apparently is use-
ful for appropriate administrative functions.\textsuperscript{94}

The English also have experimented with the ombudsman.\textsuperscript{95} In

\textsuperscript{87} Id.

\textsuperscript{88} See generally id. at 460.

\textsuperscript{89} 2 K. Davis, Administrative Law Treatise § 10.6 (2d ed. 1979).

\textsuperscript{90} Compare Friendly, supra note 5, at 1289-90 with Mashaw, supra note 26, at 53-54.

\textsuperscript{91} If the interests correspond, the standards and both sides will recognize the value of
efficiency. Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 734,
754-56 (1976).

\textsuperscript{92} Beatson, supra note 62, at 437.

\textsuperscript{93} Ganz, Administrative Procedures 16 (1974).

\textsuperscript{94} Bell, Administrative Tribunals Since Franks, 4 Soc. & Econ. Ad. 279, 299 (1970).

\textsuperscript{95} An ombudsman is an independent government official who attempts to rectify, usually
through informal consultation, particular citizen complaints against government agencies.
W. Gellhorn, Ombudsman and Others: Citizen's Protectors in Nine Countries (1966); F.
Stacey, The British Ombudsman 205 (1971). In the late sixties there was so much enthusi-
asm for the idea in this country that Professor Fuchs remarked: "[T]he institution of the
ombudsman . . . threatens to become almost an obsession with proponents of administra-
tive reform." Fuchs, Book Review, 19 Ad. L. Rev. 329, 329 (1967). In the end, the
ombudsman craze abated with virtually no impact outside certain local experiments. The
idea has been transplanted to only one country, New Zealand, outside its native Scandina-
via. See generally W. Gellhorn, supra, at 41.
1967, Parliament created a "Parliamentary Commissioner for Administration." This office is not as powerful nor its jurisdiction so pervasive as the Scandanavian ombudsman. Complaints do not come directly to the Commissioner but arrive through members of Parliament. The Commissioner has no formal power except the power to investigate and report to the members of Parliament. As in the United States, legislators in England are not interested in surrendering this most potent method for keeping the folks back home happy. Therefore, the Commissioner can investigate only maladministration in administrative action, which means among other things that the office cannot involve itself in rulemaking. In addition, many government functions are expressly removed from the Commissioner's jurisdiction.

In 1974 substantial new use of the ombudsman device was generated by the establishment of a commissioner for local authorities. Because local governments in England are more under the control of the central government than are local governments in the United States, this officer has substantial impact on the English citizens' ability to complain about government action. Moreover, the English procedural reform gave the Council on Tribunals a more active role in citizens' disputes with the government than has the Administrative Conference of the United States. Unlike the Conference, the Council deals directly with some citizen complaints concerning the way agencies go about their business. These complaints are taken up with the government departments when they seem meritorious. A number of improvements in internal procedures have resulted.

The right to a hearing in public is a fundamental constitutional

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96. J. Garner, supra note 3, at 10-11. The executive does have authority, however, to draft regulations, orders, and related statements, which form "an important means whereby the policy of the Government of the day may be implemented." Id. at 10.
97. Id. at 112.
98. See Local Authorities Act, 1972.
99. In 1976, the English Commission found maladministration at the local authority level in about 10% of the cases reported; the Welsh Commission figure stood at 45% for the same period. J. Garner, supra note 3, at 114.
100. H. Wade, supra note 4, at 823-24. The Council, however, resembles an advisory body; it has no statutory powers of investigation or rulemaking. Recent regulatory reform proposals would give ACUS jurisdiction over complaints against government agencies. See S. 1291, 96th Cong., 1st Sess., tit. IV (1979).
concept which is not applied to American administrative hearings. In the administrative context public hearings are not so much individual protections because the opening of the hearing really protects the public more than the parties. A frequent suggestion is that clientele-oriented agencies are more inclined to conspire with the regulated if they can meet in private. No matter whether any empirical support exists for such opinions, the fact is that people generally distrust government operating behind closed doors. Yet this distrust is not translated into constitutional proportions perhaps because it is not so important to the rights of the individual. Indeed, public administrative proceedings sometimes would do unwarranted harm to individual citizens.\textsuperscript{101}

In England, the Public Bodies Act of 1960 requires public admission to meetings of local authorities.\textsuperscript{102} Nonetheless, the instinct for closed administrative action curtails this open meetings requirement. For example, in \textit{R. v. Liverpool City Council}\textsuperscript{103} the court held that the public could be excluded because of insufficient space in the meeting room. The court also found that the public could be excluded because a person is entitled to make representations in the absence of others making conflicting representations. As in the United States, the parties are the ones who want private hearings, and hence public hearings do not exist to protect those directly affected by government action. For this reason the court, even in the face of a statutory open meetings requirement, responded to a reasonable excuse for a nonpublic meeting.\textsuperscript{104}

Natural justice in theory does not require a public hearing in administrative proceedings. Even so, in England as in the United States, most formal administrative hearings are open to all who have a sufficiently high threshold of boredom.\textsuperscript{105} One gets the feel-

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102. Section 1(1) of the Act provides: “[A]ny meeting of a local authority or other body exercising public functions, being an authority or other body to which this Act applies, shall be open to the public.” If the subject of the meeting is confidential and publicity will harm the public interest the proceedings need not be open. \textit{Id.} § 1(2).

103. \textit{[1975]} 1 All E.R. 379 (Q.B.).

104. The fact that the Council made reasonable attempts to accommodate the public and did not demonstrate bad faith seemed to weigh heavily in the court’s decision. \textit{Id.} at 383 (opinion of L. Widgery, C.J.). The admission of the press to the proceeding also may have been a factor.

105. D. \textit{FOULKES, INTRODUCTION TO ADMINISTRATIVE LAW} 66 (3d ed. 1972): “Not all tribu-
ing, nonetheless, that there is much less of a mandate for openness in England than in America. The observations of Schwartz and Wade, however, now may be something of an overstatement of the current presence of closed administrative decisionmaking. Even when Schwartz and Wade wrote, a good deal of development both in natural justice thinking and in statutory prescription had worked to mitigate the closed door nature of English administrative decisionmaking processes, and this movement has continued. At some point, however, agency officials must have privacy to work out their own views.

Right to Appear Through Counsel

Under both due process and natural justice the right to counsel in administrative proceedings is somewhat in doubt. Goldberg quotes the longstanding authority of Powell v. Alabama that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Nonetheless the Supreme Court refuses to make legal representation a due process right in administrative proceedings. In England the right to representation also is considered important but not so fundamental as to be required in all instances when the government confronts one of its citizens.

nals sit in public. The [Franks Committee] report thought they should do so except in three cases: where public security was involved, where intimate personal or financial circumstances had to be disclosed and where questions of professional capacity and reputation were involved." Id.

107. Schwartz & Wade, supra note 2, at 165-66; H. Wade, supra note 4, at 805-06.
108. Public disclosure of agency activities must be tempered by the demands of good decisionmaking processes. Because the English have a tradition of a more closed government, they strike this balance at a different point than we might.

Even the drafters of the Freedom of Information Act recognized this requirement. "It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.'" Clarifying and Protecting the Right of the Public to Information, and for Other Purposes, S. Rep. No. 813, 89th Cong., 1st Sess. (1965).

110. 397 U.S. at 270 (quoting 287 U.S. at 68-69).
This conclusion is true particularly in the "mass justice" environment created by expansive social welfare legislation. In those programs the underlying government objective is to grant benefits to those who are eligible, and the administrative body's duty is to identify eligible claimants. The decisionmaking is characterized as nonadversary because the agency's interest is the same as the eligible claimants'. Nonetheless, study of several social welfare programs suggests that those represented by counsel are successful more often than claimants who appear pro se. Similar findings are made in an English study of the impact of legal representation. That study finds legal representation particularly important to disadvantaged persons appearing before government agencies.

Judge Frankel suggests, however, that counsel as an advocate may interfere with the function of the decisionmaking process. Under an adversary system counsel tries to advance the interest of his client, not further the search for the truth. That the above study shows that those with legal representation are more successful than those without is not surprising. What is less clear is whether the system remains impartial and reliable when the claimants are represented by counsel. Judge Friendly suggests that instead of legal counsel the movement should be towards greater use of the investigative model. The government thereby would be forced to concentrate on gathering information to make the right decision and not on supporting only one side of the matter.

Whether counsel is more important in oral or in written hearings is difficult to determine. As the Supreme Court observed in

113. Popkin, The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs, 62 CORNELL L. REV. 989, 1026-28 (1977). But see J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, & M. Carrow, Social Security Hearings and Appeals [hereinafter cited as J. Mashaw, et. al.]. "What is much less clear . . . is whether such assistance [in the development and presentation of claims] would be better provided by counsel for the claimant than by the ALJ or his staff." Id. at 92.
115. Id. at 71-73.
117. See Mashaw, et. al., supra note 113 at xx. ("[T]here is constant controversy about the meaning of disagreements among ALJ decision makers—and between ALJ decision makers and other decisional levels—concerning the proper outcome of cases.").
118. Friendly, supra note 5, at 1316-17.
Goldberg: "Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively . . . ." Yet as a practical necessity, the attainment of mass justice often requires that as much of the decisionmaking as possible be done in writing. In this context, readily available legal assistance may be not only in the best interest of the recipient, but available counsel also may permit the use of less expensive decisionmaking processes.

Despite the lack of a right to legal counsel in both England and the United States, a citizen rarely is prevented from appearing with counsel. The more difficult question is whether counsel should be provided in the interest of equal justice. Goldberg does not require provided counsel, and natural justice in no sense requires that counsel be furnished. To some extent, legal aid mitigates this problem in both countries. For a number of years England has had a much more accommodating legal aid system that is willing to appear before many administrative tribunals. A study of the Social Security Hearings suggests that in America "the current system seems to produce, as specialists, attorneys who are available to some claimants at no cost—legal aid attorneys and paralegals."

Reasons and Records

Citizens to Preserve Overton Park v. Volpe raises the requirement of reasons in informal agency action to a special place among the procedural elements. Indeed, the Court may have made reasons a minimum due process requirement for fair informal action. Natural justice, on the other hand, does not require a state-

119. 397 U.S. at 269.
120. Id. at 270.
121. Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, c. 51.
122. Mashaw et al., supra note 113, at 93.
124. Id. at 420. Of course, the APA requires reasons for formal adjudication and rulemaking, 5 U.S.C.A. § 557(c) (West 1977), and for informal rulemaking, id. § 553(c).
125. Commentators have suggested that ordinarily the procedural minimum should be notice, written comment, and statement of reasons for agency action. Gardner, The Procedures by Which Informal Action is Taken, 24 Ad. L. Rev. 155, 163-64 (1972). Of these, statement of reasons may be an absolute floor. "[A]s we respond to less exigent claims by peeling away the layers of protection—indeed as we strip away any semblance of a 'hearing'—it is essential that we retain the core safeguard against arbitrariness, the right to re-
ment of reasons to support an administrative decision. There are circumstances, however, in which the failure to give reasons reduces the likelihood that an agency decision will withstand judicial review. Professor Wade argues strongly for requiring reasons. He observes that reasons enhance an affected citizen's impression of the justice of the administrative process and that reasons impose a "healthy discipline" on the administrative decisionmaker. Pragmatism also supports a requirement of meaningful reasons in informal action.

Although American courts and commentators respect the importance of statements of reasons, no consensus exists for how comprehensive the reasons must be. Courts usually do not strike down an action for inadequate reasons; generally the matter is returned to the agency with instructions to supply better reasons. Occasionally the reasons are so inadequate that the result "on its face renders necessary the conclusion that [the agency's] decision . . . is so irrational as to constitute the decision arbitrary and capricious." In sum, American courts apparently place a much greater value on an adequate statement of reasons than their English counterparts.

The Supreme Court in Goldberg explicitly declined to require "a complete record." Nonetheless, American courts are likely to require some kind of record even in informal action. If nothing else, some kind of record is necessary for purposes of review. The En-

127. H. Wade, supra note 4, at 464.
128. Id. at 463-64. See also Garner, supra note 3, at 243-44; Friendly, supra note 5, at 1292.
130. Friendly, supra note 5, at 1292 n.128; see text accompanying note 5 supra. In Goldberg, for example, the Supreme Court did not require "a complete record and a comprehensive opinion." 397 U.S. at 267. Moreover, the precise format that the statement must follow was not specified.
131. Adams v. Harris, 643 F.2d 995 (4th Cir. 1981) (holding statement of reasons in computer printout form adequate even though agency staff had generated specific reasons).
133. Id. at 575.
134. 397 U.S. at 267.
glish view is that American law puts far too much emphasis on the development of a somewhat formal record. Natural justice makes no requirement of a record. The English are inclined to let the hearing officer render a decision on the basis of his recollection and notes. American courts are unlikely to permit such an approach, and hence we must develop concepts based on efficient and inexpensive types of records.

*Impartial Decisionmaker*

Judge Friendly, in his already classic piece on the right to a hearing in informal agency action, holds out an impartial decisionmaker as the most important protection. He perceives that a guarantee of an unbiased and independent decisionmaker may transcend the other procedural elements. As more effort is made to assure an unbiased decisionmaker the less an adversarial process is needed. The English, perhaps intuitively, so value the protection of an unbiased decisionmaker that their tradition raises the principle to an equal footing in the natural justice doctrine with the right to be heard.

The doctrine that no man should be a judge in his own case has ancient antecedents and was well established by the early 17th century. Coke thought the rule so firmly established that he believed it should prevail over Parliament. Yet the application of this rule of natural justice to administrative matters raises some important questions.

The rule is that a judge is disqualified from determining any case in which he may be, or fairly is suspected of being, biased. The most common and best established kind of bias is pecuniary interest, but the doctrine also extends to other factors which demonstrate a real likelihood of prejudice. Direct pecuniary interest, no matter how small, can disqualify a decisionmaker. Other

137. Id. at 1279-80.
138. See Dr. Bonham's Case, 77 Eng. Rep. 638 (K.B. 1610). "[I]n many cases, the common law will . . . control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, . . . the common law will control it, and adjudge such act to be void." *Id.* at 652.
interests such as favoritism also may disqualify.\textsuperscript{139}

As in the United States, however, the "rule of necessity" may prevent an English court from disqualifying a potentially biased decisionmaker.\textsuperscript{140} If the challenged decisionmaker is the only one with the authority to act he must be permitted to sit in order to avoid crippling the functions of the government.\textsuperscript{141} The integrity of the administrative system in such situations depends on an expectation that the decisionmaker will do his duty without being affected by whatever raised the threat of bias. Natural justice accedes to necessity if it would be \textit{ultra vires} for the decisionmaker to transfer authority to another.\textsuperscript{142}

As in the United States, the most difficult problem in challenging the decisionmaker's impartiality is proving bias, unless of course there is a direct pecuniary interest. The test varies between "real likelihood" and "reasonable suspicion." Clearly the prospects of bias cannot be farfetched. Under the "suspicion" test only some showing of a possibility of bias is necessary, whereas the "likelihood" test requires a demonstration of a probability of bias.\textsuperscript{143} In some circumstances, however, the mere appearance of bias may be enough.\textsuperscript{144}

English administrative law, like its American counterpart, has substantial problems in this area with commingling of functions. Departmental bias—that the institution which the decisionmaker represents has a stake in the outcome—apparently is not enough to warrant a change.\textsuperscript{145} English government agencies, like American agencies, are permitted and in some senses expected to be biased on certain issues. For example, both systems would expect a

\textsuperscript{139} A presiding official may be disqualified by the agency upon an allegation of "personal bias or other disqualification." 5 U.S.C.A. § 556(b) (West Supp. 1981).

\textsuperscript{140} FTC v. Cement Inst., 333 U.S. 683, 701-02 (1948). If the FTC were disqualified, no other agency could undertake investigation of the complaint. \textit{Id.}


\textsuperscript{142} H. \textsc{wade}, \textit{supra} note 4, at 405-07. A person claiming bias must object immediately upon learning the facts constituting the bias or waive the objection. The presumption is strong against waiver, however, and something like the plain error rule may operate in certain cases. \textit{Id.} at 409.

\textsuperscript{143} \textit{Id.} at 410-12.

\textsuperscript{144} R. v. Sussex Justices, [1924] 1 K.B. 256.

\textsuperscript{145} H. \textsc{wade}, \textit{supra} note 4, at 413.
decisionmaker assigned responsibility for protecting the environment to be biased in favor of conservation.

Natural justice does not require an independent decisionmaker and hence does not guarantee an impartial tribunal in the sense that Judge Friendly recommends. Presiding officials, as are Administrative Law Judges (ALJs) in the United States, are part of the administrative agency. The administrative minister appoints these officials, who have less formal protection from dismissal than ALJs. Various proposals and recommendations suggesting that these officials be appointed by persons outside the department have not been accepted to date.

The presiding officials demonstrate a substantial break between English and American concepts of administrative law. For instance, presiding officials are unpaid and part-time officers. In fact, recommendations for reform support continuation of nonprofessional presiding officers in most cases. American lawyers must remember, however, that English law is committed to the "cult of the amateur." Over ninety percent of all criminal proceedings are presided over by panels of lay magistrates—citizens of the community with no more than a few weeks of specialized training. Hence, it is no surprise that administrative tribunals often are the province of nonprofessionals.

England's administrative tribunals may be supplied with professional staffs. Here again lies a difference with America in a sense of the makeup of justice: this staff is likely to be quite involved in the actual decisionmaking. Some suggest that the staff should not be supplied by the department and that their role should be confined to mostly clerical functions, but these recommendations have not yet been adopted. This issue is not so urgent for the English probably because the magistrates, who decide nearly all criminal

146. J. Garner, supra note 3, at 233-34.
147. Id. at 234-35. The Franks Committee recommended, however, that the Lord Chancellor, being more impartial than an agency minister, should make a number of appointments to the agency staff. Id.
148. Id. at 235.
150. J. Garner, supra note 3, at 235-36.
cases, have a similar relationship with their clerks. The clerk in magistrate court is extremely influential and often retires to chambers with the magistrate. As the only legally-trained person in the decisionmaking process of the magistrate court, the clerk has considerable input on the magistrate's legal theories. In this light, one can understand more easily why the English accept so readily the active participation by the administrative staff in the decisionmaking of presiding officers in administrative proceedings.

In addition, the English probably are influenced by the fact that they are surrounded by administrative systems in which the commingling of functions is not considered a defect. Most European systems have followed the lead of the French and would consider separation of functions undesirable. When the adjudicating branch of Conseil d'Etat, for example, began to detach itself more and more from both the administrative branches of the Conseil and from the "active administration" outside the Conseil, the French imposed requirements which forced that branch to become actively involved in administration.152 The Continental system also provides roles for a variety of extrajudicial officials in the decisionmaking process.

The use of agency staff in the tribunal decisionmaking process likewise is conventional theory on the Continent. Agency experts regularly participate in judicial decisionmaking in the Continental system.153 The Conseil d'Etat, for example, allows for an affirmative role for experts in its decisionmaking,154 and the Common Market's Court of Justice uses the extrajudicial advisers as a matter of course.155

In sum, the English profess none of the abhorrence for combined administrative functions as do some Americans. The sense of bias is confined to the notion of some direct or indirect interest in the

152. BROWN & GARNER, supra note 149, at 37.
153. Before the agency makes the decision no parties may participate. The affected person's rights are protected by the right to judicial review. Somewhat unjustifiably, Dicey thought this system altogether unsatisfactory. C. CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW 22-23 (1942).
154. BROWN & GARNER, supra note 149, at 47, 59.
155. The EEC Court of Justice process includes a unique official, the Advocate-General, who makes presentations to the Court and who is tremendously influential in the decisionmaking. Id. at 151. Often, the reasons for the Court's decisions are thoroughly explained in the Advocate-General's report, published with each decision.
transaction not related to the official decisionmaking duties in the overall system. To a large extent, this notion of natural justice does not satisfy Judge Friendly's recommendation for independent decisionmakers, but England seems to be making no movement in that direction.

**Review**

Unlike France, neither England nor the United States relies completely on judicial review for protection against government abuse because both countries afford a good deal of procedural protection before the decision is made.\(^{156}\) Of course judicial review is an important right in both countries, but it is a right that may be withdrawn by the respective legislatures.\(^{157}\) In England the doctrine of parliamentary supremacy theoretically permits complete removal of a government function from judicial scrutiny.\(^{158}\) In the United States, even when the statute precludes review, review may be allowed based on fundamental principles of the Constitution. Nonetheless, a strong presumption in favor of review\(^{159}\) exists in England as in the United States. Only rarely do English courts fail to find a way to review administrative determinations at least for

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156. Compare H. **Wade**, *supra* note 4, at 786:

[A fair administrative hearing] is a prominent feature of our administrative law in comparison with that of other countries. In France and other countries where there are special administrative courts . . . there is less procedural protection before the action is taken. The English system makes elaborate provision for preliminary inquiries, on the principle that prevention is better than cure.

with **BROWN & GARNER**, *supra* note 149, at 27:

Unlike in England, . . . this process of what Americans term 'judicialisation' of the administrative process has been on a relatively minor scale. The reason for this is not hard to find. Possessing in [the administrative court system] an effective system of general judicial control over administrative action, the French have less need to judicialise their administrative process by a proliferation of *ad hoc* administrative tribunals. On the other hand, the comparative ineffectiveness of general judicial control by the English High Court in the past has had precisely the opposite effect in prompting Parliament to incorporate the partial safeguard of an administrative tribunal within the actual process of reaching an administrative decision.

157. 5 U.S.C.A. § 701(a) (West 1977); J. **GARNER**, *supra* note 3, at 175.


159. Indeed, Professor Wade contends that administrative decisions are never completely unreviewable. H. **Wade**, *supra* note 4, at 341.
compliance with natural justice. Nonetheless review itself has not been raised to a guaranteed right under natural justice any more than it is under due process.

Judge Friendly believes that judicial review should not be considered a due process guarantee because the system should have sufficient flexibility so that certain government decisions may take effect without judicial interference. He suggests that review in “mass justice” cases should be confined to procedural matters and that opening such processes to substantive review may injure the system’s ability to deliver crucial social services: “[T]he spectacle of a new source of litigation of this magnitude is frightening.” He does not support substantive review of mass justice decisions even limited to an arbitrary or capricious standard of review. Although American courts will no doubt undertake substantive review of mass justice decisions, such review is not a constitutional requisite and when undertaken should be available only to the extent intended by Congress with respect to the particular regulatory scheme.

English concepts of judicial review permit the functionalism necessary for defining the proper role of courts in a mass justice system. First, the exercise of grants of broad discretion generally are unreviewable, and even the most aggressive judges approach such review very gingerly. Since mass justice processes inherently require broad discretion in order to be fair and practical, this judicial instinct adequately restrains English judges. Second, judicial attitudes toward the exercise of discretion are characterized by an effort to strike a balance between the functioning of the process and legal protection of individual citizens. Therefore, the discretionary decisionmaking that is the backbone of the mass justice

160. J. Garner, supra note 3, at 150.
161. Friendly, supra note 5, at 1295.
163. Friendly, supra note 5, at 1295.
164. J. Garner, supra note 3, at 162.
165. See H. Wade, supra note 4, at 380-81.
166. “Modern government demands discretionary powers which are as wide as they are numerous . . . [T]he courts should draw [legal] limits in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen.” Id. at 332.
system does not raise a question of undue judicial interference under current English legal philosophy.

Surprisingly, Professor Wade suggests that American administrative law scholars appear unconcerned with the judicial role in administrative discretion.\(^\text{167}\) His observations may result from observing our development at a point well beyond the current English development. English administrative theory apparently still embodies Dicey's statements about the rule of law.\(^\text{168}\) Dicey's position never was very relevant to the reality of American administrative law. American lawmakers understood early that vesting the courts with too much of the responsibility for regulating administrative discretion simply substitutes judicial discretion for administrative discretion. Such a system involves useless redundancies and just as much discretion: the decisions are those for which there are no right or wrong answers, so either the agency has the discretion or the court has the discretion.\(^\text{169}\) Because the agency for whatever reason is given the discretion, the job of discretionary justice is to confine and control that exercise, not to reassign indirectly the discretionary function. Thus the focus must be on the agencies' activities rather than on the courts' role. The English understanding of the administrative exercise of discretion is so primitive that they have not discovered the limited role courts necessarily must hold in assuring discretionary justice. Upon obtaining this understanding, English commentators will have to begin to wrestle with the same sophisticated and complex questions of confining and controlling discretion with which American theorists have struggled for years. The success of the mass justice systems compelled by social legislation depends on solving these problems and upon doing so largely without incorporating judicial review into the substantive discretionary decisions.

One of the potential monitoring devices in a mass justice system is administrative review. Professor Davis suggests that a system of supervision by administrative appeal, especially independent tribunals, could be an excellent device for checking discretion.\(^\text{170}\) Both

\(^{167}\) \textit{Id.} at 332 n.2.

\(^{168}\) \textit{See generally} \textit{R. Cosgrove, The Rule of Law} (1980).

\(^{169}\) \textit{L. Jaffe, Judicial Control of Administrative Action} 555-56 (1965).

\(^{170}\) \textit{K. Davis, Discretionary Justice} 228-29 (1969) [hereinafter cited as \textit{Discretionary Justice}].
England and the United States have levels of administrative appeals built into most of their formal procedures,\(^\text{171}\) with judicial review available after exhaustion of all administrative appeals. Unlike England, however, the right to judicial review after administrative appeal is nearly universal in the United States. This system is carried even into informal procedures. Judge McGowan urges that for many decisions justice would not be offended if the process stopped at the administrative level and some agency decisions became final after some administrative appeal level.\(^\text{172}\) The English system is much less likely to provide judicial review of administrative decisions as a matter of course.\(^\text{173}\)

**WHAT KIND OF HEARING IN RULEMAKING**

Where American administrative law most surpasses its English counterpart is in the area of rulemaking. Although many administrative rules are made in England, little prescription or commentary on the procedure exists for such rulemaking. One does not find the wealth of experimentation, and misdirection, that has contributed to the current state of the art in the United States.

This is all the more surprising because rules have a much higher status in England, both theoretically and practically. Despite the observations of Montesquieu,\(^\text{174}\) the English form of parliamentary government involves considerable overlap of powers between the executive and the legislative institutions.\(^\text{175}\) Functions are combined more than in the governmental structure of the United States. The executive, by the very nature of the parliamentary form, controls Parliament. The government departments, in fact, draft bills which are not seen by the members of Parliament until the bills are introduced.\(^\text{176}\) Because the dominant party controls both the executive and the legislative functions it can usually enact

whatever legislation it wants.\textsuperscript{177} This structure, combined with the parliamentary supremacy created by the absence of a written constitution, inhibits the judicial power to counteract executive actions. As a result, great weight attaches to administrative regulations, because they are handed down by a part of the legislature and because judicial objections theoretically can be overruled by a Parliament controlled by the executive. Although the parliamentary government's omnipotence is somewhat more theoretical than real, it does affect the way regulations are viewed within the system. Thus administrative rules in the English system are called "subordinate legislation."

Subordinate legislation does not appear to be covered by natural justice. Natural justice in theory does not extend to questions of policy, although some urge that it should,\textsuperscript{178} and hence to the extent that the exercise of subordinate legislative authority involves policy it is probably beyond the reach of natural justice. In the United States due process similarly is not applied to rulemaking.\textsuperscript{179} Thus, in both countries the opportunity to be heard in rulemaking emanates from statutes, rules of procedure, and judicial evolution. To find what kind of participation is available in England the source, as in the United States, is in the statutory requirements.\textsuperscript{180}

Although subordinate legislation is regulated somewhat by the statutory Instruments Act of 1946, no fundamental procedural structure comparable to section 553 of the APA exists in England. Much of the actual rulemaking likely is done in the bowels of the English bureaucracy through the offices of the various ministers. The public participation is through a device called an "inquiry," which allows citizens a hearing on questions of policy.\textsuperscript{181}

Inquiries are used for decisions other than making regulations and other decisions which the American system would classify as rulemaking. Inquiries may be used to make individual determina-

\textsuperscript{177} J. Garner, supra note 4, at 53-54.
\textsuperscript{178} H. Wade, supra note 3, at 469-72.
\textsuperscript{180} See generally Beatson, supra note 62.
\textsuperscript{181} H. Wade, supra note 4, at 786.
tions, although they tend to be used even then in broader, commu-
nity action contexts. An inquiry differs from a tribunal in that
an inquiry is essentially fact finding—rather than adjudica-
tive—performed in order to ascertain facts relating to a specific
matter so that a higher official is better able to make a decision.
In contrast, a tribunal is expected to reach a decision, and al-
though it may consider policy and general questions, the tribunal
traditionally applies rules of policy or general issues previously set
down. An inquiry does not reach such a decision: the presiding offi-
cial compiles the information obtained from the public and makes
a report to the head of the department. This department head
then makes the actual decision. Inquiries are convened for the par-
ticular questions at hand, whereas tribunals have a permanent ex-
istence and defined jurisdiction, such as the National Health Ser-
vices Appeal Tribunal or the Lands Tribunal. Although the
inquiry usually is established to hear objections from citizens
about a particular action, its scope is not limited to investigation of
the objection but encompasses the whole matter.

Procedures for inquiries, as with tribunals, originate in two main
sources: the Report of the Committee on Tribunals and Inquiries
of 1957 (Franks Committee) by way of the Tribunals and Inquiries
Act of 1971, and from procedural rules promulgated by the Lord
Chancellor, the Head of Judicial Administration. Although Parlia-
ment can prescribe any procedures it wishes in a particular piece
of legislation, inquiries tend to have some uniform characteristics.

Notice is an important right in an inquiry. Considerable effort is
made to assure that those objecting to a government action know
the other side. Inquiries often are formed, for example, to help a
minister in approving action by a local authority. In such a case,
the local authority must prepare written statements setting out the
reasons for its proposal. Such a requirement would improve Ameri-
can rulemaking procedure because it enhances the information-

182. Id. at 744.
183. Id.; J. Garner, supra note 3, at 102.
184. J. Garner, supra note 3, at 223.
185. H. Wade, supra note 4, at 817.
186. Large projects, for example, require more than limited local inquiries; the policies of
the local governments often must blend with considerations important to the central gov-
ernment, necessitating further, more involved stages of inquiry. See id. 819-20.
gathering potential of public participation. A study of American rulemaking agencies shows that requiring and making available the rulemaking staff's preliminary investigative report heightens the public's ability to participate. Disclosure of the staff report at the outset of the comment period advises the public as to why the agency undertook the rulemaking and organizes what may be a massive rulemaking record. The Administrative Conference recommends that an agency "include in the initial notice of proposed rulemaking a description of the theories and materials which it then considered relevant to the rulemaking, together with appropriate references to the rulemaking record, including materials both supporting and opposing the proposed rule."

Arguably, the English system falls short in this regard because the central department provides no statement of policy for consideration. Because the ultimate decision is made by the minister, who bases the decision on national policy, the absence of a clear policy statement prevents interested persons from having input into one of the dominant parts of the decision. The Franks Committee recommends that inquiries be preceded by a statement of policy from the head of the agency as well as a statement from the lower level authority. Similarly, the Administrative Conference recommendations quoted above seem to contemplate a preliminary statement from the agency head. Actual practice in both countries, however, seems contrary to these recommendations. Nonetheless, some disclosure of the reasons for the proposal, if only from the staff, and the likely general knowledge of government policy, seem to give interested persons sufficient notice to enable them to participate effectively.

As with rulemaking in America, lawyers in England criticize the inquiry hearing as insufficiently judicial. A judicial approach,
however, is decidedly rejected. Like rulemaking in America, inquiries encourage broad participation. Anyone with a genuine concern—comparable to our “interested person”—may participate, not just those directly affected. Public participation is the goal.

The Lord Chancellor, under power conferred by the Tribunals and Inquiries Act, formulates certain general rules respecting the conduct of the public hearing. The major guidelines tread the line between effective participation and overjudicialization. Inquiries, for example, are not conducted according to the rules of evidence, but neither should presiding officers hear evidence in private. Inquiries generally include some limited opportunity to cross-examine, but not as a matter of right. Thus inquiry procedures might parallel a very loose hybrid rulemaking process.

The presiding officer in an inquiry is called an “inspector” and is appointed by the central department. Because inspectors come from the departments, they generally are attuned to department policy and often have some expertise. One of the features of an inquiry is that the inspector does not reach a decision but merely submits findings of fact and recommendations.

As with American rulemaking, one objection to the inquiry procedure is that the presiding officers are too involved with the department and hence are not impartial. The Franks Committee report, however, finds them both competent and independent. It nonetheless recommends an independent group of inspectors, but the recommendation is unheeded to date.

After completion of the inquiry, the inspector submits a report. One of the improvements in recent years is the public disclosure of the inspector’s recommendations. This disclosure unfortunately excludes the portion of the report containing the evidence and the inspector’s findings of fact. The disclosure also is unsatisfactory because it does not come until after the minister makes a final determination. The report then is attached as part of the minister’s “letter of decision.” Although the disclosure of the report at all is a substantial improvement, considerable opinion exists in favor of

193. Inspectors sometimes decide cases. H. Wade, supra note 4, at 820. Inspectors occasionally are permitted to finally decide certain classes of appeals in areas where delays abound.
194. Id.
publication at the time the report is submitted to the central department.¹⁹⁵ Some urge that prior public disclosure is essential because the central department usually adopts the inspector's recommendations. In Scotland the inspector's report is required by law to be disclosed in time for participant comment or correction before the minister's decision.¹⁹⁶ That ministers are inclined to adopt the inspector's recommendation means that the parties are justified in desiring some opportunity to criticize the report before the minister commits himself. Professor Wade suggests that the additional opportunity may interfere with acceptable government performance sufficiently to argue against it.¹⁹⁷

On the other hand, a minister is recognized as not being obligated to follow the inspector's recommendation (as opposed to the findings of fact).¹⁹⁸ Indeed, in the leading case of Nelsovil, Ltd. v. Minister of Housing and Local Government,¹⁹⁹ the court emphasized the requirement that the minister make his own decision while giving such weight as he thinks proper to the recommendations of the inspector.

Almost uniformly ministers now give reasons for decisions made in inquiries. The Tribunals and Inquiries Act requires either written or oral reasons only upon request.²⁰⁰ In actual practice written reasons, in the form of a "decision letter," are given as a matter of course, and the requirement uniformly is included in procedural rules.²⁰¹ The reasons must be full and adequate in order to preclude doubt sufficient to support quashing the decision.²⁰²

As with tribunals, the Tribunals and Inquiries Act distinguishes between statutory and nonstatutory inquiries. The above rules more likely are applied, and some must be applied, to statutory

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¹⁹⁵. Administrative tribunals, however, are not legally obliged to make these disclosures.  


¹⁹⁷. H. WADE, supra note 4, at 804-05.

¹⁹⁸. J. GARNER, supra note 3, at 247.

¹⁹⁹. (1962) 1 All E.R. 423.


²⁰¹. H. WADE, supra note 4, at 805-06.

inquiries. Nonstatutory inquiries are held voluntarily by the agency either without statutory reference or when the statute merely provides that an inquiry "may" be held. The citizen has no procedural rights in such nonstatutory inquiries.\textsuperscript{203} The proceeding may be totally written, except that each side has some opportunity to see and comment on the other's submissions.

Inquiries, although generally comparable both in structure and purpose to American rulemaking, are not necessarily coextensive with the exercise of the power to make subordinate legislation in England. That power may or may not provide for inquiry proceedings. The only general statutory requirements are contained in the Statutory Instruments Act of 1946.\textsuperscript{204} Section 1 of that Act defines a "statutory instrument" as subordinate legislation made pursuant to delegated authority. "It is a comparatively simple matter . . . to ascertain whether the power is exercisable by statutory instrument; the statute itself is conclusive."\textsuperscript{205} A statutory instrument has greater force of law than other subordinate legislation and must be made according to certain procedures.

The required procedures are minimal even as compared to section 553 of the APA. When issued the statutory instrument must be in writing. Notice and comment are not required before promulgation. After promulgation, however, the statutory instrument must be printed and sold through H.M. Stationery Office.\textsuperscript{206} No thirty-day hiatus as in section 553 is required except that the statutory instrument must be available at H.M. Stationery Office at the time of any alleged violation.\textsuperscript{207} A Special Joint Committee of Parliament has found that the period between publication and effectiveness is too short.\textsuperscript{208}

Occasionally, however, individual statutes require that statutory instruments be "laid" before Parliament. This requirement is similar to the growing requirement in America for legislative review of agency rules. Due perhaps to the closer relationship between the legislative and executive branches, this device is more

\begin{thebibliography}{99}
\bibitem{203} H. \textit{Wade}, \textit{supra} note 4, at 819.
\bibitem{204} Beatson, \textit{supra} note 62, at 439.
\bibitem{205} J. \textit{Garner}, \textit{supra} note 3, at 67.
\bibitem{206} Id. at 70.
\bibitem{207} Id. at 72.
\bibitem{208} Id.
\end{thebibliography}
highly developed in England. A variety of such provisions exist. A statute may require merely that Parliament be notified of proposed subordinate legislation, that Parliament have a negative veto that must be exercised within a period of time, that Parliament must affirmatively approve the legislation, or that a draft must first be presented to Parliament.\textsuperscript{209} Parliament also has constituted a “watch committee” to inform Parliament on subordinate legislation falling into one of a list of categories.

Not only may a statute provide for parliamentary scrutiny, but it also might provide for “consultation” with institutions either inside or outside government. Although the department is not bound by the views given through such consultation, the consultation must be “genuine.” If the consultation is not “genuine” the subordinate legislation could be invalidated.\textsuperscript{210} Although this procedure is not an opportunity for comment by all interested persons, it does provide some outside input and is growing in use. This may be the first step towards public participation in the English subordinate legislation process and may foster the right to participate for all “interested persons” as is permitted in the United States. If notice and comment rulemaking is truly “one of the greatest inventions of modern government,”\textsuperscript{211} then its very utility will lead to its use in England as the consultation provision opens the door to greater public participation in subordinate legislation.

Although the technicalities of our concepts of legislative and interpretative rules are difficult to transfer to another system, English concepts clearly recognize the need for agencies to make rule-like pronouncements without delegated authority\textsuperscript{212} and without the force of law. Such pronouncements are not covered by the few procedural prescriptions applicable to statutory instruments. Ministers, for example, may give direction by means of letters issued only to local authorities or other government agencies.\textsuperscript{213} The letters, although legally binding only on the lower level agency, may

\textsuperscript{209} Id. at 75-76.
\textsuperscript{210} Id. at 81.
\textsuperscript{211} 1 K. Davis, Administrative Law Treatise § 6.1 (2nd ed. 1978).
\textsuperscript{212} J. Garner, supra note 3, at 72.
\textsuperscript{213} Id. at 462.
have important legal consequences on the rights of the public.\textsuperscript{214}

English administrative law has not had to deal with a question comparable to whether due process mandates affect the agency's choice between rulemaking and adjudication. That question is set to rest in this country by \textit{SEC v. Chenery}\textsuperscript{215} and \textit{NLRB v. Bell Aerospace Co.}\textsuperscript{216} Schwartz and Wade suggest that England has not faced the problem because it has few agencies possessing both functions.\textsuperscript{217} In fact, less overlap and conflict may exist in the responsibilities given English agencies by Parliament. Schwartz and Wade theorize that, were the question to arise, the failure to provide public participation through rulemaking procedures might be considered improper as maladministration. English agencies have wide discretion in deciding how to proceed, and judicial decisions on the choice between rulemaking and adjudication may be as quiescent as they are in the United States.\textsuperscript{218}

Although little rulemaking may be accomplished in England by adjudicative bodies, one commentator's noteworthy recommendation for reform of tribunals, which are adjudicative, is that they make general "rules of thumb."\textsuperscript{219} Perhaps the concept of required rulemaking can be transplanted to England. In the United States, courts use a variety of theories to require agencies to formulate and announce through rules general conclusions relating to their responsibility.\textsuperscript{220} This technique limits unnecessary discretion by forcing the agency to confine its own delegated discretion. It also discloses to the public the agency's interpretations of its own law, which otherwise would remain inside the agency. If appropriate,\textsuperscript{221}

\begin{footnotes}
\item 214. \textit{Id.} at 73.
\item 215. 332 U.S. 194 (1947) (Chenery II).
\item 216. 416 U.S. 267 (1974).
\item 217. SCHWARTZ \& WADE, \textit{supra} note 2, at 104-05.
\item 218. \textit{Id.} at 106.
\item 219. J. GARNER, \textit{supra} note 3, at 245. "[W]here the Minister in fact works to certain principles they should be published so that an applicant knows what are the relevant criteria." H. STREET, JUSTICE IN THE WELFARE STATE 108 (2nd ed. 1975).
\item 220. DISCRETIONARY JUSTICE \textit{supra} note 170, at 219. Professor Davis argues, however, that rules need not always be aimed at the general rather than the specific. \textit{Id.} at 220.
\item 221. The agency should announce its view of policy as soon as that view forms. Sometimes, perhaps often, they should be encouraged to do so even without using notice and comment procedures. Whereas public participation is important, as between participation and disclosure, disclosure of agency opinion is more important and should take precedence. Koch, \textit{Public Procedures for the Promulgation of Interpretative Rules and General State-
this formulation and announcement can be preceded by notice and comment procedures that would permit broad participation. English concepts of rulemaking are so far behind ours that required rulemaking is unlikely to find general use in that country in the near future. The English may not have the problem of choice between rulemaking and adjudication because they do not recognize the value of having basically adjudicatory agencies go beyond their adjudicatory function by giving some guidance and confining their discretion through generalized pronouncements. The concept is one that needs further study by English administrative authorities.

CONCLUSION

One conclusion that strikes an American surveying English administrative law is that much of our due process theory has misdirected our energies. It has focused attention away from enhancing the government's ability to deliver at the lowest possible operating costs the services we assign it. Little wonder that the criticism of government performance has increased as the structure of government operation has been distorted by well-meaning but misguided procedural changes. We must renew the search for procedures which improve government performance, for that is the task of administrative law.

The second conclusion is that the English, in the name of natural justice, have started down the same path in their reform of administrative procedures. English commentators boast that their system is better because it avoids judicialization, but recent developments suggest that their courts and legislature will be no more creative than their American counterparts in their drive to reform administrative procedure. Advocates of procedural reform in both countries seem incapable of developing procedural norms outside the trial model. American administrative law commentators have warned against overjudicialization for generations, but every innovation seems to involve elements of trial. This country has witnessed little movement to develop nonjudicial mechanisms as solutions to problems of administrative process. At present the English experience appears much the same.

ments of Policy, 64 Geo. L.J. 1047, 1073-76 (1976).
Hope in American administrative law comes from the perception that we are past the worst of the procedural myopia and that now we may begin to seek practical answers to the tough questions of good government. This perception, if accurate, does offer reason for optimism. An administrative law enthusiast in England has reason for pessimism, however, because their law still may have to struggle through an era of commitment to the trial model. In short, as so often happens, they appear to be on the brink of adopting what we are now beginning to reject. Hopefully they will avoid this trap because over the years they have shown more objectivity toward procedural questions. If they maintain that attitude they will add new practical experience to our search for better governmental processes.