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## Lions Over The Throne - The Judicial Revolution In English Administrative Law by Bernard Schwartz

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Lions Over the Throne — The Judicial Revolution in English Administrative Law, by *Bernard Schwartz*, New York and London: New York University Press, 1987 Pp. 210.

*Reviewed by N. David Palmeter\**

We learn more about our own laws when we undertake to compare them with those of another sovereign. — Justice Sandra Day O'Connor<sup>1</sup>

In 1964, half a dozen years before *Goldberg v. Kelly*<sup>2</sup> began “a due process explosion”<sup>3</sup> in the United States, *Ridge v. Baldwin*<sup>4</sup> began a “natural justice explosion” in England. The story of this explosion — of this judicial revolution — is the story of the creation and development by common law judges of a system of judicial supervision of administrative action that, in many ways, goes far beyond the system presently prevailing in the United States. It is the story that is told in this fascinating little book by Bernard Schwartz.

In his introduction, Professor Schwartz quotes an English writer who in 1950 observed that American administrative law was much more advanced than its English counterpart, and who was led to ask: “Cannot Marshall Plan Aid include ‘administrative law?’”<sup>5</sup> After summarizing developments since *Ridge v. Baldwin*, Professor Schwartz concludes his introduction with a request for “reverse Marshall Plan Aid that includes administrative law.”<sup>6</sup> One need not go so far as to believe that American administrative law is in need of assistance in order to be impressed by the developments in England

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1. O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643, 667 (1986).

2. 397 U.S. 254 (1970).

3. The words of Judge Henry Friendly in “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1268 (1975).

4. [1964] A.C. 40.

5. B. SCHWARTZ, LIONS OVER THE THRONE 1 (1987) citing Street, *Book Review*, 59 YALE L.J. 590, 593 (1950) [hereinafter Schwartz].

6. *Id.* at 8.

as recounted by Professor Schwartz.

The story is told through a collection of seven independent essays that discuss six English cases and one rule of procedure. The topics covered are familiar to the American lawyer: the right to be heard; statutory preclusion of review; procedure for obtaining review; standing; scope of review; and privilege. The last topic treated, the prerogative power, probably has no strict counterpart in the United States and is perhaps best compared to the idea of Presidential authority. Each essay follows generally the same format: the English decision is discussed (or, in the case of procedure for obtaining review, the court rule is discussed); the new development is placed in the context of prior law; the United States doctrine on the subject is described and compared; and subsequent developments are surveyed.

*Ridge v. Baldwin*, which started it all, does not strike an American lawyer as a particularly startling decision. A police officer, immediately after his acquittal on criminal charges, was dismissed from his position without notice or opportunity to be heard. This summary dismissal, the officer claimed, was a denial of "natural justice," the English counterpart of due process in the United States. The lower courts did not view the dismissal as a denial of natural justice; rather, in conformity with a long line of authority, they viewed it as an administrative act comparable to an initial appointment of the officer. This reasoning, Professor Schwartz relates, was swept aside by the House of Lords which held that natural justice requires notice of the charges and opportunity for hearing. A decision that a public employee may not be dismissed without a hearing may well produce yawns among American lawyers, but the next step of the judicial revolution in English administrative law, the 1969 decision in *Anisminic v. Foreign Compensation Commission*,<sup>7</sup> will cause the drowsy to sit up and take notice.

*Anisminic* involved the doctrine of statutory preclusion of judicial review. The statute establishing the Foreign Compensation Commission provided: "The determination by the commission of any application made to them under this Act shall not be called in question in any court of law."<sup>8</sup> The commission in fact made a determination adverse to *Anisminic's* claim, and this determination was called into question — and reversed — by a court of law. Professor Schwartz describes this nullification of a restrictive enactment of Parliament as "an unprecedented decision in a constitutional system whose foundation stone is the principle of Parliamentary supremacy."<sup>9</sup>

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7. [1969] 2 A.C. 147.

8. Schwartz, *supra* note 5, at 46.

9. *Id.* at 45.

The rationale of the unanimous House of Lords for the *Anisminic* decision collapsed a prior distinction between errors of law that went to jurisdiction and those that did not. *Anisminic* expanded the jurisdictional notion to include, in effect, any error of law, its theory being that administrative agencies are established only to interpret a statute correctly — not incorrectly. If the agency makes an error of law, it has done something the law did not authorize it to do, and, therefore, has exceeded its powers. And, a court, certainly, may proscribe an agency from exceeding its powers, even if it may not review the proper exercise of those powers. Thus, *Anisminic* holds, the determination of the agency is not reviewable provided, upon review, a court finds the agency's determination to be correct.

This reasoning has raised the eyebrow of Justice Sandra Day O'Connor who contrasted the "extreme resistance" to statutory preclusion of judicial review on the part of English courts with the markedly different attitude of courts in the United States, as exemplified by her opinion, for a unanimous court, in *Block v. Community Nutrition Institute*.<sup>10</sup> Justice O'Connor suggests that the difference in attitude may stem from differences in the constitutional roles of courts in the British and American systems. Because the English courts lack the power to declare acts of Parliament unlawful, she suggests, they are confined to wielding their power to interpret the law.<sup>11</sup>

However, the judicial activism of the English courts, as exemplified in *Anisminic*, prompted a note of caution. Seeing *Anisminic* generally as pretense of interpretation in order to protect a judicial role, Justice O'Connor has warned:

Pretense surely weakens the institutional authority of the judiciary, and hence victories such as *Anisminic* may not come without cost. The position of the English courts is inherently precarious and although Parliament has not retaliated, it may be unwise to infer impotence from accommodation.<sup>12</sup>

It is clear that Professor Schwartz is no devotee of judicial re-

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10. O'Connor, *supra* note 1, at 648; 467 U.S. 340 (1984).

11. Precisely because the role of the federal courts, and especially of the Supreme Court, rarely has been threatened in our history, and has a firm basis in a written constitution, our courts may be more willing to engage in self-restraint. Were the English courts to concede that an ouster clause wholly barred judicial review of an administrative tribunal's decision, the courts would have no way of preserving even a limited role if Parliament wished to give the tribunals a free hand. It is thus ironic that our written constitution allows for more flexibility in judicial interpretation of statutes precluding review, while the English courts are driven to a rigid defense of their constitutional role notwithstanding the axiom that Parliament is free to change that role by ordinary legislation.

O'Connor, *supra* note 1, at 656.

12. *Id.* at 655-56.

straint in the style of Justice O'Connor. "On the contrary," he writes, "the courts in this country tend too often to treat provisions vesting power to act in the subjective judgment of the administrator as conferring unreviewable discretionary authority."<sup>13</sup>

Judicial activism indeed is the theme that runs through the English administrative law developments, an activism of which Professor Schwartz heartily approves. Apart from *Anisminic*, this activism is best illustrated by the book's chapter on standing, which deals with the "The Fleet Street Casuals," part-time newspaper workers who had deftly avoided the tax collector.<sup>14</sup> As part of a plan designed to rectify the problem, the revenue authorities granted amnesty for past tax avoidance. This grant of amnesty outraged the National Federation of Self-Employed and Small Businesses, who sought to have the amnesty declared unlawful. In reasoning worthy of the "no-review of correct-determinations" holding in *Anisminic*, the House of Lords, in effect, did away with the requirement of standing by holding that courts first should decide the merits, and then look at the question of standing, rather than the other way around. If, on the merits, it were shown that the agency acted improperly, then a taxpayer would have standing to challenge the agency, the Lords said. However, if the agency acted properly, the Lords reasoned, there would be no legal interest to protect and, hence, no standing.

Professor Schwartz remarks that "[t]he English judges have displayed a more relaxed attitude toward standing than their federal confreres in this country."<sup>15</sup> So, indeed, it would appear. *Allen v. Wright*,<sup>16</sup> another opinion by Justice O'Connor, highlights the understatement of Professor Schwartz's remark. There the Court denied standing, observing that "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."<sup>17</sup> Professor Schwartz, on the other hand, opposes "restrictive" rules on standing: "If a plaintiff with a good case is turned away merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the public interest."<sup>18</sup> Perhaps. But is it really in the public interest to have personal crusaders tying up agencies with challenges to every ruling with which they take issue? It would be interesting to know if the English courts

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13. Schwartz, *supra* note 5, at 63.

14. *Regina v. Inland Revenue Commissioners: ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617.

15. Schwartz, *supra* note 5, at 101.

16. 468 U.S. 737 (1984).

17. 468 U.S. at 754.

18. Schwartz, *supra* note 5, at 114-15.

have been able to avoid this problem.

The case described by Professor Schwartz as "the culmination thus far of judicial activism in administrative law,"<sup>19</sup> the "*GCHQ*" case,<sup>20</sup> strikes a disharmonic chord for the American lawyer, for the "holding" of the case is against the prevailing party. *GCHQ*, the Government Communications Headquarters, is the agency responsible for the security of Britain's military and official communications. In reaction to continuing labor difficulties at the agency, the government, without prior consultation, and despite an apparent requirement of prior consultation, barred the agency trade unions. The unions took the matter to court, contending that the rule was invalid because of the government's failure to consult. Not so, said the government, for this was an exercise of the Crown's prerogative, a power described by Blackstone as "that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his legal dignity."<sup>21</sup> The prerogative power is the power of the Crown *qua* Crown, the remainder of absolute monarchy.<sup>22</sup> The House of Lords, Professor Schwartz recounts, took a dim view of the idea of absolute prerogative power in a modern constitutional setting. One Lord likened the notion to the "clanking of mediaeval chains." Thus, the Lords said, the government's action was reviewable for, *inter alia*, procedural impropriety.

But then, having found procedural impropriety, the Lords then turned around and ruled for the government. They justified the decision on the basis of national security. Professor Schwartz quotes one Lord as saying, "If no question of national security arose, the decision-making process in this case would have been unfair."<sup>23</sup> The principles of fairness, of natural justice, gave way to the needs of national security. But isn't this another way of saying that when the chips are down, the government will have its way? Professor Schwartz says no. "The *GCHQ* case," he writes, "can be summed up as one in which the expanding law of judicial review may have lost the immediate battle but went far toward winning the administrative law war."<sup>24</sup>

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19. *Id.* at 178.

20. *Council of Civil Service Unions v. Minister for Civil Service*, [1985] 1 A.C. 374.

21. Quoted in, Schwartz, *supra* note 5, at 184.

22. To speak of any remainder of absolute monarchy in the United States is an alien notion, as demonstrated by the *Steel Seizure Case* cited by Professor Schwartz as the closest U.S. counterpart. There, the Supreme Court through Justice Black rejected the notion of any inherent power in the President, apart from that conferred by the Constitution and laws, at least in areas where Congress can confer authority on the President. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

23. Schwartz, *supra* note 5, at 182.

24. *Id.* at 183.

It may be true, as the author says, that the *GCHQ* case stands for the proposition that the exercise of the prerogative power is as subject to judicial review as the exercise of any other administrative power, but the statements of the Lords seems to be more *dicta* than holding. While they *said* the exercise of the prerogative is reviewable, they did not in fact review it other than to cry "national security." The *holding* would seem to be that the government may prohibit unions, without notice, if it believes the requirements of national security so dictate.<sup>25</sup>

Perhaps the lesson for the American reader lies in the differences in decisional style between the two countries. The English style of oral opinions (whether or not delivered orally) leads to a very different tone from the American argumentative essay. In this context, the statements in the *GCHQ* case may be seen as a shot across the government's bow, warning that except in such obviously sensitive areas as military and intelligence communications, the purported exercise of the prerogative power has seen its day.<sup>26</sup>

In his subtitle and throughout his book, Professor Schwartz uses the term "English" rather than "British." Presumably this is to exclude Scotland with its separate legal system.<sup>27</sup> Yet Scottish civil cases from the Court of Session are appealed to the same House of Lords responsible for the revolutionary decisions discussed by Professor Schwartz.<sup>28</sup> The American reader is left to wonder if it would have made a difference if *Ridge*, or *Anisminic* or *GCHQ* had arisen in Scotland. A discussion of the implication of the judicial revolution in English administrative law for Scotland would have been of interest.<sup>29</sup>

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25. This contrasts sharply with a rather well-known "anti-prerogative" decision, *United States v. Nixon*, 418 U.S. 683 (1974), where the Supreme Court *said* that executive privilege exists, but not in that instance; it *held* that the President was required to obey a *subpoena duces tecum* issued by the Watergate Special Prosecutor. Archibald Cox relates how one European scholar protested: "It is *unthinkable* that the courts of any country should issue an order to its Chief of State." A. COX, *THE COURT AND THE CONSTITUTION*, 7 (1987). To an American, it is more unthinkable that a court should not do so.

26. Professor Schwartz is not alone in seeing review of prerogative power as the holding of the *GCHQ* case: "The House of Lords . . . boldly discarded the constraints of settled law, with three of their Lordships (Diplock, Scarman and Roskill) *holding* that, as with the exercise of statutory powers, the exercise of the prerogative is in principle subject to judicial review." Ewing, *Case and Comment*, 44 *CAMBRIDGE L.J.* 1 (1985) (emphasis added).

27. Strictly speaking, English law applies only in England and Wales. "The expression 'British Law' cannot therefore be used." R. DAVID AND J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 259 (1968).

28. D. WALKER, *THE SCOTTISH LEGAL SYSTEM* 128, 141, 256-58 (1981).

29. When the House of Lords sits in Scottish appeals, it sits as a Scottish court, and normally would not consider itself bound by its decisions in English appeals. But decisions in English appeals on statutes common to both England and Scotland "are probably binding." Walker, *supra* note 27, at 372. Decisions "on grounds of general jurisprudence raised in non-Scottish appeals are persuasive only, though in a high degree." *Id.* at 373. The same writer elsewhere implies, somewhat ruefully, that perhaps the term "British" would have been appropriate:

Another item missing from the book is a conclusion. To be sure, Professor Schwartz sets the scene with a ten page introduction, but after that each separate essay stands on its own. The book simply ends with the GCHQ chapter. A final chapter commenting on the relationships among these developments would have been welcome.

But these are complaints of omission, not of commission, and they raise another notable feature of this volume: its readability. Professor Schwartz tells a good story, and when he is finished, the reader is not really ready for it to end. Like so much of the professional reading that piles up on our desks, *Lions Over the Throne* can be read with profit; unlike so much of that professional reading, however, this little volume can be read with pleasure as well.

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Increasingly . . . the Parliamentary imposition of the same rules on Scotland as on England and the tendency to assimilate the rules of the two jurisdictions has led to steadily increasing reference in Scotland to English books, which frequently ignore Scottish decisions and specialties of Scots law. The same reasons have frequently made it not worth while for a Scottish writer to seek to write a distinctively Scottish book on a theme, such as company law or carriage or employment or shipping, where the law is largely common to the two systems and the majority of the cases are English. The same reasons have led to steadily increased citation of English cases in Scottish courts, frequently without adequate appreciation of the different background from which those English cases emerged, and the different context, historical, doctrinal and procedural in which they were decided.

D. WALKER, *THE SCOTTISH JURISTS* 421-22 (1985).

