

"SOME KIND OF HEARING"*

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It was particularly affecting to be invited to give the Owen J. Roberts lecture at this law school, of which my father-in-law, Chief Justice Horace Stern of Pennsylvania, was a distinguished graduate, a part-time teacher and a long-time trustee. The honor accorded me is even greater in that this is the hundredth anniversary of Justice Roberts' birth. Although I did not have the good fortune to know the Justice more than casually, I accept the eloquent characterization by Chief Justice Stern who knew him so well:

With Owen Roberts integrity was never a problem but an instinct. He was utterly devoid of arrogance, of pretension, of intrigue, of corroding ambitions. He was modest and simple, as all truly great men are modest and simple, and his lovely, radiant smile was the outward expression of the warm friendliness in his heart.¹

I. INTRODUCTION

My rather enigmatic title, "Some Kind of Hearing," is drawn from an opinion by Mr. Justice White rendered not quite a year ago. He stated, "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests."² The Court went on to hold that the same not altogether pellucid requirement prevailed where the deprivation was of liberty.

Despite the efforts by some of the Justices to find roots for so broad a constitutional principle deep in the past,³ these had produced only a few Supreme Court constitutional decisions

* This article is an expansion of the Owen J. Roberts Memorial Lecture delivered at the University of Pennsylvania Law School on April 3, 1975.

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The writer is more than ordinarily indebted to his law clerks, Gregory K. Palm, J.D. Harvard University, 1974, and James R. Smoot, J.D. Yale University, 1974, for their help in preparing this lecture.

¹ 3 U. PA. L. ALUMNI NEWS, June 1958, at 3.

² Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974).

³ *Id.* (citing, e.g., Grannis v. Ordean, 234 U.S. 385 (1914) (taking of private property)).

with respect to executive or administrative action until *Goldberg v. Kelly*⁴ in 1970. Since then we have witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another, an explosion which gives rise to many questions of major importance to our society. Should the executive be placed in a position where it can take no action affecting a citizen without a hearing? When a hearing is required, what kind of hearing must it be? Specifically, how closely must it conform to the judicial model?

For a long time we had labored under the illusion that the two latter questions could be answered rather easily. We needed only to determine whether the issue was one of adjudicative or of legislative fact. If the former, a full trial-type hearing was demanded; if the latter, something substantially less would do.⁵ Although this approach is useful in many circumstances, it is only an approach. Moreover, it suffers from several significant defects. For one thing it does not indicate very accurately how to determine which issues are adjudicative and which are legislative.⁶ For another, with the vast increase in the number and types of hearings required in all areas in which the government and the individual interact, common sense dictates that we must do with less than full trial-type hearings even on what are clearly adjudicative issues. By contrast, more than mere notice and comment procedures may sometimes be desirable and even constitutionally necessary on subjects that conceptually would be regarded as rulemaking.

⁴ 397 U.S. 254 (1970).

⁵ "Adjudicative facts are the facts about the parties and their activities, businesses, and properties. . . . Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958) [hereinafter cited as DAVIS]. This distinction stems from the opposite results in *Londoner v. Denver*, 210 U.S. 373 (1908), and *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), and was first developed by Professor Kenneth Culp Davis in an article, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-16 (1942), later set forth in DAVIS, *supra*, § 7.04, at 420-26.

⁶ The classifying test—that adjudicative facts "are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them," DAVIS, *supra* note 5, § 7.02, at 413, is somewhat circular and not always satisfactory. See Nathanson, Book Review, 70 YALE L.J. 1210, 1211 (1961). Professor Davis himself recognizes the existence of a "borderland" area between these broad categories where "the distinction often has little or no utility." DAVIS, *supra* note 5, § 7.02, at 414 (citing *New York Water Serv. Corp. v. Water Power & Control Comm'n*, 283 N.Y. 23, 27 N.E.2d 221 (1940)). See also DAVIS, *supra* note 5, § 15.00, at 520-21 n.43, § 15.03, at 529 (Supp. 1970).

Although some may regret the loss of the old simplicity, its passing is all to the good. In an early opinion Mr. Justice Frankfurter, who had been a great administrative law teacher, explained that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."⁷ Despite this wise observation, the tendency to judicialize administrative procedures has grown apace in the United States.⁸ English judges and scholars consider that we have simply gone mad in this respect. Lord Diplock, who headed the English administrative law "team" in a 1969 exchange of views in which I participated,⁹ is reported to have said that the main value of the enterprise from the English standpoint had been to observe the horrible American examples of over-judicialization of administrative procedures and undue extension of judicial review, and to learn not to do likewise.¹⁰ The

⁷ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). Lord Shaw had said almost twenty-five years before: "[T]hat the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded." *Local Gov't Bd. v. Arlidge*, [1915] A.C. 120, 138 (1914).

⁸ This trend is symbolized by the ultimately successful effort of the "examiners" in the federal agencies, a title eminently appropriate to the administrative function as originally conceived, to beylept "administrative law judges."

⁹ The exchange resulted in a splendid book, B. SCHWARTZ & H. WADE, *LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES* (1972) [hereinafter cited as SCHWARTZ & WADE], from which I have drawn heavily.

¹⁰ Despite their professed aversion to judicialization, our English friends consider the principle *audi alteram partem* to be one of the two elements of "natural justice," the other being the right to an unbiased decisionmaker, see *Board of Educ. v. Rice*, [1911] A.C. 179; H. WADE, *ADMINISTRATIVE LAW* 171-218 (3d ed. 1971) [hereinafter cited as WADE], even tracing its origin back to Genesis, *Rex v. University of Cambridge*, 1 Str. 557, 568 (1723). Moreover, unlike "due process" which can be invoked only when the government is somehow involved in the alleged abridgment of an individual's rights, see, e.g., *Jackson v. Metropolitan Edison Co.*, 95 S. Ct. 449 (1974), the concept of natural justice affects other areas of British society, to the extent of regulating the course of dealing between individuals in situations that Americans would generally regard as private. See, e.g., *Labouchere v. Earl of Wharnccliffe*, 13 Ch. D. 346 (1879) (resolution of a club expelling a member was without force since adopted without notice of the precise charge and a full inquiry); W. ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* 227-30 (2d ed. 1947) (discussing application of the principle to clubs, trade unions and various other voluntary associations). In that regard it is similar to, although broader in scope than, the common law principle recognized in the United States that public policy may require certain private associations "to refrain from arbitrary action" with respect to the admission, disciplining, or expulsion of members; "the association's action must be both substantively rational and procedurally fair." *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 550, 526 P.2d 253, 260, 116 Cal. Rptr. 245, 252 (1974) (en banc). See, e.g., *James v. Marinship Corp.*, 25 Cal. 2d 721, 731, 155 P.2d 329, 335 (1944) ("Where a union has . . . attained a monopoly of the supply of labor . . . such a union occupies a quasi public

matter, however, is not that clear. Professor Davis was undoubtedly right when he observed in 1970, "The best answer to the overall question of whether we want more judicialization or less is probably that we need more in some contexts and less in other contexts."¹¹

II. DEVELOPMENT OF THE HEARING REQUIREMENT

A brief survey of the historical development of the hearing requirement, both statutory and constitutional, may be useful before engaging in analysis of that requirement's content.

The term "hearing," like "jurisdiction," is "a verbal coat of too many colors."¹² Professor Davis has defined it as "any oral proceeding before a tribunal."¹³ Broad as that definition is, it may not be broad enough. Although the term "hearing" has an oral connotation, I see no reason why in some circumstances a "hearing" may not be had on written materials only.¹⁴ In addition the term "tribunal" is hardly apt to convey the notion that hearing requirements may be applied to bodies as diverse as an

position . . . and has certain corresponding obligations. It may no longer claim the same freedom from legal restraint [to choose its members] enjoyed by golf clubs or fraternal organizations"; union's policy of excluding blacks from full membership invalidated); *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961). See generally Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1014-20 (1930). The precise content of the common law "fair procedure" requirement is far more flexible than that which the Supreme Court has found to be mandated by due process where it has found sufficient state action. Compare the procedures considered necessary in *Goldberg v. Kelly*, 397 U.S. 254 (1970), with Justice Tobriner's statement in *Pinsker*:

The common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial . . . nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position. As such, this court should not attempt to fix a rigid procedure that must invariably be observed. Instead, the associations themselves should retain the initial and primary responsibility for devising method which provides an applicant adequate notice of the "charges" against him and a reasonable opportunity to respond.

12 Cal. 3d at 555, 526 P.2d at 263-64, 116 Cal. Rptr. at 255-56 (citations omitted).

¹¹ DAVIS, *supra* note 5, § 1.04-9, at 34 (Supp. 1970).

¹² *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting). Compare Mr. Justice Rehnquist's remark, "[t]he term 'hearing' in its legal context undoubtedly has a host of meanings." *United States v. Florida East Coast Ry.*, 410 U.S. 224, 239 (1973). See DAVIS, *supra* note 5, § 6.05, at 375.

¹³ DAVIS, *supra* note 5, § 7.01, at 407.

¹⁴ Professor Davis seems to take a contrary view in the context of the Administrative Procedure Act, *id.* § 7.01, at 310-11 (Supp. 1970). However, § 7(d) of the Act, 5 U.S.C. § 556(d) (1970), sanctions the use of only written materials in some types of "hearings"—rulemaking, or determining claims for money or benefits, or applications for initial licenses—"when a party will not be prejudiced thereby." In any event my discussion is not limited to the APA.

administrative law judge on the one hand or a city council on the other.¹⁵ The purpose of the hearing may range from the determination of a specific past event—did a government employee steal \$50?—to an endeavor to ascertain community feeling about a proposed change in zoning or to determine the efficacy of a new drug.

The first great federal regulatory statute, the Interstate Commerce Act of 1887,¹⁶ made sparing use of the term "hearing."¹⁷ The general charter of the Commission, section 15, used the language, "if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence."¹⁸ However, in proceedings in the circuit courts with respect to violations of the Act or refusals to obey an order of the Commission under section 15, the report of the Commission was regarded as merely *prima facie* evidence of the facts, which might be rebutted by the defendant.¹⁹ It was only in 1906, when the Hepburn Act greatly increased the powers of the Commission, that section 15 was altered to require a "full hearing,"²⁰ apparently in line with what had become Commission practice.²¹ Shortly thereafter, Mr. Justice Lamar, speaking for the Supreme Court in the well-known *Louisville & Nashville*²² case, said that this requirement, even in a proceeding relating to future rates,

conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. . . . All parties must be

¹⁵ This was the situation in one of the leading early cases, *Londoner v. Denver*, 210 U.S. 373 (1908).

¹⁶ Ch. 104, 24 Stat. 379. See generally R. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 37-64 (1941).

¹⁷ With respect to the inquiries to be engaged in by the Commission the term appeared only in a sentence in § 17 disqualifying a Commissioner from participating "in any hearing or proceeding" in which he had a pecuniary interest. Interstate Commerce Act of 1887, ch. 104, § 17, 24 Stat. 385-86.

¹⁸ *Id.* at 384. To a similar effect the famous long-and-short haul clause permitted a dispensation "after investigation by the Commission." *Id.* § 4, at 380.

¹⁹ See *id.* § 16, at 384-85.

²⁰ Ch. 1, § 15, 34 Stat. 589.

²¹ Judge Cooley, former Chief Justice of Michigan, who was appointed as the first chairman of the ICC, "is often cited as being responsible for turning the ICC into a quasi-judicial body and for providing a precedent which future commissions have followed." M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSIONS* 34 (1955). See generally 1-4 ICC ANN. REP. (1888-91) (summary histories of proceedings).

²² *ICC v. Louisville & N. R.R.*, 227 U.S. 88 (1913).

fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.²³

Scores of later federal statutes adopted the "hearing" language of the Hepburn Act, sometimes retaining the adjective "full," sometimes not. So far as action under such statutes was concerned, it was immaterial for many years whether Mr. Justice Lamar and his colleagues were simply construing a statute or were acting under the force of the Constitution as well.²⁴

Meanwhile, federal agencies became busily engaged in rulemaking, and until enactment of the Administrative Procedure Act²⁵ (APA) in 1946, they generally were permitted to do this in whatever manner they chose.²⁶ Even with the passage of the APA, only notice and comment procedures that fell far short of those described by Mr. Justice Lamar were prescribed for most agency rulemaking.²⁷ Furthermore, as the Supreme Court held in a subsequent case a rule made in compliance with these limited procedures could justify dismissal, without hearing of an application that would otherwise have required a "full hearing."²⁸ The APA prescribed trial-type procedures only "when rules are required by statute to be made on the record after opportunity for an agency hearing."²⁹ When the question of the scope of this exception finally reached the Supreme Court in *United States v. Allegheny-Ludlum Steel Corp.*³⁰ and *United States v. Florida East Coast Railway Co.*,³¹ not only was the exception given a narrow construction but the opinions (particularly the one in

²³ *Id.* at 91, 93.

²⁴ The same comment applies to Mr. Justice Holmes' statement in *United States v. Baltimore & O. S. R.R.*, 266 U.S. 14, 20 (1912), cited in *ICC v. Louisville & N. R.R.*, 227 U.S. 88, 94 (1913). However, Mr. Justices Holmes' reliance on *Washington ex rel. Oregon R.R. & Nav. Co. v. Fairchild*, 224 U.S. 510, 525 (1912), an appeal from a state court, would indicate a belief that due process was implicated.

²⁵ Ch. 324, 60 Stat. 237, as amended, 5 U.S.C. §§ 551-59, 701-06 (1970).

²⁶ However, enabling legislation often contained specific requirements for rulemaking procedures, such as requiring that a "hearing" be provided. Even then statutes requiring a hearing were often interpreted to mean public meetings or arguments, and not trials. See, e.g., *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933).

²⁷ Administrative Procedure Act § 4, ch. 324, 60 Stat. 238 (1948), as amended, 5 U.S.C. § 553(c) (1970).

²⁸ *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

²⁹ 5 U.S.C. § 553(c) (1970).

³⁰ 406 U.S. 742, 757 (1972).

³¹ 410 U.S. 224, 239 (1973).

Florida East Coast) opened wide and unexpected vistas for the use of less than full trial-type hearing procedures in business and social regulation.³²

On the other hand, the number of nonregulatory areas in which the Court has insisted on hearings has mushroomed; indeed, we have witnessed a greater expansion of procedural due process in the last five years than in the entire period since ratification of the Constitution. Understandably, the first stirrings were in reaction to the outrages stemming from the activities of Senator Joseph McCarthy. The Court invalidated inclusion of an organization on the Attorney General's subversive list and denial of a security clearance without an opportunity to be heard.³³ After a turn in the other direction by a 5-4 vote in *Cafeteria & Restaurant Workers Local 473 v. McElroy*,³⁴ in which the interest involved was deemed insufficient to trigger the constitutional right to a hearing, the trial-type hearing forces scored a resounding victory in *Goldberg v. Kelly*.³⁵

Goldberg has had considerable progeny in the Supreme Court and a much larger brood in the lower courts. Drawing also on a pre-*Goldberg* decision concerning a Wisconsin garnishment law,³⁶ the Court next struck down a Georgia statute which had provided for the suspension of the registration and driver's license of an uninsured motorist involved in an accident when the administrative hearing prior to suspension excluded any consideration of fault or responsibility but the statutory scheme made "liability an important factor in the State's determination" *Fuentes v. Shevin*³⁷ invalidated statutes permitting a con-

³² See text accompanying notes 187-242 *infra*.

³³ *Greene v. McElroy*, 360 U.S. 474 (1959); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951). The Court, however, was still proceeding very cautiously. Only four of the five-man majority (each writing his own opinion) in the *Joint Anti-Fascist* case placed their decisions on constitutional grounds. *Greene* took the form of a decision that Congress and the President had not intended to dispense with a hearing.

³⁴ *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886 (1961).

³⁵ 397 U.S. 254 (1970) (holding that due process requires an adequate hearing—including notice and the opportunity to confront and cross-examine adverse witnesses, to present oral arguments, and to obtain counsel—before welfare benefits can be terminated even for a brief interval). A step on the road to *Goldberg* was *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963) (denial of admission to the bar). This had been presaged long before by *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 123 (1926).

³⁶ *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). Although this case and *Fuentes v. Shevin*, 407 U.S. 67 (1972), involved action by court employees, the difference does not seem significant.

³⁷ *Bell v. Burson*, 402 U.S. 535, 541 (1971).

³⁸ 407 U.S. 67 (1972).

ditional seller to utilize court process for repossession of chattels without a preliminary hearing. Hearings of a considerable degree of formality also have been held to be required for revocation of parole³⁹ or probation.⁴⁰ On the day of its parole revocation decision, the Court held that a teacher at a public institution may not be dismissed without a hearing if he had a tenure or its reasonable facsimile or the dismissal involved a stigma that would impair his ability to obtain future employment.⁴¹

The 1973 Term seemed to indicate some turning back. *Fuentes* was greatly narrowed—indeed, as thought by five members of the Court, including its author, overruled.⁴² A badly divided Court held that a nonprobationary federal employee was not entitled to a hearing prior to removal from the service if he were given one later.⁴³ Perhaps most important of all, the Court rendered the decision whence the title of this lecture has been taken,⁴⁴ which, although asserting a broad scope for the requirement of “some kind of hearing” in matters of prison discipline, evinced a willingness to accept much less than the full judicial model for the determination of adjudicative facts when there was sufficient reason for doing so.

However, the most recent decisions of the 1974 Term show a resumption of the trend toward greater and greater insistence on hearings. As Mr. Justice Stewart observed, his own report of *Fuentes*' demise proved to be greatly exaggerated.⁴⁵ In *Goss v. Lopez*⁴⁶ the Court pushed the requirement of “some kind of hearing” into an area entirely new for it—a ten-day suspension from a public high school. A month later, in *Wood v. Strickland*,⁴⁷ a case that had been argued on the same day as *Goss* and the result in which must have been known when *Goss* was decided,

³⁹ *Morrissey v. Brewer*, 408 U.S. 471 (1972).

⁴⁰ *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

⁴¹ *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

⁴² *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), noted in *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 40, 72 (1974). Mr. Justice Powell, who joined the five-man majority, considered that only the *Fuentes* opinion, rather than its holding, had been overruled, 416 U.S. at 623-24 (Powell, J., concurring).

⁴³ *Arnett v. Kennedy*, 416 U.S. 134 (1974), noted in *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 40, 83 (1974).

⁴⁴ *Wolff v. McDonnell*, 418 U.S. 539 (1974).

⁴⁵ See *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719, 723 (1975) (concurring opinion).

⁴⁶ 95 S. Ct. 729 (1975).

⁴⁷ 95 S. Ct. 992 (1975).

the Court drove the knife deeper by holding that the Civil Rights Act⁴⁸ imposed civil liability on school authorities (including school board members) who made sufficiently wrong guesses concerning students' constitutional rights, presumably including procedural ones.⁴⁹ Particularly after *Goss v. Lopez* it becomes pertinent to ask whether government can do anything to a citizen without affording him "some kind of hearing."⁵⁰ The developments of the last five years, and the ebb and flow in the Court's decisions, make this an appropriate time for the *tour d'horizon* attempted here.

III. WHEN IS A HEARING NECESSARY?

Good sense would suggest that there must be some floor below which no hearing of any sort is required. One wonders whether even the most outspoken of the Justices would require one on the complaint of an AFDC recipient, recounted by Professor Bernard Schwartz, that "I didn't receive one housedress, underwears . . . They gave me two underwears for \$14.10 . . . it should have been \$17.60 instead of \$14.10."⁵¹ Although the value

⁴⁸ 42 U.S.C. § 1983 (1970).

⁴⁹ In the Court's words the holding was

that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

95 S. Ct. at 1001. See also *id.* at 1004 n.3 (Powell, J., dissenting).

⁵⁰ While Mr. Justice White's opinion for a five-man majority in *Goss* reads blandly enough, it suffers from the vice, well documented in Mr. Justice Powell's dissent, of containing no limiting principle. *Id.* at 1003. Although the suspensions there at issue were for ten days, the maximum which Ohio permitted without a hearing, emanations of the opinion go well beyond this. For all that appears, a hearing may be required for a suspension of two days—or perhaps even two hours—at least when the sanction is noted on the student's record.

⁵¹ SCHWARTZ & WADE, *supra* note 9, at 123. The quoted remarks were made by an AFDC recipient who was complaining that the special welfare grant she had received was less than the full grant for which she had applied. See also Baum, Mass Administrative Justice: AFDC Fair Hearings 52-53 (paper presented at ABA Section of Administrative Law, Center for Administrative Justice, Conference June 4-6, 1973).

The lengthy procedures now required with respect to reductions in, or denials of, special benefits to AFDC recipients are principally the result of federal regulations and state "fair hearing" statutes. See, e.g., 45 C.F.R. § 205.10 (1973); 18 N.Y.C.R.R. § 358.16 (1974) (prescribing details of fair hearing in New York). See also *id.* §§ 358.4(a)-(c) (1974) (hearing protection for recipients of food stamps, cash assistance benefits, and social services). However, given the expressed dissatisfaction of state officials with federal hearing requirements, see Baum, *supra*, at 25, 32-38 and the recent loosening of the federal regulations, see *Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859, 936-39 (1974), it is quite possible that state "fair hearing" statutes and regulations will be limited, thereby provoking a constitutional battle.

of even small benefits should not be deprecated, given the precarious financial condition of the recipients of AFDC, the cost of providing an evidentiary hearing in such a case must so far outweigh the likelihood or the value of more accurate determinations that final reliance should be placed on the informed good faith of program administrators. Until recently one would have thought there was also a floor with respect to school discipline,⁵² but *Goss v. Lopez* seems to permit dispensing with a "rudimentary hearing" only in the case of "[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process"⁵³

It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving.⁵⁴ This is particularly true in an area such as public housing where the number of qualified applicants greatly exceeds the available space, so that, from an overall standpoint, the erroneous rejection or even the eviction of one family may mean only that an equally deserving one will benefit.⁵⁵ However, particularly in the light of *Goss v. Lopez*, it seems impossible at the moment to predict at what level, if any, the Court will set the floor below which

⁵² "At some point the sanction becomes a sufficiently innocuous part of the daily pattern that the adjudicatory character requiring due process becomes imperceptible, and disciplining the student becomes solely a matter of school or classroom administration. Buss, *Procedural Due Process for School Discipline—Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 577 (1971).

⁵³ 95 S. Ct. at 740. Even in such cases "the necessary notice and rudimentary hearing should follow as soon as practicable." *Id.*

⁵⁴ See Chief Justice Burger's dissent in *Wheeler v. Montgomery*, 397 U.S. 280, 282 (1973); Buss, *supra* note 52, at 574. Some of the potential dimensions of the problem are reflected by the fact that in 1972 more than 13 million persons received maintenance assistance under the federal government's various categorical assistance programs, at a cost of about \$10.5 billion. By far the most significant category was Aid to Families with Dependent Children (AFDC) which numbered about 10.5 million persons as recipients and cost approximately \$6.5 billion. Baum, *supra* note 51, at 1. Balanced against the assistance claimant's interest in receiving a full and fair hearing with respect to any proposed action affecting his aid is the legitimate interest of the states and federal government in expunging unqualified recipients from the welfare roles. For example, in 1971 the state of Michigan paid out about \$450,000 to recipients awaiting negative action hearings and the initial decision was reversed in only 8% of a recent sample of such cases. *Id.* 32.

⁵⁵ Denial of admission to scarce higher education facilities on the basis of lack of superior qualifications stands similarly.

no hearing is needed. Perhaps there is more profit in the inquiry, if a hearing, what kind of hearing, to which I now turn.

IV. IF A HEARING, WHAT KIND OF HEARING?

The Court's early opinions on this score were rather vague. The pioneering case made the rather unilluminating statement, in the context of a special tax assessment, that while "[m]any requirements essential in strictly judicial proceedings may be dispensed with . . . [A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."⁵⁶ In his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*,⁵⁷ still the finest exposition of the need for a "hearing," Mr. Justice Frankfurter said only, even in the case of "a person in jeopardy of serious loss," that one must be given "notice of the case against him and opportunity to meet it."⁵⁸ Favorite adjectives have been "summary," "informal," "flexible," "effective," "meaningful," and now "rudimentary."⁵⁹

All this sounds like the British concept of "natural justice" where the classic statement is Lord Loreburn's oft-quoted dictum concerning the duties of a local school board on a claim of salary discrimination against teachers in church schools:

I need not add that . . . they must act in good faith and fairly listen to both sides for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.⁶⁰

One must doubt whether it is all that simple, even in England. Just how are the parties to be given "a fair opportunity . . . for correcting or contradicting anything prejudicial to their view"?

⁵⁶ *Londoner v. Denver*, 210 U.S. 373, 386 (1908).

⁵⁷ 341 U.S. 123 (1950).

⁵⁸ *Id.* at 171-72.

⁵⁹ See, e.g., *Goss v. Lopez*, 95 S. Ct. 729, 740 (1974); *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 267-69 (1970); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

⁶⁰ *Board of Educ. v. Rice*, [1911] A.C. 179, 182.

In fact, tribunals in England generally permit the calling of witnesses and cross-examination;⁶¹ the apparent informality of the process derives rather from the character of the tribunal,⁶² the less litigious habits of the English people, and the willingness of the English courts to abstain from rigid codification.

The Supreme Court's opinion in *Cafeteria & Restaurant Workers Local 476 v. McElroy*⁶³ has been cited less often for its holding that no hearing was required than for the statement that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."⁶⁴ I have elaborated a bit on this theme:⁶⁵ The required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences⁶⁶ of affording it. Even amplified in this way, such a balancing test is uncertain and subjective,⁶⁷ but the more elaborate specification of the relevant factors may help to produce more principled and predictable decisions.

It may be useful to compile one list enumerating factors that have been considered to be elements of a fair hearing, roughly in order of priority, and another that arrays various types of government action that have been urged to call for a hearing, starting with the most serious. As we go down the second list from the more severe actions to the less, the needle would point to fewer and fewer requirements on the list of required

⁶¹ See, e.g., *Osgood v. Nelson*, L.R. 5 H.L. 636 (1872) (part of the procedure required under natural justice); WADE, *supra* note 10, at 213, 272. However, in some cases courts have found it proper for the authority to employ confidential sources. *In re Pergamon Press Ltd.*, [1970] 3 W.L.R. 792 (C.A.); *Regina v. Gaming Bd. for Great Britain*, [1970] 2 W.L.R. 1009 (C.A.); *University of Ceylon v. Fernando*, [1960] 1 W.L.R. 223 (P.C.) (accusation against student taking an examination). See WADE, *supra* note 10, at 210, 218.

⁶² See note 74 *infra* & accompanying text.

⁶³ 367 U.S. 886 (1961).

⁶⁴ *Id.* at 895. See also *Arnett v. Kennedy*, 416 U.S. 134, 167-71 (1974) (Powell, J., concurring); *id.* at 186-96 (White, J., concurring); *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

⁶⁵ *Frost v. Weinberger*, No. 74-2020 (2d Cir., Apr. 17, 1975).

⁶⁶ For example, continued receipt of benefits by ineligible, retention of unqualified government employees, inability to dislodge a disruptive tenant because neighbors are afraid to testify, polarizing student-teacher relationships, etc.

⁶⁷ This was the "burden" of Mr. Justice Black's dissent in *Goldberg v. Kelly*, 397 U.S. 254, 272 (1970).

safeguards.⁶⁸ With the probable exception of *Goldberg*⁶⁹ itself, the Court's decisions seem to conform to this scheme. I suggest also that the elements of a fair hearing should not be considered separately; if an agency chooses to go further than is constitutionally demanded with respect to one item, this may afford good reason for diminishing or even eliminating another.⁷⁰

A. *Elements of a Fair Hearing*⁷¹

1. An Unbiased Tribunal

Although an unbiased tribunal is a necessary element in every case where a hearing is required, sharp disagreement can arise over how much in the way of prior participation constitutes bias.⁷² In addition, there is wisdom in recognizing that the further the tribunal is removed from the agency and thus from any suspicion of bias, the less may be the need for other procedural safeguards; while all judges must be unbiased, some may be, or appear to be, more unbiased than others. Instead of the *Goldberg* formulation permitting a welfare official (even with some involvement in the very case) to act as a decisionmaker as long as he had not "participated in making the determination under review,"⁷³ but requiring a corresponding heavy dose of judicialization, agencies might be offered an option of less procedural formality if the decisionmaker were not a member of the agency and of still less if, as in England, he were not a full-time government employee at all.⁷⁴ Distrust of the bureaucracy is

⁶⁸ After I was well along in preparing this lecture, I found that a rather similar approach had been taken by Professor William Buss with respect to school discipline. See Buss, *supra* note 52, at 547. I agree with Professor Buss' approach but, as will be seen, would give more weight to some negative factors than he does. See *id.* 579.

⁶⁹ 397 U.S. 254 (1970). See note 35 *supra* & text accompanying note 245 *infra*.

⁷⁰ This point is well developed in Buss, *supra* note 52, at 639-40.

⁷¹ My discussion here will be in terms of constitutional requirements only. Also I generally assume continued reliance on the adversary system, although with serious misgivings on that score. See text accompanying notes 115-21 *infra*.

⁷² Compare *Arnett v. Kennedy*, 416 U.S. at 134, 155 & n.21 (1974) (Rehnquist, J.) with *id.* at 196 (White, J., dissenting).

⁷³ 397 U.S. at 271. See also *Wolff v. McDonnell*, 418 U.S. 539, 570-71 (1974) (no constitutional bar to makeup of prison adjustment committee, consisting of Associate Warden for Custody, Correctional Industries Superintendent and Reception Center Director, to determine whether to revoke good time or impose severe punishment).

⁷⁴ SCHWARTZ & WADE, *supra* note 9, at 145; WADE, *supra* note 10, at 257-59. As a rule tribunals are staffed by independent persons, not by civil servants. A typical tribunal, especially if it is an appeals tribunal, will consist of three individuals. In many instances the chairman will be a local practicing attorney who is donating his services on a part-time basis. The other two members will be chosen from among volunteers outside the

surely one reason for the clamor for adversary proceedings in the United States.⁷⁵ But a better answer may not be more insistence on adversary proceedings but less reliance on the bureaucracy for decisionmaking.

2. Notice of the Proposed Action and the Grounds Asserted for It

It is likewise fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it.⁷⁶ Otherwise the individual likely would

government. In certain cases the two additional members will represent certain interests such as employer and employee in the case of National Insurance Tribunals. In some cases the chairman is paid while the other members regard the work as public service. In other cases, the panel is composed of individuals with special qualifications and each member is compensated; for example, Pensions Appeal Tribunals (certain members are paid physicians). See *id.* 258-60.

In the United States a particularly strong case for the employment of independent hearing officers is presented by evictions from private housing constructed with enough public aid so that evictions constitute government action, in states in which the function of passing on the justification is not performed by the courts. See *Joy v. Daniels*, 479 F.2d 1236, 1242-43 (4th Cir. 1973) (contrasting South Carolina procedures with those of New York and North Carolina where evictions in state court are summary in nature and, therefore, full administrative hearings must be afforded); *Caulder v. Durham Housing Auth.*, 433 F.2d 998, 1002 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (North Carolina); *Escalera v. New York Housing Auth.*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970). Since private housing projects normally do not have access to the state corps of hearing examiners, hearings in such cases are often conducted by an officer of a similar project under the management of the same organization, or even by individuals who were part of the group who initially made the eviction decision. See *Wilson v. Lincoln Redev. Corp.*, 488 F.2d 339 (8th Cir. 1973) (a member of the committee that had voted to evict the tenant and the secretary-treasurer of the housing corporation who had apprised that committee of "the facts" concerning the tenant may serve on the hearings panel unless they are required to call on their own personal knowledge in weighing the evidence); Note, *Procedural Due Process in Government—Subsidized Housing*, 86 HARV. L. REV. 880, 908 (1973). While employment of officers from similar projects seems consistent with *Goldberg*, *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974), would there not be much more confidence if the "tribunal" were, for example, a board of three retired social workers or one social worker and a tenant and a superintendent from another similar project? If the nature of the tribunal were thus altered, it should be permissible to dispense with many procedural safeguards now thought to be required, which at least cause serious delay and in the case of the confrontation requirement may prevent the eviction of a fractious tenant because his neighbors are afraid to testify. See text accompanying notes 83-104 *infra*.

⁷⁵ Even by Justices of the Supreme Court, ". . . when a grave injustice is wreaked on an individual by the presently powerful federal bureaucracy, it is a matter of concern to everyone . . ." *Richardson v. Perales*, 402 U.S. 389, 413 (1971) (Douglas, J., dissenting).

⁷⁶ See *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Goldberg v. Kelly*, 397 U.S. at 267-68; *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Subsidiary questions are whether the notice must be written and how long prior to the hearing it must be given. See *Holland v.*

be unable to marshal evidence and prepare his case so as to benefit from any hearing that was provided.⁷⁷ I add, here again, that the more forthcoming the agency has been in disclosing its grounds, the stronger should be its position in asking curtailment of other procedures.

3. An Opportunity to Present Reasons Why the Proposed Action Should Not Be Taken

This also is fundamental. The open question is whether the opportunity must be for oral presentation. *Goldberg* held that it must be in the context of welfare terminations.⁷⁸ I have no quarrel with that in the situation there presented; but assuming for the moment that confrontation is not always required, I would object to requiring oral presentation as a universal rule. Determination whether or not an oral hearing is required should depend on the susceptibility of the particular subject matter to written presentation, on the ability of the complainant to understand the case against him and to present his arguments effectively in written form, and on the administrative costs.⁷⁹

Oliver, 350 F. Supp. 485 (E.D. Va. 1972) (written notice of charges one hour before hearing to prisoner did not afford inmate due process even though he had been orally informed of the charges three days previously); *Stewart v. Jozwiak*, 346 F. Supp. 1062, 1064 (E.D. Wis. 1972) (prisoner charged with misconduct is entitled to "reasonable advance notice of such hearing"). Although many courts have concluded that oral notice is inadequate in some circumstances, e.g., *Wolff v. McDonnell*, 418 U.S. at 563-64 (loss of good time credit and confinement in a disciplinary cell), written notice in all cases is not constitutionally mandated, and either written or oral notice, at the discretion of the administrative official, has been permitted in some cases, e.g., *Goss v. Lopez*, 95 S. Ct. 729, 740 (1975).

A related question is whether notice, written or oral, must be in a language in which the intended recipient is fluent. Some commentators have argued that due process demands that so far as administratively feasible, written notice must be in a language which the recipient can read, Note, *El Derecho de Aviso: Due Process and Bilingual Notice*, 83 YALE L.J. 385 (1973); however, this argument seems not to have been accepted thus far. See, e.g., *Guerro v. Carleson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973).

⁷⁷ Cf. *In re Gault*, 387 U.S. 1, 33-34 & n.54 (1967).

⁷⁸ 397 U.S. 254, 268-69 (1970).

⁷⁹ In contrast with the mass justice cases, use of written direct testimony by expert witnesses is common in administrative hearings in the "big case" area and generally is not the subject of controversy. Allowing such written direct testimony affords great savings in time and money and often permits relatively complicated ideas, theories, or facts to be transmitted in a form best suited to complete understanding in situations where the value of observing demeanor is minimal. See W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW—CASES AND COMMENTS* 860-63 (6th ed. 1974); Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 127-28 (1972).

4, 5, and 6. The Rights To Call Witnesses, To Know the Evidence Against One, and To Have Decision Based Only on the Evidence Presented

Although these rights are different, they are so closely associated that it will be convenient to deal with them together.

Under most conditions there does not seem to be any disposition to deny the right to call witnesses, although the tribunal must be entitled reasonably to limit their number and the scope of examination.⁸⁰ A more debatable issue, which has not recently been raised in the Supreme Court, is the right to compulsory process.⁸¹ No general rule is appropriate; rather, the alleged

⁸⁰ In the context of prison disciplinary proceedings, the Supreme Court has recognized that although the right to present evidence is "basic to a fair hearing," the unrestricted right to call witnesses from among the prison population carries "potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program" *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). Balancing the inmate's interest in avoiding loss of "good time" against the needs of the prison, the Court concluded that "prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence." *Id.* Although the Court then suggested that it would be "useful" for prison officials to state their reasons for not allowing a particular witness to be called, it refused to mandate any such requirement as a constitutional matter. While this aspect of *Wolff* arguably represents a departure from prior decisions, it is still too early to predict whether it will have a significant effect in areas other than prison discipline.

The most obvious areas for such application would be those in which there is a substantial state interest in preserving the overall integrity of institutions and programs, for example, secondary schools, and there is a substantial chance that the individual may be more interested in disruption than in proving his case. *Goss v. Lopez*, 95 S. Ct. 729, 740 (1975), would seem consistent with *Wolff* in this regard, since the Court "stop[ped] short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge or to call his own witnesses to verify his version of the incident." As in *Wolff* it was left to the informed discretion of the administrative official to determine whether in a particular case any of these elements of a formal judicial hearing were desirable. However, the Court also emphasized that it had addressed itself only to the short suspension of ten days or less and that longer suspensions might require "more formal procedures." *Id.* at 741. Deep uncertainty over how "rudimentary" *Goss* hearings may be is created by the dictum: "Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than rudimentary procedures will be required." *Id.* While the Court did not put the possibility "aside," the Court neither embraced it nor gave any clue to what it meant by "unusual." Although this is the kind of remark often inserted in an opinion in order to forestall a separate concurrence, it would be hard to think of a sentence better calculated to breed lawsuits or less helpful to the lower courts in deciding them.

⁸¹ Compulsory process is guaranteed by the sixth amendment only with respect to criminal trials. Several courts have held that the failure of an administrative adjudication procedure to provide compulsory process does not violate due process. See *Low Wah*

benefits to be derived must be weighed, largely on a case-by-case basis, against the possible detriments, notably harassment and delay.

There can likewise be no fair dispute over the right to know the nature of the evidence on which the administrator relies. But with this generalization agreement ends. The most debated issue is the right of confrontation.

Since the only provision in the Bill of Rights conferring the right of confrontation is limited to criminal cases, one might think the constitutional right of cross-examination was similarly confined. However, in *Greene v. McElroy*,⁸² Chief Justice Warren said that the Court had applied this principle "in all types of cases where administrative and regulatory actions were under scrutiny."⁸³ Lofty sentiments on this score are usually accompanied by references to a passage in the Acts of the Apostles,⁸⁴ ignoring that it referred to a situation where a man was to be delivered to die, and to Wigmore's statement that cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth,"⁸⁵ ignoring that most of the world's legal systems, which are equally intent on discovering the truth, have not seen fit to import the engine.⁸⁶ Other favorites are characters as diverse as the Emperor Trajan⁸⁷ and Wild Bill Hickok of Abilene, Kansas, immortalized by President

Suey v. Backus, 225 U.S. 460, 470-71 (1912) (Immigration and Naturalization Service hearing); *Ubiotica Corp. v. FDA*, 427 F.2d 376, 381 (6th Cir. 1970) (Food and Drug Administration hearing); cf. *Hyser v. Reed*, 318 F.2d 225, 239-40 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963) (parole violation hearing). But see *Jewell v. McCann*, 95 Ohio St. 191, 116 N.E. 42 (1917).

⁸² 360 U.S. 474 (1959).

⁸³ *Id.* at 497. In fact none of the decisions cited directly support the right of confrontation as a requirement of due process in such cases under the Constitution. See *Reilly v. Pinkus*, 338 U.S. 269 (1949); *Carter v. Kubler*, 320 U.S. 243 (1943); *Morgan v. United States*, 304 U.S. 1 (1938); *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292 (1937); *Southern Ry. v. Virginia*, 290 U.S. 190 (1933).

⁸⁴ When Festus more than two thousand years ago reported to King Agrippa that Felix had given him a prisoner named Paul and that the priests and elders desired to have judgment against Paul, Festus is reported to have stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have licence [*sic*] to answer for himself concerning the crime laid against him." Acts 25:16.

Greene v. McElroy, 360 U.S. at 496 n.25.

⁸⁵ 5 J. WIGMORE, EVIDENCE § 1367, at 32 (Chadbourn rev. 1974). See 360 U.S. at 496 n.25.

⁸⁶ See, e.g., Homburger, *Functions of Orality in Austrian and American Civil Procedure*, 20 BUFF. L. REV. 9, 36 (1970).

⁸⁷ Quoted in *Carlson v. Landon*, 342 U.S. 524, 552 n.7 (1952) (Black, J., dissenting).

Eisenhower.⁸⁸ Eloquent statements have been made, notably by Mr. Justice Douglas.⁸⁹

While agreeing that these references were wholly appropriate to the witch-hunts of the McCarthy era⁹⁰ and that cross-examination is often useful, one must query their universal applicability to the thousands of hearings on welfare, social security benefits, housing, prison discipline, education, and the like which are now held every month⁹¹—not to speak of hearings on

⁸⁸ Quoted in *Jay v. Boyd*, 351 U.S. 345, 372-75 (1956) (Frankfurter, J., dissenting).

⁸⁹ *Peters v. Hobby*, 349 U.S. 331, 350-51 (1955) (concurring opinion); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 180 (1951) (concurring opinion).

⁹⁰ See Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 213-14 (1956) (need for confrontation and the dangers of "faceless" informers). For an account of other similar cases from the McCarthy era, see E. BONTECOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM* (1953).

⁹¹ In the public welfare area alone there were 1,434,900 applications for public assistance during the period from January to March 1973. SOCIAL & REHABILITATION SERV., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, APPLICATIONS AND CASE DISPOSITIONS FOR PUBLIC ASSISTANCE, [January-March 1973] 2 (U.S. Dep't of Health, Educ. & Welfare Pub. No. (SRS) 74-03109, 1973). Even though only a portion of these applications result in a full hearing, cf. Baum, *supra* note 51, at 49 (in a recent period in New York City only 5% of the cases in which benefits were decreased and only 20% of the cases in which a notice of intent to decrease was sent, resulted in a fair hearing), the burden is clearly massive. See also SOCIAL & REHABILITATION SERV., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, FAIR HEARINGS IN PUBLIC ASSISTANCE [January-June 1971] (U.S. Dep't of Health, Educ. & Welfare Pub. No. (SRS) 72-03253, 1971) (46,500 requests for hearings with respect to welfare claims during six month period); Baum, *supra* note 51, at 49 (approximately 2,000 requests for fair hearings received by New York City each month).

Similarly, recent statistics concerning the functioning of the social security system illustrate the enormous increase in the number of administrative hearings being provided in all areas. In fiscal 1970, 38,480 hearing requests were received; in 1974 the number increased to 122,793. During those same periods 38,480 hearings were conducted in the former and 80,779 in the latter. Because of this explosive growth in demand, the pending workload has continued to rise, with 77,501 hearing requests pending on June 30, 1974, and 99,524 cases awaiting hearing on November 9, 1974. *Social Security Litigation: An Inundation*, THE THIRD BRANCH, Dec. 1974, at 1, col. 2.

The number of hearings that may be required in the public schools in cases of disciplinary suspensions after *Goss v. Lopez*, 95 S. Ct. 729 (1975), is likewise overwhelming. In an amicus brief filed in *Goss* the Children's Defense Fund states that at least 10% of the junior and senior high school students sampled in a five state survey—Arkansas, Maryland, New Jersey, Ohio, and South Carolina—conducted by the Office of Civil Rights of the Department of Health, Education, and Welfare, were suspended one or more times in the 1972-73 school year (approximately 20,000 students in New York City, 12,000 in Cleveland, 9,000 in Miami, and 9,000 in Memphis suspended at least once during 1972-73). An amicus brief submitted by several school associations in Ohio also indicates that the number of suspensions is very substantial: in 1972-73, 7,352 of 57,000 (12.8%) students were suspended in Akron; 4,054 students out of a school enrollment of 81,007 (4.9%) were suspended in Cincinnati; and 14,598 of 142,053 (10.3%) students were suspended in Cleveland. Brief for Buckeye Assoc. of School Adm'rs, Ohio Assoc. of Secondary School Principals, Ohio Assoc. of Elementary School Principals, *et al.* as Amici Curiae. Even these statistics may be somewhat conservative since some schools did not respond to the survey.

recondite scientific or economic subjects.⁹² In many such cases the main effect of cross-examination is delay—an argument not really answered, as any trial judge will confirm, by the easy suggestion that the hearing officer can curtail cross-examination. Lawyers, including those who have gone on the bench, have a vivid recall of the few instances where they destroyed a dishonest witness on cross-examination and forget those where their cross-examination confused an honest one or was ineffective or worse—not to speak of the many cases when they had the good judgment to say "No questions."

Moreover, effective cross-examination of experts, and of most other witnesses, would almost inevitably require the aid of counsel. One wonders how Pedro Perales in his claim for Social Security disability benefits could have effectively subjected specialists in neurosurgery, neurology, psychiatry, orthopedics, and physical medicine to the "ordeal of cross-examination" vaunted in Mr. Justice Douglas' dissent⁹³—a task shunned by most lawyers without special experience and often regarded as unproductive even by them. Why do we not have the good sense in such cases to use something like the English medical appeals tribunal, two of whose members are private physicians,⁹⁴ and avoid the calling of experts altogether? If "procedures adequate to determine a welfare claim may not suffice to try a felony charge,"⁹⁵ it is equally true that not all procedures required for the fair trial of a felony charge are needed to dispose of a claim that may lead to the denial of a disability pension.

The absolutes of *Greene v. McElroy*⁹⁶ and of *Goldberg v. Kelly*⁹⁷ with respect to confrontation arguably have now been ended by *Wolff v. McDonnell*.⁹⁸ There the Court considered whether a prisoner faced with the loss of up to eighteen months in "good time" credits had a constitutional right to confront and cross-examine adverse witnesses. It concluded that, in the special

⁹² Even outside the area of mass justice, the prospect of lengthy and hectoring cross-examination may discourage the appearance of experts before agencies without subpoena powers. See Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEXAS L. REV. 1132, 1149 (1972).

⁹³ *Richardson v. Perales*, 402 U.S. 413, 414 (1971) (Douglas, J., dissenting). Perales appears to have had counsel, but the point remains.

⁹⁴ See Friendly, *Foreword to SCHWARTZ & WADE, supra* note 9, at xvi & n.5.

⁹⁵ *Bell v. Burton*, 402 U.S. 535, 540 (1971) (Brennan, J.).

⁹⁶ 360 U.S. 474, 496-97 (1959).

⁹⁷ 397 U.S. 254, 269-70 (1970).

⁹⁸ 418 U.S. 539 (1974).

circumstances of the prison,⁹⁹ interest-balancing would dictate a right to cross-examination only in a most limited range of cases.¹⁰⁰ In other situations, whether to allow cross-examination was left to the "sound discretion" of the prison authorities.¹⁰¹

While prisoner cases are doubtless the strongest ones for dispensing with an absolute requirement of confrontation and cross-examination, similar arguments (fear of witnesses in coming forward, undue exacerbation, and polarization of what in some instances must remain on-going relationships) exist in other situations as well—eviction of tenants from public housing,¹⁰² discipline of students, or assignment of students to a class or school for retarded or disturbed children. The trouble is that these arguments prove too much. They suggest not only denial of cross-examination but suppression of the names of the witnesses and consequent serious curtailment of the right to know the evidence against one—something that should be permitted only when the penalty is small or the decision is preliminary or if the dangers of disclosure are exceedingly grave. In other words, the question whether cross-examination should be denied must generally be viewed from an incremental standpoint—assuming that the name of the witness and the content of his testimony will have been disclosed, how much further harm, if any, will be caused by allowing cross-examination when contrasted with its value.¹⁰³

⁹⁹ Potential disruption of institutional programs as well as danger to inmate accusers resulting from resentment persisting after testimony and the concomitant demand for anonymity by inmate accusers were the special factors discussed by the Court. *Id.* at 566-72.

¹⁰⁰ *Id.* at 569.

¹⁰¹ *Id.* In dissent, while arguing vigorously that the right of cross-examination should be limited only in exceptional cases, Mr. Justice Marshall made the suggestion that even in such cases the disciplinary board should call the witness before it *in camera* and itself probe his credibility. *Id.* at 590. This might be fruitful in other fields. *Cf.* *DeJesus v. Penberthy*, 344 F. Supp. 70, 75-76 (D. Conn. 1972) (cross-examination by the tribunal is possible substitute for cross-examination of adverse witnesses by the party).

¹⁰² *Cf.* *GEORGE SCHERMER ASSOCIATES, MORE THAN SHELTER: SOCIAL NEEDS IN LOW- AND MODERATE-INCOME HOUSING* 40-42, 54-58 (1968). One suggested solution in this area has been to adopt the balance struck in *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), and to permit the concealment of the identity of complaining tenants whenever, in the judgment of the independent decisionmaker, revealing it would jeopardize tenant relationships or present a serious threat of reprisal. *See* Note, *supra* note 74, at 906-07.

¹⁰³ *See* Buss, *supra* note 52, at 593-603.

Lower courts have reached different conclusions with respect to whether due process requires that a claimant have the right to confront and cross-examine adverse witnesses. For example, in *McNeill v. Butz*, 480 F.2d 314 (4th Cir. 1973), the court held that where untenured non-civil service employees are dismissed on the basis of secret charges which

Some aspects of the doctrine that the administrator must confine himself to the record are simply another form of what we have just been considering. But even on a broad view of a right to confrontation, the principle against use of extra-record evidence can be pushed too far. In England "a tribunal such as a rent tribunal is entitled to use its own knowledge and experience, for example, as to the level of rents or the scarcity of houses in its area."¹⁰⁴ Such matters fit into Professor Davis' category of "legislative facts,"¹⁰⁵ and notice of them should be permissible as long as the tribunal clearly indicates the basis for its decision so that erroneous fact-finding might later be challenged, either on appeal or in subsequent cases.

7. Counsel

The *Goldberg* opinion quotes the oft-cited statement in *Powell v. Alabama*¹⁰⁶ 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."¹⁰⁷ Apparently no difference was perceived between a capital case and the suspension of a welfare allowance, except that in the latter the government was not required to provide counsel.

To be sure, counsel can often perform useful functions even in welfare cases or other instances of mass justice; they may bring out facts ignored by or unknown to the authorities, or help to work out satisfactory compromises. But this is only one side of

impugn their honesty and integrity, the Government must provide an opportunity for them to confront and cross-examine such adverse witnesses, absent a specific finding that the Government has "good cause" to protect its confidential informant with a cloak of absolute secrecy. See *Esteban v. Central Mo. State College*, 415 F.2d 1077, 1089 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970); *Tibbs v. Board of Educ.*, 59 N.J. 506, 284 A.2d 179 (1971). By contrast, in *Carpenter v. City of Greenfield School Dist.* No. 6, 358 F. Supp. 220, 226-27 (E.D. Wis. 1973), the court concluded that, with respect to the dismissal of a teacher, hearsay reports based on interviews with students were permissible as long as reference was made to specific instances of proscribed conduct except where no meaningful response was possible. See *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 715 (7th Cir. 1973), cert. denied, 414 U.S. 1146 (1974); *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F. Supp. 602, 608 (D. Minn. 1972). The school discipline cases are thoroughly reviewed in Buss, *supra* note 52, at 551-73. With respect to due process hearings for retarded children, see Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Reforms*, 62 CALIF. L. REV. 40, 79-81 (1974). See also *Goss v. Lopez*, 95 S. Ct. 729 (1975).

¹⁰⁴ SCHWARTZ & WADE, *supra* note 9, at 154 (citing *Crofton Inv. Trust Ltd. v. Greater London Rent Comm'n*, [1967] 2 Q.B. 955).

¹⁰⁵ DAVIS, *supra* note 1, § 7.06, at 430.

¹⁰⁶ 287 U.S. 45 (1932).

¹⁰⁷ *Id.* at 68-69.

the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means.¹⁰⁸ Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one—or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy. Finally, it is usually mere words to talk of "retained" counsel in welfare cases. When counsel appears, he will almost inevitably have been provided by an organization supported in large part by public funds and the government is thus paying the cost as fully as if counsel were assigned.

It is thus fortunate that subsequent cases have not taken this portion of *Goldberg* as an absolute governing other types of hearings. The Supreme Court recognized in *Wolff* that in the prison context "[t]he insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals."¹⁰⁹ The Court thus declined to hold that inmates had a right either to appointed or even to "retained" counsel, instead indicating that where an illiterate inmate was involved, or where the issues were sufficiently complex to make the inmate unable "to collect and present the evidence necessary for an adequate comprehension of the case," he should be permitted to seek the aid of fellow prisoners, or if that is prohibited, to have "adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff."¹¹⁰ This is a sensible compromise, which may be emulated, *mutatis mutandis*, in other contexts, such as student or employee discipline, where the disadvantages of the presence of counsel may outweigh the benefits. This portion of the *Wolff* decision, as well as the case-by-case approach of *Gagnon v. Scarpelli*¹¹¹ on revocation of probation,¹¹² are likely to have considerable anti-*Goldberg* rever-

¹⁰⁸ On this, and the whole subject of the adversary system, see Judge Frankel's remarkable Cardozo lecture, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). Passages bearing particularly on the role of the advocate will be found at 1040-43, 1047-48, 1050-55.

¹⁰⁹ 418 U.S. at 570.

¹¹⁰ *Id.*

¹¹¹ 411 U.S. 778 (1973).

¹¹² *Id.* at 787-91.

berations.¹¹³

These problems concerning counsel and confrontation inevitably bring up the question whether we would not do better to abandon the adversary system in certain areas of mass justice, notably in the many ramifications of the welfare system, in favor of one in which an examiner—or administrative law judge if you will—with no connection with the agency would have the responsibility for developing all the pertinent facts and making a just decision. Under such a model the "judge" would assume a much more active role with respect to the course of the hearing; for example, he would examine the parties, might call his own experts if needed, request that certain types of evidence be presented, and, if necessary, aid the parties in acquiring that evidence.¹¹⁴

Many parts of the mass justice area would be particularly suitable for such an experiment since the guidelines are sufficiently definite to avoid the danger that an outside reviewing panel might endeavor to remake agency policy.¹¹⁵ Although questions of fact and policy may inevitably become inter-

¹¹³ Prior to *Wolff* many lower courts had considered the right-to-counsel question in the context of student disciplinary proceedings. Although perhaps a majority of these courts concluded that due process does not incorporate the right to retain counsel, *see, e.g.,* *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967) (as long as the government does not proceed through counsel); *Barker v. Hardway*, 283 F. Supp. 228, 237 (S.D.W. Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968) (*per curiam*), *cert. denied*, 394 U.S. 905 (1969); *Due v. Florida A & M Univ.*, 233 F. Supp. 396, 403 (N.D. Fla. 1963), a substantial number, particularly since *Goldberg*, have reached the opposite result. *See, e.g.,* *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972); *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). Most commentators are of the view that there should be a right to retain counsel, at least in major disciplinary proceedings. *See, e.g.,* Buss, *supra* note 52, at 605-13; Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1075-76 (1969). One possible application of *Wolff* in the school situation might be allowing the school officials to appoint a staff member to assist the student in the preparation of his defense in lieu of retaining counsel. Similarly, courts may distinguish between the right to retain counsel at different levels of the educational process (*e.g.,* secondary school v. college) based on a difference in the perceived effect on the overall educational process of the presence of such counsel in disciplinary proceedings. *Goss v. Lopez* would not seem to proscribe such experimentation and differentiation since although intimating in dictum that "more formal procedures" might be required in cases of longer suspension or expulsion, the holding—in the context of a "short suspension"—left it to the informed discretion of the school administrator to determine whether counsel should be permitted in a particular case. 95 S. Ct. at 740.

¹¹⁴ Cf. B. SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 124 (1954).

¹¹⁵ This would seem to be a serious risk, for example, with regard to the panels for review of administrative decisions in schools with respect to the placement of retarded children suggested in *Kirp*, Buss & Kuriloff, *supra* note 103, at 123-25.

twined,¹¹⁶ for the most part the tribunals would simply be determining the facts and then applying pertinent statutes and agency rules or regulations. The hearing boards presumably would have access to government officials and program administrators for pertinent information concerning agency policies. While such an experiment would be a sharp break with our tradition of adversary process, that tradition, which has come under serious general challenge from a thoughtful and distinguished judge,¹¹⁷ was not formulated for a situation in which many thousands of hearings must be provided each month.¹¹⁸ Whoever baptized the continental system as "inquisitorial" did a disservice to American legal thought.¹¹⁹ Call it "investigatory" and the pejorative connotation fades away. Use of the investigatory system should not be viewed as a lessening of protection to the individual; if properly applied, it could well result in more. This investigatory model would also have the advantage of being more informal; the decisionmaker, in a conference-type setting, would hear the evidence and discuss the dispute with the parties and with their attorneys, assuming that they were permitted to have them.¹²⁰

If we are to experiment with the investigatory model anywhere, this is the ideal place to do it. Strongly embedded traditions, specific constitutional limitations, and resistance of the bar will prevent its use not only in criminal but also, to a lesser extent, in ordinary civil litigation. There is no constitutional mandate requiring use of the adversary process in administrative

¹¹⁶ Cf. *Yee-Litt v. Richardson*, 353 F. Supp. 996, 999-1000 (N.D. Cal.), *aff'd sub nom. Carleson v. Yee-Litt*, 412 U.S. 924 (1973) (rejecting policy/fact distinction as a basis whether to require a full evidentiary hearing); *Mothers' & Children's Rights Org. v. Sterrett*, 467 F.2d 797 (7th Cir. 1972) (same).

¹¹⁷ Frankel, *supra* note 108.

¹¹⁸ See Baum, *supra* note 51, at 49-50 ("police court" environment created by inadequate staff).

¹¹⁹ Judge Frankel has noted our curious and unfortunate parochialism on this score, Frankel, *supra* note 108, at 1043.

¹²⁰ Critical to the successful implementation of this or indeed of any plan for improving the efficiency of mass justice is the assurance of an adequate supply of skilled hearing officials. Baum, *supra* note 51, at 45-47. Although the British example of drawing the membership of its tribunals in many areas from a pool of citizen volunteers or, in other areas, of drawing on individuals with special skills to work part time, see note 74 *supra*, should be emulated where feasible, given the number of hearings currently provided it is likely that most administrative agencies will be dependent upon "professional" decision-makers for some time. There is thus a need to continue the upgrading of such positions, both through training and through compensation sufficient to attract capable individuals. Cf. B. SCHWARTZ, *supra* note 114, at 26-29, 56-57, 86-87 (French National School of Administration); M. WALINE, *TRAITÉ ÉLÉMENTAIRE DROIT ADMINISTRATIF* 73 (6th ed. 1951).

hearings unless the Court chooses to construct one out of the vague contours of the due process clause. But that clause does not forbid reasonable experimentation. For a state to experiment with procedures for mass administrative justice wholly different from those required in a felony trial would be a splendid vindication of "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory."¹²¹ Alternatively, federal agencies administering various welfare programs might attempt to implement different forms of nonadversary procedure. Action of this sort would provide controlled experiments in areas where transplantation of even a diluted form of trial type proceedings is not likely to work well.

8 and 9. The Making of a Record and a Statement of Reasons

I shall treat these two points together since they are closely associated with judicial review, although a statement of reasons serves other valuable functions as well.

Professors Schwartz and Wade tell us that "the aspect of American administrative law that impresses foreigners most unfavourably is the requirement of a formal record in every case where a hearing is held."¹²² Americans are as addicted to transcripts as they have become to television; the sheer problem of warehousing these mountains of paper must rival that of storing atomic wastes. We risk the fate of the eminent professor Fulgence Sapir, in Anatole France's *Penguin Island*, who boasted that he had all of art classified on paper slips alphabetically and topically, only to find himself suffocated when his search for one slip caused all the others to cascade upon him. Except for administrative appeal or judicial review, there would seem to be no need for any "record" in the typical mass justice case;¹²³ the facts

¹²¹ *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹²² SCHWARTZ & WADE, *supra* note 9, at 132. They cite as an example of the judicial attitude toward the provision of transcripts a federal case in which at a prior hearing concerning the validity of the initial denial of a welfare application for a grant of household goods and winter clothing, the referee had refused to provide facilities for transcription of the proceedings. The district court granted an injunction requiring the welfare agency to provide a complete record of the proceedings, without feeling any need to justify its action in a written opinion. *Id.* 133 (citing *Banner v. Smolenski*, CCH Pov. LAW REP. ¶ 10,587 (D. Mass. 1969)).

¹²³ Many lawyers would doubtless argue that knowledge that a transcript is being made tends to restrain abuses by hearing officers. It is hard to see why unless the transcripts are read by some higher authority.

are simple enough that the hearing officer can render a decision on the basis of his recollection and notes, as is done in England.¹²⁴ Even administrative appeal or judicial review would not require a transcript; for centuries appeals were heard on the judge's notes.¹²⁵ Very likely, however, we have too little confidence in hearing examiners to allow this.¹²⁶ Although electronic recording has recently acquired a bad name in other contexts, in most cases it surely should be sufficient to use tapes and to transcribe them only if an appeal were taken.¹²⁷

A written statement of reasons, almost essential if there is to be judicial review, is desirable on many other grounds.¹²⁸ The necessity for justification is a powerful preventive of wrong decisions.¹²⁹ The requirement also tends to effectuate intra-agency uniformity, and would be particularly important in this regard if the hearing board were composed of individuals drawn from outside the agency. A statement of reasons may even make a decision somewhat more acceptable to a losing claimant. Moreover, the requirement is not burdensome; sometimes it can even be met by checking a list on a card.¹³⁰ For all these reasons I would put this item close to the top rather than near the bottom of the scale.¹³¹

¹²⁴ In England since tribunals are often entitled to use their own general knowledge and experience, see note 104 *supra* & accompanying text, their decisions, therefore, to not have to be based "on the record" in the full American sense. If there is an appeal, or an application for review, on the ground that evidence was lacking concerning some finding of the tribunal, evidence of what transpired at the proceedings is normally provided by affidavit of the parties, although in some cases it may be given by direct oral testimony. See, e.g., *Regina v. Board of Control ex parte Ratty*, [1956] 2 Q.B. 109.

¹²⁵ See Medina, *The Trial Judge's Notes: A Study in Judicial Administration*, 49 CORNELL L.Q. 1, 4 (1963).

¹²⁶ *But cf.* *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) (apparently limiting requirement of a "written record" in prison disciplinary cases to a statement by the factfinder as to the evidence relied on and the reasons for the disciplinary action; not a verbatim transcript or recording).

¹²⁷ See SCHWARTZ & WADE, *supra* note 9, at 133. New York has recently adopted the California practice of recording welfare hearings on tape.

¹²⁸ Less clear is the exact detail and scope which the written statement of reasons must take. Compare *Caramico v. Secretary of the Dep't of Housing & Urban Dev.*, 509 F.2d 694 (2d Cir. 1974) (explicit decision of any disputed ground, including a statement of opposing considerations, that "adequately disposes of the issue"), with *Burr v. New Rochelle Munic. Housing Auth.*, 479 F.2d 1165, 1170 (2d Cir. 1973) (statement "outlining" reasons for approving or rejecting rent increase). In these days when appellate courts themselves are being compelled to omit or abbreviate opinions, they should be careful about imposing unrealistically high requirements upon those who must administer mass justice.

¹²⁹ See *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974).

¹³⁰ See K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 104-05 (1969).

¹³¹ Although the English courts have refused to include a statement of reasons in the

10. Public Attendance

Legal scholars have explained why this guarantee has been considered a fundamental element of a criminal trial.¹³² However, this feature of court trials has received relatively slight emphasis with respect to administrative proceedings. Balancing the particular interests of the individual and the state concerning public attendance leads to the conclusion that it is manifestly inappropriate for certain administrative hearings and that, while it is arguably desirable in others, due process generally does not require it.¹³³

To require an open hearing would be manifestly wrong in the case of a prison disciplinary proceeding. Beyond the burden that such a requirement would place on limited prison facilities, as the Court recognized in *Wolff*, "[t]he operation of a correctional institution is at best an extraordinarily difficult undertaking."¹³⁴ Consequently, given the disruptive effect that a public hearing might have on legitimate institutional interests, prison officials must be accorded the discretion to keep hearings closed to the general public and press instead of being subjected "to unduly crippling constitutional impediments."¹³⁵ A more difficult question is whether the prisoner should at least be entitled to be accompanied by family or friends.

In the area of student disciplinary proceedings, several lower courts have concluded that procedural due process is not denied because the hearing was not open to other students, the

concept of natural justice, *Regina v. Gaming Board for Great Britain ex parte Benaim & Khaida*, [1970] 2 Q.B. 417, § 12(1) of the Tribunals and Inquiries Act 1958, 6 & 7 Eliz. 2, c. 66, imposes this duty on tribunals subject to the Act whenever reasons are requested "on or before the giving or notification of the decision" The courts take this mandate seriously. See SCHWARTZ & WADE, *supra* note 9, at 155-56. However, even among tribunals that are within the Act there are certain exceptions. For example, the Lord Chancellor may directly order that any class of decisions shall be exempt if he is of the opinion that the giving of such reasons is unnecessary or impracticable. 6 & 7 Eliz. 2, c. 66, § 12(4) (1958).

¹³² Three principal reasons are typically cited for the right to an open trial as a part of due process. First, an open trial fosters confidence. See 6 J. WIGMORE, EVIDENCE § 1834, at 335 (3d ed. 1940). Second, a public trial will help to assure the accuracy of the evidence offered. 3 W. BLACKSTONE, COMMENTARIES *373. *But cf.* Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 384 (1932). Third, the presiding officials will more likely conduct the proceedings fairly. J. WIGMORE, *supra*, § 1834, at 335. It has been urged that these reasons argue in favor of an open administrative hearing in many areas. See Comment, *The Right to an Open Administrative Hearing*, 53 B.U.L. REV. 899 (1973).

¹³³ See Wright, *supra* note 113, at 1079-80.

¹³⁴ *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974).

¹³⁵ *Id.* at 566-67.

press, or the public in general.¹³⁶ The reasons for allowing closed hearings are somewhat similar to although here less forceful than those just canvassed.¹³⁷ In contrast, at least one court has concluded that due process requires a hearing on the termination of a government employee to be open.¹³⁸ Arguably the interest of the public in ensuring that the government functions fairly and the relatively greater ability of the government to provide for open hearings may support this distinction.¹³⁹

In welfare cases the problem largely solves itself; there is no good reason to exclude the claimant's family and typically no one else has any interest in attending. In public and government-subsidized housing a much more difficult problem is presented. A private landlord may not have the facilities to conduct wholly public hearings or the readily available sanctions and enforcement mechanisms necessary to ensure that the "observers" do not disrupt the proceedings. Moreover, beyond disrupting the immediate proceeding, the presence of tenants with sharply differing views, vocally expressed, may fractionalize the tenant community, a result that likely would be inimical to the long term viability of the project.¹⁴⁰ Although tenants in a given housing project have an interest in ascertaining whether the procedures that test the correctness of evictions, fines, and other penalties assessed against them by the landlord are fair, the requirement of a statement of reasons should suffice.

11. Judicial Review

Although I have not researched the state decisions, my impression is that, up to this time, judicial review in the area of mass justice has largely been limited to questions of fair procedure, and there has been little attempt to obtain review for lack

¹³⁶ Moore v. Student Affairs Comm., 284 F. Supp. 725, 731 (M.D. Ala. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 768 (W.D. La. 1968); cf. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

¹³⁷ Commentators, students and administrators are often divided on the question whether particular hearings should be open or closed, and who should have the power to make that decision. Compare CRISIS AT COLUMBIA: REPORT OF THE FACT-FINDING COMMISSION APPOINTED TO INVESTIGATE THE DISTURBANCES AT COLUMBIA UNIVERSITY IN APRIL AND MAY 1968, 97 (1968), with Linde, *Campus Law: Berkeley Viewed From Eugene*, 54 CALIF. L. REV. 40, 56-57 (1966).

¹³⁸ Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972).

¹³⁹ Cf. Comment, *supra* note 132, at 915-18.

¹⁴⁰ See Note, *supra* note 74, at 906-07; GEORGE SCHERMER ASSOCIATES, *supra* note 102, at 40-42, 54-58.

of substantial evidence or even for arbitrariness or capriciousness. Would that it may remain so! The spectacle of a new source of litigation of this magnitude is frightening. Yet many state administrative procedure acts, not to speak of the supposed "common law" right of review, would seem to subject determinations of the sort here considered to substantive review. Surely this is an area where courts should exercise self-restraint; the agencies can promote this by fair procedures and adequate statements of reasons, remembering that one sufficiently outrageous example may burst the dike.¹⁴¹

B. *The Nature of the Governmental Action*

Now I shall endeavor to make up the other list, ranking the action proposed to be taken in terms of its seriousness to the individual. Obviously this survey cannot include every kind of governmental action; I shall have to limit myself to those that have surfaced most prominently.

For starters I would draw a distinction between cases in which government is seeking to take action against the citizen from those in which it is simply denying a citizen's request. This is not the discredited right-privilege distinction in another garb. The first category includes cases where government seeks to withdraw a "privilege" as well as a "right," if indeed these terms have any meaning in this context as distinguished from their proper Hohfeldian use.¹⁴²

Still, one is entitled to ask whether the distinction has real validity. Even a beginner in mathematics knows that the distance between two points on the vertical axis is the same whether one measures down or up. Moreover, there are cases at the top of the second category whose seriousness is greater than those at the bottom of the first.¹⁴³ But the distinction has a notable lineage. The famous Article 39 of Magna Carta,¹⁴⁴ often seen as

¹⁴¹ A classic instance is *In re Gault*, 387 U.S. 1 (1967).

¹⁴² W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 35-50 (W. Cook ed. 1919).

¹⁴³ Thus it was surely more serious for Mr. Willner to be denied admission to the bar on grounds of character, *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963), or for Mrs. Knauff or Mr. Nezei to be denied reentry to the United States, *Shaughnessy v. United States ex rel. Nezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), than for a student at a state university to be suspended for a few weeks.

¹⁴⁴ "No freeman shall be taken or imprisoned or [and] disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judg-

the origin of the concept of due process, speaks in terms of the king's going out or sending against a free man, not of his refusing a request. And whatever the mathematics, there is a human difference between losing what one has and not getting what one wants. This point is convincingly developed, in the context of revocation as distinguished from denial of parole, in Chief Justice Burger's opinion in *Morrissey v. Brewer*.¹⁴⁵ The distinction is valid in economic regulation as well. Revocation of a license is far more serious than denial of an application for one; in the former instance capital has been expended, investor expectations have been aroused, and people have been employed.

When we begin to rank cases within the first category, revocation of parole or probation must stand at or near the top. Deprivation of liberty, even conditional liberty, is the harshest action the state can take against the individual through the administrative process. The Supreme Court thus was right in demanding a very high level of procedural protection and in setting out the required procedures in detail.¹⁴⁶ Civil commitment warrants a similarly high place.¹⁴⁷

Decisions involving the treatment of aliens reveal how the nature of the action affects the sort of "hearing" that is required. When an alien raises a factual issue regarding deportability, the Court applies the unusual requirement of "clear, unequivocal, and convincing evidence that the facts alleged as grounds for

ment of his peers or [and] by the law of the land." MAGNA CARTA art. 39, in W. McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 375 (2d ed. 1914). See Statute of Westminster, 28 Edw. 3 (1354).

¹⁴⁵ 408 U.S. 471, 481-82 (1972). The Chief Justice quoted with approval the statement in *United States ex rel. Bey v. Connecticut Bd. of Parole*, 443 F.2d 1079, 1086 (2d Cir.), *vacated and remanded with direction to dismiss as moot*, 404 U.S. 879 (1971): "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the condition of his release, than to his mere anticipation or hope of freedom." See *Scarpa v. United States Bd. of Parole*, 477 F.2d 278 (5th Cir.), *vacated on other grounds*, 414 U.S. 809 (1973); *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (prisoner is not entitled, under the fourteenth amendment, to procedural due process rights upon his being interviewed and considered for parole prior to termination of his sentence). *But see* *Bradford v. Weinstein*, No. 73-1751 (4th Cir., Nov. 22, 1974).

¹⁴⁶ Arguably deprivation of good time credit ranks close to revocation of probation or parole. However, the distinctions made by Mr. Justice White in *Wolff v. McDonnell*, 418 U.S. 539, 560-63 (1974), have much validity. Moreover, the *Wolff* decision rests heavily on the special problems of according the full gamut of procedural rights within a prison. See also *Jackson v. Wise*, 43 U.S.L.W. 2272 (C.D. Cal., Dec. 10, 1974).

¹⁴⁷ *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court). See generally *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

deportation are true."¹⁴⁸ Since the statute¹⁴⁹ accords the full gamut of procedural safeguards except assignment of counsel,¹⁵⁰ the question of constitutional entitlement has not arisen. A much lower standard prevails when a concededly deportable alien seeks the discretionary remedy of suspension by the Attorney General.¹⁵¹ While such an alien is entitled to a fair judgment by the decisionmaker,¹⁵² the Supreme Court has held that the Attorney General is not "required to give a hearing with all the evidence spread upon an open record with respect to the considerations which may bear upon his grant or denial of an application"¹⁵³ And although today's Court might not echo the 1950 statement that for an alien seeking admission, "[w]hatever the procedure authorized by Congress is, it is due process,"¹⁵⁴ the procedural rights accorded such an alien would not be many.

Another category ranking high on the procedural scale is the revocation of a license to practice a profession. Here the government is threatening to deprive a person of a way of life to which he has devoted years of preparation and on which he and his family have come to rely.¹⁵⁵ Moreover, the types of issues often resemble those tried in actions for fraud or negligence, or even in criminal proceedings. Finally, the number of individuals involved in such disciplinary action in any given period is likely to be relatively small, and generally no other special circumstances justify a curtailment of procedural safeguards.¹⁵⁶

¹⁴⁸ *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 286 (1966) (footnote omitted).

¹⁴⁹ Immigration and Nationality Act § 242(b), 8 U.S.C. § 1252(b) (1970).

¹⁵⁰ The statute does permit the alien to be represented by counsel at the hearing at his own expense. *Id.* § 242(b)(2), 8 U.S.C. § 1252(b)(2) (1970).

¹⁵¹ See, e.g., *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 490-91 (2d Cir. 1950). The authority to grant or deny stays of deportation after an entry of a final order of deportation has been delegated to the district directors of the Immigration and Naturalization Service, pursuant to the Code of Federal Regulations, 8 C.F.R. § 243.4 (1973). See, e.g., *Fan Wan Keung v. Immigration & Naturalization Serv.*, 434 F.2d 301 (2d Cir. 1970); *Kladis v. Immigration & Naturalization Serv.*, 343 F.2d 513 (7th Cir. 1965); *Adame v. Immigration & Naturalization Serv.*, 349 F. Supp. 313 (N.D. Ill. 1972).

¹⁵² *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

¹⁵³ *Jay v. Boyd*, 351 U.S. 345, 353 (1956).

¹⁵⁴ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); accord, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

¹⁵⁵ See, e.g., *In re Ruffalo*, 390 U.S. 544 (1968) (disbarment); *Mack v. Florida State Bd. of Dentistry*, 430 F.2d 862 (5th Cir. 1970), cert. denied, 401 U.S. 954 (1971) (revocation of dentist license).

¹⁵⁶ See text accompanying notes 102-03 *supra*. Closely related to license revocation, though only an impediment and not a complete obstruction to continuing an established

We now enter the controversial area of mass justice, still in the context of government's acting against the individual. The fields are so diverse that it is impossible to apply any universal scale of seriousness. However, gradations appear within each field. Thus a welfare termination is more serious than a reduction;¹⁵⁷ suspension of a payment that is the claimant's only hope for income is more serious than a suspension that permits resort to other sources of income, even to the welfare system;¹⁵⁸ expulsion from public housing is more serious than transfer to a smaller apartment;¹⁵⁹ expulsion from a school is more serious than suspension or loss of credit;¹⁶⁰ severance from government service is graver than suspension pending a further hearing;¹⁶¹ dismissal on a ground carrying a moral stigma is more serious than on one that does not; some types of prison discipline are more onerous than others.¹⁶²

occupation, is debarment from participation in government contracts. Depending on a variety of factors, including amount of reliance on government work and ability to secure other customers, such "blacklisting" can cause severe economic consequences and, therefore, calls for procedural safeguards. See *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964) (Burger, J.).

¹⁵⁷ See *Frost v. Weinberger*, No. 74-2020 (2d Cir., Apr. 17, 1975).

¹⁵⁸ See *Arnett v. Kennedy*, 416 U.S. 134, 169 (1974) (Powell, J., concurring); *id.* at 201-02 (White, J., concurring & dissenting); *Frost v. Weinberger*, No. 74-2020 (2d Cir., Apr. 17, 1975); *Crow v. California Dep't of Human Resources Dev.*, 490 F.2d 580 (9th Cir. 1973), *vacated and remanded for consideration of mootness*, 95 S. Ct. 1110 (1975) (majority, distinguishing *Goldberg* based on relative seriousness of loss, held that due process demands only an informal hearing prior to termination of unemployment benefits); *cf.* *Torres v. New York State Dep't of Labor*, 410 U.S. 971 (1973) (Marshall, J., dissenting); *Steinberg v. Fusari*, 364 F. Supp. 922 (D. Conn. 1973) (three-judge court), *vacated*, 95 S. Ct. 533 (1975).

¹⁵⁹ *Cf.* *Brown v. Housing Auth.*, 340 F. Supp. 114 (E.D. Wis.) (opportunity to challenge reasons for termination of month-to-month tenancy must be given "at a meaningful time" to prevent hardship which will follow the tenant's being obligated to wait until he is summoned into court at the end of the 30-day period), *aff'd*, 471 F.2d 63 (7th Cir. 1972) (without reaching constitutional question).

¹⁶⁰ Finer gradations are possible within each subcategory. For example, most courts had developed distinctions based on the length of the given suspension from school to determine whether a hearing, and what type, must be provided when students are suspended. See, e.g., *Pervis v. LaMarque Indep. School Dist.*, 466 F.2d 1054 (5th Cir. 1972) (suspension for over three months requires a prior hearing); *Linwood v. Board of Educ.*, 463 F.2d 763 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972) (seven-day suspension requires no hearing). See also *Sullivan v. Houston Indep. School Dist.*, 475 F.2d 1071, 1077-78 (5th Cir.), *cert. denied*, 414 U.S. 1032 (1973). Although *Goss v. Lopez*, 95 S. Ct. 729 (1975), quite clearly overruled decisions such as *Linwood* with respect to what length of suspension triggers the need for some type of hearing as a matter of due process, the Court seems to accept the view that the *type* of hearing that must be provided is in part dependent upon the length of the suspension. For an extensive compilation of the often conflicting lower court decisions in this area, see *id.* at 737 n.8.

¹⁶¹ *Cf.* *Arnett v. Kennedy*, 416 U.S. 134 (1974).

¹⁶² See *Wolff v. McDonnell*, 418 U.S. 539, 571-72 n.19 (1974) ("We do not suggest,

*Goldberg v. Kelly*¹⁶³ is the lodestar in this area, but it sheds an uncertain light. After the usual litany that the required hearing "need not take the form of a judicial or quasi-judicial trial,"¹⁶⁴ Mr. Justice Brennan proceeded to demand almost all the elements of one.¹⁶⁵ This seemed all the more portentous in a setting where the statute accorded a terminated welfare recipient what was admittedly an adequate hearing within ten working days after a request and a decision within twelve working days thereafter.¹⁶⁶ The Court has not had subsequent occasion to consider what Chief Justice Burger called "intriguing possibilities concerning the right to a hearing at other stages in the welfare process which affect the total sum of assistance, even though the action taken might fall short of complete termination . . . [such as] welfare reductions or denial of increases . . . , or decisions concerning initial applications or requests for special assistance."¹⁶⁷ But the effect on the lower courts of *Goldberg*, in con-

however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges."); *Newkirk v. Butler*, 499 F.2d 1214 (2d Cir.), *cert. granted*, 95 S. Ct. 172 (1974) (prisoner who was transferred from a medium to maximum security prison on basis of rumor he was about to become involved in trouble concerning the formation of an inmate union is entitled to prior notice and a hearing); *Sands v. Wainwright*, 357 F. Supp. 1062 (M.D. Fla.), *vacated*, 491 F.2d 417 (5th Cir. 1973), *cert. denied*, 416 U.S. 992 (1974) (procedures required for revocation of "good time" credits, or solitary confinement, contrasted with those required for administrative segregation); *Rinehart v. Brewer*, 360 F. Supp. 105 (S.D. Iowa 1973), *aff'd*, 491 F.2d 705 (8th Cir. 1974); *United States ex rel. Robinson v. Mancusi*, 340 F. Supp. 662 (W.D.N.Y. 1972) (informal hearing required within 72 hours of revocation of certain privileges); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).

¹⁶³ 397 U.S. 254 (1970).

¹⁶⁴ *Id.* at 266.

¹⁶⁵ See K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.07, at 169-70 (3d ed. 1972). Professor Davis thinks the two omissions noted by him, a verbatim transcript and testimony under oath, probably have "no significance." This is scarcely true about the former; the Court in *Goldberg* deliberately omitted this as serving "primarily to facilitate judicial review," 397 U.S. at 267, which could hardly occur before the post-termination "fair hearing."

The statement in the text should also be qualified to the extent that the *Goldberg* opinion is rather vague about the claimant's right to call witnesses. This right may or may not be included within the phrase "by presenting his own arguments and evidence orally." 397 U.S. at 268. And clearly there is no mention of compulsory process.

¹⁶⁶ 397 U.S. at 259-60 n.5. However, "[I]t was conceded at oral argument that these time limits are not in fact observed." *Id.*

¹⁶⁷ *Wheeler v. Montgomery*, 397 U.S. 280, 284-85 (1970) (dissenting opinion). But see *Arnett v. Kennedy*, 416 U.S. 134, 169 (1974) (Powell, J., concurring); *id.* at 201-02 (White, J., concurring & dissenting). As indicated in note 51 *supra*, this has been due to the fact that federal and state statutes and regulations have generally provided procedural protections for claimants at almost all stages of the welfare process, exceeding those mandated by *Goldberg* with respect to the termination of assistance, even when the

junction with subsequent Supreme Court decisions, on the lower courts has been profound. The trend in one area after another has been to say, "If there, why not here?"¹⁶⁸ And "[t]he tendency of a principle to expand itself to the limit of its logic" has not been much counteracted, as Cardozo expected, "by the tendency

deprivations involved are less serious. *See, e.g.*, 45 C.F.R. § 205.10 (1974) (federal regulations governing state "fair hearings" with respect to AFDC grants, 42 U.S.C. §§ 601-10, 620-26, 630-44 (1970); *id.* §§ 1396a-1396i (Medicaid Programs); 20 C.F.R. § 416 (1974) (governing hearing requirements and procedures for all adult welfare assistance programs, 42 U.S.C. §§ 301-06 (1970) (Old Age Assistance); *id.* §§ 1201-06 (Aid to the Blind); *id.* §§ 1351-55 (Aid to the Permanently and Totally Disabled); *id.* §§ 1381-85 (Aid to the Aged, Blind, or Disabled)); 18 N.Y.C.R.R. § 358.16 (1974) (prescribing details of federally mandated "fair hearings" in New York); *id.* § 358.4(a)-(c) (1974) (hearing protection for recipients of food stamps, cash assistance benefits, and social services in New York); *Developments in Welfare Law—1973*, 59 CORNELL L. REV. 859, 927-40 (1974). However, this situation may not continue.

¹⁶⁸ *See, e.g.*, in addition to decisions already canvassed: (1) Termination of social security benefits: *Williams v. Weinberger*, 494 F.2d 1191 (5th Cir.), *petition for cert. filed*, 43 U.S.L.W. 3175 (U.S. Sept. 8, 1974) (No. 74-205); *Eldridge v. Weinberger*, 361 F. Supp. 520 (W.D. Va. 1973), *aff'd per curiam*, 493 F.2d 1230 (4th Cir. 1974), *cert. granted*, 95 S. Ct. 773 (1975). *See also* Meyerhoff & Mishkin, *Application of Goldberg v. Kelly Hearing Requirements to Termination of Social Security Benefits*, 26 STAN. L. REV. 549 (1974).

(2) Eviction of tenants from public housing: *Brown v. Housing Auth.*, 471 F.2d 63 (7th Cir.), *aff'g* 340 F. Supp. 114 (E.D. Wis. 1972) (applying HUD regulations and thus not reaching constitutional holding of district court). Rejection of an applicant for public housing: *Neddo v. Housing Auth.*, 355 F. Supp. 1397 (E.D. Wis. 1971); *Davis v. Toledo Metro. Housing Auth.*, 311 F. Supp. 795 (N.D. Ohio 1970). *But see* *Sumpter v. White Plains Housing Auth.*, 329 N.Y.2d 420, 278 N.E.2d 892, 328 N.Y.S.2d 649, *cert. denied*, 406 U.S. 928 (1972) (informal interview only requirement). *See also* *Spady v. Mount Herman Housing Auth.*, 95 S. Ct. 243 (1974) (Douglas, J., dissenting from a denial of certiorari). Eviction of tenants from government-subsidized or -financed housing: *Caramico v. Secretary of the Dep't of Housing & Urban Dev.*, 509 F.2d 694 (2d Cir. 1974) (notice of proposed action and grounds; tenant may submit and "support with evidence" any considerations he wishes the Secretary to take into account before reaching final determination; explicit decision of any ground which is disputed, including a statement of opposing considerations, "that adequately disposes of the issue"); *Wilson v. Lincoln Redev. Corp.*, 488 F.2d 339, 342 n.7 (8th Cir. 1973) (informal hearing only requirement of due process); *Bonner v. Park Lake Housing Dev. Fund Corp.*, 70 Misc. 2d 325, 330, 333 N.Y.S.2d 277, 282 (Sup. Ct. 1972) (informal conference). Rent increases in public housing: *Burr v. New Rochelle Munic. Housing Auth.*, 479 F.2d 1165 (2d Cir. 1973) (flexible "hearing" requirement). *But see* *Langevin v. Chenango Ct., Inc.*, 447 F.2d 296 (2d Cir. 1971); *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970). *See also* *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1973), *cert. denied*, 95 S. Ct. 235 (1974) (tenants in public housing constructed under National Housing Act, 12 U.S.C. §§ 1701-50 (1970), have statutory right "to be heard" prior to rent increases); *Marshall v. Lynn*, 497 F.2d 643 (D.C. Cir. 1973) (tenants in government-subsidized low-income housing have similar statutory right to participate in official consideration of rent increases by written submissions).

(3) Transfer of a civilly committed patient from a mental hospital to a prison because of alleged dangerous propensities. *Romero v. Schaver*, 386 F. Supp. 851 (D. Colo. 1974).

(4) Discontinuance of medicare benefits: *Martinez v. Richardson*, 472 F.2d 1121 (10th Cir. 1973).

to confine itself within the limits of its history."¹⁶⁹ However, the mechanical application of *Goldberg*, indeed some portions of that decision itself, will now have to be reconsidered in light of *Wolff* and of *Arnett v. Kennedy*.¹⁷⁰

The spread of *Goldberg* has posed another problem. The complaining party in an action under the Civil Rights Act,¹⁷¹ be he welfare recipient, dismissed teacher, displaced tenant, or aggrieved prisoner, normally will complain of denial not of a single procedural safeguard but of several. The complainant in the next case will raise still other points. A federal district judge, being thus placed in a situation where he is gradually evolving a code of administrative procedure for the particular subject, is sorely tempted to make an end to it and to promulgate procedural rules covering all the problems that he can foresee in a particular area.¹⁷²

Although something is to be said for doing this, I regard the tendency as unfortunate in most areas of mass justice, particularly for inferior courts. The Chief Justice was right when he asked whether it would not be wiser "to hold the heavy hand of constitutional adjudication and allow evolutionary procedures at various administrative levels to develop, given their flexibility to

¹⁶⁹ B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921).

¹⁷⁰ 416 U.S. 134 (1974).

¹⁷¹ 42 U.S.C. § 1983 (1970).

¹⁷² The notable early opinion in *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.) (Rives, J.), *cert. denied*, 368 U.S. 930 (1961), did substantially this in its analysis of the constitutional constraints limiting the discretion of administrators to expel students from public colleges; however, the opinion was as much concerned with pointing out what was not required as in developing what was. Another interesting pre-*Goldberg* example, which, in endeavoring to eliminate the possibility of conflicting decisions by judges in the same district, illustrates the essentially legislative character of such judgments, can be found in the rules promulgated by the judges for the Western District of Missouri with respect to student discipline in tax-supported institutions, General Order on Judicial Standards of Procedure & Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (1969). For a recent decision developing elaborate standards of procedural protection for varying types of prison discipline, see *Sands v. Wainwright*, 357 F. Supp. 1062 (M.D. Fla.), *vacated*, 491 F.2d 417 (5th Cir. 1973), *cert. denied*, 416 U.S. 992 (1974). An extremely detailed piece of legislation with respect to civil commitment was developed in *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court, with one judge dissenting). A contrary attitude, favoring case-by-case adjudication by federal courts and leaving it to the states to develop their own procedures, is illustrated by *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). The Seventh Circuit, speaking through Judge Stevens, over the partial dissent of Chief Judge Swygert, cited with approval *Sostre v. McGinnis*, 442 F.2d 178, 197 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972), in which Judge Kaufman had said:

We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of

make adjustments in procedure without long delays."¹⁷³ As Judge Learned Hand wisely said,

Constitutions are deliberately made difficult of amendment; mistaken readings of them cannot be readily corrected. Moreover, if they could be, constitutions must not degenerate into vade mecums or codes; when they begin to do so, it is a sign of a community unsure of itself and seeking protection against its own misgivings.¹⁷⁴

Courts are good at deciding cases, bad at drafting legislation; typically they see the case at hand and a few others but not the entire spectrum. If federal judges impose a code upon a state, every claim of breach is the basis for a suit under the Civil Rights Act. Furthermore, there is no single correct solution for most of the problems here considered; as previously suggested, more of one procedural safeguard may justify less of another.¹⁷⁵ Experience has shown the wisdom of Mr. Justice Harlan's observation, "I seriously doubt the wisdom of these 'guideline' decisions. They suffer the danger of pitfalls that usually go with judging in a vacuum. However carefully written, they are apt in their application to carry unintended consequences which once accomplished are not always easy to repair."¹⁷⁶

Beyond this there is an institutional difficulty. One can readily imagine how different administrative codes would be as written by each of the twenty-seven judges of the Southern District of New York; much would depend on the luck of the draw. Appellate resolution of the grant or denial of a right claimed in a particular case is appropriate enough, but reviewing courts should not have to rework codes developed by district judges relating to points not directly at issue. This process would be painfully lengthy and indirect, and future code amendments

equipping prisoners with more elaborate constitutional weapons against the administration of discipline by prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.

479 F.2d at 717 (footnote omitted).

¹⁷³ *Wheeler v. Montgomery*, 397 U.S. 280, 283 (1970) (Burger, C.J., dissenting).

¹⁷⁴ L. HAND, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 162 (I. Dilliard 3d ed. 1960).

¹⁷⁵ See text accompanying note 70 *supra*.

¹⁷⁶ *Sanders v. United States*, 373 U.S. 1, 32 (1963) (Harlan, J., dissenting).

from new perceptions or reevaluations would be most difficult to make. Legislation should generally be left to the states or, when appropriate, to Congress and federal agencies.

It is unfortunate that, five years after *Goldberg*, we have so little empirical knowledge how it has worked in its own field, let alone in others where its principles have been applied. For one thing, one would wish to know whether the procedural safeguards that *Goldberg* required have really been applied, and, if not, whether the failure has been due to bureaucratic obduracy or to basic impracticability.¹⁷⁷ One would wish also to know the costs, both of administrative expenses that would not otherwise have been incurred and of continuation of unjustified payments,¹⁷⁸ in relation to the benefits of injustices prevented. This is not to suggest that benefits can be precisely quantified in dollar terms or that *some* excess of the costs would call for reconsideration of the required procedures. As Mr. Justice Brennan has rightly said, administrative fairness usually does entail "some additional administrative burdens and expense."¹⁷⁹ But if the excess of costs over estimated benefits were, say, four-fold, with the concomitant likelihood that, in the Chief Justice's words, "new layers of procedural protection may become an intolerable drain on the very funds earmarked for food, clothing, and other living essentials,"¹⁸⁰ one would at least wish to examine whether

¹⁷⁷ A 1972 study of fair hearing procedures as practiced by the New York City Public Welfare Agencies, Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 813-14 (1974), found that a procedurally regular hearing had not been provided in a significant number of cases: (1) 5% of the appellants received no notice of proposed adverse action; (2) 25% did not receive timely notice; (3) two-thirds failed to receive an adequate statement of what was proposed and the factual and policy reasons therefor; (4) in 15% of the cases aid had not been continued pending appeal; (5) only 25% of the applicants requesting access to agency files were granted such access; (6) in only 7% of the cases was an opportunity for cross-examination provided by having witnesses present. The results of a study by D. Kirchheimer, *Community Evaluation of Fair Hearing Procedures Available to Public Assistance Recipients* 5, 6 (1973) (on file at New York City Human Resources Administration), seem to comport with a 1969 research project which, using survey questionnaire methodology, examined the attitudes of social workers toward administrative hearings and found that a substantial portion of these individuals had negative feelings concerning the relative utility of providing hearings. See Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725 (1972).

¹⁷⁸ See note 54 *supra*.

¹⁷⁹ *Richardson v. Wright*, 405 U.S. 205, 227 (1972) (Brennan, J., dissenting).

¹⁸⁰ *Wheeler v. Montgomery*, 397 U.S. 280, 284 (1970) (Burger, C.J., dissenting).

it would not be possible to devise some less cumbersome but nevertheless fair procedures.¹⁸¹

When we move to the category in which government is merely refusing an application for a benefit, the atmosphere is quite different. To be sure, due process prevents an agency from using impermissible standards¹⁸² or from abdicating its function.¹⁸³ Similarly, due process may require a trial-type hearing on a claim of eligibility when the consequences of a refusal are serious.¹⁸⁴ But to my knowledge no court has held that an unsuccessful applicant for admission to the bar is entitled to a trial-type hearing on the grading of his examination paper;¹⁸⁵ that an unsuccessful applicant for admission to a state university with a limited number of places is entitled to an evidentiary hearing with respect to his turn-down;¹⁸⁶ or that a person on the waiting list for public housing is entitled to such a hearing on a claim that a later applicant has been preferred.

¹⁸¹ While cost-benefit analyses are not so readily made in other fields, the need for empirical studies is great. See *Sostre v. McGinnis*, 442 F.2d 178, 197 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972) ("We are particularly unwilling to interfere with state administrative processes when reliable, detailed information or empirical studies are as scanty as they are on the subject of prison disciplinary procedures").

¹⁸² See, e.g., *Vulcan Soc'y v. Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973). See also *Bridgeport Guardians, Inc. v. Members of Bridgeport Civ. Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973).

¹⁸³ This was the situation in the well-known case of *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964). The Mayor and Aldermen of Atlanta had granted liquor licenses under a system of "ward courtesy" whereby licenses were issued only after approval by one or both of the aldermen of the ward in which the establishment was to be located. The opinion instructed the district court to enjoin the denial of licenses under that system if it found that no ascertainable standards had in fact been developed by the board by which an applicant "can intelligently seek to qualify for a license . . . until a legal standard is established and procedural due process provided in the liquor store licensing field," *id.* at 612. However, the opinion did not clarify the content of this standard. It is hard to believe that the court thought eligible applicants competing for a single license were constitutionally entitled to "comparative hearings" such as those provided by statute in FCC proceedings.

¹⁸⁴ See, e.g., *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963) (holding that petitioner was clearly entitled to notice and a hearing—including confrontation and cross-examination—on the grounds for the denial of admission to the bar). See also *Homer v. Richmond*, 292 F.2d 719, 722 (D.C. Cir. 1961). The same reasoning should apply to an application for welfare benefits in which, typically, the only issue is eligibility. Compare the principle that an alien seeking suspension of a valid deportation order is entitled to a hearing on eligibility but not on the exercise of discretion to suspend deportation. *Jay v. Boyd*, 351 U.S. 345 (1956).

¹⁸⁵ See *Whitfield v. Illinois Bd. of Law Examiners*, 504 F.2d 474 (7th Cir. 1974).

¹⁸⁶ Except, of course, when the charge is invidious discrimination on the grounds of race, religion, or sex. See generally *Avins v. Rutgers, The State Univ.*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) (author of law review article not entitled to a hearing to show that editors' refusal to publish was due to dislike of author's views).

V. HEARING REQUIREMENTS FOR RULEMAKING

In the area of rulemaking the *Florida East Coast*¹⁸⁷ decision stands in sharp contrast to the broadened rights to a hearing we have been reviewing. Since the case is not exactly a household term, indeed remains largely unknown except to the cognoscenti, a short statement of the facts is in order.

In 1917 Congress amended the Interstate Commerce Act to endow the ICC with power "after hearing" to establish reasonable "rules, regulations and practices" with respect to freight car service, including the compensation to be paid by one railroad for using the cars of another.¹⁸⁸ In fixing such compensation the Commission generally accorded a full trial-type hearing.¹⁸⁹ In an effort to deal with shortages of freight cars, Congress enacted a further amendment in 1966¹⁹⁰ empowering the Commission to add a penalty, euphemistically described as "an incentive element," to fair compensation for the use of freight cars found to be in inadequate supply.

The legislative history of the amendment indicated congressional belief that "full hearings" would be accorded,¹⁹¹ and so the Commission seems to have thought.¹⁹² Ultimately, responding to congressional pressure for action, the Commission took a shortcut, according the right to file written statements of fact and position concerning a proposed schedule of charges but denying an oral hearing in the absence of a request showing "with specificity the need therefor and the evidence to be adduced."¹⁹³ The Commission denied all such requests.¹⁹⁴ When two southern carriers attacked the order on the ground that the Administrative Procedure Act¹⁹⁵ and the "hearing" provision of the Inter-

¹⁸⁷ *United States v. Florida E.C. Ry.*, 410 U.S. 224 (1973). See text accompanying note 31 *supra*.

¹⁸⁸ Act of May 29, 1917, ch. 23, 40 Stat. 101, as amended, 49 U.S.C. § 1 (1970).

¹⁸⁹ See, e.g., the order invalidated because of lack of thorough investigation and detailed findings in *Boston & M.R.R. v. United States*, 162 F. Supp. 289 (D. Mass.) (three-judge court), *appeal dismissed*, 358 U.S. 68 (1958).

¹⁹⁰ Act of May 26, 1966, Pub. L. No. 89-430, § 1, 80 Stat. 168 (codified at 49 U.S.C. § 1(14)(a) (1970)).

¹⁹¹ See 112 CONG. REC. 10443 (1966) (remarks of Representative Staggers).

¹⁹² See *United States v. Florida E.C. Ry.*, 410 U.S. 224, 254-55 (1973) (Douglas, J., dissenting); *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 219 (1970) (parties accorded "a hearing under section 556" of the APA in connection with ICC consideration of incentive charges).

¹⁹³ *Incentive Per Diem Charges—1968*, 337 I.C.C. 183, 213 (1969).

¹⁹⁴ *United States v. Florida E.C. Ry.*, 410 U.S. 224, 234 (1973).

¹⁹⁵ 5 U.S.C. § 556 (1970).

state Commerce Act¹⁹⁶ required opportunity for greater participation by parties, the Supreme Court, reversing a lower court decision in their favor,¹⁹⁷ upheld the order on the ground that the Commission had simply engaged in rulemaking. For rulemaking, governed by 5 U.S.C. section 553(c) rather than section 556 unless the rules were "required by statute to be made on the record after opportunity for an agency hearing," the opportunity to submit written comments was sufficient participation.

If the case stood only for the proposition that the provision of the APA requiring trial-type procedures when rules, in the ordinary sense of that term, "are required by statute to be made on the record after opportunity for an agency hearing" should be limited to the few statutes that used these words or something very much like them, the decision would be of relatively little moment.¹⁹⁸ Indeed, as the judge who had the misfortune of having to write a lengthy and difficult opinion in a case where the statute did require this,¹⁹⁹ I would look with special favor on a development that prevented a spread of the infection of full

¹⁹⁶ 49 U.S.C. § 1(14)(a) (1970).

¹⁹⁷ *Florida E.C. Ry. v. United States*, 322 F. Supp. 725 (M.D. Fla. 1971) (three-judge court).

In *Long Island R.R. v. United States*, 318 F. Supp. 490 (E.D.N.Y. 1970) (three-judge court), the court, in an opinion by the writer, had also held that the statute contemplated a trial-type hearing but dismissed the complaint on the ground that the Long Island had not shown that it would be prejudiced by denial of an oral hearing, 5 U.S.C. § 556(d) (1970). The decision was not appealed.

¹⁹⁸ In the wake of *Florida East Coast* lower courts have been naturally hesitant to find a requirement of the more formal procedures of 5 U.S.C. § 556 (1970), which are imposed when rules are required by statute to be made "on the record." In *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1250 (D.C. Cir. 1973), the court deemed the words "on the record" to be the "touchstone test" for imposing all of the trial-type requirements of that section. See also *Bell Tel. Co. v. FCC*, 503 F.2d 1250 (3d Cir. 1974); *Duquesne Light Co. v. EPA*, 481 F.2d 1, 6 n.26 (3d Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 630 n.48 (D.C. Cir. 1973); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 795 (1974).

¹⁹⁹ *National Nutritional Foods Ass'n v. FDA*, 504 F.2d 761 (2d Cir. 1974), cert. denied, 95 S. Ct. 135 (1975). That case included 15 petitions for review of two final regulations of the FDA prescribing label requirements and standards of identity for vitamins and minerals, promulgated under authority of 21 U.S.C. §§ 341, 343(j) (1970). The agency hearing transcript comprised more than 32,000 pages and the material sent us, consisting of selected portions of the record, filled three feet of shelf space. The use of trial-type procedures had been of little avail; cross-examination of government witnesses, which filled some 60% of the pages devoted to the Government's presentation, yielded precious few admissions or other statements of any significance. Ironically, the hearing examiner had denied cross-examination in the one instance where it might have been most useful. 504 F.2d at 792-99.

trial-type hearings to the sort of rulemaking that is predominantly a determination of policy.

However, the sweep of the *Florida East Coast* decision goes far beyond that. The opinion seems to say that "hearing" provisions in regulatory statutes, which had long been regarded as requiring trial-type hearings, have been modified by the Administrative Procedure Act so that nothing more than notice and written comment is required if the action falls within the APA's expansive definition of rulemaking,²⁰⁰ and implicitly, of course, that this comports with due process.²⁰¹ The definition of rulemaking is exceedingly broad, about the only limitation being that a rule can have only future effect.²⁰² Although the *Florida East Coast* opinion noted that the incentive payments "were applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act,"²⁰³ the APA definition of "rule" refers to a "statement of general or particular applicability,"²⁰⁴ and one can hardly believe Mr. Justice Rehnquist's decision would have been different if the Commission had used its power to exempt certain railroads from payment of incentive per diem charges.

²⁰⁰ To be sure, Justice Rehnquist makes a point of the fact that the action under review in the *Florida East Coast* case was taken pursuant to a post-APA amendment of the Interstate Commerce Act. 410 U.S. at 240-41 & n.8. But the 1966 amendment to § 1(14) was substantive, not procedural, and history showed that both Congress and the Commission intended previous procedures to continue. See notes 191-92 *supra*. The "after hearing" language has been a part of the statute since the Esch Car Service Act was enacted in 1917. Act of May 29, 1917, ch. 23, 40 Stat. 101, as amended, 49 U.S.C. § 1 (1970).

²⁰¹ Mr. Justice Douglas found this modification more than just implicit, see 410 U.S. at 246-47.

²⁰² 5 U.S.C. §§ 551(4)-(5). Section 551(4) reads:

"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . .

Justice Rehnquist noted that the order in *Florida East Coast* was "basically [a] legislative-type judgment, for prospective application only." 410 U.S. at 246.

²⁰³ 410 U.S. at 246.

²⁰⁴ 5 U.S.C. § 551(4) (1970) (emphasis added). Drawing on the legislative history, Professor Davis says, "The words 'or particular' were not intended to change into rule making what before the Act was regarded as adjudication. Those words mean no more than that what is otherwise rule making does not become adjudication merely because it applies only to particular parties or to a particular situation." 1 DAVIS, *supra* note 5, § 5.02, at 296 (1958) (footnote omitted). One could as well say "no less." See, e.g., *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973) (promulgation of standard limiting sulfur dioxide which affected only one polluter properly handled as rulemaking).

The *Florida East Coast* decision thus signals a large expansion of what can be done by notice and comment rulemaking and a corresponding retraction of the area where a trial-type hearing is required in the regulatory field. A clear example would be the division of joint rates, a subject closely akin to charges for car hire. In *The New England Divisions Case*²⁰⁵ Justice Brandeis took great pains to justify the Commission's action, pursuant to section 15(6) of the Interstate Commerce Act,²⁰⁶ in fixing divisions on a regional basis to assist the New England lines in the face of an argument by other roads that the Commission was obliged to consider divisions among carriers on an individual basis. Characterizing the proceeding as "adjudication,"²⁰⁷ he described the lengthy hearings and extensive evidence received by the Commission in satisfaction of the "full hearing" requirement of the statute.²⁰⁸ If the Commission today were to think it desirable to increase divisions for the beleaguered roads in the Northeast, *Florida East Coast* seems to say that notice and comment rulemaking might suffice.

Still more important is ratemaking, the approval or prescription of which is specifically incorporated in the APA definition of a rule. Why would not the order of the Secretary of Agriculture fixing future rates for fifty stockyard agencies in Kansas City, which was before the Court in *Morgan II*,²⁰⁹ now constitute rulemaking subject only to notice and comment procedures unless it matters that the pertinent statute spoke of a "full hearing" rather than simply a hearing?²¹⁰ The *Florida East Coast* majority, although unwilling to commit itself, evidently thinks it might be.²¹¹ Indeed why would not a future rate order

²⁰⁵ 261 U.S. 184 (1923).

²⁰⁶ 49 U.S.C. § 15(6) (1970).

²⁰⁷ 261 U.S. at 197.

²⁰⁸ *Id.* at 200. Although Mr. Justice Brandeis concluded "[t]hat there is no constitutional obstacle to the adoption of the method pursued . . .," *id.* at 199, *i.e.*, the use of evidence of typical conditions, subject to later adjustment, rather than evidence respecting each combination of railroads for which divisions were necessary, one does not get the impression that he would have thought a mere notice and comment procedure constituted due process.

²⁰⁹ *Morgan v. United States*, 304 U.S. 1 (1938).

²¹⁰ The Packers and Stockyards Act, 7 U.S.C. § 211(a) (1970), permitted the Secretary to prescribe "just and reasonable . . . rates" for stockyard services after "full hearing."

²¹¹ Mr. Justice Rehnquist was not prepared in *Florida East Coast* to contend that a "hearing" under 49 U.S.C. § 1(14)(a) (1970) and a "full hearing" under the Packers and Stockyards Act would necessarily involve the same procedural requirements. 410 U.S. at

like that in *ICC v. Louisville & Nashville R.R.*,²¹² which was held to have required a trial-type hearing, now constitute rulemaking which can be effectuated by mere notice and comment, since a rule is nonetheless a rule despite its "particular applicability"? Although the *Florida East Coast* majority sought to distinguish the *Louisville & Nashville* situation by calling it adjudication rather than rulemaking,²¹³ the distinction did not carry much conviction to the dissenters,²¹⁴ nor does it to me.²¹⁵

Hard-pressed agencies will not be slow to draw such lessons from the *Florida East Coast* decision.²¹⁶ I am not saying that, from a policy standpoint, this development is bad; I am saying that it is quite as revolutionary in the sense of retracting what had been thought to be procedural rights as *Goldberg* was in advancing them. Mr. Justice Douglas, joined by Mr. Justice Stewart, was accurate when he began his dissent by saying, "The present decision marks a sharp break with traditional concepts of procedural due process."²¹⁷

The Court is going to have to engage in more hard thinking about the location of what Justice Rehnquist conceded to be the not very bright line "between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particu-

243. This difference may be of considerable practical significance. See, e.g., 49 U.S.C. § 15(1) (1970) (according to parties a right to a "full hearing" before rail freight rates may be set aside as unjust, unreasonable, or discriminatory and new rates prescribed by the ICC); 47 U.S.C. § 309(e) (1970) (providing for a "full hearing" in connection with FCC consideration of applications for a broadcast license). But query whether the members of Congress over the years have had any idea that the adjective was more than hortatory or that they were producing a different result when they required only a "hearing," as, for example, in §§ 4(e) and 5(a) of the Natural Gas Act, 15 U.S.C. §§ 717c & d (1970), rather than a "full hearing." See also note 233 *infra*.

²¹² 227 U.S. 88 (1913). See text accompanying notes 22-24 *supra*.

²¹³ 410 U.S. at 244. It would clearly seem to follow from *Florida East Coast* that to such extent as there is a due process right to a hearing with respect to rent increases in public or publicly assisted housing, notice and opportunity for comment would suffice. Cf. note 168 *supra*.

²¹⁴ 410 U.S. at 253-54.

²¹⁵ See *Long Island R.R. v. United States*, 318 F. Supp. 490, 497 (E.D.N.Y. 1970).

²¹⁶ Taking its cue from the reasoning of *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), the Tenth Circuit approved an area rate-making order of the Federal Power Commission promulgated after implementation of new procedures which "drastically changed the procedure from the traditional method involving trial-type adjudicatory proceedings" to informal conferences and staff investigation and analysis. *Phillips Petroleum Co. v. FPC*, 475 F.2d 842, 844 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). See also *Bell Tel. Co. v. FCC*, 503 F.2d 1250 (3d Cir. 1974).

²¹⁷ 410 U.S. at 246.

lar cases on the other.”²¹⁸ The line becomes especially difficult to draw in ratemaking. The process in fixing a future rate for a single power company or for a particular rail movement is much more like the process in determining the reasonableness of past rates²¹⁹ than the process in setting nationwide safety standards or in prescribing rules for solicitation of proxies. Much more than that, since even in rulemaking that is predominantly of the policy type, there may be subsidiary issues on which notice-and-comment procedures will not always assure fair agency decisionmaking and permit meaningful judicial review, it may be doubted that they will inevitably fill the statutory or constitutional bill.

This point has already become a subject of much controversy among the judges of the District of Columbia Circuit. This is a court of special importance for administrative law because, in addition to its exclusive jurisdiction over FCC licensing decisions and actions of the Environmental Protection Agency as to emission standards under the Clean Air Act,²²⁰ it is an optional venue under a flock of regulatory statutes and has attracted—doubtless to the delight of the other circuits—the largest share of environmental litigation and review of orders of

²¹⁸ 410 U.S. at 245.

Presumably the *Florida East Coast* majority did not mean to call in question the holdings in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), followed in summary per curiam reversals in *Cates v. Haderlein*, 342 U.S. 804 (1951), and *Riss & Co. v. United States*, 341 U.S. 907 (1951), that although the adjudication section of the APA, 5 U.S.C. § 554(a) (1970), also uses the phrase “required by statute to be determined on the record after opportunity for an agency hearing,” APA adjudication procedures must be applied whenever the action was adjudication within 5 U.S.C. §§ 551(6)-(7) (1970) and it is the Constitution rather than a statute which compels a “hearing.” However, the failure of the *Florida East Coast* opinion to deal with this problem could well produce litigation over the continued vitality and applicability of *Wong Yang Sung*. If the “required by statute to be determined on the record” language reads only on the few statutes using the words recognized as magical in *Florida East Coast*, why would not the Constitution rather than the APA supply the sole guide as to proper adjudicative procedure? And this scarcely would include all the APA safeguards. The lack of discussion of the “to be determined on the record” language in *Wong Yang Sung* has always been puzzling. Perhaps Mr. Justice Jackson was relying on the conclusion in U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 42 (1947) that adjudication is always “on the record.”

²¹⁹ In *Baer Bros. Mercantile Co. v. Denver & R.G.R.R.*, 233 U.S. 479, 486 (1914), after insisting on the importance of the past-future distinction, the Court sensibly observed that “testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate and both subjects can be, and often are, disposed of by the same order.” See FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 8-11 (1962).

²²⁰ 42 U.S.C. § 1857h-5 (1970).

the Federal Power Commission fixing natural gas rates. The court had savored its role, explaining that "[w]e stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts."²²¹ But now the judges are not so sure what this brave new world is to be. In an opinion handed down only three weeks after the *Florida East Coast* decision but obviously well on the way to completion before then, Judge Leventhal said in dictum that even in an environmental rulemaking proceeding "a right of cross-examination, consistent with time limitations, might well extend to particular cases of need, on critical points where the general procedure proved inadequate to probe 'soft' and sensitive subjects and witnesses."²²² Chief Judge Bazelon, although disagreeing in some particulars, also believed that his insistence that "the agency [provide] 'a framework for principled decision-making' "²²³ might mean that, in some environmental cases, the "critical character" of the decision "requires at the least a carefully limited right of cross-examination at the hearing" ²²⁴ Shortly thereafter Judge Wilkey joined by Judge Leventhal and District Judge Jameson of Montana set aside a gas rate order of the FPC on the ground that the statutory requirement of substantial evidence to support the minimum rate order demanded more than notice and comment procedures. Judge Wilkey's opinion put the court squarely on record in favor of a "flexible interpretation of the APA" and against "forcing the problem into the artificial cubbyholes of 'informal' versus 'formal.' "²²⁵

²²¹ *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971) (Bazelon, C.J.). See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) ("the court and agency are in a kind of partnership relationship . . .") (Leventhal, J.); *Environmental Defense Fund, Inc. v. EPA*, 465 F.2d 528, 541 (D.C. Cir. 1972) (courts "as . . . partner[s] in the overall administrative process") (Leventhal, J.). There is little doubt who is considered to be the senior partner.

²²² *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631 (D.C. Cir. 1973).

²²³ *Id.* at 651 (concurring opinion). This phrase comes from the concluding paragraph of his opinion in *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971).

²²⁴ *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 651-52 (concurring opinion). The difference of opinion between the two judges again surfaced in a rate case, *Public Serv. Comm'n v. FPC*, 487 F.2d 1043 (D.C. Cir. 1973), *vacated*, 417 U.S. 964 (1974), where Judge Bazelon, with the concurrence of a district judge, went further in requiring a sufficient justification than Judge Leventhal believed proper.

²²⁵ *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1252 (D.C. Cir. 1973). The court said, *id.* at 1260:

Informal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting *information* is submitted in the form of

Judge J. Skelly Wright, who had the bad luck not to have been on the panels that rendered these and other important decisions on the subject, has taken to the law reviews to upbraid his colleagues for what he terms their "‘ad hoc’ approach to procedural review" of rulemaking, contrary in his view to the clear command of the APA and in no way justified under the due process clause.²²⁶

As always, Judge Wright's argument is forceful. One would not gather from a reading of section 553²²⁷ alone that courts were free to impose procedures for rulemaking more stringent than those prescribed by Congress. Beyond that, an agency ought to know in advance how to proceed when promulgating a "rule" and not have to risk reversal and remand because a reviewing court decides that something more was needed in the particular case—with attendant expense and delay.²²⁸ What Judge Wright thinks would be the "completely predictable" ad-

comments by adverse parties, the procedure employed cannot be relied upon as adequate. A "whole record," as that phrase is used in this context, does not consist merely of the raw data introduced by the parties. It includes the process of testing and illumination ordinarily associated with adversary, adjudicative procedures. Without this critical element, informal comments, even by adverse parties, are two halves that do not make a whole. Thus, it is adversary procedural devices which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence "substantial" enough to support rates.

The opinion sought to distinguish *Florida East Coast* on the ground that the Interstate Commerce Act does not contain the substantial evidence language included in later statutes like the Natural Gas Act. 15 U.S.C. § 717r(b) (1970). 483 F.2d at 1260-61 nn.83 & 84. This is scarcely a persuasive point in light of the long history of substantial evidence review of ICC orders. The court disagreed with *Phillips Petroleum Co. v. FPC*, 475 F.2d 842 (10th Cir. 1973), believing that Judge Seth's dissenting opinion in that case was more persuasive. 483 F.2d at 1262. See note 216 *supra*.

²²⁶ Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 384 (1974). For other decisions condemned, see *id.* at 384 nn.39-42.

At long last *Ethyl Corp. v. EPA*, 43 U.S.L.W. 2334 (D.C. Cir., Jan. 28, 1975), gave Judge Wright an opportunity for judicial expression of his views; predictably, in light of his article, he disagreed with Judge Wilkey's reversal of an order of the Environmental Protection Agency.

²²⁷ 5 U.S.C. § 553 (1970).

²²⁸ The costs of delay are enormous. A paper, *Future Energy Requirements: Capital Productivity and Capital Costs*, submitted by Jerome S. Katzin and George J. Konomos of Kuhn, Loeb & Co. at the New York City hearings of the Federal Energy Administration on Project Independence, August 19-22, 1974, demonstrated that the cost of a \$600 million 1200 megawatt nuclear generating plant, assuming a 12% cost of money and an 8% inflation factor, would be \$1,336,000,000 if the plant took 10 years to construct as against \$981 million if the plant could be finished in six. Schedule I. For all electric generating projects planned for the single year 1980, a 20% reduction in the period of construction would save \$3.1 billion on the same assumptions. Schedule IV.

ministrative response to the ad hoc approach, namely, for the agency to clothe its action "in the full wardrobe of adjudicatory procedure" in every case in order to avoid the risk of reversal in some,²²⁹ would be equally bad.

A judge not in the arena must wonder whether the war Judge Wright is waging with his colleagues is not in some degree semantic. He emphasizes that agency action is subject to substantive review, whether because of the particular statute or the APA,²³⁰ on a standard either of substantial evidence or at least of arbitrariness or capriciousness.²³¹ Although the substantial evidence requirement of the APA applies only in a case subject to sections 556 and 557 "or otherwise reviewed on the record of an agency hearing provided by statute,"²³² it is arguable that, even as regards rulemaking, the latter phrase is not limited to the few cases where the statute expressly requires a determination "on the record" after opportunity for an agency hearing.²³³ Apart from this, many recent statutes apply the substantial evidence test to judicial review of rulemaking.²³⁴ Furthermore, the degree of difference between the substantial evidence test and the arbitrary and capricious test can readily be exaggerated.²³⁵ One can hardly quarrel with the conclusion that if a reviewing court finds that the procedures followed by the agency in adopting a rule have not produced a body of evidence enabling it to pronounce

²²⁹ Wright, *supra* note 226, at 395.

²³⁰ 5 U.S.C. §§ 701, 702, 706 (1970).

²³¹ Wright, *supra* note 226, at 390.

²³² 5 U.S.C. § 706(2)(E) (1970).

²³³ See Judge Wilkey's argument in *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1258-59 (D.C. Cir. 1973), based on the statutory requirement for agency transmission of a transcript of the record, 15 U.S.C. § 717r(b) (1970), and the concession in U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 33-34 (1947), that rate orders under the Interstate Commerce Act and the Packers and Stockyards Act must be regarded as "required by statute to be made on the record after opportunity for an agency hearing."

²³⁴ See, e.g., Consumer Product Safety Act, 15 U.S.C. § 2060 (Supp. III, 1973), and the Occupational Safety and Health Act, 29 U.S.C. § 655(f) (1970).

²³⁵ See *Associated Indus., Inc. v. United States Dep't of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973), and authorities there cited. For a contrary view on the significance of the difference with respect to licensing see *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 95 S. Ct. 438, 441-42 (1974), and Judge Wright's opinion in *Ethyl Corp. v. EPA*, 43 U.S.L.W. 2334, 2335 (D.C. Cir., Jan. 28, 1975) ("arbitrary and capricious" is an "undemanding" standard). But see *National Nutritional Foods Ass'n v. Weinberger*, No. 74-1738 (2d Cir., Feb. 3, 1975), in which the court remanded for a further evaluation of the adequacy of the record to support the agency's action. Judge Lumbard, concurring, expressed his view that when an agency engages in substantive rulemaking, the arbitrary and capricious and substantial evidence standards are identical. *Id.* at 1623-24.

the required benediction, the court must remand.²³⁶ In other words, while Judge Wilkey's general condemnation of notice and comment procedure as applied to ratemaking²³⁷ may have been too broad, he very likely reached the proper result in the case before him.²³⁸

It is thus not too consequential whether a court invalidates a rule on the ground that the procedures have not developed substantial evidence to support it or even evidence adequate to rebut a claim that it is arbitrary and capricious, or, instead, takes the route of prescribing ad hoc procedural requirements in addition to those of section 553. Although the former course seems more in keeping with the statutory language and less likely to promote undue judicial activism, the practical result is much the same. Both roads lead to the conclusion that an administrator engaged in rulemaking governed by the APA cannot always be sure that rudimentary notice and comment procedures, even if they measure up to Judge Wright's salutary specifications,²³⁹ will always suffice. There will continue to be cases of rulemaking in which, in order to show that its action is supported by substantial evidence or even to avoid characterization of its action as "arbitrary and capricious," the agency must provide "*some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others.*"²⁴⁰ Just what mechanism must be provided will depend on the interests at stake, the complexity of the issue, and the usefulness of the particular mechanism as weighed against its adverse effects.²⁴¹ In most cases the rulemaking pro-

²³⁶ See, e.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973): "The procedures followed in this case . . . have resulted in a record that leaves this court uncertain, at a minimum, whether the essentials of the intention of Congress were achieved. This requires a remand whereby the record as made will be supplemented by further proceedings."

²³⁷ See note 225 *supra*.

²³⁸ This seems to be Chief Judge Bazelon's approach in *Public Serv. Comm'n v. FPC*, 487 F.2d 1043, 1087 (D.C. Cir. 1973), *vacated*, 417 U.S. 964 (1974).

²³⁹ Wright, *supra* note 226, at 395.

²⁴⁰ *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1258 (D.C. Cir. 1973) (emphasis in original). See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-401 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), the reasoning of which Judge Wright seems to find compatible with his formulation of the proper role of judicial review in this area, Wright, *supra* note 226, at 380 n.17, 381 n.22. See also *South Terminal Corp. v. EPA*, 504 F.2d 646, 662 (1st Cir. 1974), holding that notice and comment rulemaking was proper but remanding a particular issue for receipt and consideration of further arguments.

²⁴¹ The Administrative Conference of the United States has been considering whether § 553 requires amendment. See 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 66-67 (1972) (Recommendation

cedures suggested by Judge Wright should suffice; in a few, with respect to the same issue, they may not.

In rulemaking also we thus end with a requirement not much more precise than "some kind of hearing." While *Florida East Coast* liberates the agencies from the constraints of full adjudicatory procedures in many cases where these had been thought required, it is not a license for sloppiness. If reviewing courts insist that an agency engaged in rulemaking properly advise the parties of the intended action and the grounds and data thought to support it, afford opportunity for opposing the action or proposing alternatives, and render reasoned decisions, then the broadened role for "informal" rulemaking adumbrated by the decision, whether "right" or "wrong" as a matter of precedent, will be a constructive development, avoiding the delays incident to formal adjudicative procedures in many instances where these are not needed, yet safeguarding the essentials.²⁴²

VI. CONCLUSION

With that I bring this long survey to a close. If I have raised more problems than I have settled, that is the prerogative of a judge giving a lecture, as distinguished from the certainty seemingly felt by students writing law review notes. We have traveled over wide areas—from termination of welfare payments to the establishment of incentive per diem for freight cars, from student and prison discipline to rates for natural gas.²⁴³ Yet the problem is always the same—to devise procedures that are both fair and feasible.

72-5; Procedures for Adoption of Rules of General Applicability); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972). The problem is that the infinite varieties of rulemaking make it difficult and probably unwise to go beyond a minimal amount of legislative prescription. For an interesting recent example of the latter, see Federal Trade Commission Improvement Act, 83 Stat. 2183, tit. II, §§ 201, 202 (1975).

²⁴² For illuminating pre-*Florida East Coast* discussion, see Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972); Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51; Hamilton, *supra* note 241; Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970).

²⁴³ The exercise in breadth has necessarily involved a sacrifice in depth with respect to particular areas. Happily, one such gap, relating to the *Florida East Coast* case, is about to be filled in an article by Professor Nathaniel L. Nathanson in a forthcoming issue of the *Columbia Law Review*, a draft of which I was privileged to read after I had nearly completed my own writing.

In this task we still have far to go. In the mass justice area the Supreme Court has yielded too readily to the notions that the adversary system is the only appropriate model and that there is only one acceptable solution to any problem, and consequently has been too prone to indulge in constitutional codification. There is need for experimentation, particularly for the use of the investigative model, for empirical studies, and for avoiding absolutes. While the Court has been too rigid in some ways, it has been too vague in others. Apart from the field of creditors' preliminary remedies,²⁴⁴ the lower courts have been furnished little in the way of principle that will enable them to decide with fair assurance as new situations develop. One source of the difficulty has stemmed from the Court's pulling practically all the procedural stops in *Goldberg* which, although styled as a welfare termination, was in fact a suspension under peculiarly necessitous circumstances. All that was really wrong with the New York procedure was the failure to afford any opportunity for an oral presentation in situations where claimants often were unable to state their case in writing and to provide some opportunity for testing the credibility of tipsters.²⁴⁵ Now *Goss v. Lopez* has advanced the frontiers of due process without giving any indication where, if anywhere, the stopping place may be. Meanwhile *Florida East Coast* was floated, greatly expanding the area for notice-and-comment rulemaking without precise explanation of the decision's effect on prior rulings of the Court, on situations where the statutory language differed slightly,²⁴⁶ and on long-held assumptions of regulated industries and their counsel, or sufficient consideration of the occasional inadequacies of infor-

²⁴⁴ This area, not discussed in detail in this Article, is considered to be in a state of serious disarray by several Justices. See *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719, 726 (1975) (Blackmun, J., joined by Rehnquist, J., dissenting).

²⁴⁵ The opinion of the three-judge court, *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968), which was affirmed in *Goldberg* was much more moderate than the Supreme Court's. After outlining the rather modest requirements, Judge Feinberg characterized them as an "informal conference." *Id.* at 905.

²⁴⁶ For example, does it matter whether a "hearing" statute was pre-APA or post-APA; whether it requires a "hearing" or a "full hearing"; whether it includes a direction for transmission of the record; whether it contains a substantial evidence clause; whether a substantial evidence clause is the conventional one making determinations conclusive if supported by substantial evidence or one directing a court to set the order aside if not supported by substantial evidence? The Court, or Congress, should move speedily to clear up these uncertainties. To my mind such distinctions are trivial; the best course is to give *Florida East Coast* a broad application but to recognize that in some cases even the best notice-and-comment rulemaking may not suffice with respect to some issue.

mal procedure which had already surfaced. While I applaud the Court's basic initiatives with respect to administrative hearings, the time for some new thinking and also for some tidying up has arrived.